Third District Court of Appeal

State of Florida

Opinion filed August 7, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-347
Lower Tribunal No. 16-3233

Safepoint Insurance Company,
Appellant,

vs.

Shanika Brown and Juanita Reid,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Bronwyn C. Miller, Judge.

Cole Scott & Kissane, P.A., Kathryn L. Ender, Scott A. Cole and Therese A. Savona, for appellant.

Barnard Law Offices, L.P., and Garrett William Haakon Clifford, for appellees.

Before EMAS, C.J., and FERNANDEZ, and SCALES, JJ.

FERNANDEZ, J.

The defendant, Safepoint Insurance Company ("Safepoint"), appeals the trial court's order denying its Motion for Attorneys' Fees and Costs. Because the indemnity provision in Safepoint's proposals for settlement was ambiguous and would cause additional litigation rather than fair settlement of the dispute, we affirm.

On July 31, 2015, plaintiffs, Shanika Brown ("Brown") and Juanita Reid ("Reid"), filed a claim with Safepoint for water damage. Brown and Reid commenced litigation to recover damages for the alleged loss. On May 11, 2017, Safepoint served separate proposals for settlement ("Proposals") upon both Brown and Reid, offering each $2,500.00. If either plaintiff accepted the Proposal, she would agree to indemnify Safepoint for attorneys' fees and costs, including any incurred from continuing litigation should the other party not settle. In relevant part, Safepoint's Proposals read:

> Upon acceptance of this Proposal, Plaintiff shall defend and indemnify SAFEPOINT INSURANCE COMPANY, against any and all claims in any way related to the subject matter of this litigation, including, but not limited to, any remaining claims by SHANIKA BROWN, any other named or omnibus insured(s), any mortgagees, any public adjusters, and any and all attorney's fees, costs, and expenses incurred by SAFEPOINT INSURANCE COMPANY in defending the same, as well as any attorney's fees and costs incurred in defense of such claims.

Brown received an identical Proposal but requiring indemnification against Reid.

On September 27, 2017, the trial court granted summary judgment in favor of Safepoint. Safepoint then filed a motion to recover attorneys' fees and costs to enforce its Proposals. After a hearing on the indemnification provision, the trial court

entered its Order denying Safepoint's Motion for Fees, concluding that the Proposals "are, at a minimum ambiguous, and violate the differentiation requirement under Florida Rule of Civil Procedure 1.442(c)(3)."

"As the issue in this appeal is whether the proposal for settlement complies with rule 1.442(c)(3) and section 768.79, we review the trial court's denial of the plaintiff's motion for attorney's fees and costs *de novo*." Oasis v. Espinoza, 954 So. 2d 632, 634 (Fla. 3d DCA 2007) (citing Papouras v. BellSouth Telecomms., Inc., 940 So. 2d 479, 480 (Fla. 4th DCA 2006)).

Rule 1.442 must be strictly construed. See Audiffred v. Arnold, 161 So. 3d 1274, 1277 (Fla. 2015) (citing Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 278 (Fla. 2003)). Rule 1.442(c)(3) requires that a joint proposal for settlement "state the amount and terms attributable to each party." Further, rule 1.442(c)(2) requires proposals to be stated with particularity. "If ambiguity within the proposal could reasonably affect the offeree's decision, the proposal will not satisfy the particularity requirement." State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So. 2d 1067, 1079 (Fla. 2006). In addition, section 768.79 requires courts to weigh "the amount of the offer" against "the judgment obtained." § 768.79(6)(b), Fla. Stat. (2017).

If a settlement proposal for fees and costs requires both parties to mutually agree and prevents either party from individually accepting the proposal, the

proposal is invalid under section 768.79 and rule 1.442. See Attorneys' Title Ins. Fund, Inc. v. Gorka, 36 So. 3d 646, 651 (Fla. 2010). In Gorka, the Florida Supreme Court held that a proposal by an insurance company to multiple offerees was invalid because the proposal did not allow each individual offeree "to settle the suit knowing the extent of his or her financial responsibility." Id. The Florida Supreme Court reasoned that if a proposal requires mutual agreement and only one party agrees, he or she is forced to participate in further litigation out of his or her control, which goes against the goal of the statute and rule to end litigation through settlements. Id. at 650.

Similarly, in the instant case, Safepoint's Proposals would only cause further litigation. If Brown were to accept Safepoint's Proposal and Reid continues litigation, Brown would be obligated to pay Safepoint an indeterminable amount of money, which goes against the particularity requirement of rule 1.442. The trial court could not weigh the proposed amount versus the judgment as required by section 768.79 because the future legal fees are an unknowable variable to be subtracted from the offered $2,500.00. Moreover, the Proposals prevent Brown and Reid from independently evaluating the offer. As the trial court correctly stated in its order now on appeal, relying on the language in Gorka, "absent joint acceptance, a settling plaintiff would be unable to evaluate her true financial exposure. As such, the proposals divest the plaintiffs 'of independent control of the decision to settle,' are

tacitly contingent upon joint acceptance, fail to identify financial exposure, and are patently ambiguous."

Although indemnity provisions are permissible in an offer of judgment, in this case, acceptance of Safepoint's Proposals can only serve to guarantee additional litigation rather than a fair settlement of the dispute. Thus, we affirm the trial court's order denying Safepoint's Motion for Attorneys' Fees and Costs.

Affirmed.