

Third District Court of Appeal

State of Florida

Opinion filed October 2, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-847
Lower Tribunal No. 15-19303

Michael A. Pizzi, Jr.,
Appellant,

vs.

Town of Miami Lakes, Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Mavel Ruiz,
Judge.

Reiner & Reiner, P.A., and David P. Reiner, II and Samuel B. Reiner, II;
Kuehne Davis Law, P.A., and Benedict P. Kuehne and Michael T. Davis and Susan
Dmitrovsky; Jones Walker, LLP and Edward R. Shohat; Dorta Law, and Gonzalo
R. Dorta, for appellant.

Lydecker | Diaz and Joan Carlos Wizel and Onier Llopiz, for appellee.

Before SALTER, MILLER and GORDO, JJ.

SALTER, J.

Michael A. Pizzi, Jr. (“Pizzi”), appeals a final order dismissing with prejudice his second amended complaint¹ against the Town of Miami Lakes, Florida (“Town”). Pizzi sought reimbursement from the Town of attorney’s fees and costs, some \$2,510,000.00, allegedly incurred in his successful defense of criminal charges brought against him by the United States for conspiracy to commit extortion, attempted extortion, and bribery concerning programs receiving federal funds, while serving as the municipal attorney for Medley, Florida, and as the elected Mayor (at the time) of the Town. Pizzi was acquitted following a jury trial and verdict in the United States District Court for the Southern District of Florida in August 2014.

Based on the exacting standard of review applicable to our review of a final order dismissing a complaint with prejudice for legal insufficiency, and at this preliminary procedural juncture, we reverse the final order and remand the case to the trial court for further proceedings. In doing so, we express no opinion regarding the ultimate merit, or lack of merit, of Pizzi’s reimbursement claims.

I. Standard of Review

“We review a final order dismissing a complaint with prejudice under the de novo standard of review. In doing so, we assume all of the allegations in the complaint are true. We construe all reasonable inferences from the allegations in favor of [the Appellant].” Calderon v. Vasquez, 251 So. 3d 303, 304 (Fla. 3d DCA

¹ We refer to the second amended complaint and its attachments as the “Complaint.”

2018). Our review of the trial court’s interpretation of the Town’s official Legal Representation Policy (“Policy”) is also de novo, as it is essentially a contract for the benefit of designated officials who meet the Policy’s eligibility requirements. See City of Winter Springs v. Winter Springs Prof’l, 885 So. 2d 494, 501 (Fla. 1st DCA 2004) (concurring opinion of Ervin, J.).

II. Background and Procedural History

Pizzi was elected Mayor of the Town in 2012. In 2013, the United States filed the initial criminal charges against him for alleged acts as the municipal attorney for Medley and as Mayor of the Town. Pizzi was thereupon suspended from his position as Mayor by the Governor of Florida pending resolution of the charges.

The criminal charges culminated in a second superseding indictment (the “Indictment”) of Pizzi by a grand jury in February 2014. A jury acquitted Pizzi of all charges in August 2014. After further state court legal proceedings, Pizzi was reinstated to office in 2015. Slaton v. Pizzi, 163 So. 3d 655 (Fla. 3d DCA 2015).

In August 2015, Pizzi’s attorneys demanded that the Town reimburse Pizzi for \$2,510,000.00 in attorney’s fees and costs “for the year long criminal representation.”² A week later, Pizzi filed an initial complaint in the circuit court

² Although this letter included a caption, “Confidential Settlement Discussions,” a copy was appended to the Complaint as Exhibit “B,” and a footnote to the accompanying allegation expressly waived confidentiality for purposes of Pizzi’s reimbursement lawsuit.

which included a copy of the Indictment as Exhibit “A,” a copy of the verdict and final judgment of acquittal as Exhibit “B,” and two counts seeking reimbursement of attorney’s fees and costs incurred in his defense of the criminal case. The initial complaint was dismissed with leave to amend, as was the first amended complaint. In the first amended complaint, Pizzi did not attach a copy of the Indictment, but did attach as exhibits copies of a Town Resolution featured in the Indictment (as an official action for which Pizzi was charged with soliciting cash and campaign contributions as a bribe for his support and vote) and the Town’s five-page “Legal Representation Policy.”

After a further motion to dismiss was granted, Pizzi filed the Complaint under consideration by the circuit court and this Court. That Complaint also omitted the initially-attached Indictment but did allege generally Pizzi’s arrest and prosecution for “federal charges arising from his performance of his official duties as Town Mayor for a public purpose.” The Complaint attached as exhibits: a memo from a Town Council member to Pizzi and the Council regarding a federal grant application and an intermediary, private Florida company that purportedly would procure the grant for the Town; the resolution ultimately approved by Mayor Pizzi and the Council regarding the grant; Pizzi’s attorney’s demand letter for reimbursement of his defense expenses; and the Town’s Legal Representation Policy.

The Town once again sought dismissal. After a hearing, the motion was granted, and the Complaint was dismissed with prejudice.

The seven-page final order of dismissal interpreted the Legal Representation Policy to mean that Pizzi's reimbursement claim under that Policy (count I of his Complaint) is subject to the discretion of the Town Council, which had rejected the claim. The order also concluded that Pizzi's common law claim (count II) failed to establish a reimbursable public purpose based on "the context of the alleged actions from which the criminal charges that were brought against Mr. Pizzi arose, as set forth in the complaint, attachments to the complaint, and documents incorporated into the complaint by reference." Finally, the order ruled that the complaint could not be further amended so as to state a cause of action based on the facts that Pizzi can allege, such that dismissal with prejudice was warranted. This appeal followed.

III. Analysis

A. The Indictment

As a preliminary matter, Pizzi alleges that the trial court erred by making the Indictment a part of the "four corners" of the Complaint and attachments, based on the references to the federal criminal case in the Complaint and as necessary to evaluate the "context" of the alleged misconduct. The trial court, referring to the dismissal of the initial complaint in the case, found:

As the predecessor judge in this case found in regard to similar references in a previous version of the complaint in this case, this Court

finds that these references sufficiently incorporate the indictment upon which the federal criminal charges were brought against Mayor Pizzi, a copy of which was attached to the motion to dismiss.

As support for deeming the Indictment a part of the Complaint and taking judicial notice of the record in the federal case, including the Indictment, the trial court cited this Court's opinion in Posigian v. American Reliance Insurance Co. of New Jersey, 549 So. 2d 751, 753 (Fla. 3d DCA 1989). Pizzi contends that the trial court's ruling and reliance on Posigian are erroneous, because a motion to dismiss is not a motion for summary judgment and must not rely on facts and matters outside the four corners of the complaint and its attachments. See Winter v. Miami Beach Healthcare Grp., Ltd., 917 So. 2d 973 (Fla. 3d DCA 2005); Lewis v. Barnett Bank of S. Florida, N.A., 604 So. 2d 937 (Fla. 3d DCA 1992).

Posigian was an unusual case, drew a principled dissent, and has not been cited for the proposition advanced by the Town in this case. In that case, a dispositive insurance policy (including exclusions) was excerpted in an attachment and characterized in the complaint, but the entire document was not attached. The opinion relied upon Florida Rule of Civil Procedure 1.130(a) and its directive that a document sued upon, or "the portions thereof material to the pleadings, must be incorporated in or attached to the pleading." Based on that directive, this Court held that "[t]he trial court's consideration of these documents was, therefore, correct." Posigian, 549 So. 2d at 753.

In the present case, Pizzi was not suing “on” the Indictment or rights determinable from that document as a matter of law.³ The Town asked the trial court to evaluate the “context” of the federal charges in the Indictment, including factual allegations within it.

Just as the jury’s verdict of “not guilty beyond a reasonable doubt” is not a fact assuring an automatic reimbursement of defense costs, the allegations in the Complaint do not, without more, preclude reimbursement. The two critical elements alleged under both causes of action in Pizzi’s Complaint, “performing official duties” and “while serving a public purpose,” must be assumed to be present at this stage, and those allegations in the Complaint are not merely conclusory. There is no dispute that Pizzi was the Mayor at all material times, and that he supported and voted in favor of a Town Council resolution purporting to facilitate a federal grant application to the AmeriCorps Federal Economic Recovery Assistance Program (allegedly intending to obtain a resulting public benefit for the Town’s inhabitants).

Pretrial discovery and the evidence adduced by the parties will be necessary to determine whether the Town’s present allegations regarding certain matters in the Indictment—such as the fabrications surrounding “Sunshine Universal,” the intermediary (said to be procuring the federal grant, but actually a company

³ In contrast, the Legal Representation Policy attached to the Complaint sets forth the specific written terms under which Pizzi’s reimbursement claim in Count I must be evaluated.

allegedly formed by the Federal Bureau of Investigation in connection with its investigation), and the question of whether Pizzi received cash at all, received cash for a favorable vote and campaign expenses, or received cash for Christmas toys— can be proven or disproven by either party under the less stringent “mere preponderance” standard applicable to the civil case.

For these reasons, we conclude that the full text of the Indictment (without proof of allegations within it) did not demonstrate the legal insufficiency of the Complaint for purposes of the Town’s motion to dismiss and the trial court’s order granting the motion with prejudice.

B. Count I—Town Legal Reimbursement Policy

The trial court found Pizzi’s claim for reimbursement under the Town’s Legal Reimbursement Policy insufficient as a matter of law because the Town Council had, and exercised, “the absolute discretion to decide whether or not to provide legal representation to a town official.” We disagree.

It is correct that sections 1A and 5 of the Policy allow the Town Council to exercise discretion regarding (a) the provision of legal representation to a Town official “in” any action or proceeding (section 1A), or (b) limitations imposed by the Town Manager on the amounts to be expended for defense costs in particular cases (section 5). These sections address circumstances in which an eligible Town official requests legal representation in an active case, with that representation provided by

the Town Attorney or private counsel, and with any invoices for legal services to be reviewed and approved by the Town Manager and Town Attorney before payment.

Section 8 of the Policy (captioned “Reimbursement subsequent to proceedings”) applies to claims for reimbursement for legal expenses incurred by an eligible Town official after the fact and when “no Legal Representation was provided at the expense of the Town.” That is the scenario presented in the present case in Pizzi’s Complaint. Section 8 does not state that it is subject to the Town Council’s, Town Manager’s, or Town Attorney’s discretion. In pertinent part, section 8.A.3 states that the eligible Town Official is not prohibited from seeking reimbursement from the Town for legal expenses already incurred in a case in which “the Official was performing his/her official duties while serving a public purpose.”

We need look no further than the plain meaning of the text of section 8 of the Policy to conclude that it applies to the present case and that it is not subject to the absolute discretion of the Town Council or other officials. It seems equally clear to us, however, that the Town Council is not required to pay the applicant’s legal bills without questioning the amounts of the invoices, the reasonableness of the fees sought, and the extent to which the applicant proves the twin elements of “performing his/her official duties” and “while serving a public purpose.”

The Town argues otherwise, relying on Leon County v. Stephen S. Dobson, III, P.A., 957 So. 2d 12 (Fla. 1st DCA 2007). In that case, the Leon County policy

provided for reimbursement of legal expenses incurred in the successful defense of actions brought against county commissioners, but expressly provided: “The Board of County Commissioners shall determine if the attorney’s fees and costs shall be reimbursed, and if so, in what amount.” Id. at 13. After Commissioner Rudy Maloy successfully defended himself against criminal charges, he sought reimbursement under the Leon County policy. The First District concluded that the indemnity provision was subject to the Commission’s option to not perform, rendering it a nullity.

The Town’s Legal Reimbursement Policy, section 8, includes no such “option to not perform,” distinguishing Pizzi’s claim from that of Commissioner Maloy.⁴ We conclude that Pizzi has, at this preliminary juncture, established a legally sufficient claim under the Legal Representation Policy.

C. Common Law Reimbursement Claim

The trial court also concluded that Pizzi’s common law claim for reimbursement, Count II, was legally insufficient, based on several Florida decisions and the “context” of the allegations within the Indictment. Those decisions, however, involved fact-weighting assessments of a claimant’s performance of

⁴ In Leon County, the First District did approve the trial court’s finding that Commissioner Maloy’s actions “arose out of his official duties while he served a public purpose,” entitling him (under his common law claim) “to have his legal fees reimbursed by the public.” 957 So. 2d at 14.

official duties and whether there was truly a public purpose (equated with “public interest” and excluding “any taint of ‘private interest’”). Chavez v. City of Tampa, 560 So. 2d 1214, 1218 (Fla. 2d DCA 1990).

None of the decisions cited in the final order of dismissal disposed of a reimbursement claim such as Pizzi’s on a motion to dismiss.⁵ Rather, each of the cases cited in the dismissal order, most notably the Florida Supreme Court decision in Thornber v. City of Ft. Walton Beach, 568 So. 2d 914 (Fla. 1990), was initially decided on summary judgment or at trial. The history of Thornber discloses that the common law legal fee reimbursement claims of the three city council members in the case were determined via a motion for summary judgment (as to one count) and after a trial. See City of Ft. Walton Beach v. Grant, 544 So. 2d 230 (Fla. 1st DCA 1989) (this opinion was approved in part and quashed in part by the Florida Supreme Court in Thornber).

In a second opinion relating to Leon County Commissioner Maloy (discussed above regarding the Town’s contractual argument that reimbursement is subject to the absolute discretion of the Town Council), the Commissioner’s common law claim for reimbursement was denied by the trial court on a motion for summary

⁵ Counsel for the Town has been unable to cite any case disposing of such a common law reimbursement claim in an order granting a motion to dismiss with prejudice.

judgment, not a motion to dismiss. Maloy v. Bd. of Cty. Comm'rs of Leon Cty., 946 So. 2d 1260, 1261 (Fla. 1st DCA 2007).

Assuming the allegations in the Complaint are true, and indulging all reasonable inferences in favor of Pizzi, we conclude that the common law claim (Count II) also stated a legally sufficient cause of action at this procedural juncture.

IV. Conclusion

For the reasons detailed above, the final order of dismissal with prejudice is reversed, and the case is remanded to the trial court for further proceedings. Although we have concluded that Counts I and II of the Complaint state legally sufficient claims, we reiterate that we have made no determination regarding the veracity of the allegations in the Complaint, or the defenses which may be interposed by the Town in its responsive pleadings.

Reversed and remanded.