

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY FLORIDA

APPELLATE DIVISION (CIVIL)
CASE NO.: 502006AP000057XXXXMB
L.T.: 502000CC000124XXXXCV

RICHARD D. COHEN,

Appellant,

v.

WORLD OMNI FINANCIAL CORP.,

Appellee.

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PALM BEACH COUNTY, FL.
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Opinion filed: JUN 21 2007

Appealed from the County Court in and for Palm Beach County, Judge James L. Martz.

For Appellant: Richard D. Cohen, Esq., 21870 Cartagena Drive, Boca Raton, FL 33428.

For Appellee: Mitchel Chusid, Esq., 7000 West Palmetto Park Road, Suite 305, Boca Raton, FL 33433.

REVERSED AND REMANDED

Appellant, Richard D. Cohen, appeals an order awarding fees and costs to Appellee, World Omni Financial Corp., incurred during the 15 months beginning 18 months after entry of final judgment and six months after the judgment was affirmed on appeal, based on an offer of judgment made during the merits litigation. We agree with Cohen that Florida Statute §768.79, the offer of and demand for judgment statute ("Offer of Judgment Statute"), does not permit the award, and reverse.

World Omni sued Cohen on a car lease in January, 2000. Cohen filed a counterclaim.¹ World Omni served a demand for judgment on June 14, 2000 ("Demand"). Following the jury's verdict, final judgment was entered in World Omni's favor on July 28, 2003. On May 21, 2003, the trial court found World Ornni entitled to fees and costs pursuant to the Demand. On August 11, 2003, the trial court awarded World Omni its fees and costs. Both the final judgment and fee award were affirmed by this court August 2, 2004. World Omni's motion for appellate fees and costs under its Demand was granted, and the action remanded to the trial court to determine the amount. On April 12, 2005 the trial court entered an order awarding both appellate and other post-judgment trial level fees through January 31, 2005. That award is subject to a separate appeal and a Rule 9.400(c), Rules of Appellate Procedure, Motion ("Rule 9.400(c) Motion").

On July 19, 2006 World Omni filed its Corrected Amended Motion for Additional Attorney's Fees and Costs since February 1, 2005 ("Motion").² Cohen contended that the Motion sought an award of fees and costs for work in the trial court after conclusion of the appeal and fees incurred in defending against the Rule 9.400 (c) Motion. World Omni disputed that it sought fees on appellate

¹ In June, 1995, Cohen leased a Range Rover From World Omni's predecessor in New York. World Ornni alleged that Cohen did not make the January, 1998 payment; that it accelerated the balance; that it repossessed and sold the vehicle; and that Cohen owed a deficiency balance. Cohen alleged that the lease payments included the 8.5% New York State Sales Tax; that in June, 1996, he moved to Florida and World Ornni began charging him for the 6% Florida Use Tax; and that he paid the Florida Use Tax for 15 months then stopped, claiming the tax was not owed, and sought to apply the amount he had allegedly overpaid as a credit against the October, 1997 payment, when World Ornni declared the lease in default and repossessed the vehicle. Cohen filed a counterclaim for breach of the lease and libel. On July 11, 2000, the trial court granted World Ornni's motion for summary judgment on liability.

² World Ornni first sought fees From February 1, 2005 forward by motion filed May 9, 2006. Cohen moved to dismiss for lack of subject matter jurisdiction, pointing out that the motion claimed fees on appellate matters and matters before other tribunals. Cohen acknowledged that some fees may be appropriate, but suggested that World Ornni re-do its motion to include only recoverable fees. World Ornni agreed, and Cohen canceled a hearing set on his motion to dismiss. World Ornni eventually served its Motion. As further explained, *infra*, Cohen claims World Ornni's Motion still claimed fees for appellate matters absent a mandate.

matters absent a ~~mandate~~.³ Without reconciling this conflict, on August 11, 2006 the trial court entered its Order on World Omni's Corrected Amended Motion for Additional Attorney's Fees and Costs Since February 1, 2005 and Final Judgment, awarding World Omni an additional \$21,255 in attorney's fees, \$1,600.10 in costs, and \$1,300 in expert witness fees.

World Omni sought, and the trial court awarded, post-judgment fees ~~and~~ costs solely under the Offer of Judgment Statute and Rule 1.442, Florida Rules of Civil Procedure. The Offer of Judgment Statute, and the rule implementing it, do not permit an award of post-judgment, post-appeal fees and costs, though.

Florida Statute §768.79 requires an award of attorney's fees as a penalty if a reasonable settlement offer is rejected. Rule 1.442(g) requires that an application for §768.79 sanctions be filed in accordance with Rule 1.525. Rule 1.525 requires that the motion be filed within 30 days of judgment. The rule is mandatory. See *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598 (Fla. 2006). Obviously, World Omni's Motion was not filed within 30 days of the final judgment.

³ The testimony before the trial court was limited to the issues of whether the time sought was both actually spent and reasonable. There was no testimony about the nature of the services rendered.

A review of the Record shows that Cohen filed a Petition for Writ of Certiorari with the Fourth District. The petition was denied February 15, 2005, though the Fourth District awarded World Omni fees. Cohen petitioned the United States Supreme Court for certiorari review. The petition was denied October 11, 2005. The U.S. Supreme Court did not award World Omni fees. Cohen paid the underlying final judgment, which included the disputed Florida Use Tax, and sought a refund from the Florida Department of Revenue. Initially, DOR required Cohen to submit an assignment from World Omni. When World Omni refused to execute an assignment, Cohen filed a Motion to Compel Execution. The trial court denied that motion. Eventually, DOR refunded the Florida Use Tax to Cohen, without an assignment. Cohen filed a Verified Motion for Relief from Judgment, arguing both that the summary judgment was erroneous as a matter of law, given DOR's refund, and that the other defaults claimed by World Omni were not included in the Complaint. That motion was denied.

A review of World Omni's counsel's time entries in support of the Motion appears to show that it claimed fees for (i) defending against Cohen's claims that the trial court could not award appellate fees absent a mandate, a proposition with which we agree; (ii) efforts to collect the final judgment; (iii) efforts to defend against the Rule 9.400(c) Motion; (iv) issues involved in Cohen's request that World Omni assign its right to any Use Tax refund to him; (v) defending against the Petition for Writ of Certiorari directed to the Fourth District; (vi) opposing Cohen's motion for relief from the final judgment once the DOR refunded him the Florida Use Tax; and (vii) determining the amount of fees owed under the prior appeal.

Consequently, on that ground alone it should have been denied.

World Omni argues that it makes no sense to require it to comply with Rule 1.525 where it seeks an award of fees incurred more than 30 days **after** entry of final judgment. That argument ignores the clear dictate of Rule 1.442(g). Further, the argument makes sense only if we assume the Legislature meant to permit an award of post-judgment fees in Florida Statute §768.79 but the Florida Supreme Court, in adopting a rule to implement procedures under the statute, simply failed to adopt a procedure controlling post-judgment awards. We do not read Florida Statute §768.79 to permit an award of post-judgment fees, though.

Florida Statute §768.79(6) provides that a motion seeking sanctions under the statute must be filed within 30 days of judgment. While that requirement may be unconstitutional as an impermissible encroachment on the Florida Supreme Court's rule making authority, it evinces the Legislature's **position** that the statute does not permit an award of post-judgment fees. See The Florida Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442 (*Offer of Judgment*), 550 So. 2d 442 (Fla. 1989). Further, the statute, as both in derogation of the common law and as one imposing a penalty, must be strictly construed. See *Campbell v. Goldman*, ___ So. 2d ___, 2007 WL 1703503 (Fla. June 14, 2007); *Hibbard v. McGraw*, 918 So. 2d 967 (Fla. 5th DCA 2005); *Hess v. Walton*, 898 So. 2d 1046 (Fla. 2d DCA 2005), rev. den. 929 So. 2d 1052 (Fla. 2006). Finally, the statute itself is intended to encourage merits settlements of the underlying claim. See *Motter Roofing, Inc. v. Leibowitz*, 833 So. 2d 788 (Fla. 3d DCA 2002); *BDO Seidman, LLP v. British Car Auctions, Inc.*, 802 So. 2d 366 (Fla. 4th DCA 2001), rev. den. 828 So. 2d 384 (Fla. 2002) (Gross concurring). Post-judgment, post-appeal fees must, by definition, concern something other than the underlying merits

judgment which served as the basis of the determination that a demand triggered a right to fees. **See**, also, *In re Hanft*, 2003 WL 23812512 (S.D. Fla. Sept. 23, 2003) (not reported in F. Supp. 2d) (no fees under Fla. Stat. §768.79 for litigating dischargeability of debt represented by final judgment in bankruptcy court). As an aside, we note it appears that much of the time claimed by World Omni in the Motion was spent responding to Cohen's assertions that World Omni was not entitled to additional fees under the Offer of Judgment Statute.⁴

Finally, we note that a trial court lacks jurisdiction to consider a claim for appellate fees absent a mandate. *See Respiratory.Care Services, Inc. v. Murray D. Shear, P.A.*, 715 So. 2d 1054 (Fla. 5th DCA 1998). The trial court lacked jurisdiction over any portion of the Motion which sought fees incurred in defending against the Rule 9.400(c) Motion before this court.

Separately, we note that virtually none⁵ of the costs awarded were taxable under the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, and that the award of interest on costs was improper. *See Kendall Racquetball Investments, Ltd. v. The Green Companies, Inc. of Florida*, 657 So. 2d 1187 (Fla. 3d DCA 1995); Fla. Stat. §768.79(6)(b); *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210 (Fla. 2003); *C&S Chemicals, Inc. v. McDougald*, 754 So. 2d 795 (Fla. 2d DCA 2000), *rev. den.* 773 So. 2d 56 (Fla. 2000). The award of interest on fees from February 1, 2005, a date which *preceded* the date the services were performed and which therefore preceded the date World Omni's obligation to pay for them arose, was likewise improper. *See Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212 (Fla. 1985). Florida subscribes to the loss theory of interest,

⁴ World Omni sought fees only under Florida Statute §768.79. It did not seek fees under Florida Statute §§57.105(1), 57.115, 56.29(11), or on any other basis.

⁵ It appears that World Omni spent \$96.50 on recording.

under which pre-award interest compensates for loss of the use of money **from** the date of loss through the date of award. There can be no damage for loss of the use of money predating the date the money was spent.

The August 11, 2006 Order on Plaintiffs Corrected Amended Motion for Additional Attorneys' Fees and Costs since February 1, 2005 and Final Judgment is reversed, and the matter remanded to the trial court to consider which portion, if any, of the fees sought was (i) for work on an appellate matter for which no mandate had yet been issued, and (ii) for other work. The portion of the Motion, if any, seeking fees for (i), should be stricken by the court. The portion of the Motion seeking fees for (ii) should be denied.

MAASS, STERN. and FRENCH, JJ., concur.