

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

NEIL J. GILLESPIE,
Plaintiff,

Case No. 05-CA-7205

-vs-

Division: "F"

BARKER, RODEMS & COOK, P.A.
a Florida corporation; and
WILLIAM J. COOK,
Defendants.

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TRANSCRIPT OF PROCEEDINGS

BEFORE: HONORABLE JAMES M. BARTON, II
Circuit Judge

TAKEN AT: In Chambers
George E. Edgecomb Courthouse
Tampa, Florida

DATE & TIME: 1 July 2008

REPORTED BY: WILLIAM HERRMANN
Court Reporter
Notary Public

STENOGRAPHICALLY RECORDED (ORIGINAL)
COMPUTER-AIDED TRANSCRIPTION (COPY)

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ORIGINAL

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P R O C E E D I N G S

1
2 THE COURT: How are you-all this morning?

3 MR. RODEMS: Good morning, Your Honor.

4 MR. BAUER: How are you, Your Honor?

5 THE COURT: Good, good. All right, we're here
6 on a couple of matters in Gillespie versus Barker,
7 Rodems and Cook, PA.

8 MR. RODEMS: Yes.

9 THE COURT: First of all, there is a Motion
10 for Contempt against the plaintiff for not filling
11 out a Fact Information Sheet.

12 MR. RODEMS: Yes, sir.

13 THE COURT: Any progress on that?

14 MR. BAUER: Your Honor, we forwarded it to our
15 client to get him to fill it out. We have not
16 received it back as yet.

17 THE COURT: When did you forward it to him,
18 roughly?

19 MR. BAUER: Shortly after we received the
20 original order. And we forwarded it to him again.
21 We have also filed a Motion to Stay in light of the
22 situation that we still have many issues pending.
23 There may be awards that are granted to my client
24 that will set off -- obviously, since it's
25 appropriate for, you know, until all the judicial

1 work is done to determine exactly who owes what, it
2 seems inappropriate to be passing back and forth
3 money on different issues.

4 THE COURT: Well, this has nothing to do with
5 money directly. It might lead to it, but it's just
6 a simple two pages, three pages.

7 MR. BAUER: Yes, sir.

8 THE COURT: That --

9 MR. RODEMS: Mr. Gillespie has not posted a
10 bond. He could post a bond, also. He hasn't done
11 that. So I mean, we just --

12 THE COURT: I mean, you know, that stays
13 enforcement of the judgment, but even then, that --
14 it's a two page form that when somebody gets a
15 judgment people are entitled to have it filled out,
16 especially when I -- I believe I ordered it, did I
17 not?

18 MR. RODEMS: Yes, sir.

19 THE COURT: So, I mean --

20 MR. BAUER: Your Honor, I'll request an
21 additional 15 days. We'll again attempt to express
22 to our client the importance of complying with the
23 Court's mandate and, I mean, I don't have the
24 information myself to be able to fill it out,
25 otherwise of course, I would have.

1 THE COURT: I understand. You certainly can't
2 take charge of that business. Is Mr. Gillespie
3 local or is he --

4 MR. BAUER: No, Your Honor, he's out of Ocala,
5 Gainesville.

6 THE COURT: Within a couple hours of Tampa.

7 MR. BAUER: Yes, sir.

8 MR. RODEMS: We have attached a proposed
9 order, Your Honor, which basically makes a finding
10 that he hasn't complied with the Court's order and
11 directs him to have a certain amount of time to
12 comply or face --

13 THE COURT: Dismissal of his complaint. We
14 draft the order.

15 MR. RODEMS: Okay.

16 THE COURT: Let's make it clear.

17 MR. BAUER: Understood.

18 THE COURT: Ten days.

19 MR. BAUER: Yes, sir.

20 MR. RODEMS: Your Honor --

21 THE COURT: Which, I mean, there might not be
22 that left of it anyway.

23 MR. RODEMS: That's the point that I was going
24 to make is that that remedy of law may not carry
25 the day depending upon what happens with the

1 remainder of this morning's hearing time, so that's
2 why we sought incarceration. I know this is my --

3 MR. BAUER: I don't think there's -- I'm sorry
4 for interrupting. I apologize.

5 MR. RODEMS: There is -- my partner just went
6 through a similar situation in Pasco County and of
7 course I'm not suggesting that you have to follow
8 the basic -- but this was sort of the procedure
9 that my partner told me the Court followed in that
10 case. And so we would ask --

11 THE COURT: I mean, the normal -- and in
12 County Court I did this hundreds, if not thousands
13 of times. It was actually much more common in
14 County Court than Circuit Court, for a lot of
15 reasons. But in any event, normally it was in the
16 context of a debt collection that was a one or two
17 count complaint and no counterclaim. So the only
18 thing you could do was try to get somebody's
19 attention. Normally once you got their
20 attention -- and out of those hundreds there were
21 maybe a handful over the years that we actually had
22 them picked up, taken to jail. We then had them
23 brought over immediately, the same day they were
24 arrested. And then, oh, all I have to do is do a
25 ten minute deposition or fill out this form? Yes.

1 Oh. You know, when can we do it? Then we would
2 let them out. If it's a form we put them in a
3 room, give them, you know, 15 minutes or however
4 long they needed to fill it out. But I don't know
5 that we're going to need to get to that point. I
6 would hope not in something like this.

7 And I don't know -- have you communicated with
8 your client orally at all? I'm not seeking for any
9 content, just I mean, are the lines of
10 communication open there or --

11 MR. BAUER: Yes, Your Honor, my office has
12 communicated with him orally. I have not
13 personally, but I have directed members of my staff
14 to call him and tell him the importance of filling
15 this out, that it needs to be filled out.

16 THE COURT: Specifically that this was on the
17 table today?

18 MR. BAUER: Yes, Your Honor.

19 THE COURT: All right. Okay. Again, so
20 that -- we'll see, I might, depending on how I rule
21 on your motion, and again, it's a motion for
22 judgment on the pleadings.

23 MR. RODEMS: Yes, sir.

24 THE COURT: As opposed to summary judgment,
25 although looking through your memo on page 4,

1 paragraph 7, at the very bottom of page 4: Based
2 on the allegations of the complaint and exhibits
3 attached thereto, there are several bases to grant
4 summary judgment in defendant's favor --

5 MR. RODEMS: Yes, sir.

6 THE COURT: -- I guess that was a slip of
7 the --

8 MR. RODEMS: The was the proverbial slip of
9 the word processer, it should have been to grant
10 judgment on the pleadings.

11 THE COURT: And I suppose that, I don't know
12 if that was a Freudian slip or not, but I mean, so
13 much of this as we have gone over in prior hearings
14 is factually driven. And I know you're trying to
15 rely on a rule of law that says that if one
16 attaches exhibits to a complaint or any other
17 pleading, for that matter, then the attachments,
18 the exhibits become part and parcel of the pleading
19 itself. I know that's what you're relying on.

20 MR. RODEMS: Yes, sir.

21 THE COURT: But in any event, your position is
22 fairly clear in your motion. Anything else you
23 want to tell me this morning?

24 MR. RODEMS: No, sir. If you have reviewed
25 the motion and you're satisfied that you understand

1 my position, then I have nothing to add. I'll just
2 reserve whatever I have to the conclusion.

3 THE COURT: Yeah, I usually find that to be
4 more productive.

5 MR. RODEMS: Yes, sir.

6 THE COURT: So what would the plaintiff say
7 about this?

8 MR. BAUER: Your Honor, we've also filed a
9 motion in response. I don't know if the Court --
10 it was a long time ago, it was back in October.
11 And I think clearly the key issues that we have --
12 the Court has already heard this once and raised
13 the issues that there are different factual
14 allegations, there have been statements made. We
15 have to assume in proper pleading that any of the
16 allegations that we make if you're going to rule in
17 a motion for judgment on the pleadings, that they
18 are true as alleged only for the purpose of
19 judgment on the pleadings.

20 It clearly indicates that there is an issue of
21 fact of whether or not there was any oral
22 modifications to the contract that was made between
23 the parties and whether there was any fraud that
24 went on between the parties. It cannot be
25 determined straightly from the pleadings whether or

1 not -- it can be -- also I'm still very concerned
2 about the issue that these exact allegations were
3 raised initially at the very beginning of this case
4 in a motion to dismiss before a different Judge.
5 That Judge specifically ruled that excluding I
6 believe four inflammatory sentences, that the
7 pleading itself even though pro se, was properly --
8 perfectly proper, withstood the Motion to Dismiss,
9 properly stated a cause of action. And the Court
10 ruled.

11 This motion for judgment on the pleadings
12 serves to be nothing more than appellate review
13 within the Court itself because a new Judge has
14 been assigned. We don't believe that's proper.

15 Further, a review of the case law clearly
16 shows that it's always the position of the Court to
17 best Judge this on the facts and allege them and
18 look at them, not move on summary judgments or
19 motions on the pleading unless it's absolutely,
20 unequivocally clear that the moving party's
21 entitled to them. The Court much prefers to
22 adjudicate these issues on the facts themselves,
23 move forward on the merits.

24 We had discussed previously that if the Court
25 wished to grant this motion on the pleadings it

1 would be appropriate to allow us to amend our
2 complaint. And I apologize, somehow I missed the
3 case that I have specifically on point on that
4 issue. I'll be happy to forward that to the Court
5 and opposing counsel after this hearing. Even if
6 the Court grants the motion for judgment on the
7 pleadings it is appropriate to allow us to amend
8 our complaint, if it's nothing more than a failure
9 to state a cause of action if we're capable of
10 fixing those issues, we should be able to fix such
11 issues. And as if the Court grants this motion we
12 would request that it's granted with leave to amend
13 in 20 days.

14 THE COURT: Clearly the exhibits show that the
15 plaintiff signed a number of documents
16 acknowledging -- whereby he acknowledged that this
17 \$50,000 that was sent to the defendant, it would be
18 going to the defendant, was for this that and the
19 other. And I think -- how is it that the plaintiff
20 seeks to get around those? And there are exhibits
21 I think to the complaint about it.

22 MR. BAUER: Your Honor, our client will
23 present evidence and testify to the fact that he
24 was misled as to the meaning of those documents,
25 specifically that he understood the \$50,000 was

1 going to the defendants in this action. But there
2 was fraud committed in procuring those documents in
3 the first place in that he was advised that the
4 defendants must get the \$50,000, that it was
5 pursuant to a court order, that the Court in the
6 class action had approved this award, had moved it
7 forward and said this is what must happen if this
8 is going to settle. He thought that was wrong in
9 the first place, but felt that because it was a
10 court order that he must comply -- that the
11 attorney's fees awarded was court ordered, he was
12 advised by his attorney that this was the most he
13 could get because an attorney was not entitled to
14 split attorney's fees with -- which if it was a
15 court order that would be true. However, in a
16 settlement negotiation the attorney could have
17 negotiated a higher return for his client and a
18 lower agreement of what the attorney's fees would
19 have been paid for.

20 I modify my attorney's fees all the time in
21 the interest of making sure that a settlement goes
22 through. And I believe my client will be able to
23 proffer that testimony to the jury. The jury will
24 determine whether or not they believe that
25 testimony, whether fraud was committed in procuring

1 that document. And I think that's the crux of our
2 argument and that's where there is a factual
3 dispute. Did those discussions go on? Did that
4 fraud happen?

5 THE COURT: What about on the pure breach of
6 contract, Count 1? If you look at -- here is the
7 contract. They're all kinds of written agreements
8 and then again you got letters. I mean, wasn't
9 there -- don't Exhibits 4 and 5 to the complaint
10 show that the plaintiff authorized the defendant in
11 writing to negotiate a settlement for him and
12 that -- in that underlying case that party was
13 going to pay the fees?

14 MR. BAUER: Your Honor, yes, he did negotiate
15 and he authorized the defendant to negotiate fees
16 for him. And that's the whole problem is --
17 authorized him to, it was contractually provided
18 for that he would negotiate for my client's
19 settlement with my client's interests in mind. I
20 think clearly from the settlement there was a
21 breach of that contract, that he did not settle --
22 or he did not enter negotiate -- it was a failure
23 of the agreement, which simply is if Your Honor was
24 to contract for a house to be painted and for it to
25 be properly painted and everything to be conducted

1 in the proper manner, if you painted the house and
2 left huge spots of unpainted areas, that would be a
3 breach of contract. It wouldn't be a negligence
4 count because --

5 THE COURT: Right.

6 MR. BAUER: And so in the same vein a failure
7 to negotiate for an individual on a proper
8 contractual basis, do that properly and come out
9 with a good settlement, that's a breach of
10 contract. There is places the paint brush didn't
11 touch, things that didn't get -- otherwise, the
12 57.105 that awarded attorney's fees under the --
13 under my client's improper forwarding an Economic
14 Loss Rule, barring him and negligence counts, then
15 we should go, okay, fine.

16 If, if -- this isn't a breach of contract,
17 it's a negligence count, it's one of two of those
18 things. It's either -- it can be intentional fraud
19 or it can be negligence or it can be intentional
20 fraud and breach of contract. Which is it? And
21 it's either going to -- and we've had arguments in
22 the past that --

23 THE COURT: What? More precise breach or --

24 MR. RODEMS: The breach of the contract is his
25 failure to negotiate in my client's interests.

1 THE COURT: Which would have what, in theory
2 would have gotten him more than the \$2,000?

3 MR. BAUER: Yes, Your Honor. Because if they
4 had breached -- if they had spoke with the other
5 side and said: Look, you're willing to give us I
6 believe some \$60,000 or plus more, that's what
7 you're willing to settle for. You don't focus on
8 who's getting attorney's fees paid or whether my
9 clients getting paid, whether you're mad at them or
10 whether you're mad at us, what's going on. Let's
11 do this in a straight settlement negotiation.

12 Let's say it's \$60,000 is what we're settling for,
13 I'll take my fees pursuant to the contract that I
14 already have.

15 They slipped out of the contract that they had
16 that was for 40 percent and they ended up with
17 \$50,000 and my client only getting \$2,000. That's
18 nowhere near -- and I'm roughly quoting the
19 numbers. I'm a little off. But I think clearly
20 that is a failure -- either a failure of a contract
21 or it's a tort. It's one or the other. And if --
22 there was a motion to dismiss for failure to state
23 a cause of action, there was Economic Loss Rules
24 that were entered, and clearly we had an
25 establishment at the beginning of this case that

1 this was a contract and it was a fraud issue by the
2 motions to dismiss that were originally filed.

3 If we're going to go back and revisit that
4 Motion to Dismiss we need to go back to that time
5 and allow us then to say, fine, if we're going to
6 go back and revisit everything from the beginning
7 and say this is not a contract or a fraud case,
8 then it's going to be a fraud plus other torts. We
9 need to be given the opportunity to either assert
10 this is a contract or assert this as a tort,
11 because the fraud issue is a time, the fraud is in
12 the beginning, then it's either a breach of
13 contract at the time with the contract subsequent
14 or it's a tort at the same time as the breach of
15 contract. We need to know which it is. We'll be
16 happy to plead which one -- whichever one it is,
17 but we need a solid position.

18 The previous Court ruled there was a contract
19 and a fraud issue. If this Court is going to rule
20 it's not a breach of contract issue, we need to go
21 back, amend this and say, okay fine, now this is a
22 fraud and it's a tort.

23 THE COURT: He's claiming that he should have
24 gotten a little over \$6,000 more than he actually
25 got?

1 MR. BAUER: At the very least, Your Honor,
2 yes.

3 THE COURT: Well, what about at the most? I
4 think that's what you put in your memo that that's
5 what he seems to be asking for, that he got two and
6 he should have gotten -- in fact, there's a very
7 specific amount, \$6,224 and 78 cents.

8 MR. BAUER: Yes, Your Honor.

9 MR. RODEMS: Yes, sir. He specifically said
10 the breach was not in calculating the fee according
11 to the contract. And he put a specific amount that
12 he said he was owed. He did not allege that there
13 was a breach by failing to negotiate in his
14 client's best interest. That's something he just
15 made up this morning. That's not part of the
16 complaint.

17 THE COURT: I wondered about that. Because
18 that could in theory, who knows what that number
19 is? If you didn't negotiate in good faith, you
20 know, of roughly 52,000 they paid total, the law
21 firm should have gotten at most -- let's throw some
22 numbers out of the air -- 20,000, and my client
23 should have gotten 42,000, let's say. Or any other
24 combination that would have to -- I don't know if
25 we did it right, but whatever adds up to \$52,000.

1 Well, I suppose again if that failure to negotiate
2 on behalf of the client in good faith is what is
3 now being claimed is a breach.

4 MR. RODEMS: Well, that's not in the
5 complaint. We're a long way down the road here and
6 to be honest, Judge, that's just a drowning man
7 reaching for a stick. The bottom line here is
8 this, Mr. Gillespie participated and directed the
9 negotiations. He told us what to ask for. He knew
10 that he had a claim for his damages. He knew that
11 there was also a claim for court ordered attorney's
12 fees --

13 MR. BAUER: Objection, Your Honor, that's
14 issues -- we're talking about a motion for judgment
15 on the pleading.

16 THE COURT: Right.

17 MR. BAUER: These are facts being alleged way
18 outside --

19 THE COURT: Well, I assume he'll -- now that
20 you called him on it, say, well, Judge, that's in
21 exhibit whatever, that's in the complaint or
22 whatever.

23 MR. RODEMS: That's exactly what I think --

24 MR. BAUER: Your Honor --

25 MR. RODEMS: Excuse me.

1 THE COURT: Well, let him try.

2 MR. RODEMS: That's Exhibit Number 4 and
3 Exhibit Number 5. And these are the documents that
4 Mr. Gillespie attached.

5 THE COURT: Okay.

6 MR. RODEMS: Exhibit 4: Dear Neil, this
7 confirms that you authorized us to appeal the
8 decision in the above referenced case. We will not
9 be filing a new lawsuit in State Court. In
10 addition, you authorized us to demand 1,000 to
11 settle your claim plus 50,000 in attorney's fees
12 and costs.

13 Exhibit 5 is a letter from Mr. Gillespie to
14 Mr. Cook. And it's relating to that previous
15 letter, Exhibit 4. And he says in terms of why the
16 case hasn't settled, I believe the sticking point
17 is your request for 50,000 in attorney's fees and
18 costs. I do not believe that the request of a
19 thousand dollars for myself and Mrs. Longfield is a
20 very good settlement.

21 Then he goes on to say: Given your lack of
22 success in this matter thus far I suggest you ask
23 for 10,000 in attorney's fees and costs.

24 So Mr. Gillespie directed and participated in
25 the settlement negotiations. He knew that we were

1 asking for money for him and he knew that we were
2 asking for money for the attorney's fees and costs.

3 MR. BAUER: Objection, hearsay.

4 MR. RODEMS: Then when the settlement
5 occurred --

6 THE COURT: What?

7 MR. BAUER: Objection, Your Honor, hearsay.

8 THE COURT: I think he's trying to argue from
9 an exhibit and not --

10 MR. BAUER: Yes, Your Honor, but that would
11 have to be some type of verified or sworn affidavit
12 or something for the Court to be able to support a
13 summary judgment or motion for judgment on the
14 pleading type issue. Those aren't verified,
15 they're --

16 THE COURT: The letters aren't?

17 MR. BAUER: No, Your Honor.

18 THE COURT: Well, they might not be, but if
19 the party attaches an exhibit, particularly an
20 exhibit that the party not only represented party
21 but a pro se party says attaches an exhibit saying;
22 here's a letter that I wrote; I'm going to feel
23 fairly comfortable relying on that unless in the
24 complaint the litigant either with or without
25 counsel saying, Exhibit 4 has my name and purported

1 signature on it, but it's a forgery. Then I'll
2 draw that conclusion. But I don't see how I can
3 disregard an exhibit that a party has signed. I
4 mean, it might not give the movement here all of
5 the, you know, inferences that they want, but I
6 don't see how you can say that it's hearsay when
7 the party that wrote it says here's a letter that I
8 wrote, I'm attaching it as Exhibit 4 or 5.

9 MR. BAUER: Objection still.

10 THE COURT: Pardon?

11 MR. BAUER: Just I renew the objection.

12 THE COURT: Okay, that's fine. I'm overruling
13 it.

14 MR. RODEMS: In addition, Your Honor,
15 following the conclusion of the settlement
16 Mr. Gillespie signed a closing statement, which is
17 required by the rules regulating the Florida Bar.
18 And that's Exhibit 2, which Mr. Gillespie attached.
19 He's also signed it, as did Mr. Cook. This is what
20 it says, quote: In signing this closing statement
21 I acknowledge that Amscot Corporation separately
22 paid my attorneys \$50,000 to compensate my
23 attorneys for their claim against Amscot for Court
24 awarded attorney's fees and costs.

25 And he signed that. He knew that Amscot paid

1 for Rodems and Cook \$50,000 for it's attorney's
2 fees and costs. He knew that. He knew that he was
3 getting \$2,000. This is what Mr. Gillespie agreed
4 to, Your Honor. He agreed to this. Then he files
5 a breach of contract action and says, yeah, I know
6 I agreed to it, but I've come up with a different
7 interpretation of the contract and I should get the
8 benefit of this contract.

9 Well, the contract says clearly that the
10 defendant may pay some or all of Mr. Gillespie's
11 attorney's fees. And that's in fact what happened
12 in this case. Mr. Gillespie's attorney's fees were
13 paid entirely by the defendant. Entirely. And he
14 knew it.

15 So when you look at the contract,
16 Mr. Gillespie paid zero percent for attorney's
17 fees, zero. The defendant paid all his attorney's
18 fees. Mr. Gillespie didn't have to dip into his
19 pocket to pay one penny of it. In fact, he got
20 \$2,000 out of settling the case.

21 Now, this lawsuit arose under the Truth in
22 Lending Act which has a fee shifting provision.
23 That's how we were able to negotiate a separate
24 amount for our attorney's fees and costs.

25 Mr. Gillespie's own letters and closing statement

1 affirmed that he understood that we were
2 negotiating for our attorney's fees separately. So
3 we have not charged Mr. Gillespie any fee in this
4 case. And Mr. Gillespie expressly agreed to our
5 law firm being paid \$50,000 for its claim for court
6 ordered attorney's fees.

7 I mean, clearly Judge, there is no facts in
8 dispute there. You have the documents in front of
9 you that Mr. Gillespie filed with this exhibit. If
10 you look at what we got paid for attorney's fees
11 and costs and you compare that to what
12 Mr. Gillespie paid out of his pocket for attorney's
13 fees and costs, he paid zero. Amscot paid 100
14 percent of his attorney's fees and costs.

15 So in this case Mr. Gillespie ended up being
16 better off than if there had been no fee shifting
17 provision. If there had been no fee shifting
18 provision we wouldn't have been able to get \$50,000
19 from Amscot, we would have gotten 2,000 for
20 Mr. Gillespie and he would have paid 40 percent of
21 that 2000 for attorney's fees.

22 The Truth in Lending Act is one of those laws,
23 one of those laws, Your Honor, that exists with a
24 fee shifting provision because otherwise the
25 amounts at issue would be too small to retain

1 competent counsel. So there's been no breach of
2 contract by Barker, Rodems and Cook, because we
3 haven't charged Mr. Gillespie any fee.

4 As far as the claim against Mr. Cook
5 individually, Mr. Cook was not a party to the
6 contract. The contract was between Barker, Rodems
7 and Cook and Mr. Gillespie. So Mr. Cook should be
8 dismissed from this litigation.

9 Barker, Rodems and Cook should be dismissed
10 from the breach of contract claim because it hasn't
11 breached the contract, the documents Mr. Gillespie
12 filed show that, along with a copy of the contract.

13 And then as far as the fraud claim is
14 concerned, Mr. Gillespie's saying in his complaint
15 they told me that this was for court ordered fees.
16 But the documents show that Mr. Gillespie signed
17 that he acknowledged that it was a 50,000-dollar
18 settlement to compensate his attorneys for their
19 claim against Amscot, their court ordered
20 attorney's fees and costs, not in satisfaction of a
21 court order.

22 Now when the documents attached to a lawsuit
23 differ from the allegations in the lawsuit, the
24 documents control. I have cited those cases in my
25 motion, Your Honor. So Mr. Gillespie can say the

1 cow jumped over the moon; if the document says the
2 cow did not jump over the moon you have to go with
3 the document. And in this case Mr. Gillespie
4 acknowledged that Barker, Rodems and Cook would be
5 paid \$50,000 to settle their claim for Court
6 awarded attorney's fees and costs.

7 So there has been no fraud. He cannot rely on
8 a statement as he alleges. We have to take all of
9 his factual allegations as true. He says he relied
10 on the statement that the attorney's fees were for
11 a Court awarded attorney's fee. So let's accept
12 that as true. But now let's compare that to the
13 closing statement that he signed and that he
14 attached as Exhibit 2 and he acknowledges that it
15 wasn't for court ordered attorney's fees, it was
16 for a claim for court ordered attorney's fees.

17 So we have to go with the clear unequivocal
18 document that Mr. Gillespie signed. And if that
19 was the only thing that would be sufficient, but if
20 you look at Exhibit 4 and 5, it's clear that
21 Mr. Gillespie knew that we were negotiating a
22 settlement. It's clear that he knew that. Exhibit
23 4 is a letter from Mr. Cook to him talking about
24 the settlement negotiations. Exhibit 5 is
25 Mr. Gillespie's letter telling us how to do the

1 settlement negotiations. He knew that we were
2 trying to settle. He knew that when we did settle
3 that they paid us \$50,000 for our claim for court
4 ordered attorney's fees and costs. And there is --
5 therefore, he can't meet the reliance element of
6 proving a fraud claim.

7 THE COURT: I don't understand your -- I mean,
8 I understand your rational of saying that there is
9 an allegation in the complaint that is then
10 essentially rebutted by an exhibit, then the
11 exhibit controls. That's certainly a general rule.

12 MR. RODEMS: Yes, sir.

13 THE COURT: But if that were the case there
14 would never be fraud complaints and fraud actions,
15 because that's the essence of a fraud count. I
16 allege, yes, I signed a document because the person
17 that gave it to me said that he needed something
18 for me to sign so I could get my roof fixed.
19 However, I did not sell my property to this person
20 and so therefore attached to this complaint is
21 Exhibit A, which is a warranty deed, which I did
22 sign, but that the defendant said that they just
23 needed that so they could show to somebody to do
24 this, that or the other. I mean, you could think
25 of any number of facts that are alleged in fraud

1 complaints. And those are never dismissed because
2 the very essence of the complaint is to obviate the
3 effectiveness of the written document, whether it's
4 a deed or a mortgage or a note or whatever it is.
5 So --

6 MR. RODEMS: Your Honor, may I point out to
7 you that the Court in Taylor Woodrow Homes, 850
8 So.2d 536, stated, quote: The Courts have held
9 that a party may not recover in fraud for an
10 alleged false statement when proper disclosure of
11 the truth is subsequently revealed in a written
12 agreement between the parties.

13 That is exactly on point with this case, Your
14 Honor. Mr. Gillespie is saying they told me this
15 was for court ordered fees. A subsequent written
16 agreement, Exhibit 2, is the closing statement.
17 And in that closing statement that Mr. Gillespie
18 signed it says: I acknowledge that Amscot
19 Corporation separately paid my attorneys \$50,000 to
20 compensate my attorneys for their claim against
21 Amscot for Court awarded fees and costs.

22 So subsequent written agreement, he's
23 acknowledging that it was the settlement of a claim
24 for fees. It's the whole premise of his fraud
25 complaint is that we told him that the Court

1 awarded 50,000 in fees.

2 Now, we could tell you, Judge, that's not what
3 happened, but on a motion for judgment on the
4 pleadings we have to accept that as true. Unless
5 it's directly contradicted by a written document,
6 which it is in this case. He clearly signed a
7 document saying that he understood we were being
8 paid \$50,000 for our claim for court awarded fees.
9 And because that is a subsequently revealed written
10 agreement between the parties that shows that the
11 50,000 was for a claim for fees and not for a court
12 awarded fee any statements he makes --

13 THE COURT: But again, drawing all inferences
14 in favor of the plaintiff here, you could sign a
15 closing statement that says, yeah, they settled
16 that claim for Court awarded fees because it could
17 have been a whole lot more than that and that's
18 what they settled for. I mean, I don't know what
19 the ultimate facts are going to be determined here,
20 but to me that's not one that totally rebuts the
21 best case scenario by this plaintiff.

22 Now, the question is, because I do with your
23 other point, if this is fraud, and if it's
24 established as fraud, this is not fraud in the
25 inducement, this is fraud in the performance.

1 Because I don't even think that either the
2 plaintiff or the plaintiff's counsel, you correct
3 me if I have an erroneous impression, believes that
4 that's what they intended to do when they entered
5 into this contract, because I don't think they had
6 any idea they were going to be this successful in
7 terms of getting this amount of fees or any fees at
8 all. So that has to be fraud in the performance,
9 which I think the case law is clear, you don't have
10 a separate fraud count for that, that's folded into
11 any breach of contract action that you have. Seems
12 to me.

13 So I'm going to -- I am going to grant the
14 motion for Count -- as to Count 2, the fraud count.
15 But would be ruling that the allegations in the
16 fraud count will be -- if they're not -- are they
17 arguably part of your Count 1, the breach of
18 contract count?

19 MR. BAUER: Your Honor, Count 1-7 references
20 paragraphs 1 through 6. Paragraph 6 -- paragraph 6
21 alleges the law firm -- referencing Barker, Rodems
22 and Cook, and I believe all individually Mr. Cook
23 was the intent. That was not satisfied with the
24 contractual entitlement, 45 percent of the total
25 recovery for attorney's fees and wanted more money.

1 So I believe that arguably it does incorporate
2 those allegations of fraud entered to the contract
3 count.

4 But if Your Honor -- to clarify things, so is
5 the Court just making a ruling that we're
6 incorporated, we'll be happy to amend the complaint
7 so that there is a clear pleading record to show
8 that everything is contained in the breach of
9 contract count.

10 THE COURT: And wasn't the contract between
11 the plaintiff and the defendant law firm as opposed
12 to Cook individually?

13 MR. BAUER: No, Your Honor. Actually, because
14 there was a predecessor law firm that originally
15 had this contract and the predecessor law firm
16 broke up. It went into a secondary law firm.
17 There was an attempt to forward a new contract to
18 the client. That contract was never entered into,
19 it was never signed.

20 Previously counsel has alleged that there
21 actually -- in this Court has alleged that there
22 actually was an assigned contract. However, an
23 attempt to file discovery and request those
24 documents all we have received back are -- we have
25 not received a proper response as far as pleadings.

1 We received an e-mail that e-mailed us everything
2 that we already had and stated that there was no
3 further documents that existed.

4 We would request that prior to the Court
5 entering a dismissal individually that the Court
6 either make a determination that there was
7 automatically some assignment and there was a
8 corporate veil established, which I don't think
9 there's an argument out there that exists. There
10 were two potential entities that were working the
11 contract. After the dissolution of the first
12 entity that was the professional, Mr. Cook himself,
13 who's personally liable. And then he was working
14 with the corporation. And I'm sure their resources
15 were used on this. They're liable for everything
16 that goes on with this. I think we're going to
17 need either some factual findings that show some
18 type of separation on those two, or their failure
19 to properly issue a new contract after the other
20 one was dissolved or not properly assigned open
21 them up to liability. I mean, that's why we have
22 all of our corporate shields, that's why we all
23 have our very specific steps. I think unless they
24 can produce a signed contract --

25 THE COURT: Well, we're here on the judgment

1 on the pleadings, so I'm not --

2 MR. BAUER: Well, Your Honor, I believe there
3 is actually -- this issue was dealt with on the
4 first motion and opposing has brought this up. And
5 the Court issued an order on that dismissing -- am
6 I not correct? Dismissing Mr. Cook individually.

7 MR. RODEMS: Correct.

8 MR. BAUER: I don't believe that --

9 MR. RODEMS: That's not an issue.

10 MR. BAUER: Well, it was brought up by
11 opposing counsel --

12 THE COURT: Yeah, I just heard you --

13 MR. BAUER: Yes, I was going to file a motion
14 for relief from judgment due to mistake or error.
15 Well, since it's been brought up --

16 THE COURT: You need to move to have the Court
17 readdress it.

18 MR. RODEMS: Your Honor, if I understand your
19 ruling correctly, you're granting the motion for
20 judgment on the pleadings as to Count 2, the fraud
21 count?

22 THE COURT: Yes.

23 MR. RODEMS: Okay.

24 THE COURT: But with the understanding that
25 the allegations, again, they're either expressly or

1 implicitly a part of Count 1, could be part of the
2 evidence of Count 1 breach, unless there is a need
3 or a desire to amend Count 1.

4 MR. BAUER: There's -- if the Court doesn't
5 want that I'll be happy to leave --

6 THE COURT: I mean, I don't want to -- again
7 counsel, you're perfectly aware of these
8 allegations and the alleged statements that were
9 either made or not made, but --

10 MR. RODEMS: Yes, sir. So Count 1, the breach
11 of contract claim as to Barker, Rodems and Cook, PA
12 survives?

13 THE COURT: Yes.

14 MR. RODEMS: And Count 2 --

15 THE COURT: Temporarily.

16 MR. RODEMS: Yes.

17 THE COURT: You have ten days.

18 MR. RODEMS: Yes. Judgment on the pleadings
19 has been granted as to Count 2 --

20 MR. BAUER: Oh, I understand.

21 MR. RODEMS: And then as far as the motion for
22 contempt, you would like me to redraft that order
23 so that it provides that if compliance is not met
24 within ten days that Mr. Gillespie's complaint
25 shall be dismissed.

1 THE COURT: Yeah. And also, I'm going to
2 reserve ruling to impose additional sanctions,
3 because all this is intended to get his attention
4 to fill out this two page form. While I understand
5 that the case is being appealed or is that --

6 MR. BAUER: Yes, Your Honor. The award of
7 attorney's fees is being appealed.

8 THE COURT: Not the judgment itself.

9 MR. BAUER: Yes. Well, Your Honor, the
10 judgment and the award were incorporated together.

11 THE COURT: All right. So again, they're
12 entitled to have him fill out this form even while
13 the appeal is going on. I would say even with a
14 stay order. I mean, they can't just try to execute
15 on a judgment that has been stayed, but
16 nevertheless, they could still set him down even
17 for a deposition in aide of execution. A
18 deposition in aide. They just can't flat out use
19 the information they got to garnish wages or
20 execute or levy on property or -- see what I'm
21 saying?

22 MR. BAUER: Are you saying, Your Honor, that
23 you have granted -- I admit it has not been noticed
24 for today, but if we can just get rid of this as
25 opposing counsel is we will comply with the ten

1 day, get it filled out, but the Court is granting
2 the motion to stay?

3 THE COURT: No. I'm saying if -- I'm saying
4 even if a judgment has been stayed --

5 MR. BAUER: My apologies.

6 THE COURT: -- a party can depose people in
7 aide of execution or have him fill out this form.

8 MR. RODEMS: We want to be on record as saying
9 that we do oppose a stay. I know it's not brought
10 up for hearing today but --

11 MR. BAUER: I just misunderstood what the
12 Court was saying.

13 THE COURT: Okay.

14 MR. RODEMS: I'll circulate a proposed order
15 to Mr. Bauer and then send them on to you --

16 MR. BAUER: Is that ten days as of today or of
17 the signing of the order?

18 THE COURT: Today.

19 MR. BAUER: Thank you.

20 THE COURT: If you can get it over, but, you
21 know, don't delay in getting it over.

22 MR. RODEMS: Yes, sir. I will have one on
23 Mr. Barton's -- or on Mr. Bauer's e-mail before he
24 even arrives back in Gainesville.

25 THE COURT: Great. All right, thank you.

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MR. RODEMS: Thank you, Judge.

THE COURT: Be in recess.

(Whereupon, the above hearing was
concluded.)

C-E-R-T-I-F-I-C-A-T-E

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

I, WILLIAM HERRMANN, Court Reporter for the
Circuit Court of the Thirteenth Judicial Circuit of
the State of Florida, in and for Hillsborough County,

DO HEREBY CERTIFY, that I was authorized to
and did, report in shorthand the proceedings and
evidence in the above-styled cause, as stated in
the caption hereto, and that the foregoing pages
constitute a true and correct transcription of my
shorthand report of said proceedings and evidence.

IN WITNESS WHEREOF, I have hereunto set my hand
in the City of Tampa, County of Hillsborough, State
of Florida, this 4 July 2008.

WILLIAM HERRMANN, Court Reporter.

s/William Herrmann

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