IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CAROLINA MESA,

Appellant,

v.

CASE NO.: CVA1 07-9
Lower Court Case No.: 06-CC-2872

ESURANCE INSURANCE COMPANY,
A foreign for-profit insurance company,

Appellee.
_____/

Appeal from the County Court,
for Orange County,
Wilfredo Martinez, Judge.

Rick L. Martindale, Esquire, and
Pierre J. Seacord, Esquire,
for Appellant.

Michael R. D'Lugo, Esquire,
for Appellee.

Before M. SMITH, GRINCEWICZ, DAWSON, J.J.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING TRIAL COURT

Appellant Carolina Mesa (Mesa) timely appeals the lower court's final order denying Mesa's Second Motion for Leave to Amend and granting dismissal with prejudice in favor of Appellee Esurance Insurance Company (Esurance). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A).

Mesa filed suit against Esurance for breach of contract and declaratory relief based on her loss resulting from an automobile theft on January 4, 2006. Prior to the automobile theft,

Esurance issued an insurance contract to Mesa for her 1997 Honda Civic LX, policy number PAFL-002172347. This policy was in full force and effect during all times material to this suit.

Following the theft of her vehicle, Mesa promptly notified the Orange County Police Department and Esurance. On or about January 7, 2006, Mesa's vehicle was located but it was a total loss due to significant damage. The cash value of Mesa's vehicle at the time of theft was determined to be $4,132.75. After Mesa submitted a claim, Esurance issued payment to Mesa in the amount of $3,850. When Mesa contacted Esurance regarding the payment discrepancy, Mesa was informed that she would not be provided with the vehicular sales tax of $282.75, until after she purchased a replacement vehicle.

On February 27, 2006, Mesa filed a complaint for breach of contract and declaratory relief against Esurance. In the first count, Mesa sought thirteen separate declarations of her rights pursuant to Florida law and her insurance policy. In the second count, Mesa alleges that Esurance breached the policy by failing to pay the vehicular sales tax prior to her purchasing a replacement vehicle.

In its answer, Esurance admitted that while Mesa would be provided with payment of vehicular sales tax in the amount of $282.77, it was acting in accordance with section 626.9743, Florida Statutes, which allows an automobile insurer to defer payment of sales tax until the purchase of a replacement vehicle. On April 21, 2006, Esurance filed a Motion for Judgment on the Pleadings pursuant to Florida Rule of Civil Procedure 1.140(c). The trial court granted Esurance's Motion for Judgment on the Pleadings and ruled the provisions of 626.9743, Florida Statutes, were implied in the subject policy thereby permitting Esurance to postpone its payment of the sales tax. The trial court also granted Mesa the opportunity to file an amended complaint.

Thereafter, Mesa filed an Amended Complaint on June 19, 2007, alleging that a replacement vehicle had been purchased but Esurance continued to ignore its contractual obligation to issue payment for sales tax. In response, Esurance again admitted that Mesa would be provided with payment of the applicable vehicular sales tax; however, it asserted that Mesa failed to provide notice that a replacement vehicle was purchased.

On October 19, 2006, Mesa filed a Motion for Leave to Amend to add allegations for a coverage dispute. Along with the proposed Second Amended Complaint, Mesa attached the following documents: a letter from Esurance, dated June 27, 2006, stating that a check for taxes would be issued upon receipt of a purchase agreement or bill of sale and the amount of the taxes would be the lesser of the amount for the replacement vehicle or $282.75; another letter from Esurance, dated July 24, 2006, confirming that it paid sales tax in the amount of $117.00 based on the value of the replacement vehicle; a copy of the check for $117.00; and a copy of the bill of sale, dated May 22, 2006, stating that the replacement vehicle had a value of $1,800.00. Mesa's Motion for Leave to Amend was subsequently denied.

Despite the trial court's denial, Mesa filed a Second Motion for Leave to Amend and a proposed Third Amended Complaint for Breach of Contract on January 10, 2007. Following a hearing on January 19, 2007, the trial court again denied Mesa's Motion for Leave to Amend and dismissed the action with prejudice. This appeal followed.

On September 15, 2008, this Court sua sponte entered an Order Directing Appellant to File Trial Transcript allowing Mesa thirty days to file a transcript of the hearing below which resulted in dismissal with prejudice. Mesa filed a response on or about September 26, 2007, stating that there was no trial transcript available as no court reporter was present. The parties did not file a statement of the evidence.

Whether a complaint sufficiently states a cause of action resolves an issue of law. Therefore, an order granting a motion to dismiss is reviewable on appeal by a de novo standard of review. Nero v. Continental Country Club R.O. Inc., 979 So. 2d 264, 267 (Fla. 5th DCA 2007).

This appeal concerns setting forth a cause of action for breach of contract and declaratory relief, and the interpretation of a claim settlement provision in a motor vehicle insurance policy and the application of section 626.9743, Florida Statutes (2006), to such policy.

Mesa asserts that the trial court erred in denying her Second Motion for Leave to Amend because the trial court was limited to the four corners of the complaint and the proposed third amended complaint set forth allegations necessary to state a valid cause of action. Additionally, Mesa argues that a judgment should have been entered in her favor as it relates to the third amended complaint because the policy language is clear and unambiguous regarding the amount of sales tax to be paid under these circumstances. Alternatively, Esurance contends that the trial court properly entered a dismissal because there was no set of facts that Mesa could have alleged in order to state a valid cause of action. Moreover, Esurance argues that Mesa's stance on the payment of sales tax is at odds with Florida law and the insurance policy.

It is well established that in appellate proceedings the decision of a trial court is presumed to be correct and the burden is on the appellant to demonstrate error. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1980); Wright v. Wright, 431 So. 2d 177, 178 (Fla. 5th DCA 1983). It is also well established that the appellant bears the burden of bringing before the appellate court a record adequate to support his or her appeal. Id.; Fla. R. App. P. 9.200(e).

On its own motion pursuant to Rule 9.200(f)(2), Florida Rules of Appellate Procedure, this Court ordered Mesa to supplement the record with the transcript of the hearing. The transcript of the hearing at issue is not available as there was no court reporter. Despite the unavailability of the transcript, Mesa did not prepare a statement of evidence as suggested by Rule 9.200(b)(4), Florida Rules of Appellate Procedure.

The record neither reveals the arguments presented by the parties to the trial court nor the reasoning used by the trial court in making its decision. Additionally, with the exception of a brief notation in the court minutes, there is no record of Esurance's Motion to Dismiss. "Unless this [C]ourt is provided with all of the evidence which was before the trial court, either by a transcript . . . or a stipulated statement, then [this Court] cannot fault and reverse a trial judge for a purported error." Beasley v. Beasley, 463 So. 2d 1248, 1248 (Fla. 5th DCA 1985). This Court does not have a sufficient record before it upon which to base a determination that the trial court acted erroneously.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Denial of Second Motion for Leave to Amend And Dismissal With Prejudice" entered on January 22, 2007, is **AFFIRMED** and "Appellant's Motion for Attorney's Fees" is **DENIED.**

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the __7__ day of __November_____, 2008.

__/S/_____
MAURA T. SMITH
Circuit Judge

_/S/_____
DONALD E. GRINCEWICZ
Circuit Judge

__/S/_____
DANIEL P. DAWSON
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **Rick L. Martindale, Esquire**, 1511 East Robinson Street, Orlando, Florida 32801; **Pierre J. Seacord, Esquire**, 14 East Washington Street, Suite 200, Orlando, Florida 32801 and **Richards H. Ford, Esquire,** Post Office Box 2753, Orlando, Florida 32802 on the ___7_____ day of __November_____, 2008.

___/S/_____
Judicial Assistant