Third District Court of Appeal

State of Florida

Opinion filed November 13, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1588
Lower Tribunal No. 15-26022

Irma Perez,
Appellant,

vs.

SafePoint Insurance Company,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Abby Cynamon, Judge.

David B. Pakula (Pembroke Pines); Perry & Neblett, P.A., and David A. Neblett and James M. Mahaffey, III, for appellant.

Bressler, Amery & Ross, P.C., and Hope C. Zelinger and Nicole S. Houman (Fort Lauderdale), for appellee.

Before SALTER, LOGUE and SCALES, JJ.

SALTER, J.

Irma Perez ("Ms. Perez"), the insured under a homeowner's insurance policy issued by SafePoint Insurance Company ("SafePoint"), appeals a final order of dismissal of her circuit court lawsuit against SafePoint. The order of dismissal concluded that Ms. Perez had perpetrated a fraud on the court. We vacate the order and remand the case for further proceedings based on the particular features of this record and on the analysis which follows.

Ms. Perez alleged that she sustained water damage from a roof leak caused by wind on February 7, 2015. She submitted an estimate of $23,089.47 for the repairs. SafePoint investigated the claim and determined that the damages were not covered, as damages caused by rain are covered only if "a covered peril first damages the building causing an opening in a roof or wall and the rain . . . enters through this opening."[1]

In November 2015, Ms. Perez filed the lawsuit against SafePoint for its failure to pay her claim. SafePoint took her deposition in July 2016 and moved for final summary judgment in January 2017. Ms. Perez's counsel in the trial court (the firm of Perry & Neblett, P.A.) filed a lengthy affidavit signed by Ms. Perez, in opposition to the motion, and a similar affidavit signed by Ms. Perez's daughter Emily. These

[1] Section I(2)(h) of the policy issued by SafePoint. Issuance of the policy, the fact that the policy was in force at the time of the loss and claim, and the intrusion of water into the home through the roof are uncontroverted. The condition of the roof and cause of the leaks are disputed.

extraordinary affidavits exude certainty regarding the fact, date, and cause of the loss, as well as commentary regarding SafePoint's engineering expert's report and deposition testimony.[2]

Ms. Perez's affidavit also included statements reflecting reliance on her public adjuster's detailed inspection and report to her on causation of the water leaks, and a paragraph swearing under oath that "I believe that Perry & Neblett, P.A., David Avellar Neblett, and James M. Mahaffey III are some of the top attorneys in the field in the country regarding litigation of insurance matters and I understand that David Avellar Neblett is Board Certified."

Ms. Perez testified in her initial deposition in 2016 that she had diabetes for years, and that she had many problems affecting her memory. Her doctor gave her "something for the memory," and she took that medication for more than a year, but then the doctor advised her to stop taking it.

Shortly after the affidavits of Ms. Perez and her daughter were filed in opposition to SafePoint's motion for summary judgment, SafePoint moved to (1) strike the affidavits, and (2) dismiss Ms. Perez's lawsuit for fraud on the court. The trial court heard the latter motion in February 2018 and followed up with an

[2] At the time she signed the affidavit, Ms. Perez was 82 years old. She had no training or expertise in engineering or construction, having been an elementary school teacher in Cuba for 30 years before coming to the United States. Nonetheless, her affidavit included disagreement with statements made by SafePoint's expert engineer "that a 30 mile an hour wind is not enough to cause an opening in the roof."

evidentiary hearing the next month. Ms. Perez testified at the hearing. She did not know the wind speed on the claimed date of loss; she did not know "what the miles per hour threshold is for that it would take for wind to cause damage to a roof;" and she did not know what it means "to be board certified as an attorney." When it came to the date of loss, she answered "I thought it was 2014, but then afterwards it was 2015."[3]

SafePoint's examination elicited Ms. Perez's testimony that she first discovered the loss by discovering a stain in the closet and wet clothing, with water running down the wall. She had been asked in her 2016 deposition if she had seen "any water actually dripping or coming into your home," and she said "no." She testified that she had never been up on her roof, and that she had no personal knowledge "with [her] own eyes as to the condition of [her] roof." But she also remembered that "somebody went on the roof and told me the roof was damaged." At the in-court hearing, Ms. Perez was 83 years old. She testified that she took "many" medications and had "many" memory issues.

Following the hearing, the trial court granted SafePoint's motion to dismiss the case for fraud on the court and denied Ms. Perez's motion for rehearing. This appeal followed.

[3] She testified that she later determined when the loss occurred by speaking with her niece, Evelyn Perez.

Analysis

On review, an order of dismissal for fraud on the court is considered a "severe sanction," appropriate only in "the most egregious cases," and under a "'narrowed' abuse of discretion standard." Empire World Towers, LLC v. CDR Créances, S.A.S., 89 So. 3d 1034, 1038 (Fla. 3d DCA 2012). The movant must establish, by clear and convincing evidence, that the non-moving **party** "sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate [the non-moving **party's** claim] by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." Sky Dev., Inc. v. Vistaview Dev., Inc., 41 So. 3d 918, 920 (Fla. 3d DCA 2010) (emphasis provided) (citation omitted).

In addition, and as correctly recognized by the trial court, when a party's **attorneys** have contributed to the alleged misconduct imputed to the client, the trial court should weigh the factors enumerated in Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993), before dismissing the case with prejudice. And as this Court underscored in Motors, Pumps & Accessories, Inc. v. Miami Medley Business & Industrial, LLC, 116 So. 3d 503, 506 (Fla. 3d DCA 2013), Kozel also specifies that "if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative" (quoting Kozel, 629 So. 2d at 818).

SafePoint never presented to the trial court the first motion it filed regarding Ms. Perez's affidavit, a motion to strike her September 2017 affidavit (SafePoint's second motion, to dismiss for fraud on the court, was filed three weeks later). In the order under review, the trial court specifically observed that "the affidavit was crafted in order to misrepresent the core facts of the case so that it would support [Ms. Perez's] claim that her damage was the result of rain entering her house through an opening in her roof which was caused by a storm, and thus was covered under her insurance policy." On this record, it is obvious that Ms. Perez's limited memory and English-language skills (her testimony was through an interpreter), and her lack of familiarity with (1) engineering and construction matters and (2) "board certification" of attorneys, ruled her out as the source of numerous matters in the affidavit "crafted" by her counsel and signed by her.

The trial court concluded that "[n]othing less severe than dismissal with prejudice appears to be a viable alternative," but there is no indication that the court considered the alternative measure of striking the discredited affidavit.[4] As SafePoint put it in its answer brief in this Court, "Perez's affidavit is plagued by inappropriate legal conclusions and accolades for her counsel," including "conclusions that Perez was not qualified to make." SafePoint also observed, "To

[4] As already noted, the trial court never heard or entered an order on SafePoint's motion to strike the affidavit, filed shortly before SafePoint's motion to dismiss Ms. Perez's case in its entirety for alleged fraud on the court.

bespeak more flagrant falsity, Perez's affidavit was drafted in perfect English, despite her prior testimony (requiring a translator) insisting that she only reads and speaks Spanish."

In her testimony, and putting aside the affidavit, Ms. Perez conceded that her memory was imperfect. And it is uncontroverted that her home suffered water damage during the policy period. She did not prevent inspection of the roof and damaged area by SafePoint's adjuster. To the extent that her testimony reflects inconsistencies from one year to the next (one deposition in 2016, another in 2017, and in-court testimony in 2018), she can be cross-examined and impeached on those points.

Cases such as this require the court to "carefully balance a policy favoring adjudication on the merits with competing policies to maintain the integrity of the judicial system." Cox v. Burke, 706 So. 2d 43, 46 (Fla. 5th DCA 1998) (citing Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1117-18 (1st Cir. 1989)). And when the record demonstrates that a party's attorney accounts for the party's lapse, our sibling district court has observed that "we generally seek to avoid the harsh result of dismissal which can result in the sins of the attorney being visited upon the client." Moose v. State, 519 So. 2d 61, 62 (Fla. 2d DCA 1988).

On this record, and applying the heightened standards applicable to such dismissals, we conclude that the lesser sanction initially proposed by SafePoint

ought to have been specifically addressed and ruled upon, and that the order of dismissal must be vacated.

Conclusion

SafePoint's analysis recognized Ms. Perez's limited powers of recollection and fluency in English, and her lack of expertise on several matters that can only have been engrafted into her affidavit by her attorneys in the trial court. The trial court's reaction, and ours, to such hyperbole is a teaching point and a caution that a client's personal knowledge, however imperfect, is not to be gilded, excessively bolstered, or embellished by her counsel in the hope of improving a case.

Order of dismissal vacated, cause remanded to the trial court for further proceedings.