Third District Court of Appeal

State of Florida

Opinion filed July 17, 2019.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D19-1276 & 3D19-1213
Lower Tribunal No. 16-7784

Ludeca, Inc.,
Petitioner,

vs.

Alignment and Condition Monitoring, Inc., et al.,
Respondents.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Thomas J. Rebull, Judge.

A Case of Original Jurisdiction -- Mandamus.

Gray Robinson, P.A., and Frank A. Shepherd; K&L Gates LLP, Carol C. Lumpkin, Jonathan B. Morton, and Hayden P. O'Byrne, for petitioner.

Benson Mucci & Weiss, P.L. and Matthew D. Cohen (Coral Springs); Griesing Law, LLC, and Julie Negovan (Philadelphia, PA), for respondents.

Before SALTER, FERNANDEZ, and MILLER, JJ.

MILLER, J.

Petitioner, Ludeca, Inc., the defending party and counterclaimant in the proceedings below, has filed an original petition for writ of mandamus seeking to compel the lower tribunal to halt the imminently scheduled trial in a declaratory relief action involving proprietary rights to customer data. In furtherance of its entitlement to relief, petitioner asserts that the trial court failed to strictly adhere to the requirements of Florida Rule of Civil Procedure 1.440. Petitioner further seeks a writ of certiorari to quash an order severing its compulsory trade secret misappropriation counterclaim from the primary action. Petitioner contends the bifurcation of the interwoven claims inflicts harm irremediable on direct appeal and constitutes a departure from the essential requirements of law. For the reasons elucidated below, we grant relief.

FACTS

The complaint in this case alleges, in substance, that for well over twenty years, petitioner served as the sole authorized distributor in the United States of certain industrial alignment and monitoring products produced by a German manufacturer, Pruftechnik. Respondents, Alignment and Condition Monitoring, Inc., Lazertech, LLC, L & V Diagnostics, Inc., Shoreline Alignment & Vibration, LLC, and Solute, LLC, were independent sales representatives engaged in selling Pruftechnik's products to various consumers. Each completed consumer transaction generated a compendium of valuable customer data.

Between 2006 and 2016, a series of occurrences, including the initiation of litigation in a German tribunal, eventually divested petitioner of its exclusive distributor status and paved the way for Pruftechnik to directly and indirectly peddle its own products within the United States.

In 2016, respondents filed the instant suit seeking a judicial imprimatur of their right to use the compilation of customer data acquired pursuant to the sales transactions. By late 2017, petitioner had answered the complaint and the pleadings were closed.

On April 25, 2019, following a case management conference, the lower court issued an order scheduling trial for approximately two months later. Thereafter, petitioner sought leave to file a counterclaim and, simultaneously, requested a continuance of the trial. The court convened a hearing and granted leave to amend, but denied the motion for continuance. The following day, petitioner filed an emergency motion to remove the case from the trial docket contending the reopening of the pleadings rendered the case no longer at issue. Respondents then moved to bifurcate the declaratory relief action from the misappropriation of trade secrets counterclaim. Ultimately, the court denied the removal motion, delayed the trial for

approximately one month, and granted bifurcation. The instant petitions for mandamus and certiorari ensued.[1]

ANALYSIS

I. Petition for Writ of Mandamus

"[T]o render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy." Marbury v. Madison, 5 U.S. 137, 169, 2 L. Ed. 60 (1803); see State ex rel. Lane v. Dade Cty., 258 So. 2d 347, 349 (Fla. 3d DCA 1972) ("Mandamus is a harsh and extraordinary remedy. It is available to enforce a legal right that has been clearly established, but not to establish a legal right.") (citation omitted).

"A notice for trial is properly filed when the action is ready for trial." Bennett v. Cont'l Chems., Inc., 492 So. 2d 724, 726 (Fla. 1st DCA 1986) (citation omitted). "Florida Rule of Civil Procedure 1.440 provides that a case may be set for trial when it is 'at issue.'" Reilly v. U.S. Bank Nat'l Ass'n, 185 So. 3d 620, 621 (Fla. 4th DCA 2016). A case is at issue "after any motions directed to the last pleading served have been disposed of or, if no such motions are served, [twenty] days after service of the last pleading." Fla. R. Civ. P. 1.440(a). Although rule 1.440(a) "exempts . . . cross-

[1] Following the filing of the instant petition for writ of mandamus, respondents answered the counterclaim.

claims from the determination of when an action is at issue," it contains no parallel provision excluding counterclaims. Bennett, 492 So. 2d at 727 ("Since rule 1.440(a) exempts only cross-claims from the determination of when an action is at issue, we disagree with appellee's argument which would have us sever the motions directed to the counterclaim from the answer."). Further, rule 1.440 "prescribes a minimum interval of fifty days between service of the last pleading and commencement of trial." Gawker Media, LLC v. Bollea, 170 So. 3d 125, 129 (Fla. 2d DCA 2015).

"For many years, the appellate courts of this state have emphasized that [rule 1.440's] specifications are mandatory." Id. Accordingly, "[f]ailure to adhere strictly to the mandates of [r]ule 1.440 [constitutes] error." Precision Constructors, Inc. v. Valtec Constr. Corp., 825 So. 2d 1062, 1063 (Fla. 3d DCA 2002).

Here, the filing of the compulsory counterclaim reopened the pleadings, thereby divesting the case of its "at issue" status.[2] Thus, "[t]he original notice for trial was no longer viable." Id. ("The original notice for trial was no longer viable after the plaintiff subsequently filed an amended complaint, thereby reopening the pleadings.") (citing Nystrom v. Nystrom, 105 So. 2d 605, 608 (Fla. 2d DCA 1958) (noting that had the defendant's motion to amend her answer been granted, "then the

[2] A compulsory counterclaim, as distinct from a permissive counterclaim, "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction." Fla. R. Civ. P.1.170(a).

pleadings would be reopened and the cause would really be no longer at issue")). Moreover, as respondents filed their answer to the counterclaim on June 21, 2019, the pending trial date of July 22, 2019, violated the "minimum interval of fifty days between service of the last pleading and the commencement of trial." Gawker Media, 170 So. 3d at 129; see Tucker v. Bank of N.Y. Mellon, 175 So. 3d 305, 306 (Fla. 2014) ("The case was not at issue and, therefore, could not have been noticed for trial until [twenty] days *after* appellee filed its answer to the appellant's counterclaim."); see also Fla. R. Civ. P. 1.440(c) ("Trial shall be set not less than [thirty] days from the service of the notice for trial.").

Respondents argue that, notwithstanding the obligatory nature of rule 1.440, petitioner waived its legal right to avail itself of any remedy. Although "in some instances appellate courts have held that a party waived its objection to an order setting trial contrary to the rule," those decisions rest upon a finding that appearance and participation at trial, without "objection to any deviation from rule 1.440," constitute a waiver. Gawker Media, 170 So. 3d at 130; see also Correa v. U.S. Bank Nat'l Ass'n, 118 So. 3d 952 (Fla. 2d DCA 2013) (finding waiver where the appellant agreed to a rescheduled trial date, participated in the trial, and made no objection to any deviation from rule 1.440); Parrish v. Dougherty, 505 So. 2d 646 (Fla. 1st DCA 1987) (finding waiver where the appellant's attorney appeared at the trial and participated without objecting to the manner in which it had been set). However, no

such waiver is evident here, where upon the reopening of the pleadings, petitioner promptly urged compliance with the requirements of rule 1.440.

Further, as recently recognized in a well-reasoned decision rendered by our sister court, the body of jurisprudence finding waiver of this legal right is limited to the context of plenary appeals:

> The second reason that the waiver cases are inapplicable to this proceeding is more nuanced but nonetheless significant: whereas this is a mandamus proceeding, those cases were plenary appeals from final judgments. The two types of proceedings serve very different purposes, entailing very different requirements. In an appeal from a final judgment the lower court's rulings are reviewed for reversible legal error. Generally speaking, a judgment may be reversed only for an error that has been preserved by timely objection in the lower court and that has prejudiced the complaining party in a way that likely affected the result. Goldschmidt v. Holman, 571 So. 2d 422 (Fla. 1990) (stating no judgment may be reversed unless a court finds error resulting in a miscarriage of justice); see also § 59.041, Fla. Stat. (2015) (same); Aills v. Boemi, 29 So. 3d 1105 (Fla. 2010) (holding that, except in cases of fundamental error, an appellate court cannot consider any ground for objection not presented to the trial court). Thus, the appellant's failure to make a timely objection waives the issue on appeal, as happened in Parrish and Correa.
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> Mandamus is a different animal altogether. Its purpose is not to review a lower court ruling for prejudicial error; rather, it is meant to enforce the respondent's unqualified obligation to perform a clear legal duty. State ex rel. Buckwalter v. City of Lakeland, 112 Fla. 200, 150 So. 508 (1933). If the petitioner is entitled to demand performance of the duty, he or she need not preserve the issue beyond making the demand. Further, it is unnecessary for the petitioner to suffer prejudice as a result of the respondent's dereliction.

Gawker Media, 170 So. 3d at 130-31. Consequently, we decline to impute waiver.

II. Petition for Writ of Certiorari

Respondents further contend severance of the compulsory counterclaim vitiated any aforementioned error. We are unpersuaded, as we conclude that the court improvidently ordered bifurcation of factually and legally intertwined claims.

"A writ of certiorari is an extraordinary type of relief that is granted in very limited circumstances." Coral Gables Chiropractic PLLC v. United Auto. Ins. Co., 199 So. 3d 292, 294 (Fla. 3d DCA 2016) (quoting Rousso v. Hannon, 146 So. 3d 66, 69 (Fla. 3d DCA 2014)). It is axiomatic that "a party seeking review through a petition for writ of certiorari must demonstrate: (1) a material injury in the proceedings that cannot be corrected on appeal (sometimes referred to as irreparable harm); and (2) a departure from the essential requirements of the law."[3] Nader v. Fla. Dep't of Highway Safety & Motor Vehicles, 87 So. 3d 712, 721 (Fla. 2012) (citation omitted). The first prong is jurisdictional and must be established before this Court may analyze the second. Williams v. Oken, 62 So. 3d 1129, 1132 (Fla. 2011); Dade Truss Co. Inc. v. Beaty, 271 So. 3d 59, 62 (Fla. 3d DCA 2019).

"Certiorari is an appropriate remedy for orders severing or bifurcating claims which involve interrelated factual issues because severance risks inconsistent

[3] "The traditional manner of stating the test for certiorari of a non-final order is somewhat misleading because it places the substantive issue before the jurisdictional issue." Chessler v. All Am. Semiconductor, Inc., 225 So. 3d 849, 852 (Fla. 3d DCA 2016).

outcomes." Kavouras v. Mario City Rest. Corp., 88 So. 3d 213, 214 (Fla. 3d DCA 2011). Moreover, bifurcation of interwoven factual claims risks a "race to judgment," as "[w]hen a compulsory counterclaim is brought as a separate action independent from the initial proceeding, the first judgment entered may bar the remaining action." Branscomb v. Ploof Truck Lines, Inc., 454 So. 2d 59, 60 (Fla. 1st DCA 1984).

Here, by severing the counterclaim from the primary claim, the court will determine the issue of proprietary rights to the data in isolation, without considering the disputed evidence of misappropriation. Further, any determination of finality on the primary claim could serve to bar future litigation of the counterclaim. Cuervo v. W. Lake Vill. II Condo. Ass'n, Inc., 709 So. 2d 598, 599-600 (Fla. 3d DCA 1998) ("[T]he main action and counterclaim were inextricably intertwined such that a determination of the issues in one action would necessarily be dispositive of the issues raised in the other."). Finally, we are cognizant that although both the claim and counterclaim are subject to non-jury determination, there is simply no guarantee the same tribunal will ultimately preside over both proceedings. Accordingly, as the claims are necessarily intertwined, bifurcation threatens inconsistent outcomes and could serve to eviscerate petitioner's cause of action. Thus, the severance order inflicts material injury in the proceeding that cannot be remedied on appeal. See Martinique Condos., Inc. v. Short, 230 So. 3d 1268, 1270 (Fla. 5th DCA

2017) ("[B]y allowing the main action to remain severed from the third-party action, there is a clear risk of inconsistent verdicts . . . Under these circumstances, [petitioner] would have sustained a material injury that cannot be remedied on a postjudgment appeal."); cf. Giacalone v. Helen Ellis Mem'l Hosp. Found., Inc., 8 So. 3d 1232, 1234 (Fla. 2d DCA 2009) (discussing in an analogous context that an order effectively eviscerating a party's counterclaim implicates certiorari jurisdiction because it is irremediable on appeal).

Finally, we consider whether the trial court departed from the essential requirements of law. Florida Rule of Civil Procedure 1.270(b) provides that "[t]he court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, crossclaims, counterclaims, third-party claims, or issues." Although 1.270(b) does "not necessarily preclude a severance" of a compulsory counterclaim, "it is more likely that a severance will prejudice a party or cause inconvenience if the severed issues include a compulsory counterclaim." Norris v. Paps, 615 So. 2d 735, 737 (Fla. 2d DCA 1993) (citation omitted). This is because, "[i]t is improper to sever a counterclaim and affirmative defenses from the plaintiff's claim, when the facts underlying the claims of the respective parties" rest upon common issues of fact and law. Maris Distrib. Co. v. Anheuser–Busch, Inc., 710 So. 2d 1022, 1024 (Fla. 1st DCA 1998); see also Yost v.

Am. Nat'l Bank, 570 So. 2d 350, 353 (Fla. 1st DCA 1990). Thus, "it is well-settled that it is a departure from the essential requirements of the law to sever claims that are inextricably interwoven." Choi v. Auto-Owners Ins. Co., 224 So. 3d 882, 884 (Fla. 2d DCA 2017) (citations omitted).

Here, as previously explicated, petitioner seeks damages and injunctive relief arising out of the purported misappropriation of its trade secrets, a claim that emanates from the same customer database over which respondents seek to exercise dominion in the declaratory relief action. Accordingly, by bifurcating the two inextricably interwoven claims, the court departed from the essential requirements of law. Norris, 615 So. 2d at 737 (granting petition for writ of certiorari where the circuit court severed the defendant's compulsory counterclaim from the plaintiff's equitable claim and the claims raised common issues).

CONCLUSION

As petitioner is "without any other specific and legal remedy," and compliance with rule 1.440 is a legal right, we grant the petition for writ of mandamus to compel the trial court to remove the matter from the trial docket. Marbury, 5 U.S. at 169. We are confident that the lower court will comply forthwith, thus, we withhold issuance of the formal writ. We further grant the petition for certiorari and quash the severance order under review.

Petitions granted; order quashed.