**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA**

LAS PALMAS AT SAND LAKE CONDOMINIUM ASSOCIATION, INC.,

Appellant,

v.

GISELLA DE LA TORRES AND GISELLE MARIE COLON,

Appellees.
_____/

CASE NO.: 2014-CV-000038-A-O
Lower Case No.: 2014-CC-001945-O

Appeal from the County Court, for Orange County, Florida, Andrew L. Cameron, County Judge.

Amber N. Williams, Esquire, for Appellant.

Dennis A. Chen, Esquire, for Appellee.

Before THORPE, MYERS, JR., and S. KEST, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT'S "ORDER GRANTING DEFENDANT'S MOTION TO SET ASIDE DEFAULT AND DISMISS COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION"

Appellant, Las Palmas at Sand Lake Condominium Association, Inc. ("Las Palmas"), timely appeals the Trial Court's "Order Granting Defendant's Motion to Set Aside Default and Dismiss Complaint for Failure to State a Cause of Action," entered on May 2, 2014. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A).

Las Palmas is a condominium association that also owns several units, which it rents to tenants. This case involves the rental of one such unit. The Appellees, Gisella de la Torres and Giselle Marie Colon ("de la Torres and Colon"), were renting a unit from Las Palmas on a month-to-month basis, and began the tenancy on December 1, 2011. In its Complaint, filed February 11, 2014, Las Palmas alleged that it delivered to de la Torres and Colon a timely Notice of Termination of the lease, pursuant to section 83.57(3), Florida Statutes (2014). The Notice to Terminate, sent to de la Torres and Colon on December 11, 2013, purported to terminate their lease, effective February 1, 2014.

The trial court entered a default judgment as to possession only on February 25, 2014 against de la Torres and Colon for insufficiencies in their answer, filed February 20, 2014, including that the answer did not: 1) allege that the rent claimed to be due was paid; 2) reflect that the rent payment had been deposited with the Clerk of the Court; and 3) request a hearing to determine the amount of rent that should be required to be deposited into the court registry, or alternatively, if requested, did not attach documentation in support of the motion.

On February 28, 2014, de la Torres and Colon, through counsel, filed a "Motion to Set Aside Default and Dismiss Complaint for Failure to State a Cause of Action," requesting that the trial court set aside the default and arguing that Las Palmas provided defective notice. In their Motion, de la Torres and Colon requested that the trial court dismiss without leave to amend. The trial court held a hearing on that Motion on March 13, 2014. On May 2, 2014, the trial court entered an "Order Granting Defendant's Motion to Set Aside Default and Dismiss Complaint for Failure to State a Cause of Action." In that Order, the trial court specifically stated that Las Palmas would not have an opportunity to amend. Presently, Las Palmas appeals that order.

The central issue in this case is whether the trial court abused its discretion when it granted de la Torres' and Colon's motion to dismiss without giving Las Palmas an opportunity to amend. The standard of review for reviewing an order dismissing a complaint without leave to amend is an abuse of discretion standard. *See Inland Materials, Inc. v. Superior Aircraft Hangars, Inc.*, 464 So. 2d 1320, 1321 (Fla. 5th DCA 1985) ("The general rule in Florida is that as to amendments to pleadings, a court abuses its discretion if it does not allow a party to amend its pleadings unless that party has abused the amendment privilege or it appears that the deficiency cannot be cured.").

On appeal, Las Palmas makes three arguments: 1) that the dismissal of its initial complaint without leave to amend was an abuse of discretion; 2) that the trial court's analysis of the terms of a contract on a motion to dismiss is an improper evaluation of Las Palmas' ability to prove its case, which in turn necessitates reversal of the order dismissing the complaint; and 3) that the trial court's finding of ambiguity in the contract is contrary to the law, as the plain language of the lease is not reasonably susceptible to alternative interpretation. Conversely, de la Torres and Colon argue that: 1) Las Palmas failed to preserve the issue of dismissal and amending its complaint at the trial court level, which constitutes waiver of the issue on appeal; 2) even if this Court were to find the issue of amending the complaint was preserved for appeal, the trial court did not abuse its discretion by dismissing the action without prejudice where an amendment of a pleading would not have cured a defective notice; 3) the motion to dismiss was properly addressed at the end of a properly noticed evidentiary hearing on de la Torres' and Colon's motion to set aside default, wherein the trial court determined that there was improper

notice and accordingly dismissed the action; and 4) the applicable lease term is ambiguous and must be construed in favor of the non-drafting party, i.e., de la Torres and Colon.

While Las Palmas raises several arguments on appeal, the Court finds that the dispositive issue is whether it was improper for the trial court to dismiss the initial complaint without giving Las Palmas leave to amend. Pursuant to section 83.60(1)(a), Florida Statutes (2014), "[t]he landlord **must** be given an opportunity to cure a deficiency in a notice or in the pleadings before dismissal of the action." (emphasis added); *see also Noimbie v. Harvey*, 137 So. 3d 606, 607 n.1 (Fla. 4th DCA 2014) (further indicating that "a landlord who files an eviction action with a defective three-day notice might serve a new three-day notice and serve an amended complaint"). Furthermore, Florida law allows for liberal amendment of pleadings. *See, e.g., Trotter v. Ford Motor Credit Corp.*, 868 So. 2d 593, 595 (Fla. 2d DCA 2004) ("A court should not dismiss a complaint without leave to amend unless the privilege of amendment has been abused or it is clear that the complaint cannot be amended to state a cause of action."); *Gowan v. Bay County*, 744 So. 2d 1136, 1138 (Fla. 1st DCA 1999) ("An opportunity to amend the complaint should be freely granted and should not be denied unless the privilege has been abused."); *Gladstone v. Smith*, 729 So. 2d 1002, 1003 (Fla. 4th DCA 1999) ("A claim should not be dismissed with prejudice without giving the plaintiff an opportunity to amend the defective pleading, unless it is apparent that the pleading cannot be amended to state a cause of action." (internal quotations omitted)).

If there is an error on the face of the final judgment, then an appellate court may review a lower court judgment for that apparent error. *Hill v. Calderin*, 47 So. 3d 852, 854 (Fla. 3d DCA 2010) ("Generally, where an appellant fails to provide the appellate court with a trial transcript, the trial court's judgment must be affirmed. Notwithstanding the absence of a transcript,

however, an appellate court may review a lower court judgment for error apparent on its face." (internal citations omitted)); *see also BarrNunn, LLC v. Talmer Bank and Trust*, 106 So. 3d 51, 52 (Fla. 2d DCA 2013) ("Although in many cases, the lack of a transcript of the lower court proceedings prevents the appellant from demonstrating reversible error, the absence of a transcript does not preclude reversal where an error of law is apparent on the face of the judgment." (internal citations omitted) (internal quotations omitted)).

Here, while there is no transcript of the hearing on the motion to dismiss, there is an error apparent on the face of the record. Las Palmas should have been afforded an opportunity to amend to cure the deficiencies in its complaint. Las Palmas did not abuse the amendment process because it had only filed the original complaint. As a result, the Court finds that the trial court abused its discretion when it dismissed Las Palmas' complaint without giving it an opportunity to amend. As to de la Torres' and Colon's counter-argument that Las Palmas did not preserve the issue for appeal, that argument is without merit, as the error was apparent from the face of the record.

Finally, because the Court finds that reversal is warranted, it declines to consider the remaining arguments raised on appeal.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Trial Court's "Order Granting Defendant's Motion to Set Aside Default and Dismiss Complaint for Failure to State a Cause of Action," entered on May 2, 2014 is **REVERSED and REMANDED**

for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 1st day of June , 2015.

/S/
JANET C. THORPE
Presiding Circuit Judge

MYERS, JR. and S. KEST, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Amber N. Williams, Esquire**, Coyle Law Firm, P.A., 730 Vassar Street, Third Floor, Orlando, Florida 32804; **Dennis A. Chen, Esquire**, Chen Law Firm, P.A., P.O. Box 1039, Ocoee, Florida 34761, on the 1st day of June, 2015.

/S/
Judicial Assistant