IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA GENERAL CIVIL DIVISION

NEIL J. GILLESPIE,

Plaintiff, CASE NO.: 2005 CA-7205

vs.

BARKER, RODEMS & COOK, P.A., a Florida corporation, DIVISION: F

WILLIAM J. COOK,

Defendants.
_____/

PLAINTIFF'S NOTICE OF SERVICE OF CASE LAW IN REBUTTAL TO DEFENDANTS' MOTION TO DISMISS AND STRIKE

Plaintiff pro se, Neil J. Gillespie, provided the following case law to Defendants' attorney, Mr. Ryan Rodems, via hand delivery:

1. Deal v. Migoski, 122 So. 2d 415
2. Gerlach v. Donnelly, 98 So. 2d 493
3. Susan Fixel, Inc. v Rosenthal & Rosenthal, Inc
4. Singleton v. Foreman, 435 F.2d 962
5. Wassall v. W.H. Payne, 682 So. 2d 678
6. Stintson v. Feminist Woman's Health Center, Inc., 416 So. 2d 1183
7. Krehling v. Baron, 900 F. Supp. 1574

8. Bay Colony Office Bldg. Joint Venture v. Wachovia Mortg. Co., 342 So. 2d 1005

RESPECTFULLY SUBMITTED this 7th day of October, 2005.

Neil J. Gillespie, Plaintiff pro se
8092 SW 115th Loop
Ocala, Florida 34481
Telephone: (813) 810-0151

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Plaintiff's Rebuttal to Defendants' Motion to Dismiss and Strike* and case law has been furnished via hand delivery to Ryan Christopher Rodems, Attorney at Law, Barker, Rodems & Cook, P.A., Attorneys for Defendants, 300 West Platt Street, Suite 150, Tampa, Florida 33606, this 7th day of October, 2005.

Neil J. Gillespie

C

District Court of Appeal of Florida, Third District.

John J. DEAL, Appellant,

v.

Walter J. MIGOSKI, Appellee.

No. 59-143.

July 14, 1960.

Action by plaintiff to rescind assignment of his distributive interest in estate of his grandmother to his attorney, employed for perfecting settlement of estate, on ground that purchase by attorney was unconscionable. The Circuit Court for Dade County, George E. Holt, J., entered decree for attorney and plaintiff appealed. The District Court of Appeal, Pearson, J., held that where undisputed facts showed that attorney purchased client's interest while employed to secure settlement of estate, that purchase price was far less than the distributive share and that client at time of purchase was unemployed and desperate for money, burden was upon attorney to adequately demonstrate that the purchase was for a full and complete consideration, and principle of clean hands would not be applied against client whom attorney claimed had not revealed that he had made a previous assignment of income from estate.

Reversed and remanded for further proceedings.

West Headnotes

[1] Attorney and Client 123(2)

45k123(2) Most Cited Cases

Responsibility of an attorney to place client's interest ahead of his own in dealing with matters upon which attorney is employed is foundation of legal system, and if an attorney purchases from the client subject matter of the attorney's employment then transaction is suspect. 31 F.S.A. Code of Ethics, rule B, § 1, Canon 10.

[2] Attorney and Client 123(2)

45k123(2) Most Cited Cases

Where attorney employed by another purchases the subject matter of his employment, upon action being filed to rescind transaction attorney has burden of proving that he paid full and complete consideration for purchase. 31 F.S.A. Code of Ethics, rule B, § 1, Canon 10.

[3] Attorney and Client 123(2)

45k123(2) Most Cited Cases

[3] Equity 65(2)

150k65(2) Most Cited Cases

Where attorney was employed by client having distributive interest in estate to effect a settlement of such estate and purchased client's interest for a price which was considerably less than the distributive share, and at time of purchase client was unemployed and desperately needed funds, attorney had burden of demonstrating that purchase was for a full and complete consideration and doctrine of clean hands would not be invoked against client who did not reveal to attorney that he had made a previous assignment of income from estate. 31 F.S.A. Code of Ethics, rule B, § 1, Canon 10; Preamble.

***416** Cunningham & Weinstein, Miami, for appellant.

John D. Brion and Wilbur C. Rollins, Miami, for appellee.

PEARSON, Judge.

The appellant, John J. Deal, owned a distributive interest in the estate of his grandmother. The appellee was Deal's attorney who was hired to effect a prompt settlement of the estate. For his fee the attorney was to receive one-third of Deal's ultimate distribution. The attorney, however, purchased the client's entire interest in the estate. Thereafter Deal brought a complaint in chancery seeking rescission

and alleged that the purchase was unconscionable. This appeal is from a final decree for the defendant. The decree is reversed and the cause remanded for further proceedings.

The final decree was in part as follows:

'The Plaintiff has filed his complaint herein seeking cancellation and rescission of an assignment of his interest in the estate of his grandmother, Margaret C. Deal, deceased, to the Defendant Walter J. Migoski, an attorney, on the grounds of misrepresentation and fraud while acting as Plaintiff's attorney, and seeking to enjoin the Defendant Wallace Ruff, as Administrator C.T.A., D.B.N. of said estate from disbursing any funds thereof to the Defendant Walter J. Migoski.

'The Defendant Walter J. Migoski's answer denies the wrongdoing charged to him, claiming that he paid full value for the inheritance and setting up the additional defense that the Plaintiff did not come into equity with clean hands, by reason of the fact that the Plaintiff had previously assigned the income from the inheritance to his mother and father without disclosing such prior assignment, whereby a fraud was perpetrated on the defendant Migoski.

'From the issues made by the pleadings and the proof submitted, the ***417** Plaintiff has failed to prove the material allegations of his complaint and the Court finds that the Defendant Walter J. Migoski under the circumstances acted in good faith and paid a good and sufficient consideration, namely, $2,500.00, for the assignment of the inheritance which consisted of a one-sixteenth interest in and to the Estate of Margaret C. Deal, without notice or knowledge of the prior assignment of the income to Plaintiff's father and mother, namely, Daniel F. Deal and May Gertrude Deal, which is dated July 16, 1938.'

[1][2] It is apparent that the chancellor has failed to apply the proper rule as to the burden of going forward with the evidence. The responsibility of an attorney to place his client's interest ahead of his own in dealings with matters upon which the attorney is employed is at the foundation of our legal system. If an attorney in contravention of Canon 10, Rule B, Section (I) of the Code of Ethics Governing Attorneys, 3 F.S. '59, 31 F.S.A., [FN1], purchases from his client the subject matter of the attorney's employment, then the transaction is suspect. Upon action being filed to rescind the transaction, the attorney has the burden of proving that he paid full and complete consideration for the purchase. Gerlach v. Donnelly, Fla.1957, 98 So.2d 493; Renno v. Sigmon, 148 Fla. 229, 4 So.2d 11; Bolles v. O'Brien, 63 Fla. 342, 354, 59 So. 133; Williams v. Bailey, 69 Fla. 225, 67 So. 877. See also Williston, Contracts, § 1625A (rev. ed. 1937.)

> FN1. '*Acquiring Interest in Litigation* .--The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.'

[3] Certain facts appear without dispute from this record: 1) Migoski purchased his client's interest in an estate while he was employed to secure settlement of the estate. 2) The purchase price was $2,500 and the distributive share was at trial, two and one-half years later, worth from $7,200 to $8,500, exclusive of income and charges for probate. 3) The client was at the time of the purchase unemployed and desperate to find a source of money to meet daily needs. Therefore it is necessary to determine whether the attorney has met the burden cast upon him by his conduct.

In an attempt to invoke the principle, 'He who comes into a court of equity must come with clean hands', the attorney complained that Mr. Deal did not reveal to him that he had made a previous assignment to his mother and father of the income from the estate. While Mr. Deal's explanation that he forgot the informal assignment is not adequate to relieve him of responsibility, the effect of the assignment was not to destroy the advantage gained by Mr. Migoski. It only decreased and postponed the enjoyment of the advantage.

The principle of clean hands requires a plaintiff to be free of any inequitable conduct relative to the controversy. See cases cited at 12 Fla.Jur., Equity § 55. See Faber v. Landman, Fla.App.1960, 123 So.2d 405. There are some recognized limitations

to this principle. 2 Pomeroy, Equity Jurisprudence, § 399 (5th ed. 1941), and cases cited therein

The relation of attorney and client is one of the most important as well as one of the most sacred relations known to the law. It is indeed a relation affected by a very vital public interest which is predicated on trust and confidence. State v. Snyder, 136 Fla. 875, 187 So. 381 [FN2].

> FN2. The preamble to Rule B, of the Code of Ethics Governing Attorneys, 3 F.S. '59, 31 F.S.A., reads as follows:
> 'In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.'

*418 We therefore hold that the public interest requires the intervention of the court, if the defendant-lawyer is unable to satisfy the burden cast upon him to prove that no advantage has been taken by him of his client, notwithstanding the wrongdoing of the plaintiff-client. To apply the principle of clean hands in the instant case would be to ignore the exacting standards placed upon lawyers, who are officers of the court. The principle should not be applied by the court as a shield to protect its own officers if there is a question of unconscionable advantage. It is true that courts should be cautious in affording relief to a complaining party, who is guilty of wrongdoing; but where vital public interests are involved, the door should not be closed.

When the matter is again entertained by the chancellor the issue before him will be whether the attorney has adequately demonstrated that the purchase was for a full and complete consideration and free of all the advantages which an attorney ordinarily has of knowing more of a client's legal rights than the client knows.

Reversed and remanded for further proceedings in accordance with the opinion.

HORTON, C. J., concurs.

CARROLL, CHAS., J., concurs specially

CARROLL, CHAS., Judge (concurring specially).

I concur in the court's reversal of the decree, but I do not agree with the majority's direction for further trial of this case.

It was established that the value of the interest purchased by the lawyer was far more than he paid for it. This is so, even giving effect to the assignment the plaintiff had made of the income for a period.

By the defendant attorney's own testimony, he and the plaintiff discussed the value of plaintiff's share in the estate and estimated it to be in excess of $7,000 after administrative expenses; and the attorney informed the plaintiff that an outsider approached to buy his share in the estate would regard the purchase as a speculation, and probably would not be willing to pay more than one-third of the value of the plaintiff's interest [FN1].

> FN1. The testimony of Walter J. Migoski on this feature was as follows:
> 'Q. Did you have any discussion with him as to the value of his inheritance, the price he should ask? A. Yes, I did; and I made certain notations on my files, and if I may use that file to refresh my memory--my scribbled notes show a gross estimated estate of $113,500. Dividing that into sixteen parts would give an interest of $7,093 as the estimated interest of his share. * * * That, combined with the

> brokerage commission that would have been involved in the sale of those properties [of the estate], the expenses of closing, that I would easily figure on about $20,000 as gross expenses, which would include the brokerage commissions, attorney's fees, administrative fees, and so on. Taking that into consideration, we arrived at a figure of a little over $7,000 as the estimated value of this one-sixteenth interest in the estate. As I mentioned previously----
>
> 'Q. You told him to answer these ads that appeared in the papers, and so on. Had he set any figure, or was it just inquiry? Was he making any figure as to what he should ask for his inheritance? A. I said based upon a figure of $7,500, and that he would probably realize one-third of that. In my opinion, a prospective speculator or buyer would not pay any more than that. And we arrived at $2,500 as a reasonable figure that he could expect to get.
>
> 'When he told me that it was all right, what he would be willing to accept for it, I advised him to try to sell it to other people. He came back to see me and had had no success. I then said I had a Canadian client who perhaps would be interested.'
>
> [After explaining that his Canadian client, though interested, had not purchased plaintiff's interest because he was required to return to Canada on business] '* * * When Mr. Deal came back to me, I then advised him that in my opinion I could sell it, and if he was interested, I would go ahead. He asked me right then and there, could I advance him some money, and I immediately made out a check for him on, I believe--* * *'.

*419 It appears that the plaintiff was so pressed for funds that he was willing to sell on that basis if that was all he could get, and he authorized his attorney to so proceed. The attorney purchased the interest for himself, while the plaintiff was given to believe the attorney was selling it to a third party.

But the plaintiff's lawyer was not uninformed on the value of the plaintiff's interest in the estate. Conceding that an outside party, not having the full knowledge of the estate enjoyed by the plaintiff and his lawyer, understandably would consider it a speculation, and be willing to buy it only at a fraction of its represented value, the situation was different as to the plaintiff's attorney. He knew the value, and under the applicable law he was required to make full disclosure to his client of the circumstances of the sale to him, as well as to pay full value. Is it not reasonable to assume that the plaintiff would have expected to receive more from his lawyer, who knew the estate and its value, than from an uninformed third party he understood was to be the purchaser? Otherwise, why would the lawyer, while buying the interest for himself, allow his client to believe he was selling to an outsider to the estate on a 'speculation' basis?

This record shows, by the plaintiff's testimony, that even when he and his wife signed the papers for transfer of his interest in the estate to Migoski he understood that the transfer was being handled through Mr. Migoski for some 'northern buyer' with whom the attorney was in contact. The testimony given in the case by the defendant attorney does not contain any denial of this. The lawyer testified that he instructed and informed the plaintiff about the papers by which the assignment was being made to him in his name, but his testimony does not disclose what the explanation was, and nowhere does the attorney clearly or flatly state that he informed the plaintiff that it was he, and not a northern buyer as the plaintiff says he understood it, who was buying plaintiff's interest in the estate. In addition to this nondisclosure on the part of the attorney, there were the circumstances of the financial distress of the plaintiff and an established inadequacy of consideration. The result was that the lawyer acquired property of his client under conditions and circumstances in which the courts hold he may not be permitted to retain it.

The law applicable to this situation is well stated in 1 Black, Rescission and Cancellation, § 51 (2d ed. 1929), as follows:

'The relation of attorney and client is likewise one

122 So.2d 415

> which requires the exercise of the utmost good faith and integrity. Any transaction or dealing between them will be closely scrutinized by the courts, and the attorney will not be allowed to retain any unconscientious advantage which he may have gained, even though he was guilty of no actual fraud. It is necessary, in fact, for him to show, in order to defend his position, that there was no fraud or mistake, no undue influence or bad advice on his part, no concealment or misrepresentation, and no inequitable advantage taken of his dominating position. An attorney who bargains with his client in a matter of advantage to himself must, if the transaction is afterwards questioned, show that it was fairly conducted, and that he discharged his duties to his client not only by refraining from all misrepresentation and concealment, but by diligence to see that the client was fully informed of the nature of the transaction and of his own rights and interests, either by independent advice or else by such advice from the attorney himself as he would have given if ***420** he had been a stranger to the transaction. These rules are applicable with perhaps peculiar severity where the attorney buys property from his client or sells to him * * *'.

I therefore, concur in the reversal of the decree, but I can not agree that there is need for any further trial in this matter; and it is my opinion that this court should remand the cause with directions to enter a decree in favor of the plaintiff for rescission of this sale of his interest in the estate to his lawyer.

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Supreme Court of Florida.
Kingsley H. GERLACH, Appellant,
v.
Jess Stanley DONNELLY, as Executrix under the Last Will and Testament of Emmett Donnelly, deceased, Appellee.

Nov. 20, 1957.

Action to cancel notes brought by purported maker against executrix of estate of deceased payee. The Circuit Court, Polk County, D. O. Rogers, J., dismissed complaint, and maker appealed. The Supreme Court, Drew, J., held that evidence supported finding that notes were actually signed by maker, but did not support conclusion that maker had had any knowledge or recollection of signing notes or that they represented any legal obligation of maker to payee.

Reversed.

Thomas and Hobson, JJ., dissented.

West Headnotes

[1] Bills and Notes ⚿517
56k517 Most Cited Cases

[1] Bills and Notes ⚿518(1)
56k518(1) Most Cited Cases
In action to cancel notes brought by purported maker against executrix of estate of deceased payee, evidence supported finding that notes were actually signed by maker but did not support conclusion that maker had had any knowledge
or recollection of signing notes or that notes represented any legal obligation of maker to payee.

[2] Executors and Administrators ⚿433
162k433 Most Cited Cases
In action to cancel notes brought by purported maker against executrix of estate of deceased payee, all defenses which would have been available between parties to note were available. F.S.A. § 674.18.

[3] Bills and Notes ⚿492
56k492 Most Cited Cases
Presumption of delivery of note falls in face of direct proof. F.S.A. § 674.18.

[4] Bills and Notes ⚿517
56k517 Most Cited Cases
In action to cancel notes brought by purported maker against executrix of estate of deceased payee, direct testimony that there was no delivery of notes and that they were procured by fraud overcame presumption of delivery before it arose. F.S.A. §§ 90.05, 674.18.

[5] Witnesses ⚿164(6)
410k164(6) Most Cited Cases
In action to cancel notes brought by purported maker against executrix of estate of deceased payee, dead man's statute did not preclude maker from testifying as to transactions. F.S.A. § 90.05.

[6] Bills and Notes ⚿493(1)
56k493(1) Most Cited Cases
Presumption that every negotiable instrument has been issued for a valuable consideration is rebuttable and may be overcome by proof. F.S.A. § § 90.05, 674.27.

[7] Bills and Notes ⚿518(1)
56k518(1) Most Cited Cases
In action to cancel notes brought by purported maker against executrix of estate of deceased payee, evidence overcame presumption of consideration. F.S.A. §§ 90.05, 674.27.

[8] Attorney and Client ⚿106
45k106 Most Cited Cases
An attorney is under duty at all times to represent

his client and handle his client's affairs with utmost degree of honesty, forthrightness, loyalty and fidelity.

[9] Attorney and Client 123(2)
45k123(2) Most Cited Cases
Burden is upon attorney to establish by clear and convincing evidence fairness of an agreement or transaction purporting to convey a property right from a client to his attorney, and burden is cast upon attorney in such transactions to establish that they were made upon full and adequate consideration.

[10] Attorney and Client 123(2)
45k123(2) Most Cited Cases
In action by client, who was purported maker of notes, to cancel notes brought against executrix of estate of deceased attorney, who was payee, evidence precluded conclusion that obligations were valid and enforceable.

[11] Attorney and Client 123(1)
45k123(1) Most Cited Cases
Attorneys are required to establish fairness and validity of transactions between himself and his client, and courts have power to closely scrutinize and supervise the actions of attorneys.
***494** Arthur A. Simpson, of Macfarlane, Ferguson, Allison & Kelly, Tampa, for appellant.

Boone D. Tillett, Jr., Lake Wale, for appellee.

DREW, Justice.

Emmett Donnelly, a member of the Bar of Florida, was arrested on June 8, 1954 for complicity in a conspiracy to murder Kingsley H. Gerlach, his client of more than 23 years. A search was made of Mr. Donnelly's office at the time of his arrest and in his safe the sheriff found two promissory notes bearing the signature of Kingsley H. Gerlach. Both were demand notes payable to Emmett Donnelly. One for $20,000 was dated April 21, 1950 and the other for $12,000 was dated April 19, 1952 and each provided for interest at 5% per annum until paid. At the time of the search Mr. Gerlach was on the outside of the office of Mr. Donnelly. The sheriff testified that Mr. Donnelly made no comment when asked about the notes but when they were exhibited to Mr. Gerlach, the sheriff said 'I remember Mr. Gerlach being very much offended at the presence of those notes and he made some remark and those notes seemed to disgust him.' The notes were retained by the authorities as evidence.

Mr. Donnelly was released on bond. Sometime during the following day, he died of gunshot wounds which were--in the opinion of the authorities--self-inflicted.

During the latter part of the month this suit was instituted for the purpose of cancelling the two notes. Gerlach alleged in his complaint that Donnelly had acted as his attorney for many years and had handled many legal transactions for him; that during said time he, the said Gerlach, had signed numerous documents prepared by the said Donnelly and submitted to him for signature. He further alleged that he had the utmost confidence in Donnelly and because of this he signed many documents without reading them. He alleged that he never knew of the existence of said notes until June 8, 1954. Gerlach further alleged that he was not indebted to Donnelly in any amount whatsoever and that said notes were obtained from him in some manner unknown to him and, if signed by him, he had no knowledge or recollection of ever having signed the same.

The executrix answered asserting that the notes which were the subject matter of the litigation here were in the possession of the county solicitor of Polk County; she asserted her lack of knowledge of many of the allegations in the complaint and denied others. She directly alleged that Emmett Donnelly was for a number of years a practicing attorney at Lake Wales, Florida and that during said period of time handled various and sundry legal transactions for the plaintiff Gerlach. She further alleged that the said Gerlach executed the said two notes, describing them.

On the issues so made the cause was tried before the circuit judge and resulted in a decree holding

that the signatures on the promissory notes were the genuine signatures of plaintiff Gerlach and further 'that the plaintiff has failed to prove his case by the greater weight of the testimony; that this suit is based on two promissory notes, one for $20,000 and one for $12,000, both of which are presumptively valid and based on a good and sufficient consideration. The burden of proving lack of consideration and that the signatures were not the plaintiff's thereon is on the plaintiff which he has failed to sustain.' The court thereupon decreed that the relief prayed for be denied and dismissed the complaint at the cost of plaintiff. It is from ***495** this decree that this appeal has been prosecuted.

The essential facts developed at the hearing of this cause and pertinent to its ultimate disposition are as follows: In the early part of 1954 the appellant Gerlach learned of the alleged existence of a conspiracy on the part of Donnelly and others to murder him. He was placed under the surveillance of guards while the investigation of the conspiracy was being made by the law enforcement agencies.

Early in March, 1954, realizing the necessity of procuring legal advice, he employed Mr. Chester Ferguson of Tampa and related the facts to him. Mr. Ferguson testified that after taking the necessary precaution of preparing a new will and revoking any possible outstanding powers of attorney and having Mr. Gerlach execute them, he forwarded to Mr. Donnelly a letter advising Mr. Donnelly of his employment by Mr. Gerlach and requesting the delivery of any of Gerlach's papers in the possession of Donnelly. Among other things this letter stated: 'On questioning Mr. Gerlach he stated that he had paid all bills for services rendered by you to date and that he was not indebted to you in any amount whatsoever. So that this may be a matter of record, I will appreciate your confirming this fact.' A few days later Mr. Donnelly replied to the letter stating, 'Mr. Gerlach is not indebted to this office for any current legal services.' Parenthetically, it should be here observed that at the time of this exchange of correspondence and of several letters which followed in rapid succession relating to various matters and sundry papers belonging to Gerlach and in the possession of Mr. Donnelly, Mr. Ferguson had no knowledge whatever of the existence of said notes nor, according to the positive testimony of Mr. Gerlach, did he. Mr. Ferguson further testified that in addition to the letter he received from Mr. Donnelly above mentioned, that Mr. Donnelly telephoned him in this general period of time inquiring as to why Mr. Gerlach had employed other counsel. During the course of this conversation Mr. Ferguson testified, 'I wanted to be certain that Mr. Gerlach was not indebted to him in any way because I didn't want to represent a client that was indebted to another lawyer and my recollection is that Mr. Donnelly assured me that Mr. Gerlach didn't owe him anything.' This conversation took place and these letters were exchanged in March and April of 1954 whereas the notes which were the foundation of this cause of action were not discovered until the arrest of Mr. Donnelly the following June 8th. It is pertinent to observe and we reiterate that at the time they were discovered, Mr. Donnelly refused to discuss them saying that he did not desire to do so until he had consulted his attorney. Donnelly, of course, knew at that time that he was under indictment for conspiracy to murder Mr. Gerlach. Moreover Mr. Gerlach testified that he had paid Donnelly from time to time 'many thousands of dollars' for legal services rendered for him. The last payment made to Mr. Donnelly was in June of 1952 in the sum of $1,500, at which time Mr. Gerlach also paid Mr. Donnelly $100 for expenses in connection with a trip concerning a case in the Supreme Court. Moreover, an extensive investigation was made of the records of Mr. Donnelly, following his apparent suicide, by accountants employed for that purpose. No credible evidence was found among Donnelly's books, records or possessions which in any way sheds any light upon or relates to these outstanding obligations. Mr. Donnelly kept no detailed records of accounts. There was no transaction among those handled for Mr. Gerlach upon which it could be inferred that any such fee could have been logically earned. Although these notes were apparently in existence, one for at least four years prior to Mr. Donnelly's death, and the other for two years, he had never mentioned their existence or the fact that he possessed them to any of his friends or

associates. On occasions he had mentioned some sort of indebtedness from Gerlach but this evidence is so vague and inconclusive as to have little if any probative ***496** value. During the whole period of time that these notes were in the possession of Donnelly, no demand was ever made for payment nor was any interest ever paid thereon. The record further establishes that during this whole period of time Mr. Gerlach had on deposit in the local bank an average daily balance in an amount in excess of that due upon said obligations, both principal and interest.

It is suggested in the answer that these notes represent an amount due for legal services and were executed to secure the payment thereof. There is no suggestion in the record that the relationship of these parties was anything other than attorney and client. The testimony of a witness for the executrix-- an attorney who was called by Mr. Donnelly in the early stages of the investigation of the conspiracy--was that Mr. Donnelly had intimated to him that Mr. Gerlach was indebted to him for a substantial sum of money for services in connection with a legal matter arising out of a claim against his brother's estate and in connection with other litigation between Gerlach and his wife. No suggestion is made in this record that this obligation, if actually one existed, was other than for services growing out of the relationship of attorney and client.

[1] We think the lower court misconstrued the legal effect of the evidence before it and placed too great an emphasis on the proposition of the *presumptive validity* of these notes which he found to be signed by Gerlach. The evidence amply supports the finding of the lower court that the notes were actually signed by Gerlach but the record does not support the conclusion that Gerlach had any knowledge or recollection of signing the notes or that they represented any legal obligation of Gerlach to Donnelly. The prima facie case made by introduction of the notes in evidence was overcome by the testimony of Mr. Ferguson and Mr. Gerlach and the witnesses who testified for him.

[2] The executrix of Donnelly's estate stands in no better position than Donnelly would have stood had he not died and had this litigation been between him and Gerlach. So far as this case is concerned, it is a suit between the original maker and payee of a promissory note. All defenses which would have been available between the parties to the note are available here. No question of a holder in due course is in any way involved in this litigation.

Section 674.18, Florida Statutes 1955, F.S.A. which raises the presumption of delivery of a promissory note, by its very terms limits its effect. The statute provides:

> 'When incomplete and revocable
>
> 'Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery in order to be effectual must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. *And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.*' (Emphasis added.)

[3] The statute provides that the presumption exists only until the contrary is proven. Ergo, the presumption falls in the face of direct proof. Gerlach's testimony that he never knowingly signed the notes ***497** nor knew of their existence until they were discovered upon Donnelly's arrest and that he owed nothing to Donnelly; Ferguson's testimony that Donnelly told him that Gerlach was not indebted to him; the letter from Donnelly stating that Gerlach was not indebted for any 'current legal services'; Donnelly's refusal to discuss the notes when they were discovered; Gerlach's reaction when exhibited the notes, as well as the

circumstances of the conspiracy of Donnelly to murder Gerlach and the other testimony delineated above, completely overcame the presumption of delivery of these obligations.

[4] If this were a suit upon the notes brought by Donnelly against Gerlach, the introduction of the notes in evidence would be sufficient to eliminate the necessity of proof of delivery. But in this case, brought against the estate of Donnelly to cancel these notes as fraudulent, the direct testimony that there was no delivery of the instruments and that they were procured by fraud overcomes the presumption before it arises.

[5][6][7] There is some discussion in the brief about the dead man's statute, F.S.A. § 90.05, but this statute does not preclude the plaintiff Gerlach testifying as to the transaction. The reason that this is true is set forth in Security Trust Company v. Calafonas, Fla.1953, 68 So.2d 562, 563, wherein we quoted with approval the following language from Blount v. Blount, 158 Ala. 242, 48 So. 581, 582, 21 L.R.A.,N.S., 755:

> "* * * A transaction between two parties necessarily implies action, consent, knowledge or acquiescence on the part of both. Hence, if a grantor never in truth and in fact executed or attempted to execute an alleged deed to a given grantee, he is not and cannot be a party to the transaction, which on its face purports to be the execution by him of a deed to the named grantee.
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> * * *
>
> "We are not now writing as to the probative force of such proof of execution, filing, and recording of the deed, but as to the conclusiveness of such matters to show a transaction between the grantor and grantee. We hold that the grantor in such document, no matter what its nature, character, or recitals, is not precluded, by such proof, such filing, and such recording, from showing that his alleged signature thereto and his acknowledgment thereto are forgeries and frauds, perpetrated without his knowledge or consent. If this be not true, one man can acquire, for his estate after his death, all the property of another, without the knowledge or consent of such other, and yet do it by due process of law. We say the law is not, and ought not to be such as to allow such proceedings or results."

The trial court held in the quoted portion of its decree that the burden of showing lack of consideration was on the plaintiff. The negotiable instruments law (the applicable section being 674.27, F.S.A.) provides that every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration. This is a presumption, like delivery, which may be overcome by proof. It is a rebuttable presumption. Florida National Bank and Trust Co. of Miami v. Brown, Fla.1950, 47 So.2d 748. The presumption of consideration as well as delivery is rebuttable under the statute as between the original parties to the transaction. This presumption having been here overcome by overwhelming evidence and there being no testimony which in our judgment has probative force sufficient to overcome the direct and positive testimony of the appellant here that there was no consideration and that there had been no delivery, the conclusion is inescapable that the decree of the lower court was the result of misconstruing the legal effect of the evidence and was therefore erroneous.

There is another reason why this decree must be reversed.

***498** [8][9][10][11] There is no relationship between individuals which involves a greater degree of trust and confidence than that of attorney and client. The relationship has its very foundation in the trust and confidence the client reposes in an attorney selected to represent him. The attorney is under a duty at all times to represent his client and handle his client's affairs with the utmost degree of honesty, forthrightness, loyalty and fidelity. Business transactions between attorney and client are and always ought to be subject to the closest scrutiny because of this underlying relationship. It is an ancient and firmly established principle of the law that the burden is placed upon an attorney to established by clear and convincing evidence the fairness of an agreement or transaction purporting to convey a property right from a client to his attorney. Moreover, the burden is cast upon the

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attorney in transactions of this kind to establish that such was made upon full and adequate consideration. Bolles v. O'Brien, 1912, 63 Fla. 342, 59 So. 133. See also Williams v. Bailey, 1915, 69 Fla. 225, 67 So. 877; Halstead v. Florence Citrus Growers' Ass'n, 1932, 104 Fla. 21, 139 So. 132; and Renno v. Sigmon, 1941, 148 Fla. 229, 4 So.2d 11.

The latest expression of this Court upon the subject is found in Brass v. Reed, Fla. 1953, 64 So.2d 646, 648, where among other things, we said:

> 'The only difference in dealings between attorney and client and other people is that relationship between attorney and client is very intimate, close, personal and confidential, and an attorney is required to exercise in all his dealings with his client a much higher standard than is required in business dealings.'

With these principles in mind, there is no view which could be taken of the evidence in this cause upon which a conclusion could be lawfully reached that these obligations were valid and enforceable. It imposes no undue hardship upon an attorney to require him to justify the fairness and validity of transactions between him and his client, and this rule vests in the courts the power to closely scrutinize and supervise the actions of those who are its officers.

This cause is reversed with directions to enter a decree in accordance with the views herein expressed.

TERRELL, C. J., ROBERTS and THORNAL, JJ., and STURGIS, District Judge, concur.

THOMAS and HOBSON, JJ., dissent.

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C

Briefs and Other Related Documents

District Court of Appeal of Florida,
Third District.
SUSAN FIXEL, INC., Appellant,
v.
ROSENTHAL & ROSENTHAL, INC., Appellee.
No. 3D02-1139.

April 2, 2003.

Wholesaler brought action against its factor, alleging, inter alia, breach of fiduciary duty, fraud in the inducement, fraudulent misrepresentation, and negligent misrepresentation. The Circuit Court, Miami-Dade County, Eleanor L. Schockett, J., granted factor's motion to dismiss. Wholesaler appealed. The District Court of Appeal, Nesbitt, Senior Judge, held that: (1) factually intensive nature of implied fiduciary duty inquiry precluded dismissal of claim that factor breached fiduciary duty to wholesaler; (2) wholesaler adequately alleged cause of action, so as to avoid dismissal, for fraud in the inducement; (3) wholesaler adequately alleged cause of action, so as to avoid dismissal, for negligent misrepresentation; and (4) tort claims brought by wholesaler against factor were not barred by economic loss rule.

Reversed and remanded.

West Headnotes

[1] Pretrial Procedure ⚿622
307Ak622 Most Cited Cases
A motion to dismiss tests whether the plaintiff has stated a cause of action.

[2] Appeal and Error ⚿893(1)
30k893(1) Most Cited Cases
Because a ruling on a motion to dismiss for failure to state a cause of action is an issue of law, it is reviewable on appeal by the de novo standard of review.

[3] Pretrial Procedure ⚿679
307Ak679 Most Cited Cases

[3] Pretrial Procedure ⚿681
307Ak681 Most Cited Cases
When determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party.

[4] Pretrial Procedure ⚿681
307Ak681 Most Cited Cases
Consideration of potential affirmative defenses or speculation about the sufficiency of evidence which plaintiff will likely produce on the merits is wholly irrelevant and immaterial in ruling on motion to dismiss.

[5] Fraud ⚿7
184k7 Most Cited Cases
Fiduciary relationships may be implied in law and such relationships are premised upon the specific factual situation surrounding the transaction and the relationship of the parties.

[6] Pretrial Procedure ⚿680
307Ak680 Most Cited Cases
Factually intensive nature of implied fiduciary duty inquiry precluded dismissal for failure to state cause of action of wholesaler's claim that factor breached fiduciary duty to wholesaler.

[7] Pleading ⚿248(17)
302k248(17) Most Cited Cases
Failure of wholesaler to assert claim for breach of fiduciary duty against its factor in second amended complaint did not preclude wholesaler from

asserting claim in third amended complaint, where rule governing amended and supplemental pleadings embodied liberal amendment policy, and there was an absence of any prejudice to factor or abuse of amendment privilege by wholesaler. West's F.S.A. RCP Rule 1.190.

[8] Fraud 3
184k3 Most Cited Cases
To state a claim for fraud in the inducement, a plaintiff must allege (1) a misrepresentation of a material fact; (2) knowledge by the person making the statement that the representation is false; (3) intent by the person making the statement that the representation would induce another to rely and act on it; and (4) that the plaintiff suffered injury in justifiable reliance on the representation.

[9] Fraud 32
184k32 Most Cited Cases
If fraud occurs in connection with misrepresentations, statements or omissions which cause a party to enter into a transaction, then such fraud is fraud in the inducement and survives as an independent tort.

[10] Factors 43
167k43 Most Cited Cases
Wholesaler adequately alleged cause of action against its factor, so as to avoid dismissal, for fraud in the inducement, where wholesaler alleged that factor's false material representations were made to induce wholesaler to enter into agreement with manufacturer, that wholesaler reasonably relied upon the representations in entering into agreement, and that, as a result, wholesaler was damaged.

[11] Fraud 3
184k3 Most Cited Cases
The elements of a fraud claim are (1) a false statement concerning a specific material fact; (2) the maker's knowledge that the representation is false; (3) an intention that the representation induce another's reliance; and (4) consequent injury by the other party acting in reliance upon the representation.

[12] Factors 43
167k43 Most Cited Cases
Wholesaler adequately alleged cause of action against its factor, so as to avoid dismissal, for negligent misrepresentation, where wholesaler alleged that factor had a duty to wholesaler to use due care in disclosing financial information about manufacturer with which factor also had a business relationship, that factor failed to use such due care, and that wholesaler justifiably and detrimentally relied upon the false information negligently supplied by factor.

[13] Factors 43
167k43 Most Cited Cases
Fraud and misrepresentation claims brought by wholesaler against its factor were not barred by economic loss rule, where the various claims were distinct and independent from the contractual relationships between the parties.
***205** Adorno & Yoss and Samantha N. Tesser, Fort Lauderdale, for appellant.

Ferrell, Schultz, Carter, Zumpano & Fertel and Alan Fertel, Miami, and H. Eugene Lindsey, for appellee.

Before COPE and WELLS, JJ., and NESBITT, Senior Judge.

NESBITT, Senior Judge.

[1][2][3][4] Appellant Susan Fixel, Inc. ("Fixel"), a Florida corporation engaged in the business of wholesaling clothes, filed a Third Amended Complaint which included, in Counts II-V, claims against its factor [FN1] Appellee Rosenthal & Rosenthal, Inc. ("Rosenthal"), for breach of fiduciary duty, fraud in the inducement, fraudulent misrepresentation and negligent misrepresentation. ***206** Upon Rosenthal's motion to dismiss, the trial court dismissed all of the claims for failure to state a cause of action, found that there was no fiduciary duty between Rosenthal and Fixel, and, noting it was the Third Amended Complaint, ruled the dismissals were with prejudice. The trial court gave Fixel leave "to attempt to state a cause of action sounding in contract" against Rosenthal. We reverse.

FN1. Black's Law Dictionary (7th ed.1999), defines a factor, in part, as one who buys accounts receivable at a discount.

A motion to dismiss tests whether the plaintiff has stated a cause of action. Because a ruling on a motion to dismiss for failure to state a cause of action is an issue of law, it is reviewable on appeal by the de novo standard of review. When determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party.

Bell v. Indian River Mem. Hosp., 778 So.2d 1030, 1032 (citations omitted). *See also Siegle v. Progressive Consumers Ins. Co.*, 819 So.2d 732, 734-35 (Fla.2002); *Ralph v. City of Daytona Beach*, 471 So.2d 1, 2 (Fla.1985); *Orlando Sports Stadium, Inc. v. State*, 262 So.2d 881, 883 (Fla.1972); *Alvarez v. E & A Produce*, 708 So.2d 997, 999 (Fla. 3d DCA 1998). Consideration of potential affirmative defenses or speculation about the sufficiency of evidence which plaintiff will likely produce on the merits is wholly irrelevant and immaterial to deciding such a motion. *Barbado v. Green & Murphy, P.A.*, 758 So.2d 1173 (Fla. 4th DCA 2000); *Abrams v. General Ins. Co.*, 460 So.2d 572 (Fla. 3d DCA 1984); *Parkway Gen. Hosp., Inc. v. Allstate, Ins. Co.*, 393 So.2d 1171 (Fla. 3d DCA 1981).

Casting the allegations of the Third Amended Complaint in a light most favorable to Fixel, and accepting them as true, the claims against Rosenthal are based upon the following facts:

In 1997, Fixel and Rosenthal entered into a Factoring Agreement, under which Rosenthal purchased Fixel's receivables based upon a credit-risk evaluation and Fixel drew funds according to an agreed advance rate. Fixel and Rosenthal also entered into a letter agreement, pursuant to which Rosenthal agreed to make inventory advances to Fixel up to $150,000.00, secured by a security interest in Fixel's inventory. The parties established an ongoing relationship in which Rosenthal knew that Fixel placed trust and confidence in Rosenthal, and that, separate from the relationship established by the terms of the parties' contracts, Rosenthal assumed a role of superiority and exerted influence over Fixel, which relied upon Rosenthal for its counsel and guidance with regard to its business dealings.

During this time period, Rosenthal also was the factor of C & L Textile Corporation ("C & L"), a clothing manufacturer. By virtue of its relationship with C & L, Rosenthal knew that C & L was experiencing deep financial difficulties, rendering it difficult for C & L to support and maintain its existing business. Nevertheless, Rosenthal, for its own financial benefit, wanted to create a relationship between Fixel and C & L, even though Rosenthal knew that such an agreement was not in Fixel's best interest. Rosenthal, exerting extensive control, pressured Fixel to enter into a contract with C & L by threatening to call in Fixel's inventory loan and terminate its factoring relationship with Fixel, which on short notice would have immediately put Fixel out of business. This pressure was combined with repeated false representations from certain of Rosenthal's employees and representatives throughout September and October, 1998 concerning C & L's financial status and ability to ***207** handle Fixel's business, including representations that:

a. "They [C & L] have an open checkbook with us [Rosenthal];"

b. Fixel would be getting a financially secure partner with C & L;

c. "C & L had the financial wherewithal" to produce and ship Fixel's inventory; and

d. "C & L could do whatever Fixel needed them to do financially."

Rosenthal undertook activities beyond the performance of its contractual duties in advising and guiding Fixel. In October of 1998, relying upon Rosenthal's false representations (which Fixel alleges was reasonable in light of its relationship of trust and confidence with Rosenthal), and in response to the pressure Rosenthal exerted, Fixel entered into a written agreement with C & L (the "C & L Agreement"), pursuant to which C & L was to

be responsible for Fixel's production and shipping. Meanwhile, Rosenthal and C & L structured a financial arrangement between themselves, without the prior knowledge or consent of Fixel, pursuant to which Rosenthal and C & L would benefit economically from C & L's new business relationship with Fixel. Without Fixel's consent, Rosenthal deducted 15% of the money it was advancing to C & L for shipments and applied this against money allegedly owed by Fixel to Rosenthal. Again, without Fixel's consent, C & L would then deduct the 15% from the money owed to Fixel from the shipped orders.

C & L did not, in fact, have the credit worthiness or cash resources, or the "open checkbook" with Rosenthal, needed to provide the goods and services which it agreed to provide for Fixel, which caused damages to Fixel. [FN2] Rosenthal induced and coerced Fixel to enter into the C & L Agreement for Rosenthal's own economic benefit to the detriment of Fixel. Rosenthal used its inside superior knowledge as C & L's factor, its relationship of trust, influence and superiority over Fixel, and Fixel's reliance upon Rosenthal's counsel and guidance, to orchestrate the C & L Agreement.

> FN2. Fixel has also sued C & L for breach of contract.

Rosenthal argues that Fixel's claims for breach of fiduciary duty, fraud in the inducement, fraudulent misrepresentation and negligent misrepresentation are insufficient as a matter of law because its relationship with Fixel is governed by the parties' contracts. Rosenthal further asserts Fixel's claims can only be asserted as breach of contract claims, that the economic loss rule precludes the various tort claims, and that there is, as a matter of law, no fiduciary duty between Rosenthal and Fixel.

[5] In *Doe v. Evans,* 814 So.2d 370 (Fla.2002), a fiduciary relationship was characterized as follows:

> If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a predicate for relief.

814 So.2d at 374, quoting *Quinn v. Phipps,* 93 Fla. 805, 113 So. 419, 421 (Fla.1927). *See also Dale v. Jennings,* 90 Fla. 234, 107 So. 175 (1925); *First Nat. Bank and Trust Co. v. Pack,* 789 So.2d 411 (Fla. 4th DCA 2001); *Capital Bank v. MVB, Inc.,* 644 So.2d 515, 518 (Fla. 3d DCA 1994), *rev. denied* 654 So.2d 918 (Fla.1995). Fiduciary relationships may be implied in law and such relationships are "premised upon the specific factual situation surrounding the transaction and the relationship of the parties." *Id.* at 518; *Doe v. Evans, supra,* at ***208** 374. *See also Hooper v. Barnett Bank of West Florida,* 474 So.2d 1253 (Fla. 1st DCA 1985), *decision approved,* 498 So.2d 923 (Fla.1986).

Depending upon the specific factual circumstances, courts have found the existence of fiduciary relationships between borrowers and lenders. *Barnett Bank v. Hooper,* 498 So.2d 923 (Fla.1986); *First Nat. Bank and Trust Co. v. Pack, supra; Capital Bank v. MVB, Inc., supra* at 519 (and numerous authorities cited therein). Such relationships have been found "where the bank knows or has reason to know that the customer is placing trust and confidence in the bank and is relying on the bank so to counsel and inform him." *Capital Bank v. MVB, Inc., supra* at 519, quoting *Klein v. First Edina Nat'l Bank,* 293 Minn. 418, 196 N.W.2d 619 (1972) Additionally, "special circumstances" may impose a fiduciary duty where the lender takes on extra services for a customer, receives any greater economic benefit than from a typical transaction, or exercises extensive control. *Capital Bank v. MVB, Inc., supra* at 519, citing *Tokarz v. Frontier Fed. Sav. & Loan Ass'n,* 33 Wash.App. 456, 656 P.2d 1089 (1982).

[6][7] Fixel asserts a similar claim for breach of fiduciary duty against Rosenthal, its factor, claiming Rosenthal knew Fixel placed trust and confidence in Rosenthal and relied upon Rosenthal for its advice and counsel, and that Rosenthal took on "extra services" in its orchestration of the C & L Agreement and exercising extensive control over Fixel. Fixel alleges Rosenthal breached the fiduciary duty which arose between them by: (a) coercing Fixel into entering a business relationship

with C & L to benefit Rosenthal's own financial interests to the detriment of Fixel; (b) repeatedly misrepresenting C & L's financial ability to produce and ship Fixel's inventory; (c) not acting in Fixel's best interest and not disclosing accurate financial information regarding C & L; (d) benefitting from the C & L Agreement; and (e) taking unfair advantage of Fixel. Such a claim is not precluded as a matter of law. *See, e.g., Dresses for Less, Inc. v. CIT Group/Commercial Serv., Inc.*, 2002 WL 31164482 (S.D.N.Y.)(fiduciary duty claim against factor stated a cause of action); *Resnick v. Resnick,* 722 F.Supp. 27 (S.D.N.Y.1989)(same). *See also* Restatement (Second) of Agency § 14N, cmt. a (1958) (listing "factors" as among those independent contractors who are "fiduciaries"). Because of the factually intensive nature of an implied fiduciary duty inquiry, such claims are better addressed by a summary judgment motion, or at trial, than on a motion to dismiss. *Dresses for Less, Inc. v. CIT Group/Commercial Serv., Inc., supra,* *16-17. *See, e.g., Bonnie & Company Fashions, Inc. v. Bankers Trust Co.,* 945 F.Supp. 693, 712 (S.D.N.Y.1996)(on summary judgment motion, evidence submitted was insufficient to establish extra-contractual fiduciary duty between borrower and bank/factor). [FN3]

> FN3. We reject Rosenthal's contention that Fixel was precluded from asserting a claim for breach of fiduciary duty in the Third Amended Complaint because it failed to do so in the Second Amended Complaint. Given the liberal amendment policy embodied by Rule 1.190 Fla. R. Civ. P., and the absence of any prejudice to Rosenthal or abuse of the amendment privilege by Fixel, allowing the claim to be asserted in the Third Amended Complaint was appropriate. *Hall v. Wojechowski,* 312 So.2d 204 (Fla. 4th DCA 1975); *Penn Cork and Closures, Inc. v. Piggyback Shippers Ass'n of Florida, Inc.,* 281 So.2d 46 (Fla. 3d DCA 1973).

[8][9][10] Fixel alleges that Rosenthal's false material representations were made to induce Fixel to enter into the C & L Agreement, that Fixel reasonably relied ***209** upon the representations in entering into the C & L Agreement, and, as a result, was damaged. To state a claim for fraud in the inducement, a plaintiff must allege (1) a misrepresentation of a material fact; (2) knowledge by the person making the statement that the representation is false; (3) intent by the person making the statement that the representation would induce another to rely and act on it; and (4) that the plaintiff suffered injury in justifiable reliance on the representation. *Samuels v. King Motor Co. of Fort Lauderdale,* 782 So.2d 489, 497 (Fla. 4th DCA 2001); *Palumbo v. Moore,* 777 So.2d 1177, 1179 (Fla. 5th DCA 2001); *W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.,* 728 So.2d 297, 304 (Fla. 1st DCA 1999); *Hillcrest Pacific Corp. v. Yamamura,* 727 So.2d 1053, 1055 (Fla. 4th DCA 1999); *Kutner v. Kalish,* 173 So.2d 763 (Fla. 3d DCA 1965).

> If the fraud occurs in connection with misrepresentations, statements or omissions which cause a party to enter into a transaction, then such fraud is fraud in the inducement and survives as an independent tort.

Allen v. Stephan Co., 784 So.2d 456, 457 (Fla. 4th DCA 2000). We conclude that Fixel adequately alleged a cause of action for fraud in the inducement.

[11] Similarly, the elements of a fraud claim are (1) a false statement concerning a specific material fact; (2) the maker's knowledge that the representation is false; (3) an intention that the representation induce another's reliance; and (4) consequent injury by the other party acting in reliance upon the representation. *Lopez-Infante v. Union Cent. Life Ins. Co.,* 809 So.2d 13, 15 (Fla. 3d DCA 2002); *Ward v. Atlantic Sec. Bank,* 777 So.2d 1144, 1146 (Fla. 3d DCA 2001). We conclude that Fixel adequately alleged a cause of action for fraudulent misrepresentation.

[12] Alternatively, based on the alleged fiduciary relationship, Fixel alleges that Rosenthal had a duty to Fixel to use due care in disclosing financial information about C & L, that it failed to do so, and that Fixel justifiably and detrimentally relied upon the false information negligently supplied by

Rosenthal. Fixel's allegations adequately state a cause of action for negligent misrepresentation. *Gilchrist Timber Co. v. ITT Rayonier,* 696 So.2d 334 (Fla.1997)

[13] The various tort claims as alleged by Fixel are distinct and independent from the contractual relationships between the parties, and, as such, are not barred by the economic loss rule. *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.,* 685 So.2d 1238 (Fla.1996)(fraudulent inducement is not barred by economic loss rule); *Allen v. Stephan Co.,* 784 So.2d 456 (Fla. 4th DCA 2000)(economic loss rule does not bar tort actions for negligent misrepresentation and fraudulent inducement); *Invo Florida, Inc. v. Somerset Venturer, Inc.,* 751 So.2d 1263 (Fla. 3d DCA 2000)(economic loss rule does not abolish cause of action for breach of fiduciary duty, even if there is an underlying contract); *Clayton v. State Farm Mut. Auto. Ins. Co.,* 729 So.2d 1012 (Fla. 3d DCA 1999)(torts independent of contractual breach, such as fraudulent inducement, not barred by economic loss rule). *See also Moransais v. Heathman,* 744 So.2d 973 (Fla.1999); *PK Ventures, Inc. v. Raymond James & Assocs., Inc.,* 690 So.2d 1296 (Fla.1997).

The matters raised by Rosenthal in opposition to Fixel's claims, including that it was contractually permitted to deduct certain monies flowing between Fixel and C & L, are in the nature of defenses or issues which may be addressed by way of summary judgment, depending on the development of the factual record. We do not ***210** opine about whether Fixel will be able to present evidence to support its allegations, or whether the relationship and dealings between Fixel and Rosenthal gave rise to a fiduciary duty. We simply hold that the dismissal of these claims for failure to state causes of action was erroneous.

We reverse the order of dismissal, and remand this matter to the trial court for further proceedings consistent with this opinion.

842 So.2d 204, 28 Fla. L. Weekly D847

Briefs and Other Related Documents (Back to top)

- 3D02-1139 (Docket) (Apr. 19, 2002)

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C

United States Court of Appeals, Fifth Circuit.
Geneva Ann SINGLETON, Plaintiff-Appellant,
v.
Percy FOREMAN, Defendant-Appellee.
No. 29195.

Dec. 1, 1970.

Diversity action by client against discharged attorney to recover jewelry given as security under contingent fee agreement and to recover for alleged emotional distress client suffered by reason of attorney's conduct following discharge after attorney refused to permit client to settle divorce action. The United States District Court for the Middle District of Florida, Joseph P. Lieb, Chief Judge, rendered judgment of dismissal on the pleadings, and plaintiff appealed. The Court of Appeals, Goldberg, Circuit Judge, held that complaint that attorney, who allegedly caused client to enter into contingent fee agreement at time client was distraught over proposed divorce action, refused to return jewelry and entered on course of abuse and oppression causing client extreme mental pain and suffering, stated cause of action against attorney, under Florida law, both in contract and tort.

Reversed and remanded.

West Headnotes

[1] Federal Civil Procedure ⚿1771
170Ak1771 Most Cited Cases
(Formerly 170Ak1)
Dismissal of action on the pleadings is not looked on favorably.

[2] Federal Civil Procedure ⚿1773
170Ak1773 Most Cited Cases

[2] Federal Civil Procedure ⚿1829
170Ak1829 Most Cited Cases
A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of claim; on motion to dismiss on the pleadings it must be assumed that all of the allegations of the complaint are true.

[3] Attorney and Client ⚿129(2)
45k129(2) Most Cited Cases
Complaint that attorney, who allegedly caused client to enter into contingent fee agreement at time client was distraught over proposed divorce action and who had been discharged as counsel, refused to return jewelry given as security for retainer and entered on course of abuse and oppression causing client extreme mental pain and suffering, stated cause of action against attorney, under Florida law, both in contract and tort.

[4] Federal Courts ⚿410
170Bk410 Most Cited Cases
(Formerly 106k359)
Florida conflicts law was to be applied in determining whether Florida or Tennessee law should be applied in Florida diversity action by client against attorney involving contract which had been entered into in Tennessee and under which attorney had agreed to represent client in forthcoming Florida divorce action.

[5] Attorney and Client ⚿147
45k147 Most Cited Cases
Florida law governs validity and interpretation of contingent fee contract, which had been entered into in Tennessee by attorney and client, under which attorney had undertaken to represent client in forthcoming Florida divorce action and on which client sued attorney in Florida court following discharge of attorney.

[6] Attorney and Client ⚿147

45k147 Most Cited Cases
Contract for contingent fee in divorce cases are void and unenforceable under Florida law.

[7] Contracts ⚿138(1)
95k138(1) Most Cited Cases

[7] Contracts ⚿139
95k139 Most Cited Cases
Under Florida law, courts generally will not aid either party to an illegal contract but will leave them where they place themselves; however, Florida law recognizes an exception to such rule when law or public policy requires action by the courts, or where the parties are not in pari delicto.

[8] Attorney and Client ⚿147
45k147 Most Cited Cases
Client, who had merely entered into contingent fee contract under which attorney undertook to represent client in forthcoming Florida divorce action was not in pari delicto with attorney, who allegedly subsequently entered on course of abuse and oppression directed toward client causing client extreme mental pain and suffering and, thus, Florida courts would go to aid of client, who discharged attorney, to extent of returning consideration client had tendered in performance of her part of the invalid contract.

[9] Contracts ⚿171(1)
95k171(1) Most Cited Cases
Under Florida law, a contract should be treated as entire when, by a consideration of its terms, nature, purpose, each and all of its parts appear to be interdependent and common to one another and to the consideration; a contract is indivisible where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement.

[10] Contracts ⚿137(1)
95k137(1) Most Cited Cases
Where retainer and contingent fee were related to whole object of employment of attorney, i. e., representation of client in forthcoming Florida divorce action, contract was not subject to divisible classification and invalid contingent fee made entire contract void and unenforceable under Florida law and, thus, retainer could not be allowed to stand on ground that contract was divisible.

[11] Attorney and Client ⚿76(1)
45k76(1) Most Cited Cases

[11] Attorney and Client ⚿106
45k106 Most Cited Cases
Implicit in every attorney-client contract under Florida law is a covenant by the attorney that he will conduct himself according to customary professional standards; the attorney is under a duty to represent his client with the utmost degree of honesty, forthrightness, loyalty and fidelity and must resign if at any time in the course of litigation his interest in the suit becomes adverse or hostile to his client.

[12] Attorney and Client ⚿101(1)
45k101(1) Most Cited Cases
An attorney never, under Florida law, has right to prohibit his client from settling an action in good faith.

[13] Attorney and Client ⚿76(1)
45k76(1) Most Cited Cases
If true, attorney who allegedly exploded into torrent of abuse and refused to allow client to settle pending divorce action and threatened to ruin both client and her husband, allowed himself to be in economic and personal hostility to client, the wife, and thus was, under Florida law, under legal duty to withdraw and, if true, client, who sued on contingent fee contract, had absolute right to fire attorney and terminate any rights which he might have had under contract.

[14] Contracts ⚿261(1)
95k261(1) Most Cited Cases
Under Florida law, when one party to a contract unjustifiably refuses to perform a substantial part of his duty under the contract, the other party has the right to rescind the contract and recover what he has paid pursuant to the agreement; rule applies equally to situations where there is an unsuccessful attempt to perform.

[15] Damages ⚿57.11

115k57.11 Most Cited Cases
(Formerly 115k54, 115k49)
Florida law recognizes a cause of action for insulting and abusive language resulting in mental distress if the conduct was sufficient to cause severe emotional distress to one of ordinary sensibilities.

[16] Damages ⚿89(2)
115k89(2) Most Cited Cases
Florida does not allow exemplary damages for simple breach of contract; however, where the acts constituting the breach also may amount to an independent tort, exemplary damages may be recovered.

[17] Damages ⚿89(2)
115k89(2) Most Cited Cases
(Formerly 115k91(1))
If simple breach of contract is accompanied by some intentional wrong, insult, abuse, gross negligence, or oppression, claim for exemplary damages is properly asserted under Florida law.

[18] Attorney and Client ⚿129(4)
45k129(4) Most Cited Cases
If proven, claim that attorney, who was discharged by client and sued by client to recover jewelry given as security under contingent fee agreement, engaged in conduct so hostile and threatening to client following discharge for failure to permit client to settle case that client sustained emotional distress, client would be entitled to recover punitive damages.
***964** Raymond E. LaPorte, Tampa, Fla., for plaintiff-appellant.

William R. Hapner, Jr., Tampa, Fla., for defendant-appellee.

Before TUTTLE, BELL, and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

Once again-- it seems to be habitual-- we are confronted with a case demonstrating the dangers of rendering a judgment of dismissal on the basis of bare-bone pleadings. Finding that the plaintiff did plead facts sufficient to state a ***965** claim upon which relief can be granted, we reverse.

We must here review an unseemly and deplorable belligerancy between an attorney, Percy Foreman, and his client, Mrs. Geneva Singleton. The difficulties began in February 1969 when Mrs. Singleton who was apparently experiencing marital difficulties traveled from her home in Tampa, Florida, to Memphis, Tennessee, to consult with the defendant, a Texas attorney. Following consultation Mrs. Singleton retained Mr. Foreman to represent her in a divorce action in the State of Florida. The parties entered into the following contract pertaining to Mr. Foreman's employment:

'This is to make a record of our agreement concerning my employment as your principal attorney to represent you in a divorce action to be filed in the Circuit Court of Hillsborough Co., Florida, within the near future. I am not licensed to practice law in Florida, but I have never been refused permission to try an isolated case there, and I anticipate engaging a licensed lawyer who maintains offices in Tampa and with whom I have previously worked.

'My normal retainer for accepting a case outside Texas, where there is child custody and/or a considerable estate to establish, is $25,000.00. This is not applied to the per diem but is a retainer paid solely for my agreement to represent the client. My actual fee in your case is to be one-third of the value of any recovery that may be obtained for you, plus a reasonable fee of any alimony and or support payments the Court may grant or allow, such reasonable fee of such installment payments is to be fixed by the Court.

'The one-third of the base recovery in property or money is to be my property absolutely, whether obtained by me or anyone else. That is, should you elect to dispense with my services and engage another lawyer, I am still entitled to receive the one-third of any recovery and a reasonable amount of any payments made after the divorce.

'I agree to pay any local lawyer that I may engage out of the above fee arrangement. But it is

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anticipated that he and I will apply for an advance for attorneys fees and trial expenses. Any such fees so advanced by order of the Court will apply to our total or over all fee.

'I have made no statement, representation or warranty concerning the outcome of this case. We both know that it is a hard fight. But I have promised to appear at the final trial of this case in person and to try to be present at the first hearing. I will prepare all pleadings and have the final decision on all important matters, subject, of course, to consultation with you when such is possible.

'To secure the payment of my $25,000.00 retainer, you have given me this date the following jewelry and personal property, to-wit:

	Description	Appraised
1-	Platinum pin, consisting of 35 diamonds and 36 emeralds total weight diamonds 6 1/2 cts emeralds 7 1/2 cts (J-15)	$ 5,800.00
1-	Lady's platinum ring (damaged by cutting off finger) with two long baguettes and 2.25 emerald cut diamond, white and clear (J-1)	3,500.00
1-	Lady's 18 kt yellow gold heavy hand-made ring, consisting of 1-22 cts. turquoise and 102 round diamonds (J-14)	3,200.00
1-	Lady's platinum bracelet containing 1 emerald cut diamond, 2 kite shaped diamonds, 52 round diamonds (mostly full cuts) and 39 baguettes and tapered baguette diamonds (J-13)	3,600.00

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1-	Lady's 23 jeweled 14 K white gold Bulova Diamond watch with diamond attachment (J-9)	1,200.00
1-	Lady's large turquoise ring, white gold circled by 20 diamonds (J-8)	400.00
1-	Yellow gold, heavy bracelet with four charms hand made	400.00
1-	Diamond, 14 kt. white gold pin 'GS'	150.00
1-	14 kt yellow gold shrimp on black onyx (J-18)	250.00
1-	Yellow gold wedding band cut in two	----------
1-	Twenty Dollar (U.S.) Gold piece made into a locket-charm	100.00

***966** 'You will note the total value of the above are less than my stated retainer fee. But, since you have evidenced a willingness to do whatever you could in the way of placing your jewels with me, I agree to hold all the above until the final disposition of your case, including any appeals, and that you shall have all the above personal property returned to you upon payment to me out of your portion of the recovery, in addition to by one-third fee aforesaid, the total value of each or any of the above items you may care to redeem.

'The above jewels are not a part of the fee provided in the court's advance order or the one-third attorney fee but are to be considered soley as my separate retainer in the case. It is not contemplated that any local attorney will have any claim on them whatsoever.

'As evidence that the above is our agreement, you will sign the original and two copies of this agreement.

Yours very truly, (S) PERCY FOREMAN

'The above is our agreement and I have signed each page of the original and two copies of same. I fully understand it.

(S) GENEVA A. SINGLETON'

By February 28, 1969, 21 days after their initial meeting and approximately 10 days after the plaintiff's divorce petition was filed in Florida, discord and dissent between the parties had reached such a crescendo that Mrs. Singleton dismissed Mr. Foreman as her attorney. Subsequently Mrs. Singleton brought this suit in a Florida court against

Mr. Foreman, alleging the following:

'Plaintiff, GENEVA ANN SINGLETON, sues

Defendant, PERCY FOREMAN, and alleges:

1. This is an action for compensatory and exemplary damages in the sum of two million dollars.

2. That on or about February 7, 1969, the plaintiff, while in a state of despair and confusion due to marital problems and discord, traveled from her residence in Tampa, Florida to Memphis, Tennessee to seek the advice and counsel of the defendant PERCY FOREMAN, concerning her domestic and marital problems.

3. That after a discussion between the plaintiff and defendant, the defendant undertook to represent the plaintiff in a divorce action to be filed in the Circuit Court of Hillsborough County, Florida.

4. That on or about February 10, 1969, the defendant drafted an alleged agreement and secured the signature of the plaintiff to same. That a copy of said alleged agreement is attached hereto as Exhibit A and the contents of Exhibit A are incorporated herein as fully as if set forth herein.

5. That at the time of affixing her signature to said Exhibit A the plaintiff was distraught, confused, apprehensive and was not fully aware of the contents of Exhibit A at the time of affixing her signature.

6. That plaintiff's medical condition, as described in paragraph 5 was due to the actions of the defendant in that the defendant exhorted the plaintiff to be distrustful of everyone including plaintiff's mother, sister and family; that the defendant instructed the plaintiff to keep the purported agreement, Exhibit A, a secret and especially not to mention *967 same to the attorney he planned to associate in the case in Tampa, Florida named James Thompson; that defendant further oppressed the plaintiff and her spirit by requiring the plaintiff to deliver to defendant certain items of jewelry described on page two of Exhibit A attached hereto; that in addition the defendant told plaintiff that he had to have the Jaguar coat that he saw upon the plaintiff although it was then the middle of winter in Memphis, Tennessee; that plaintiff prevailed upon the defendant to allow her to keep the coat since she would then be without any coat with which to keep herself warm while she remained in Memphis or while she was returning to Tampa, Florida; and that defendant then told plaintiff that he would let the plaintiff keep the coat until May, 1969.

7. That the defendant then entered upon a course of abuse and oppression directed toward plaintiff which caused the plaintiff extreme mental pain and suffering; that the defendant cursed the plaintiff, and in some instances the plaintiff's mother in the presence of the plaintiff, with language so vile, scurrilous, and indecent that plaintiff is embarrassed to repeat them in this pleading and to spread said language upon the public records.

8. That defendant's abuse of plaintiff continued until on or about February 28, 1969 when plaintiff advised defendant that she did not want his legal services for any purpose.

9. That on or about February 27, 1969, the plaintiff attempted to discuss a possible out of court settlement of plaintiff's divorce complaint which had been filed by defendant and James Thompson, in plaintiff's name, against her husband, Henry Charles Singleton. Said divorce complaint was filed February 17, 1969 in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, being case number 176010.

10. That while attempting to discuss the terms of settlement that plaintiff desired, the defendant exploded into a torrent of abuse, cursing and vile language directed at plaintiff. In the course of said obscenities, the defendant told the plaintiff that she was a 'stupid .....'; that plaintiff did not 'have any more to say in this case than a chair in the Court room'; and that if plaintiff attempted to obtain the services of another lawyer that, 'I'll ruin you and that ..... husband of yours.'

11. That the alleged agreement, Exhibit A, was and is offensive to and violative of public policy and is void ab initio.

12. That the plaintiff has requested that defendant return the jewelry itemized in Exhibit A, but defendant has failed and refused to return said jewelry.

13. That in addition to the unwarranted abuse described hereinabove which defendant has directed toward plaintiff, the defendant is also attempting to obtain monies from the plaintiff in excess of one million dollars for purported attorney fees for alleged representation in her above mentioned divorce suit.

14. That the defendant is guilty of professional misconduct as follows:

(a) securing and attempting to enforce the alleged agreement attached as Exhibit A, which is repugnant to the law governing the conduct of members of the legal profession;

(b) in attempting to secure an exorbitant fee, greatly in excess of the reasonable value for services rendered or to be rendered by him for plaintiff;

(c) in the oppression and abuse of the plaintiff as hereinabove described.

15. That plaintiff is entitled to exemplary damages because defendant should be taught that when individuals approach him for aid and services, as plaintiff did, much as one would approach a priest or minister, he should not be allowed to conduct himself in the manner in which he has toward the plaintiff; that defendant's actions apparently follow a similar pattern or modus operandi with other clients, such as his actions ***968** in representing 'Candy' Mossler and James Earl Ray, wherein he has reportedly demanded exorbitant fees and in some instances obtained jewels and property which he has refused to return.

16. That as a proximate result of defendant's conduct and actions the plaintiff has experienced extreme mental suffering to her physical detriment and will continue to so suffer in the future.

WHEREFORE, plaintiff demands a judgment from the defendant for the value of the jewels which defendant has converted to his own use, plus compensatory and punitive damages in the total sum alleged.'

Foreman removed the cause from the state court to the United States District Court for the Middle District of Florida, where he then filed a motion to dismiss, asserting that Mrs. Singleton's complaint failed to state a claim upon which relief could be granted. The trial court apparently agreed and granted the motion to dismiss after Mrs. Singleton declined to amend her pleadings.

[1][2][3] The central issue in this case, therefore, is whether the trial court was in error in dismissing the action on the pleadings. We are moved to note at the onset that dismissal at such an early stage is not looked upon favorably. Barnes v. Merritt, 5 Cir. 1967, 376 F.2d 8, n. 6. Chief Judge Brown has characterized such a procedure as both a 'precarious one with a high mortality rate,' Barber v. Motor Vessel 'Blue Cat,' 5 Cir. 1967, 372 F.2d 626, 627, and 'a tortuous thing,' Arthur H. Richland Co. v. Harper, 5 Cir. 1962, 302 F.2d 324. Though our opinions are replete with homilies and entreaties not to deal cavalierly with cases in this manner, they, like much of scripture, have too often gone unheeded. [FN1]

> FN1. For a list of the evergrowing number of cases where the trial judge disregarded the caution we have so often tried to instill, see Millet v. Godchaux Sugars, Inc., 5 Cir. 1967, 241 F.2d 264, n. 1, and Barber v. The Motor Vessel 'Blue Cat,' 5 Cir. 1967, 372 F.2d 626, n. 1.

The rule is clear and often repeated-- a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of

his claim. Barnes v. Merritt, supra; Arthur H. Richland Co. v. Harper, supra; 2A J. Moore, Federal Practice P12.08 (1968). Stated another way, on a motion to dismiss on the pleadings the court must assume that all of the allegations of the complaint are true in order to determine whether a cognizable claim is stated. Gardner v. Toilet Goods Association, Inc., 1967, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704. Sitting as diversity court in the State of Florida we must apply this federal standard to determine whether under the substantive law which a Florida court would apply Mrs. Singleton has stated a claim upon which relief can be granted. Evaluating Mrs. Singleton's complaint according to these standards, we think she has stated claims, both in contract and in tort for which a Florida court could grant relief.

The Applicable Law

[4] At the outset we are faced with a conflicts problem because the contract between Mrs. Singleton and Mr. Foreman was apparently made in Tennessee, but was to be performed in Florida. Since we are sitting as a Florida court we must look to the conflicts rule of the State of Florida to determine whether the law of Florida or the law of Tennessee should in this instance be applied. Klaxon Co. v. Stentor Electric Mfg. Co., Inc., 1941,313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477. Unfortunately, however, the relevant Florida conflicts rule is not entirely clear.

[5] At one time Florida apparently followed the rule that matters concerning the validity and interpretation of contracts were governed by the lex loci contractus, Walling v. Christian & Craft Grocery, 1899, 41 Fla. 479, 27 So. 46. Later cases indicate, however, that the Florida courts subsequently moved to a more flexible position and followed the ***969** rule that the nature, validity, and interpretation of contracts are to be governed by the place where the contract is made or the place where the contract is to be performed. Brown v. Case, 1920, 80 Fla. 703, 86 So. 684; Connor v. Elliott, 1920, 79 Fla. 513, 85 So. 164; Fincher Motors, Inc. v. Northwestern Bank & Trust Co., Fla.App.1964, 166 So.2d 717. We have discovered no case where the Florida authorities have discussed the appropriate law to be applied when, as here, the place of making and the place of performance are not the same. Consequently, we must attempt to guess which law the Florida court would apply in this situation. [FN2] We conclude that the Florida courts, in a case where the place of making differs from the place of performance would choose between the two according to which place had the more significant relationship to the contract. Applying that test to the instant case, we find that Florida, the place of performance, has the more significant relationship to the contract. The Tennessee contracts, arising solely from the transitory presence of the parties, were insignificant and entirely fortuitous. All that was to follow from the contract was performable in Florida since the contract dealt with a divorce and property settlement to be obtained in Florida. It concerned sensitive domestic relations matters peculiarly within Florida's domain. We have no doubt that in such a situation a Florida court would choose to apply Florida law. We therefore will do the same.

> FN2. It may be that because Tennessee has absolutely no interest in having its law applied that the instant problem is more properly characterized as a 'false conflict.' See Lester v. Aetna Life Insurance Co., 5 Cir. 1970, 433 F.2d 884. We do not decide this question since under either approach Florida law would apply.

Claims Stated

[6][7][8] It is immediately apparent to us that at the very least Mrs. Singleton's complaint states a cognizable claim for a return of the retainer paid to Mr. Foreman. The contract provided for a retainer and a contingent fee out of the proceeds from the divorce settlement. Contracts for a contingent fee in divorce cases are void and unenforceable under Florida law. Salter v. St. Jean, Fla.App.1964, 170 So.2d 94; Sobieski v. Maresco, Fla.Ct.App.1962, 143 So.2d 62. Although Florida follows the general rule that courts will not aid either party to an illegal contract but will leave them where they place themselves, Florida also recognizes an exception to

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this rule when 'law or public policy requires action by the courts, or where the parties are not in pari delicto.' Stewart v. Sterns and Culver Lumber Co., 1908, 56 Fla. 570, 48 So. 19, 25. Since on the pleadings Mrs. Singleton can in no manner be considered in pari delicto with Mr. Foreman, we think the courts of Florida would go to her aid to the extent of returning the consideration which she tendered in performance of her part of the invalid contract. Restatement of Contracts § 604 (1932).

[9][10] Foreman, however, contends that even if the contract is invalid as to the contingent fee, the retainer should be allowed to stand since the contract is divisible. We do not agree. Florida law provides that 'a contract should be treated as entire when, by a consideration of its terms, nature, and purpose, each and all of its parts appear to be interdependent and common to one another and to the consideration.' Local No. 234 of United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of United States and Canada v. Henley and Beckwith, Inc., Fla.1953, 66 So.2d 818, 821. Similarly, 'a contract is indivisible where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement.' Id. at 821. Judged by this standard, we think the contract here was clearly non-divisible. The retainer and contingent fee were related to the sole object of employment, the divorce. The parties did not contemplate a piece work relationship. We think it obvious that Mr. Foreman did not agree and ***970** would not have agreed to handle the divorce for the retainer alone. With the illegal portion of the contract excised, the greater portion of the consideration was eliminated. It is impossible to think that a portion of the contract with this much significance could be entirely 'eliminated from the contract and still leave a valid working arrangement fairly reflecting the original mutual understanding between the parties.' Local No. 234 v. Henley and Beckwith, Inc., supra, at 822. The contract is thus not subject to divisible quantification. The retainer and the contingent fee both related to the whole obligation. We conclude, therefore, that the invalid contingent fee made the entire contract void and unenforceable.

[11] Furthermore, even if the retainer could be considered a separate part of a divisible contract, we think Mr. Foreman would still be required to return the retainer since, if the allegations are supported by fact, he clearly breached the entire contract. Implicit in every attorney-client contract is a covenant by the attorney that he will conduct himself according to customary professional standards. In Florida, as elsewhere, the attorney-client relationship is regarded as demanding an extremely high standard of conduct. Gerlach v. Donnelly, Fla.1958, 98 So.2d 493. The attorney is under a duty to represent his client with the 'utmost degree of honesty, forthrightness, loyalty and fidelity.' Smyrna Developers, Inc. v. Bornstein, Fla.App.1965, 177 So.2d 16, 18. He must resign if at any time in the course of litigation his interest in the suit becomes 'adverse or hostile to his client,' United States Savings Bank v. Pittman, 1920, 80 Fla. 423, 86 So. 567, 572. Hostility or adverse positions need not always be of an economic character. Indeed, custom requires that the attorney treat his clients with civility, common decency, and loyalty, both as to legal problems and as to their personal relationships.

[12] Moreover, it is clear that an attorney never has the right to prohibit his client from settling an action in good faith. Sentco v. McCulloh, Fla.1955, 84 So.2d 498; Florida Bar Rules, Canon No. 7. A client by virtue of a contract with his attorney is not made an indentured servant, a puppet on counsel's string, nor a chair in the courtroom. Counsel should advise, analyze, argue, and recommend, but his role is not that of an imperator whose edicts must prevail over the client's desire. He has no authoritarian settlement thwarting rights by virtue of his employment. This is particularly true where, as here, the client's lawsuit is one for divorce, for public policy favors reconciliation.

[13] Judging Mr. Foreman's conduct according to these rules, and assuming, as we must, that the allegations in the complaint are true, we think it quite clear that he breached the most fundamental aspects of the confidential relationship with Mrs. Singleton. The complaint alleges that when she indicated a desire to settle her divorce action, Mr.

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Foreman 'exploded into a torrent of abuse,' refused to allow her to settle, and threatened to ruin both Mrs. Singleton and her husband. He thus allowed himself to be in economic and personal hostility to his client and at this point was under a legal duty to withdraw from the case. United States Savings Bank v. Pittman, supra. Instead, Mr. Foreman, it is alleged, threatened to ruin his client and her husband if they obtained the services of different counsel.

[14] Such irresponsible and reprehensible conduct on the part of an attorney, if factually established, would give the client an absolute right to fire the attorney with cause, thereby terminating any rights which he may have under the contract of employment. Goodkind v. Wolkowsky, 1938, 132 Fla. 63, 180 So. 538, aff'd 147 Fla. 415, 2 So.2d 723, reaff'd 151 Fla. 62, 9 So.2d 553. Rosenkrantz v. Hall, Fla.Ct.App.1964, 161 So.2d 673. Further, it is settled Florida law that when one party to a contract unjustifiably refuses to perform a substantial part of his duty under the contract,*971 the other party has the right to rescind the contract and recover what he has paid pursuant to the agreement. Savage v. Horne, 1947, 159 Fla. 301, 31 So.2d 477; Givens v. Vaughn-Griffin Packing Co., 1941, 146 Fla. 575, 1 So.2d 714; Ganaway v. Henderson, Fla.App.1958, 103 So.2d 693; Pinellas Central Bank & Trust v. International Aerodyne, Inc., Fla.App.1970, 233 So.2d 872. In Binz v. Helvetia Florida Enterprises, Inc., Fla.App.1963, 156 So.2d 703, 704, cert. denied, 162 So.2d 665, appeal dism. 379 U.S. 12, 85 S.Ct. 117, 13 L.Ed.2d 24, the Florida court stated the applicable rule:

'It is axiomatic that where a promise to pay a sum of money is made upon the consideration of a promise to perform certain service, the consideration fails if the services are not performed, and the promise based thereon is discharged.'

In Binz there was no attempt to render any services under the contract. Our court in analyzing this rule, however, has concluded that it applies equally to the situation where there is an unsuccessful attempt to perform. Sanitary Linen Service Co. v. Alexander Proudfoot Co., 5 Cir. 1970, 435 F.2d 292.

In the instant case we can form no other conclusion but that the alleged acts of Mr. Foreman constitute an absolute refusal to perform substantial duties under the contract, rendering his entire performance unsuccessful. If we assume that he did and said that which Mrs. Singleton alleges, his conduct was so pockmarked with hostility and arrogance that Mrs. Singleton was justified in rescinding the entire contract and demanding the return of her consideration. Sanitary Linen Service v. Alexander Proudfoot Co., supra; Binz v. Helvetia Florida Enterprises, Inc., supra. We therefore hold that Mrs. Singleton's complaint states a valid cause of action for the return of the jewels or their value since she paid this much on the contract which Mr. Foreman did not successfully perform.

[15] Moreover, Mrs. Singleton has alleged that she suffered physical and mental disturbances as a result of Mr. Foreman's conduct, and she asked, in addition to actual damages, a sum for exemplary damages. Florida recognizes a cause of action for insulting and abusive language resulting in mental distress if the conduct was sufficient to cause severe emotional distress to one of ordinary sensibilities. Slocum v. Food Fair Stores of Florida, Fla.1958,100 So.2d 396; Korbin v. Berlin, Fla.App.1965, 177 So.2d 551, cert. denied, 183 So.2d 835; Gay v. McCaughan, 5 Cir. 1960, 272 F.2d 160. We think the conduct alleged was sufficient to state a cause of action under the Slocum and Korbin principle.

[16][17][18] Florida, like most states, does not allow exemplary damages for simple breach of contract. However, where the acts constituting the breach also amount to an independent tort, exemplary damages may be recovered. Griffith v. Shamrock Village, Fla.1957, 94 So.2d 854. If the breach is accompanied by some intentional wrong, insult, abuse, gross negligence, or oppression, the claim for exemplary damages is properly asserted. Griffith v. Shamrock Village, supra; Associated Heavy Equipment Schools, Inc. v. Masiello, Fla.Ct.App.1969, 219 So.2d 465. We have held that Foreman's alleged conduct was sufficient to state an independent tort action, and, since that alleged conduct was both oppressive and showed

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such a great indifference to the persons and property rights of others, malice may be imputed, thus justifying punitive damages. Kirksey v. Jernigan, Fla.1950, 45 So.2d 188.

In sum, we find that Mrs. Singleton's complaint stated claims on which relief can be granted under Florida law. The facts as ultimately developed may not be congruent with the allegations contained in the complaint, but Mrs. Singleton deserves the opportunity to submit proof of her jeremiad.

The case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

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C

District Court of Appeal of Florida,
First District.
Richard D. WASSALL, Appellant,
v.
W.H. PAYNE and Dean Highfield, Appellees.
No. 95-3874.

Nov. 7, 1996.

Purchaser and lessee brought action against vendor and real estate broker, alleging fraudulent misrepresentation, negligent misrepresentation, and negligence per se in connection with sale of real estate that was subject to flooding. The Circuit Court, Bay County, N. Russell Bower, J., granted broker judgment on lessee's pleadings as to counts of fraudulent misrepresentation, negligent misrepresentation and negligence per se, and dismissed lessee's cause of action against vendor for fraudulent misrepresentation. Lessee appealed. The District Court of Appeal, Van Nortwick, J., held that: (1) privity requirement did not preclude lessee's material misrepresentation or negligence per se claims, and (2) economic loss rule did not bar action.

Reversed and remanded.

West Headnotes

[1] Brokers ⚿102
65k102 Most Cited Cases

[1] Fraud ⚿29
184k29 Most Cited Cases
Privity requirement did not preclude lessee, who actively participated in negotiations which preceded sale, from bringing suit against vendor and real estate broker for material misrepresentation of material latent defects in connection with sale of real estate.

[2] Fraud ⚿25
184k25 Most Cited Cases
When fraudulent misrepresentation and negligent misrepresentation in formation of contract are alleged, economic loss rule does not bar tort action based on such misrepresentations.

[3] Brokers ⚿101
65k101 Most Cited Cases
Privity requirement did not preclude lessee, who actively participated in negotiations which preceded sale, from bringing suit against real estate broker for negligence per se in connection with sale of real estate that was subject to flooding.
***679** Robert M. Ervin, Jr. and J. Stanley Chapman of Ervin, Varn, Jacobs, Odom & Ervin, Tallahassee, for Appellant.

Mark D. Dreyer of Harrison, Sale, McCloy & Thompson Chartered, Panama City, for Appellees.

VAN NORTWICK, Judge.

Richard D. Wassall appeals two orders, one granting appellee Dean Highfield a judgment on the pleadings on Wassall's count against him for fraudulent misrepresentation, negligent misrepresentation and negligence per se; and the other dismissing with prejudice Wassall's cause of action against appellee W.H. Payne for fraudulent misrepresentation. Wassall had leased real property which Payne sold to Dorothy Frazier, for which sales transaction Highfield allegedly acted as the broker. In the appealed orders, the trial court concluded that Wassall could not state a cause of action against appellees, because Wassall, as lessee from Frazier, had no privity of contract with either Highfield or Payne, and because neither Highfield nor Payne had a duty to disclose to Wassall the latent defects of the property which caused it to flood on occasion. Wassall contends, and we agree, that the lack of privity of contract does not preclude his action for fraudulent or negligent

misrepresentation, and, thus, the orders appealed must be reversed.

I.

On April 24, 1989, Frazier purchased real property and improvements from Payne, with Highfield allegedly acting as the real estate broker for this transaction. One day later, Wassall leased the premises from Frazier. Pursuant to the lease, Wassall was responsible for making the payments to Payne for purchase of the property.

As Wassall alleges, he was an active participant in the negotiations which preceded the sale and, initially, it was he, not Frazier, who was planning to purchase the property. He also alleges that, prior to this sale and lease, he inquired whether the property was subject to flooding and that both Payne and Highfield misrepresented the property's propensity for flooding to him. He alleges further that Payne made this misrepresentation knowingly and with the intent that Frazier and Wassall rely upon the misrepresentation and consummate the sale and lease; and that he detrimentally relied upon this misrepresentation and expended money on improvements to the property before realizing that the property was subject to periodic flooding. Wassall's allegations are the same regarding Highfield, except that he alleges Highfield made the misrepresentation either knowingly or without knowledge of its truth or falsity.

***680** Both Frazier and Wassall filed a complaint against Payne, Highfield, and Bay County. In the order on appeal, the trial court granted a judgment on the pleadings as to Wassall's claims against Payne and Highfield. Frazier's claims are still pending in the trial court, as are Wassall's claims against Bay County for negligence, inverse condemnation and trespass.

II.

[1] At the outset, we point out that this suit involves alleged misrepresentations by both appellees which preceded the creation of the contracts for sale and lease of the subject real property. The complaint alleges that the misrepresentations induced Frazier to buy and Wassall to lease this property. As the supreme court explained in *A.R. Moyer, Inc. v. Graham,* 285 So.2d 397, 399 (Fla.1973):

> Privity is a theoretical device of the common law that recognizes limitation of liability commensurate with compensation for contractual acceptance of risk. The sharpness of its contours blurs when brought into contact with modern concepts of tort liability.

In this instance, the distinction between tort and contract is important. It cannot be said that Wassall contractually accepted the risk that defendants would lie to him (as it is alleged) so that he would enter into the lease in the first instance. Thus, the theoretical underpinnings for contractual limitation of the defendants' liability are not present in this case.

We conclude that the instant case is governed by the principles enunciated by the Second District in *Wallis v. South Florida Savings Bank,* 574 So.2d 1108 (Fla. 2d DCA 1990). In *Wallis,* the court determined that the Wallises had stated a cause of action against South Florida Savings Bank for intentional misrepresentation in connection with obtaining the Wallises' personal guarantee of a loan by Park Bank to a developer. The Wallises alleged that they gave their guarantee based upon South Florida's representation that it would loan the developer $27,000,000. South Florida failed to honor its commitment letter and the development went into foreclosure. As explained by Judge Altenbernd in his concurring opinion:

> The primary theory which the Wallises allege against South Florida is a more traditional theory of fraud. They allege that South Florida made a material misrepresentation of fact concerning its ability to lend $27,000,000. South Florida allegedly knew this statement was untrue and knew that the Wallises were relying upon its accuracy when they agreed to guarantee the subordinated loan. They allege that South Florida intended to induce persons in their capacity to rely upon the incorrect information in the commitment letter. Finally, they allege that they were damaged by their justifiable reliance on the misrepresentation. If true, these allegations are enough to establish fraud--so long as the

> relationship between South Florida and the Wallises is sufficiently close to create a duty owing under a theory of fraud.
> Frequently, the relationship which creates a duty owing in fraud is also a relationship involving contractual privity. *See, e.g., Johnson* [*v. Davis,* 480 So.2d 625 (Fla.1985)]. In this case, no contractual privity exists. It is not clear that the Wallises are third-party beneficiaries of any contract executed by South Florida. *See Deanna Constr. Co. v. Sarasota Entertainment Corp.,* 563 So.2d 150 (Fla. 2d DCA 1990). There are occasions, however, when third persons with close connections to a business transaction may allege a cause of action in fraud or negligence against a party involved in the transaction. *See* 37 Am.Jur.2d *Fraud and Deceit* § 297 (1968). *See generally First Fla. Bank v. Max Mitchell & Co.,* 558 So.2d 9 (Fla.1990); *Restatement (Second) of Torts* § 552 (1976). The buy-out of this partnership was in the broadest sense a single business transaction. If the allegations of the complaint are true, South Florida certainly had reason to expect that another bank or a guarantor would rely upon its commitment to loan $27,000,000. The inaccuracy of that representation could greatly increase the risks of a subordinated bank or guarantor. If South Florida had actual knowledge ***681** that Mr. Propps [the developer] was using the commitment letter to induce the Wallises or other people to undertake financial risks in this development, it does not appear ill-conceived to make the bank liable for some measure of resulting damage. By this court's decision, we are merely giving the Wallises an opportunity to prove a set of facts which establishes such a relationship and which also establishes the remaining elements of the alleged fraud.

Id. at 1110-1111.

We distinguish the instant case from this court's opinion in *Haskell Co. v. Lane Co., Ltd.,* 612 So.2d 669 (Fla. 1st DCA), *rev. dismissed sub nom., Service Merchandise Co., Inc. v. Lane Co., Ltd.,* 620 So.2d 762 (Fla.1993). In *Haskell,* this court held that the requirement of privity precludes a lessee from bringing a suit for nondisclosure of material latent defects in connection with the sale of real estate. The instant action, however, is not a suit involving mere nondisclosure, but instead seeks a recovery for the separate and distinct tort of material misrepresentation.

III.

[2] Although not a basis for the trial court's rulings in this case, appellees suggest that this court should affirm the trial court on the grounds that the economic loss rule precludes the instant action. This rule has been summarized by this court to mean that "absent a tort independent of breach of contract, remedy for economic loss lies in contract law." *Monco Enterprises, Inc. v. Ziebart Corp.,* 673 So.2d 491, 492 (Fla. 1st DCA 1996). Until recently, the district courts of appeal were split regarding the economic loss rule's application to the tort of fraud in the inducement. *Compare, Monco Enterprises, supra; TGI Development, Inc. v. CV Reit, Inc.,* 665 So.2d 366 (Fla. 4th DCA 1996); and *Williams v. Peak Resorts International, Inc.,* 676 So.2d 513, 517-518 (Fla. 5th DCA 1996) with *Woodson v. Martin,* 663 So.2d 1327 (Fla. 2d DCA 1995), *quashed,* 21 Fla. L. Weekly S446, 685So.2d 1240 [1996 WL 600478] (Fla. October 17, 1996); and *Florida Bldg. Inspection Services, Inc. v. Arnold Corp.,* 660 So.2d 730 (Fla. 3d DCA 1995). The Supreme Court resolved this conflict, however, in *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.,* 21 Fla. L. Weekly S447, 685 So.2d 1238 [1996 WL 600501] (Fla. October 17, 1996), in which the court held that the "cause of action for fraud in the inducement is an independent tort and is not barred by the economic loss rule." *Id.* at S448, at ----. Thus where, as here, fraudulent misrepresentation and negligent misrepresentation in the formation of a contract are alleged, the economic loss rule does not bar the tort action based on such misrepresentations. *Id.*

We do not address whether the elements of fraudulent misrepresentation and negligent misrepresentation have been sufficiently pled to state a cause of action under those theories. Because the trial court has not had an opportunity to rule on sufficiency of the allegations of fraudulent misrepresentation or negligent misrepresentation, it

would be premature for this court to decide that issue. *Wolfe v. American Sav. and Loan Assoc. of Florida*, 539 So.2d 606 (Fla. 3d DCA 1989).

IV.

[3] Finally, turning to the dismissal of the claim for negligence per se, the trial court's order indicates that it erroneously considered the sufficiency of this cause of action based solely upon the privity requirement. We thus reverse the trial court's decision that Wassall does not have a cause of action against Highfield for negligence per se. In so doing, we decline to consider whether there are other factual and legal arguments which, if they had been considered by the trial court, might have justified dismissal of the claim for negligence per se. *See e.g., Greenberg v. Mahoney Adams & Criser, P.A.*, 614 So.2d 604, 605 (Fla. 1st DCA 1993).

REVERSED and REMANDED for proceedings consistent with this opinion.

BOOTH and BENTON, JJ., concur.

682 So.2d 678, 21 Fla. L. Weekly D2390

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416 So.2d 1183

(Cite as: 416 So.2d 1183)

C

District Court of Appeal of Florida,
First District.
Betty Owen STINSON and Kent Spriggs,
Appellants/Cross Appellees,
v.
FEMINIST WOMEN'S HEALTH CENTER, INC.,
Appellee/Cross Appellant.
No. AE-403.

June 28, 1982.
Rehearing Denied Aug. 6, 1982.

Attorneys brought suit for fees due on settlement proceeds. Client filed counterclaim. The Circuit Court for Leon County, John A. Rudd, J., assessed compensatory and punitive damages against attorneys, determined amount of their attorney fees for representing client in previous action, dissolved their charging liens for those fees and awarded attorney fees, and attorneys appealed. The District Court of Appeal, Wigginton, J., held that: (1) trial court did not err in awarding compensatory and punitive damages; (2) as foundation for punitive damage award against client's former attorneys, judge properly computed compensatory damages as interest on money that would have come to client, less agreed-upon fees and costs, at time of settlement; (3) trial judge did not err in failing to require client to pay interest on its former attorneys' fees and costs; and (4) trial judge was without authority to award client its fees on its counterclaim.

Affirmed in part, reversed in part and remanded.

West Headnotes

[1] Attorney and Client ⚿109
45k109 Most Cited Cases
Award of compensatory damages against client's former attorneys was supported by judge's conclusions, supported by the record, that at outset of client's action, parties agreed that attorneys should be paid at rate of $30 per hour, not $60 per hour as claimed by attorneys, that attorneys represented to client that they would deliver settlement check and would look to client for payment of their fees, but instead, their machinations tied up check for months, and that attorneys obfuscated, manipulated and deceived their clients in tortious attempt to take all of the settlement money.

[2] Damages ⚿91.5(1)
115k91.5(1) Most Cited Cases
(Formerly 115k91(1))
Generally, punitive damages are not awardable unless offending parties have acted with malice, moral turpitude, gross negligence, reckless indifference to rights of others, wantonness, oppression, outrageous aggravation or fraud.

[3] Attorney and Client ⚿129(4)
45k129(4) Most Cited Cases
Trial judge did not err in awarding punitive damages against attorneys, finding that attorneys had acted oppressively and with indifference to persons and property rights of others, and that their behavior had been egregious and self serving and unconscionable.

[4] Damages ⚿87(2)
115k87(2) Most Cited Cases
Punitive damages are recoverable only where actual damages are shown.

[5] Attorney and Client ⚿129(4)
45k129(4) Most Cited Cases
As foundation for punitive damage award against client's former attorneys, judge properly computed compensatory damages as interest on money that would have come to client, less agreed-upon fees and costs, at time of settlement.

[6] Interest ⚿14
219k14 Most Cited Cases

Trial judge did not err in failing to require client to pay interest on its former attorneys' fees and costs, where attorneys, not client, caused settlement funds to be out of circulation.

[7] Attorney and Client 129(4)
45k129(4) Most Cited Cases
Trial judge was without authority to award client its fees on its counterclaim against its former attorneys, where no statute made such fees recoverable and parties' contract did not provide for attorney fees in event of breach or default. West's F.S.A. § 713.76(1, 2).

***1184** Joseph C. Jacobs and Robert King High, Jr., of Ervin, Varn, Jacobs, Odom & Kitchen, Tallahassee, for appellants/cross appellees.

Baya Harrison, III, of Fuller, Johnson & Harrison, Tallahassee, for appellee/cross appellant.

WIGGINTON, Judge.

Kent Spriggs and Betty Owen Stinson, members of the Florida Bar, appeal from a final judgment in which the trial court assessed compensatory and punitive damages against them, determined the amount of their attorneys' fee for representing the appellee in a previous action, dissolved their charging liens for those fees, and awarded the appellee attorneys' fees in the action below. We affirm in part and reverse in part.

In the autumn of 1975, Spriggs and Stinson (and another attorney who is not a party to this appeal) were engaged by the Health Center to represent it in a dispute with the Florida Board of Medical Examiners and a group of individual doctors. The protracted pretrial phase of the ensuing lawsuit progressed through the federal court system until 1979, when the case was remanded for trial. *Feminist Women's Health Center, Inc. v. Mohammad*, 415 F.Supp. 1258 (N.D.Fla.1976), *aff'd* , 586 F.2d 530 (5th Cir. 1978), *rehearing denied*, 591 F.2d 1343 (5th Cir. 1979), *cert. denied*, 444 U.S. 924, 100 S.Ct. 262, 62 L.Ed.2d 180 (1979).
In January, 1980, shortly before the scheduled trial date, the parties reached settlement and the attorneys each filed a lien on the Health Center's $75,000 settlement proceeds. After the attorneys and their client failed to agree on the amount of their fees, the attorneys filed this action in circuit court, and the Health Center through new counsel filed a counterclaim. That is the sanitized version of the events leading to this appeal.

Spriggs and Stinson argue that the award of compensatory and punitive damages is unsupported by the record. We cannot agree.

[1] In affirming the award of damages against the appellants, we make the following findings: First, the record supports the judge's conclusion that at the outset of the action against the doctors, these parties agreed that the attorneys should be paid at the rate of $30 per hour, not $60 per hour as Spriggs and Stinson have claimed. Second, the record supports the judge's conclusion that Spriggs and Stinson had represented to the Health Center that they would deliver the $75,000 settlement check to the Center and would then look to the Center for payment of their fees; instead, the attorneys' machinations tied up the check for months. Third, the record supports the judge's conclusion that Spriggs and Stinson obfuscated, manipulated and deceived their clients in a tortious attempt to take all of the settlement money.

***1185** [2][3] Generally, punitive damages are not awardable unless the offending parties have acted with malice, moral turpitude, gross negligence, reckless indifference to the rights of others, wantonness, oppression, outrageous aggravation or fraud. *See* 17 Fla.Jur.2d, Damages, §§ 109, 119 and authorities cited therein. The trial judge awarded punitive damages here, finding that Spriggs and Stinson had acted "oppressively and with indifference to the persons and property rights of others," that their behavior had been "egregious" and "self serving" and "unconscionable." The trial judge did not err.

[4][5][6] As a foundation for punitive damages, [FN1] the judge properly computed compensatory damages as the interest on the money that would have come to the Health Center, less the agreed-upon fees and costs, at the time of

settlement. We reject the appellants' contention that an award of prejudgment interest is improper under these circumstances. *See Bergen Brunswig Corporation, et al. v. Florida Department of Health and Rehabilitative Services*, 415 So.2d 765 (Fla. 1st DCA 1982). We also reject the appellants' alternative argument that they, too, should be awarded prejudgment interest. The record shows that the attorneys, not the Health Center, caused the settlement funds to be out of circulation. Accordingly, the trial judge did not err in failing to require the Health Center to pay interest on the attorneys' fees and costs.

> FN1. Under Florida law, punitive damages are recoverable only where actual damages are shown. *Martin v. Security Services, Inc.*, 314 So.2d 765, 772 (Fla.1975), citing *McLain v. Pensacola Coach Corp.*, 152 Fla. 876, 13 So.2d 221 (1943).

Because the record supports the judge's computation of the attorneys' fees, we disagree with the appellants' argument that their fees should be redetermined on a quantum meruit basis. Similarly, we disagree with the Health Center's cross appeal argument that the fees should be reduced or not allowed.

[7] Nevertheless, we must reverse the portion of the final judgment that awarded the Health Center its fees in this action. It is fundamental that attorneys' fees are not recoverable in the absence of a statute or contract which makes them recoverable. Section 713.76(2), Florida Statutes, cited in the final judgment as authorizing the fee award, is inapplicable. By its terms, that statute only permits an award of attorneys' fees when the offending party has violated Section 713.76(1). Further, the parties' contract did not provide for attorneys' fees in the event of breach or default.

The Health Center, citing this Court's opinion in *Howard v. Crawford and Company*, 384 So.2d 1326 (Fla. 1st DCA 1980), argues that attorneys' fees may be awarded when the complaining party proves fraud. However, the attorneys' fee awarded in *Howard* had accrued some time earlier, in a different case. That decision manifested the widely-held view that attorneys' fees are awardable where the wrongful act has forced the aggrieved person into litigation with a third party. *See generally* 22 Am.Jur.2d, Damages, § 166, "Litigation against third person as result of defendant's wrongful act." The *Howard* opinion did not create a "fraud exception" to the general rule prohibiting the award of fees. Consequently, the trial judge was without authority to enter the fee award below.

Finally we note that the trial court dissolved the attorneys' liens and directed that full payment be made to the Health Center, which in turn was ordered to pay the appellants their portion of the judgment. Because the appellants perfected their liens before this suit was instituted, we believe that justice would be better served if the judge computed the net award for each party and ordered the clerk to disburse the funds directly.

Accordingly, the final judgment is affirmed in part, reversed in part, and remanded for further proceedings.

JOANOS, J., and OWEN, WILLIAM C., Jr., Associate Judge, concur.

416 So.2d 1183

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H

United States District Court,
M.D. Florida,

Fort Myers Division.

Henry W. KREHLING, Jr., Plaintiff,
v.
Eli BARON, John N. Brugger, Jr., John F. Forsyth, Forsyth, Brugger, Reina & Bourgeau, P.A., Barclay Building Corp., Deauville Lake Development Corp., Montclair Building Corp., Chatham Square Development Corp., Elba Development Corp., Attorney's Title Insurance Fund, Inc., and Commonwealth Land Title,
Defendants.
No. 93-347-CIV-FTM-17D.

June 23, 1995.

Former client of law firm who brought civil Racketeer Influenced and Corrupt Organizations (RICO) action against law firm, attorney who had represented him, and other corporations based on alleged fraudulent activities in connection with real estate transactions subsequently amended complaint and added state law claim for breach of fiduciary duty against second attorney at firm, and second attorney moved to dismiss for failure to state claim. The District Court, Kovachevich, J., held that: (1) allegations that second attorney had been aware of fraudulent actions undertaken by attorney but had not taken steps to prevent them stated claim for relief, and (2) court would exercise supplemental jurisdiction over state law breach of fiduciary duty claim.

Motion denied.

West Headnotes

[1] Federal Civil Procedure ⚿1773

170Ak1773 Most Cited Cases
Complaint should not be dismissed for failure to state claim unless it appears beyond doubt that plaintiff can prove no set of facts that would entitle him to relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] Federal Civil Procedure ⚿1829

170Ak1829 Most Cited Cases
Trial court in ruling on motion to dismiss is required to view complaint in light most favorable to plaintiff. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] Federal Civil Procedure ⚿673

170Ak673 Most Cited Cases

[3] Federal Civil Procedure ⚿1772

170Ak1772 Most Cited Cases
Threshold of sufficiency that complaint must meet to survive motion to dismiss for failure to state claim is exceedingly low; plaintiff need not set forth all facts upon which claim is based, and short and plain statement is sufficient if it gives defendant fair notice of what claim is and grounds upon which it rests. Fed.Rules Civ.Proc.Rules 8(a), 12(b)(6), 28 U.S.C.A.

[4] Federal Civil Procedure ⚿673

170Ak673 Most Cited Cases
Provisions of Federal Rules of Civil Procedure which outline standard by which adequacy of pleadings is to be judged, taken together, underscore emphasis placed on clarity and brevity by Rules, and reflect basic philosophy that simplicity, flexibility, and absence of legalistic technicality are touchstones of good procedural system; true test of sufficiency of complaint is whether it provides adequate notice to defendant to make defendant aware of basis of claims, and theory is that more detailed information should be developed through discovery process. Fed.Rules Civ.Proc.Rule 8(a), (e)(1), 28 U.S.C.A.

[5] Attorney and Client ⚿129(2)
45k129(2) Most Cited Cases
Under Florida law, allegations that attorney at law firm had been informed that second attorney at firm was committing fraud in connection with real estate transactions involving client, and had failed to take steps to prevent second attorney from committing further fraud, were sufficient to state claim for breach of fiduciary duty against attorney; allegations if true would establish breach of professional duty on part of attorney to prevent violation of professional rules by second attorney, which would allow attorney to be held personally liable regardless of membership in professional service corporation. West's F.S.A. § 621.07; West's F.S.A. Bar Rule 4- 5.1(c)(2).

[6] Corporations ⚿1.4(1)
101k1.4(1) Most Cited Cases
Under Florida law, corporate entity as method of doing business will not be permitted to protect the unfaithful or unethical.

[7] Federal Courts ⚿15
170Bk15 Most Cited Cases
State law breach of fiduciary duty claim asserted by former client of law firm against attorney at firm based on alleged failure of attorney to take steps to stop fraudulent behavior was based on same common nucleus of operative fact as civil Racketeer Influenced and Corrupt Organizations (RICO) action brought by client against law firm, second attorney at firm, and other corporations based on alleged fraud in real estate transactions, and court could exercise supplemental jurisdiction over fraud claim; both claims revolved around same central fraud, and same evidence would be involved. 18 U.S.C.A. § 1964; 28 U.S.C.A. § 1367.

[8] Federal Courts ⚿15
170Bk15 Most Cited Cases
Court would not decline to exercise supplemental jurisdiction over state law claim for breach of fiduciary duty asserted against attorney in connection with action in which civil Racketeer Influenced and Corrupt Organizations (RICO) claims were asserted against law firm, second attorney at firm, and other corporations based on alleged fraud in real estate transactions; claim did not assert novel or complex issue and did not predominate over RICO claim, court had not dismissed all claims over which it had original jurisdiction, and judicial economy would be advanced by considering claim. 18 U.S.C.A. § 1964 ; 28 U.S.C.A. § 1367.

***1575** W. Donald Cox, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, FL, Allen I. Saeks, Michael J. Wurzer, Patrick M. O'Brien, Leonard, Street and Deinard, P.A., Minneapolis, MN, for plaintiff.

Mark V. Silverio, Cynthia Byrne Halle, Law Office of Mark V. Silverio, Miami, FL, for defendants except Brugger, Forsyth, Brugger, Reina & Bourgeau, P.A.

Bruce McLaren Stanley, Henderson, Franklin, Starnes & Holt, P.A., Ft. Myers, FL, for defendants John N. Brugger, Jr., Forsyth, Brugger, Reina & Bourgeau, P.A.

Michael S. Pasano, Zuckerman, Spaeder, Taylor & Evans, Miami, FL, Melissa Hammersley Clark, Zuckerman, Spaeder, Taylor & Evans, Tampa, FL, for defendant John F. Forsyth.

Dwight A. Whigham, Winesett, Avery, Dupree & Whigham, P.A., Ft. Myers, FL, for ***1576** defendant Attorney's Title Insurance Fund, Inc.

Mark A. Brown, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, FL, for defendant Commonwealth Land Title Insurance Company.

KOVACHEVICH, District Judge.

ORDER ON MOTION TO DISMISS

This cause is before the Court on Defendant John F. Forsyth's Motion to Dismiss (Dkt. 87) and response (Dkt. 96).

STANDARD OF REVIEW

[1][2] A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that Plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson,* 355

U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). A trial court, in ruling on a motion to dismiss, is required to view the complaint in the light most favorable to the plaintiff. *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

BACKGROUND

Plaintiff filed his Complaint against Defendants on December 7, 1993 (Docket No. 1). This Complaint was amended on February 22, 1995 (Docket No. 81). It contains the following facts as pled:

Defendant John F. Forsyth was an attorney at the law firm of Forsyth, Brugger, Reina & Bourgeau, P.A. (hereafter, the "Firm"). In the spring of 1991, Defendant was informed by an employee that another attorney for the Firm was writing fraudulent title insurance policies, and closing the sale of certain properties without paying or satisfying all the lienholders. The attorney named was Brugger. Defendant informed the employee that he would look into the situation. However, Defendant took no action.

In January of 1992, Defendant was again informed that Brugger was committing fraud. However, Defendant again did not take any affirmative steps to look into the allegations made against Brugger. Plaintiff alleges that as a result, Defendant, through his financial interest in the firm received a benefit from Brugger's allegedly fraudulent activity.

These allegedly fraudulent activities were connected with land developments in which Plaintiff was defrauded by Brugger, through one or more of the corporate defendants, of over $2.4 million. The alleged fraud perpetrated against Plaintiff was made possible by the Firm in several ways. First, Brugger and the Firm were counsel to both Plaintiff and Corporate defendants; Brugger had advised Plaintiff that recording mortgages Plaintiff held over the properties was unnecessary. Second, Brugger and the Firm were responsible for forwarding the proceeds of the sales of the property to Plaintiff, who held mortgages on these properties; the proceeds were allegedly not forwarded to Plaintiff. Third, Brugger acted as title insurance agent by acquiring title insurance for the property; Brugger, because he had advised against recording Plaintiff's mortgages, knew that the properties had liens held against the property by Plaintiff.

The allegations against Defendant Forsyth are contained in Count Seven of Plaintiff's First Amended Complaint (Docket No. 81). It alleges the following:

First, Defendant owed a duty to Plaintiff to prevent Brugger from continuing the fraud being committing when informed of Brugger's activities. Second, Defendant breached his fiduciary duties to Plaintiff by failing to take any action to prevent Brugger from committing any further fraud upon Plaintiff, once Defendant was apprised of its activity. Third, this breach was the proximate cause of the injuries suffered by Plaintiff. Based on these Counts in Plaintiff's Complaint, Defendant moves for dismissal (Docket No. 87).

DISCUSSION

Defendant proffers two theories for dismissal. The first is to dismiss for failure to state a claim. The second is that the Court does not have jurisdiction over this claim, and in the alternative, that the Court should elect not to exercise supplemental jurisdiction over this claim.

[3] Defendant's first theory alleges that Plaintiff has "[failed] to state a claim upon which relief can be granted." Rule 12(b)(6). ***1577** The threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low. *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corporation,* 711 F.2d 989 (11th Cir.1983). Federal Rule of Civil Procedure 8 outlines the standard by which the adequacy of pleadings are to be judged. Rule 8(a)(2) requires the Plaintiff to provide in the complaint a "short and plain statement of the claim showing that the pleader is entitled to relief." The plaintiff need not set forth all the facts upon which the claim is based; rather, a short and plain statement is sufficient if it

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gives the Defendant fair notice of what the claim is and the grounds upon which it rests. *Id.* In addition to Rule 8(a), Rule 8(e)(1) states that each "averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

[4] Taken together, Rules 8(a) and 8(e)(1) underscore the emphasis placed on clarity and brevity by the Federal pleading rules. These rules reflect the basic philosophy of the Federal Rules that simplicity, flexibility, and the absence of legalistic technicality are the touchstones of a good procedural system. 5 *Wright & Miller, Federal Practice and Procedure:* Civil 2d § 1217 at p. 169. The true test of the sufficiency of the complaint is whether it provides adequate notice to Defendant to make Defendant aware of the basis of the claims. The theory is that more detailed information should be developed through the discovery process.

Plaintiff's First Amended Complaint alleges that Defendant committed a wrongful act by failing to take action when informed by an employee of the Firm of Brugger's activity. Florida Statute § 621.07 establishes limited liability for members of a professional service corporation. However, it also creates several exceptions.

An individual will be personally liable for any negligent or wrongful act or misconduct committed by them, or by any person under that person's direct supervision regardless of their membership in a professional service corporation. Fla.Stat.Ann. § 621.07 (1995). Defendant contends that his failure to act does not bring his conduct within the exceptions created by the statute.

[5] However, the weight of authority renders Defendant's argument unpersuasive. Assuming all the allegations in the First Amended Complaint as true, Defendant is subject to Rule 4-5.1(c)(2) of the Rules Regulating the Florida Bar, which provides that:

> A lawyer shall be responsible for another lawyer's violation of the Rules of Professional conduct if: the lawyer is a partner in the law firm in which the other lawyer practices, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rules Regulating the Florida Bar, 4-5.1(c)(2) (1994).

[6] Therefore, Defendant Forsyth, through his knowledge of Brugger's activity, violated Rule 4-5.1(c)(2) by his failure to either report or stop the conduct once he was apprised of its existence. Furthermore, the Supreme Court of Florida has specifically rejected Defendant's attempt to use the professional association as a shield to prevent personal liability. The Court said that "[t]he corporate entity as a method of doing business will not be permitted to protect the unfaithful or unethical." *In re The Florida Bar,* 133 So.2d 554, 556 (Fla.1961).

Accordingly, the First Amended Complaint has set forth sufficient facts to show that Defendant committed a wrongful act within the meaning of § 621.07, and if proven would leave the Defendant personally liable for his misfeasance. The pleadings establish sufficient evidence to defeat Defendant's Motion to Dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6).

The second prong of Defendant's Motion to Dismiss, based on Rule 12(b)(1), is a dismissal for lack of jurisdiction over the subject matter. Defendant attacks Plaintiff's use of 28 U.S.C. § 1367 to establish supplemental jurisdiction. The Court has original jurisdiction over Plaintiff's Racketeer Influenced and Corrupt Organization Act (hereafter "RICO") claim. 18 U.S.C. § 1964 (1995). To establish supplemental jurisdiction over claims against Defendant, Plaintiff must meet the requirements of 28 U.S.C. § 1367 (1994). Section 1367 provides:

> ***1578** [I]n any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all claims that are so related to claims in that action that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or

intervention of additional parties. § 1367.

[7] Moreover, in *United Mine Workers v. Gibbs,* the Supreme Court established that "[t]he state and federal claims must derive from a common nucleus of operative fact." *United Mine Workers v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). Applying this test to Plaintiff's claim against Defendant, both claims share common elements. First, they revolve around the central fraud involving the federal RICO claim. Second, the evidence for the non-federal claim will involve the same witnesses and evidence as the federal RICO claim. These parallel connections create the same case or controversy within the meaning of Article III of the United States Constitution. Therefore, supplemental jurisdiction should be correctly exercised under § 1367.

Defendant argues in the alternative that even if supplemental jurisdiction over Plaintiff's complaint is proper, the Court should nonetheless decline to exercise it. There are four examples, under § 1367, wherein the court should exercise its discretion. These are:

(1) the claim raises a novel or complex issue of State law;
(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction;
(3) the district court has dismissed all claims over which it has original jurisdiction; or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367 (1994)

[8] Applying these to Plaintiff's claim, first, the breach of fiduciary duty is not such a novel or complex issue of State law that this court should not exercise jurisdiction. Second, this claim does not predominate over the RICO claim. Third, this court has not dismissed all claims over which it has original jurisdiction.

Regarding the fourth exception of § 1367, in *Palmer v. Hospital Authority of Randolph County,* such factors as "judicial economy, convenience, fairness to the parties, and whether all the claims would be expected to be tried together" should be used in determining whether to decline to exercise supplemental jurisdiction. *Palmer v. Hospital Authority of Randolph County,* 22 F.3d 1559, 1569 (11th Cir.1994).

In this case, because it was previously determined that the federal and non-federal claims arise out of the same case or controversy, judicial efficiency would be more properly served by the inclusion of the state claim. With the broad approach of "judicial economy" on this matter, this Court views the following reasons as persuasive. First, the evidence and witnesses for the claims are the same. Second, not exercising supplemental jurisdiction would require the simultaneous presentation of two trials which would require those same witnesses to be present at both. These offer strong motivation to not decline supplemental jurisdiction. Therefore, the Court will not decline to exercise proper supplemental jurisdiction over the non-federal claim. Accordingly, it is

ORDERED that Defendant's Motion to Dismiss (Docket No. 87) be **DENIED** as to all Counts.

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C

District Court of Appeal of Florida, Fourth District.
BAY COLONY OFFICE BUILDING JOINT VENTURE, a partnership, et al., Appellants,
v.
WACHOVIA MORTGAGE COMPANY, a North Carolina Corporation, et al., Appellees.
No. 76--1894.

Feb. 4, 1977.

From order of the Circuit Court, Broward County, Leroy H. Moe, J., striking affirmative defenses, defendants appealed. After plaintiffs gave notice of withdrawal of opposition to appeal and moved that their brief be stricken, the District Court of Appeal, Fourth District, Alderman, J., held that trial court erred in striking, sua sponte, three of the affirmative defenses.

Order reversed as to striking of three affirmative defenses.

West Headnotes

[1] Pleading ⚿360
302k360 Most Cited Cases
(Formerly 302k360(1))
Trial court may not on its own initiative strike an affirmative defense for reason that it is legally insufficient. 30 West's F.S.A. Rules of Civil Procedure, rule 1.140(f).

[2] Pleading ⚿354
302k354 Most Cited Cases
(Formerly 302k354(4))
Affirmative defense may not be stricken merely because it appears to a judge that defendant may be unable to produce evidence at trial to sustain such a defense. 30 West's F.S.A. Rules of Civil Procedure, rule 1.140(f).

[3] Pleading ⚿352
302k352 Most Cited Cases
Striking of pleadings is not favored and is an action to be used sparingly by courts, with any doubts to be resolved in favor of the pleadings. 30 West's F.S.A. Rules of Civil Procedure, rule 1.140(f).

[4] Pleading ⚿354
302k354 Most Cited Cases
(Formerly 302k354(4))
Trial court erred in striking, sua sponte, three of defendant's affirmative defenses, in view of fact that such defenses were not scandalous or impertinent matter and were not entirely without any possible relation to controversy in question. 30 West's F.S.A. Rules of Civil Procedure, rule 1.140(f).

[5] Pleading ⚿362(3)
302k362(3) Most Cited Cases

[5] Pleading ⚿364(3)
302k364(3) Most Cited Cases
Matter should be stricken as redundant or immaterial only if it is wholly irrelevant and can have no bearing on the equities and no influence at all on the decision. 30 West's F.S.A. Rules of Civil Procedure, rule 1.140(f).

***1005** James W. Geiger, Fort Lauderdale, for appellants.

Patrick G. Kelley of Kelley, Tompkins, Frazier & Kelley, Fort Lauderdale, for appellees.

***1006** ALDERMAN, Judge.

After this appeal had been filed, and briefs from both parties received by this court, the appellees gave Notice of Withdrawal of Opposition to Appeal and moved that their own brief be stricken. With the contestants in apparent agreement that the court below should be reversed, we have considered the record carefully and find that we must concur that the trial court erred in striking, sua sponte, three of the appellants' affirmative defenses.

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(Cite as: 342 So.2d 1005)

Because there was no motion to strike the affirmative defenses numbered 4, 5 and 6, the court's authority to strike was limited to the provisions of Fla.R.Civ.P. 1.140(f):

> 'Motion to Strike. A party may move to strike or the court may strike redundant, immaterial, impertinent or scandalous matter from any pleading at any time.'

[1][2][3][4][5] The trial court may not on its own initiative strike an affirmative defense for the reason that it is legally insufficient; in that case a motion by a party is required. Fla.R.Civ.P. 1.140(b). Neither may an affirmative defense be stricken merely because it appears to a judge that the defendant may be unable to produce evidence at trial to sustain such a defense. Windle v. Sebold, 241 So.2d 165 (Fla.4th DCA 1970). In the present case, there obviously being no scandalous or impertinent matter, the only possible justification for the trial court's striking the three affirmative defenses at issue here would be that those defenses were redundant or immaterial. Recalling that the striking of pleadings is not favored and is a drastic action to be used sparingly by courts, and further that any doubts are to be resolved in favor of the attacked pleadings, we conclude that affirmative defenses 4, 5 and 6 in this case were not so entirely without any possible relation to the controversy as to warrant their being stricken. Van Valkenberg v. Chris Craft Industries, Inc., 252 So.2d 280, 284 (Fla.4th DCA 1971). Matter should be stricken as redundant or immaterial only if it is wholly irrelevant and can have no bearing on the equities and no influence at all on the decision. Gossett v. Ullendorff, 114 Fla. 159, 154 So. 177 (1934); Pentecostal Holiness Church, Inc. v. Mauney, 270 So.2d 762 (Fla.4th DCA 1972).

The order from which this appeal is taken is reversed as to the striking of affirmative defenses 4, 5 and 6.

CROSS and LETTS, JJ., concur.

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