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IN THE SUPREME COURT
STATE OF FLORIDA

ALAN CHEEK,

Petitioner,

vs.

McGOWAN ELECTRIC SUPPLY COMPANY,

Respondent.

DOCKET NO. 68,563

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE FACTS

After the special account was frozen, Cheek authorized a couple of charges amounting to less than $500 total (R 743). McGowan Electric never raised any special issue as to these charges, and they should be considered absorbed in the substantial payments made by the account debtor or by Cheek.

ISSUE I

MCGOWAN ELECTRIC'S FAILURE TO PRESENT ITS CLAIM FOR ATTORNEYS' FEES TO THE JURY PRECLUDES AWARD BY THE TRIAL COURT.

McGowan Electric overlooks that (1) attorneys' fees were provided by the note upon default; (2) that the note does not provide for the court to award fees; (3) that Cheek was entitled to jury trial on all issues in the case pursuant to mandate of the appellate court; and (4) that McGowan Electric claims some $30,000 in attorneys' fees, which is hardly incidental to the principal claim.

In essence, McGowan Electric now agrees that jury trial should establish the reduction or credit, but that Cheek can be deprived of that benefit by substantial attorneys' fees awarded by the court alone (which may not share the view of the jury on the merits).

There is no rule that the trial court can award contract fees in jury cases. Attorneys' fees agreements are strictly construed. Venetian Cove Club v. Venetian Bay Developers, 411 So.2d 1323 (Fla. 2nd DCA 1982). Nothing can

be implied which is not specifically provided. See Ohio Realty Invest. Corp. v. Southern Bank of W. Palm B., 300 So.2d 679 (Fla. 1974).

The agreement here does not say that only the court can award fees provided for. It says maker will pay fees if there is a default and collection is sought. If a jury trial attains, this payment must be decided by the jury as any other payment due under the note.

In the context of holding that no authority existed to award attorneys' fees, various cases state that attorneys' fees can be taxed, awarded or recovered only pursuant to statute, rule, or agreement, unless the fees were incurred in another action caused by the violation sued on.

However, no case cited by Respondent deals with whether the court can award contract attorneys' fees as a taxable cost in a jury case where the parties have not stipulated to that procedure. Indeed, the rule has long prevailed in Florida that attorneys' fees are a substantive part of recovery and are not taxable costs in absence of a statute or rule specifically authorizing them to be taxed by the court (for example, fees on appeal pursuant to Rule 9.400). See Royal Ins. Co v. Bars, 99 So. 668 (Fla. 1924); Grachetti v. Johnson, 308 So.2d 143 (Fla. 2nd DCA 1975); Reiss v. Goldman, 196 So.2d 184 (Fla. 3rd DCA 1967):

> "The issue of the amount of attorneys' fees should be determined by a jury, as any other damages arising from breach of contract, when a jury trial is

> requested. Attorneys' fees generally are not an item of costs. See Ridders Hotel Inc. v. Sidebotham, 142 Fla. 171, 194 So. 322; Ronlee v. P. M. Walker Co., Fla. App. 1961, 129 So.2d 175; Sork v. United Benefit Life Ins. Co., Fla. App. 1964, 161 So.2d 54; 8 Fla.Jur. Costs §38; 9 Fla.Jur. Damages §77; 25 C.J.S. Damages 550c, p. 784."

All the cases in Florida dealing with the issue hold that contract attorneys' fees are special damages for determination by the jury in jury cases. Even the First District so holds by two different panels. See note 2, page 21, Respondent's Brief.

This rule is consistent with the general rule stated in 25 C.J.S. Damages §550c:

> "Expenditures made for attorneys' fees in an action based on a contract containing a stipulation for such fees are in the nature of special damages incidental to breach of the contract, which according to the terms of the contract, are to be compensated for in addition to a recovery of the principal sum due." (e.s.)

Accord: George v. Northcraft, 476 So.2d 758 (Fla. 5th DCA 1985) (attorneys' fees allowed by the contract sued on are an "integral part of the damages stemming from suit on the contract").

Award of attorneys' fees as taxable costs pursuant to specific statute authorizing assessment by the court is what the United States Supreme Court viewed as a collateral matter in the White decision discussed on page 26 of Respondent's Brief. In contrast to contract fees that arise

out of the breach or default sued on, court-taxed fees are not, in the distinguishing language of White, "compensation for injury giving rise to the action".

Respondent urges that the note here includes fees to be paid as costs of collection. This phrase is used in the broad sense of special expenses occasioned by default. Similar provisions in Ronlee,[1] Commodore Plaza,[2] and Newcombe,[3] and other decisions presented a jury issue.

Costs and fees of collection are special damages (i.e. advance notice is given that they are payable if breach or default occurs). The provision does not say that these are costs which may only be awarded or taxed by the court.

For example, a contract provision to pay all costs resulting from breach, including the fees of a private investigator or the rental of jet aircraft to assist investigation, would clearly be an advance agreement that these expenses are items of foreseeable damages that may be

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[1]The Ronlee Opinion quotes the written contract and guaranty to purchase limerock as providing: "Upon breach, ... the (guilty) party agrees to pay all costs and expenses, including reasonable attorneys' fees. See 129 So.2d at 176.

[2]The Opinion in Commodore Plaza noted that the lease provided lessor was entitled to recover reasonable attorneys' fees if he prevailed in any action arising because of lessee's failure to perform, default in payment, or breach. 350 So.2d at 503 n.1.

[3]The brokerage contract in Newcombe provided "for customer to pay reasonable attorneys' fees, court costs, collection fees and expenses... in enforcement of... the agreement." 340 So.2d at 1192.

awarded, not that they can be awarded by the court in a jury case.

Whether a contract provision could waive the right to jury trial as to attorneys' fees is a wholly different issue. There was no waiver here. See A 4.

Respondent argues that several factors and policies should be considered to allow court award in a jury case without a specific statute, rule or stipulation to this procedure. Obviously, if attorneys' fees provided by contract to be paid upon breach of the contract are special damages, as the authorities hold, the right to jury trial attaches and the matters discussed by Respondent are irrelevant.

Nevertheless, to touch all bases, we offer the following rebuttal comments to these notions:

1. Whether attorneys' fees in other litigation caused by breach of a duty are recoverable damages is unrelated to whether payment of attorneys' fees specified by contract on breach thereof are also damages. A contractual provision must exist for latter, but not the former. However, both are damages in different kinds of situations.

2. It would seriously erode a defendant's right to jury trial if he was compelled to permit the court to award contract attorneys' fees. A hostile court could override by an award of fees what the defendant had gained through offset from the jury.

3. The amount of attorneys' fees can be adjudicated conveniently by the jury, as much as any other damage issue involving the use of experts. Post-trial time can be estimated, and alternative opinions can be given depending on the degree of success, if that is a factor. Trial can also be bifurcated on the fee issue, and special interrogatory is available to isolate the amount of fees from other general and special damages, if that is desirable.

4. An offer of judgment is never presented until after the amount of plaintiff's recovery is denied.

5. Attorneys' fees on appeal, if otherwise awardable, are authorized by Rule 9.400 for work in that forum. This is an excellent example of how an agreement can serve as the basis to tax costs. There is no right of jury trial extended for an appeal, and of necessity, the court must award the fees if there is a substantive basis and an authorized procedure.

Finally, McGowan Electric suggests that Cheek's counsel agreed for the trial court to award attorneys' fees. This is utterly untrue. The cited statement pertains to arguments in the first trial after the case had been withdrawn from the jury. The parties came back three weeks later for non-jury proceedings. The trial judge had already decided to try the case non-jury and obviously would decide fees too. When the trial court tried to press settlement, Cheek's counsel suggested that settlement discussions ought to set aside the issue of attorneys' fees (R 62).

The quoted statement is taken completely out of context as explained in the record (R 447) and noted by the trial court at the hearing on Motion for Attorneys' Fees after the second trial (R 437).

The trial court ruled that Cheek timely objected to the failure to present the claim to attorneys' fees to the jury (R442, 450), and the case proceeded under mandate from the appellate court that all issues would be submitted to jury trial.

ISSUE II

THE ORIGINAL AND AMENDED OFFERS OF JUDGMENT ARE EFFECTIVE.

If McGowan Electric's claim for contract attorneys' fees was waived, as Cheek contends, this issue is still viable to enable recovery of Cheek's taxable costs and to reduce McGowan Electric's taxable costs. If the contract attorneys' fees are taxable costs, of course, the offers of judgment, if effective, would substantially reduce them.

McGowan Electric argues that relation back of an amendment to an offer of judgment could cause prejudice, but such amendment would not be allowed. The amended offer here was not prejudicial as to intervening costs or time for evaluation. A bona fide amendment correcting an offer just made in light of adjustments discovered on deposition should be allowed where no prejudice results.

Respondent analogizes to the summary judgment procedure where opposing affidavits must be filed one day prior to hearing. See Auerback v. Alto, 281 So.2d 567 (Fla. 3rd DCA 1967). As a practical matter, that rule had to be interpreted to provide delivered service, otherwise opposing counsel could not possibly consider the affidavit prior to hearing and the rule's purpose would be subverted. Of course, the offer of judgment rule does not contemplate filing, and service is ten days before trial. Hence the same practicality is not present to require delivered

service. Surely Respondent does not now contend that an offer mailed on the eleventh day before trial is ineffective.

Rule 1.440 does not discriminate between methods of service and need not to accomplish its purpose of promoting settlement. Service by federal express to Miami counsel on the eleventh day is as timely as service by regular mail. Hence, the rule can only import substantial compliance to enable sufficient time for evaluation prior to trial.

In this case, hand-delivered service on Monday morning, the day of discovery cutoff and the tenth day (March 24) before trial began (April 3), of an amended offer revising an offer delivered a few days before, is sufficient compliance.

Moreover, when the eleventh day before trial is a weekend, the time for filing or service is extended until the next work day, and the amended offer is timely under either standard.

ISSUE III

CHEEK WAS ENTITLED TO THE FULL BENEFIT OF BOTH DEFENSES.

Resolution of the certified issues is inextricably related to and dependent upon the underlying merits of the case which affect the outcome of the certified questions. See Reed v. State, 470 So.2d 1382 (Fla. 1985); Tillman v. State, 471 So.2d 32 (Fla. 1985). For example, if full credit is given for the improper charges, Cheek would owe

McGowan Electric far less than the initial offer of judgment which would be operative (assuming affirmative answer to the fourth certified question on rehearing).

The First District's decision contemplates further plenary review by this Court by expressly noting the possible attendant effect of such review on its ruling on costs (A 21). Furthermore, the first certified question on attorneys' fees would be altered if McGowan Electric is not the prevailing party.

In addition, the First District's Opinion creates great confusion in the law of guaranty and mistaken payment and should be reviewed. See Cantor v. Davis, 11 F.L.W. 249, 250 (Fla. June 5, 1986)("Once this court has jurisdiction, however, it may, at its discretion, consider any issue affecting the case".)

A. IMPROPER CHARGES

McGowan Electric simply cannot answer why Cheek should pay for charges that were not within the terms of his guaranty. Either the account charges were or they were not within the terms of the guaranty. They cannot be both.

The jury was never instructed that fault finding would be applied to the improper charges. The jury was instructed that Cheek's second defense was that McGowan Electric knowing allowed improper charges but did not inform Cheek, that Cheek owed a duty of care on this defense, and that if there was equal fault, McGowan Electric would prevail (R 9-10).

The jury was also told, and expressly directed on the verdict form, to answer the comparative fault questions only if they found for Cheek on this defense by affirmative answer to Question 1B.

In the isolated excerpt quoted from the early part of the charge conference, apparently the trial court assumed the jury would find for McGowan on Question 1A and for Cheek on Question 1B with half the charges improper and thus equal fault. Regardless, Cheek inquired fully into the specifics to clarify application of the verdict to conform with the instructions, the verdict form, and the charge conference assurances that followed.

The amount of improper charges found by the jury was supported by the evidence (explanation at R 389) and cannot now be attacked.

McGowan Electric tries to avoid the jury findings by esoterically "construing" the verdict. However, the quoted passage from Am.Jur.2d deals with construction of special verdicts where the findings are ambiguous or unclear (e.g. transposed numbers) or where the findings are internally inconsistent. See and compare 32 Fla.Jur. Trial §275. There is no issue of interpretation here, but rather failure to give effect to the findings.

There can be no speculation in applying special verdicts. The design of a special verdict is to obtain pure findings of fact by the jury, divorced from any opinion on

the ultimate outcome of the case. See Anno. 90 A.L.R. 2nd at 1040; Cycl. Fed. Prac. 442 (Rev. ed. 1967); 76 Am.Jr.2d Trial §1190: "There can be no aider of a special verdict by implication or intendment. (J)udgment thereon must be the logical, legal conclusion from the facts found by the jury, unaided by the evidence or any extrinsic matter."

Finally, we emphasize that Cheek was entitled to recover (be credited for) all the improper charges. Cheek only guaranteed charges for materials to his job. He did not vouch for the account debtor unconditionally or warrant his integrity. Cheek did not undertake account supervision and limited his liability by negotiated restriction. Because the District Court failed to honor the parties agreement allocating their risks, the result below should be altered to give Cheek full credit for the improper charges.

B. DISCHARGE

McGowan Electric argues that common sense dictates that Cheek should pay for proper account charges (even though he already paid the electrical subcontractor for the materials). This would be correct if McGowan were innocent of the account debtor's wrongdoing. But a guarantor is discharged from all liability where the creditor is knowledgeable. Cheek was prevented from avoiding double payment for the materials used on his jobs by engaging another subcontractor (as he ultimately did). To the extent

Cheek was not responsible for discovering the dishonesty, he is discharged from liability. This is in fact logical, and complies with case law, the first appellate opinion, the jury instructions, the verdict form and charge conference assurances.

Discharge results not simply because there were improper charges, but because there was knowledge of dishonesty, i.e. false reporting about charges to make the guarantor appear to be liable. Wishart is not applicable because the excess charges were patently not the guarantor's responsibility; no issue of dishonesty in recordation existed there. If Cheek is not discharged, there was no need for two defenses in the case.

Finally, the District Court did not adopt the reasoning asserted by McGowan Electric. It held that no authority existed to discharge a guarantor who was not fraudulently induced to sign the guaranty. We have shown that this holding was incorrect. Knowledgeable failure to disclose a debtor's dishonesty with respect to a guaranty account does discharge the guarantor.

CROSS-REVIEW ISSUES

A. DIRECTED VERDICT

McGowan Electric argued below that the jury could not adopt the meaning of the guaranty agreement embodied in Question 1A. The District Court rejected this argument. Now a different argument is made, which is therefore inappropriate for review, and in any event lacks merit.

McGowan Electric refuses to accept the ruling of the first appellate decision upholding the mistaken payment/lack of consideration defense. (A 2). This ruling long ago became the law of the case and cannot be revisited. See Rogers v. State Ex Rel Bd. of Public Instr. , 23 So.2d 154 (Fla. 1945); Wroton v. Wash-bowl, Inc., 456 So.2d 967 (Fla. 2nd DCA 1984). To the extent a prior debt did not exist, a promissory obligation or check mistakenly given in payment is an overpayment not enforceable by the payee. See Tharp v. Kitchel, 9 So.2d 457, 460 (Fla. 1942); St. Lucie Estates, Inc. v. Nobles, 141 So. 314, 316 (Fla. 1932).

McGowan Electric did not contest or appeal the absence of instructions or verdict answers on inexcusable neglect or detrimental reliance, which are recognized in Maryland Casualty Co. v. Krasnek, 174 So.2d 541, 543 (Fla. 1965) as mitigating against recision of a release or contract because of unilateral mistake. Obviously these are factual matters that if contested must be resolved by the trier of fact. See Bethlehem Steel Corp. v. Centex Homes Corp., 327 So.2d 837, 839 (Fla. 3rd DCA 1976).

Cheek testified without contradiction that McGowan Electric assured him that the account balance was correct and was owed by him as guarantor (R 45-46). Cheek did not have any invoices and did not understand electrical lingo anyway. If McGowan Electric believed the account balance was owed, there was mutual mistake; if not then there was a false representation clearly entitling a claim of mistake. See Ferguson v. Cotler, 382 So.2d 315 (Fla. 5th DCA 1980). Nor could McGowan Electric detrimentally rely on the note since its position was not changed thereby.

Regardless, when mistaken payment is involved, the authorities readily reject arguments that recovery is precluded by any lack of care. See First State Bank of Fort Meade v. Singletary, 169 So. 407, 408 (Fla. 1936); Ferguson v. Cotler, supra, 382 So.2d at 1316 (unconscionable for money paid to be retained upon discovery of the mistake and demand for return if the recipient does not show right thereto); Restatement of Restitution §§20, 157 (person paying excessive amount of money believing same necessary to discharge duty is entitled to restitution of the excess; mistaken party's failure to know or discover facts does not preclude restitution).

B. APPELLATE FEES

This issue is not dispositive of the case and should not be reviewed here. See Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982). Award of appellate fees is discretionary, and no abuse of discretion is shown. See Puder v. Revitz, 424 So.2d 76 (Fla. 3rd DCA 1982). Failure to state the grounds for attorneys' fees on appeal is a basis for denial, and the First District previously put all counsel of notice in Lehigh Corp. v. Bird, 397 So.2d 1202, 1205 (Fla. 1st DCA 1981). There was no basis to award fees anyway since the note does not provide for attorneys' fees to the prevailing party and is silent on appellate fees. See Ohio Realty Inv. Corp. v. Southern Bank, 300 So.2d 679 (Fla. 1974).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to WILLIAM C. OWEN, ESQ., P. O. Drawer 190, Tallahassee, FL 32302; by U. S. Mail this 4th day of August, 1986.

M. Stephen Turner