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O.H. 11-5-92

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FILED
SID J. WHITE
JUL 13 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,253

METROPOLITAN DADE COUNTY

Petitioner,

vs.

JONES BOATYARD, INC.,

Respondent.
_____/

BRIEF OF RESPONDENT, JONES BOATYARD, INC.

DAVID J. HORR, ESQUIRE
RODRIGUEZ, HORR, ARONSON
& BLANCK, P.A.
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Miami, Florida 33156
Telephone: (305) 670-2227

Attorneys for Respondent

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OTHER AUTHORITIES

I. STATEMENT OF THE FACTS

On November 30, 1989, Metropolitan Dade County (hereinafter referred to as "METROPOLITAN") filed an Offer of Judgment pursuant to Florida Statute §768.79 in the amount of $19,999.00. A final judgement was entered in favor of METROPOLITAN in the amount of $47,000.00. METROPOLITAN filed its Motion for Attorney's Fees on or about February 14, 1990. The Motion specifies it is made "pursuant to F.S. §768.79". (A-1) A supporting affidavit of METROPOLITAN's counsel reiterated that METROPOLITAN's Offer of Judgment was made under "F.S. §768.79". (A-2)

On May 7, 1990, the Trial Court granted METROPOLITAN's Motion for Pre-judgement Interest, to Tax Costs for Pre-judgement Interests and for Attorney's Fees. The Trial Court granted METROPOLITAN's motion for attorney's fees pursuant to Florida Statute §768.79 in the amount of $16,250.00 with interest.

Jones Boatyard (hereinafter referred to as "JONES") filed a timely appeal in the Third District Court of Appeal. The Third District Court of Appeal found that at the time of the loss, which was no later than August 6, 1985, there was no applicable statute which permitted the awarding of attorney's fees. The Third District Court of Appeal aligned itself with the opinion and decision of Reinhardt v. Bono, 564 So.2d 1233 (Fla. 5th DCA 1990) and disallowed attorney's fees to METROPOLITAN.

On or about April 1, 1992 METROPOLITAN executed a Satisfaction of Judgment for the principal amount of the judgment

and pre-judgment interest. (A-3). Hence, the only matter now remaining is METROPOLITAN's claim for attorney's fees.

The action below involved a vessel which METROPOLITAN acquired title to in 1985 pursuant to criminal forfeiture proceedings. The vessel was stored at JONES' facilities until METROPOLITAN decided to sell it at public auction. On August 6, 1985 METROPOLITAN failed to locate various equipment that was listed as being on board the vessel and concluded that it had been stolen. METROPOLITAN subsequently filed its Complaint in negligence and bailment against JONES and later sought attorney's fees.

II. SUMMARY OF ARGUMENT

METROPOLITAN is not entitled to attorney's fees for several reasons. The cause of action METROPOLITAN sued upon arose before the enactment of Florida Statute §768.79. Florida Statute §768.79 does not apply to a cause of action arising on or after July 1, 1986. The cause of action in the case at bar arose no later than August 6, 1985.

METROPOLITAN's demand for judgement is exclusively a creature of Florida Statute §768.79 not Florida Statute §45.061. METROPOLITAN's attempt to "boot strap" §45.061 to apply to §768.79 is inapposite and unpersuasive. This argument flies in the face of established rules of construction which dictate that the statutes should be strictly construed. The specific provision of the

Chapter which includes Florida Statute §768.79 must be treated as distinct and cannot be construed with reference to Florida Statute §45.061.

Finally, JONES is in no way estopped from asserting that Florida Statute §769.79 is not valid. METROPOLITAN omits any reference to the notion that reasonable reliance is a required element of an estoppel claim.

III. ARGUMENT

A. METROPOLITAN IS NOT ENTITLED TO ATTORNEY'S FEES PURSUANT TO FLORIDA STATUTE §768.79 INVOLVING A CAUSE OF ACTION ARISING BEFORE JULY 1, 1986.

The lawsuit below arose from an alleged loss of equipment occurring on or before August 8, 1985. On November 30, 1989, METROPOLITAN filed an Offer of Judgment pursuant to Florida Statute §768.79 in the amount of $19,999.00. A final judgment in the amount of $47,000 was entered on February 26, 1990. Upon application by METROPOLITAN pursuant to its Offer of Judgment, the Trial Court entered a final judgment awarding attorney's fees for METROPOLITAN.

JONES respectfully submits that Florida Statute §768.79 is inapplicable to the instant case. As is evident from the pleadings filed in the Trial Court, this cause of action arose prior to the Statute's effective date of January 1, 1986.

Chapter 768, Florida Statutes, "Negligence", is divided into three parts. Part III, "Damages", contains §§768.71 through 768.81. §768.71, entitled "Applicability; Conflicts", provides, in

part:

> (2) This part applies only to causes of action arising on or after July 1, 1986, and does not apply to any cause of action arising before that date.

Florida Statute §768.79, by the terms of its companion §768.71, does not apply to offers of judgment where the underlying cause of action accrued prior to its effective date of July 1, 1986. Mundano v. St. Paul Fire & Marine Insurance Co., 543 So.2d 876, 877 (Fla 4th DCA 1989).

The Court in Mundano held further that "the statute, in any effect, effects substantive rights, and therefore may only be applied prospectively." 543 So.2d at 877, citing, Smith v. Department of Insurance, 507 So.2d 1080 (Fla 1987). In addition, the Fifth District Court of Appeal held that §768.79 should not be applied to causes of action which accrued before their effective dates. Reinhardt v. Bono, 564 So.2d 1233, 1235 (Fla. 5th DCA 1990) citing Mundano.

METROPOLITAN's reliance on Leapai v. Milton, 595 So.2d 12 (Fla. 1992) is misapplied. This Court held that F.S. §45.061 did not apply retroactively, but it did apply to when an unreasonable rejection of an offer of settlement occurred. This Court limited its ruling to F.S. §45.061 and did not address F.S. §768.79. METROPOLITAN's offer of settlement was made pursuant to §768.79 which distinguishes Leapai from the case at bar.

METROPOLITAN also relies on the Second District Court of Appeal's holding that application of Florida Statute §45.061 should be determined by when the rejection of the Offer of Settlement

occurs; not when the original cause of action accrues. A.G. Edwards & Sons, Inc. v. Davis, 559 So.2d 235 (Fla. 2nd DCA 1990). The holding in A.G. Edwards is limited to F.S. §45.061. The Court in Edwards does not cite to §768.79 and therefore this decision is not applicable to the case at bar.

B. **METROPOLITAN'S ATTEMPT TO BRING IN FLORIDA STATUTE §45.061 THROUGH §768.79 SHOULD NOT BE PERMITTED NOR SHOULD §768.79 BE INTERPRETED THROUGH §45.061.**

JONES submits that METROPOLITAN'S arguments purporting to "boot strap" Florida Statute §45.061 to apply to the demand for judgment made by METROPOLITAN are inapposite and unpersuasive. The demand for judgment propounded by METROPOLITAN by its terms is exclusively a creature of Florida Statute §768.79.

METROPOLITAN's contention there is a conflict between Florida Statute §768.79 and Florida Statute §45.061 in the context of this case is also baseless. Florida Statute §768.79 does not apply to a cause of action arising on or after July 1, 1986. Florida Statute §768.71(2). It is not possible for Florida Statute §768.79 to "conflict" with Florida Statute §45.061 as the respective statutes might pertain to this case, since Florida Statute §768.79 clearly does not apply to METROPOLITAN'S claims against JONES which arose on August 8, 1985.

Additionally, in the case below, Jones Boatyard, Inc. v. Metropolitan Dade County, 588 So.2d 1033, 1034 (Fla. 3rd DCA 1991) the only Offer of Judgment and resultant ruling made regarding attorney's fees was based on Florida Statute §768.79. The demand

for judgment filed by METROPOLITAN was based solely on F.S. §768.79, not F.S §45.061. Therefore METROPOLITAN should not be permitted to "slide" F.S. §45.061 in via F.S. §768.79.

Any statute allowing an award of attorney's fees must be strictly construed. Roberts v. Carter, 350 So.2d 78 (Fla. 1979). METROPOLITAN's argument impermissibly requests this Court to ignore the clear language of the statutory chapter within which F.S. §768.79 is contained. The statute clearly expresses the legislature's intent that F.S. §768.79 does not apply to causes of action which accrued on or before July 1, 1986. F.S. §768.71

C. METROPOLITAN'S CONTENTION THAT JONES IS ESTOPPED FROM ASSERTING THAT FLORIDA STATUTE §768.79 IS NOT APPLICABLE TO THE FACTS AT HAND IS BASELESS.

METROPOLITAN's contention that JONES is estopped to assert the legal effectiveness of the demand for judgment is baseless. Not surprisingly, METROPOLITAN fails to cite a single authority to support this "novel" argument. Equally unsurprising is METROPOLITAN's omission of any reference to the notion that reasonable reliance is a required element of an estoppel claim. This omitted element clearly exposes the total lack of basis for METROPOLITAN's estoppel argument.

The law is clear that a party claiming estoppel must demonstrate its reliance on the adversary's conduct was reasonable, i.e. that the party claiming estoppel did not know nor should have known, that the adversary's conduct was misleading. See, Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51,

104 S. Ct. 2218 (1984), Warren v. Department of Administration, 554 So. 2d. 568 (Fla. 5th DCA 1989). Here, METROPOLITAN was represented by its own legal counsel. The inapplication of F.S. §768.79 is apparent from the language of the pertinent statutory sections and could have been reasonably discovered by METROPOLITAN's own lawyers. cf. F.S. §768.71. Hence, METROPOLITAN's purported "reliance" on the mistaken Offer of Judgment by JONES is not reasonable and cannot justify application of estoppel principles.

In any event, METROPOLITAN's adduced no evidence that JONES's conduct was such that refusal to apply estoppel "would be virtually to sanction fraud". See, McAllister Enterprises, Inc. 219 So.2d 114 (Fla. 3d DCA, 1969)

IV. CONCLUSION

Based upon the foregoing argument and citation of authorities, JONES requests this Court to uphold the Third District Court of Appeal's opinion that attorney's fees are not awardable and METROPOLITAN's offer of settlement was invalid.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 10th day of July 1992 to Evan Grob, Esq., Suite 2810, Metro Dade Center, 111 N.W. 1st Street, Miami, Florida 33130.

RODRIGUEZ, HORR, ARONSON & BLANCK, P.A.
9350 South Dixie Highway, Suite 1550
Miami, Florida 33156
Telephone: (305) 670-2227

By: _____
David J. Horr, Esquire
Florida Bar No.: 310761

047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,253

METROPOLITAN DADE COUNTY

Petitioner,

vs.

JONES BOATYARD, INC.,

Respondent.
_____/

APPENDIX TO BRIEF OF RESPONDENT, JONES BOATYARD, INC.

DAVID J. HORR, ESQUIRE
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Telephone: (305) 670-2227

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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

METROPOLITAN DADE COUNTY

PLAINTIFF,

vs.

JONES BOATYARD, INC., a Florida corporation,

Defendant.
_____/

GENERAL JURISDICTION DIVISION
CASE NO. ~~87-46428 CA 29~~ 87-40248 (29)
FB#699373

MOTION FOR ATTORNEYS FEES

COMES NOW, the Plaintiff, METROPOLITAN DADE COUNTY, by and through undersigned counsel, hereby files its motion for attorneys fees pursuant to F.S. 768.79 and states as follows:

1. In the above-referenced case, a unanimous jury verdict was returned in favor of the Plaintiff in the amount of $47,000.

2. An offer of judgment was filed in this case by the Plaintiff, METROPOLITAN DADE COUNTY, pursuant to F.S. 768.79 on November 29, 1989 in the amount of $19,999. The statute requires that attorney fees be given if the verdict is more than 25% than the offer of judgment.

3. Since that date, attorneys for Dade County have spent 152.5 hours on the above-referenced case. Undersigned counsel spent 110 hours, co-counsel, Eric Gressman spent 40 hours, and Robert Davies spent 2 1\2 hours.

4. The attached Affidavit of John Gould, the Risk Manager for Dade Dade County, indicated that the average charge for tort work for the County is $150.00 per hour.

A-1

WHEREFORE, Plaintiff, METROPOLITAN DADE COUNTY, requests that this Court grant Plaintiff's Motion for Attorneys Fees in the amount of $22,875.

ROBERT A. GINSBURG
DADE COUNTY ATTORNEY
Metro Dade Center
Suite 2810
111 N.W. 1st St.
Miami, FL 33128-1993
(305) 375-5151

Evan Grob
Assistant County Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed to: Robert W. Blanck, Esq., Hayden and Milliken, P.A., 5915 Ponce de Leon Blvd., Suite 63, Miami, FL 33146 and to David J. Horr, Mitchell, Harris, Horr & Associates, P.A., 2650 Biscayne Blvd., Miami, FL 33137 this 14th day of February, 1990.

Evan Grob
Assistant County Attorney

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

METROPOLITAN DADE COUNTY

PLAINTIFF,

vs.

JONES BOATYARD, INC., a Florida corporation,

Defendant.
_____/

GENERAL JURISDICTION DIVISION
CASE NO. ~~87-46428~~ 87-46248

AFFIDAVIT OF EVAN GROB

STATE OF FLORIDA :
:ss
COUNTY OF DADE :

BEFORE ME, the undersigned authority personally appeared EVAN GROB, and after being duly sworn, deposes and says:

1. I am EVAN GROB, and am employed by Metropolitan Dade County in the capacity as an Assistant County Attorney.

2. I was in charge of the case of Dade County v. Jones Boatyard, Inc.., along with Eric Gressman.

3. An offer of judgment under F.S. 768.79 was filed on November 29, 1989 in the amount of $19,999.

4. Since that date, one hundred and fifty-two hours have been spent on the case. This work would include trial, preparation for trial, meeting with witnesses, depositions, motions, jury instructions and telephone conversations, etc.

FURTHER AFFIANT SAYETH NAUGHT.

EVAN GROB

SWORN TO and SUBSCRIBED Before me this 14th day of February 1990.

My Commission Expires:

Notary Public, State of Florida at Large

\12

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. APR 30,1990
BONDED THRU GENERAL INS. UND.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 87-46248 CA 29

METROPOLITAN DADE COUNTY,

Plaintiff,

vs.

JONES BOATYARD, INC., a Florida corporation,

Defendant.
_____/

SATISFACTION OF JUDGMENT

KNOW ALL MEN BY THESE PRESENTS that METROPOLITAN DADE COUNTY for and in consideration of the sum of NINETY-THREE THOUSAND 00/100 ($93,000.00) DOLLARS, and other good and valuable consideration, to it in hand paid by or on behalf of JONES BOATYARD, INC., receipt whereof is hereby acknowledged, does hereby acknowledge full and complete satisfaction of certain Judgments heretofore entered in this cause, which said cause was duly and regularly tried in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. Final Judgment in favor of the Plaintiff, METROPOLITAN DADE COUNTY, in the principal amount of $47,000.00 was entered on the 24th day of February, 1990. Final Judgment in favor of the Plaintiff, METROPOLITAN DADE COUNTY, in the amount of $25,199.00 for prejudgment interest bearing an interest rate of 12% from February 3, 1990, and in the amount of $1,592.52 for costs bearing an interest rate of 12% from May 7, 1990, was entered on the 8th day of May, 1990. It is expressly acknowledged this Satisfaction includes and extinguishes all costs and interest, both pre-judgment and post-judgment on the aforesaid

Judgments.

IN WITNESS WHEREOF I have hereunto set my hand and seal at Miami, Florida, on this 1ST day of April, 1992.

WITNESS:

Kathleen L. McBride

Megan Lunnock

As Authorized Representative for
METROPOLITAN DADE COUNTY

Evan Grob, Assistant County Attorney
Office of Robert A. Ginsburg
Dade County Attorney
Metro-Dade Center
111 N.W. 1st Street
Miami, Florida 33128-1993

EVAN GROB

STATE OF FLORIDA

COUNTY OF DADE

BEFORE ME, the undersigned authority, this day personally appeared John Gould as Authorized Representative for METROPOLITAN DADE COUNTY to me known and known to be the person described in the foregoing Satisfaction of Judgment and he/she acknowledged to me that he/she has read the same, knows the contents thereof and that he/she executed the same in the capacities and for the uses and purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at Miami, Dade County, Florida, this 1ST day of April, 1992.

NOTARY PUBLIC, State of Florida at Large

MILSIDA HUERTAS

My Commission Expires:

OFFICIAL NOTARY SEAL
MILSIDA HUERTAS
NOTARY PUBLIC STATE OF FLORIDA
COMMISSION NO. AA757827
MY COMMISSION EXP. APR. 30,1994