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

THE HOUSING AUTHORITY OF THE CITY OF ORLANDO, FLORIDA,

Appellant,

v.

SHAWN M. BRADLEY,

Appellee.
_____/

CASE NO.: 2013-CV-000073-A-O
Lower Case No.: 2012-CC-008888-O

Appeal from the County Court, for Orange County, Florida, Faye L. Allen, County Judge.

Rhonda E. Stringer, Esquire, and
Suzanne J. Decopain, Esquire, for Appellant.

Lizzie L. Johnson, Esquire, for Appellee.

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

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Appellant, The Housing Authority of the City of Orlando, Florida ("OHA"), timely appeals the Trial Court's "Order Granting Defendant's Motion to Dismiss" entered on May 1, 2013 and "Order Denying Plaintiff's Motion for Rehearing" entered on November 4, 2013. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

Summary of Facts and Procedural History

OHA is a public housing authority that owns, operates, and manages various federally funded, low-income housing properties in Orange County, Florida. Among such properties, OHA owns and leases real property located on Meadows Court in Apopka, Florida, which is currently in the possession of Shawn Bradley ("Bradley") pursuant to a dwelling agreement ("Lease"). During Bradley's tenancy, OHA discovered that her son, Larry Bradley, a household member, was arrested on January 31, 2010 and subsequently charged with robbery and other offenses. OHA also discovered that Larry Bradley was sentenced to probation for his robbery conviction and thereafter, he was arrested for violating his probation/communty control twice on or about May 2, 2011 and February 6, 2012.

OHA then determined that Larry Bradley's criminal conduct constituted material noncompliance of certain sections of the Lease. As a result of the Lease violations, OHA served Bradley with a 7-Day Notice of Termination of Tenancy dated June 5, 2012 ("June Notice"). Bradley did not vacate the premises per the Notice and thereafter on June 27, 2012, OHA filed an evcition action for removal of Bradley and for damages based on her Lease violations. On July 12, 2012, Bradley filed her combined Answer, Affirmative Defenses, and Motion to Dismiss. In the Motion to Dismiss, Bradly requested that the Trial Court dismiss OHA's Complaint pursuant to section 83.56(5), Florida Statutes, that provides that a landlord receiving a rent subsidy from the federal government waives the right to evict a tenant if the landlord does not commence an eviction proceeding within 45 days from the alleged noncomplaince by the tenant. Also, the 45-day waiver was included among Bradley's Affirmative Defenses along with exhibits in support including another 7-Day Notice of Termination of Tenancy dated May 3, 2012 ("May Notice").

On January 23, 2013, a hearing was held addressing Bradley's Motion to Dismiss. After the conclusion of the hearing, the Trial Court took the matter under advisement and directed both parties to submit proposed orders. On May 1, 2013 , the Trial Court entered the Order granting Bardley's Motion to Dismiss. Thereafter, on May 13, 2013, OHA filed a Motion for Rehearing that was subsequently heard on October 30, 2013. On November 4, 2013, the Trial Court entered the Order denying Bradley's Motion for Rehearing.

Argument on Appeal

On appeal, OHA argues that in considering Bradley's Motion to Dismiss, the Trial Court erred by failing to confine its review to the four corners of the Complaint when it reviewed the May Notice document. Conversely, Bradley argues that the Trial Court properly granted her Motion to Dismiss because: 1) Her 45-day waiver Affirmative Defense is established on the face of the Complaint; 2) To the extent that the Trial Court's Order relied on evidence outside the four corners of the Complaint, the error was harmless as OHA did not object to the Trial Court's consideration of the May Notice during the Motion to Dismiss hearing; and 3) The Complaint failed to state a cause of action and was properly dismissed by the Trial Court.

Standard of Review

Because the determination as to whether a complaint sufficiently states a cause of action is an issue of law, an order granting a motion to dismiss is reviewable by the de novo standard of review. *Sobi v. Fairfield Resorts, Inc.*, 846 So. 2d 1204, 1206-1207 (Fla. 5th DCA 2003). When an appeal involves a purely legal matter such as the judicial interpretation of a statute, the standard of review is also de novo. *Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So. 2d 376, 377 (Fla. 5th DCA 1998).

Analysis

The procedural basis of OHA's argument is that the Trial Court should have limited its review to the four corners of the Complaint with exhibits and should not have considered the May Notice that was attached to the Answer, Affirmative Defenses, and Motion to Dismiss, but not attached or referenced in the Complaint. This Court concurs with OHA that the Trial Court erred by considering the May Notice when reviewing Bradley's Motion to Dismiss. *Sobi,* 846 So. 2d at 1206 (explaining that the trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations); *Nat Weaver, Inc. v. Fencl*, 701 So. 2d. 121 (Fla. 5th DCA 1997) (explaining that a motion to dismiss a complaint is not a motion for summary judgment in which the court may rely on facts adduced in depositions, affidavits, or other proofs); *Bozeman v. Hernando County,* 548 So. 2d 300, 301 (Fla. 5th DCA 1989) (holding that the trial court erred when reviewing a motion to dismiss by granting summary judgment based upon information which was not set forth in the complaint).

However, this Court concurs with Bradley that at the hearing addressing the Motion to Dismiss, both the May and June Notices were referenced, but OHA did not object to the Trial Court's consideration of the May Notice. Therefore, this argument was not preserved for appeal and should be barred from review unless the Trial Court's action resulted in a jurisdictional or fundamental error. *Florida Emergency Physicians-Kang & Associates, M.D., P.A. v. Parker*, 800 So. 2d 631, 636 (Fla. 5th DCA 2001) (explaining that absent a jurisdictional or fundamental error, an appellate court should not consider issues that were not presented to the trial court). Notwithstanding OHA's failure to object at the hearing as to this issue, this Court finds that the Trial Court's consideration of the May Notice was fundamental error as explained below.

The substantive issue in this case is whether the Trial Court correctly granted Bradley's Motion to Dismiss based on the 45-day waiver under section 83.56(5), Florida Statutes. Per the statute, the 45 day period began to run from the date when OHA had actual knowledge of Bradley's noncompliance with the Lease i.e. the criminal offense(s) committed by her son, Larry Bradley, who resided with her. The allegations in OHA's Complaint do not state a specific date when OHA discovered Larry Bradley's criminal offenses. Thus, the date when OHA had actual knowledge of the noncompliance was an issue of material fact in order to determine when the 45 day time period to file the eviction action began running.

Both the May Notice and the June Notice were included in the Trial Court's findings in granting the Motion to Dismiss. The May Notice was dated May 3, 2012 and the Complaint was filed 55 days later on June 27, 2012. Thus, had the May Notice been referenced and/or attached in the Complaint, granting the Motion to Dismiss would have been warranted because on its face the May Notice would have shown that OHA had actual notice of Bradley's noncompliance by that date and thus, the Complaint was filed too late. Next, this Court reviewed the sufficiency of the Complaint without the May Notice and finds there was nothing else in the Complaint or attachments to support dismissing the action with prejudice. Further, the Complaint was clearly filed within 45 days from the date of the June 5, 2012 Notice. Lastly, this Court notes that the failure of OHA to specifically state the date that it discovered the noncompliance is concerning and as food for thought, perhaps the appropriate procedural route to have taken in this case would have been a motion for a more definite statement or a dismissal without prejudice with leave for OHA to file an amended complaint stating the date when it had actual knowledge of the noncompliance; or had the issue arose at a later stage in the case via a motion for summary judgment, the Trial Court's reliance on the May Notice may have been proper.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Trial Court's "Order Granting Defendant's Motion to Dismiss" entered on May 1, 2013 and "Order Denying Plaintiff's Motion for Rehearing" entered on November 4, 2013 are **REVERSED and REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 11th day of August, 2014.

/S/
SALLY D.M. KEST
Presiding Circuit Judge

LEBLANC and MYERS, JR., J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Rhonda E. Stringer, Esquire** and **Suzanne J. Decopain, Esquire**, Saxon, Gilmore, Carraway, & Gibbons, P.A., 201 E. Kennedy Blvd., Suite 600, Tampa, Florida 33602; **Lizzie L. Johnson, Esquire**, Community Legal Services of Mid-Florida, Inc., 315 Magnolia Avenue, Sanford, Florida 32771, on the 12th day of August, 2014.

/S/
Judicial Assistant