Can I Recover Fees Under an Offer of Judgment Even if I Lose on Appeal?

June 22, 2023

McGlinchey's Commercial Law Bulletin is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation.

Ohio

Valid Settlement Agreement

***Marchbanks v. Ice House Ventures, LLC*, Slip. Op. No. 2023-Ohio-1866.**

In this discretionary appeal, the Ohio Supreme Court reversed the appellate court's ruling, finding that an enforceable settlement agreement existed, notwithstanding the fact that the parties had not defined "damages" in the context of a potential breach of the agreement.

The Bullet Point: Under Ohio law, settlement agreements are considered contracts, and an "[e]ssential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." Notably, because a breach of a contract is not an inevitability, it cannot follow that a definition of "damages" is an essential element of a contract. As the court noted, "[i]f a contract's terms are properly performed, the question of damages never arises. Indeed, a valid contract may exist and bind the parties without its mentioning damages at all."

Defamation

***Mitchell v. Fix*, 5th Dist. Fairfield, No. 2023-Ohio-1957.**

In this appeal, the Fifth Appellate District affirmed the trial court's decision to dismiss a defamation claim, finding that the alleged defamation claim was one for defamation per quod, and the plaintiff had failed to plausibly assert facts to support such a claim.

The Bullet Point: To establish defamation, the plaintiff must show (1) a false statement of fact was made, (2) that the statement was defamatory, (3) the statement was published, (4) the plaintiff suffered injury as a proximate result of the publication, and (5) the defendant acted with the requisite degree of fault in publishing the statement. There are two types of defamation, defamation per se and defamation per quod. For a communication to be defamatory per se, it must be actionable upon the very words spoken without regard to the listener's interpretation, i.e., it is actionable on its face. A statement is defamatory per se when it falls into three categories: (1) the imputation of an indictable offense involving moral turpitude or infamous punishment, (2) the imputation of some offensive or contagious diseases calculated to deprive the person or society, or (3) having the tendency to injure the plaintiff in his trade or occupation. In order for a statement to be defamatory per se, it must be defamatory upon the face of the statement. When a statement is only defamatory through interpretation, innuendo, or consideration of extrinsic evidence, then it is defamatory per quod and not defamatory per se.

Bad Faith Breach of Contract

***Metro Renovations 12, LLC v. Sabir*, 5th Dist. Fairfield No. 2023-Ohio-1867.**

In this appeal, the Fifth Appellate District affirmed in part and reversed in part the trial court's decision to grant the plaintiff judgment, finding that the plaintiff failed to prove it was the prevailing party on a claim that would support an award of attorney's fees.

The Bullet Point: When considering an award of attorney fees, Ohio follows the "American Rule," under which a prevailing party in a civil action may not generally recover attorney fees. However, attorney fees may be awarded when a statute or an enforceable contract specifically provides for an award of attorney fees or when the prevailing party demonstrates the losing party acted in bad faith. A prevailing party is generally the party "in whose favor the decision or verdict is rendered and judgment entered."

Florida

Offer-of-Judgment Statute

***Coates v. R.J. Reynolds Tobacco Co.*, No. SC2021-0175 (Fla. June 15, 2023)**

The Florida Supreme Court decided a recurring issue of law regarding whether a party must prevail in a proceeding to be entitled to fees under Florida's offer-of-judgment statute.

The Bullet Point: Florida's offer-of-judgment statute, Fla. Stat. § 768.79, operates to penalize a party who refuses to accept a good-faith, reasonable proposal for settlement as reflected in the ensuing final judgment. At issue in this appeal is whether this statute is a prevailing-party statute. The Florida Supreme Court concluded that it is not, reasoning that the text of the statute contemplates a situation where the defendant is entitled to

fees even if the plaintiff recovers on the most significant issues at trial and ultimately recovers a substantial judgment.

At trial, the plaintiff was awarded $16,150,000, $16,000,000 of which was for punitive damages. The plaintiff had previously rejected a $749,000 offer of judgment. On appeal, the punitive damage award was reversed as excessive and remanded for remittitur or, in the alternative, a new trial solely on punitive damages. Despite not prevailing in the appeal and having the $16,000,000 punitive damage award reversed, the plaintiff/appellee was provisionally granted reasonable attorneys' fees from the appeal, conditioned upon the trial court finding entitlement to fees. Accordingly, a party does not need to prevail in appellate proceedings to be entitled to fees for those proceedings under the offer-of-judgment statute.

Foreclosure Action Barred by Statute of Limitations

***Maki v. NCP Bayou 2, LLC*, No. 6D23-643 (Fla. 6th DCA June 16, 2023)**

The Sixth District concluded that a foreclosure action was barred by the applicable statute of limitations.

The Bullet Point: Under Fla. Stat. § 95.11(2)(c), a mortgage foreclosure action must be commenced within five years. In an action to foreclose a mortgage securing an accelerated debt, the statute of limitations begins to run when the lender exercises its right to accelerate the debt. A lender bringing an action solely on a note and obtaining a final judgment for the amount owed under the note does not extend this statute of limitations period for a later filed action to foreclose the mortgage.

In this case, the appellants obtained a home equity line of credit loan, for which they signed a note and a mortgage to secure repayment of the note. After the appellants failed to make the payments due on the note, the appellee's predecessor-in-interest accelerated the debt and subsequently brought an action solely on the note. The appellee's predecessor-in-interest succeeded in its claim for a judgment for the amounts due under the note, and the note was merged into the final judgment. The appellee was later assigned the final judgment and the mortgage, and it commenced the underlying mortgage foreclosure action after the appellants failed to pay the amounts due under the final judgment. On appeal, the Sixth Circuit concluded that the appellee's mortgage foreclosure action was barred by the statute of limitations, reasoning that the statute of limitations began to run in October 2014 when the appellee's predecessor-in-interest accelerated the amounts due under the note. No event occurred that tolled or reset the statute of limitations. Accordingly, because the mortgage foreclosure action commenced in December 2019, two months after the statute of limitations period expired, the final judgment of foreclosure was reversed.

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