Case No. 20-6735

IN THE

SUPREME COURT OF THE UNITED STATES

From:
Supreme Court of Florida Case No. SC19-1814
Third District Court of Appeal of Fla. Case No. 3D19-1562
11th Jud. Cir. of Fla. Appellate Division Case No.13-394 AP (01)
County Court, Miami-Dade Cty, Florida Case 2011-026200 CC 23 (02)

FRANK A. McCLUNG, JR. and
MARIAN E. TELLMAN-McCLUNG,
his wife,

Petitioners,

vs.

ELIA E. ESTEVEZ,

Respondent.
_____/

PETITION FOR REHEARING

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POINT ON REHEARING

RESPONDENT *ESTEVEZ* SOUGHT AND WAS AWARDED STATUTORY ATTORNEY'S FEES UNDER *FLORIDA STATUTE §83.48 (2013)* WHICH IS NOT APPLICABLE UNDER THE FACTS OF THIS CASE, AND THEREFORE THE AWARD OF SAME (App "B" Doc 1) IS FUNDAMENTAL ERROR REQUIRING REVERSAL.

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Compliance with Rule 44

Petitioners FRANK A. McCLUNG, JR. and MARIAN E. TELLMAN-McCLUNG, ***pro se,*** pursuant to ***Supreme Court Rule 44, "Rehearing,"*** in addition to and without waiving any argument previously raised, provide the following, substantial ground, not previously presented, for rehearing. Petitioners first became aware that this issue is fundamental error, and therefore reviewable without formal objection below, upon finding ***Keys Company v. Sens***, 382 So.2d 1273, (Fla. 3rd DCA 1980), ***after*** the Petition for Writ of Certiorari was filed herein. Seeking recovery under an inapplicable statute is grounds to deny recovery under ***Tilson v. DISA, Incorporated***, No. 20-30009, Summary Calendar, United States Court of Appeals, Fifth Circuit, September 10, 2020.

References to documents attached to this Petition are to "Ex ___." References to documents included in the Appendix to the Original Petition are to "App ___."

Point on Rehearing

> RESPONDENT *ESTEVEZ* SOUGHT AND WAS AWARDED STATUTORY ATTORNEY'S FEES UNDER *FLORIDA STATUTE § 83.48, (2013)* WHICH IS NOT APPLICABLE UNDER THE FACTS OF THIS CASE, AND THEREFORE THE AWARD OF SAME, (App "B" Doc 1), IS FUNDAMENTAL ERROR REQUIRING REVERSAL.

Facts Apparent from the Record

Respondent ESTEVEZ sought ***only*** statutory attorney's fees, (see App "Z" Doc 1 Pg 31 Lns. 18-19, "[T]he basis for the fees is statutory"); and ***only*** pursuant to ***Florida Statute § 83.48***, (see App "G" Doc 2 and App "K" Doc 2, Respondent's Motions for Attorney's Fees filed in the 2012 certiorari proceedings for which the Trial Court awarded attorney's fees, ***and*** App "L" Doc 1, Respondent's October 23, 2012, Motion for Evidentiary Hearing to Determine Attorney's Fees and Costs). Respondent ESTEVEZ made no pre-judgment plea of entitlement to, or motion for, statutory trial court attorney's fees. (App "N" Doc 1, Complaint; App "R" Doc 1, Motion to Strike Answer; App "H" Doc 1, Emergency Motion for Final Judgment, Affidavit of costs only.)

Argument

Respondent ESTEVEZ, was not entitled to ***seek*** statutory attorney's fees under ***Florida Statute § 83.48 (2013)***, (Ex "1"), effective July 1, 2013, the date of the hearing during which the attorney's fees were awarded. (App "Z" Doc 1, Transcript, 7/1/13 hearing).

Florida Statute § 83.48 (2013), (Ex "1"), provides:

> 83.48 Attorney's fees. – In any civil action ***brought to enforce the*** provisions of the ***rental agreement or this part, the party in whose favor a judgment or decree has been rendered may recover reasonable attorney fees and court costs, from the nonprevailing party***. (Emphasis provided). (Provisions of second sentence added in 2013 are not applicable.)

The underlined portion of the quoted statute, amended effective July 1, 2013, (Ex "1"), previously read "reasonable court costs ***including*** attorney's fees." ***Florida Statute § 83.48 (2012)***, (Ex "2"), (Emphasis provided). The amendment redefined the term "court costs" as costs only. This clarification is material to an understanding of the statute in "this part" under which the within trial court lawsuit was brought, ***Florida Statute § 83.59 (2011)***, (Ex "3"), which provides: "(4) The prevailing party is entitled to have judgment for costs and execution therefor." The statute "in effect at the time of the decision" is the applicable statute. ***Stevens v. Allegro Leasing, Inc.***, 562 So.2d 380 (Fla. 4th DCA 1990). Effective July 1, 2013, the date the attorney's fees were awarded, the term "costs" meant ***only*** costs, and ***did not "include" attorney's fees***.

Respondent ESTEVEZ, who appears to be but was ***not*** the prevailing party, sought attorney's fees under a statute which did not authorize attorney's fees ***in this case***, barring Respondent's recovery herein as it did in ***Tilson, supra***, as follows.

1. ***Florida Statute § 83.48 (2013)***, (Ex "1"), allows "attorney fees and court costs" in cases "brought to enforce the provisions of the rental agreement or this part,"... . The Complaint, (App "N" Doc 1), ***was not "brought to enforce the ... rental agreement."*** The Complaint: (1) attached the pre-suit notice, not the contract, (Pg 5); (2) denied there was a written contract, (Pg 2 Par 3); (3) expressly stated:

"however, that [rent] is not at issue," (Pg 2 Par 4), and did not allege violation of any contractual term; but (4) instead stated: "Plaintiff merely desires to reclaim possession of her unit ... ." (Pg 2 Par 4). During the February 6, 2012 hearing, counsel for Respondent re-affirmed, as a cause of action: "My client just needs her property back." (App "Y" Doc 1, Transcript, 2/6/12 hearing, Pg 8 Ln 11).

It was Petitioners who raised the parties' written, unexpired contract and addenda thereto, in defense of their right of possession. (App "O" Doc 1 Pg 5, Answer attaching original March 31, 2007 contract; and App "Y" Doc 2, June 15, 2008 addenda to contract with duration provision until "sale," which never occurred, presented during the 2/6/12 hearing, App "Y" Doc 1 Pg 15 Lns 1-24).

During the February 6, 2012 prejudgment hearing, the Trial Court stated the unexpired, written contract "is not valid." App "Y" Doc 1 Pg 25 Lns 7-8).

Therefore, rather than enforcing it, ***this action eviscerated the parties' unexpired, written contract.***

2. The Complaint, (App "N" Doc 1), ***was brought*** pursuant to, and therefore with the intent ***to enforce the provisions of, "this part,"*** being "Part II," "Florida Residential Landlord and Tenant Act." ***Florida Statutes § 83.40.***

The Complaint, filed December 9, 2011, (App "N" Doc 1), stated: (Pg 1, Par 1):

> 1. This is an action for removal of tenant(s) from real property located in Miami-Dade County, Florida pursuant to ***Section 83.59 of the Florida Statutes***. (Emphasis provided.)

The relevant portions of ***Florida Statutes § 83.59 (2013)***, (Ex "4"), "Right of action for possession," are:

> (2) A landlord, the landlord's attorney, or the landlord's agent, applying for the removal of a tenant shall file in the county court of the county where the premises are situated a complaint describing the dwelling unit and stating the facts that authorize its recovery. ... The landlord is entitled to the summary procedure provided in ***s. 51.011***, and the court shall advance the cause on the calendar
>
> (3) The landlord shall ***not*** recover possession of a dwelling unit except: (a) in an action for possession under subsection (2) or other civil action in which the issue of right of possession is determined; ... [(b)(c)(d) not applicable].

> (4) The prevailing party is entitled to have ***judgment for costs*** and execution therefor. (Emphasis provided.)

The only difference in the Statute when the Complaint was filed in 2011, was "[F.S. 1971]" appeared after "s.51.011" in Paragraph (2). (Ex "3").

The statute, Paragraph (4), expressly provides for recovery ***only*** of "costs." Consistent therewith, counsel for Respondent itemized only trial court "costs" in the Affidavit attached to Respondent's pre-judgment, July 17, 2012, Emergency Motion for Final Judgment, (App "H" Doc 1), and did not mention trial court attorney's fees in the Motion.

3. The reason for expressly providing only for recovery of costs becomes apparent by reviewing ***Florida Statute § 83.625 (2013)***, "Power to Award Possession and Enter Money Judgment," (Ex "5," not amended since 1988), which provides: "The prevailing party in the action may also be awarded attorney's fees and costs," -- ***provided, however, that "no money judgment shall be entered unless service of process has been effected by personal service*** ... ." The difference between the statutes is, therefore, a ***Florida Statute § 83.59 (2013)*** action is ***in rem*** against property only; therefore, ***service of process by posting applies to actions under § 83.59 (2011)***, and only court costs may be recovered; while a ***Florida Statute § 83.625 (2013)*** (Ex "5"), action is ***in personam***, including claims against the person of the Defendant; therefore, ***if required personal service is "effected,"*** both attorney's fees and court costs may be recovered. ***Florida Statute § 83.59 (2013)***, did not require personal service, and therefore did not -- and could not -- provide for recovery of a money judgment for attorney's fees.

Herein, no money judgment was sought in the within Complaint, (App "N" Doc 1 Pg 2 Par 4), and service of process was initially by posting -- that is, the Clerk's mailing of copies of Complaint and Summons to the Defendant. (App "M" Doc 1 Docket, Pg 4, 12/9/11 entries). It is to this service by posting that Petitioners initially responded. (App "O" Doc 1, Answer, Pg 2, Par 9). The Complaint was never amended to allege any action other than one for possession only under ***Florida Statute § 83.59***. The un-amended, ***in rem,*** Complaint for possession only, brought pursuant to ***Florida Statute § 83.59***

(2011), would nevertheless limit recovery to court costs, and exclude attorney's fees which are a money judgment, and therefore outside the scope of an ***in rem*** action.

4. The Supreme Court of Florida made it clear that the statute under which a claim is brought is controlling over ***Florida Statute § 83.48 (2013)***. In ***Lewis v. Guthartz***, 428 So.2d 222, 224 (Fla. 1982), which was an action brought by tenants against a landlord, where "the gravemen of the Tenant's claim was embedded solely in terms of the [FHA] regulatory agreement," ***Florida Statute § 83.48*** was held "inapplicable," and the attorney's fees awarded the prevailing parties under ***Section 83.48*** were reversed. The Supreme Court, quoting and applying the statute then in effect, (amended thereafter to include "this part"), held:

> ***Section 83.48 is applicable only where a landlord under a rental agreement is entitled by its terms to recover attorneys' fees from a tenant.*** A corresponding right is granted to the tenant ... . (Emphasis provided).

Applied herein, under the amended statute, the holding would be as follows: ***Section 83.48 is applicable only where a landlord under a provision of this part is entitled by its terms to recover attorneys' fees from a tenant***. As the statute in "this part" which the landlord sought to enforce herein, ***Florida Statute § 83.59 (2013)*** does not entitle the landlord to attorney's fees, ***Florida Statute 83.48 (2013)*** is "inapplicable" to Respondent ESTEVEZ' Motions for Attorney's Fees; and the October 17, 2013 award of attorney's fees, (App "B" Doc 1), must be reversed under ***Lewis v. Guthartz, supra***, solely because ***Florida Statute 83.48 (2013)*** "do not apply," ***Tilson, supra***, on the date of the decision, July 1, 2013.

5. Respondent ESTEVEZ appears to be "***the party in whose favor a judgment or decree has been rendered***," or "prevailing party," which is defined in ***Hensley v. Eckerhart,*** 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983) as the party having "'succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" However, if the underlying July 24, 2012 Final Judgment, which determines prevailing party for purposes of attorney's fees, is void ***ab initio***, and therefore a nullity for all purposes, including a prevailing party determination, even an award of costs would be invalid.

Although "if process or service is insufficient, the court lacks jurisdiction over the defendant and a judgment entered therein is invalid," ***Powell v. Best Buy Co., Inc.***, "II Standard of Review," No. 3:21-cv-00064-MOC-DSC, USDC W.D. North Carolina, Charlotte Division, March 22, 2021; and although entry of judgment on default void for lack of written notice, in violation of ***Fed.R.Civ.P 55(b)(2)***, and ***Fla.R.Civ.P. 1.500(b)***, voids the ensuing judgment; these issues were expressly raised in the original Petition and cannot be raised herein. However, implicit in the Statement of the Facts in the original Petition, but not expressly raised as an issue, is the fact that the July 24, 2012 Final Judgment (App "I" Doc 1) was entered while the reviewing court in Case No 12-081 AP (01) still had jurisdiction, which continued until the September 10, 2012 Mandate, (App "J" Doc 3), was "duly remitted to, and received in, the office of the clerk of the lower court." ***Colonel v. Reed***, 379 So.2d 1297, 1298 (Fla 1980). The Supreme Court of Florida added: "Obviously, if the appellate court does not lose jurisdiction until the mandate is issued, the trial court cannot regain jurisdiction until that time;" and thereupon the Supreme Court of Florida, on certiorari, reversed the November 1, 1978 Judgment entered a month before the December 1, 1978 receipt of the Mandate, holding:

> "[T]he County Court had no jurisdiction to proceed with the second trial and entry of judgment prior to the receipt of the Mandate from the Circuit Court."

Colonel v. Reed, supra, p. 1298. Likewise herein, the County Court had no jurisdiction to enter the July 24, 2012 Final Judgment (App "I" Doc 1) prior to the receipt of the September 10, 2012 Mandate (App "J" Doc 3) from the Circuit Court. The Court in ***Florida Organic Aquaculture, LLC, v Advent Environmental Systems, LLC***, 268 So.3d 910, 912 (Fla. 5th DCA 2019), clarified that where, as herein, there is a reservation of jurisdiction to consider attorney's fees in an otherwise executable, final judgment "constituting an end to judicial labor in the case," the reservation of jurisdiction is "nonfinal as to the issue of attorney's fees." The Final Judgment, (App "I" Doc 1), entered July 24, 2012, and executed, with Writ of Possession returned August 10, 2012, (App "M", Doc 1 Pg 3, Docket), is therefore void ***ab initio*** as entered by the Trial Court at a time when the Trial Court was totally without jurisdiction to finally dispose of the case.

There is, however, another reason why the July 24, 2012 Final Judgment, (App "I" Doc 1), is void ***ab initio***; and this reason is found in Federal case law interpreting the term "void" in motions for relief from judgment under ***Fed.R.Civ.P. 60(b)(4)***, the Florida counterpart being ***Fla.R.Civ.P. 1.540(b)(4)***. The United States Court of Appeal, First Circuit, in ***Lubben v. Selective Service System Local Board 27***, 453 Fed.2d 645, 649 (1972), stated:

> A void judgment is to be distinguished from an erroneous one, in that the latter is subject only to direct attack. A void judgment is one which, from its inception, was a complete nullity and without legal effect.[12] In the interest of finality, the concept of void judgments is narrowly construed. While absence of subject matter jurisdiction may make a judgment void,[13] such total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction. A court has the power to determine its own jurisdiction, and an error in that determination will not render the judgment void. ***Only in the rare instance of a clear usurpation of power will a judgment be rendered void.*** (Emphasis provided); [Footnote references were to: [12.] 7 ***Moore's Federal Practice*** ¶ 60.25; and [13.] *E. g.*, ***Kalb v. Feuerstein***, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940); ***In re Burrus***, 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890); ***United States to use of Wilson v. Walker***, 109 U.S. 258, 3 S.Ct. 277, 27 L.Ed. 927 (1883)].

The fact that the trial court in ***Colonel v. Reed, supra*** was concerned about such a "clear usurpation of power" by the County Court's proceeding to re-try the case and re-enter judgment without regard to the jurisdiction of the pending appeallate court, is evidenced by the Supreme Court of Florida, on certiorari, directly reversing the trial court order. Virtually the same facts exist herein. Although Petitioners brought the issue to the Trial Court's attention by means of Emergency Motion to Vacate Premature Judgment and for stay (Ex "6"), the Trial Court found the judgment was "properly entered" and on July 30, 2012, denied the Motion (App "I" Doc 2). Entry of the July 24, 2012 Final Judgment (App "I" Doc 1) was therefore clearly an intentional "usurpation of power" of the kind that ***voids*** judgments under ***Lubben, supra***. In ***United States***

of America v. Boch Oldsmobile, Inc., 909 Fed.2d 657, 661-662, United States Court of Appeal, First Circuit 1990, the court similarly held:

> A judgment is void, and therefore subject to relief under ***Rule 60(b)(4)***, only if the court that rendered judgment lacked jurisdiction or in circumstances in which the ***court's action amounts to a plain usurpation of power constituting a violation of due process. V.T.A., Inc. v. Airco, Inc., 597 F.2d at 224***. It is essential to state, that total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and that ***only "rare instance[s] of a*** (**pg 662**) ***clear usurpation of power***" will render a judgment void. ***Lubben v. Selective Service System Local Board No. 27***, 453 F.2d at 649. (Emphasis provided).

While such "instances" may be "rare" in Federal Courts, ***Colonel v. Reed, supra***, indicates it does occur -- in particularly in County Courts; for in ***Pro-Art Dental Lab v. V-Strategic Group, LLC***, 986 So.2d 1244, 1259, (Fla. 2008), the Supreme Court of Florida, in reversing a County Court judgment for a landlord, criticized the trial court judge for "***sua sponte*** amend[ing] the plaintiff's complaint to ***vest itself with jurisdiction***," and prohibited such a practice. Therefore, even the very narrow definition of "void" judgments includes what occurred herein under the Federal standard of "clear usurpation of power." The July 24, 2012 Final Judgment is void ***ab initio***, and therefore a nullity for all purposes, including determination of a prevailing party for purposes of awarding fees under ***Florida Statute § 83.48 (2013)*** at issue herein.

6. The award of compensatory damages under an "inapplicable ordinance" was found to be "fundamental error" in ***Keys Company v. Sens, supra***, pg 1275. The court in ***Keys Company, supra*** defined "fundamental error," as "error which goes to the foundation of the case or goes to the merits of the cause of action." The exception of fundamental error to the rule that "questions not presented to and ruled upon by the trial court are not reviewable on appeal" was applied in ***Keys Company, supra***, as it is herein.

In reversing the judgment on jury verdict, the Court in ***Keys Company, supra,*** Pg 1275, held:

> The error of imposing on a defendant compensatory damages ***which are not authorized by law and which are contrary to law*** is one that goes to the ultimate merits of the cause. Moreover, such an error ***is one of constitutional dimension***, for the reason that ***enforcement of such a judgment would constitute a taking of property from the defendant without due process of law***. (Emphasis provided.)

Herein, enforcing the at-issue October 17, 2013 money judgment for attorney's fees ***awarded under an inapplicable statute***, and therefore ***not authorized by law and contrary to law***, would constitute taking Petitioners' property without due process of law. This Court has jurisdiction under the ***Fourteenth Amendment to the Constitution of the United States***; and this Court has the authority "to declare a state court decision "null and void." ***Rooker v. Fidelity Trust Comany***, 263 U.S. 413, 414-416 (1923); cited in ***Hancock v. Miller***, United States Court of Apeals, 6th Circuit, 3/26/21.

Conclusion

The at-issue, October 17, 2018 Order, (App "B" Doc 1), awarding attorney's fees under an inapplicable statute, ***Florida Statute § 83.48 (2013),*** and therefore not authorized by law and contrary to law, and based upon the July 24, 2012 Final Judgment, (App "I" Doc 1), which is void and therefore fails to make the statutorily required determination of prevailing party, must be vacated and/or reversed to prevent enforcement which would constitute taking of Petitioners' property without due process of law. Therefore, Petitioners respectfully request this Court to grant this Petition for Rehearing so that it may remand this cause to the Third District Court of Florida, now the court with appellate jurisdiction, (App "A" Doc 6), with directions to reverse the per curiam affirmance, (App "A" Doc 1), of the at-issue order awarding attorney's fees, (App "B" Doc 1), and to direct the Trial Court: (1) to vacate the July 24, 2012 Final Judgment, (App "I" Doc 1), as "null and void;" (2) to reverse the successive, October 17, 2013, at-issue order, (App "B" Doc 1), as entered without a prevailing party determination, and based upon a statute which did not apply; and (3) to proceed with any other matter heretofore or hereafter raised by Respondent ESTEVEZ in a manner consistent herewith.

CERTIFICATE OF GOOD FAITH

Under penalty of perjury, Petitioners declare that this Petition for Rehearing is submitted in good faith and not for delay. Petitioners further submit that the foregoing constitutes "substantial ground" for rehearing, for lack of authority even to seek statutory attorney's fees under the facts of this case and statute relied upon is fundamental error which, if enforced, would constitute a taking of Petitioner's property without due process of law.

Executed on April 9th, 2021.

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Case No. 20-6735

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From:
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County Court, Miami-Dade Cty, Florida Case 2011-026200 CC 23 (02)

FRANK A. McCLUNG, JR. and
MARIAN E. TELLMAN-McCLUNG,
his wife,
Petitioners,
vs.
ELIA E. ESTEVEZ,
Respondent.
/

PROOF OF SERVICE

WE, Frank A. McClung, Jr. and Marian E. Tellman-McClung, Petitioners, do swear or declare that on this date, Thursday, April 15, 2021, as required by *Supreme Court of the United States Rule 29*, Petitioners served the foregoing Petition for Rehearing on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above document in the United States mail properly addressed to each of them and with first-class postage prepaid, ~~or by delivery to a third-party commercial carrier for delivery within 3 calendar days~~.

The names and addresses of those served are as follows:

Andrew P. Kawel, Esq., Counsel for Respondent ELIA E. ESTEVEZ
Kawel, PLLC, 331 Almeria Avenue, Coral Gables, FL 33134

We declare under penalty of perjury that the foregoing is true and correct.

Executed on April 9th, 2021.

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Fla. Stat. § 83.48

Current through Chapter 1 of the 2021 Legislative Session
Section 83.48 - Attorney fees

In any civil action brought to enforce the provisions of the rental agreement or this part, the party in whose favor a judgment or decree has been rendered may recover reasonable attorney fees and court costs from the nonprevailing party. The right to attorney fees in this section may not be waived in a lease agreement. However, attorney fees may not be awarded under this section in a claim for personal injury damages based on a breach of duty under s. 83.51.

Fla. Stat. § 83.48

Amended by 2013 Fla. Laws, ch. 136,s 2, eff. 7/1/2013.s. 2, ch. 73-330; s. 4, ch. 83-151.

2012 Florida Statutes

Title VI CIVIL PRACTICE AND PROCEDURE
Chapter 83 LANDLORD AND TENANT Entire Chapter
SECTION 48
Attorney's fees.

83.48 Attorney's fees.—In any civil action brought to enforce the provisions of the rental agreement or this part, the party in whose favor a judgment or decree has been rendered may recover reasonable court costs, including attorney's fees, from the nonprevailing party.
History.—s. 2, ch. 73-330; s. 4, ch. 83-151.

2011 Florida Statutes

Title VI CIVIL PRACTICE AND PROCEDURE
Chapter 83 LANDLORD AND TENANT Entire Chapter
SECTION 59
Right of action for possession.

83.59 Right of action for possession.—

(1) If the rental agreement is terminated and the tenant does not vacate the premises, the landlord may recover possession of the dwelling unit as provided in this section.

(2) A landlord, the landlord's attorney, or the landlord's agent, applying for the removal of a tenant shall file in the county court of the county where the premises are situated a complaint describing the dwelling unit and stating the facts that authorize its recovery. A landlord's agent is not permitted to take any action other than the initial filing of the complaint, unless the landlord's agent is an attorney. The landlord is entitled to the summary procedure provided in s. 51.011 [F.S. 1971], and the court shall advance the cause on the calendar.

(3) The landlord shall not recover possession of a dwelling unit except:

(a) In an action for possession under subsection (2) or other civil action in which the issue of right of possession is determined;

(b) When the tenant has surrendered possession of the dwelling unit to the landlord;

(c) When the tenant has abandoned the dwelling unit. In the absence of actual knowledge of abandonment, it shall be presumed that the tenant has abandoned the dwelling unit if he or she is absent from the premises for a period of time equal to one-half the time for periodic rental payments. However, this presumption does not apply if the rent is current or the tenant has notified the landlord, in writing, of an intended absence; or

(d) When the last remaining tenant of a dwelling unit is deceased, personal property remains on the premises, rent is unpaid, at least 60 days have elapsed following the date of death, and the landlord has not been notified in writing of the existence of a probate estate or of the name and address of a personal representative. This paragraph does not apply to a dwelling unit used in connection with a federally administered or regulated housing program, including programs under s. 202, s. 221(d)(3) and (4), s. 236, or s. 8 of the National Housing Act, as amended.

(4) The prevailing party is entitled to have judgment for costs and execution therefor.

History.—s. 2, ch. 73-330; s. 1, ch. 74-146; s. 24, ch. 82-66; s. 1, ch. 92-36; s. 447, ch. 95-147; s. 1, ch. 2007-136.

2013 Florida Statutes

Title VI CIVIL PRACTICE AND PROCEDURE
Chapter 83 LANDLORD AND TENANT Entire Chapter
SECTION 59
Right of action for possession.

83.59 Right of action for possession.—

(1) If the rental agreement is terminated and the tenant does not vacate the premises, the landlord may recover possession of the dwelling unit as provided in this section.

(2) A landlord, the landlord's attorney, or the landlord's agent, applying for the removal of a tenant, shall file in the county court of the county where the premises are situated a complaint describing the dwelling unit and stating the facts that authorize its recovery. A landlord's agent is not permitted to take any action other than the initial filing of the complaint, unless the landlord's agent is an attorney. The landlord is entitled to the summary procedure provided in s. 51.011, and the court shall advance the cause on the calendar.

(3) The landlord shall not recover possession of a dwelling unit except:

(a) In an action for possession under subsection (2) or other civil action in which the issue of right of possession is determined;

(b) When the tenant has surrendered possession of the dwelling unit to the landlord;

(c) When the tenant has abandoned the dwelling unit. In the absence of actual knowledge of abandonment, it shall be presumed that the tenant has abandoned the dwelling unit if he or she is absent from the premises for a period of time equal to one-half the time for periodic rental payments. However, this presumption does not apply if the rent is current or the tenant has notified the landlord, in writing, of an intended absence; or

(d) When the last remaining tenant of a dwelling unit is deceased, personal property remains on the premises, rent is unpaid, at least 60 days have elapsed following the date of death, and the landlord has not been notified in writing of the existence of a probate estate or of the name and address of a personal representative. This paragraph does not apply to a dwelling unit used in connection with a federally administered or regulated housing program, including programs under s. 202, s. 221(d)(3) and (4), s. 236, or s. 8 of the National Housing Act, as amended.

(4) The prevailing party is entitled to have judgment for costs and execution therefor.

History.—s. 2, ch. 73-330; s. 1, ch. 74-146; s. 24, ch. 82-66; s. 1, ch. 92-36; s. 447, ch. 95-147; s. 1, ch. 2007-136; s. 11, ch. 2013-136.

2013 Florida Statutes

Title VI CIVIL PRACTICE AND PROCEDURE
Chapter 83 LANDLORD AND TENANT Entire Chapter
SECTION 625
Power to award possession and enter money judgment.

83.625 Power to award possession and enter money judgment.—In an action by the landlord for possession of a dwelling unit based upon nonpayment of rent, if the court finds the rent is due, owing, and unpaid and by reason thereof the landlord is entitled to possession of the premises, the court, in addition to awarding possession of the premises to the landlord, shall direct, in an amount which is within its jurisdictional limitations, the entry of a money judgment with costs in favor of the landlord and against the tenant for the amount of money found due, owing, and unpaid by the tenant to the landlord. However, no money judgment shall be entered unless service of process has been effected by personal service or, where authorized by law, by certified or registered mail, return receipt, or in any other manner prescribed by law or the rules of the court; and no money judgment may be entered except in compliance with the Florida Rules of Civil Procedure. The prevailing party in the action may also be awarded attorney's fees and costs.

History.—s. 1, ch. 75-147; s. 8, ch. 87-195; s. 6, ch. 88-379.

IN THE COUNTY COURT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CIVIL DIVISION

CASE NO.: 11- 26200-CC-23 (02)

ELIA E. ESTEVEZ,

Plaintiff-
Appellee,

vs.

FRANK McCLUNG, et al,

Defendants-
Appellants.
_____/

EMERGENCY REQUEST FOR HEARING
-and-
EMERGENCY MOTION TO VACATE PREMATURE JUDGMENT AND TO STAY FURTHER PROCEEDINGS THERETO

Defendants FRANK McCLUNG and all others in possession, pursuant to Rules 9.310, Florida Rules of Appellate Procedure, and all Rules of Procedure applicable to emergency motions, respectfully request an emergency hearing on their emergency motion to vacate premature Final Judgment entered herein July 24, 2012, while appellate proceedings remain pending, in violation of Rule 9.130(f), Florida Rules of Appellate Procedure.

1. Defendants, who are Appellants in Case No. 12-081 AP presently pending in the Circuit Court of the 11th Judicial Circuit, in and for Miami-Dade County, Florida, timely filed their Motion for Rehearing and for Declaration that Final Judgment Prematurely Entered is a Nullity. A copy of said Motion, date stamped by the Clerk of the Appellate Division of the Circuit Court, is attached hereto as ~~Plaintiffs~~ Defendants' Exhibit "1".

2. Defendants, who are Appellants in Case No. 12-081 AP presently pending in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida filed their Memorandum of Law in support of said Motion for Rehearing and Declaration. A copy of said Memorandum of Law, date stamped by the Clerk of the Appellate Division of the Circuit Court, is attached hereto as ~~Plaintiffs~~ Defendants' Exhibit "2".

3. Rule 9.130(f). Florida Rules of Appellate Procedure, is black letter Florida law, repeatedly and affirmatively enforced by Florida Courts, as discussed in the attached Memorandum of law, Exhibit "2" hereto. The lower tribunal had no jurisdiction to enter a Final Judgment while

appellate proceedings remained pending. Appeal Case No. 12-081 AP remained pending for at least fifteen (15) days subsequent to July 11, 2011, or through July 26, 2011. Now that Appellants have filed their Motion for Rehearing, appellate jurisdiction will continue past July 26, 2011 until all matters pertaining to Appellants' Motion for Rehearing and to Vacate Premature Judgment, including any rehearing thereon which the Court may order, are finally concluded. Therefore, this Court's Final Judgment dated July 24, 2011, entered without jurisdiction to do so, is a nullity

4. On March 2, 2012, Defendants filed herein a Motion for Stay Pending Review which has not been ruled upon. Should any harm befall Defendants as a result of the premature entry of a Final Judgment herein, Defendants intend to seek sanctions against all those in any way responsible.

WHEREFORE, Defendants respectfully request this Honorable Court to conduct an emergency hearing on this emergency motion to vacate the premature Final Judgment entered by this court without jurisdiction to do so, for the purpose of vacating said Final Judgment, which is a nullity, and entering an immediate stay of all further proceedings herein pending the finalization of Appellate Case No. 12-081 AP.

CERTIFICATE OF SERVICE

WE CERTIFY that copy hereof was mailed to Julio C. Cavero, Esq., Cavero & Associates, P.A., Attorneys for Plaintiff, 815 Ponce de Leon Blvd., Suite 206, Coral Gables, Florida 33134, this 26th day of July, 2012.

FRANK A. McCLUNG, JR., Defendant, Pro Se
P.O. Box 61-0661, North Miami, FL 33161
Telephone: (305) 733-5544 Messages (305) 893-9110

MARIAN E. TELLMAN McCLUNG, Defendant, Pro Se
P.O. Box 61-0661, North Miami, FL 33161
Telephone: (305) 733-5544 Messages (305) 893-9110

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLATE DIVISION

CASE NO. 12-081 AP
L. T. Case No. 11-026200-CC-23

FRANK McCLUNG, et al,

Appellants,

vs.

ELIA E. ESTEVEZ,

Appellee.

_____/

APPELLANTS' MOTION FOR REHEARING AND FOR DECLARATION THAT FINAL JUDGMENT PREMATURELY ENTERED IS A NULLITY

Appellants, FRANK McCLUNG, et al, pursuant to Rule 9.130(f), Florida Rules of Appellate Procedure and Rule 9.330(a), Florida Rules of Appellate Procedure, respectfully request this Honorable Court for Rehearing of the within cause heard and determined July 11, 2012, on the following grounds:

1. The decision of this Court was entered herein July 11, 2012 [Exhibit "A" hereto.] Clearly stated on the Order was the following: "Not Final Until disposition of timely filed motion for rehearing, clarification, or certification."

2. Under Rule 9.330(a), Florida Rules of Appellate Procedure, a motion for rehearing, clarification, or certification "may be filed within 15 days of an

order...". The jurisdiction of this court in this case, therefore, continued for at least fifteen (15) days, or from from July 12, 2012 to and including July 26, 2012.

3. The Trial Court therefore prematurely entered Final Judgment on July 24, 2012. [Exhibit "B" hereto.] The Trial Court lacked jurisdiction to enter a Final Judgment prior to at least July 27, 2012 as this appeal was then and is now still pending.

4. Rule 9.130(f), Florida Rules of Appellate Procedure, provides:

> In the absence of a stay, during the pendency of a review of a non-final order, the lower tribunal may proceed with all matters, including trial or final hearing; ***provided that the lower tribunal may not render a final order disposing of the cause pending such review.*** Emphasis provided.

5. As many Florida appellate courts have found[1], this Appellate Court's pending jurisdiction over this proceeding usurps the jurisdiction of the trial court to enter Final Judgment. This Appellate Court, under Rule 9.130(f), Florida Rules of Civil Procedure, cannot permit the proceedings below to be finally determined while this Court still has jurisdiction, as it does herein.

6. Appellants further respectfully request this Court to re-hear this cause, and specifically to re-consider its jurisdictional ruling, for Appellate Rule 9.030(c),

---

[1] See Memorandum of Law in Support of Motion for Rehearing and to Vacate Final Judgment.

Jurisdiction of Circuit Court, (1) Appeal Jurisdiction (B) Non-final orders of lower tribunals as provided by general law, should apply.

7. Appellants were seriously limited in presenting their case to this Court because they were precluded from filing their Initial Brief and Appendix, even after an extension was granted to April 22, 2012 by this Court [Exhibit "C" hereto], for on April 18, 2012, four (4) days before their Initial Brief and Appendix was due, this Court Ordered Appellants to respond to Appellee's Motion to Dismiss within fifteen (15) days, and prohibited further filings of any kind.

8. This cause is meritorious, as Notice was admittedly improper; service of process was invalid; a written rental agreement with a six-month term existed; rental non-payment was never an issue; Appellants were advised by Appellee that no further rents would be accepted; and Appellants' defenses regarding Appellee's breach of statutory and contractual duties were never even seriously considered by the Trial Court. And now, the Trial Court has usurped the jurisdiction of this Appellate Court by prematurely entering Final Judgment.

WHEREFORE, Appellants respectfully request this Honorable Court to Rehear the within cause and to declare the Final Judgment prematurely entered below as a nullity. Appellants further respectfully request this Honorable Court to issue a

written opinion.

CERTIFICATE OF SERVICE

WE CERTIFY that copy hereof has been furnished to Andrew Paul Kawel, Esq., Kawel PLLC, Appellate Attorney for Appellee ESTEVEZ, Plaintiff below, 815 Ponce de León Blvd., Suite 305, Coral Gables, Florida 33134, this 26th day of July, 2012.

FRANK A. McCLUNG, JR., Appellant, Pro Se
P.O. Box 61-0661, North Miami, FL 33261-0661
Telephone: (305) 733-5544 Messages (305) 893-9110

MARIAN E. TELLMAN McCLUNG, Appellant,
Pro Se
P.O. Box 61-0661, North Miami, FL 33161
Telephone: (305) 733-5544 Messages (305) 893-9110

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

APPELLATE DIVISION

Not Final Until disposition of timely filed motion for rehearing, clarification, or certification

CASE NO.: 12-081 AP
LOWER COURT CASE NUMBER: 11-026200-CC 23

FRANK MCCLUNG
Appellant(s)

vs.

ELIA E ESTEVEZ
Appellee(s)

An Appeal from the County Court for Miami-Dade County, Florida, Judge CARYN C. SCHWARTZ.

FRANK A. MCCLUNG AND MARIAN E. MCCLUNG, PRO SE, for appellant(s).

ANDREW P. KAWEL, for appellee(s).

Before PEDRO P. ECHARTE, JR, DIANE WARD, BEATRICE BUTCHKO, JJ.

PER CURIAM.

[✓] Denied.

[ ] Affirmed.

This 11th **day of** July **, 2012.**

PEDRO P ECHARTE, JR

DIANE WARD

BEATRICE BUTCHKO

EXHIBIT
tabbies
"A"
(1 Page)

cc: FRANK A MCCLUNG AND MARIAN E. MCCLUNG PRO SE
PO BOX 61-0661
NORTH MIAMI, FL 33131

ANDREW P. KAWEL
815 PONCE DE LEON BLVD
CORAL GABLES, FL 33134

IN THE COUNTY COURT OF THE ELEVENTH (11th) JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

ELIA E. ESTEVEZ,

PLAINTIFF,

vs.

FRANK McCLUNG, AND ALL OTHERS IN POSSESSION OF THE SUBJECT PROPERTY AND/ OR UNIT,

DEFENDANTS,

_____/

CIVIL DIVISION

CASE NUMBER: **12-26200 CC 23 (02)**

FINAL JUDGMENT FOR REMOVAL OF TENANT

THIS ACTION came on to be heard before this Court upon Plaintiff's Complaint for Removal of Tenant and subsequent Emergency Motion for Final Judgment. Upon consideration of the evidence presented herein, a Final Judgment may be duly and regularly entered based upon the Default that was originally entered by this Court on February 6, 2012, and the Appellate Court's July 11, 2012 Ruling on the Appeal and Order Regarding Appellee's Motion for Tax Costs & Attorneys fees. It is therefore ORDERED and ADJUDGED:

That a Final Judgment be and same is hereby entered against **FRANK McCLUNG** and all others in possession of the subject property, for possession of the premises/real property located at, and known as:

12530 NE 4th AVENUE, NORTH MIAMI, FLORIDA 33161,
for which let Writ of Possession and execution now issue.

Plaintiff may set and notice for hearing its Appellee's Motion to Tax Attorneys Fees and Costs in accordance with the July 11, 2012 Mandate of the Appellate Court

DONE AND ORDERED in chambers at Miami-Dade County, Florida on the

_____ Day of July, 2012.

SIGNED AND DATED
JUL 24 2012
JUDGE CARYN CANNER SCHWARTZ
COUNTY COURT JUDGE

COUNTY COURT JUDGE

EXHIBIT tabbies "B" (1 Page)

FINAL ORDER AS TO ALL PARTIES
SRS DISPOSITION
NUMBER

Plaintiff's Attorney:

Julio C. Cavero, Esq.
815 Ponce de Leon Blvd., Suite 206
Coral Gables, Florida 33134

Harvey Ruvin
CLERK OF THE CIRCUIT AND COUNTY COURTS
Miami-Dade County, Florida

RE: Appellate Court Case No.: 12-081 AP
Lower Court Case No.: 11-026200-CC 23

Appellant, FRANK MCCLUNG

vs.

Appellee, ELIA E ESTEVEZ

To: FRANK MCCLUNG JR. and
MARIAN E. TELLMAN MCCLUNG

APPELLATE DIVISION
Dade County Courthouse
73 West Flagler, Rm. 138
Miami, Florida 33130

February 10, 2012

THE ORIGINAL FILED
FEB 10 2012
IN THE OFFICE OF
CIRCUIT COURT DADE CO., FLA.

The Clerk of the Court acknowledges receipt of your [X] ***Notice of Appeal*** *[ ]* ***Petition for Writ of Certiorari*** *filed February 06, 2012.*

Appellate Rules 9.100(b), 9.110(b), 9.130(b) and Florida Statute 28.241(2) prescribe that the filing fee shall be paid upon the filing of a Notice of Appeal or Petition. **A filing fee of *$2.00* is due on the above cited case by** *February 29, 2012.*

Additionally, Appellate Rule 9.110(e) directs the clerk to prepare the Record on Appeal and serve copies of the index on all parties within 50 days of the filing of the Notice of Appeal and Florida Statute 28.24 prescribes that the Clerk of the Courts charge for the services rendered in the preparation of said Record. ***In order for the Record to be completed within the prescribed time a Record deposit fee of $100.00 is due by*** *February 29, 2012.*

Pursuant to Appellate Rules 9.110(4)(f), 9.130(6)(e), and 9.140(g), your initial brief is due within the prescribed times as noted below, subject to any orders tolling the time for said filing.

- ***CIVIL and ADMINISTRATIVE APPEALS:*** Rule 9.110(4)(f) Appellant's initial brief shall be served within 70 days of filing the notice.
- ***NON FINAL ORDERS:*** Rule 9.130(6)(e) Appellant's initial brief, accompanied by an appendix as prescribed by rule 9.220, shall be served within 15 days of filing the notice.
- ***CRIMINAL APPEALS:*** 9.140(g) Initial briefs shall be served within 30 days of service of the record or designation of appointed counsel, whichever is later.

Your Initial Brief is due on *April 22, 2012.*

FAILURE TO COMPLY WITH PAYMENT OF THE FILING FEE, PAYMENT OF THE RECORD DEPOSIT FEE OR FILING OF THE INITIAL BRIEF BY THE DATES CITED ABOVE SHALL RESULT IN THE DISMISSAL OF THE CASE.

Please refer to the Florida Rules of Appellate Procedure for time calculations and other requirements.

Please provide a self addressed, stamped envelope to receive a copy of the opinion on your case. Additionally, you are required to enclose addressed, stamped envelopes with all motions, one for the party filing the motion and one for each of the parties listed in the Certificate of Service.

Sincerely,

Harvey Ruvin
Clerk of Courts
BY Tanya D. Bennett
Tanya D. Bennett,
Deputy Clerk

CIRCUIT AND COUNTY COURTS CLERK IN GOD WE TRUST DADE COUNTY, FLORIDA

EXHIBIT
tabbies
"C"
(1 Page)

JULIO C CAVERO, ESQ.

Attachment: Invoice to Appellant's Attorney