CH-11-592 047

FILED
SID J. WHITE
JUN 18 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 PETITIONER,
METROPOLITAN DADE COUNTY

ROBERT A. GINSBURG
Dade County Attorney
Metro-Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
(305) 375-5151

By

Evan Grob
Assistant County Attorney

and

Eric K. Gressman
Assistant County Attorney

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STATEMENT OF THE FACTS

On November 28, 1989, Jones Boatyard filed an offer of settlement pursuant to Fla. Stat. §768.79. (R.172). In response to Jones Boatyard's offer of judgment, Metropolitan Dade County (hereinafter referred to as "County") filed its offer of judgment on November 30, 1989 in the amount of $19,999. (R.210). A final judgment in the amount of $47,000 was entered on February 26, 1990 pursuant to the jury verdict. The trial court later entered a final judgment awarding attorney fees in favor of the County as a result of its offer of judgment.

The underlying action involves a vessel to which Dade County acquired title in 1985 pursuant to criminal forfeiture proceedings. In August 1985, Metropolitan Dade County discovered the equipment was missing from the yacht when it was sold at auction. Dade County subsequently filed its complaint in negligence and bailment.

The Third District Court of Appeal found at the time of loss, which it stated had to be no later than August 6, 1985, there was no statute which permitted attorney fees in this circumstance. However, the Third District held that its decision created direct conflict with A. G. Edwards & Sons, Inc. v. Davis, 559 So.2d 235 (Fla. 2d DCA 1990). This Court accepted jurisdiction of this matter.

SUMMARY OF ARGUMENT

Dade County was entitled to attorney fees for three independent reasons. Since the offer of judgment was not filed by Dade County until 1989 which was well after the enactment date of July 1, 1986 for Fla. Stat. §768.79, such offer was valid. Second, even if this Court finds that Fla. Stat. §768.79 was not valid as applied to this case, Dade County is nevertheless entitled to attorney fees under Fla. Stat. §45.061 as the court should look to the substance of the offer and not just its form. The attorney fee statutes are almost identical in determining when attorney fees should be granted. Fla. Stat. §768.79 also provides that if it conflicts with any provision of another Florida Statute, such other provisions shall apply. Fla. Stat. §45.061 was subsequently enacted by the legislature on July 1, 1987 which also provides for attorney fees and is in conflict with Fla. Stat. §768.79 and therefore should control. The Supreme Court has recently held that Fla. Stat. §45.061 is constitutional and valid and applies to any case in which the offer of judgment was made subsequent to the enactment of the statute in 1987. Additionally, Jones Boatyard is estopped from asserting §768.79 is not valid when it in fact filed this demand for judgment pursuant to Fla. Stat. §768.79 prior to Dade County filing its offer of judgment.

The Third District opinion elevates form over substance. All parties in this litigation sought to invoke the provisions of statutes and rules governing offers of judgment. This

Court should enforce the clear intent of the Legislature and the parties by ruling the County's offer to settle this matter as valid.

ARGUMENT

I

DADE COUNTY FILED A VALID OFFER OF JUDGMENT WHERE THE OFFER WAS MADE SUBSEQUENT TO THE ENACTMENT OF THE STATUTE.

Dade County filed its offer of judgment in November, 1989 in the amount of $19,999. (R.210). The jury returned a verdict of $47,000, in excess of 25% of the offer of judgment, and the trial court awarded attorney fees. The Third District Court of Appeals held that "we find that at the time of the loss, which had to be no later than August 6, 1985, there was no statute which permitted attorney's fees in this circumstance." Jones Boatyard v. Metropolitan Dade County, 588 So.2d 1033 (Fla. 3rd DCA 1991). Subsequent to the Third District court's decision this Court held contrary to the Third District's opinion in Leapai v. Milton, 17 F.L.W. 61 (Fla. S.Ct. January 23, 1992). In Leapai an automobile collision occurred in 1986. In 1988 Leapai made a $1 offer of settlement to Milton, which was rejected. Ultimately Leapai prevailed and moved to tax costs and attorney fees in accordance with the provisions of Sections 45.061 and 768.79, Florida Statutes (1987) and rule 1.442, Florida Rules of Civil Procedure. The trial court awarded attorney fees but the district court reversed the trial court. In reversing the district court and upholding the attorney fees awarded, this Court found Fla. Stat. §45.061 was constitutional. Furthermore, this Court found that the "statute was not

applied retroactively since the right to recover attorney fees attach not to the cause of action, but to the unreasonable rejection of an offer of settlement. As noted in our Statement of Facts, the offer and rejection of the offer occurred after the act had been adopted by the legislature." Id. at 62.

The Second District Court of Appeals also provides the reasoning as to why the statute should not be applied retroactively when an offer of judgment is made after the enactment of the statute. A.G. Edwards & Sons, Inc. v. Davis, 559 So.2d 235 (Fla. 2nd DCA 1990). It is only upon the making of an offer of settlement that the respective rights and duties of the parties are aligned according to the requirements of the statute, and at that time both parties are free to respond or not to the policies embodied in the statutory scheme without reference to any earlier events. Id. at 235.

The same reasoning that this Court has adopted as to Fla. Stat. §45.061 which was enacted on July 1, 1987 should also govern Fla. Stat. §768.79 which was enacted on July 1, 1986. Jones Boatyard argued below that the offer of judgment was invalid because Chapter 768, Fla. Stat. "negligence" is divided into three parts. Part III "Damages", contains Fla. Stat. §§768.71 through 768.81. Section 768.71, entitled "Applicability; Conflicts", provides, that "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."

However, Part III entitled "Damages" is further divided within subsections which includes not only offer of judgments and demand for judgments but in addition includes a claim for punitive damages; limitations on punitive damages; remittor and additur; optional settlement conference in certain tort actions; collateral sources of indemnity; itemized verdict; alternate methods of payment of damage awards; and comparative fault. The statute does not define the term cause of action. However, in Black's Law Dictionary 279 (4th ed. 1968) "cause of action" is defined as one thing for one purpose and something different for another. In the case at bar, the cause of action as it relates to attorney fees is when the offer of judgment is made and rejected by the opposing party. For it is only at this juncture, that attorney fees can be potentially imposed. The evil attempted to be avoided by the legislature regarding the language concerning causes of action is to prevent a statute from being imposed retroactively. Since this Court has already ruled in regard to Fla. Stat. §45.061 that the operative event is when an offer of judgment is made and rejected, this Court should follow this same reasoning as to Fla. Stat. §768.79.

II

EVEN ASSUMING THIS COURT FINDS THAT FLA. STAT. §768.79 IS INAPPLICABLE IN THIS CASE IT SHOULD NEVERTHELESS CONSIDER THE OFFER OF JUDGMENT UNDER FLA. STAT. §45.061.

It is well settled that a pleading will be considered what it is in substance even though it is mislabeled. De Mendoza v. Board of County Commissioners, 221 So.2d 797 (Fla. 3rd DCA 1969). In De Mendoza appellee had filed a motion which was labelled a "motion notwithstanding the verdict" and appellant's main point on appeal was that the motion was improper and could not be used to question the sufficiency of the evidence to support the verdict. The appellee had previously moved for a directed verdict at the conclusion of all the evidence upon the ground that the plaintiff's evidence had not shown any negligence towards her. The court indicated the motion should have been entitled a "motion for judgment in accordance with motion for directed verdict" or something similar but nevertheless found that the court could treat it as such as the "court should look to the substance of a motion." Id. at 799. Furthermore, the court noted that the motion was based on one ground and the appellant was not prejudiced or misled by the mistake. See also Chison v. Richey, 91 So.2d 811 (Fla. 1957) (the court will look beyond the form of the prayer for relief in determining the nature of relief to be granted); Scarfone v. Marin, 442 So.2d 282 (Fla. 2nd DCA 1983) (nature and character of pleading must be determined, not by its title, but by its contents and by

actual issues in dispute); Circle Finance Company v. Peacock, 399 So.2d 81 (Fla. 1st DCA 1981).

Applying the above legal principles to the issue at bar, this Court should look beyond the form of Dade County's offer of judgment and consider its substance. A demand for judgment pursuant to either Fla. Stat. §768.79 and Fla. Stat. §45.061 provide attorney fees to the prevailing plaintiff if the judgment is at least 25% more than the demand for judgment. Such test was satisfied in this case. There was no prejudice to Jones Boatyard because they were considering the same criteria under either statute when determining whether to accept Dade County's offer of judgment. Furthermore, Jones Boatyard certainly cannot argue that they were aware that Fla. Stat. §768.79 was invalid when in fact they had made an offer under such statute prior to Dade County's offer.

Dade County is also entitled to attorney fees under Fla. Stat. §45.061 since Fla. Stat. §768.79 provides that if it is in conflict with any other statute such other provision shall apply. Chapter 768, Fla. Stat. is divided into three parts. Part III, "Damages", contains Fla. Stat. §§768.71 - 768.81. Section 768.71, entitled "Applicability"; "Conflicts", provides, in part:

> (3) If a provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply.

Fla. Stat. §45.061 was enacted by the legislature on July 1, 1987. The two statutes are almost identical in their

language in providing for attorney fees to a plaintiff who makes an offer of judgment and obtains a judgment which is at least 25% greater than the rejected offer.

Even assuming that this Court finds that Fla. Stat. §768.79 does not apply if the underlying negligence cause of action is before July 1, 1986, the statutes would then be in conflict as to the effective dates of the offers of judgment. Fla. Stat. §768.79 would apply to causes of actions after July 1, 1986 while this Court in interpreting Fla. Stat. §45.061 held only that the offer of judgment be made after July 1, 1987, the effective date of the statute, without reference to the dates of the underlying cause of action. Leapai, supra.

Fla. Stat. §45.061 would therefore control in the present action. It would be an absurd result to have a statute which was enacted in 1987 apply to causes of actions prior to July 1, 1986 so long as the offer was made after July 1, 1987 but that Fla. Stat. §768.79, which becomes effective July 1, 1986 not apply to causes of actions prior to that date even when the offer of judgment was made subsequent to such date. The language of Fla. Stat. §768.79 anticipated that the Legislature might at some point enact another Florida Statute which might conflict with Fla. Stat. §768.79 and therefore provided that such other statute shall control. Fla. Stat. §45.061 includes but is not limited to torts and contract actions which is the only permissible subject matter under

Fla. Stat. §768.79. Since in this case the offer of judgment was made by Metropolitan Dade County after July 1, 1987, the effective date of Fla. Stat. §45.061, it is hereby submitted that such offer was timely filed. There is no prejudice to Jones Boatyard when it is considering whether to accept Dade County's offer of judgment because it was aware that if Dade County obtained a judgment 25% more than its offer it would be liable for fees. Both statutes have the same criteria in determining when fees would be awarded.

III

JONES BOATYARD IS ESTOPPED FROM ASSERTING FLA. STAT. §768.79 IS NOT VALID WHEN IT IN FACT FIRST SERVED ON DADE COUNTY AN OFFER OF JUDGMENT PURSUANT TO SUCH STATUTE AND DADE COUNTY COUNTEROFFERED UNDER THE SAME STATUTE.

Jones Boatyard is estopped from asserting that §768.79 is not valid in the instant action when it in fact filed its demand for judgment pursuant to Fla. Stat. §768.79 prior to Dade County filing its offer of judgment. (R.172). Estoppel is a legal doctrine by which a person is precluded by his act or conduct from asserting a right which he otherwise had. The elements of an estoppel are "(1) words and omissions, or conduct, acts and acquiesces, or other combined, causing another person to believe in the existence of a certain state of things; (2) in which the persons that are speaking, admitting, acting and acquiescing did so wilfuly [sic], culpably, or negligently; and (3) by which such other person is or made be induced to act so as to change his own previous position injuriously." Taylor v. Kenco Chemical and Manufacture MFJ Corp., 465 So.2d 581, 586 (Fla. 1st DCA 1985); Capital Bank v. Schuler, 421 So.2d 633 (Fla. 3rd DCA 1982). Clearly, Jones Boatyard prior filing of an offer of judgment pursuant to Fla. Stat. §768.79 caused Dade County to believe that such statute was valid. Furthermore, such conduct is at the very least negligent. Finally, Jones Boatyard's offer caused Dade County to file its offer of judgment pursuant to

§768.79 instead of other offers of judgment which were valid, such Fla. Stat. §45.061. Therefore, Metropolitan Dade County has met the three - point test.

CONCLUSION

For any and all of the foregoing reasons, this Honorable Court should reverse the Third District's opinion insofar as it holds that Dade County's offer of settlement was invalid. Furthermore, this Court should uphold the trial court's determination that Jones Boatyard should pay for Dade County's attorney's fees.

Respectfully submitted,

ROBERT A. GINSBURG
Dade County Attorney
Metro-Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
(305) 375-5151

By: _____
Evan Grob
Assistant County Attorney
Florida Bar No. 699373

and

_____
Eric K. Gressman
Assistant County Attorney
Florida Bar No. 343773

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 16 day of June, 1992, mailed to: DAVID J. HORR, ESQUIRE, Rodriguez, Horr, Aronson & Blanck, P.A., 9350 South Dixie Highway, Suite 1550, Miami, Florida 33156; and WILLIAM BOERINGER, ESQUIRE, at Hayden and Milliken, P.A., 5915 Ponce de Leon Blvd., Suite 63, Miami, Florida 33146-2477.

Assistant County Attorney

OA 11-5-92 047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,253

METROPOLITAN DADE COUNTY,

Petitioner,

vs.

JONES BOATYARD, INC.,

Respondent.

_____/

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APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

ROBERT A. GINSBURG
Dade County Attorney
Metro-Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128
(305) 375-5151

By

Evan Grob
Assistant County Attorney

and

Eric K. Gressman
Assistant County Attorney

predecessor-in-interest either contractual right of immediate possession or unperfected security interest in subject stock certificates so as to permit it to bring action for prejudgment replevin. West's F.S.A. § 78.055(2).

Adorno & Zeder and Brian K. Goodkind, Coconut Grove, for appellants.

White & Case and Stephen M. Corse, Miami, for appellee.

Before HUBBART, FERGUSON and GERSTEN, JJ.

PER CURIAM.

The defendant Manuel D. Medina appeals an adverse non-final order, as amended, directing the issuance of a prejudgment writ of replevin against a certain stock certificate owned by the defendant. We have jurisdiction to entertain this appeal, Art. V, § 4(b)(1), Fla. Const.; Fla.R.App.P. 9.130(a)(3)(C)(ii), and affirm.

[1, 2] The remedy of prejudgment replevin is available to the plaintiff Star Holding Company No. 1, Inc. because (a) it is entitled to possession of the claimed stock certificate under a pledge agreement entered into between the plaintiff's predecessor-in-interest and the defendant, § 78.055(2), Fla.Stat. (1989), and (b) the defendant was in the process of dissipating the economic value of the stock certificate by stripping the assets of the company for which the stock was issued, thus wasting the value of the stock certificate. Section 78.068(2), Fla.Stat. (1989). We conclude, contrary to the defendant's argument, that the pledge agreement which requires the defendant to pledge the stock certificate as additional collateral for an underlying loan gave the plaintiff's predecessor-in-interest either a contractual right of immediate possession or an unperfected security interest in the subject stock certificate so as to permit it to bring an action for prejudgment replevin. *See Transtar Corp. v. Intex Recreation Corp.*, 570 So.2d 366 (Fla. 4th DCA 1990); *Lease Fin. Corp. v. National Commuter Airlines, Inc.*, 462 So.2d 564 (Fla. 3d DCA 1985); *cf. Finizio v. Shubow*, 557 So.2d 640 (Fla. 4th DCA 1990) (enforceable security interest in stock created by contract without physical transfer of certificates).

Affirmed.

JONES BOATYARD, INC., Appellant,

v.

METROPOLITAN DADE COUNTY, Appellee.

Nos. 90–1981, 90–1087.

District Court of Appeal of Florida, Third District.

Nov. 5, 1991.

Rehearing Denied Dec. 17, 1991.

Appeal was taken from order of the Circuit Court, Dade County, Frederick N. Barad, J. The District Court of Appeal, Barkdull, J., held that statute providing for award of attorney fees in favor of party which recovers a judgment most favorable than that of its offer did not apply to case in which loss being sued upon occurred prior to the factual date of the statute.

Affirmed as amended.

Costs ⇐194.22

Statute providing for award of attorney fees in favor of party which recovers a judgment more favorable than its offer of settlement did not apply to case in which the cause being sued upon occurred prior to the effective date of the statute, even though the offer came after the statute was adopted. West's F.S.A. § 768.79.

Rodriguez, Horr, Aronson & Blanck and David Horr, for appellant.

Robert A. Ginsburg, County Atty., and Evan Grob and Eric K. Gressman, Asst. County Attys., for appellee.

Before BARKDULL, HUBBART and NESBITT, JJ.

BARKDULL, Judge.

Jones Boatyard, Inc. appeals an adverse judgment in the amount of $47,000.00 based on a jury verdict and also the award of attorney's fees to the successful plaintiff. For factual background of this case *see Schmidgall v. Jones Boatyard, Inc.*, 526 So.2d 1042 (Fla. 3d DCA 1988).

In 1985, Dade County acquired legal title to a boat pursuant to criminal forfeiture proceedings. In August 1985, Metro Dade County discovered equipment was missing from the yacht when it was sold at auction. The plaintiff/appellee subsequently filed its complaint.

In November 1989, Metro Dade filed an offer of judgment in the amount of $19,-999.00. On the trial's first day, the plaintiff/appellee made an *ore tenus* motion *in limine* which was granted by the trial court. The appellant claims this precluded the defense from introducing crucial evidence. The jury was instructed on bailment and was told that after the plaintiff met its burden of proof on bailment, the burden was upon the defendant to explain the loss. The jury returned a verdict in favor of the plaintiff, Metro Dade, on all issues in the amount of $47,000.00. Final judgment favoring Metro Dade was entered in the amount of $47,000 plus $16,250 for attorney's fees. This appeal followed.

The appellant contends that the trial court erred in: (1) granting Metropolitan's unwritten and unnoticed motion *in limine* just prior to trial, (2) failing to direct a verdict on the issue of a bailment as the required element of exclusivity was missing, (3) failing to direct a verdict on the issue of negligence, (4) failing to strike/exclude Metropolitan's expert witness testimony based on an improper measure of damages, (5) its instructions to the jury, and (6) awarding attorneys's fees pursuant to Florida Statute 768.79 involving a case of action arising before July 1, 1986.

We find no merit in the errors urged as to points one through five. *C.W.B. Enterprises, Inc. v. K.A.T. Equipment Corp.*, 449 So.2d 354 (Fla. 3d DCA 1984); *Fruehauf Corporation v. Aetna Insurance Co.*, 336 So.2d 457 (Fla. 1st DCA 1976); *Marine Office-Appleton & Cox Corp. v. Aqua Dynamics, Inc.*, 295 So.2d 370 (Fla. 3d DCA 1974); *J & H Auto Trim Co., Inc. v. Bellefonte Insurance Co.*, 677 F.2d 1365 (11th Cir.1982). As to the sixth point, which goes to the validity of the award of attorney's fees as a result of an offer of judgment, we find that at the time of the loss, which had to be no later than August 6, 1985, there was no statute which permitted attorney's fees in this circumstance. Section 768.79 was enacted in 1986 and became effective on July 1, 1986. The Second District Court of Appeal has construed the statute as permitting an award of fees if the offer of judgment was subsequent to the effective date of § 768.79. *A.G. Edwards & Sons, Inc. v. Davis*, 559 So.2d 235 (Fla. 2d DCA 1990). The 5th DCA has held to the contrary. *Reinhardt v. Bono*, 564 So.2d 1233 (Fla. 5th DCA 1990).

We align ourselves with the opinion and decision of *Reinhardt v. Bono, supra*, and thereby this opinion and decision will create direct conflict with *A.G. Edwards & Sons, Inc. v. Davis, supra*, of the Second District Court of Appeal. Therefore, we strike from the final judgment here under review that provision awarding attorney's fees to the successful plaintiff, and as amended, we affirm the final judgment under review.

Affirmed as amended.