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

STAR CAMCAM,

Appellant,

v.

CASE NO.: CVA1 08-23
Lower Court Case No.: 2005-SC-11413-O

ALLSTATE INSURANCE COMPANY,

Appellee.
_______________________________________/

Appeal from the County Court,
for Orange County,
Antoinette Plogstedt, Judge.

Steven J. Kirschner, Esquire,
for Appellant.

Yim S. Mah, Esquire and
David B. Shelton, Esquire,
for Appellee.

Before RODRIGUEZ, KOMANSKI, and LEBLANC, J.J.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING TRIAL COURT

Appellant Star Camcam ("Camcam") timely appeals the trial court's Final Summary Judgment against her and in favor of the Appellee, Allstate Insurance Company ("Allstate"). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Facts and Procedural History

The present case stems from an earlier lawsuit, Case Number 2002-SC-0402-O ("2002

suit”), in which Camcam sued Allstate for the payment of PIP benefits under her automobile insurance policy. On May 13, 2002, Allstate, through its counsel, wrote a letter to Camcam stating that it “agreed to pay for the unpaid portion of the $10,000 policy limits and $333.92 for the double billing that occurred for Rural Metro Ambulance.” The letter further requested that Camcam inform Allstate of her demand for reasonable attorney’s fees and costs in order to reach an amicable settlement of the matter. Allstate asserts, and Camcam does not refute or deny, that Camcam never responded to the letter.

After one year passed without any action from either party, Allstate filed a Motion to Dismiss for Lack of Prosecution. After Allstate filed its motion to dismiss, Camcam filed a Motion for Attorney’s Fees and Costs. The court granted Allstate’s Motion by dismissing the case without prejudice. However, it did not acknowledge or address Camcam’s Motion for Attorney’s Fees and Costs. Camcam did not appeal the dismissal.

Approximately eleven months after the court ordered the dismissal, Camcam filed a Motion to Set Aside the Dismissal without Prejudice and for Other Appropriate Relief. The court denied Camcam’s motion, stating that Camcam “did not timely and reasonably file a Motion for Rehearing or seek other timely relief subsequent to the Order of Dismissal without Prejudice, dated June 20, 2003.”

On November 23, 2005, Camcam filed a complaint in the present case, alleging that the parties “settled” the 2002 suit, but that the 2002 suit was dismissed before Allstate paid Camcam’s attorney’s fees or costs. This original complaint sought attorney’s fees and costs, without seeking damages for Camcam’s losses or stating any independent cause of action. Allstate responded with a motion to dismiss for failure to allege ultimate facts upon which relief may be granted.

Before the trial court ruled on the motion to dismiss, Camcam filed an Amended Complaint ("First Amended Complaint"), as a matter of right, seeking damages for Allstate's failure to pay the purported settlement amount, interest thereupon, and attorney's fees and costs. Camcam's theory for relief is that Allstate's May 13, 2002 letter constituted a settlement agreement and a "confession of judgment," but that Allstate did not pay the purported settlement amount. Therefore, Camcam argues, she has been damaged, and she is entitled to relief.

Allstate responded with a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. Before the trial court issued a written order on the motions, and without leave of court, Camcam filed another Amended Complaint ("Second Amended Complaint"), in which she included separate counts for breach of contract/settlement agreement, bad faith, and fraud. Allstate filed a Motion to Strike Plaintiff's Amended Complaint as a Nullity, stating as its grounds that Camcam filed the Second Amended Complaint without leave of court in violation of Florida Rule of Civil Procedure 1.190(a).

On February 6, 2008, the trial court entered Final Summary Judgment against Camcam and in favor of Allstate. Camcam timely filed a Motion for Rehearing and Reconsideration and to Vacate Final Summary Judgment, which the trial court denied. Camcam timely appeals.

Discussion of Law

The standard of review for an order granting summary judgment is *de novo*. Volusia County v. Aberdeen at Ormond Beach, 760 So. 2d 126, 130 (Fla. 2000). The Court must determine whether there is a "genuine issue as to any material fact" and whether "the moving party is entitled to a judgment as a matter of law." Krol v. City of Orlando, 778 So. 2d 490, 491-492 (Fla. 5th DCA 2001) (citing Fla. R. Civ. P. 1.510(c)).

On appeal, Camcam argues that the trial court erred in entering summary judgment for

Allstate because Allstate confessed judgment during the 2002 suit. In addition, Camcam argues that, even if Allstate did not confess judgment, final summary judgment was improper because her Second Amended Complaint contains causes of action for breach of contract, breach of settlement agreement, bad faith, and fraud. She contends that, if Allstate did not confess judgment, the trial court should have granted partial summary judgment as to the issue of confession of judgment only.

On the other hand, Allstate argues that the trial court correctly granted summary judgment because neither a confession of judgment nor a settlement agreement occurred in the 2002 suit. Furthermore, Allstate argues, Camcam is collaterally estopped from relitigating whether a settlement agreement occurred in the 2002 suit because that issue was decided adversely to Camcam by the 2002 court. In addition, Allstate answers Camcam's argument that its motion should be characterized as a motion for partial summary judgment by asserting that the motion was properly directed at the First Amended Complaint, which Allstate wishes to characterize as a one-count complaint.

The Court declines to address whether Camcam is collaterally estopped from "relitigating" whether the parties entered into a settlement agreement in the 2002 suit. The issue of collateral estoppel was not raised before the trial court. Therefore, it is not proper for this Court to consider this issue on appeal. See Jacques v. Wellington Corp., 183 So. 718, 719 (Fla. 1938).

Therefore, the Court will only address two issues. First, whether summary judgment was proper on the issue of confession of judgment. Second, whether Allstate's Motion for Summary Judgment was sufficient to justify an order of Final Summary Judgment, as opposed to partial summary judgment on the issue of confession of judgment only.

Confession of Judgment

Confession of judgment is a judicial construct designed to preserve an insured party's statutory right to an award of attorney's fees resulting from a lawsuit against the insurer, during which the insurer pays the claim in settlement of the suit. See Wollard v. Lloyd's and Companies of Lloyd's, 439 So. 2d 217 (Fla. 1983). In Wollard, an insured party suffered a loss and filed a claim with his insurance company. Id. at 217. The insurance company denied the claim, and the insured party filed a lawsuit. Id. Before the trial, the parties agreed to a settlement of the claim, but they stipulated that the matter of an award of attorney's fees would be submitted to the trial court. Id. at 218. The trial court awarded attorney's fees to the insured plaintiff under section 627.428, Florida Statutes. On appeal, the appellate court reversed, ruling that "[a] negotiated settlement between an insured and his insurer does not entitle the insured to attorney's fees pursuant to section 627.428[.]" The appellate court construed section 627.428 to require entry of a judgment in favor of the insured on the claim as a condition precedent to the award of attorney's fees. Id.

The Florida Supreme Court quashed the decision of the appellate court. Id. at 219. It held that allowing an insurer to avoid liability for statutory attorney's fees by simply paying the disputed claim sometime after a lawsuit is filed, but before final judgment is entered, would be neither reasonable nor just. Id. at 218. Therefore, Florida courts have construed section 627.428 to authorize the award of attorney's fees to an insured who brings suit against an insurer after a loss is payable, during which suit the insurer voluntarily pays the claim before judgment can be rendered. Id. "[S]uch voluntary payment is the equivalent of a confession of judgment against [the insurer]." Id.

There are no genuine issues of material fact in the present case. However, the parties

disagree on two questions of law. First, whether the undisputed facts of this case establish that the parties entered into a valid and enforceable settlement agreement during the 2002 suit. Second, if a settlement agreement does exist, is the existence of a settlement agreement enough to find confession of judgment, despite the undisputed fact that Allstate never paid the claim.[1] Therefore, under the applicable standard of review, the Court must now determine whether Allstate is entitled to a judgment as a matter of law.

Interpretation of settlement agreements is governed by the rules of contract law, and whether a valid and enforceable agreement exists is a matter of law. See ABC Liquors, Inc. v. Centimark Corp., 967 So. 2d 1053, 1056 (Fla. 5th DCA 2007); Leesburg Cmty. Cancer Ctr. v. Leesburg Reg'l Med. Ctr., 972 So. 2d 203, 206 (Fla. 5th DCA 2007). The basic and essential elements of a valid contract are offer and acceptance, supported by consideration. Leesburg Cmty. Cancer Ctr., 972 So. 2d at 206. It has long been established that, to create a binding contract, an offer must be accepted, and that acceptance must be communicated to the offeror. Kendel v. Pontious, 261 So. 2d 167, 169-170 (Fla. 1972).

Camcam fails to allege offer and acceptance. She argues that Allstate's May 13, 2002 letter operates as "a notification by Allstate that the matter was settled." She alleges that Allstate wrote the letter in response to her filing of the 2002 suit, and her response was not required to form an enforceable settlement agreement.

Even when construing the facts in the light most favorable to Camcam, her argument clearly fails. If Allstate's letter was an offer, Camcam did not communicate acceptance of that offer to Allstate. Even if Camcam had accepted, the payment of attorney's fees and costs was an open term, subject to future negotiation. "Where essential terms of an agreement remain open,

[1] Camcam's contention, on appeal, that a genuine issue exists as to whether Allstate paid the claim is inconsistent with her prior and concurrently stated position, and thus it is not persuasive. In her complaint and in her brief, Camcam alleges that Allstate did *not* pay the claim.

and subject to future negotiation, there can be no enforceable contract." ABC Liquors, 967 So. 2d at 1056 (quoting Dows v. Nike, Inc., 846 So. 2d 595, 602 (Fla. 4th DCA 2003)).[2]

If Camcam's filing of the 2002 suit was an offer, and Allstate's letter was intended to be an acceptance of that offer, there would still be no enforceable agreement. For the acceptance of an offer to result in a contract, it must be: "1) Absolute and unconditional; 2) *identical with the terms of the offer*; and 3) in the mode, at the place, and within the time expressly or impliedly required by the offer." Kendel, 261 So. 2d at 169 (emphasis added) (quoting Strong & Trowbridge Co. v. H. Baars & Co., 54 So. 92, 93-94 (Fla. 1910)). Camcam's complaint in the 2002 suit demanded judgment against Allstate for "all covered losses *with interest on any overdue payments*, attorney's fees and costs." (Emphasis added). Allstate did not agree to pay interest on overdue payments, and it did not agree to pay Camcam's attorney's fees and costs.[3] Thus, Allstate's acceptance would not have been identical with the terms of Camcam's offer.

Based on the undisputed facts, and the arguments of the parties, we find that the parties did not enter into a valid and enforceable settlement agreement. Construing all facts and inferences in the light most favorable to Camcam, we find that, at best, Allstate's letter was an agreement to participate in settlement negotiations. "Nevertheless, an 'agreement to agree' is unenforceable as a matter of law." ABC Liquors, 967 So. 2d at 1056. Therefore, we agree with the trial court that the parties merely attempted settlement negotiations, without entering a binding settlement agreement.

The second question of law upon which the parties disagree is whether the existence of a

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[2] Payment of attorney's fees and costs is clearly an essential term. It is arguable that payment of attorney's fees and costs is *the* essential term, and not the $333.92 otherwise at issue. Camcam's original complaint in this matter sought *only* attorney's fees and costs, without mentioning the purported settlement amount between the parties.

[3] Camcam's contention that "Allstate clearly admitted that she was entitled to attorney's fees and costs" is unfounded. Allstate requested her reasonable demand for attorney's fees and costs "in order to reach a[n] amicable settlement of [the] matter." The statement was made in an attempt to negotiate a settlement, and it admits nothing.

settlement agreement is enough to find confession of judgment, despite the undisputed fact that Allstate never paid the claim. In light of our conclusion that the parties did not enter into a settlement agreement, we find it unnecessary to address this issue.

Allstate is entitled to a judgment as a matter of law in its favor on the issue of confession of judgment. The parties did not enter into a settlement agreement, and Allstate did not pay the disputed claim. Thus, we find that Allstate did not confess judgment. Therefore, we find that the trial court properly granted summary judgment on the issue of confession of judgment.

Propriety of Final Summary Judgment

Before the Court can make a ruling on the propriety of the final summary judgment, it must determine the valid and currently operative complaint upon which the final summary judgment was granted. Camcam asserts that the Second Amended Complaint is the valid and currently operative complaint.[4] Whereas, Allstate argues that the First Amended Complaint is the valid and currently operative complaint.

Under Florida Rule of Civil Procedure 1.190(a), in order for a party to file a second amended complaint, it must obtain either leave of court or written consent of the adverse party. Furthermore, if a party files an amended complaint without complying with the requirements of Rule 1.190(a), then the subject amended complaint is a nullity. See Fusilier v. Markov, 676 So. 2d 1053, 1054 (Fla. 3d DCA 1996).

Camcam filed her First Amended Complaint in open court on March 5, 2007, as a matter of course. Camcam did not obtain leave of court to file her Second Amended Complaint on June 22, 2008. Camcam does not allege, nor does any evidence in the Record demonstrate, that Allstate gave written consent for her to file a second amended complaint. Therefore, Camcam's

[4] In her Motion for Rehearing and Reconsideration, Camcam asserted that the First Amended Complaint was never docketed or signed. Therefore, on appeal, she assumes that the Second Amended Complaint is her first and only amended complaint.

Second Amended Complaint dated June 22, 2008 is a nullity, and the First Amended Complaint is the valid and currently operative complaint. Thus, the new counts added in the Second Amended Complaint are ineffective. Therefore, we find that the trial court properly entered final summary judgment.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Final Summary Judgment" entered on February 6, 2008 is **AFFIRMED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the _20___ day of ________April____________, 2010.

______/S/ ______________________
JOSE R. RODRIGUEZ
Circuit Judge

______/S/_________________________
WALTER KOMANSKI
Circuit Judge

______/S/______________________
BOB LEBLANC
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: **Steven J. Kirschner, Esq.**, 1555 Howell Branch Road, Suite C201, Winter Park, Florida 32789; **Yim S. Mah, Esq., Law Offices of Robert Soifer,** Bank of America Center, 390 North Orange Avenue, Suite 1550, Orlando, Florida 32801; and **David B. Shelton, Esq., Rumberger, Kirk & Caldwell, P.A.,** Post Office Box 1873, Orlando, Florida 32802-1873 on the _____20____ day of ______April____________, 2010.

______/S/______________________
Judicial Assistant