

DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

Bojadzije v. Roanoke Technology Corp.

997 So. 2d 1251 (Fla. Dist. Ct. App. 2009) · No. No. 5D08-571 · Decided January 2, 2009

SUMMARY

The Florida Fifth District Court of Appeal affirmed a default final judgment and the denial of the defendant's motion to vacate it. The court held that the defendant failed to establish excusable neglect, a meritorious defense, or due diligence, and waived any right to seek arbitration by not timely moving to compel arbitration. The court further held that challenges to the damages determination should have been raised on direct appeal rather than through a motion for relief from judgment.

CASE DETAILS

COURT	District Court of Appeal of Florida, Fifth District
WRITING FOR THE COURT	Palmer, C.J.; Griffin, J.; Lawson, J.
JURISDICTION	Florida
DECIDED	January 2, 2009
DOCKET	No. 5D08-571
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from an order denying the appellant's motion to vacate a default final judgment.
PRECEDENTIAL VALUE	published opinion
PARTIES	Thomas L. Bojadzije v. Roanoke Technology Corporation

TOPICS

- default judgment
- arbitration
- waiver
- appellate procedure
- civil procedure

PRACTICE AREAS

- civil procedure
- appellate procedure
- arbitration
- contracts
- commercial litigation

QUESTIONS PRESENTED

- Whether Bojadzije established the grounds required to vacate the default final judgment.
- Whether the trial court was required to dismiss the complaint sua sponte because the attached contracts contained arbitration clauses.

3. Whether alleged errors concerning the jury demand and the evidentiary basis for the damages award could be raised through a motion to vacate rather than by direct appeal.

HOLDINGS

1. A party seeking to set aside a default final judgment must show excusable neglect, a meritorious defense, and due diligence. Because Bojadzjev did not challenge the trial court's determination that he failed to establish those requirements, the judgment was not subject to vacatur on that basis.
2. A trial court does not refuse to consider a lawsuit merely because the contract sued upon contains an arbitration clause. The party seeking arbitration must timely move to compel arbitration, and the failure to do so waives the right to seek arbitration.
3. Errors concerning the trial court's handling of the jury demand or determination of damages were errors to be raised on direct appeal, not grounds for relief from judgment under the circumstances presented.

KEY QUOTATIONS

“Instead, it is up to the party seeking to enforce the arbitration clause to raise it before the trial court in a motion to compel arbitration.” (997 So. 2d at 1253)

FACTUAL BACKGROUND

Roanoke filed claims arising from contracts attached to its complaint, including claims for breach of contract, unjust enrichment, constructive trust, and injunctive relief. Bojadzjev was served but filed no response, resulting in a clerk's default and a default final judgment for the full amount of Roanoke's claimed damages, exceeding six million dollars. Months later, Bojadzjev sought to vacate the judgment based on surprise and excusable neglect and argued that the contracts' arbitration clauses required dismissal.

PROCEDURAL HISTORY

Roanoke sued Bojadzjev for breach of contract, unjust enrichment, constructive trust, and injunctive relief. After Bojadzjev failed to respond to the personally served complaint, the clerk entered a default, and the trial court entered a default final judgment awarding more than six million dollars. The trial court denied Bojadzjev's later motion to vacate the judgment and permit an answer and affirmative defenses, and the Fifth District affirmed.

DISPOSITION

affirmed

CASES CITED

- Lazcar Intern. Inc. v. Caraballo, 957 So. 2d 1191 (Fla. 3d DCA 2007)
- Patricia Seifert v. U.S. Home Corporation, et al., Seifert v. U.S. Home Corp., 750 So. 2d 633 (Fla. 1999)
- Raymond James Financial Services, Inc. v. Saldukas, 896 So. 2d 707 (Fla. 2005)
- Latin American Cafeteria, Inc. v. Zales Meats Distributors, Inc., 921 So. 2d 768 (Fla. 3d DCA 2006)

- Opti, Inc. v. Sales Engineering Concepts, Inc., 701 So. 2d 1234 (Fla. 4th DCA 1997)

OPINION

PER CURIAM.

997 So. 2d 1251 (2009) Thomas L. BOJADZIJEV, Appellant, v. ROANOKE TECHNOLOGY CORPORATION, Appellee. No. 5D08-571. District Court of Appeal of Florida, Fifth District. January 2, 2009. *1252 Haseeb R. Jabbar, of NeJame, LaFay, Jancha, Barker & Joshi, P.A., Orlando, for Appellant. No Appearance for Appellee. PALMER, C.J. Thomas L. Bojadzjev appeals the trial court's order denying his motion to vacate a default final judgment which was entered in favor of appellee, Roanoke Technology Corporation (Roanoke).[1] We affirm the default final judgment.

Roanoke filed suit against Bojadzjev for breach of contract, unjust enrichment, constructive trust, and injunctive relief. The complaint contained a general claim for damages in excess of \$15,000.00. Bojadzjev was served with the complaint but he failed to file any response thereto.

After obtaining a clerk's default against Bojadzjev, Roanoke filed a motion seeking entry of a default final judgment against Bojadzjev and an affidavit setting forth a claim for damages in excess of six million dollars. A hearing was held on Roanoke's motion. At the conclusion of the hearing, the trial court entered a default final judgment for the full amount of the damages sought. *1253 Months later, Bojadzjev filed a motion seeking to vacate the default final judgment and for leave to file an answer and affirmative defenses claiming that he was surprised by the lawsuit, was overburdened with attorney's fees, and was in the midst of a separate lawsuit with Roanoke.

Bojadzjev claimed his conduct was a result of surprise and excusable neglect. Additionally, Bojadzjev claimed that Roanoke should never have filed a complaint in the trial court because each of the three contracts Roanoke attached to its complaint contained a mandatory arbitration clause.

After conducting a hearing, the trial court concluded that Bojadzjev had failed to demonstrate any evidence of excusable neglect or due diligence and, accordingly, denied his motion. We agree. In order to succeed on a motion to set aside a default final judgment, the moving party must show: (1) the failure to file a responsive pleading was the result of excusable neglect; (2) the moving party has a meritorious defense; and (3) the moving party acted with due diligence in seeking relief from the default.

Lazcar Intern. Inc. v. Caraballo, 957 So. 2d 1191 (Fla. 3d DCA 2007). See also Fla. R. Civ. P. 1.540(b). On appeal, Bojadzjev fails to challenge the trial court's order denying his motion to vacate the default final judgment based on excusable neglect, due diligence, or meritorious defense. Instead, Bojadzjev claims that the trial court should have examined three contracts

attached to Roanoke's complaint, discovered the arbitration clauses contained in the contracts, and then dismissed the complaint for failure to state a cause of action.

We disagree. In *Seifert v. U.S. Home Corporation*, 750 So. 2d 633 (Fla.1999), our supreme court decided that there are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration was waived.[2] Thus, according to *Seifert*, a trial court will not refuse to consider a lawsuit merely because a contract sued under contains an arbitration clause.

Instead, it is up to the party seeking to enforce the arbitration clause to raise it before the trial court in a motion to compel arbitration. The trial court will then determine whether the dispute must be submitted to arbitration applying the *Seifert* analysis. See *Raymond James Financial Services, Inc. v. Saldukas*, 896 So. 2d 707 (Fla.2005)(holding an arbitration right must be safeguarded by a party who seeks to rely upon that right, and the party must not act inconsistently with the right).

Here, *Bojadzijevev* waived his right to seek arbitration by failing to raise the issue before the trial court in a timely motion to compel arbitration. Accordingly, the trial court did not err in denying *Bojadzijevev's* motion to vacate the default final judgment on this basis. Next, *Bojadzijevev* challenges the trial court's order denying his motion to vacate the default final judgment, claiming Roanoke requested trial by jury in its complaint and that the damages in this case were awarded against him without proper findings of fact or a sufficient basis for the award.

We conclude that these issues should have been raised on direct appeal rather than a motion for relief from judgment. See *Latin American Cafeteria, Inc. v. Zales Meats Distributors, Inc.*, 921 So. 2d 768 (Fla. 3d DCA 2006) (holding *1254 cafeteria operator, against which trial court entered default judgment in meat distributor's action for treble damages arising out of operator's alleged tendering of worthless checks to pay for merchandise, was not entitled to relief from trial court's determination of distributor's damages without a hearing, even though distributor requested a jury trial in its complaint and did not waive that request; any error in trial court's determination of damages without a hearing was a mistake of law that should have been raised on appeal, rather than in a motion for relief from judgment).[3] Accordingly, we affirm the entry of the default final judgment.

AFFIRMED. GRIFFIN and LAWSON, JJ., concur. NOTES [1] See Fla. R. Civ. P. 1.540(b). [2] Notably, the instant case was decided after *Seifert*. Compare *Opti, Inc. v. Sales Engineering Concepts, Inc.*, 701 So. 2d 1234 (Fla. 4th DCA 1997).

[3] As in *Latin American Cafeteria, Inc. v. Zales Meats Distributors, Inc.*, 921 So. 2d 768 (Fla. 3d DCA 2006), appellant had timely notice of the complaint, the clerk's default, the motion seeking entry of final judgment, and the final judgment itself all of which were personally served upon him.

