

Third District Court of Appeal

State of Florida

Opinion filed June 24, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D19-375 & 3D18-2407
Lower Tribunal No. 09-69166

Kelly Phillips, et al.,
Appellants/Cross-Appellees,

vs.

Mitchell's Lawn Maintenance Corp.,
Appellee/Cross-Appellant.

Appeals from the Circuit Court for Miami-Dade County, Abby Cynamon,
Judge.

Weinstein Law, P.A., and Morgan L. Weinstein (Fort Lauderdale), for
appellants/cross-appellees.

Espinosa Law Group, and Daniel A. Espinosa; Hazel Law, P.A., and Robin
F. Hazel (Hollywood), for appellee/cross-appellant.

Before SALTER, LOGUE and HENDON, JJ.

PER CURIAM.

The appellants, two defendants below, Kelly Phillips and Edel Leon, were sued by Mitchell's Lawn Maintenance Corp. ("Mitchell's") in 2010 in an amended complaint alleging counts for civil theft, unjust enrichment, conversion, fraud, and civil conspiracy. The amended complaint also included claims against Miranda's Lawn Maintenance Corp. and Hary de la Cruz.

The amended complaint alleged that Phillips and Leon had intentionally misapplied funds of Mitchell's and diverted checks payable to Mitchell's, converting and stealing all such funds and checks for their own benefit. The pleadings of these two defendants were stricken after numerous instances of "willful and contumacious violation" of the trial court's orders. Before the pleadings were stricken, Phillips and Leon were given notice of an evidentiary hearing for their appearance and were ordered to show cause why such an order should not be entered.

Following the hearing, the order was entered striking the pleadings of Phillips and Leon. The order also entered a final default judgment against them. In July 2018, the trial court conducted a bench trial on damages, ultimately entering an amended final judgment for \$871,552.82 in favor of Mitchell's and against Phillips and Leon. These appeals followed.¹

¹ Our Case No. 3D18-2407 was Phillips' and Leon's appeal from the amended final judgment and 13 prior orders pertaining to Phillips' and Leon's (a) non-compliance with discovery orders and (b) misrepresentations to the trial court. Mitchell's cross-appealed the final judgment, contending that the trial court erred in awarding conversion damages, but not civil theft damages as well. In our Case No. 3D19-375,

Analysis

We review a trial court's order striking pleadings for a party's misconduct for an abuse of discretion. Ham v. Dunmire, 891 So. 2d 492, 495 (Fla. 2004). This record amply supports the order striking Phillips' and Leon's pleadings, demonstrating repeated, flagrant, and intentional failures to respond to discovery and appear for deposition (including a court order requiring Phillips to appear for deposition), and other dilatory and sanctionable misconduct.

Importantly, and addressing a contention of Phillips and Leon on appeal, it was unnecessary for the trial court to provide written findings pursuant to Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993), before striking pleadings as a sanction. Kozel is applicable to misconduct by counsel for a party, not (as here) where the entirety of the misconduct is attributable to the party. Ledo v. Seavie Res., LLC, 149 So. 3d 707, 710 (Fla. 3d DCA 2014) ("Since Ledo was sanctioned for his own failures to comply with court orders while he was acting *pro se*, Kozel has no application here.").

As to Mitchell's cross-appeal, we find no reversible error. Whether concerned by duplicative damages or a technical deficiency in the pre-suit civil theft notice, the trial court considered the evidence and rendered the amended final judgment

Kelly and Phillips appealed the denial of their claim for attorney's fees under section 772.104(3), Florida Statutes (2019), of the civil theft statute.

accordingly. Finally, in Case No. 3D19-375, we find no reversible error in the trial court's conclusion that Phillips and Leon should not be awarded attorney's fees under section 772.104(3) of the civil theft law. Such an award would require the trial court to find that Mitchell's "raised a claim which was without substantial fact or legal support." Our review of this record demonstrates that Phillips and Leon made no such showing.

Based on the foregoing analysis, we affirm the amended final judgment and the order on attorney's fees in all respects.

Affirmed.