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IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2020-CA-398

DIVISION: CV-B

DERK ALLABEN,

Plaintiff,

vs.

KIMBERLY TUSHER,

Defendant.

**DEFENDANT KIMBERLY TUSHER'S MOTION TO SET ASIDE CLERK'S ENTRY
OF DEFAULT**

Defendant, Kimberly Tusher ("Tusher"), by and through the undersigned counsel, files this Motion to Set Aside Clerk's Entry of Default pursuant to Florida Rule of Civil Procedure 1.500(d) and in support thereof states:

1. Plaintiff filed his complaint on January 23, 2020. However, Tusher was not served with the complaint until January 28, 2020. See Exhibit A.
2. Pursuant to Florida Rule of Civil Procedure 1.140(a), a party must file a responsive pleading within 20 days "after service of original process and the initial pleading on the defendant."
3. Florida Rules of Judicial Administration 2.514 provides that if a deadline falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the following day.
4. February 17, 2020 was Presidents' Day, a legal holiday, which extended the filing deadline to February 18, 2020.
5. Tusher's Motion to Dismiss Plaintiff's Claim was timely electronically filed February 18, 2020 and a copy was sent to Plaintiff by mail. See Exhibit B.

6. On February 19, 2020, Plaintiff filed a Motion for Default.
7. The Clerk's Office entered a Default against Tusher on February 19, 2020 citing Tusher's failure to respond, despite the fact that Tusher timely responded on February 18, 2020.
8. The Clerk's Default is void.
9. A final judgment has not been entered in this case.

MEMORANDUM OF LAW

The erroneous entry of a default entitles a party to relief on a motion to set aside default judgment. *See Reichenbach v. Southeast Bank, N.A.* 462 So.2d 611, 612 (Fla. 3d DCA 1985); *Chester, Blackburn & Roder, Inc. v. Marchese*, 383 So.2d 734, 735 n.3 (Fla. 3d DCA 1980). As stated above, the default was improperly entered because Tusher's responsive pleading was timely filed. Even assuming Tusher's deadline was February 17, 2020, Tusher's February 18, 2020 filing was before the entry of default on February 19, 2020. Pursuant to Florida Rules of Civil Procedure 1.500(c), a party may plead or otherwise defend before a default is entered. If a default is entered after the responsive pleading has been filed, then the default is entered in contravention to Florida Rules of Civil Procedure 1.500(c). *Chester* at 734. *See also Thompson v. Hancock Bank*, 158 So.3d 613, 615 (Fla. 5th DCA 2013). If an answer has been filed before a default is entered, entry of the default is erroneous. The erroneous entry of a default entitles the defendant to relief upon a motion to set aside default judgment. *Thompson* at 615.

Florida Rules of Civil Procedure 1.540(b)(4) grants the court authority to relieve a party from final judgment on the ground that "the judgment or decree is void." A clerk's default is void *ab initio* when a defendant served an answer before the clerk entered its default. *Derosa v. Pugliese*, 782 So.2d 1011 (Fla. 4th DCA 2001). "Because a default was entered erroneously by the

clerk at a time when [the defendant] had, in fact, served papers in the cause, there was no requirement that [the defendant] establish excusable neglect, a meritorious defense, or due diligence.” *Beztak v. Kesling Carpets, Inc. a Div. of Old Mill Indus., Inc.*, 596 So.2d 1297, 1298 (Fla. 2d DCA 1992). Thus, the clerk’s February 19, 2020 entry of Default is void and should be set aside as such.

WHEREFORE, Tusher respectfully requests this Honorable Court set aside the Clerk’s Default as void and grant any other relief deemed just and proper.

MURPHY & ANDERSON, P.A.

/s/ Catherine M. Licandro

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Attorneys for Defendant Kimberly Tusher

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been furnished by U.S. mail and by email (DKAllaben@gmail.com) to Derk Allaben on this 10th day of March, 2020.

/s/ Catherine M. Licandro

EXHIBIT A

Return Of Service

2020-02923

Control Number

SUMMONS

To be Served: KIMBERLY C. TUSHER

Street Address: 1616 JORK RD STE 102 JACKSONVILLE, FL 32207

Plaintiff: DERK ALLABEN

-VS-

Defendant: KIMBERLY C. TUSHER

Attorney

Case Number: 16-2020-CA-398

Court: DUVAL

Type of Writ: SUMMONS

Court Date:

Court Time:

INDIVIDUAL

Received the above named writ on FRIDAY, JANUARY 24, 2020, at 8:28 AM and served the same at 9:30 AM on TUESDAY, JANUARY 28, 2020, in DUVAL County, Florida, by delivering a true copy of this writ together with a copy of the COMPLAINT AND ORDER with the date and time of service and my id number and signature or initials pursuant to s. 48.031(5), to-wit KIMBERLY C. TUSHER after the provisions as set forth in Section 48.031(1)(a), Florida Statutes have been met.

SERVED PARTY POSITIVELY IDENTIFIED VIA FL DL PHOTO

MIKE WILLIAMS, Sheriff
Duval County, Florida
By 5754 C.I. BRIDGEMAN

Exhibit 1

CHARLIE I BRIDGEMAN

JSO Special Process Server

Electronically signed, 1/28/2020 per Florida statute 48.21

Printed on 1/29/2020

FILED JAN 30 2020 0808 FUSSELL

EXHIBIT B

Catherine Licandro

From: eservice@myflcourtagency.com
Sent: Tuesday, February 18, 2020 5:43 PM
Subject: SERVICE OF COURT DOCUMENT CASE NUMBER 162020CA000398XXXXMA ALLABEN, DERK - TUSHER, KIMBERLY C
Attachments: Motion To Dismiss.pdf

Notice of Service of Court Documents

Filing Information

Filing #: 103512290
Filing Time: 02/18/2020 05:43:14 PM ET
Filer: Catherine Licandro 904-598-9282
Court: Fourth Judicial Circuit in and for Duval County, Florida
Case #: 162020CA000398XXXXMA
Court Case #: 16-2020-CA-000398-XXXX-MA
Case Style: ALLABEN, DERK - TUSHER, KIMBERLY C

Documents

Title	File
Motion To Dismiss	2020.02.18 D's MTD.pdf

E-service recipients selected for service:

Name	Email Address
Catherine Licandro	clicandro@murphyandersonlaw.com
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E-service recipients not selected for service:

IN THE CIRCUIT COURT FOR THE
FOURTH JUDICIAL CIRCUIT IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2020-CA-398

DIVISION: CV-B

DERK ALLABEN,

Plaintiff,

v.

KIMBERLY TUSHER,

Defendant.

**DEFENDANT KIMBERLY TUSHER'S MOTION TO DISMISS PLAINTIFF'S
COMPLAINT**

Defendant, Kimberly Tusher ("Tusher"), by and through the undersigned counsel, files this Motion to Dismiss Plaintiff's Complaint pursuant to Florida Rule of Civil Procedure 1.140(b) and in support thereof states:

1. Tusher is a local attorney who has solely handled dependency cases since 1992. She earned the distinction of board certification in Juvenile Law in 2017.
2. Plaintiff, appearing pro se, is the natural father of the child involved in dependency case number 16-2004-DP-438 (the "Dependency Case") (referred to by Plaintiff in his Complaint as 16-2005-DP-438). Defendant requests that the Court take judicial notice of the Dependency Case pursuant to Florida Statute § 90.203. In order to maintain confidentiality in the Dependency Case, documents from the Dependency Case are hereinafter referenced by name and date, but not attached hereto.

3. The Dependency Case was initiated in 2004 and at that time the child was placed with Plaintiff. Subsequently, the child was removed from Plaintiff due to Plaintiff's arrest on September 30, 2005 for Murder in the Second Degree in case number 16-2005-CF-013990 (the "Criminal Case"). Defendant requests that the Court take judicial notice of the Criminal Case pursuant to Florida Statute § 90.203. Plaintiff was jailed without bond in the Criminal Case. .

4. In 2004 and 2005, Tusher was under contract with the City of Jacksonville to accept appointments in dependency cases. The appointments alternated between Tusher and another attorney.

5. Due to the structure of the appointment schedule, oftentimes Tusher would be appointed to a dependency matter without being present in court.

6. Tusher was appointed in the Dependency Case (16-2004-DP-438) without being present in court. *See* Clerk Notes dated October 5, 2005 in the Dependency Case.

7. The record for the Dependency Case reflects that Plaintiff was also not present in court at the time of the Order, as he had not been transported from the jail. *See* Clerk Notes dated October 5, 2005 in the Dependency Case.

8. Plaintiff was represented by attorney James Keenan in the Criminal Case. Beginning on November 1, 2005, Keenan also represented Plaintiff in the Dependency Case. Keenan filed a Notice of Discovery in the Dependency Case on Plaintiff's behalf.

9. Tusher never filed a pleading in the Dependency Case, nor had any involvement with the Plaintiff aside from her name being used in the initial order of appointment. *See generally*, the Dependency Case.

10. In the Criminal Case, Plaintiff ultimately pled to the lesser charge of Manslaughter on February 22, 2007 and was sentenced to ten years in prison.

11. Due in large part to Plaintiff's incarceration, Plaintiff's child was placed with a legal guardian.

12. On December 22, 2015, Plaintiff filed a Motion for Contempt of Court in the Dependency Case claiming the legal guardian was alienating the child from Plaintiff and preventing visitation.

12. In late December 2015 or early January 2016, Tusher began representation of the child's guardian. In that capacity, Tusher did not represent any party but rather represented a participant.

13. There was a period of inactivity in the Dependency Case up until fall 2019, when the guardian decided to relinquish custody. On behalf of the guardian, Tusher filed a motion to relinquish custody and requested Plaintiff be awarded custody. Tusher assisted the guardian with that process until Tusher was granted leave to withdraw in an order dated February 10, 2020.

14. Plaintiff filed his instant Complaint on January 23, 2020, but it was not served on Tusher until January 28, 2020.

15. The Complaint contains a single ground entitled "Breach of Fiduciary Duty."

16. For the reasons discussed in the incorporated memorandum of law below, Plaintiff's claim fails to state a cause of action against Tusher upon which relief may be granted. Therefore, the claim must be dismissed.

MEMORANDUM OF LAW

Standard on a Motion to Dismiss

Florida Rule of Civil Procedure 1.110(b) requires a pleading set forth "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief[.]" On a motion to dismiss, "[t]he question for the trial court to decide is simply whether, assuming all the allegations

in the complaint may be true, the plaintiff would be entitled to the relief requested.” *Fox v. Prof'l Wrecker Operators of Fla., Inc.*, 801 So.2d 175, 178 (Fla. 5th DCA 2001) (quoting *Cintron v. Osmose Wood Preserving, Inc.*, 681 So.2d 859, 861 (Fla. 5th DCA1996)). When evaluating a motion to dismiss for failure to state a cause of action, the “trial court is bound by the four corners of the complaint and attachments, and all ambiguities and inferences drawn from ‘the recitals in the complaint, together with the exhibits attached,’ must be construed in the light most favorable to the plaintiff.” *Lonestar Alternative Solutions, Inc. v. Leview-Boymelgreen Soliel Developers, LLC*, 10 So.3d 1169, 1172 (Fla. 3d DCA 2009) (quoting *Vinneau v. Metro Life Ins. Co.*, 548 So.2d 856, 858 (Fla. 4th DCA 1989)). In order for the complainant to survive a motion to dismiss, the complaint must plead a *prima facie* case. *Alvarez v. E&A Produce Corp.*, 708 So. 2d 997, 999-1000 (Fla. 3d DCA 1998). Whether a *prima facie* case is pled “depends on the sufficiency of [Complainant’s] allegation of fact, excluding bare conclusions.” *Id.*

The Court can consider a document outside the four corners of the complaint “if it is central to the Plaintiff’s complaint and the contents are undisputed.” *Manley v. Stube*, 2010 U.S. Dist. LEXIS 21192 at *3 (Fla. MD March 9, 2010), (citing *Maxcess, Inc. v. Lucent Technologies, Inc.*, 433 F.3d 1337 (11th Cir. 2005)). Further, Fla. R. Civ. P. 1.130 allows a court to consider documents that are incorporated by reference in pleadings. A trial court is allowed to review documents in deciding a motion to dismiss if the document in question has been incorporated by reference in the complaint. *One Call Prop, Servs, v. Sec. First Ins. Co.*, 165 So.3d 749, 752 (Fla. 4th DCA 2015).

DISCUSSION

I. Plaintiff’s claim against Tusher fails to state a cause of action upon which relief may be granted.

To prove a breach of fiduciary duty claim, Plaintiff must show a.) the existence of a fiduciary relationship; b.) a breach of the duty owed; and c.) damages proximately caused by the

breach. *USA Interactive v. Dow Lohnes & Albertson, PLLC*, 328 F. Supp. 2d 1294 (M.D. Fla. 2004). Plaintiff's claim fails on all accounts upon review of the dependency case file at the center of Plaintiff's complaint, case # 16-2004-DP-438.

A. Plaintiff has not established that Tusher owed him a duty or that she breached it.

In the instant Complaint, Plaintiff cited to and attached an Order appointing Tusher to the Dependency Case in an effort to establish a fiduciary duty between him and Tusher. However, the Dependency Case records show that neither Plaintiff nor Tusher were present at the time of the Order. See Clerk Notes dated October 5, 2005 in the Dependency Case. At a court date less than a month later, Plaintiff was present and was represented by other counsel. Therefore, even assuming Plaintiff had sufficiently alleged a fiduciary relationship based on the entry of the Order appointing Tusher, which he hasn't, Plaintiff has failed to establish a breach of that duty, as the incorporated record refutes his claims in paragraph 8 of the instant Complaint that Tusher failed to maintain his confidences and loyalties or protect his rights and interests.

In his Complaint, Plaintiff cites to Florida Bar Rules Regulating Professional Conduct 4-1.7(a), which addresses representing adverse interests and which is inapplicable to the instant case. Plaintiff's claim for Breach of Fiduciary Duty cannot sufficiently allege Tusher was adverse to him. Tusher was not, and has never been, a party to the Dependency Case and has never filed any pleadings to limit or impair Plaintiff's rights. To the contrary, Tusher's assistance of the guardian in the Dependency Case in the relinquishment of guardianship only inures to Plaintiff's benefit, especially in light of Tusher's October 2019 filing requesting the Court award custody to Plaintiff. See Motion for Change of Custody dated October 7, 2019 in the Dependency Case.

B. Plaintiff's claims for damages are not sufficiently alleged and certain damages are moot.

Plaintiff has failed to sufficiently allege damages proximately caused by the purported breach. Damages must be plead with specificity and “for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation.” *Papasan v. Allain*, 478 U.S. 265, 286 (1986). In other words, plaintiff must go beyond the "conclusory" and must offer "some further factual enhancement" in order to "enter the realm of plausible liability." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 at 557 n. 5 (2007). “In the instant case, although the defendant compiled a list of alleged breaches, there are no allegations as to what injury the defendant sustained as a result of those alleged breaches, nor how the injury is causally related to the alleged breaches.” *Bankers Trust Realty v. Kluger*, 672 So.2d 897, 898 (Fla. 3d DCA 1996) (citing *Dillard Smith Constr. Co. v. Greene*, 337 So.2d 841, 843 (Fla. 1st DCA 1976)). While Plaintiff has listed out grievances against Tusher, he failed to allege a causal connection between those allegations and his unsupported damages.

Plaintiff makes the conclusory assertion that he lost visitation and was alienated from the child due to Tusher; however, as discussed below, Plaintiff’s own pleading in the Dependency Case filed in December 2015, by Plaintiff’s own admission, predates Tusher’s Notice of Appearance. In Plaintiff’s Motion for Contempt of Court Order filed December 22, 2015 in the Dependency Case, Plaintiff asserted that from May 2015 through the time of filing, the guardian (not Tusher) committed acts that, in Plaintiff’s mind, impaired his visitation and relationship with the child. In the instant Complaint, Plaintiff accuses Tusher of the same conduct. Yet, Plaintiff’s claims against the guardian predate Tusher’s representation. Essentially, in the instant case Plaintiff is claiming Tusher’s conduct damaged him, however, Plaintiff previously alleged in the Dependency Case that he was damaged in the exact same manner which was wholly independent

from Tusher. Therefore, Plaintiff, by his own concession, cannot establish a nexus between his alleged damages and Tusher's representation of the guardian.

Tusher no longer represents the guardian of Plaintiff's minor child in the dependency case. *See* Order Granting Consent Motion to Withdraw as Attorney for Custodian/ Permanent Guardian dated February 10, 2020 in the Dependency Case. Therefore, any veiled and unsubstantiated allegation of future damages in the instant Complaint is moot.

CONCLUSION

Plaintiff's Complaint against Tusher should be dismissed by this Court. First, Plaintiff has not sufficiently pled a duty existed between him and Tusher, or that assuming a duty existed, that Tusher breached said duty. Moreover, the Complaint is deficient because there is no nexus between the damages Plaintiff alleged and Tusher's representation of the guardian.

WHEREFORE, Tusher respectfully requests this Honorable Court dismiss Plaintiff's Complaint and grant any other relief deemed just and proper.

MURPHY & ANDERSON, P.A.

/s/ Catherine M. Licandro

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CERTIFICATE OF SERVICE

I certify that on February 18, 2020, the foregoing has been furnished via U.S. Mail to Derk Allaben.

/s/ Catherine M. Licandro
Attorney

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