

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

**APPELLATE DIVISION (CIVIL)
CASE NO.: 502005AP000034XXXXMB
LT Case No.: 502000CC000124CVRF
Division: AY**

RICHARD D. COHEN,

Appellant,

vs.

WORLD OMNI FINANCIAL CORP.,

Appellee.

Opinion Filed: 11/17/07

☒ **Appealed** from the County Court in and for Palm Beach County, Florida, Judge Joseph Marx.

☒ For Appellant, Richard D. Cohen, Esquire, 21870 Cartagena Drive, Boca Raton, Florida 33428.

☒ For Appellee, Mitchel Chusid, Esquire, 7000 West Palmetto Park Road, Suite 305, Boca Raton, Florida 33433.

REVERSED AND REMANDED

In this consolidated appeal, the Appellant. RICHARD D. COHEN ("COHEN"), seeks review of the trial court's Order on WORLD OMNI FINANCIAL CORP.'s ("WORLD OMNI") Motion for Appellate and Additional Attorney's Fees and Costs and Final Judgment dated April 12, 2005; and the trial court's Order on WORLD OMNI's Motion to Satisfy Judgments against COHEN from Supersedeas Bond dated May 27, 2005.¹ For the reasons set forth below, we reverse the trial court's order and remand with directions.

¹ By separate appeal, the Appellant. RICHARD D. COHEN, sought review of an Order awarding fees and costs to WORLD OMNI FINANCIAL CORP. incurred during the 15 months beginning 18 months after entry of the Final Judgment and six months after the judgment was affirmed on appeal, based upon an Order of Judgment made during the merits litigation. This Order was reversed by this Court in an Opinion

It is not necessary for purposes of this appeal to detail the tortured history of the litigation between the respective parties. For purposes of this appeal, the facts are straightforward. Following a jury's verdict against COHEN, a Final Judgment was entered in WORLD OMNI's favor on July 28, 2003. Subsequently, the trial court on August 11, 2003 awarded WORLD OMNI fees and costs under an Offer of/Demand for Judgment pursuant to Florida Statutes 8768.79. Both the Damage and Attorney's Fees Final Judgments were affirmed by this Court on August 2, 2004. This Court also granted WORLD OMNI's Motion for Appellate Attorney's Fees and Costs under its Offer/Demand and remanded the matter for trial to the trial court for determination of the amount. *See, Motter Roofing, Inc. v. Liebowitz*, 833 So.2d 788 (Fla. 3rd DCA 2002)[holding that Florida Statutes 8768.79 applies to fees incurred on appeal.]

On August 20, 2004, WORLD OMNI filed a renewed Motion for Appellate Costs and Attorney's Fees in the trial court seeking fees from July 1, 2003 through July 31, 2004. On November 12, 2005, WORLD OMNI filed a Supplemental Affidavit in support of its Motion for Appellate Costs and Attorney's for the period August 1, 2004 through August 31, 2004. On February 22, 2005, WORLD OMNI filed a Supplement to its Motion for Appellate Costs and Attorney's Fees from November 1, 2004 through January 31, 2005. As a result of these pleadings, WORLD OMNI not only sought its attorney's fees pursuant to the Mandate issued by this Court and the Order awarding appellate costs and attorney's fees, but also sought to recover additional non-appellate post-judgment attorney's fees and costs. On April 12, 2005, the trial court entered an Order awarding WORLD OMNI its attorney's fees. The trial court's Order, however, did not differentiate which portion of the award was for

filed June 21, 2007, holding that Florida Statutes 8768.79 does not permit such an award. *Cohen v. World Omni Financial Corp.*, Case No. 502006AP000057XXXXMB. .

appellate work pursuant to this Court's Mandate and Order awarding appellate attorney's fees and costs or which portion was for additional non-appellate trial court attorney's fees and costs incurred subsequent to the Final Judgment. *See, Altamonte Hitch and Trailer Service, Inc. v. U-Haul Company of Eastern Florida*, 483 So.2d 852 (Fla. 5th DCA 1986)[no meaningful review of the award can be undertaken on appeal where the trial court failed to state in its order what portion of a fee and cost award pertains to appellate as opposed to trial fees and costs]; but see *Hartleb v. State of Florida Department of Transportation*, 711 So.2d 228 (Fla. 4th DCA 1988).

Pursuant to Florida Rule of Appellate Procedure 9.310(b)(1), COHEN filed a Supersedeas Bond related to the original merits judgment and the original trial level attorney's fee judgment on August 19, 2003 and August 27, 2003, respectively. Subsequent to the Mandate on September 14, 2004, on April 29, 2005, WORLD OMNI filed its motion to satisfy these judgments against the Supersedeas Bonds filed by the Defendant. In response, COHEN asserted that WORLD OMNI was entitled to interest only through the date of the Mandate, September 14, 2004 and did not need an Order from the court or permission of the Defendant to execute or draw down on the bond. On May 27, 2005, the trial court issued its Order awarding the total amounts under the bonds to WORLD OMNI, which amounts included interest on the judgments subsequent to the Mandate of this Court, September 14, 2004.

WORLD OMNI sought attorney's fees for appellate work pursuant to this Court's Mandate and non-appellate attorney's fees and costs from July 1, 2003 through January 31, 2005 solely based upon Florida Statutes 8768.79 and Florida Rule of Civil Procedure 1.422. For the reasons expressed below, we hold that the Offer of Judgment/Proposal for Judgment Statute and the Rule

implementing it, do not permit an award of the non-appellate costs and attorney's fees portion of the trial court's order of April 12, 2005.

Florida Statutes §768.79 provides a method for obtaining attorney's fees if a reasonable Offer of Judgment and/or Demand for Judgment is not accepted. Florida Rule of Civil Procedure 1.442 applies to all proposals authorizing settlement by Florida law and supersedes any statute inconsistent therewith. Under Rule 1.442(g), any Motion to Obtain Attorney's Fees must be served in accordance with Florida Rule of Civil Procedure 1.525. Florida Rule of Civil Procedure 1.525 provides that any party **seeking** a judgment taxing costs and attorney's fees or both shall serve a motion no later than 30 days after filing of the judgment. This rule was created to establish a bright-line rule to resolve uncertainties surrounding **filing** of motions for attorney's fees motions and is mandatory. *See e.g., Saia Motor Freight Line, Inc. v. Reid*, 930 So.2d 598 (Fla. 2006). Obviously, WORLD OMNI's motion **seeking** non-appellate **post-judgment** attorney's fees in the present matter was not filed within 30 days of the Final Judgment and consequently does not comply with Florida Statutes 9768.79, Florida Rule of Civil Procedure 1.442, Florida Rule of Civil Procedure 1.525, or Florida Supreme Court decisions interpreting them.

WORLD OMNI, nevertheless, argues that the bright-line rule as set forth in FRCP 1.442 and 1.525 and in **Saia** should not be applied when one seeks award of attorney's fees under an Offer of Judgment filed in the merits litigation when such fees occur more than 30 days after entry of the Final Judgment. First, this argument ignores the clear and unambiguous dictate of Rule 1.442(g) and Florida Rule of Civil Procedure 1.525 and requires this Court to assume that the Florida Supreme Court in adopting rules implementing Florida Statutes 9768.79 merely failed to adopt a procedure controlling such

non-appellate post-judgment trial court attorney's fees under circumstances in the present litigation. Furthermore, such a construction ignores the specific language of Florida Statutes §768.79(6) which provides that a motion seeking sanctions under the statute must be filed within thirty days of the judgment. While this provision of Florida Statutes 8768.79 may be an impermissible encroachment upon the Florida Supreme Court's rule making power, it does clearly evidence the Legislature's understanding and intent that the statute does not permit an award for trial level attorney's fees more than 30 days after the judgment.

Such an interpretation is also consistent with the intended purposes of the statute. The purpose and intent of Florida Statutes 8768.79 is to encourage parties to settle claims without going to trial thereby lowering litigation costs and reducing the impact of litigation upon the state court system. *See e.g., MGR Equipment Corp., Inc. v. Wilson Ice Eaters, Inc.*, 371 So.2d 1262, 1264 (Fla. 1999); *Aspen v. Bayless*, 564 So.2d 1081, 1083 (Fla. 1990); and *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). It would seem axiomatic that most post-judgment non-appellate attorney's fees must concern something other than the underlying merits of the litigation between the parties which, in fact, is the predicate for fees under Florida Statute 8768.79. *See e.g., In Re. Hanft*, 2003 WL 23812512 (So. Dist. Fla. Sept. 23, 2003)(not reported in F.Supp.2d)[no fees under Florida Statutes 8768.79 for litigating the chargeability of debt represented by the Final Judgment in bankruptcy court.] Moreover, Florida Statutes 8768.79 is in derogation of common law and, therefore, must be strictly construed. *See, Campbell v. Goldman*, 959 So.2d 223 (Fla. 2007); *Hibbard v. McGraw*, 918 So.2d 967 (Fla. 5th DCA 2005).

COHEN also contends the trial court improperly awarded WORLD OMNI interest on the judgments subsequent to the Mandate of September 14, 2004. Florida Rules of Appellate Procedure 9.310(e) provides in pertinent part as follows:

A stay entered by lower tribunal shall remain in effect during the pendency of all review proceedings in Florida courts until a mandate issues, or unless otherwise modified or vacated.

By posting a Supersedeas Bond, COHEN received a stay in the proceedings pending review. Upon issuance of the Mandate in the case, the automatic stay resulting from the posting of the Supersedeas Bond was automatically lifted and WORLD OMNI had a right to either execute on the judgment or proceed against the Supersedeas Bond. *Superior Garlic International, Inc. v. E & A Produce Corp.*, 934 So.2d 484 (Fla. 3rd DCA 2004). Rather than proceeding against the Supersedeas Bond on the date of the Mandate, WORLD OMNI elected to wait over eight months and then filed a motion with the trial court requesting approval. At no time was any stay of the Mandate issued nor requested. Therefore, WORLD OMNI did not need this permission to collect on the Supersedeas Bond. *Id.*

Neither party has cited any controlling authority to this Court. However, upon issuance of the Mandate by the Court, WORLD OMNI had every right to collect its judgments, including any interest thereupon, against the Supersedeas Bond without approval of the court or permission of the Defendant. For reasons of its own, however, WORLD OMNI elected not to collect its judgments and more than eight months later sought an order from the court for approval which it did not need. The Supersedeas Bonds in the present litigation upon issuance of the Mandate by this Court (absent a stay of

the Mandate) operated as a tender of the amounts due under the judgments. Under such circumstances, WORLD OMNI is entitled to interest only until September 14, 2004, the date of the Mandate.

The trial court's Order on WORLD OMNI's Motion for Appellate and additional attorney's fees, costs and Final Judgment dated April 12, 2005 and Order on WORLD OMNI's Motion to Satisfy Judgment against COHEN from Supersedeas Bond dated May 27, 2005 are hereby reversed and the matter is remanded to the trial court. Upon remand, the Court should determine the reasonable appellate attorney's fees and costs pursuant to this Court's Order and its Mandate of September 14, 2004. The portion of the motion, if any, seeking non-appellate trial court attorney's fees should be stricken by the court. Any order on attorney's fees must make specific findings of fact as to the reasonable number of hours and hourly rate. *South Pointe Family and Children Center, Inc. v. First National Bank of Chicago*, 783 So.2d 327 (Fla. 3rd DCA 2001). On remand, the court should award interest on the judgments only for that period of time until the Mandate was issued by this Court on September 14, 2004.

CROW, HOY and KELLEY JJ., concur.