TERRY'S TAKES

May 28-June 3, 2023

Announcements

Judge Osterhaus assumed duties as chief judge of the 1st DCA on July 1, 2023. Judge Logue became the chief judge of the Third DCA and Judge Scales was placed in line to be the chief in 2025. Judge Edwards became chief judge of the Fifth DCA.

Third DCA

B. Little & Company, Inc. v. Choi Wai Printing (Hong Kong) Limited

3d DCA
5/31/23, Judge Bokor
Topics: Forum; Personal Jurisdiction

Both the plaintiff and the defendant in the case are foreign corporations that don't conduct any business in Florida or maintain any physical presence here. B. Little operates in New York.

Choi Wai Printing sued B. Little for breach of contract. The contract in question had an arbitration clause that specified that arbitration must take place in New York, and the contract contemplated no business in Florida.

B. Little moved to dismiss based on a lack of personal jurisdiction and also on forum *non conveniens*. The trial court denied the motion, and B. Little appealed.

B. Little really screwed up. Instead of moving to dismiss at the outset of the case, it sought affirmative relief. By "affirmative relief," the court meant seeking some sort of relief for which the defendant could have maintained an action or proceeded to recovery. A party can also *waive* an objection to personal jurisdiction by showing *submission* to jurisdiction. Here, B. Little moved to enforce the arbitration clause without mentioning personal jurisdiction, an example of seeking affirmative relief. It also filed an answer and affirmative defenses that did not mention jurisdiction, an example of submission. The defense of lack of personal jurisdiction was finally raised for the first time in an amended answer. There was no error in denying a motion at that stage to dismiss for lack of personal jurisdiction.

Luckily for B. Little, it fared better with its motion to dismiss for forum non conveniens. The court noted that it had to apply the factors set out in Kinney Sys., Inc. v. Cont'l Ins. Co., 674 So. 2d 86 (Fla. 1996). Without walking through each factor, the court simply stated that the overwhelming weight of the Kinney factors leaned in favor of sending the case to New York, so the court reversed the denial of the motion to dismiss on that basis.
https://supremecourt.flcourts.gov/content/download/869910/opinion/230020_DC08_05312023_102845_i.pdf

City of Miami v. Robinson

3d DCA
5/31/23, Judge Bokor
Topics: Affirmative Defenses; Sovereign Immunity; Summary Judgment

Appellee Lyn M. Robinson sued the City of Miami for negligence as a result of an automobile accident with a City of Miami-owned vehicle driven by a City employee, Fire-Rescue Lieutenant Karen Salinas. The City answered and asserted sovereign immunity pursuant to section 768.28, Florida Statutes. Due to discovery violations, the trial court struck the City's answer and affirmative defenses.

Despite the order striking the affirmative defense, the City argued that sovereign immunity could be raised at any time, and it moved for summary judgment. The trial court denied the motion, and the City appealed. There was no real factual dispute—the employee was merely driving to work and was not at work when the accident occurred. Under the "going and coming" rule, she was not in the course and scope of her employment with the city at the time of the accident.

Section 768.28(1), Fla. Stat., only waives sovereign immunity for tort claims where the employee was acting within the course and scope of employment.

Despite the fact that the DCA stated, in a footnote, that they "do not address the propriety of sanctions for the conduct alleged, as the sanctions order is not before us on appeal," the DCA still addressed the merits of the stricken defense. The only explanation the DCA provides for addressing the merits of a stricken defense is this: "The fact that the trial court struck the City's defenses changes nothing. Much like subject matter jurisdiction, sovereign immunity isn't an affirmative defense, and it can be raised at any time." The DCA cited cases holding that the issue of sovereign or governmental immunity is jurisdictional, not an affirmative defense. (NOTE: This still does not answer the question fully. Other portions of the opinion state that the government may **waive** sovereign immunity, whereas a party cannot **waive** a lack of subject matter jurisdiction. The DCA made it clear that the sanctions order had not been appealed and that they were not reviewing the merits of the sanction order. Failure to challenge the sanctions order would ordinarily mean that the issue has been **waived** by the party. But the DCA appears to apply a different rule here.)
https://supremecourt.flcourts.gov/content/download/869906/opinion/220972_DC13_05312023_102332_i.pdf

Fourth DCA

Fuentes v. Luxury Outdoor Design, Inc.

4th DCA
5/31/23, Per Curiam (Warner, Ciklin, and Forst)
Topics: Summary Judgment

The trial court erred in holding that it had no choice but to rule for the defendant on summary judgment where the plaintiff failed to file a response to the summary judgment motion. The judge expressly stated they had **no alternative** but to grant the motion in light of the lack of response. Rule 1.510(c)(5) makes the filing of a response mandatory, but the **penalty** is that the court **may** grant the motion if the lack of dispute of the facts means that the movant is entitled to summary judgment, but it may also do any of the other things under Rule 1.510(e). Those include:

(1) give an opportunity to properly support or address the fact;
(2) consider the fact undisputed for purposes of the motion;
(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or
(4) issue any other appropriate order.

Because the trial court stated it had no choice but to grant the motion, the order granting summary judgment was reversed and remanded.
https://supremecourt.flcourts.gov/content/download/869915/opinion/220332_DC08_05312023_095742_i.pdf

Superior Brokerage Services, Inc. v. Maduel

4th DCA
5/31/23, Per Curiam (May, Gerber, Levine)
Topics: Default Judgment

A default judgment was entered against Superior Brokerage Services, Inc., and the company moved for relief based on the argument that service of process was insufficient. The trial court found that the company had waived its right to complain about insufficient service because it had filed a motion to enlarge time to respond to the complaint.

The company argued that the attorney who filed the motion for extension did not have a right to appear on the company's behalf. The judge denied the motion, and the company appealed.

Without reaching the question of whether the attorney had the right to appear on the company's behalf or could waive anything on the company's behalf, the DCA noted that filing a motion for enlargement of time does not constitute a general appearance in a case and, thus, does not waive a defense of lack of jurisdiction for insufficient service of process.
https://supremecourt.flcourts.gov/content/download/869921/opinion/230876_DC13_05312023_100616_i.pdf