

Third District Court of Appeal

State of Florida

Opinion filed September 2, 2020.

Not final until disposition of timely filed motion for rehearing.

No. 3D16-2085

Lower Tribunal No. 14-2954

**Island Travel & Tours Ltd. Co., a Florida Corporation,
William J. Hauf, an individual, Ismael O. Sene, an individual,
and Danny Looney, an individual,**
Appellants,

vs.

MYR Independent, Inc., etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Antonio Arzola,
Judge.

Law Offices of Roberto Villasante, and Roberto Villasante, for appellants.

Arnold R. Ginsberg, P.A. and Arnold R. Ginsberg, for appellee.

Before LOGUE, SCALES, and LINDSEY, JJ.

LINDSEY, J.

Appellants/Defendants below Island Travel & Tours Ltd., Co.; William Hauf;
Ismael Sene; and Danny Looney appeal (1) an order granting Appellee/Plaintiff

below MYR Independent, Inc.’s motion for fees based on individual proposals for settlement and (2) an order denying Appellants’ motion for fees pursuant to section 772.11, Florida Statutes (2019), which entitles a defendant “to recover reasonable attorney’s fees and court costs in the trial and appellate courts upon a finding that the claimant raised a claim that was without substantial fact or legal support.” For the reasons set forth below, we reverse both orders.

The underlying merits dispute in this case stemmed from a disagreement over the distribution of money collected during a brief joint venture between Island and MYR. When the parties were unable to agree how to distribute the money, MYR sued Island along with Looney, Sene, and Hauf (individuals associated with Island) for breach of contract, unjust enrichment, fraud in the inducement, negligent misrepresentation, civil conspiracy, and civil theft.

Following a five-day jury trial, the court entered a directed verdict in favor of Looney, Sene, and Hauf on MYR’s civil theft claim, finding no evidence of criminal intent. After the jury returned a verdict against Island on the civil theft claim, the trial court granted Island’s motion for judgment notwithstanding the verdict, finding that the civil theft count against Island could not stand because none of Island’s agents possessed the requisite intent.

Ultimately, final judgment was entered in favor of MYR on its claims for breach of contract, negligent misrepresentation, and fraudulent inducement. The parties appealed, and this Court affirmed the judgment in favor of MYR only as to

its breach of contract claims. See Island Travel & Tours, Ltd., Co. v. MYR Indep., Inc., 45 Fla. L. Weekly D704 (Fla. 3d DCA Mar. 25, 2020). This Court also affirmed the trial court's entry of judgment as a matter of law on MYR's civil theft claim because the evidence below "merely established the existence of a contractual dispute, nothing more" and there was "no evidence of criminal intent prior to the alleged breach." Id.

We now turn to the two orders on attorney's fees before us in this appeal, which we review for an abuse of discretion. Glob. Xtreme, Inc. v. Advanced Aircraft Ctr., Inc., 122 So. 3d 487, 490 (Fla. 3d DCA 2013). However, when entitlement to fees is based on the interpretation of a statute, the standard of review is de novo. Id.

The first order under review concerns MYR's individual proposals for settlement. Following a hearing, the trial court found that the individual proposals for settlement served on Looney and Sene were not valid due to numerous typographical errors and inconsistencies. With respect to Hauf and Island, the court found that the proposals for settlement were valid and therefore granted MYR's motion for entitlement to fees as to Hauf and Island. We find no error in the trial court's granting of MYR's motion as to Hauf and Island; however, because MYR ultimately prevailed only on its breach of contract claim, we reverse and remand for a determination of the amount of fees directly related to the breach of contract claim.

The second order under review concerns Appellants' entitlement to fees under the civil theft statute, section 772.11, Florida Statutes (2019), which allows a

defendant “to recover reasonable attorney’s fees and court costs in the trial and appellate courts upon a finding that the claimant raised a claim that was without substantial fact or legal support.” Here, MYR did not prevail on its civil theft claims, but this does not necessarily entitle the defendants to fees and costs under section 772.11. See Standafer v. Schaller, 726 So. 2d 352, 353 (Fla. 2d DCA 1999) (“[T]he failure of a plaintiff to prevail on a civil theft claim by clear and convincing evidence does not necessarily mean that the claim was without substantial fact or legal support.”); see also Opus Group, LLC. v. Int’l Gourmet Corp., 11-23803-CIV, 2013 WL 12383485 (S.D. Fla. July 26, 2013); Soltero v. Swire Dev. Sales, Inc., 08-20260-CIV, 2013 WL 12340902 (S.D. Fla. Mar. 8, 2013); Ramjeawan v. Bank of Am. Corp., 09-20963-CIV, 2010 WL 11602097 (S.D. Fla. Oct. 13, 2010), report and recommendation adopted sub nom. Ramjeawan v. Bank of Am., N.A., 09-20963-CIV, 2011 WL 13273129 (S.D. Fla. Feb. 25, 2011).

The clear language in the statute permits recovery of fees and costs only when a claim is raised “without substantial fact or legal support.” § 772.11, Fla. Stat. (2019). Based on the record before us, we conclude that Appellants were entitled to recover fees under section 772.11 because MYR’s civil theft claims were without substantial fact or legal support.

Here, the trial court directed a verdict in favor of the Appellants, finding that there was no evidence of criminal intent, a necessary element of the civil theft claim. See Island Travel, 45 Fla. L. Weekly D704 (affirming the trial court’s entry of a

directed verdict). “By the grant of a directed verdict on the grounds that there was no showing of criminal intent, the trial court determined that no evidence was presented to support an essential element of the civil theft claim. Therefore, the claim of civil theft was by definition without any factual evidentiary support, let alone substantial fact, because it was missing an essential element of the claim.” Friedman v. Lauderdale Med. Equip. Serv., Inc., 591 So. 2d 328, 329 (Fla. 4th DCA 1992); see also Moore Business Forms, Inc. v. Iberoamerican Elecs., S.R.L., 698 So. 2d 611, 613 (Fla. 3d DCA 1997); Hartford Ins. Co. of the Midwest v. Miller, 681 So. 2d 301, 302 (Fla. 3d DCA 1996).

We therefore reverse the trial court’s order denying Appellants’ motion for fees pursuant to section 772.11 and remand for a determination of the attorney’s fees expended on the civil theft counts.

Reversed and remanded.