IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

LILLIAN CURVEY,

Appellant,

v. Case No. 5D20-1865

AVANTE GROUP, INC., AVANTE AT BOCA RATON , INC., AVANTE AT INVERNESS, INC., AVANTE VILLIA AT JACKSONVILLE BEACH, INC., ET AL.,

Appellees.

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Opinion filed September 3, 2021

Nonfinal Appeal from the Circuit Court
for Orange County,
John M. Kest, Judge.

Cyrus L. Booker, Brentwood, Tennessee, and John R. Phillips, Tampa, for Appellant.

Laura Zborowski, Marjorie Levine and Brian Russell, of Bobo, Ciotoli, White & Russell, P.A., Palm Beach Gardens, for Appellees.

NARDELLA, J.

Lillian Curvey ("Curvey") appeals the lower court's denial of her motion to dissolve a temporary injunction which prohibited her from continuing to

make allegedly false and defamatory comments against Avante Group, Inc. ("Avante"). Because the temporary injunction issued by the lower court is an unconstitutional prior restraint on Curvey's speech, we reverse the denial of Curvey's motion for dissolution and remand with instructions that the temporary injunction be dissolved.

The present action stems from Curvey's belief that her mother, who was a resident at Avante's facility in Orlando, was mistreated. This belief led Curvey to file a nursing home negligence action against Avante, e-mail third parties about Avante's alleged misdeeds, and create a website wherein she claimed, among other things, that Avante experimented on patients without consent.

In response to these communications, Avante filed a lawsuit for defamation per se and injunctive relief, and then, while the lawsuit was pending, moved for a temporary injunction against Curvey prohibiting her from continuing to make allegedly false and defamatory comments against Avante. The lower court held a hearing on Avante's motion and ultimately entered a temporary injunction prohibiting Curvey from speaking on seventeen distinct matters related to Avante. Curvey moved to dissolve the temporary injunction, contending that it is an unconstitutional prior restraint

on her speech. In other words, Curvey contended that it was clear legal error to issue the temporary injunction in the first place.

The lower court denied Curvey's motion to dissolve without addressing her First Amendment concerns. Instead of determining if the temporary injunction was an unconstitutional prior restraint on Curvey's speech, the lower court asked only whether Curvey had demonstrated a "change in circumstances." The lower court explained the standard it was applying as follows: "[w]hen a motion to dissolve is directed to a temporary injunction entered after notice and a hearing, the moving party must establish that a change in conditions justifies the dissolution."

The "standard of review in determining whether a trial court properly refuses to dissolve a temporary injunction is abuse of discretion." *Thomas v. Osler Med., Inc.*, 963 So. 2d 896, 899 (Fla. 5th DCA 2007). However, appurtenant legal matters are reviewed de novo. *Price v. Taylor*, 298 So. 3d 654, 656 (Fla. 4th DCA 2020) (citation omitted).

Curvey correctly argues on appeal that because the temporary injunction impermissibly infringed on her constitutional right to free speech at its inception, the lower court erred in applying a "change in circumstances" standard in deciding whether to vacate it. *Planned Parenthood of Greater Orlando, Inc. v. MMB Props.*, 211 So. 3d 918 (Fla. 2017) (rejecting need to

make threshold showing of a change in circumstances to dissolve temporary injunction when a party shows clear misapprehension of the facts or clear legal error on the part of the trial court in entering the temporary injunction). Curvey never argued changed circumstances as the reason to dissolve the temporary injunction, nor was she required to show changed circumstances in order to receive the relief she sought in this case. Thus, the lower court erred in focusing on whether circumstances changed and disregarding Curvey's argument that the temporary injunction should never have been entered in the first place because it violated her right to free speech. *Id*., 211 So. 3d at 925–26.

The lower court's failure to apply the correct legal standard in this case matters because it led the lower court to the wrong result. Contrary to Avante's assertion, it is well established that temporary injunctive relief is not available to prohibit the making of defamatory statements. *Chevaldina v. R.K./FL Mgmt., Inc.*, 133 So. 3d 1086, 1090 (Fla. 3d DCA 2014); *Vrasic v. Leibel*, 106 So. 3d 485, 486 (Fla. 4th DCA 2013); *Murphy v. Daytona Beach Humane Soc'y, Inc.*, 176 So. 2d 922, 924 (Fla. 1st DCA 1965); *see Weiss v. Weiss*, 5 So. 3d 758, 760 (Fla. 5th DCA 2009) ("In the absence of some other independent ground for invoking equitable jurisdiction, equity will not enjoin either an actual or threatened defamation.").

The reason for this broad prohibition is twofold. First, a temporary injunction directed towards speech is a classic example of a prior restraint on speech triggering First Amendment concerns. *Vrasic*, 106 So. 3d at 486. The United States Supreme Court has characterized such restraints as the "most serious and the least tolerable infringement on First Amendment rights," *Neb. Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976), regardless of the falsity of the speech to be enjoined. *Town of Lantana v. Pelczynski,* 290 So. 2d 566, 569 (Fla. 4th DCA) ("Freedom from prior restraint upon speech and press extends to false, as well as true statements.") (citing *Patterson v. Colorado,* 205 U.S. 454, 462 (1907)), *aff'd,* 303 So. 2d 326 (Fla. 1974). Second, to be entitled to a temporary injunction, the moving party must establish that it will suffer irreparable harm because there is no adequate remedy at law. *Vrasic*, 106 So. 3d at 486. In the case of defamatory statements, there is an adequate remedy at law—an action for damages. *Id.* (citing *Murphy*, 176 So. 2d at 924); s*ee Reyes v. Middleton*, 36 Fla. 99 (1859) (insolvency of the defendant alone is not a reason to allow speech to be enjoined); *see also Se. Promotions, Ltd. v. Conrad,* 420 U.S. 546, 559 (1975) ("[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.").

There is a limited exception to the rule prohibiting temporary injunctions against defamatory speech when the defamatory statements are made in the furtherance of the commission of another intentional tort. *Chevaldina*, 133 So. 3d at 1090 (citing *Murtagh v. Hurley*, 40 So. 3d 62 (Fla. 2d DCA 2010); *Zimmerman v. D.C.A. at Welleby, Inc.*, 505 So. 2d 1371 (Fla. 4th DCA 1987)). But that is not the case here.

The temporary injunction at issue here enjoins Curvey from making certain statements about Avante. Even if the Court assumes the speech being enjoined is false or defamatory, the temporary injunction is still an improper prior restraint on otherwise pure speech. *Chevaldina*, 133 So. 3d at 1090; *Vrasic*, 106 So. 3d at 486; *Murphy*, 176 So. 2d at 924. Accordingly, the lower court abused its discretion by not dissolving the temporary injunction.

Avante's claim that the speech at issue constitute "verbal acts" and, therefore, can be enjoined is unavailing. In support, Avante relies on *Murtagh* and *Zimmerman*.[1] Those decisions recognize that defamatory speech may be enjoined when it is made in the furtherance of another intentional tort. In both cases, the plaintiff asserted claims for defamation

[1] Avante also relies on the out-of-state decision in *Hawks v. Yancey*, 265 S.W. 233 (Tex. 1924), which is neither binding nor persuasive given the in-state jurisprudence discussed herein.

and intentional interference with an advantageous business relationship. It was upon the second of those claims — intentional interference with advantageous business relationships — that the courts found a temporary injunction could issue. Avante, however, has only asserted a claim for defamation per se. Therefore, unlike the situations in *Murtagh* and *Zimmerman*, there is not another intentional tort alleged in this case that could support the temporary injunction. This case, consequently, does not fall into the limited exception allowing defamatory speech to be temporarily enjoined.

For the foregoing reasons, we reverse the denial of Curvey's motion to dissolve and remand with instructions that the temporary injunction be dissolved in its entirety.

REVERSED and REMANDED with instructions.

COHEN and WOZNIAK, JJ., concur.