

LITCHFORD & CHRISTOPHER

PROFESSIONAL ASSOCIATION

Attorneys and Counselors at Law

LEGAL NEWS FOR CLIENTS

Spring 2006

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COURT GRANTS A NEW TRIAL BECAUSE JUROR FAILED TO TRUTHFULLY ANSWER QUESTIONS DURING JURY SELECTION

Upon receiving a summons for jury duty, an individual must go to the courthouse in order to potentially become a juror in a trial. Generally, a potential juror has to endure the jury selection process, known as “voir dire,” which is French for “to speak the truth.” During voir dire, the judge and the attorneys ask questions of the potential jurors to determine whether they are qualified and suitable to serve on the jury. After initial questioning, the judge may excuse some potential jurors. The attorneys may also request that additional prospective jurors be stricken “for cause,” which means that the individual is excused for a specific reason, typically bias for or against one of the parties. The attorneys are also given a limited number of discretionary challenges, called peremptory challenges, which may be used to excuse prospective jurors. The attorneys do not have to give any reason for using a peremptory challenge. They may not use a peremptory challenge, however, to exclude a juror merely because of race or gender. As potential jurors are excused, additional potential jurors replace them and are asked questions to determine whether they should sit on the jury. After all challenges have been exhausted and the correct number of jurors have been seated in the jury box then the jury selection ends.

Although jury selection can be quite an anxious or intimidating process, one should always tell the truth when answering questions during voir dire. In Martinez v. Brinks, Inc., 410 F. Supp. 2d 1202 (S.D. Fla. 2004), the court granted a new trial after it discovered that a juror failed to disclose material information during voir dire. The plaintiff, Mario Martinez, had brought a malicious prosecution claim against defendant, Brinks, Inc., for helping law enforcement arrest Martinez for theft. Martinez had been eventually acquitted on all the criminal charges. During jury selection, the court and the attorneys for both sides asked questions seeking to learn whether any of the jurors or their family members or friends had prior arrests and if so, whether the juror felt that the person arrested had been wrongfully accused of a crime. Despite being asked on two occasions whether any of her family members or friends had spent any time in jail, juror Ana Veciana-Suarez did not raise her hand. She also failed to respond when the judge asked whether any of the jurors or their friends or family had ever been “what you think is wrongfully accused of a crime.” Defendant’s counsel asked a similar question with no response from Ms. Veciana-Suarez. Finally, she said nothing in response to the catch-all question – “Is there anything that you feel that we ought to know in terms of trying to determine fair and impartial jurors?”

After the trial was concluded, the presiding Magistrate Judge, purely by coincidence, discovered that Ms. Veciana-Suarez’s father had been convicted of federal drug charges and had served a federal prison sentence. Court records revealed that Ms. Veciana-Suarez was aware of her father’s conviction. The Magistrate Judge therefore held a hearing and questioned Ms. Veciana-Suarez on the matter. She invoked her Fifth Amendment privilege and refused to answer any questions. Ms. Veciana-Suarez declined to state why she had failed to raise her hand during voir dire and refused to answer a variety of further questions concerning her possible bias in the case.

In order to determine whether Ms. Veciana-Suarez's failure to honestly answer questions during voir dire warranted a new trial, the court analyzed two issues – (1) whether Ms. Veciana-Suarez in fact failed to honestly answer questions during voir dire and (2) if she did fail to answer honestly, whether her failure was material. The court readily determined that Ms. Veciana-Suarez had failed to truthfully answer questions posed during voir dire, because she never disclosed that her father had been convicted of federal drug charges. Next, the court determined that Ms. Veciana-Suarez's failure to reveal such information was material. The fact that her father had been convicted of federal drug charges may have shown potential bias. That might have warranted the court excusing her from the jury pool. Brinks, Inc. was therefore entitled to a new trial.

DISTRICT COURT UPHOLDS REMOVAL FROM STATE COURT TO FEDERAL COURT

Before filing a lawsuit, attorneys typically consider whether the lawsuit should be filed in state or federal court. While most of the rules for state and federal court overlap, some are quite different. A variety of factors can dictate whether it is more beneficial for a party to file suit in federal or state court. Whether the case remains filed in state or federal court oftentimes results in strategic maneuvering by the opposing attorneys. Parties must be careful, however, not to let the strategy backfire. When a party files a lawsuit in state court, the Complaint should be carefully prepared in anticipation of precluding the other party from removing the lawsuit to federal court.

In Deel v. Metromedia Restaurant Services, Inc., 19 Fla. L. Weekly Fed. D409 (N.D. Fla. 2006), the plaintiff, Chantal Deel ("Deel"), sued defendant, Metromedia Restaurant Services, Inc. ("Metromedia"), in state court in Escambia County, Florida. Her complaint alleged sexual harassment and retaliation in violation of the Florida Civil Rights Act. In a crafty maneuver, Metromedia removed the case to federal court. Deel responded by filing a motion to remand the lawsuit back to state court.

Any civil case filed in state court may be removed to federal court by the defendant only if the case could have been originally filed in federal court. One of the grounds for removing a lawsuit from state court to federal court is diversity jurisdiction. Diversity requires that: (1) both parties be citizens of different states *and* (2) the amount in controversy exceeds \$75,000.00. The removing defendant has the burden to establish that federal jurisdiction is proper and that the procedural requirements for removal have been met.

In the Deel case, both of the parties unquestionably resided in different states. The more difficult issue was whether the amount in controversy exceeded \$75,000.00. In its notice of removal, Metromedia alleged that the amount in controversy requirement was satisfied based on statements made by Deel in her settlement demand letter. In her letter, Deel had offered to settle all claims for \$75,000.00. Metromedia therefore relied on that figure to satisfy the amount in controversy requirement. The court acknowledged that her settlement letter had made this demand, but the court did not ultimately rely on the settlement offer as evidence of the amount in controversy. Rather, the court looked to the Florida Civil Rights Act, under which a prevailing plaintiff is presumptively entitled to back pay in employment cases. The court calculated Deel's

potential back pay in the case to be \$80,501 for 2.12 years of wages. This amount satisfied the amount in controversy and thus the lawsuit had been properly transferred to federal court. The federal court therefore retained jurisdiction. Defendant Metromedia prevailed over plaintiff Deel in the strategic maneuvering to transfer the case from state to federal court.

**PARTY TO SETTLEMENT AGREEMENT
MAY LOSE ALL RIGHTS BY FAILING TO TIMELY PERFORM**

A party to a contract who fails to perform in accordance with the contract may commit a material breach of the contract. To constitute a material breach, a party's non-performance must "go to the essence of the contract." Failure to perform one's obligations under a contract within the amount of time specified in the contract is not necessarily a material breach. The contract must usually specify that "time is of the essence;" or the breaching party must have been requested to perform within a reasonable time; or under the circumstances, treating time as non-essential must produce a hardship for the non-breaching party. Even where time is of the essence, courts will not enforce a provision that imposes a "penalty" for failure to timely perform.

Settlement agreements are construed in accordance with the same rules as other contracts. In determining whether a settlement outcome is a "penalty," courts consider whether a trial on the merits might have yielded the same outcome. In Polezoes v. Bartlett, 921 So.2d 35 (Fla. 4th DCA 2006), Bartlett was the owner of real property that he occupied jointly with the Polezoes. Bartlett sued to evict the Polezoes. They then countered with a claim that they had acquired equitable ownership of the property. After months of litigation, Bartlett agreed to sell the property to the Polezoes. The settlement agreement specified that the closing "shall occur" within thirty days, and that Bartlett would continue to pay the mortgage on the property until then. If the closing failed to occur within thirty days through no fault of Bartlett, the Polezoes were required to execute and deliver to him a quitclaim deed to the property and to dismiss their claim. Once thirty days had passed, the Polezoes asked Bartlett for an extension of time to close and proposed a new mortgage under which Bartlett would become a joint obligor. Because Bartlett was paying the existing mortgage on the property, his expected net proceeds from the settlement sale were being reduced each time he made a monthly mortgage payment. He therefore declined the Polezoes' requested extension and obtained a final judgment enforcing the settlement agreement.

On appeal, the Polezoes argued that time was *not* of the essence in the agreement, and they should have been given reasonable additional time to close. They further argued that the provision of the agreement requiring them to deliver a quitclaim deed in the event they failed to close within thirty days constituted a penalty, and was thus unenforceable. The appellate court rejected both of these arguments. It held that the settlement agreement implicitly made "time of the essence." Moreover, the requirement that the Polezoes deliver a quitclaim deed was not a penalty, because they would have been in exactly the same position had Bartlett prevailed on his eviction claim and they had lost on their counterclaim. The appellate court accordingly held that because time was of the essence, Bartlett was justified in obtaining a final judgment to enforce the settlement agreement.

WHERE AN ARBITRATION PROVISION IS NOT PROPERLY INCORPORATED INTO THE CONTRACT OR TIMELY RAISED, LITIGATION MAY PROCEED

Contracts often contain provisions requiring that any disputes arising from the contract be arbitrated rather than litigated in the courts. Despite the existence of such a clause, however, oftentimes one party will file a lawsuit rather than initiating arbitration. If the party being sued prefers arbitration, it must move to compel arbitration. In determining whether to grant such a motion, courts consider the following questions: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration has been waived. Questions one and three were the subject of two recent court decisions.

In Affinity Internet, Inc. v. Consolidated Credit Counseling Services, Inc., 920 So.2d 1286 (Fla. 4th DCA 2006), Affinity had contracted to provide computer and web hosting internet services to Consolidated. The contract stated that Consolidated was “subject to” terms and conditions accessible on Affinity’s website. A user agreement on the website included an arbitration provision. When Consolidated filed a lawsuit alleging Affinity had breached the contract, Affinity moved to compel arbitration in reliance on its user agreement. In opposition to Affinity’s motion, Consolidated argued that it did not sign – and was never provided with – a copy of the user agreement. The trial court accordingly denied Affinity’s motion to arbitrate and Affinity appealed.

The appellate court affirmed, holding that that the contractual language stating the contract was “subject to” the collateral documents on the website failed to sufficiently evidence the parties’ intention to incorporate the terms of the collateral documents. The court suggested that Affinity should have attached the user agreement to the contract, provided it to Consolidated, or at least described it in a manner sufficient to evidence the parties’ intention to incorporate it into the contract. Having failed to do any of these, Affinity could not compel arbitration and was obligated to proceed with the litigation.

In addition to failing to include or improperly incorporating an arbitration provision, a party may lose the right to arbitrate by participating in litigation. In The Estate of Lee L. Williams, SR. v. Manor Care, et. al., 923 So.2d 615 (Fla. 2d DCA 2006), the Estate sued Manor Care for breach of contract. Manor Care filed an answer that demanded a jury trial and made no mention of an arbitration provision that had been contained in the contract. Nine days later, Manor Care filed a motion to compel arbitration. The trial court granted the motion on the two grounds – (1) the Estate had failed to show that Manor Care had knowledge of its right to arbitrate and (2) the Estate was not prejudiced by Manor Care’s failure to assert its right to arbitrate in its initial pleading. Upon review, the appellate court reversed the trial court’s order granting Manor Care’s motion to arbitrate. The appellate court noted that a party to an arbitration agreement is presumed to have knowledge of its right to arbitrate. Accordingly, the Estate was not required to demonstrate that Manor Care had knowledge of its right to arbitrate. Manor Care effectively waived its right to arbitrate by not initially raising the issue and instead filing an answer and demanding a jury trial in the litigation.

WELCOME TO OUR SUMMER CLERK

Litchford & Christopher is pleased to announce the arrival of our new law clerk for the summer, John Dodd. John graduated from University of Florida Fredric G. Levin College of Law this past May and is planning on taking the Florida bar examination in July. As an undergraduate, John attended Harvard University where he majored in Physics and participated in the Shotokan Karate Club and the Harvard Project for Asian International Relations. John is a native Floridian and is set to begin a two-year federal clerkship in August 2006 with the Honorable Robert A. Mark of the U.S. Bankruptcy Court in Miami, Florida.