

The Florida Bar Business Litigation Committee of the Business Law Section - Case Summaries for August 12, 2005 Meeting

by Melanie Damian and Peter F. Valori, Damian & Valori, LLP

Consumer Law – Unfair and Deceptive Trade Practices

Fonte v. AT&T Wireless Services Inc., 30 Fla. L. Weekly D1491 (Fla. 4th DCA 2005). Plaintiff consumer entered into a contract with provider AT&T for wireless phone service. The “Terms and Conditions” section to the provider’s new customer welcome guide contained an arbitration clause. The arbitration clause: (1) disallowed the arbitrator to award relief on a class wide basis; (2) allowed relief pursuant to applicable consumer protection statutes; (3) provided that each party was responsible for their own attorney’s fees; and (4) provided that if any portion of the agreement was found invalid, the balance remained enforceable. The provider subsequently changed customer rate plans whereby charges for directory assistance calls were increased, and busy/unconnected calls were now billed. Plaintiff attempted to cancel her plan, but did so after the provider’s penalty-free window had expired. Plaintiff then filed a proposed class action lawsuit, alleging that the provider’s practice of unilaterally changing customer rate plans was a breach of contract, fraud, and a violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The trial court granted provider’s motion to compel arbitration, finding that the challenged portions of the arbitration agreement were not unconscionable. The plaintiff appealed.

The Fourth District Court of Appeals reversed in part and affirmed in part:

(1) The Fourth District found the FDUTPA to be a remedial statute designed to protect consumers, with a remedial purpose to provide for the possibility of an attorney’s fee award

(see Section 501.2105, Florida Statutes.) Because of the small sums usually involved, if individual consumers could not recover in full their attorney fees, they would likely determine it is too costly and too great a hassle to file suit, and individual enforcement of this act would fail. To avoid this from happening, attorney’s fees are included in the protection, and the Fourth District held that the arbitration clause’s attempt to bar on an award of attorney’s fees defeated a remedial purpose of FDUTPA.

(2) However, the Fourth District attempted found this bar on fees severable from the remaining valid legal obligations of the agreement, and thus the entire agreement was not void as a matter of law. On remand the trial court was instructed to sever this clause denying attorney’s fees to bring the agreement into conformity with the remedial purposes of FDUTPA.

(3) The arbitration clause’s bar on class representation did not defeat any of the remedial purposes of FDUTPA in the instant matter, and there is no “blanket right” to the use of the class tool under any circumstance.

(4) To decline to enforce a contract as unconscionable, the contract must be both procedurally unconscionable (i.e. unconscionable in the formation) and substantively unconscionable (i.e. unconscionable terms.) Here, the Court held that the arbitration clause was not procedurally unconscionable, as the Terms and Conditions were explicitly noticed, the plaintiff was free to choose any wireless service provider and the plaintiff had a period of time to cancel the contract after its execution. Thus, the Court did not need to examine the substantive aspect of

unconscionability.

Boca Burger, Inc. v. Forum, 30 Fla. L. Weekly S539 (Fla. July 7, 2005). In a lengthy analysis and review of a Fourth District Court of Appeal ruling regarding an action brought under the Florida Deceptive and Unfair Trade Practices Act, the Florida Supreme Court held: 1) a trial court has no discretion to deny a plaintiff the absolute right to amend its complaint once as a matter of course before any responsive pleading is served and the fact that a motion to dismiss is pending at the time of the amendment has no effect; 2) a defendant may assert as an affirmative defense of federal preemption in a motion to dismiss; and 3) a district court may impose sanctions on an appellee or lawyer for a frivolous defense of a patently erroneous trial court order but should only do so in rare circumstances.

Creditor’s Rights – Supplementary Proceedings

Dylan Investments, Inc. v. Nortel, Inc., 30 Fla. L. Weekly D1518 (Fla. 4th DCA 2005). Plaintiff obtained a judgment against Arne Soreide and his wholly-owned corporation, Nortel, for breach of a commercial lease. Plaintiff then brought supplementary proceedings against Mr. Soreide’s wife, Lynn Soreide, alleging that Ms. Soreide was indebted to it by virtue of fraudulent transfers from Nortel through a separate corporation, Accutel Communications, wholly-owned by Ms. Soreide. The trial court entered judgment in favor of Ms. Soreide.

The Fourth District Court of Appeal affirmed on the grounds that there existed competent, substantial evidence that Accutel conducted an

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entirely different business than Nortel and was incorporated before the lease at issue was consummated. As such, the trial court did not err by concluding that no fraudulent transfer occurred as the evidence at hand supported this conclusion.

Improper Fee Splitting

***The Florida Bar v. Shankman*, 30 Fla. L. Weekly S571 (Fla. July 7, 2005).** In *Shankman*, four attorneys joined together to form a law firm with no shareholder agreement. Two years after the firm started, it faced financial difficulties, with only one of the partners, the respondent, generating fees. Worried that he would incur more than his fair share of the firm's debt, the respondent left the firm, bringing with him his labor law department which consisted of himself, an associate, a paralegal, and an administrative assistant. In the course of his move, the Supreme Court found that he violated a number of Rules Regulating the Florida Bar: 1) he created a bonus sharing plan while still at the original firm that split fees with his paralegal, associate, and administrative assistant; 2) he accepted a payout from settlement proceeds of the original firm's client without disclosing it to his department or the firm (storing it in the ceiling of his apartment and later justifying it as an "unexpected gift"); and 3) he took several of the firm's clients without disclosure. The Supreme Court found this to be fraudulent and deceitful conduct in violation of the Rules with aggravating circumstances such to warrant a ninety-one day suspension with proof of rehabilitation required as a condition to respondent returning to active status.

Fiduciary Duty

***Mac-Gray Services, Inc. v. DeGeorge*, 30 Fla. L. Weekly D1663 (Fla. 4th DCA July 6, 2005).** In reversing a jury award in favor of the Plaintiffs arising from claims relating to a failed laundry business, the Florida Fourth District Court of Appeal held that the trial court should have directed a verdict in favor of the

defendant where the contract between the parties for the purchase of laundry equipment precluded relief on Plaintiff's claims of fraudulent inducement and breach of fiduciary duty. In so doing, the District Court held that where the transaction between the parties was an ordinary commercial transaction, the purchase of equipment to start a laundromat, no fiduciary duty was owed from the seller to the purchaser for the success of the business. This was especially so because the purchase contract between the parties stated that the buyer was not to rely on the seller's expertise. A fiduciary relationship is one based on special trust created between the parties, which could not have existed where it was contractually disavowed.

Noncompetition Agreements

***Vela v. Kendall*, 30 Fla. L. Weekly D1674 (Fla. 5th DCA July 8, 2005).** Plaintiff ran a delivery service to various retail stores to whom Defendant was hired as an independent contractor to provide such delivery services. Defendant was terminated, and Plaintiff brought suit seeking an injunction and damages pursuant to Defendant's alleged violation of a restrictive covenant (two year non-compete clause) in his employment contract with Plaintiff. The trial court ruled in favor of Plaintiff, awarded damages, and granted a two year injunction. Defendant appealed. The Florida Fifth District Court of Appeal affirmed the ruling in all respects except the injunction. In so doing, the court held that the time of the two year non-compete clause had already run, Plaintiffs received sufficient damages for that time period, and the trial court was without authority to further extend the restrictive covenant for another two years in the final judgment.

***Fulford v. Drawdy Bros. Const., II, Inc.*, 5 Fla. L. Weekly D1386 (Fla. 4th DCA 2005).** Employee entered into a non-competition agreement with his former employer. Employee was terminated and believed that the former employer had fired him to avoid paying a bonus. Employee and his former employer used pre-suit mediation to settle this disagreement, whereby employee received a monetary payment, and the

non-compete agreement was modified to reduce its duration from three years to 18 months and its geographic scope was limited from eight counties to three counties. Within the 18 month period, the employee began working for a competitor in one of the three prohibited counties. The former employer obtained a temporary injunction, which the employee challenged.

The Fourth District Court of Appeals held that trial court did not abuse its discretion in enforcing a non-compete agreement against the employee. Here, the 18-month covenant not to compete within three particular counties, furthered the employer's legitimate business interests relating to its bidding process, customer list, and specialized training in the industry. The covenant was reasonably necessary to protect these business interests, and was not overbroad or overlong.

Offer of Judgment/Proposals for Settlement

***Mills v. Martinez*, 30 Fla. L. Weekly D1672 (Fla. 5th DCA July 8, 2005).** The Fifth District Court of Appeal reversed a trial court's decision denying Plaintiff her request for attorney's fees after prevailing pursuant to Florida Rule of Civil Procedure 1.442 and section 768.79. The trial court had denied fee on the grounds that her proposal of settlement was prematurely filed. The District Court held that Plaintiff's error in filing her proposal to settle prematurely was immaterial and did not affect the Rule's application such as to deny her an award of attorney's fees, which would only serve to frustrate legislative intent.

***Heymann v. Free*, 30 Fla. L. Weekly D1714 (Fla. 1st DCA July 18, 2005).** This case arose on appeal from a trial court's ruling granting Plaintiffs significant attorneys' fees and costs as sanctions against Defendants for unreasonably rejecting Plaintiffs' unified settlement offer prior to proportionately larger jury award in Plaintiffs' favor. The First District reversed the award of attorneys' fees and costs because Plaintiffs' original settlement proposal had failed to apportion the proposal between the two Defendants. The Court held that the plain language of

Florida Rule of Civil Procedure 1.442(c)(3) required a joint proposal for settlement to differentiate between the parties, even where one party's liability is purely vicarious. The District Court reversed the trial court's ruling reluctantly and further state in dicta that its ruling, while necessitated by the Rule and current case law, has against legislative intent and that the Supreme Court should amend the rule to keep it better in line with the legislature's purpose.

***Nation Technology Corp. v. AI Teletronics, Inc.*, 30 Fla. L. Weekly D1549 (Fla. 2d DCA 2005).** Plaintiff sued Defendant Corporation and its president, asserting tortious interference with an employment contract and tortious interference with business relationships. Plaintiffs also sought an injunction against defendants. Prior to trial, defendants served plaintiff with an offer of judgment in the amount of \$50,000. Plaintiff rejected the offer and proceeded to trial. Following a jury verdict of no liability on the part of defendants, defendants sought to recover their attorney's fees and costs incurred since the date of their offer. The trial court denied them fees and costs, finding that their offer was deficient because it failed to mention plaintiff's request for injunctive relief. The trial court also denied prevailing party fees to defendants. Defendants appealed.

The Second District Court of Appeals reversed, finding the defendant's offer to be legally sufficient to support an award of fees and costs because it complied with the requirements of Florida Rule of Civil Procedure 1.442(c)(2)(D), and Section 768.79, Florida Statutes, by stating with particularity all nonmonetary terms and conditions. The trial court found that the offer failed to specifically address the plaintiff's claim for injunctive relief, rendering the offer fatally defective. The Second District disagreed because the defendants' offer provided that it was intended to "resolve all claims in this action arising out of the incident giving rise to the Plaintiff's complaint." The Second District held that the offer presented no ambiguity and plaintiff could fully evaluate the offer without judicial interpretation. Defendants' offer was thus suf-

ficiently particular to satisfy the requirements of Section 768.79 and to entitle them to an award of reasonable attorney's fees and costs incurred since the date of their offer.

Real Property

***Rotemi Realty, Inc. v. Act Realty Co.*, 30 Fla. L. Weekly S528 (Fla. July 7, 2005).** This case involved a dispute over a commission purportedly arising out of the sale of real property to the Miami-Dade County School District for the construction of a new high school. In quashing the Third District Court of Appeal's decision, the Florida Supreme Court reaffirmed the general rule that contingency fee contracts (contingent on the consummation of the sale) involving a government purchase or sale do not violate public policy unless it is shown they involve or were induced by "favor" or "corrupt means" and extends that fifty year old general rule to include real estate brokerage fee arrangements. In so doing, the Supreme Court held that where the brokers were the procuring cause of the sale they were entitled to their commission for such sale.

Spoilation of Evidence

***Martino v. Wal-Mart Stores, Inc.*, 30 Fla. L. Weekly S536 (Fla. July 7, 2005).** In approving the Florida Fourth District Court of Appeal's dismissal of an independent action for spoliation of evidence, the Florida Supreme Court held that an independent cause of action for spoliation of evidence does not lie where the alleged spoliator is also the defendant in an underlying negligence case defendant are one and the same. The Plaintiff was injured when a shopping cart in Defendant's store collapsed. She sued the Defendant for negligence and filed a separate claim for spoliation based on Defendant's inability to produce during discovery either the shopping cart at issue or a security video that may have recorded the incident. The Fourth District Court of Appeal held and the Supreme Court agreed, that where the Defendant is not found to have intentionally destroyed evidence and had no contractual or statutory duty to preserve that evidence, no separate claim for spoliation can be maintained, but a presumption may arise

from such spoliation that can be considered in the underlying action for negligence.

Shareholders/Breach of Fiduciary Duty

***Radcliffe v. Gyves*, 30 Fla. L. Weekly D1439 (Fla. 4th DCA 2005).** Plaintiff shareholders brought suit against defendant board of directors alleging gross negligence, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty, arising out of an alleged fraudulent manipulation of corporation's stock price. Directors moved to dismiss for lack of personal jurisdiction, because they were not residents of Florida. The trial court denied the motion to dismiss. The directors appealed.

The Fourth District Court of Appeals reversed the trial court and held that the shareholders failed to establish the existence of long-arm jurisdiction over board members, and that the board members lacked minimum contacts with Florida. The Fourth District held that, where the directors filed affidavits that contained blanket denials of the factual allegations in the complaint, and further contended that the individual board members never committed a tortious act in Florida and had no reasonable expectation of being hailed into court in Florida, the burden shifted to the plaintiff shareholders to show that jurisdiction was proper. The shareholders filed a response to the dismissal motion but failed to file any counter-affidavits. The Fourth District held therefore, that the shareholders failed to meet their burden of demonstrating that minimum contacts existed and the corporate veil was not pierced.

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