DISTRICT COURT OF APPEAL, FIRST DISTRICT

September 8, 2021

CASE NO.: 1D20-3683, 1D20-3685
L.T. No.: 16-2019-CA-006876, 16-2019-CA-006876

Britne White	**v.**	**Fidus Roofing & Construction, LLC, a Florida limited liability company, Shane Kowalchik, individually and as owner of Rise Again Roofing, a Florida registered fictitious name**
Appellant/Petitioner(s)		**Appellee/Respondent(s)**

REPLY BRIEF OF APPELLANT BRITNE WHITE

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA. THE HONORABLE GARY L. WILKINSON PRESIDING

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PREFACE

Defendant-Appellant Britne White will hereinafter be referred to as "Ms. White."

Co-Defendant-Co-Appellant Shane Kowalchik may be hereinafter referred to as "Kowalchik."

Plaintiff-Appellee FIDUS ROOFING & CONSTRUCTION, LLC, may further be referred to as "Fidus."

Trial Judge Honorable Gary L. Wilkinson will hereinafter be referred to as the "trial court."

The trial record will be cited as (R., p. #).

The supplemental trial record will be cited as (S.R., p. #).

The Amended Initial Brief of Appellant will be referred to as the "Initial Brief."

The Appellee's Answer Brief will be referred to as the "Answer Brief."

REBUTTAL STATEMENT OF FACTS

Appellee's Statement of the Facts

As an initial matter, Appellant agrees with Appellee's correction that the Requests for Admission and Responses to Requests for Admission were indeed filed with the trial court, but not included within the Trial Record or the Supplemental Trial Record and that Appellant's prior contention that those documents were not filed was incorrect (though with no intention to be disingenuous or misleading).

Appellee 'takes issue' with Appellant's statement reciting the fact that the Temporary Injunction entered by the lower court trial court was in fact entered in a manner that, from the face of the Record, certainly appears to have in violation of Fla. R. Civ. P. 1.610 in that it was entered *ex-parte* and without the benefit of a verified motion or affidavit and without having conducted an evidentiary hearing (whether in the presence of Appellant as required by Rule 1.610, or otherwise). (R. 43-47; 48-52). Even after Appellant Ms. White and Co-Appellant Kowalchik jointly filed a Motion to Dissolve Temporary Injunction on November 5, 2019, no hearing was conducted, whether within five days thereafter pursuant to Fla. R.

Civ. P. 1.610(c) or otherwise. (R. 95-97; 1486-1487). Appellant provided the information regarding this anomaly, which was within the Record, as part of the Statement of the Case, although procedurally the Appellant agrees that that specific issue is not one of the enumerated bases for the instant appeal.

However, despite its protests of Appellant's purported non-sequitur, Appellee itself then made reference to material which clearly does not apply to the appeal in commenting on the status of the collateral criminal action against Appellant stating that "[the] charges are currently pending") as of the date of the Answer Brief, which would clearly be outside the Record and a thinly-veiled attempt to smear Appellant by association with pending criminal charges.[1]

Although it appears to be an oversight or simple misstatement, Appellee states that the trial court "drafted and entered a 23-page Final Judgment making specific findings of fact, conclusions of law and providing relief to the Appellee on all issues tried, denying any relief to Appellant and Kowalchik, determining Appellee was the

[1] For the sake of completeness, since the Appellee commented on the then-current status of that case (numbered 20000559CFMA, Uniform Case Number 552020CF000559XXAXMX), it was subsequently dismissed and closed as of August 27, 2021.

prevailing party and reserving jurisdiction regarding an award of attorney's fees." (Answer Brief, p. 5). Certainly the trial court entered the Final Judgment, but the Final Judgment was actually drafted in substantial part by the Parties (and specifically the Appellee) as the trial court directed the parties to "submit proposed final judgments." (S.R. 4564). In response to counsel Appellee admitting that Appellee would be "going to be probably participating . . . to a greater extent [than Appellant]," sought clarification of what was to be included in the proposed Final Judgments and the Court directed that the parties should "write it like a brief . . . . full findings, cite the law that supports your position and then have a final judgment that awards or doesn't award whatever you're proposing." *Id*. This is an important distinction given certain inconsistencies within the findings and the remedy awarded in the Final Judgment, as will be explained below.

SUMMARY OF THE ARGUMENT

Appellee's Answer Brief mirrors the three main issues raised by Appellant on appeal, which were (1) that Appellee failed to adduce sufficient evidence to support entry of judgment as to Count I for Temporary and Permanent Injunctive Relief, Count II for Misappropriation of Trade Secrets and Confidential Information, Count V for Violation of Florida's Uniform Trade Secrets Act, and Count VI for Breach of Contract as a matter of law; (2) that the trial court erred in allowing amendment of the pleadings to conform over the objection of Appellant to the detriment of her due process rights; and (3) that the trial court's refusal to allow Appellant to cure mere procedural defects in her attempt to seek admission of evidence of unpaid commissions was not in keeping with the requirements of leniency for *pro se* litigants and amounted to an abuse of discretion.

The arguments raised by Appellee do not contravene those of the Appellant and cannot operate to support the entered Final Judgment in the lower tribunal.

ARGUMENT

I. APPELLEE'S ARGUMENTS AS TO SECTION I. DO NOT SUPPORT UPHOLDING THE TRIAL COURT'S ENTRY OF JUDGMENT IN FAVOR OF APPELLEE AS TO COUNT I FOR TEMPORARY AND PERMANENT INJUNCTIVE RELIEF, COUNT II FOR MISAPPROPRIATION OF TRADE SECRETS AND CONFIDENTIAL INFORMATION, COUNT V FOR VIOLATION OF FLORIDA'S UNIFORM TRADE SECRETS ACT, AND COUNT VI FOR BREACH OF CONTRACT.

A. Count I For Temporary and Permanent Injunctive Relief Fails As A Matter Of Law.

Appellant generally agrees with Appellee's contention that "[a] violation of an enforceable restrictive covenant creates a presumption of irreparable injury" with respect to entry of a temporary injunction. *See Environmental Services, Inc. v. Carter*, 9 So.3d 1258, 1262 (Fla. 5th DCA 2009). However, the issue is that Appellee, by virtue of the awarded relief (or, more specifically, the lack of any awarded relief) within the Final Judgment results in the inescapable conclusion that Appellee did not adduce sufficient evidence to support a finding of *any* injury, much less irreparable injury.

The Final Judgment stands in testament to the fact that Appellee failed to uphold presumption of irreparable injury and that the lower tribunal must have determined that Appellant had

overcome that presumption in awarding no financial compensation to Appellee, despite the trial court's note that "given the nature of [theft of trade secrets] damages and the related difficulty of proof, the degree of certainty required is somewhat less than in most contract damage claims." (R. 1482) citing *Perdue Farms Incorporated v. Hook*, 777 So.2d 104 7 (Fla. 2d DCA 2001). Thus, even with a lowered bar in terms of requirements of proof, the trial court found that Appellee's proffer of damages or injury were not "sufficiently certain." (R. 1483).

In terms of requirements specific to a permanent injunctive relief, "[t]o obtain a permanent injunction, the petitioner must "'establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief.'" *Hollywood Towers Condo. Ass'n, Inc. v. Hampton*, 40 So. 3d 784, 786 (Fla. 4th DCA 2010) *citing K.W. Brown & Co. v. McCutchen,* 819 So.2d 977, 979 (Fla. 4th DCA 2002).

With respect to the permanent injunction, Appellee likewise fell short of its burden of proof by failing to adduce sufficiently certain evidence any harm or damage. As we previously noted, similar possession of allegedly confidential company materials by other employees had been treated extremely mildly. (S.R. 4026-4033).

Appellee's Answer did not squarely address the fact that it previously agreed that it did not have "any specific evidence that [appellant] specifically used them for [appellant's] own company or disclosed them to a competitor." (S.R. 3610).

The trial court found that Appellee had failed to establish any actual damages from any of the alleged conduct of Appellant Ms. White. (R. 1482-1483). As a result, Appellee failed to establish an essential element of a claim for issuance of a permanent injunction; irreparable harm or injury. *See Yardley v. Albu*, 826 So.2d 467, 470. As such, any final judgment resting upon Count I of the verified complaint must fail, as Appellee failed to support his claim for entry of a permanent injunction.

B. Count II For Misappropriation Of Trade Secrets And Confidential Information Fails As A Matter Of Law.

Appellant will address Appellee's Answer Brief as to Count II in Section II below.

C. Count V For Violation Of Florida's Uniform Trade Secrets Act Fails As A Matter Of Law.

While the Appellee points out several findings of fact in the version of the proposed Final Judgment adopted and modified by the trial court that it believes would support entry of injunctive relief

and/or damages under Chapter 688, the inescapable conclusion is that the Final Judgment itself, which makes specific reference to §542.335(l)(c), Fla.Stat., but does not reference Chapter 688, Florida Statutes either in the Temporary Injunction or in the Final Judgment. (R. 48-52; 1467-1489). There is no reference within the conclusion sections of the Final Judgment to § 688.004, Florida Statutes[2]. (R. 1482).

As to damages, as we have noted herein, there was no award of damages under any theory advanced by Appellee, whether Chapter 688 or otherwise.

Finally, the award of attorneys' fees was made under the parties' non-compete agreements—not under Chapter 688, Florida Statutes. In fact, the award of attorneys' fees could not have been made pursuant to § 688.005, Florida Statutes, as the final judgment omitted any findings that Appellant's alleged conduct amounted to "willful and malicious misappropriation." *See* § 688.005, Florida Statutes. Thus, an award of attorneys' fees under § 688.005, Florida

[2] As previously noted, this same section also references remedies arising out a claim for civil theft under § 812.035, Florida Statutes, which was never a claim in this action, as admitted by Appellee. (S.R. 4381)

Statutes would have been improper, even if the final judgment had referenced that section in its determination of entitlement to fees on the part of Appellee.

Since the final judgment does not award injunctive relief under § 688.004, Florida Statutes, makes no award of damages to Appellee at all, and did not award attorneys' fees under § 688.005, Florida Statutes, this Count should be reversed and judgment entered thereon in favor of Appellant.

D. Count VI For Breach Of Contract Fails As A Matter Of Law.

While Appellant concedes that it is primarily focused in its appeal on this issue with the fact that Appellee recovered no damages, the reason for that single-minded focus is clear; without an award of damages, Appellee has failed to meet its burden to prove one of the three essential requirements in a breach of contract claim—damages. *See* The Florida Bar, Jury Instructions For Business Litigation, BL FL-CLE 15-1 *citing Friedman v. New York Life Insurance Co.*, 985 So.2d 56 (Fla. 4th DCA 2008)(a plaintiff must at a minimum plead and prove three "bare bone elements": "a valid contract, a material breach, and damages" in order to prevail on a breach of contract claim.)

Despite the citations as to contingent or possible future damages and other paragraphs of the Final Judgment referred to by the Appellee, there can be no argument that damages were not awarded by the trial court, and thus damages were not proven at trial by Appellee. Appellee has failed to establish the proper measure of damages or to adduce sufficient specific evidence in support of its damages. (R. 1482-1483). As we previously noted, the trial court found that Appellee was relying on the improper measure of damages ("the basis for damages from the competition of the former employee does not comport with the damages for loss of trade secrets that plaintiffs seek in this case"). *Id.*

Since Appellee failed to prove its damages given a full and fair opportunity previously to do so, outright dismissal of that Count is appropriate. *See Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 283 (Fla. 2d DCA 2014) *citing Morton's*, 48 So.3d at 80. ("Accordingly, we see no reason to afford [plaintiff] a second opportunity to prove its case. We reverse and remand with directions for the trial court to enter an order of involuntary dismissal"); *see also Allard v. Al-Nayem Intern., Inc.*, 59 So. 3d 198, 201 (Fla. 2d DCA 2011) (*citing* Rule 1.420(b), Florida Rules of Civil Procedure)

("Involuntary dismissal is proper where there is inadequate proof at trial on the correct measure of damages").

II. THE TRIAL COURT IMPROPERLY ALLOWED APPELLEE TO AMEND THE PLEADINGS TO ASSERT A CLAIM OF EMBEZZLEMENT, AND ENTRY OF JUDGMENT ON AMENDED COUNT II SHOULD BE REVERSED.

One of the arguments raised by Appellee in support of the trial court allowing its late amendment of its pleadings is that "Appellant was provided ample opportunity to further argue the matter before the trial court in advance of trial, but did not." (Answer Brief, p. 15). However, a review of the Record indicates this contention is inaccurate.

The Record shows clearly that it was not until May 4, 2020 in Appellee's Motion In Limine to Limit Evidence, that the first instances of presenting to the trial court the concept of "embezzlement" was raised as a claim against Appellant. (R. 281-284). That motion contains two references to the allegation in reference to Fidus's alleged "confidential information and trade secrets." (R. 281; 283).

As we have noted, Appellant objected within days to Fidus's reference to "embezzlement" on May 11, 2020. (R. 295-300). Yet, the Record reflects that, as of that time, Ms. White still was not on notice

that there was any intention by Appellee to raise actual claims in the underlying action for embezzlement, but rather as a reference outside the case itself to a collateral criminal action. (R. 295-300). Specifically, Ms. White asked the trial court to ban such references, believing them to have been made simply "for the sake of character assassination" and sought to exclude "[r]eferences and/or evidence of any kind regarding embezzlement." (R. 295-297; 298).

Tellingly, on the same day that Ms. White raised her objection to references to "embezzlement," Attorneys' fee records show both counsel for Fidus reviewed her objection specifically looking for the term "embezzlement" and strategized regarding casting embezzlement in terms of theft. (R. 1542). Attorneys' fee records indicate the first instance of research by Fidus's counsel into conforming pleadings to the facts and trial by consent take place approximately one week after the fifth and final day of trial. (R. 1602; *see* R. 3187-3188).

As we have noted, it was not until Appellee filed its Pre-Trial Stipulation[3] that Fidus articulated any intention to raise

[3] Appellee and Co-Appellants filed separate and competing Pre-Trial "Stipulations" that were not, in fact, stipulated to by the opposition.

embezzlement as a matter to be decided by the trial court. (R. 673-693). In the section entitled "CONCISE STATEMENT OF ISSUES OF FACT WHICH REMAN TO BE LITIGATED," Fidus posed as its second through fifth issues of fact. (R. 677). However, the stipulation under the section entitled ANY PROPOSED AMENDMENTS TO THE PLEADINGS contained the representation by Fidus as to proposed amendments that there were "[n]one at the time of filing this Joint Pre-Trial Stipulation." This "Stipulation" was filed and served on June 4, 2020, less than three weeks prior to the start of the trial period. (R. 693; *see* S.R. 3190).

A hearing was indeed conducted on June 10, 2020[4] on Appellant's objection to inclusion of and adducing evidence related to claims of "embezzlement" in addition to Fidus's motion in limine. (R. 1060-1061). No transcript was taken of that hearing, but an Order was entered deferring ruling on all evidentiary matters until trial. (R. 1060-1061). Thus, Appellee's argument that Appellant had "ample opportunity to further argue the matter before the trial court in

[4] The Initial Brief contained a typo indicating that this hearing was conducted in 2021, rather than June 10, 2020.

advance of trial, but did not" falls flat since the trial court had already ruled that it would address the arguments at trial.

Trial commenced on June 24, 2020 and continued through five days, including June 25, 2020 and August 6, 7, and 12, 2020. (R. 3187-3188). Appellee Fidus proceeded to try its case on the basis of the eight enumerated counts of its verified complaint. (R. 676-678) (listing the Verified Complaint without proposed amendments as the operative pleading).

As previously noted, Fidus made three references in its opening arguments to embezzlement, but then made no references to the term "embezzlement" through the entirety of the rest of its case in chief. (S.R. 3211-3212; *see generally* S.R. 3189-3842). At the end of Fidus's case in chief, counsel for Appellee made a request to conform its pleadings to the evidence. (S.R. 3842). Appellee did not further explain the nature of the amendment to the pleadings sought at that time and it was not until later that Appellee provided clarification that the amendment was sought with respect to embezzlement. (S.R. 3858-3859).

Appellant Ms. White objected to introduction of embezzlement as a claim by Appellee, referencing the previous Motion in Limine on

the subject, but the trial court did not rule at that time on the objection. (S.R. 4259). This objection was raised again by Ms. White and the trial court expressed confusion over the elements of a count for embezzlement as compared to misappropriation (S.R. 4383). However, once again the trial court did not announce a ruling on inclusion of embezzlement as a count against Appellant. *Id.*

As has been noted in this State, "[f]irst and foremost, a court must be mindful of the larger purpose that pretrial pleadings fulfill in civil litigation—pleadings function as a safeguard of due process by ensuring that the parties will have prior, meaningful notice of the claims, defenses, rights, and obligations that will be at issue when they come before a court." *Tracey v. Wells Fargo Bank, N.A. as Tr. for Certificateholders of Banc of Am. Mortgage Sec., Inc.*, 264 So. 3d 1152, 1154–57 (Fla. 2d DCA 2019) *citing Pro-Art Dental Lab, Inc. v. V-Strategic Grp., LLC*, 986 So.2d 1244, 1252 (Fla. 2008) ("'[t]o allow a court to rule on a matter without proper pleadings and notice is violative of a party's due process rights.'" (alteration in original) (emphasis omitted; internal citations omitted).

The *Tracey* court also noted that, "[i]t must also be remembered that rule 1.190(b), like all the rules of civil procedure, aims 'to prevent

the use of surprise, trickery, bluff and legal gymnastics.'" *Tracey v. Wells Fargo Bank, N.A. as Tr. for Certificateholders of Banc of Am. Mortgage Sec., Inc.*, 264 So. 3d 1152, 1154–57 *citing Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 111 (Fla. 1970).

Appellee first attempted to introduce its claim of embezzlement against Ms. White on May 4, 2020 when it filed a Motion In Limine to Limit Evidence featuring the first instances of "embezzlement" as a claim. (R. 281-284). To allow Appellee to lie in wait, as indicated by its own attorneys' fee invoices and attempt to ambush the *pro se* Appellant at trial cannot stand and amounts to a substantial denial of her due process rights. (R. 1542; 1602; *see* R. 3187-3188).

As such, entry of final judgment on the amended Count II must be reversed and instructions for entry of an order of involuntary dismissal as to that Count should be ordered.

III. THE TRIAL COURT IMPROPERLY REFUSED TO ALLOW APPELLANT AS A PRO SE LITIGANT TO CORRECT DEFICIENCIES IN THE FOUNDATION FOR EVIDENCE OF COMMISSIONS OWED.

As an initial matter, however, Appellant agrees that it erroneously indicated that Ms. White appeared *pro se* during the entire litigation, when instead Appellant meant to state that Ms.

White appeared *pro se* during the entire *trial*. (Answer Brief, P. 12). However, Appellee's citation to *James v. Crews*, 132 So. 3d 896, 899 (Fla. 1st DCA 2014) is of little import, as there are no arguments either by Appellant or Appellee that the trial court showed such tolerance of Ms. White's procedural shortcomings that it amounted to partiality in her favor by the trial court. Indeed, as Appellee itself was accorded wide procedural latitude by the trial court in terms of foundational proof and on-the-fly amendments to its pleadings, partiality in favor of Appellant could scarcely be raised as an issue.

Appellee also correctly points out that no case cited by Appellant holds that the standards for admission of evidence should be lowered for *pro se* litigants. However, that is not the argument raised by Appellant. Appellant instead argues that it should have been provided leniency procedurally in attempting to set a groundwork for admission of her evidence. Had the trial court enumerated the specific bases for its finding that there was insufficient foundation (i.e., which foundational elements it believed Appellant had not yet met), the trial court certainly could have both balanced its need to remain impartial and to not provide legal guidance while balancing the interests of justice in providing meaningful access to justice for

non-attorney litigants. This would have allowed Appellant to more squarely tailor its proffer in order to support admission of its evidence.

The effect of this failure is much more pronounced in the instant case, as the evidence barred by the trial court amounted to a *de facto* involuntary dismissal of Appellant's entire counterclaim.

Ms. White attempted to adduce from the court what portions of the foundation for the evidence on commissions the trial court had determined were unmet, however the trial court would not provide specific grounds. (S.R. 4247-4253). Additional attempts to navigate the foundation aspects of commission evidence failed once again. (S.R. 4251-4253).

As we noted, the cited authority supports affording *pro se* litigants some leniency on certain procedural technicalities such as requesting relief and making and defending objections. *Hanna-Mack v. Bank of Am., N.A.*, 218 So. 3d 971, 973–74 (Fla. 3d DCA 2017).

Appellant's attempts to introduce evidence of unpaid commissions which were barred on several occasions, but without any true specifics as to the enumerated reasons for that finding by the trial court. (S.R. 3640-3646; S.R. 3877-3880; S.R. 3927-3933;

S.R. 3937-3945; S.R. 3933-3935; S.R. 3983-3997; and S.R. 4251-4253). Therefore, Ms. White was not afforded a meaningful opportunity to cure any defect in the foundation of the materials. (S.R. 3645-3646; S.R. 3881-3882; and S.R. 4247-4253). The failure to allow for that leniency amounted to an abuse of discretion and a failure of due process in the trial court.

As such, the trial court's determination barring Ms. White's proffered evidence should be reversed with instructions to allow Appellant to lay a proper foundation with information on the factual basis upon which the trial court has refused to admit the evidence.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's final judgment and enter an order dismissing involuntarily Appellee's Count I for Temporary and Permanent Injunctive Relief, Count II for Misappropriation of Trade Secrets and Confidential Information, Count V for Violation of Florida's Uniform Trade Secrets Act, and Count VI for Breach of Contract. Further, this Court should send the matter back to the trial court with instructions to permit Appellant to attempt to overcome purely procedural hurdles to attempt to provide sufficient foundation for admission of evidence of her owed commissions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail transmission to the following at the respectively referenced email addresses and via the Florida Courts e-Filing Portal, this 8th Day of September, 2021.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rule 9.045(e), Florida Rules of Appellate Procedure, that the foregoing brief complies all font and word count requirements as outlined in Rule 9.045, in that it is generated in 14-point Bookman Old Style font and totals less than 4,000 total words excluding words in the caption, cover page, table of contents, table of citations, certificate of compliance, certificate of service, and signature block.

This brief also complies with Rule of Appellate Procedure 9.210 and 9.420 as well as Florida Rule of Judicial Administration 2.420, 2.515, and 2.516.

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