

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO.: 12-034121 (07)

P&S ASSOCIATES, GENERAL PARTNERSHIP,
A Florida limited partnership; S&P ASSOCIATES,
GENERAL PARTNERSHIP, a Florida limited
partnership; Philip von Kahle as Conservator of a
Florida limited partnership; and S&P ASSOCIATES,
GENERAL PARTNERSHIP, a Florida limited
partnership

Plaintiffs,

v.

JANET A. HOOKER CHARITABLE TRUST, a
Charitable trust, *et al.*,

Defendant.

_____/

**NOTICE OF FILING SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANT,
GREGG WALLICK'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR
DEFAULT JUDGMENT**

Defendant, Gregg Wallick ("WALLICK"), by and through his undersigned counsel, gives notice of filing the attached authority as a supplement to his Response in Opposition to Plaintiff's Motion for Default Judgment.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that in accordance with the Supreme Court of Florida's Administrative Order No. AOSC13-49, a true and correct copy of the foregoing has been filed with the Florida Courts E-Filing Portal on this 16th day of September, 2014, and a copy of same will be sent by the E-Filing Portal via E-Mail to: **Leonard K. Samuels, Esq.**, lsamuels@bergersingerman.com Berger Singerman, LLLP, 350 East Las Olas Boulevard, Suite 1000, Ft. Lauderdale, FL 33301; **Thomas M. Messana, Esquire**, tmessana@messana-law.com;

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735 So.2d 528
District Court of Appeal of Florida,
Fourth District.

VACATION ESCAPE, INC., Appellant,
v.
MICHIGAN NATIONAL BANK, a national
banking association, Appellee.

No. 98-1465. | May 19, 1999.

Defendant filed **motion** to set aside **clerk's default** on one count. The Circuit Court, Broward County, Leroy H. Moe, J., entered final **default** judgment as to that count. Defendant appealed. The District Court of Appeal, Dell, J., held that trial court was **required** to resolve defendant's **motion** to set aside **clerk's default** prior to entry of final **default** judgment.

Reversed and remanded.

West Headnotes (3)

^[1] **Judgment**
⚡Premature Entry of Judgment

Trial court was **required** to resolve defendant's **motion** to set aside **clerk's default** prior to court's entry of final **default** judgment.

3 Cases that cite this headnote

^[2] **Judgment**
⚡Pendency of **Motion**

Where an undisposed **motion** is pending in a cause, a **default** judgment may not be entered, unless the determination of the **motion** either way would not affect the plaintiff's right to proceed with the action.

3 Cases that cite this headnote

^[3] **Judgment**
⚡Hearing and Determination

Defendant was entitled to **evidentiary hearing** on its **motion** to set aside **clerk's default**.

2 Cases that cite this headnote

Attorneys and Law Firms

*529 Merrill A. Bookstein and Laura P. Riddle of Merrill A. Bookstein, P.A., and Kenneth J. Schwartz & Associates, P.A., Boca Raton, for appellant.

Mimi L. Sall of Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Fort Lauderdale, for appellee.

Opinion

DELL, J.

Vacation Escape, Inc. appeals from a final **default** judgment, contending that the trial court erred when it failed to resolve its **motion** to set aside the **clerk's default** before entering a final judgment as to Count I. We reverse.

On November 20, 1997, appellee filed a four-count complaint against appellant and appellant's principals ("the Hamiltons"). Neither appellant nor the Hamiltons responded to the complaint, and on December 12, 1997, a **clerk's default** was entered against them on all four counts. Thereafter, appellee amended its complaint to add Count V against the Hamiltons. On January 22, 1998, the court entered final **default** Judgment in favor of appellee, as to Counts II, III, and IV. Appellee then filed a **motion** for a final **default** judgment as to Count I on March 3, 1998. In response, appellant filed a **motion** to set aside the **clerk's default** as to Count I on March 13, 1998, and scheduled a hearing for May 11, 1998.

On March 24, 1998, the trial court heard appellee's **motion** for final **default** judgment as to Count I and summary judgment as to Count V. At the hearing, appellant asked the court to hear his pending **motion** to vacate the **clerk's default** before considering appellee's

motion for a final **default** judgment as to Count I. Appellee argued that appellant failed to show excusable neglect for setting aside the **default**, and did not use due diligence in waiting three months to remedy the problem. Without the presentation of any evidence or hearing counsels' arguments on appellant's **motion**, the court granted appellee's **motion** and entered a final **default** judgment as to Count I on March 30, 1998.

[1] [2] [3] Appellant contends that as a matter of law, the trial court should have resolved appellant's **motion** to set aside the **clerk's default** prior to its entry of final **default** judgment as to Count I. "[W]here an undisposed **motion** is pending in a cause, a **default** judgment may not be entered, unless the determination of the **motion** either way would not affect the plaintiff's right to proceed with the action." *Punta Gorda Ready Mixed Concrete, Inc. v. Green Manor Constr. Co.*, 166 So.2d 889, 890 (Fla.1964)(citing *Cobb v. Trammell*, 73 Fla. 574, 74 So. 697 (1917); *Dudley v. White*, 44 Fla. 264, 31 So. 830 (1902)). Obviously a favorable determination by the court on appellant's **motion** to set aside the **clerk's default** would have affected appellee's right to proceed with its **motion** for final **default** judgment. The pending **motion** to set aside the **clerk's default** "precluded the trial court from entering a [final **default** judgment] without first

determining the merits of the **motion**..." See *Sister Donut, Inc. v. Cameron-Brown Co.*, 495 So.2d 772 (Fla. 4th DCA 1986). Furthermore, by granting appellee's **motion** for final **default** judgment without first ruling on appellee's **motion** to vacate the **clerk's default** as to Count I, the trial court denied appellant's **motion** without an **evidentiary *530 hearing**. This was an abuse of discretion. See *Hernandez v. National Bank of Fla.*, 423 So.2d 920 (Fla. 3d DCA 1982).

Accordingly, we reverse the final **default** judgment as to Count I, and remand for further proceedings consistent herewith.

REVERSED and REMANDED.

POLEN and STEVENSON, JJ., concur.

Parallel Citations

24 Fla. L. Weekly D1218