Third District Court of Appeal

State of Florida, July Term, A.D. 2007

Opinion filed July 18, 2007.
Not final until disposition of timely filed motion for rehearing.

No. 3D06-725
Lower Tribunal No. 05-329

Olga Peraza,
Appellant,

vs.

Irma Robles,
Appellee.

An Appeal from the Circuit Court for Monroe County, Luis M. Garcia, Judge.

Hunter, Williams & Lynch and Christopher J. Lynch, for appellant.

Anania, Bandklayder, Blackwell, Baumgarten, Torricella & Stein and Douglas H. Stein, for appellee.

Before COPE and SUAREZ, JJ, and SCHWARTZ, Senior Judge.

SCHWARTZ, Senior Judge.

After the plaintiff-appellant Peraza was involved in a serious automobile accident caused by the defendant-appellee Robles, Peraza's counsel sent Robles' liability carrier MGA Insurance Company a bad faith letter demanding that it pay the $10,000 policy limits within fifteen days. Virtually by return mail, a $10,000 draft from MGA claims adjuster Mario Fernandez was forwarded to counsel. The plaintiff did not negotiate the draft, however, and filed suit in Monroe County circuit court anyway. This appeal is by the plaintiff from a final order enforcing the $10,000 settlement and dismissing the case. We affirm.

Plaintiff's only serious contention on this appeal is that the terms of the offer – that is the letter sent by the claims adjuster to counsel which accompanied the settlement check – were not met in that she did not secure a release from her UM carrier, State Farm, as purportedly required by the terms of the offer that the check be held in escrow by her lawyer until MGA received an unaltered "release executed . . . along with a copy of the U/M Carrier Authorization of Settlement and Waiver of Subrogation Rights." Whatever the legal consequences of her adherence to or violation of that provision, see § 627.727(6), Fla. Stat. (2006), however, it was plainly one which benefited only MGA and Robles in precluding a potential subrogation action against them. It is an established principle that "contractual terms may be waived, both expressly and implicitly, by the party to whom the term benefits." Hammond v. DSY Developers, LLC, 951 So. 2d 985,

988 (Fla. 3d DCA 2007). In this case, it is clear that such a waiver was indeed effected when appellee successfully moved for enforcement of the settlement and defended the ensuing judgment to that effect on appeal – all without insisting upon or receiving the UM carrier waiver. See New Prods. Corp. v. City of N. Miami, 241 So. 2d 451 (Fla. 3d DCA 1970), cert. denied, 244 So. 2d 434 (Fla. 1971); see also Gilman v. Butzloff, 155 Fla. 888, 22 So. 2d 263 (1945); Lipton v. First Union Nat'l Bank, 944 So. 2d 1256, 1258 (Fla. 4th DCA 2007); Ruggio v. Vining, 755 So. 2d 792, 795 (Fla. 2d DCA 2000).

We recognize that the practical effect of our ruling is that, because the plaintiff has received the policy limits she "demanded" (although obviously with the hope that they would not in fact be forthcoming), no bad faith action for amounts beyond the $10,000 may be maintained. We are not uncomfortable with this result. See Berges v. Infinity Ins. Co., 896 So. 2d 665, 685 (Fla. 2004)(Wells, J., dissenting).

Affirmed.