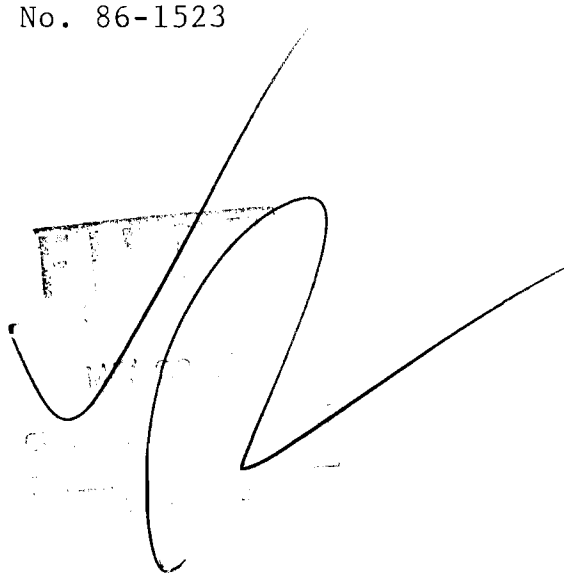
IN THE SUPREME COURT

OF THE STATE OF FLORIDA

BLAISE PICCHI,	**	
Petitioner,	**	
vs.	**	CASE NO. 70,464
BARNETT BANK OF SOUTH FLORIDA, N.A., et al,	**	Fourth District Court of Appeal No. 86-1523
Respondent.	**	
**********		

PETITIONER'S BRIEF



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SUMMARY OF ARGUMENT

The basic issue presented by this appeal is whether there was a legal excuse when the trial court entered a default against Respondent after an application for default was served without a noticed hearing. A Notice of Appearance is not provided for by the rules of civil procedure; when Respondent filed its appearance of record, its sole purpose in filing its appearance was for delay purposes.

There are strong policy reasons for affirming the trial court's ruling in denying Respondent's Motion to Vacate the entry of a default. The rules of civil procedure do not provide for the filing of a Notice of Appearance. The intention of the rules of civil procedure is to promote the expeditious progress of litigation, not to hinder the progress of litigation. The rules of civil procedure do not require a noticed hearing when a defendant has in fact filed a notice of appearance, so long as an application for a default is served on the opposing party.

When the trial court found that there was no legal excuse for failing to timely file a responsive pleading, there was a basis in the record for its decision. Implicit in the trial court's ruling is its conclusion that Respondent intentionally disregarded the rules of civil procedure when it filed a notice of appearance and did nothing for approximately two months. As such, the principles announced in Fierro v. Lewis, 388 So.2d 1361 (Fla. 5th DCA 1980), and the clean hands doctrine provide this Court with a basis to affirm the trial court's denial of Respondent's Motion to Vacate.

PRELIMINARY STATEMENT

Respondent, BARNETT BANK OF SOUTH FLORIDA, N.A., will be referred to herein as Respondent; Petitioner, BLAISE PICCHI, will be referred to herein as Petitioner.

References to the Record will be designated as ("R"), and followed by the appropriate page number.

STATEMENT OF THE FACTS AND CASE

Petitioner, BLAISE PICCHI, sued the Respondent, BARNETT BANK OF SOUTH FLORIDA, N.A., and CREDIT BUREAU, INC., in the Circuit for Broward County, Florida (R 5-13). The claim against Respondent, BARNETT BANK, is an action for damages pursuant to Florida Statute 559.77, and an action for libel (R 9-11). Respondent, BARNETT BANK, was served on December 31, 1985 (R 5). A Notice of Appearance on behalf of Respondent, BARNETT BANK, was mailed to the attorney for the Petitioner on January 16, 1986, and the original was mailed to the Court on that date (R 14).

Thereafter, a Motion for Default against Respondent, BARNETT BANK, was mailed by the attorney for the Petitioner on January 27, 1986. A Notice of Hearing on the Motion for Default was never served.

On April 1, 1986, Respondent, BARNETT BANK, served a Motion to Dismiss and a Notice of Hearing setting the hearing on its Motion to Dismiss for April 10, 1986 (R 21-23). At the hearing, after the presentation of the argument on the Motion to Dismiss, Respondent, BARNETT BANK, was informed for the first time in open court that a Default had been entered on February 3, 1986 (R 26). After argument of counsel, an Order was entered by the Court that the Motion to Dismiss was moot since a Default had been entered, and that Respondent, BARNETT BANK, had 20 days to file a Motion to Vacate the Default that was entered on February 3, 1986 (R 40).

The Motion to Vacate the Default was filed on April 29, 1986, and a Hearing was held on May 12, 1986 (R 41-42, 46). The Court entered an Order on May 30, 1986, denying the Motion to Vacate Default (R 1-3). Respondent, BARNETT BANK, filed an appeal (R 4) to the District Court of Appeal, Fourth District, which reversed the trial Court, but certified the following question to be of great public importance:

> Does Florida Rule of Civil Procedure 1.500(b) require a notice or hearing before entry of a default following filing of a notice of appearance?

Barnett Bank of South Florida, N.A. vs. Blaise Picchi, Case No. 86-1523, Opinion filed March 18, 1987, rehearing denied April 8, 1987.

Petitioner filed a Notice to Invoke Discretionary Jurisdiction on or about April 24, 1987. This Court has accepted review of the decision of the District Court of Appeal, Fourth District. See generally Hillsborough Association For the Retarded Citizens, Inc. vs. City of Temple Terrace, 332 So. 2d 611 (Fla. 1976); Rupp vs. Jackson, 238 So. 2d 86 (Fla. 1970).

POINTS INVOLVED

I

DID THE TRIAL COURT ACT WITHIN ITS SOUND DISCRETION BY REFUSING TO SET ASIDE THE DEFAULT?

II

DOES FLORIDA RULE OF CIVIL PROCEDURE 1.500(b) REQUIRE A NOTICE OF HEARING BEFORE ENTRY OF A DEFAULT FOLLOWING FILING OF A NOTICE OF APPEARANCE? (CERTIFIED QUESTION)

ARGUMENT I

The standard of review on appeal of a trial court's decision to set aside a default is whether there has been a gross abuse of discretion. See Rivera vs. Southland Painting Corp., Inc., 478 So. 2d 892 (Fla. 3d DCA, 1985).

When there is competent evidence on which to base a judgment, a reviewing court may not substitute its judgment for that of the trier of fact. See generally, Parson vs. Reyes, 238 So. 2d 561 (Fla. 1970); Moore vs. Dietrich, 183 So. 2 (Fla. 1938); Tampa Shipbuilding & Engineering vs. Adams, 181 So. 403 (Fla. 1938); State vs. Nova, 361 So. 2d 411 (Fla. 1978); Roberts vs. State, 390 So. 2d 769 (Fla. 3d DCA, 1980); State vs. Battlement, 374 So. 2d 636 (Fla. 3d DCA, 1979); State vs. Riocabo, 372 So. 2d 126 (Fla. 3d DCA) cert. dism., 378 So. 2d 348 (Fla. 1979). It is also fundamental that if there is any basis in the record to support the trial court's decision, an appellate court should affirm the trial court. Gavel vs. Girton, 183 So. 2d 10, 13 (Fla. 2d DCA, 1969); Harvey vs. Maistrosky, 114 So. 2d 810 (Fla. 2d DCA, 1969). As there was a basis in the record, this high court should affirm the trial court, and should not substitute its judgment for that of the trial judge.

The general rule as to setting aside a default and default judgment is that relief may be granted by a trial Court upon a showing of the existence of a meritorious defense, and a legal excuse for the failure to comply with the rules, or what is termed under Florida Rules of Civil Procedure 1.540 and 1.500(d), as mistake, inadvertence, surprise, misrepresentation, or excusable neglect.

The requirements for setting aside a default or default judgment are as follows:

1. Facts that would tend to excuse the defaulting party from filing a pleading or raising a defense;

2. An allegation that the defaulting party has a meritorious defense;

3. Have attached a copy of the pleading that the defaulting party desires to file and serve should the motion be granted;

4. Be supported by an affidavit by the defaulting party, or persons having knowledge of the facts contained in the motion.

See generally, Morgan vs. Marshall, 78 Fla. 59, 82 So. 609 (1919); Benedict vs. W. T. Hadlow, 52 Fla. 188, 42 So. 239 (1906); and others.

Respondent, in the instant case, failed to file a proposed Answer when it filed a Motion to Set Aside Default (R 41-46). As such, Respondent has wholly failed to allege a meritorious defense. See generally, North Shore Hospital, Inc. vs. Barber, 143 So. 2d 849 (Fla. 1962); Town of North Miami vs. State ex rel Watson, 22 So. 2d 762 (Fla. 1945). In as much as Respondent was given that right, but failed to do so, relief from the entry of a default was properly denied by the trial court. This high court should affirm the trial court.

The Courts have repeatedly acknowledged that "excusable neglect sufficient to warrant vacating a default is not shown by mere proof that the defendant relied upon another to defend the

action." National Premium Budget Plan Corporation vs. All American Assurance Company, 389 So. 2d 324, 325 (Fla. 3d DCA, 1980). In National Premium Budget Plan Corporation, supra, Sun Finance Corp. vs. Friend, 139 So. 2d 484 (Fla. 3d DCA, 1962), and White vs. Spears, 123 So. 2d 689 (Fla. 3d DCA, 1960), the Court held that defendant's reliance on defense counsel to answer a summons and complaint does not, in and of itself, constitute excusable neglect. Similarly, in Acme Fast Freight vs. Bell, 318 So. 2d 213 (Fla. 3d DCA, 1975), and Lawn vs. Wasserman, 226 So. 2d 261 (Fla. 3d DCA, 1969), the Court held that defendant's misplaced reliance on his insurance company to timely respond to a complaint will not, by itself, excuse defendant's failure to comply with the Rules of Civil Procedure. In Edwards vs. City of Fort Walton Beach, 271 So. 2d 136 (Fla. 1972), Supreme Court overruled Lawn, supra, to the extent that it may have implied the existence of a general rule that reliance on an insurer can never constitute excusable neglect. The Court noted that "the facts of each case are of singular importance in determining whether or not relief under RCP 1.540(b) should be granted." Id. at 137. (Emphasis supplied).

There has been no showing by Respondent of mistake, inadvertence, misrepresentation, or excusable neglect. There were no ongoing negotiations between the respective parties; no discussions had occurred; there was no irregularity in procedure by Respondent; there was no misunderstanding between the parties.

There was no legal excuse herein. Instead, Respondent's conduct was a flagrant disregard of the rules, and constitutes gross negli gence where, as here, it intentionally waited more than two months, without cause, to file a Motion to Dismiss. There is nothing in the record supporting Respondent's reasons for not timely filing its responsive pleading, except its own unilateral and erroneous belief that no default could be entered after filing a Notice of Appearance except after a hearing, and its own procrastination and dilatory tactics. The facts in the case at bar indicate that Respondent, "intentionally ignored the necessity to take appropriate action; that is to say, where the conduct could reasonably be characterized as partaking of gross negligence or as constituting a willful and intentional refusal to act." Somero vs. Hendry General Hospital, 467 So. 2d 1103, 1105-6 (Fla. 4th DCA, 1985).

A Notice of appearance is not provided for by the rules. Its sole purpose when filed, as here, was to delay in as much as Respondent was served with a motion for default on or about January 27, 1986, and it was not until April 1 , 1986--more than two months later--that Respondent served a responsive pleading in its motion to dismiss. The conduct by Respondent was flagrant and intentional; and its sole purpose was to delay for it had ample time to file a pleading from the date it received the motion for default on or about January 28, 1986 (R 15) to the date the Court entered the default on February 3, 1986 within which to file its motion to dismiss, or request an extension of time in accordance

with the rules of civil procedure.

In the trial court's own order (R 1-3), the Circuit Court Judge found that Respondent failed to provide a legal excuse for its failure to file a responsive pleading, and that it failed to allege a meritorious defense. This was found after the trial court considered the affidavit of Respondent in its motion to vacate (R 41-5), and after considering the arguments of counsel at a hearing held on or about April 10, 1986 (R24-39). In as much as there is a basis for the trial court's ruling, this Court should affirm the trial court's decision.

ARGUMENT II

Respondent suffered the entry of a default after only filing a Notice of Appearance. An issue presented by this appeal is whether a noticed hearing is required for the entry of a default against a party who has filed a notice of appearance, and who has not filed any responsive pleadings or motions.

The district courts of appeal have not been uniform in considering this issue at hand. A leading case on this issue is Fierro vs. Lewis, 388 So. 2d 1361 (Fla. 5th DCA, 1980). In Fierro, supra, a party was properly served, and thereafter filed a notice of appearance. No further motion or responsive pleading was filed even after service of a motion for default. At an unnoticed hearing, the party suffered the entry of a default. The appellate court in Fierro, at pages 1361-2, stated that:

> "Rule 1.500(b), Florida Rules of Civil Procedure, does not require a noticed hearing for entry of an order of default against a party who has failed to plead or otherwise defend; it requires only that a copy of the application for default be served upon a party who has filed or served a paper in the action. See Trawick, Fla. Prac. and Proc., § 25-2 (1979).
>
> In the instant case, the appellants filed a motion to vacate on grounds of mistake and excusable neglect. The evidence adduced at the hearing on this motion shows that the reason for inaction was the interpretation

> of appellants' counsel that a notice of hearing in regard to the motion for default would be forthcoming, and this notice would set "the absolute deadline" for action to be taken by the appellants. That is not good cause. This record supports entry of the default by the trial judge and his refusal to set it aside.
>
> AFFIRMED."

Respondent has argued that where a party serves a notice of appearance (that constitutes neither a "pleading" nor a "responsive pleading"), a default can never be entered without a noticed hearing. This court should reject that argument, and affirm the trial court.

In Okeechobee Insurance Agency vs. Barnett Bank, 434 So. 2d 334 (Fla. 4th DCA, 1983), the agency filed a motion to dismiss a counterclaim, which was denied when the trial court ordered the agency to answer within a set number of days. One day after the time set to file an answer, the bank served a motion for default and a notice of hearing on the motion for default. These materials were received by opposing counsel after the hearing date. The Court did reverse the trial Court's denial of a Motion to Vacate Default, and did state in its decision that notice of a hearing was required before the entry of a default under the facts of the case.

In Bloom vs. Palmetto Federal Savings and Loan Association, 477 So. 2d 48 (Fla. 4th DCA, 1985), the Court held that where a party failed to timely plead, the entry of a default without adequate notice was error, where the matter was set for hear-

ing, but the opposing party received notice several days after the hearing on the Motion for Default.

In Leon Shaffer Golmich Advertising, Inc. vs. Cedar, 523 So. 2d 1015 (Fla. 4th DCA, 1982), a party was properly served with process, and within twenty (20) days filed a Notice of Appearance. The opposing party served a Motion for Default and Notice of Hearing. One week before the hearing, the attorney served an Answer, Affirmative Defenses, and a Motion to Dismiss. The trial Court entered a default although responsive pleadings were filed well before the hearing, and refused to vacate that default. Although the Court reversed, the appellate Court condemned the practice and stated at page 1016:

> First, the misunderstanding was that of the trial court as to the effect of Florida Rule of Civil Procedure 1.500(b) and (c). When appellant filed its answer, affirmative defenses and motion to dismiss -- days prior to the hearing on the motion for default -- it deprived the trial court of the authority to consider whether a default should be entered or to enter one. The hearing on the motion was superfluous; and the attorney's non-appearance was legally justified, albeit rude if he was noticed and failed to contact the court.
>
> Second, the misuse was that of appellant's attorney by filing a notice of appearance admittedly because he knew the clerk could not enter a default with the notice in the court file, and doing so for the purpose of getting additional time in which to plead. We believe this practice is used often by others, and we condemn it.

Cedar held that once a responsive pleading was filed, a trial Court had no authority to enter a default; and it condemned

the practice of filing a Notice of Appearance rather than a responsive pleading as is required by Florida Rule of Civil Procedure 1.500(b).

Respondent has argued that a Notice of Appearance constitutes a "paper" within the meaning of Florida Rules of Civil Procedure 1.500(a), therefore, an application for default can only be made by serving the other party a Motion and Notice of Hearing. See also Florida Rule of Civil Procedure 1.500(b). It has been held that a stipulation of counsel for respective parties constitutes a "paper", see Fernandez vs. Colson, 472 So. 2d 868 (Fla. 3d DCA, 1985); and Bowman vs. Kingsland Development, Inc. 432 So. 2d 660 (Fla. 5th DCA, 1983), where the Court stated that the filing of a "notice of appearance" is not a responsive pleading, is not a substitute for an answer or motion, and "its function is to delay or prevent the entry of a default." Bowman, 432 So. 2d at 662; and others.

Cases such as Reichinbach vs. Southeast Bank, 462 So. 2d 611 (Fla. 3d DCA, 1965), and Building Inspection Services, Inc. of Dade vs. Olemberg, 476 So. 2d 744 (Fla. 3d DCA, 1985), concern possible misrepresentation where parties agree to an extension of time to file a responsive pleading, and clearly if or when a default is entered, such conduct has been held to be good cause to set aside a default where parties agree to an extension of time

to plead. See also Tark Enterprises, Inc. vs. Seidleck, 458 So. 2d 1181 (Fla. 4th DCA, 1984), involving the entry of a default where good faith negotiations were going on, and where there was an agreed extension of time to file an answer; there was a misunderstanding by one party caused by the other party's attorney as to the length of the extension of time to file an answer. Similarly, in Savela vs. Fisher, 464 So. 2d 240 (Fla. 2d DCA, 1985), all defendants were involved in the same business enterprise, and represented by the same attorneys. Two defendants were served on the same date; the third defendant was served several days later. The attorneys and parties involved reasonably assumed that all had been served at the same time. But for the foregoing assumption -- that all were served at the same time -- the responses would have been timely for the defaulted party. And in Somero vs. Hendry General Hospital, 467 So. 2d 1103 (Fla. 4th DCA, 1985), involved the failure to move for substitution; apparently both parties assumed that one party's attorney would prepare a stipulation for substitution of a personal representative; or where there was a legitimate misunderstanding between the parties or their attorneys about the time of the pleadings. See also Evans vs. Hydeman, 168 So. 2d 183 (Fla. 2d DCA, 1964; Florida Investment Enterprises, Inc. vs. Kentucky, 160 So. 2d 733 (Fla. 1st DCA, 1964); and Building Inspection Services, Inc. of Dade vs. Olemberg, 476 So. 2d 744 (Fla. 3d DCA, 1985), concerned a letter asking for time to obtain an attorney, and is

no different that a motion for extension of time, see Fla. Rules of Civil Procedure 1.090, or a pleading.

A "Notice of Appearance" is not allowed by the Florida civil rules; its sole purpose, as here, was to delay in as much as Respondent was served with a Motion for Default on or about January 27, 1986, and it was not until April 1 , 1986 -- more than two months later -- that Respondent served a responsive pleading, that is, its Motion to Dismiss. The conduct by Respondent was flagrant and intentional; its purpose was solely to delay for it had ample time to file a pleading from the date of receipt of the Motion for Default on or about January 27, 1986 (R 15) to the entry of a default on February 3, 1986 to file its Motion to Dismiss, or request an extension of time in accordance with the rules of civil procedure.

There are strong policy arguments in favor of construing "pleading" as contained in Florida Rule of Civil Procedure 1.500(a)(b) to exclude a "Notice of Appearance". Nowhere in the civil rules is there such a thing called a "Notice of Appearance". There is no authority for filing a "Notice of Appearance". In fact, it was apparently eliminated from the rules in 1952 or 1953, and if one is filed, it may be attacked by filing a motion for default. See Trawick's, Florida Practice and Procedure (1983), § 8-1 Process and Service. In as much as there is no legal authority to file a "Notice of Appearance", it was proper for the trial court to disregard it's existence, and enter a default without a noticed hearing.

The intent of Florida Rule of Civil Procedure 1.500(a)(b) is to promote the expeditious and orderly progress of litigation. The word, "paper", should be read in light of the purpose of these civil rules, which is that a responsive pleading or motion must be served to promote the orderly progress of the litigation. By serving a Notice of Appearance, that is not even provided for by the rules, a party exhibits lawlessness, dilatory tactics, and procrastination in the litigation. The fact that some attorneys in Broward County, or in the State of Florida, may exhibit such lawlessness does not make it right or legally correct. Respondent's only purpose in filing a Notice of Appearance was "to delay or prevent the entry of a default". Bowman, 432 So. 2d at 662. See also Willyard vs. Anderson, 312 So. 2d 504 (Fla. 4th DCA, 1975). It is not provided for by the rules, and was done solely for delay purposes! No notice of hearing was required.

This Court should adopt the holding of the Court in Fierro, and apply it to the instant case. There is no basis in the civil rules for filing a "Notice of Appearance". Notice of an application for a default was given to Respondant in accordance with Florida Rules of Civil Procedure 1.500(b). Respondent erroneously relied on Petitioner to serve a notice of hearing. Its own unilateral belief is not enough.

Florida Rule of Civil Procedure 1.500(c) does not require a noticed hearing before a court may enter a default against a party who has failed tofile a pleading, or defend against a complaint. Instead, it only requires that a copy of an application for default be served on a party who has filed or served a paper in an action. Fierro, supra.

This Court should reverse the district court of appeal, fourth district, and affirm the Circuit Court in and for Broward County, Florida by answering the certified question in the negative.

CONCLUSION

Based upon the foregoing arguments contained in this brief, this Court should affirm the trial Court, and reverse the District Court of Appeal, Fourth District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by mail this 21 day of May, 1987, on:

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