Third District Court of Appeal

State of Florida

Opinion filed August 14, 2019.

No. 3D18-1132
Lower Tribunal No. 16-21856

Miccosukee Tribe of Indians of Florida,
Appellant,

vs.

Lewis Tein P.L., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Beatrice Butchko, Judge.

Saunooke Law Firm, P.A., and Robert O. Saunooke (Plantation); Alston & Bird LLP, and George B. Abney, (Atlanta, GA), for appellant.

Colson Hicks Eidson P.A., and Curtis B. Miner, Roberto Martinez, and W. Allen Bonner, for appellees.

Before EMAS, C.J., and SALTER and LOGUE, JJ.

LOGUE, J.

ON MOTION FOR REHEARING

We grant the motion for rehearing, withdraw the prior opinion, and issue this opinion in its place.

The Miccosukee Tribe of Indians of Florida seeks review of the trial court's denial of its motion for attorneys' fees pursuant to section 768.79, Florida Statutes, which governs offers of judgment. The trial court denied the motion after it found that the offers of judgment made by the Tribe were not made in good faith. We reverse.

FACTS

In August 2016, plaintiffs, Lewis Tein, P.L., and individual attorneys Guy Lewis and Michael Tein, filed suit against the Miccosukee Tribe of Indians of Florida. The plaintiffs sought damages from the Tribe allegedly arising from its conduct in prior lawsuits. On November 11, 2016, shortly after being served, the Tribe moved to dismiss the lawsuit for lack of subject matter jurisdiction under a theory of sovereign immunity. The trial court denied the motion.

In December 2016, the Tribe appealed the denial of its motion to dismiss. Oral argument on the Tribe's appeal was heard by this Court on May 10, 2017. The following week, on May 17, 2017, the Tribe made offers of judgment totaling $7,500 -- $2,500 to each of the three plaintiffs -- in the underlying lawsuit. The offers of judgment were not accepted within 30 days. Roughly three months later, on August 9, 2017, this Court issued an opinion reversing the denial of the motion to dismiss

and holding that the plaintiffs' claims against the Tribe were precluded by sovereign immunity. Miccosukee Tribe of Indians v. Lewis Tein, P.L., 227 So. 3d 656, 660 (Fla. 3d DCA 2017). This Court subsequently denied the plaintiffs' motion for certification to the Florida Supreme Court. The plaintiffs then petitioned the United States Supreme Court for a writ of certiorari, which was denied. Lewis Tein, P.L. v. Miccosukee Tribe of Indians of Florida, 138 S. Ct. 741 (2018). On remand, the circuit court dismissed the plaintiffs' complaint.

Following the dismissal, the Tribe moved for attorney's fees pursuant to section 768.79. The trial court denied the motion for fees because it found the offers of judgment were made in bad faith because they were (1) nominal and (2) not made at the beginning of the lawsuit but nine months into the case. This appeal followed.

ANALYSIS

A trial court's ruling that an offer of judgment was not made in good faith is reviewed for abuse of discretion. State Farm Fla. Ins. Co. v. Laughlin-Alfonso, 118 So. 3d 314, 315 (Fla. 3d DCA 2013); Down v. Coastal Sys. Intern., Inc., 972 So. 2d 258, 261 (Fla. 3d DCA 2008) ("The standard of review on this issue is whether the court abused its discretion.").

Under section 768.79, a right to attorney's fees is established once the two statutory requisites are satisfied. These requisites are (1) "a party has served a demand or offer for judgment, and (2) that party has recovered a judgment at least

25 percent more or less than the demand or offer. These are the only elements of the statutory entitlement. No other factor is relevant in determining the question of entitlement." Schmidt v. Fortner, 629 So. 2d 1036, 1040 (Fla. 4th DCA 1993). Thus, "the right to an award turns only on the difference between the amount of a rejected offer and the amount of a later judgment." Id. at 1041.

Nevertheless, "[i]f a party is entitled to costs and fees pursuant to the provisions of this section, the court may in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees." § 768.79(7)(a), Fla. Stat. Although "[a] trial court may decline to award attorney's fees if it finds the offeror did not make its offer of judgment in good faith," the question of "[w]hether the offeror has good faith rests on whether the offeror has a reasonable foundation on which to base the offer." Arrowood Indem. Co. v. Acosta, Inc., 58 So. 3d 286, 289 (Fla. 1st DCA 2011). As explained by the Fourth District,

> [T]he legislature has created a mandatory right to attorney's fees, if the statutory prerequisites have been met. The statute begins by creating an "entitlement" to fees. That entitlement may then lead to an "award" of fees. That award may then be lost by a finding that the entitlement was created "not in good faith," or the amount of the award may be adjusted upward or downward by a consideration of statutory factors.

Schmidt, 629 So. 2d at 1040.

The nominal nature of the offers of judgment does not automatically indicate a lack of good faith. "Even nominal offers may be made in good faith." Downs, 972

So. 2d at 262 (citing Neptune Beach v. Smith, 740 So. 2d 25, 27 (Fla. 1st DCA 1999)); see also Dep't of Highway Safety v. Weinstein, 747 So. 2d 1019, 1021 (Fla. 3d DCA 1999) (reversing order denying fees and holding that $1,000 offer of judgment was made in good faith). An offer of judgment is not negated simply because the amount of the offer is nominal if the "offeror had a reasonable basis to conclude that his/her exposure was nominal or minimal." Taylor Eng'g, Inc. v. Dickerson Fla., Inc., 221 So. 3d 719, 723 (Fla. 3d DCA 2017). "The obligation of good faith merely insists that the offeror have some reasonable foundation on which to base an offer." Schmidt, 629 So. 2d at 1039.

Instead, the "issue of 'good faith' is by its very nature, determined by the subjective motivations and beliefs of the pertinent actor" and "so long as the offeror has a basis in known or reasonably believed fact to conclude that the offer is justifiable, the 'good faith' requirement has been satisfied." Weinstein, 747 So. 2d at 1021; see also United Auto. Ins. Co. v. Partners in Health Chiropractic Ctr., 233 So. 3d 1201, 1204 (Fla. 3d DCA 2017) ("[The party making the offer of judgment] was not required to show that it had no exposure in the case at the time the proposal for settlement was made—it was only required to demonstrate that at the time of its offer, it possessed a reasonable basis to conclude that its exposure was nominal."); Isaias v. H.T. Hackney Co., 159 So. 3d 1002, 1004-05 (Fla. 3d DCA 2015) ("The determination of whether a 'nominal' offer is in good faith requires the

trial court to consider whether the offeror had a reasonable basis to conclude, at the time of making the offer, that its exposure was nominal."); Peoples Gas Sys., Inc. v. Acme Gas Corp., 689 So. 2d 292, 300 (Fla. 3d DCA 1997) (concluding that where "the undisputed record strongly indicated that [the defendants] had no exposure . . . [the defendants] had such a reasonable basis to make nominal offers [of judgment]. . ."); Schmidt, 629 So. 2d at 1039 (noting that the good faith requirement "insists that the offeror have some reasonable foundation on which to base an offer.").

The trial court determined, in part, that the offers of judgment were indicative of a lack of good faith because they were nominal. Under the standard of review, the trial court's ruling on this point was reversible error given the facts of this case because "even viewing such offers with 'considerable skepticism,' proof of bad faith requires a showing beyond the mere amount of the offer." Fox v. McCaw Cellular, 745 So. 2d 330, 333 (Fla. 4th DCA 1998) (citation omitted).

> We stress that the question of good faith in making an offer under section 768.79 involves an inquiry into the circumstances shown by the entire record of the case. Each case requires its own analysis, and must be considered on its own facts. Whether an offer was made in bad faith involves a matter of discretion reposed in the trial judge to be determined from the facts and circumstances surrounding the offer. That determination is not controlled by a legal imperative requiring a finding of bad faith merely because the offer was nominal.

Id.

Here, the Tribe had a well-founded, good faith, and legally correct belief that sovereign immunity divested the trial court of subject matter jurisdiction. As we held

in the earlier appeal in this matter, "'an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.' Congressional waiver or abrogation of tribal sovereign immunity must be unequivocal and does not arise by implication. Likewise, a waiver of tribal immunity must be clear." Lewis Tein, 227 So. 3d at 661 (quoting Seminole Tribe of Fla. v. McCor, 903 So. 2d 353, 358 (Fla. 2d DCA 2005)). Thus, "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." Lewis Tein, 227 So. 3d at 661 (quoting McCor, 903 So. 2d at 358). Given these circumstances, the nominal offers had a reasonable foundation, namely the Tribe's nominal exposure. In these circumstances, the nominal offers did not indicate a lack of good faith.

The trial court also found the offers of judgment were not made in good faith because the offers were made – not at the inception of the case – but nine months later after the interlocutory appeal of the denial of the motion to dismiss for tribal immunity had been argued, but was still pending. This was also error. The statute at issue envisions offers of judgment being made well into the litigation because it awards fees not incurred from the inception of the lawsuit but fees "incurred from the date the offer was served." § 768.79(6)(a), Fla. Stat. Moreover, the governing rule contains time restrictions on offers of judgment, but the offers here were made well within those time restrictions. Fla. R. Civ. P. 1.442(b). Finally, the offers were

made immediately after a major event in the case, namely the appellate argument on the interlocutory appeal. The Tribe may well have left the oral argument believing the appellate court was persuaded by its arguments. While we do not comment on the reliability of a prediction of the outcome of an appeal based on the discussion at oral argument, these circumstances do not support a finding that the timing of the offers reflected bad faith. Under the applicable standard of review the trial court's ruling to the contrary was reversible error.

Finally, Lewis Tein argues that the trial court merely dismissed the case for lack of jurisdiction and therefore the dismissal does not qualify as a basis for an award under section 768.79 of Florida Statutes. Lewis Tein's claims were dismissed on the grounds that they are barred by the Tribe's sovereign immunity. Because this dismissal was with prejudice and prevents Lewis Tein from further pursuing its claims against the Tribe in either State or federal court, it constitutes a final adjudication on the merits under the statute. See Gammie v. State Farm Mut. Auto. Ins. Co., 720 So. 2d 1163, 1163–64 (Fla. 3d DCA 1998) ("In order for a defendant to recover attorney's fees under the offer of judgment statute following a plaintiff's voluntary dismissal of its claim, the dismissal must be with prejudice."); Smith v. Loews Miami Beach Hotel Operating Co., 35 So. 3d 101, 103 (Fla. 3d DCA 2010) ("an involuntary dismissal, a dismissal with prejudice, and a second voluntary

dismissal (which serves as adjudication on the merits pursuant to rule 1.420(a)(1)) all qualify as a basis of an award of attorney's fees under section 768.79.").

Reversed and remanded.