IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC07-1397

PRO-ART DENTAL LAB, INC.

Petitioner,

v.

V-STRATEGIC GROUP, LLC

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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REPLY TO RESPONDENT'S POINT ONE ON APPEAL

POINT ONE

FLA. STAT. §51.011 DOES NOT PERMIT THE ENTRY OF AN EO INSTANTE DEFAULT UPON THE FAILURE OF A PARTY TO FILE AN ANSWER WITHIN THE STATUTORILY PROSCRIBED TIME.

As the substance of Respondent's arguments have been thoroughly addressed in Petitioner's Initial Brief, Petitioner seeks in its Reply to principally address Respondent's framing of the issues and its misguided effort to broaden Petitioner's argument in an effort to better position Respondent.

Petitioner does not and has not sought to attack the historical role of summary procedure in the State's jurisprudence as Respondent's argument would suggest. Rather, Petitioner concurs with Respondent's principal argument that the "History of Summary Procedure reflects that its purpose is to provide an expedited process for resolution of claims for possession in landlord tenant disputes". That being the case, Respondent's core argument is not in dispute in this case and reflects Respondent's misunderstanding of the intent, purpose and application of §51.011. Indeed if there is to be the appearance of an attack on long standing historical precedent and/or practice it is Respondent's argument as advanced that the failure to file an Answer

within the time allotted is appropriately addressed only through an *eo instante* default.

In the instant case, Plaintiff filed its complaint and having served same upon the Defendant, was in a position to seek a default after the expiration of five (5) days rather than twenty (20) days as would otherwise have been the case in the absence of the "expedited process" referred to by Respondent. Respondent's ability to seek a default upon the expiration of the five (5) day period satisfied the purpose of the statute and to conclude otherwise would be to exceed the bounds of the statute itself and the "expedited process" intended by the rule and to instead read into the rule a requirement of an *eo instante* default. This is a result neither provided for nor intended by the rule. Indeed, as the Court noted in Crocker v. Diland Corp., 593 So. 2d 1096 (Fla. 5th DCA 1992),

> A case to which the summary procedure applies is necessarily at issue within five days of service and becomes eligible to be set for trial on a priority basis as described in section 51.011(2).

Such eligibility satisfies both the purpose and the proper application of the statutory framework.

The failure of the Respondent in the instant case to overtly acknowledge its interpretation of the statute stems from the fact that there is no legal support for the notion.

Further, unable to find any relevant Florida precedents to support Respondent's position, Respondent cites to Brusco v. Braun, 199 A.D. 2d 27 (N.Y.A.D. 1 Dept. 1993) in support of the notion that the rules of civil procedure should not be used to frustrate the purpose of a statute. The facts in Brusco are plainly and substantively different from the case at bar since in Brusco there was a declared express conflict between the rules as opposed to the instant case where no conflict exists.

Additionally, Respondent's citation to Weems v. McCloud, 619 F. 2d 1081 (5th Cir. 1980) is likewise misplaced. Respondent cites the aforementioned case and suggests that it stands for the proposition that "the general rules of civil procedure should not be used to frustrate the purpose of a statute…" . This characterization is misleading in light of the Court's actual findings. The Court in considering whether a counterclaim exceeded the scope of a confirmation proceeding, recognized that the rules of civil procedure are "frequently applied less strictly in special statutory proceedings, where strict application would frustrate the statutory purpose." Weems at 1094. In the instant case, Respondent's suggested application of the plain language of the statutory procedure would constitute a frustration of the statutes' purpose. Nothing in the statutory framework at issue calls for an *eo instante* default upon the failure of a party to file its Answer within

five (5) days. To the contrary, those matters not expressly addressed in the framework are referred to the rules of civil procedure. As a result, it is Respondent's interpretation that would "constitute a frustration of the statutes' purpose". Had the legislature intended the result of a failure to file an Answer within the allotted time to result in an *eo instante* default, it could have expressly included such language in the statute. Its failure to do so represents the statutory intent that the rules of civil procedure should govern. In fact, Fla. Stat. §51.011 expressly states

> that Rules of procedure apply to this section except when this section or the statute or rule prescribing this section provides a different procedure…"

The plain language of the statute can support no other interpretation other than that advanced by Petitioner as there is no "different procedure" provided for in a case where a Defendant fails to file an answer within the allotted five (5) days but ultimately files one prior to the entry of a default. As a result, the rules of civil procedure are applicable.

REPLY TO RESPONDENT'S POINT TWO ON APPEAL

CROCKER SUPPORTS PETITIONER'S POSITION

Respondent's assertion that Crocker can be reconciled with the facts at issue in this case requires a tortured reading of the Court's decision. To the extent that Respondent suggests that Crocker stands for the proposition

that Petitioner is only entitled to one opportunity to file its Answer before being exposed to a default, Petitioner and Respondent agree. Indeed, it is without dispute that §51.011 "permits only a single opportunity to raise defenses within the five (5) day period set forth in Section 51.011." The dispute in the instant case surrounds what happens when defenses are raised after the five (5) day period but prior to the entry of a default. Indeed, as the Court opined in Crocker,

> It was obliged to file all its defenses, including failure to state a cause of action, within five days and by failing to do so was exposed to entry of a 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. Fla.R.Civ.P. 1.500(c); Irwindale Co. N.V. v. Three Islands Olympus, 474 So.2d 406 (Fla. 4th DCA 1985).

The above analysis by the Court is wholly and inescapably inconsistent with that of the lower Court in the instant case. In the instant case, the lower court entered a default notwithstanding that an Answer had been filed. The Court's ruling in Crocker is consistent with Florida law and is squarely in conflict with the lower court's ruling in the instant case.

Respondent seems to conclude that whether Petitioner filed an Answer before or after the entry of the default is irrelevant to the analysis, an argument clearly rejected by the Court in Crocker.

Finally, Respondent seeks to reconcile Crocker by arguing that the Motion to Dismiss filed by the Petitioner in the instant case was actually a defective Answer as was the case in Crocker. Respondent's analysis is faulty for at least two reasons. First, in the instant case, the Court never ruled upon the Motion to Dismiss as a defective Answer and secondly, even if, as in Crocker, the Court's ruling upon the Motion to Dismiss was taken as a pleading, then the Petitioner's subsequent filing of an Answer prior to the entry of a default would be appropriately viewed as an Amended Answer precluding the entry of a default.

Florida Rule of Civil Procedure 1.190(a) states that:

> A party may amend a pleading once as a matter of course at any time before a responsive pleading is served, or if the responsive pleading is one to which no responsive pleading is permited and the action has not been placed on the trial calendar, may so amend it at any time within twenty days after it is served…

To the extent that Fla. Stat. §51.011 neither eliminates nor even references the concept of the amendment of pleadings, the rule as stated above governs.

Even assuming *arguendo* that in fact Petitioner's Motion to Dismiss was viewed as an Answer, the filing of its later filed pleading titled "Answer" should properly be viewed as the Petitioner's exercise of its right under Florida Rule of Civil Procedure 1.190(a) to file an amended Answer as a matter of right. In either case, it is clear that the Court erred in entering a default against the Petitioner after an Answer had been filed.

CONCLUSION

Based on the foregoing reasons, this Court should overrule the Fourth District herein and adopt the Crocker analysis to resolve the conflict between the districts court.

CERTIFICATE OF COMPLIANCE

I DO HEREBY CERTIFY that this brief was prepared in Courier New 12-point Font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Eric A. Jacobs

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this __ day of December, 2007 to Cory W. Eichhorn, Esq.,Greenberg Traurig, P.A.. 401 Las Olas Boulevard, Suite 2000, Fort Lauderdale, Florida 33301

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Eric A. Jacobs