IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-1397

PRO-ART DENTAL LAB, INC.,
A Florida Corporation,

Petitioner/Defendant,

v.

V-STRATEGIC GROUP, LLC,
A Florida Corporation,

Respondent/Plaintiff.

An Appeal from the Fourth District Court of Appeal of The State of Florida
Case No.: 4D06-5016

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

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Statement Of The Case And Facts

This case arises from a dispute between the Petitioner, as tenant, and the Respondent, as landlord, relating to an alleged agreement to terminate a written lease agreement. The Respondent asserted that an agreement for termination of the leasehold had been reached between the parties and the Petitioner denied any agreement had been reached. The Petitioner refused to surrender possession of the premises to the Respondent based on breach of the disputed agreement. There was no assertion that Petitioner had violated any term or provision of the written lease agreement, failed to pay rent, or otherwise committed an act of default under the lease.

On April 4, 2006, Respondent commenced an action in the County Court in and for Broward County, Florida. (Appendix, pp. 4-8). The Complaint was titled "Complaint For Ejectment" and contained a single count seeking Ejectment. The Complaint neither sought relief for violation of any provision of the existing lease agreement between the parties nor any remedy pursuant to Chapter 83, Part I, Florida Statutes ("Nonresidential Tenancies"). Respondent asserted that the proceeding was governed by the Summary Procedure statute, Section 51.011, Florida Statutes[1], and on April 10, 2006 served the Petitioner with a five-day

[1] While the Lower Tribunals have held that the Complaint in Ejectment contained sufficient allegations of a landlord-tenant dispute, the Respondent has never explained the legal basis for the application of § 51.011 to the proceedings other

summons. (Appendix, p. 9). On April 7, 2006, Respondent filed a Notice of Filing that had appended to it "a copy of the letter dated October 13, 2005 as Exhibit '2' to its Complaint for Ejectment." (Appendix, pp. 10-12).

On April 10, 2006, Petitioner filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction asserting that the County Court lacked subject matter jurisdiction under § 26.012.[2] (Appendix, pp. 13-14). On April 28, 2006, a hearing was held on the Petitioner's Motion to Dismiss and the County Court entered an order denying the Motion to Dismiss. (Appendix, p. 31). The County Court also noted the appearance of new counsel in the proceedings and, on its own initiative, scheduled a hearing for the following Monday, May 1, 2006, to consider the Respondent's *ore tenus* motion for default. (Appendix, pp. 24-25). Soon after the hearing, and on the same day, the Petitioner filed its Answer and Affirmative Defenses to the Complaint. (Appendix, pp. 32-34). At the hearing on May 1, 2006 (Appendix, pp. 35-60), the County Court rejected the Petitioner's Answer, announced a default against the Petitioner, and simultaneously entered a Final Judgment for Possession (Appendix, pp. 61-63), specifically ruling that "V-

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than Respondent sought possession of the subject property. Conversely, Petitioner continuously argued that § 51.011 did not apply to the proceedings and the statutory remedy of Ejectment does not provide for the applicability of § 51.011 to those proceedings. The express language of § 51.011 states "The procedure in this section applies only to those actions specified by statute or rule."

[2] An Amended Motion to Dismiss was rejected for filing by the Clerk of the Court. (Appendix, pp. 15-16).

Strategic Group is entitled to the immediate entry of Final Judgment on Count I of Plaintiff's Complaint.", to-wit, Ejectment. The County Court simultaneously directed the issuance of a Writ of Possession "forthwith". On May 3, 2006, the Petitioner sought to obtain a stay in the County Court, however the case file was "closed" on the same day the Judgment of Possession was entered and the Clerk of the County Court refused to accept the Petitioner's stay request. On May 3, 2006, the Petitioner was involuntarily dispossessed.

Petitioner appealed to the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, where the Judgment was affirmed. A subsequent Petition for Writ of Certiorari to the Fourth District Court of Appeal was ultimately denied, however as part of the denial of a Motion for Rehearing, the Fourth District Court of Appeal certified direct conflict between its holding and the Fifth District Court of Appeal decision in Crocker v Diland Corporation, 593 So.2d 1096 (Fla. 5th DCA 1992).

On July 26, 2007, Petitioner filed a Notice to Invoke Discretionary Jurisdiction and after the parties fully briefed the jurisdictional issue, this Court accepted jurisdiction to consider the conflict.

Summary Of Argument

The Fourth District Court of Appeal has certified conflict with the Fifth District's opinion in Crocker v Diland Corporation, 593 So.2d 1096 (Fla. 5th DCA 1992). While both the Fourth and the Fifth District Courts of Appeal recognize and note the significance of the language in § 51.011, Florida Statutes, stating that "all defenses of law and fact shall be contained in defendant's answer which shall be filed within 5 days after service of process", the two District Courts diverge as to the immediate effect of the failure of the defendant to file an answer.

The introductory language of § 51.011 makes the rules of procedure applicable to it "except when this section or the statute or rule prescribing this section provides a different procedure." Section 51.011 does not prescribe the effect of a failure to initially file an answer to a five-day summons. Accordingly, the rules of procedure are applicable and, in the case of a default, Rule 1.500 (c) specifically applies. In Crocker, the Fifth District Court of Appeal looked to the status of the pleadings at the time of the hearing on the motion for default and applied Rule 1.500(c) holding that the filing of any answer or otherwise defending prior to the hearing makes the entry of a default improper. Accordingly, the Fifth District does not construe § 51.011 as abrogating Rule 1.500(c). The Fourth District has conversely held that § 51.011, Florida Statutes, has impliedly superseded Rule 1.500(c), Fla.R.Civ.P. Thus, under the Fourth District's

construction of § 51.011, Florida Statutes, a defendant's failure to file a timely answer results in an *eo instante* default, without further motion or hearing.

The Fourth District's decision in Pro-Art is legislative in nature through its creation of additional procedures in § 51.011 and encroaches on this Court's rule-making power through the abrogation of rules that would otherwise govern procedures under the express introductory language of § 51.011.

Petitioner asserts that the Fifth District decision in *Crocker* is correct. Prior to the entry of the default, Petitioner filed and served its Answer to the Respondent's Complaint. The entry of a default in these circumstances has been universally recognized in Florida courts as being improper. Lenhal Realty, Inc. v. Transamerica Commercial Finance Corporation, 611 So.2d 79 (Fla. 4th DCA 1992); Graves v. Giordano, 590 So. 2d 1113 (Fla. 4th DCA 1991); In Re Estate of Lydia M. Snyder, 562 So.2d 403 (Fla. 4th DCA 1990); Haitian Community Flamingo Auto Parts Corp. v. Landmark First National Bank of Ft. Lauderdale, 501 So.2d 170, 171 (Fla. 4th DCA 1987).

ARGUMENT

I
Standard of Review

The conflicting decisions of the Fourth and Fifth District Courts of Appeal relate to and are a function of the differing interpretation of § 51.011. There are no disputed underlying facts.

> The standard of appellate review on issues involving the interpretation of statutes is de novo. *See State v. Burris,* 875 So.2d 408, 410 (Fla. 2004) ("This question of statutory interpretation is subject to *de novo* review."); *In re Guardianship of J.D.S.,* 864 So.2d 534, 537 (Fla. 5th DCA 2004) ("Because this case involves the application of statutory law, and is a pure question of law, the standard of review is *de novo.*").

B.Y. v. Department of Children and Families, 887 So.2d 1253, 1255 (Fla. 2004). See also Mourning v. Ballast Nedam Construction, Inc., No. 4D06-2557 (Fla. 4th DCA Sept. 26, 2007) (Where the lower court's ruling was as a matter of law, standard of review is de novo); Kone, Inc. v. Robinson, 937 So.2d 238 (Fla. 1st DCA 2006) (A trial court's construction of a statute is reviewed de novo); Chrestensen v. Eurogest, Inc., 906 So.2d 343 (Fla. 4th DCA 2005) (Where facts are undisputed and trial court's conclusions were purely legal, the standard of review is de novo).

II.
Procedures Not Specifically Prescribed By Section 51.011, Florida Statutes Are Subject To The Rules Of Civil Procedure

The introductory language to Section 51.011, Florida Statutes, provides:

> The procedure in this section applies only to those actions specified by statute or rule. Rules of procedure apply to this section except when this section or the statute or rule prescribing this section provides a different procedure. If there is a difference between the time period prescribed in a rule and in this section, this section governs.

(Emphasis added). Section 51.011 is the result of legislative action authorized pursuant to Rule 1.010, Fla.R.Civ.P. Its enactment has been held not to be the result of an impermissible delegation of the Supreme Court's rule-making power because the rule specifically provided that summary claims procedure statutes would govern only in event that they did not conflict with Rules of Civil Procedure. See Hayden v. Reese, 596 So.2d 1207 (Fla. 4th DCA 1992). Rule 1.090, Fla.R.Civ.P., has been held to be applicable to summary eviction proceedings where "Section 51.011, Florida Statutes (1975) does not prescribe the method of computing the five-day time allowed for the filing of defensive pleadings, . . . " Berry v. Clement, 346 So.2d 105, 106 (Fla. 2d DCA 1977). § 51.011 is not unique in this regard. In Traces Fashion Group, Inc. v. C & C Management, Inc., 763 So.2d 502, 503 (Fla. 3d DCA 2000), the Third District Court of Appeal reviewed the summary procedure for issuance of a prejudgment

writ of replevin under Section 78.068, Florida Statutes. The Circuit Court had conducted a hearing on the application for prejudgment possession pending trial, but at the hearing entered judgment for the plaintiff and awarded damages. In reversing the Circuit Court's final judgment, the Third District Court of Appeal held:

> Section 78.18 states that plaintiff is entitled to judgment for damages caused by defendants' unlawful detention of the property, but does not indicate when such judgment is to be entered. In fact, Chapter 78 makes no provision for the procedure to be used in adjudicating the ordinary replevin action. We must assume, therefore, that the Florida Rules of Civil Procedure apply, Fla. R. Civ. P. 1.010 cmt. (1967) ("To the extent that statutes dealing specifically with a particular civil action or proceeding do not set out a specific rule for a particular phase would appear to be governed by these rules.").

As noted in the ensuing section of this brief, § 51.011 directs that the defendant file an answer containing all defenses of law or fact, but makes no provision for a procedure based upon a defendant's filing of motions or other papers.[3] Accordingly, the rules of civil procedure, and particularly Rule 1.500 (c), govern the issue of default in this case.

[3] A motion to dismiss is not a pleading. Rule 1.100(a), Fla.R.Civ.P.

III.
Section 51.011, Florida Statutes, Does Not Prescribe A Procedure For The Failure Of A Defendant To File An Answer

Section 51.011 (1) sets forth the manner in which pleadings shall be filed with the court:

> Plaintiff's initial pleading shall contain the matters required by the statute or rule prescribing this section or, if none is so required, shall state a cause of action. All defenses of law or fact shall be contained in defendant's answer which shall be filed within 5 days after service of process. If the answer incorporates a counterclaim, plaintiff shall include all defenses of law or fact in his or her answer to the counterclaim and shall serve it within 5 days after service of the counterclaim. No other pleadings are permitted. All defensive motions, including motions to quash, shall be heard by the court prior to trial.

Section 51.011 does not address the procedure to govern the court when a defendant fails to answer, or if a pleading other than one containing defenses of law or fact is filed with the court. "The summary procedure statutes envision an expedited process to determine the right to possession of property promptly without the necessity of deciding all other issues between the parties." Camena Investments and Property Management Corp. v. Cross, 791 So.2d 595 (Fla. 3d DCA 2001), review denied, 821 So.2d 293. Clearly, the legislature purposefully created a procedure that was designed to avoid protracted litigation in certain expressly identified types of actions. It is equally clear that the legislature, conscious that the rules of procedure would apply where it failed to speak, elected

not to declare the result of a defendant's failure to file an answer under § 51.011 (1) as an automatic default. To do so would constitute impermissible rule-making reserved to this Court. Notwithstanding, this is the construction given to the statute in the Fourth District's opinion in Pro-Art. As noted in the order denying Pro-Art's Motion for Rehearing and certifying conflict with Crocker, the Fourth District stated:

> Rule 1.500(c) allows a defendant to file an answer "at any time before a default is entered." *Crocker* applies this rule in a Chapter 51 case.
>
> Such an application of rule 1.500(c) would allow, as a matter of routine, the filing of answers after five days of service of process. The practice *Crocker* condones contravenes the mandatory time limit of section 51.011(1). Rule 1.500(c) does not say that it applies in Chapter 51 actions; it does not therefore "specifically provide" a contrary time limit rule, as is required by rule 1.010 to modify the time for pleading contained in a special statutory proceeding. Therefore, rule 1.500(c) does not apply to allow the filing of an untimely answer in a Chapter 51 proceeding, even one filed before the entry of a default.

(Emphasis supplied). Pro-Art respectfully asserts that this language is directly contrary to the introductory provision of § 51.011. By virtue of the absence of a stated procedure for default, § 51.011 applies Rule 1.500 to summary proceedings. The above-quoted language from Pro-Art relies on the absence of language in Rule 1.500 make the statute control.

The above-quoted language from Pro-Art is also a clear overstatement of the

effect of the application of Rule 1.500 to § 51.011. For example, in carrying out its intent to expedite certain types of actions, §51.011 requires that while the parties may engage in discovery, "[N]o discovery postpones the time for trial except for good cause shown or by stipulation of the parties." § 51.011 (2). Further, if a jury trial is demanded, "the action may be tried immediately; otherwise, the court shall order a special venire to be summoned immediately." The party demanding jury trial is required to deposit monies with the clerk to pay the jury fees. § 51.011 (3). In fact, while the court may advance the matter on its calendar and set a trial date in the absence of a defendant's answer and defenses, the more likely source of delay will come from a request for discovery.

IV.
The Decision In Pro-Art Is Legislative In Nature And Invades The Rule-Making Power Reserved To This Court

The authority of the legislature to adopt rules of summary procedure originates in Rule 1.010, Fla.R.Civ.P. and has been held not to be an unconstitutional delegation of the rule-making power of this Court. See Hayden v. Reese, 596 So.2d 1207 (Fla. 4th DCA 1992). "We find that rule 1.010 itself demonstrates that it is not unconstitutional in that it provides that the summary procedure statutes govern only in the event that they do not conflict with the Rules of Civil Procedure." Hayden, at 1208. See also Lane v. Brith, 313 So.2d 91 (Fla. 4th DCA 1975). " . . . it is not the court's duty or prerogative to modify or shade

clearly expressed legislative intent in order to uphold a policy favored by the court. *See McDonald v. Roland,* 65 So.2d 12 (Fla.1953)." Holly v. Auld, 450 So.2d 215, 219 (Fla. 1984). Rules of practice and procedure are the "machinery of the judicial process" and are reserved to the Supreme Court. Art. V, § 2(a), Fla. Const. (1968); Haven Federal Savings & Loan Association v. Kirian, 579 So.2d 730, 732 (Fla. 1991); In re Commitment: Cartwright, 870 So.2d 152, 158 (Fla. 2d DCA 2004). ". . . the limitation upon the legislature enacting procedural law is not absolute. Rather, it is prohibited only in the event the proposed statute conflicts with an existing rule of procedure adopted by the supreme court." Williams v. First Union National Bank of Florida, 591 So.2d 1137, 1139 (Fla. 4th DCA 1992). § 51.011 is a paradigm for these statements. To carry out a public policy encouraging the prompt and efficient administration of actions relating to possession of real property, the legislature enacted § 51.011. The legislature was careful to avoid including matters conflicting with existing rules of procedure, e.g., Rule 1.500.

The construction given to § 51.011 in the Pro-Art decision expands the statute beyond its plain language and the legislative intent. By judicial fiat, the Fourth District Court of Appeal has essentially legislated an *eo instante* default provision into § 51.011. Additionally, this construction has placed the "Pleadings" subdivision of § 51.011 in direct conflict with Rule 1.500(c). This has been done despite the plain absence of a legislative intent to do so and, further, in the face of

language clearly applying Rule 1.500 in the absence of such a legislative statement. Accordingly, the Pro-Art decision is either an impermissible encroachment on the legislature or a promulgation of rules of procedure reserved to this Court, or both.

V.
Crocker Correctly Applies Rule 1.500 (c) to Section 51.011

The Fifth District Court of Appeal decision in Crocker correctly applies Rule 1.500(c) to Section 51.011. The Crocker court did not modify or shade the express language of § 51.011. "All defenses of law or fact must be filed in an answer within five days." Crocker, 593 So.2d at 1099. Recognizing this statutory pleading obligation placed on the defendant, the Fifth District Court of Appeal went on to hold:

> In short, we conclude that Diland was wrong in relying on its motion to dismiss to toll the time to file its answer. It was obliged to file all of its defenses, including failure to state a cause of action, within five days and by failing to do so was exposed to entry of default. Diland's failure to timely file does not end our analysis, however, because the ultimate issue is Crocker's entitlement to a default. Under the rule governing defaults, if a party who has appeared fails to timely plead, but does plead or otherwise defend before the hearing on the motion for default, a default is improper.

Crocker at 1100. (Emphasis added).

As noted above, because of the absence of language establishing a procedure for entry of default, Florida Rule of Civil Procedure 1.500(c) is the procedure

applicable to defaults for purposes of § 51.011. Particularly, Rule 1.500 (c) states that "a party may plead or otherwise defend at any time before default is entered." See Graves v. Giordano, 590 So. 2d 1113 (Fla. 4th DCA 1991) citing Chester, Blackburn & Roder, Inc. v. Marchese, 383 So.2d 734, 735 (Fla. 3d DCA 1980), (A party may plead or otherwise defend at any time before default is entered). This rule is inviolate to the extent that even "if a Defendant files an untimely answer before a default is entered, the entry of default is avoided." In Re Estate of Lydia M. Snyder, 562 So. 2d 403 (Fla.4th DCA 1990). Further, "the term 'paper' is construed liberally and includes any written communication that informs the plaintiff of the defendant's intent to contest the claim." Becker v. Re/Max Horizons Realty, Inc., 819 So.2d 887, 890 (Fla. 1st DCA 2002). The actual consideration for the court is limited to whether or not an answer was filed before or after the entry of a default by the Court. A default is not deemed entered, "notwithstanding its having been signed by the court, until it is actually filed with the clerk. Since at the time the order granting default was entered, appellant had already filed its motion to dismiss, entry of default was error." Lenhal Realty, Inc. v. Transamerica Commercial Finance Corporation, 611 So.2d 79 (Fla. 4th DCA 1992). See also Pinnacle Corporation of Central Florida, Inc. v. R.L. Jernigan Sandblasting & Painting, Inc., 718 So.2d 1265, 1266 (Fla. 2d DCA 1998).

In the instant cause, the Petitioner was served with the Complaint for Ejectment on or about April 10, 2006. It promptly filed a Motion to Dismiss on April 10, 2006. On April 28, 2006, the County Court denied Petitioner's Motion to Dismiss and set a May 1, 2006 hearing on Respondent's *ore tenus* motion for entry of a default. Petitioner filed and served its Answer on the afternoon of the same day its motion was denied. Notwithstanding the filing of Petitioner's Answer, on May 1, 2006 the County Court announced a default and entered the Judgment for Possession, simultaneously directing the issuance of a Writ of Possession, "forthwith."

Florida courts have uniformly held that "[t]his court and others have interpreted the rules as prohibiting entry of a default where an answer is filed before the default is entered, even though the answer may have been untimely." Haitian Community Flamingo Auto Parts Corp. v. Landmark First National Bank of Ft. Lauderdale, 501 So.2d 170, 171 (Fla. 4th DCA 1987). Despite this universal and long-standing rule, the County Court entered the Judgment of Possession in this case on May 1, 2006. The County Court clearly erred by announcing the default and entering the Judgment thereon. TLC Trust v. Sender, 757 So.2d 570, 571 (Fla. 4th DCA 2000).

Conclusion

Pro-Art asserts that the Fifth District decision in Crocker is consistent with the express language of § 51.011 and does not force a conclusion that conflicts with the statute or the rules of procedure. Accordingly, Petitioner respectfully requests this Court to resolve the certified conflict by accepting the decision in Crocker v Diland Corporation, 593 So. 2d 1096 (Fla. 5th DCA 1992), reversing the decision in Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC, 959 So.2d 753 (Fla. 4th DCA 2007), and remanding this case to the County Court for Broward County, Florida for further proceedings and instructions to vacate and set aside the Final Judgment and accept Petitioner's Answer.

Respectfully submitted this 22nd day of October, 2007.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Amended Initial Brief on the Merits was served, via United States Mail, Postage Prepaid, on Craig S. Barnett, Esq. and Cory W. Eichhorn, Esq., Greenberg Traurig, P.A., 401 East Las Olas Boulevard, Suite 2000, Fort Lauderdale, Florida 33301 this 22nd day of October, 2007.

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David H. Charlip, Esq.

Certificate of Compliance – Rule 9.210(a)(2)

Pursuant to Rule 9.210(a)(2), I hereby certify that the preceding computer-generated Petitioner's Amended Initial Brief on the Merits has been prepared in Times New Roman 14-point font.

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David H. Charlip, Esq.