

THE WEEK IN TORTS

FLORIDA LAW WEEKLY VOLUME 39, NUMBER 17 CASES FROM THE WEEK OF APRIL 25, 2014

AFFIRMATIVE DEFENSE IN CO-DEFENDANT'S ANSWER AND SWORN ALLEGATIONS IN ANOTHER CO-DEFENDANT'S AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT CREATES GENUINE ISSUES OF MATERIAL FACT COMMON TO ALL DEFENDANTS

Neiman v. Kahn, Chenkin & Resnick, 39 Fla. L. Weekly D806 (Fla. 4th DCA April 16, 2014):

A group of clients retained a law firm to represent them in a suit. The fee agreement included a "timely objection clause" requiring the defendants to read all billing statements and notify the law firm of any errors or discrepancies within 15 days. It contained an arbitration clause in the event of a timely objection.

The law firm sued several defendants for non-payment of fees. Several defendants filed individual answers. They filed an amended answer and a motion to dismiss alleging mandatory arbitration. The law firm moved for summary judgment.

An attorney for one of the defendants filed an affidavit in opposition to the summary judgment, stating that the firm's legal strategy was aimed at having the underlying suit dismissed as quickly as possible and conserving resources. The affidavit stated, however, that the firm failed to inform the defendants that the contract had an arbitration provision which should have resulted in a quick dismissal of the underlying suit and savings of millions of dollars. The other clients did not file affidavits in opposition to the law firm's summary judgment motion.

The trial court denied the motion for summary judgment as to some of the plaintiffs and granted it to others (those who filed the affidavit).

On a motion for reconsideration, the appellants argued that the affidavit was submitted on behalf of all defendants, but the trial court denied the motion.

The court reversed. Because the appellants were similarly situated as was apparent from the record (they had the exact same fee agreement with the same law firm; the complaint and the motions were the same, and the liability was based on the same circumstances), all the predicate facts were shared. Additionally, all five defendants filed an amended answer containing the same allegations regarding the arbitration provision.

Because all defendants were similarly situated, it did not follow that the trial court could deny summary judgment as to some and grant it as to others. The affirmative defenses in the answer and sworn allegations in the affidavit created genuine issues of material fact common to all defendants, and therefore the court decided to reverse the judgment as to all the defendants.

ERROR TO DISMISS COMPLAINT BECAUSE OF THE FAILURE TO PERFECT SERVICE ON ONE DEFENDANT-ORDER DOES NOT SAY THAT CASE WAS DISMISSED WITHOUT PREJUDICE AND COULD BE REFILED

Taylor v. Bavaro, 39 Fla. L. Weekly D812 (Fla. 5th DCA April 17, 2014):

In this case where there was a pending counterclaim that had never been set for hearing, non-compliance with the joint status report (but no finding under the *Koze/* factors of bad faith) and it was not evident whether the defendant was an indispensable party or not, it was error for the trial court to dismiss an entire complaint for failure to perfect service on one defendant without an evidentiary hearing and appropriate findings. It was not clear whether the case was dismissed with or without prejudice. The case was remanded for further consideration.

ERROR TO ENTER SUMMARY JUDGMENT FOR DEFENDANT WHERE DISPUTED ISSUES OF FACT REMAINED AS TO WHETHER PLAINTIFF KNEW OF DANGER ON DEFENDANT'S PROPERTY, WHETHER IT WAS OPEN AND OBVIOUS, AND WHETHER DEFENDANT SHOULD HAVE WARNED GUESTS OF ENTERING

Minor v. Young, 39 Fla. L. Weekly D814 (Fla. 5th DCA April 17, 2014):

Plaintiff was injured when she fell through an unfinished attic floor on premises owned by her aunt. She had gone to the attic to retrieve an item for her grandmother. After taking only a few steps in the direction indicated by her aunt the owner, the plaintiff fell through the attic floor and landed on the garage below injuring her ankle. Plaintiff sued the defendant for negligently failing to maintain her premises in a reasonably safe condition, and for failing to warn her of a dangerous condition.

The court reversed the summary judgment finding there were unresolved issues of fact about whether the plaintiff knew of the danger, whether it was open and obvious, and whether the defendant knew or should have known of the

danger and breached the duty to maintain her premises in a reasonably safe condition and warn her invited guest of the danger before she entered the attic. Normally, an invitee's knowledge of a danger is not a complete bar to recovery but simply triggers the application of comparative negligence principles. Also, the obvious danger doctrine does not apply when negligence is predicated on a breach of the duty to maintain the premises in a reasonably safe condition.

Best Regards

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