Third District Court of Appeal

State of Florida

Opinion filed January 18, 2023.
Not final until disposition of timely filed motion for rehearing.

No. 3D21-1826
Lower Tribunal No. 11-5755

Virginia Hadad Gonzalez,
Appellant,

vs.

Millin A. Nobregas,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Mark Blumstein, Judge.

J. Muir & Associates, P.A., and Jane W. Muir, for appellant.

Wasson & Associates, Chartered, and Annabel C. Majewski; Nobregas-Sancio, P.A., and Millin A. Nobregas, for appellee.

Before EMAS, MILLER and BOKOR, JJ.

BOKOR, J.

Virginia Hadad Gonzalez, the defendant below, appeals from the trial court's denial of fees and costs after a jury found in her favor. In pertinent part, Gonzalez claims fees as the prevailing party in an action under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), section 501.204, et. seq., Florida Statutes, as well as under a proposal for settlement pursuant to section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442. Additionally, Gonzalez seeks costs based on section 57.041, Florida Statutes. As explained below, we affirm the trial court's denial of fees and costs based on the FDUTPA claim and the proposal for settlement but reverse as to the mandatory imposition of costs pursuant to section 57.041.

First, we examine the trial court's denial of fees and costs under FDUTPA.[1] The relevant statute vests the trial court with discretion to award fees and costs under FDUTPA. See Coral Gables Imports, Inc. v. Suarez, 306 So. 3d 348, 349 n.3 (Fla. 3d DCA 2020) ("recognizing the discretionary nature of the relevant statutory provision [under FDUTPA]"); see also § 501.2105(1), Fla. Stat. ("[T]he prevailing party . . . *may* receive his or her reasonable attorney's fees and costs . . . ."") (emphasis added); Id. (3) ("[t]he

[1] We review the trial court's ruling on the issue of entitlement under an abuse of discretion standard. Forte v. All Cnty. Towing, Inc., 336 So. 3d 316, 319 (Fla. 4th DCA 2022).

trial judge *may* award the prevailing party" reasonable fees and costs) (emphasis added). A non-exhaustive list of factors that a trial court may consider in determining fee entitlement under FDUTPA include: (1) the scope and history of litigation; (2) the ability to pay fees; (3) whether an award of fees would deter future conduct; (4) the merits of the respective positions of the parties; (5) whether the claim was frivolous, unreasonable, or groundless; (6) whether claims or defenses were raised to frustrate or stall; and (7) whether the claim was brought to resolve a significant issue under FDUTPA. Humane Soc'y of Broward Cnty., Inc. v. Fla. Humane Soc'y, 951 So. 2d 966, 971–72 (Fla. 4th DCA 2007); see also Forte, 336 So. 3d at 321 (listing Humane Society factors after determining that it remains good law).

Here, the record reflects that the trial court granted partial summary judgment as to liability in favor of the plaintiff on the FDUTPA claim, but the jury awarded no damages. Based on the record before us, the discretionary nature of prevailing party fees under FDUTPA, and the analytical framework described above, we find no abuse of discretion in the trial court's denial of fees and costs to Gonzalez on the FDUTPA claim. See Forte, 336 So. 3d at 319 ("An award of attorney's fees will be upheld on appeal so long as it is supported by competent, substantial evidence.").

Next, we turn to the denial of fees and costs under the proposals for settlement presented to the trial court.[2] Section 768.79 entitles a defendant to reasonable attorney's fees and costs where the defendant serves an offer of judgment, not accepted by the plaintiff within 30 days, and "(1) the judgment is one of no liability; (2) the judgment obtained by the plaintiff is at least twenty-five percent less than the defendant's offer; or (3) the cause of action was dismissed with prejudice." Smith v. Loews Miami Beach Hotel Operating Co., 35 So. 3d 101, 102 (Fla. 3d DCA 2010). Nobregas didn't accept the offers within 30 days and Gonzalez received a judgment of no liability. The issue of the proposals' validity, therefore, turns on whether they comply with the legal requirements of the statute, which delineate that an offer must:

> (a) Be in writing and state that it is being made pursuant to this section.
> (b) Name the party making it and the party to whom it is being made.
> (c) State with particularity the amount offered to settle a claim for punitive damages, if any.
> (d) State its total amount.
> The offer shall be construed as including all damages which may be awarded in a final judgment.

[2] We review de novo entitlement to costs and fees under the offer of judgment statute. See, e.g., Magdalena v. Toyota Motor Corp., 253 So. 3d 24, 25 (Fla. 3d DCA 2017) ("As the issue before this Court involves the interpretation of a statute, which is a pure question of law, the standard of review is de novo.").

§ 768.79(2), Fla. Stat. Florida Rule of Civil Procedure 1.442 also imposes some additional requirements for implementing the statute. "An offer of settlement must comply with both rule 1.442 and section 768.79." Campbell v. Goldman, 959 So. 2d 223, 224 (Fla. 2007) (quotation omitted) (noting also that the 1996 amendment to rule 1.442 was intended to "require greater detail in settlement proposals"). Based on an examination of the statutory factors, the trial court correctly found the proffered proposals legally insufficient.[3]

The proposals considered by the trial court contain multiple deviations from the strict requirements of the statute and rule. See Brower-Egar v. Noon, 994 So. 2d 1239, 1241 (Fla. 4th DCA 2008) ("Our supreme court has rejected any deviation from the strict requirements of the statute and rule."). Most notably, the proposals require the plaintiff to execute a release but fail

[3] The record contains three proposals for settlement with the latter two purporting to supersede the ones before. Gonzalez sought fees and costs in the trial court, and argues for such entitlement here, only under the first two proposals for settlement. This is likely because the third proposal for settlement, presented after the amendment of the complaint to add punitive damages, runs afoul of section 768.79(2)(c), Florida Statutes and Florida Rule of Civil Procedure 1.442(c)(2)(E), which both require a proposal for settlement to "state with particularity the amount proposed to settle a claim for punitive damages, if any." We take no position on whether the first two proposals for settlement were extinguished by the submission of subsequent proposals for settlement, because the first two proposals for settlement are legally flawed for the reasons described.

to attach or describe the release with sufficient detail. See State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So. 2d 1067, 1078 (Fla. 2006) ("[W]e agree with those courts that have treated releases as conditions or nonmonetary terms that must be described with particularity."); see also Papouras v. BellSouth Telecomms., Inc., 940 So. 2d 479, 480–81 (Fla. 4th DCA 2006) ("In this case, the proposal simply provided for the plaintiff to execute a full release without further detail. A copy of the release was not attached, and no summary of the terms was included in the proposal. BellSouth argues, and we agree, that this proposed release lacked sufficient detail to eliminate any reasonable ambiguity about its scope."). Additionally, the proposals contain, at a minimum, ambiguity as to the issue of punitive damages.[4]

[4] As explained in footnote 3, the failure to address punitive damages with particularly renders the third proposal fatally flawed. But the failure to address punitive damages constitutes a fatal flaw with the first two proposals as well. Prior to service of the first proposal, Gonzalez sought to add a claim for punitive damages (which addition was ultimately permitted by the trial court prior to the third proposal). Even though Gonzalez was on notice of such attempt to add punitive damages, the first two proposals state that "[n]o punitive damages are claimed in this case." This may be correct in the sense that the complaint hadn't yet been amended to add the punitive damages claim, but the plaintiff was seeking them (arguably, "claiming" them as the word is generally understood). At a minimum, the failure to address punitive damages that Gonzalez sought to add that had not, at that time, been ruled upon, likely renders the proposals ambiguous. See Mix v. Adventist Health System/Sunbelt, Inc., 67 So. 3d 289, 292 (Fla. 5th DCA 2011) ("A proposal does not satisfy the 'particularity' requirement if an ambiguity within the proposal could reasonably affect the offeree's decision."). This also amplifies the ambiguity and lack of specificity of the release language.

Finally, the releases require payment from the date of "settlement" without defining such date. See Hibbard ex rel. Carr v. McGraw, 918 So. 2d 967, 971 (Fla. 5th DCA 2005) ("Because the offer of judgment statute and related rule must be strictly construed, virtually any proposal that is ambiguous is not enforceable."). Accordingly, none of proposals proffered under the offer of judgment statute satisfy the strict requirements of the relevant statute and rule, and the trial court correctly declined to enforce them.

Finally, we address Gonzalez's entitlement to costs under section 57.041, Florida Statutes. The statute uses mandatory language. "The party recovering judgment *shall* recover all his or her legal costs and charges which shall be included in the judgment." § 57.041(1), Fla. Stat. (emphasis added). A zero judgment, a defense verdict by which the plaintiff takes nothing, constitutes a judgment in favor of the defendant for purposes of recovery of costs. See Tacher v. Mathews, 845 So. 2d 332, 334–35 (Fla. 3d DCA 2003). Accordingly, we vacate the portion of the final judgment denying costs. Section 57.041 requires an award of costs in favor of Gonzalez.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Third District Court of Appeal

State of Florida

Opinion filed January 11, 2023.
Not final until disposition of timely filed motion for rehearing.

No. 3D21-1724
Lower Tribunal No. 18-537

Yazan Saleh,
Appellant/Cross-Appellee,

vs.

Miami Gardens Square One, Inc., etc., et al.,
Appellees/Cross-Appellants.

An Appeal from the Circuit Court for Miami-Dade County, Peter R. Lopez, Judge.

Bret Lusskin, P.A., and Bret L. Lusskin; Scott D. Owens, P.A., and Scott D. Owens (Hollywood); Bruce S. Rogow, P.A., and Bruce S. Rogow (Cedar Mountain, NC); The Law Office of Jibrael S. Hindi, PLLC., and Jibrael S. Hindi (Fort Lauderdale); Bruce S. Rogow, P.A., and Tara A. Campion (Boca Raton), for appellant/cross-appellee.

Akerman LLP, and Christopher S. Carver (Fort Lauderdale); Akerman LLP, and Kristen M. Fiore (Tallahassee), for appellees/cross-appellants.

Before EMAS, LINDSEY and GORDO, JJ.

GORDO, J.

Yazan Saleh appeals a trial court order granting final judgment in favor of Miami Gardens Square One, Inc. d/b/a Tootsie's Cabaret ("Miami Gardens") and RCI Hospitality Holdings, Inc.'s ("RCI").[1] We have jurisdiction. Fla. R. App. P. 9.030(b)(1)(A). Finding no error in the trial court's dismissal of Saleh's federal statutory claim, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In late December 2016, Saleh visited Tootsie's Cabaret, an adult entertainment nightclub located in Miami Gardens. Prior to leaving, Saleh gave his server two different personal credit cards to pay for the services provided. Saleh's server returned his credit cards to him along with two printed receipts, each displaying the first six and last four digits of his credit card account numbers. Saleh kept both receipts.

A month later, Saleh filed a lawsuit against Miami Gardens and RCI[2] in federal court based on those receipts, arguing Miami Gardens and RCI willfully violated the Fair and Accurate Credit Transactions Act, 15 U.S.C § 1681c(g)(1) ("federal FACTA"). A year later, Saleh filed an identical federal

[1] Miami Gardens and RCI filed a cross-appeal of the same order but acknowledge this Court need only reach the issues of this cross-appeal in the event the Court finds Saleh has standing to bring his federal FACTA claim. As we find Saleh lacks standing to maintain his claim, this cross-appeal is considered moot.

[2] Miami Gardens is a subsidiary of RCI.

FACTA based claim in state court. In 2020, the Eleventh Circuit resolved the issue of standing in Muransky v. Godiva Chocolatier, Inc., 979 F. 3d 917, 920 (11th Cir. 2020), finding "a party does not have standing to sue when it pleads only the bare violation of a statute."

In March 2021, Miami Gardens and RCI moved to dismiss the instant state action arguing Saleh lacked standing because he failed to assert an injury in fact. Saleh filed an amended complaint reasserting standing and alleging Miami Gardens and RCI willfully violated federal FACTA because they were aware of federal FACTA's requirements.[3] Miami Gardens and RCI again moved to dismiss the claim asserting lack of standing, which Saleh opposed. In August 2021, the trial court held a hearing on the motion

[3] While the trial court did not rule on the willfulness issue, we note the United States Supreme Court has found that under the federal FACTA scheme "willfulness" encompasses both knowing conduct and reckless conduct. See Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007). To show willfulness, a plaintiff must allege a defendant had knowledge of federal FACTA and was knowingly violating it. See Crupar-Weinmann v. Paris Baguette Am., Inc., 2014 WL 2990110, at *4 (S.D.N.Y. June 30, 2014) (finding bare allegations "that [the] defendant knew about FACTA's requirements, [did] not support a plausible inference that [the] defendant knew that it was violating FACTA"); Seo v. CC CJV Am. Holdings, Inc., 2011 WL 4946507, at *2 (C.D. Cal. Oct. 18, 2011) ("The fact that information about FACTA was available to CJV does nothing to support Defendant's naked assertion that CJV was notified of FACTA's provisions and knowingly ignored them."); Torongo v. Roy, 176 F. Supp. 3d 1320, 1323–24 (S.D. Fla. 2016) (noting "there [we]re no factual allegations supporting Plaintiff's conclusory allegation[s]" of willfulness and "[i]f a [FACTA] violation is merely negligent, a plaintiff may recover only actual identity theft damages.").

to dismiss and ultimately granted the motion aligning itself with the federal court's interpretation in Muransky finding Saleh lacked standing because he asserted no legal injury. The trial court thus entered an order granting the motion to dismiss and entered judgment in favor of Miami Gardens and RCI. This appeal followed.

LEGAL ANALYSIS

We affirm in all respects based on the standing analysis in Southam v. Red Wing Shoe Co., Inc., 343 So. 3d 106, 113 (Fla. 4th DCA 2022), review denied, SC22-1052, 2022 WL 16848677 (Fla. Nov. 10, 2022) (finding the appellant lacked standing to pursue his federal FACTA claim as he did not demonstrate an injury in fact "since appellant kept the credit card receipt and there is no danger that the credit card number could result in any concrete injury to appellant"); see also Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (holding that "a bare procedural violation, divorced from any concrete harm" does not confer standing); Muransky v. Godiva Chocolatier, Inc., 979 F. 3d 917, 936 (11th Cir. 2020) ("Although the receipt violated the law because it contained too many digits, [Appellant] has alleged no concrete harm or material risk of harm stemming from the violation. Because this amounts to nothing more than a 'bare procedural violation, divorced from

any concrete harm,' [Appellant] has failed to allege that he has standing to bring this lawsuit." (quoting Spokeo, 578 U.S. at 341)).

On appeal, Saleh's counsel concedes his client did not and cannot establish he suffered an actual harm based on the receipts from Tootsie's because he retains possession of them. Instead, Saleh asks us to broaden Florida's standing requirements and exercise jurisdiction over the federal statutory claim because Muransky only applies to Article III standing under the United States Constitution. We find no basis to do so where Florida law also imports an injury in fact requirement under our standing framework. See State v. J.P., 907 So. 2d 1101, 1113 n.4 (Fla. 2004) (stating there are "three requirements that constitute the 'irreducible constitutional minimum' for standing. First, a plaintiff must demonstrate an 'injury in fact,' which is 'concrete,' 'distinct and palpable,' and 'actual or imminent.' Second, a plaintiff must establish 'a causal connection between the injury and the conduct complained of.' Third, a plaintiff must show 'a "substantial likelihood" that the requested relief will remedy the alleged injury in fact.'") (internal citations omitted).

Separately, where Saleh has sued under the federal statute, he is required to allege a legally sufficient claim pursuant to the federal FACTA statute itself. In 2008, Congress issued the Clarification Act which amended

the federal FACTA statutory scheme to include actual harm. See Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241 § 2(b), 122 Stat. 1565, 1565 (2008) ("The purpose of this Act is to ensure that consumers suffering from any **actual harm** to their credit or identity are protected while simultaneously limiting abusive lawsuits that do not protect consumers but only result in increased cost to business and potentially increased prices to consumers.") (emphasis added). As recognized by the Eleventh Circuit in Muransky, the Clarification Act demonstrated Congress's "view that some technical FACTA violations caused consumers no harm." Muransky, 979 F. 3d at 921. Thus, mere violation of the statute absent harm cannot create a viable claim because, "there is good reason to doubt that Congress has deemed every violation of FACTA to pose a material risk of identity theft. . . . [as] Congress expressly recognized in the Clarification Act that not all violations of the truncation requirement pose a serious threat to consumers." Id. at 932–33 (citing Pub. L. No. 110-241 § 2(b), 122 Stat. at 1566). Accordingly, because Congress clarified the purpose of the federal FACTA statutory scheme is to protect consumers from actual harm, a plaintiff must allege an actual harm to pursue a claim under the statute. As Saleh acknowledges he suffered no actual harm, we also find the trial court

properly dismissed Saleh's complaint as legally insufficient for failure to plead an actual injury under the federal FACTA statutory scheme.

Affirmed.

Third District Court of Appeal

State of Florida

Opinion filed January 4, 2023.

No. 3D21-1781
Lower Tribunal No. 11-27895

J&R United Industries, Inc., etc.,
Appellant,

vs.

Stephen E. Miron, etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Mark Blumstein, Judge.

Karen B. Parker, P.A., and Karen B. Parker, for appellant.

Tobin & Reyes, P.A., and Adrian J. Alvarez (Boca Raton), for appellee.

Before EMAS, GORDO and BOKOR, JJ.

GORDO, J.

ON MOTION FOR REHEARING

We deny J&R United Industries, Inc.'s ("J&R") motion for rehearing, but withdraw our previous opinion, and substitute the following opinion in its stead.

INTRODUCTION

J&R appeals a final judgment entered after a full non-jury trial in favor of Stephen E. Miron, individually and as personal representative of the Estate of Julie Miron ("Miron"). We have jurisdiction. Fla. R. App. P. 9.030(b)(1)(A). We affirm the final judgment finding competent, substantial evidence supports the trial court's findings.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal stems from a lawsuit initiated in 2011 where Miron sued South American Textile Manufacturing Group, Inc. ("SATM") for breach of a commercial lease contract. After years of litigation and following a bench trial, the trial court entered judgment in 2017 in favor of Miron and against SATM in the amount of $1,479,914.31, plus interest. Thereafter, the trial court in 2018 entered a final judgment for attorney's fees and costs against SATM in the amount of $207,020.38, plus interest. The judgments remained unpaid.

In 2019, Miron filed a motion for leave to file a supplemental complaint to implead J&R as an alter ego and successor entity of SATM under a de facto merger. The trial court granted Miron's motion. J&R denied the allegations and the parties proceeded to try the case in a bench trial. The trial court entered final judgment in favor of Miron. J&R filed a motion for rehearing that was denied. This appeal followed.

STANDARD OF REVIEW

"When a cause is tried without a jury, the trial judge's findings of fact are clothed with a presumption of correctness on appeal, and these findings will not be disturbed unless the appellant can demonstrate that they are clearly erroneous." Sunshine State Ins. Co. v. Davide, 117 So. 3d 1142, 1144 (Fla. 3d DCA 2013).

LEGAL ANALYSIS

Florida follows the corporate law rule that the liability of a selling predecessor corporation is not imposed upon the buying successor company unless: "(1) the successor expressly or impliedly assumes the obligations of the predecessor; (2) the transaction is a de facto merger; (3) the successor is a mere continuation of the predecessor; or (4) the transaction is a fraudulent effort to avoid liabilities of the predecessor." Reina v. Gingerale Corp., 472 So. 2d 530, 531 (Fla. 3d DCA

1985). "The imposition of liability upon a successor corporation is based on the notion that no corporation should be permitted to commit a tort or breach of contract and avoid liability through corporate transformation in form only." Lab. Corp. of Am. v. Prof'l Recovery Network, 813 So. 2d 266, 269 (Fla. 5th DCA 2002). Here, the trial court concluded there was evidence to support the last three exceptions. We find the trial court's findings of fact are supported by competent, substantial evidence.

Affirmed.