

Third District Court of Appeal

State of Florida, January Term, A.D. 2009

Opinion filed June 24, 2009.

Not final until disposition of timely filed motion for rehearing.

No. 3D08-1960

Lower Tribunal No. 07-29723

Marisa Infante,

Appellant,

vs.

**Vantage Plus Corp., Vantage Hotel Equity Fund I, LLC, Al Delaney
and Omar Botero,**

Appellees.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Gill S. Freeman, Judge.

Warren P. Gammill and Madelin D'Arce, for appellant.

Richard L. Lapidus; Shutts & Bowen and Stephen T. Maher and Jerel C. Dawson, for appellees.

Before RAMIREZ, WELLS, and CORTIÑAS, JJ.

RAMIREZ, J.

Marisa Infante appeals the trial court's order vacating a default final judgment. We reverse because Infante correctly asserted all of the causes of

action in her complaint, and thus the trial court improperly vacated the default final judgment on the grounds that the complaint was technically deficient.

Infante filed suit in which she named various defendants. The essence of her suit involves her investment of \$1.2 million so as to acquire a hotel property, convert it to a condominium property, and sell the condominium units for a profit. In her complaint, she asserted three causes of action: count 1 for an accounting, and counts II and III for civil theft.

In count I, Infante alleged that Vantage Plus Corporation entered into an escrow agreement with Camner, Lipsitz & Poller, P.A., through Neale J. Poller, Esq., whereby Vantage Plus deposited \$1.2 million with its escrow agent Camner. She further alleged that a lawsuit ensued which resulted in a settlement between Vantage Plus and the seller wherein Vantage Plus received an unknown sum of money. Infante demanded an accounting of her investment. She alleged that Vantage Plus and Vantage Equity, a company through which Infante obtained an ownership interest, had failed and refused to provide her with any accounting of her investment. She further alleged that they had failed and refused to return to her \$429,000 of her \$1.2 million capital contribution.

In counts II and III, Infante alleged that she neither authorized nor agreed to any escrow disbursements beyond \$429,000, and that she did not receive any notice of any demand for escrow funds. She further alleged that she demanded the

return of \$771,000 from her escrow agent, and that the escrow agent failed to comply. The escrow agent instead colluded and conspired with Vantage Plus, and Vantage Plus' officers Omar Botero and Al Delaney to deprive her of \$771,000.

Infante more specifically alleged in counts II and III that her escrow agent created a fictional notice letter to her in which Vantage Plus demanded the funds in escrow, but that the escrow agent had already disbursed funds from escrow without any notice to her. She also alleged that Vantage Plus, Botero, and Delaney, in furtherance of their conspiracy to defraud her, subsequently delivered a letter to her in which they demanded the escrow funds. Thereafter, Vantage Plus, Botero, Delaney, and the escrow agent created a bogus fax confirmation sheet to represent notice from the escrow agent to Infante consistent with the terms of the escrow agreement. Vantage Plus, Delaney, Botero, and the escrow agent thus committed theft in that they knowingly obtained, used, or endeavored to obtain or to use \$771,000 that belonged to Infante with the intent to either temporarily or permanently deprive her of her right to the funds.

The defendants failed to timely respond to the complaint, and the trial court entered defaults against them. The trial court thereafter entered a default judgment in Infante's favor. Several defendants subsequently moved to vacate the default judgment, arguing that the complaint failed to state a cause of action. The trial court granted the motion and vacated the default judgment.

The standard of review of an order that vacates a final judgment by default as void for a complaint's failure to state a cause of action is de novo. See Rubenstein v. Primedica Healthcare, Inc., 755 So. 2d 746, 748 (Fla. 4th DCA 2000). As this Court stated in Cruz v. Domenech, 905 So. 2d 938, 940 (Fla. 3d DCA 2005), “[i]n determining whether [the trial court’s] jurisdiction to grant a particular form of relief has been properly invoked by the pleadings, the trial court must be guided by whether the pleadings provided the parties with sufficient notice that matters related to such relief would be at issue.”

We disagree with the trial court that count I failed to state a cause of action for an accounting based upon certain technical deficiencies of the complaint. Count I stated a cause of action for accounting. Infante detailed at length the nature of the claim filed against the defendants, stated the relief she sought, and she alleged that the defendants had failed and refused to give her the accounting she requested. The complaint thus placed the defendants on sufficient notice of Infante’s demand for an accounting. The trial court thus should have upheld the final judgment by default on this basis.

The trial court likewise erroneously concluded that the actions for civil theft in counts II and III failed to state a cause of action because Infante failed to allege a felonious intent to steal. Infante pled the precise language of the criminal theft

statute, section 812.014(1), Florida Statutes (2006), which provides in pertinent part:

A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

- (a) Deprive the other person of a right to the property or a benefit from the property.
- (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

Infante alleged in both counts numerous facts that demonstrated the manner in which the defendants engaged in fraud to ultimately deprive her of her escrow funds. Infante, for example, discussed the defendants' creation of false evidence to show that she had indeed consented to the release of the escrow funds. Infante thus alleged facts sufficient to plead the statutory requirements that the defendants acted with the felonious intent to steal.

However, even if these counts were technically deficient, the theft counts placed the defendants on sufficient due process notice of the nature of the claims filed against them. The trial court thus erred when it ruled that the default judgment was void for failure to plead properly the theft counts pursuant to the theft statute.

Neither do we find that there is a sufficient basis upon which to affirm the trial court's order based upon the record before us and applicable law. We

therefore reverse the trial court's order that voided the entry of the default judgment.