

DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Stoner v. Verkaden

493 So. 2d 1126 (Fla. 4th DCA 1986) · No. No. 85-2014 · Decided September 17, 1986

SUMMARY

The Florida Fourth District Court of Appeal reversed a final judgment against an individual defendant because the trial court's discovery order directed only the corporation to produce bills and invoices. The court held that discovery sanctions could not be imposed on the individual for the corporation's noncompliance, and that the issue was fundamental and could be considered for the first time on appeal.

CASE DETAILS

COURT	District Court of Appeal of Florida, Fourth District
WRITING FOR THE COURT	Glickstein, J.; Gunther, J.; Stone, J.
JURISDICTION	Florida
DECIDED	September 17, 1986
DOCKET	No. 85-2014
DISPOSITION	reversed
PROCEDURAL POSTURE	Wonna Stoner appealed a final judgment entered against her after the trial court struck her pleadings as a discovery sanction.
STANDARD OF REVIEW	De novo review of the legal issue concerning the trial court's authority to impose discovery sanctions; the court also considered an unpreserved fundamental error.
PRECEDENTIAL VALUE	Published opinion
PARTIES	Wonna Stoner v. C.H. Verkaden, Stoner Builders Corporation

TOPICS

- sanctions
- discovery dispute
- appellate procedure
- preservation of error
- contracts

PRACTICE AREAS

- civil procedure
- appellate procedure
- construction law
- contracts

QUESTIONS PRESENTED

1. Whether the trial court could impose discovery sanctions against the individual defendant when the discovery order did not direct her to produce the requested documents.
2. Whether the appellate court could consider that issue for the first time on appeal because the error was fundamental.

HOLDINGS

1. The trial court committed harmful error by striking the individual defendant's pleadings because the discovery order did not direct her to produce the requested bills and invoices, and the corporation's alleged discovery misconduct could not be charged to her as a co-party.
2. The appellate court could consider the issue for the first time on appeal because the trial court's lack of authority to impose the sanctions constituted fundamental error and declining review would result in a miscarriage of justice.

KEY QUOTATIONS

"If one has not been ordered by the court to submit to discovery, one cannot have failed to comply with the order. One cannot willfully disregard an order one has not been given." (493 So. 2d at 1127)

"The corporation's misconduct cannot be charged to its co-party." (493 So. 2d at 1127)

FACTUAL BACKGROUND

The underlying action alleged an oral contract under which the plaintiff was to receive a percentage of construction costs. The plaintiff sought bills and invoices reflecting labor and materials performed by Stoner Builders Corporation, and the corporation and individual defendant moved for a protective order. The trial court granted the motion to compel against the defendant identified in the order as the corporation, but later struck the individual defendant's pleadings and entered a \$25,800 judgment against her.

PROCEDURAL HISTORY

The appellee sought discovery of bills and invoices from Stoner Builders Corporation. Although the trial court's order compelling production referred to the corporation and did not instruct the individual appellant to comply, the court struck the appellant's pleadings for failure to produce documents and later entered a \$25,800 final judgment against her. The Fourth District Court of Appeal reversed.

DISPOSITION

reversed

CASES CITED

- *Zanathy v. Beach Harbor Club Association, Inc.*, 343 So. 2d 625 (Fla. 2d DCA 1977)
- *Henry A. Knott Company, Division of Knott Industries v. Redington Towers, Inc.*, 428 So. 2d 687 (Fla. 2d DCA 1983)
- *Leatherby Insurance Company v. Jones*, 332 So. 2d 139 (Fla. 3d DCA 1976)

- Mercer v. Raine, Mercer v. Raine, 443 So. 2d 944, 947 (Fla. 1983)
- Hillsborough County v. Bennett, 167 So. 2d 800, 805 (Fla. 2d DCA 1964)

OPINION

PER CURIAM.

493 So. 2d 1126 (1986) Wonna STONER, Appellant, v. C.H. VERKADEN and Stoner Builders Corporation, Appellees. No. 85-2014. District Court of Appeal of Florida, Fourth District. September 17, 1986. Steven W. Gomberg of The Law Offices of Steven W. Gomberg, West Palm Beach, for appellant. Scott Kramer, North Palm Beach, for appellees. GLICKSTEIN, Judge.

I. This is an appeal from a final judgment in favor of the individual appellee, who has sued appellant and a corporation, Stoner Builders Corporation, alleging, in his amended complaint, the existence of an oral contract between him and the appellant or the defendant corporation.

We reverse. Appellee attempted to depose the corporation and served a "Re-Notice of Taking Deposition Duces Tecum," appending a list of documents. Both defendants moved for a protective order. The plaintiff moved to compel "the defendant," which was unnamed, to produce: All bills or invoices reflecting amounts billed for labor or materials performed by STONER BUILDERS CORPORATION.

The motion then alleges the plaintiff was to receive a percentage of the gross cost of construction performed by "the defendant," again not naming which defendant. *1127 The style of the pleading names only the corporation.

The amended complaint, in paragraph 5, refers to construction work performed by the corporation. The trial court's order of July 19, 1984, recites: THIS MATTER came on to be heard upon the Motion of the Plaintiff to Compel the Defendant to produce all bills or invoices reflecting the amount billed for labor or materials performed by STONER BUILDERS CORPORATION on various residential and commercial property.

The Defendant has also filed a Motion for Protective Order protecting it from having to produce the same documentation requested by the Plaintiff. The Court after having heard argument of counsel and being otherwise advised it is; ORDERED AND ADJUDGED that the Plaintiff's Motion to Compel is granted and the Defendant's Motion for Protective Order is denied.

The Defendant shall be required to produce the item requested within forty-five (45) days from the date of this Order at a place mutually convenient for the parties. It is clear from the above order that there was no reference, whatsoever, to the individual defendant.

The style of the order names only the corporation as a defendant, notwithstanding the plural of defendant appearing below it. Yet the court then struck the individual's pleadings for her failure to

produce various bills and invoices, pursuant to the trial court's foregoing order. Subsequently, the trial court entered final judgment against appellant for \$25,800.

The trial court's order, striking the individual's pleadings, was harmful error. The corporation's misconduct cannot be charged to its co-party. See *Zanathy v. Beach Harbor Club Association, Inc.*, 343 So. 2d 625 (Fla. 2d DCA 1977) (husband-wife); *Henry A. Knott Company, Division of Knott Industries v. Redington Towers, Inc.*, 428 So. 2d 687 (Fla. 2d DCA 1983) (insurer-insured); and *Leatherby Insurance Company v. Jones*, 332 So.

2d 139 (Fla. 3d DCA 1976) (insurer-insured). Since the individual had never been instructed by the court to comply with any discovery request, sanctions against her were inappropriate. Rule 1.380, Florida Rules of Civil Procedure, authorizes sanctions for a party's failure to comply with the court's order. If one has not been ordered by the court to submit to discovery, one cannot have failed to comply with the order.

One cannot willfully disregard an order one has not been given. Parenthetically, an order imposing sanctions under Rule 1.380 must recite the party's willful failure to submit to discovery. *Mercer v. Raine*, 443 So. 2d 944, 947 (Fla. 1983). No such recitation appears in the order here appealed. Appellant has not raised this particular point and it has not played a part in our decision.

II. When it became apparent that the real issue in this case had not been presented to the trial court, we requested supplemental briefs upon the question whether the issue was so fundamental in nature that this court could consider it initially on appeal. Our review leads us to conclude that the error is fundamental in nature. While perhaps not so certain as the late Justice Stewart's perception of obscenity, we view the trial court as having no authority to order the sanctions against the individual here.

The question is one of law; and our refusal to consider it would result in a miscarriage of justice. See *Hillsborough County v. Bennett*, 167 So. 2d 800, 805 (Fla. 2d DCA 1964). GUNTHER and STONE, JJ., concur.