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

NEIL J. GILLESPIE,

Plaintiff,

vs.

Case No.: 05CA7205
Division: F

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

Defendants.
_____/

DEFENDANTS' REPLY TO PLAINTIFF'S REBUTTAL TO DEFENDANTS' MOTION TO DISMISS AND STRIKE

Pursuant to the Court's directive at the hearing on Monday, September 26, 2005, on Defendants Barker, Rodems & Cook, P.A. (BRC) and William J. Cook's motion to dismiss, Defendants reply to Plaintiff's Rebuttal to Defendants' Motion to Dismiss and Strike, as follows:

1. Plaintiff has made a series of false, scandalous, and irrelevant allegations in both his complaint and his rebuttal, none of which supports either count against either Defendant. Plaintiff's pro se status or unfamiliarity with the law do not excuse his uncorrectable pleading defects, and therefore the Complaint should be dismissed with prejudice. See Anderson v. School Board of Seminole County, 830 So.2d 952 (Fla. 5th DCA 2002); Kohn v. City of Miami Beach, 611 So.2d 538 (Fla. 3d DCA 1992).

2. Breach of contract. In Count I, Plaintiff sues both Defendants for breach of contract. Plaintiff hired BRC to sue Amscot. Plaintiff claims that the contract between BRC and him, which he attached to the complaint in this action as Exhibit "1", was breached by, in effect, the defendant, Amscot, paying all of his attorneys' fees.

a. As pleaded, Count I fails to state a cause of action for breach of contract against BRC. It is fundamental that, "[a]ny exhibit attached to a pleading is part of the pleading for all purposes, and if an attached document negates a pleader's cause of action, the plain language of the document will control and may be the basis for a motion to dismiss." Franz Tractor Co. v. J.I. Case Co., 566 So.2d 524, 526 (Fla. 2d DCA 1990). Here, the documents attached to Plaintiff's Complaint contradict the allegations of the Complaint.

First, the contract (Exhibit "1" to the Complaint) says at page 2 that a Defendant may pay "all or part of the attorneys' fees." Here, as the closing statement Plaintiff attached as Exhibit "2" confirms, the Defendant paid all of the Plaintiff's attorneys' fees. Thus, the $50,000 payment for attorneys' fees and costs was in compliance with the contract.

In addition, Exhibits "2", "4" and "5" show that Plaintiff agreed to Amscot paying all of his attorney' fees and therefore negate any allegations that he did not approve of the payment or that the contract did not allow the payment. "When there are conflicts between the allegations and documents attached as exhibits, the plain language of the documents control." Geico General Ins. Co., Inc. v. Graci, 849 So.2d 1196, 1199 (Fla. 4th DCA 2003).

b. Realizing that the documents he attached are fatal, Mr. Gillespie promises to amend his complaint and leave out the documents that defeat his allegations: "In the alternative, upon leave to amend the Complaint, Plaintiff will remove the Closing Statement exhibit, plead the allegation by reference in the Complaint, and then impeach the Closing Statement with the Appellate Court ruling, Exhibit 7." (Plaintiff's Rebuttal at page 10). The Court should not permit the Plaintiff to unnecessarily prolong his meritless case by giving Plaintiff the opportunity to mislead the Court and Defendants with allegations he knows are

contradicted by the documents he has filed.

c. Plaintiff fails to offer any legal support for a breach of contract action against Defendant Cook, in his individual capacity. Mr. Cook was not a party to the contract. As a matter of law, Mr. Cook is entitled to dismissal with prejudice of Count I against him.

3. Fraud. Count II fails to comply with section 768.72(1), Florida Statutes and should be dismissed on that basis alone. It also is barred by the economic loss rule, and the Complaint's exhibits contradict any allegations of justifiable reliance. Count II should be dismissed with prejudice, as Plaintiff again merely proposes to remove any contradictory documents if he is allowed leave to amend. (Plaintiff's Rebuttal at page 10). Mr. Gillespie should not be given an opportunity to commit fraud on the Court.

a. Count II fails to state a cause of action for fraud because Plaintiff has not alleged an independent tort, and a fraud claim will not arise from what amounts to a claim of breach of contract. Mr. Gillespie's fraud claim alleges that Mr. Cook told him that the Court awarded fees of $50,000, thereby triggering a clause that said the attorney's would be the higher of 45% or the Court awarded fee. He says he relied on that representation. He alleges that, under the contract, the fees should have been 45%. At bottom, Mr. Gillespie is saying that the Defendants somehow tricked him into allowing BRC to take a greater fee than permitted under his contract. Even assuming the patently false allegations are true, they do not allege an independent tort separate from his breach of contract claim and therefore must be dismissed.

i. If the alleged tort or fraud arises from the same conduct that breaches the contract, the tort or fraud count cannot survive. Richard Swaebe, Inc. v. Sears World Trade, Inc., 639 So.2d 1120, 1121 (Fla. 3d DCA 1994)("The relationship between RSI

and SWT was strictly contractual and RSI has not proved that a tort independent of the contractual breaches was committed. The fraud for which the jury found SWT liable was not a separate and independent underlying tort, but rather merely a breach of the RSI/SWT contracts. See Lewis v. Guthartz, 428 So.2d 222 (Fla.1982)(without proving a separate and independent tort, even flagrant and oppressive breach of contract could not be converted into tort in order to recover punitive damages)"); Lake Placid Holding Co. v. Paparone, 508 So.2d 372, 377 (Fla. 2d DCA 1987)(Reversing judgment of fraud: "The alleged fraud and breach of fiduciary duty attributed to Tobler and LPHC 'arose from the same conduct which [constituted] a breach of contract.' Taylor v. Kenco Chemical & Mfg. Corp., 465 So.2d 581, 590 (Fla. 1st DCA 1985))"; Taylor v. Kenco Chemical & Mfg. Corp., 465 So.2d 581, 590 (Fla. 1st DCA 1985); John Brown Automation, Inc. v. Nobles, 537 So.2d 614, 617 (Fla. 2d DCA 1988); Sarkis v. Pafford Oil Co., 697 So.2d 524, 527 (Fla. 1st DCA 1997).

ii. Moreover, the damages Gillespie claims in the fraud count are the exact same as in the breach of contract: $6,224.78. R.D.M.H., Inc. v. Dempsey, 618 So.2d 794, 795 (Fla. 5th DCA 1993)("[W]e reverse the remaining award of compensatory damages for fraud and the associated punitive damage award. An award of compensatory damages for both breach of contract and fraud is erroneous where the plaintiff fails to establish that he sustained compensatory damages based on fraud which were in any way separate or distinguishable from the compensatory damage award for breach of contract.").

b. Count II also fails to state a cause of action for fraud because the exhibits attached to the complaint refute one of the elements of fraud: Reliance. "In order to recover for fraud in the inducement, the plaintiff must prove by the greater weight of the evidence that: 1) a

false statement was made regarding a material fact; 2) the individual who made the statement knew or should have known that it was false; 3) the maker intended that the other party rely on the statement; and 4) the other party relied on the false statement to its detriment." Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp., 850 So.2d 536, 542 (Fla. 5th DCA 2003).

i. "Reliance on the alleged false statement is an essential element and if the evidence shows that the recipient of the statement knew it was false, reliance on the statement is unjustified. . . Moreover, the courts have held that a party may not recover in fraud for an alleged false statement when proper disclosure of the truth is subsequently revealed in a written agreement between the parties. . . ." Id. at 542-43.

ii. In his complaint, Mr. Gillespie alleges that he relied on Mr. Cook's purported statement that the Court awarded the fees to BRC. The Closing Statement, however, shows that Mr. Gillespie knew Amscot paid BRC $50,000 to settle its claim for court-awarded fees and that there was no actual fee award. Here is what it said: "In signing this closing statement, I acknowledge that AMSCOT Corporation separately paid my attorneys $50,000.00 to compensate my attorneys for their claim against AMSCOT for court-awarded fees and costs. I also acknowledge that I have received a copy of the fully executed Release and Settlement Agreement dated October 30, 2001." So, when Mr. Gillespie signed the Closing Statement, Gillespie knew the $50,000 payment by Amscot to BRC was for the claim against Amscot for court-awarded fees, not for an award of fees.

iii. Thus, the closing statement again contradicts the specific allegations of reliance in the complaint in that it shows that after Mr. Cook's purported false statement, Mr. Gillespie signed a document that disclosed the "truth." As a matter of law, Mr.

Gillespie cannot claim he relied on the false statement. See Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp., 850 So.2d 536, 542-43 (Fla. 5th DCA 2003) ("Moreover, the courts have held that a party may not recover in fraud for an alleged false statement when proper disclosure of the truth is subsequently revealed in a written agreement between the parties.").

Because the Closing Statement Mr. Gillespie signed shows that he knew the payment was for a claim for court-awarded fees, not for an award of fees by the Court, Mr. Gillespie cannot claim to have relied on the presumed-to-be-true allegation that Mr. Cook told him that the Court awarded BRC $50,000 in fees.

iv. Another document shows that Mr. Gillespie clearly knew the Defendants were negotiating a claim for court-awarded fees: Mr. Gillespie's letter, attached to the Complaint as Exhibit 5. In it, he tells Defendants exactly how to negotiate the settlement, with BRC demanding money to settle his claims, and then separately negotiating to settle BRC's claims for court-awarded fees and costs. He was well aware that BRC was asking for $50,000 for its attorneys' fees claim, and he told BRC to ask for $1,000.00 for his claims, and to reduce the attorneys' fees demand to $10,000. The document belies any claim of reliance, and without reliance, there is no fraud.

In summary, Defendants are entitled to dismissal with prejudice. It is proper to deny leave to amend when "the complaint is clearly unamendable. . . . Stated another way, where a party may be able to allege additional facts, or where the ultimate facts alleged may support relief based upon another theory, dismissal of a complaint with prejudice is an abuse of discretion." Thompson v. Investment Management and Research, Inc. 745 So.2d 475, 476-77 (Fla 5th DCA 1999). Here, Mr. Gillespie asks for permission to allege less to avoid the outcome of his initial

complaint which pleads enough information to demonstrate that he has no cause of action for breach of contract or fraud.

RESPECTFULLY SUBMITTED this 10 day of October, 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendants' Reply to Plaintiff's Rebuttal to Defendants' Motion to Dismiss and Strike has been furnished via U.S. Mail to Neil J. Gillespie, 8092 SW 115th Loop, Ocala, Florida 34481, this 10 day of October, 2005.

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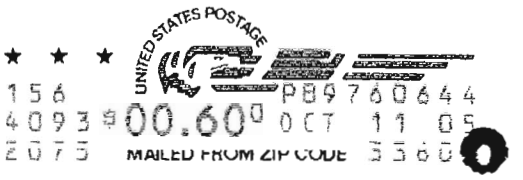
Gillespie - 05.5422



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