

County Civil Court: ATTORNEY'S FEES—Summary Judgment—Section 57.105, Fla. Stat. (2006)—Summary judgment for defendant properly entered on claims of violation of federal Telephone Communications Protection Act and Florida Unfair and Deceptive Trade Practices Act based on section 365.1657(1), Florida Statutes (2006) (Florida facsimile spam statute) because facsimile did not constitute "commercial activity." Plaintiff did not dismiss complaint during section 57.105(4), safe-harbor period and sanction of attorney's fees correctly awarded. Judgments affirmed. Law Office Of James M. Thomas, Esq., P.A. v. WorkNet Pinellas, Inc., No. 09-000015AP-88A (Fla. 6th Cir. App. Ct. August 17, 2010).

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION**

LAW OFFICE OF JAMES M. THOMAS,
ESQ., P.A.,

Appellant,

Case No. 09-000015AP-88A
UCN522009AP000015XXXXCV

v.

WORKNET PINELLAS, INC.,

Appellee.

Opinion Filed _____

Appeal from Final Judgments
Pinellas County Court
Judge Myra Scott McNary
and Judge Karl B. Grube

James M. Thomas, Esq.
Attorney for Appellant

Marie Tomassi, Esq.
Charles M. Harris, Jr., Esq.
Lisa Easler, Esq.
Attorneys for Appellee

PER CURIAM.

The Law Office of James M. Thomas, Esq., P.A., appeals the "Amended Order Granting Summary Final Judgment" and the "Final Judgment Granting Fees Pursuant to § 57.105 of the Florida Statutes" entered by the County Court in favor of WorkNet Pinellas, Inc. We affirm.

Procedural History

Appellant/Plaintiff-below the Law Office of James M. Thomas, Esq., P.A. (hereinafter "the Law Office"), placed an advertisement in the St. Petersburg Times newspaper soliciting resumes for employment of an associate. Contained in the advertisement was the office facsimile number. In response to the advertisement, on June 27, 2006, Appellee/Defendant-below WorkNet Pinellas, Inc., a 501(c)3 not-for-profit organization (hereinafter "WorkNet") that helps pair employers with employees, transmitted a facsimile offering free services to the Law Office to assist in finding an employee.¹

The Law Office filed a three-count complaint against WorkNet for transmitting this facsimile. The first two counts alleged violations of 47 U.S.C. section 227, the federal Telephone Communications Protection Act (TCPA). The third count claimed violation of the Florida Unfair and Deceptive Trade Practices Act, section 501.204, Florida Statutes (2006) (FDUTPA), based on Florida's facsimile spam statute, section 365.1657(1), Florida Statutes (2006).

In the course of the litigation, WorkNet served the Law Office with a motion for sanctions, pursuant to section 57.105, Florida Statutes (2006). The statute provides for an award of attorneys' fees to the prevailing party if the losing party's attorney (1) knew or should have known that a claim was not supported by material fact, or (2) would not be supported by the application of the existing law to the facts involved in the action.

¹ WorkNet receives funding from the State and the federal government to offer free programs for connecting potential employers with potential employees. It works in partnership with the Pinellas County Economic Development Office and St. Petersburg College. WorkNet was selected by the Pinellas County Board of County Commissioners to serve as the fiscal agent and administrative entity for the local workforce investment area, as designated by the Governor pursuant to the Workforce Investment Act of 1998, 29 U.S.C. §§ 2861-64 and the Florida Workforce Investment Act, section 445.003, Florida Statutes (2007).

The statute provides a "safe-harbor period" of twenty-one days from the date of service of the motion within which a party may voluntarily dismiss the unfounded claims to avoid sanctions. See § 57.105(4), Fla. Stat.

WorkNet filed a motion for summary judgment on all three counts of the complaint. Prior to the hearing on the summary judgment motion, the Law Office dismissed count three, the claim under FDUTPA. The dismissal by the Law Office was entered after the statutory twenty-one day safe-harbor period had expired.

A hearing on the motion for summary judgment was conducted on April 30, 2008, before County Court Judge Myra Scott McNary. On May 19, 2008, the trial Court entered an order granting WorkNet's motion for summary judgment on the two remaining claims. It specifically found that the facsimile did not constitute "commercial activity" within the meaning of the TCPA.² A hearing was conducted on August 4, 2008, before County Court Judge Karl B. Grube to consider the issue of WorkNet's entitlement to attorney's fees. An order was entered by the trial court on August 26, 2008, granting WorkNet's motion for attorneys' fees and costs. The trial court concluded that WorkNet was entitled to recover costs and fees under section 57.105 for all three counts of the complaint. After a hearing on December 12, 2008, before Judge McNary, a final judgment for attorneys' fees and costs was entered on February 19, 2009. In the final judgment on fees and costs the trial court made the finding that the Law Office had failed to dismiss the FDUTPA count within the twenty-one-day safe-harbor window provided by section 57.105(4).

On appeal, the Law Office claims that the trial court erred in granting summary judgment on the merits of the complaint because pre-trial discovery was not complete at the time of the hearing on the motion for final summary judgment; therefore, it cannot reasonably be asserted that an issue of fact did not exist. The Law Office also asserts that the trial court erred in granting WorkNet's motion for attorney's fees because (1) the record did not support the sanction; (2) the voluntary dismissal of the claim under FDUTPA precludes an award of sanctions associated with that claim; and (3) the evidence submitted to the trial court supports the argument that WorkNet is not entitled

² An "Amended Order Granting Summary Final Judgment" was entered on February 23, 2010, nunc pro tunc May 19, 2008.

to sanctions because there were grounds for an actionable claim. The Law Office asserts that in the event both the summary judgment and sanctions are found to be valid; at a minimum, the amount awarded was excessive.

Standards of Review

Summary judgment is proper only if, viewing every possible inference in favor of the party against whom summary judgment has been entered, there are no genuine issues of material fact. Poe v. IMC Phosphates MP, Inc., 885 So. 2d 397, 400-01 (Fla. 2d DCA 2004). Once the moving party meets its burden, then the party opposing entry of a summary judgment must prove the existence of genuine triable issues. First N. Am. Nat'l Bank v. Hummel, 825 So. 2d 502, 503 (Fla. 2d DCA 2002); see United Auto. Ins. Co. v. A-1 Mobile MRI, Inc., 12 Fla. L. Weekly Supp. 444b (Fla. 17th Cir. Jan. 25, 2005). Additionally, if there are no genuine issues of material fact, summary judgment is proper only if the moving party is entitled to judgment as a matter of law. Poe, 885 So. 2d at 400-01. The appellate court conducts a de novo review of a summary final judgment. Barrington v. Gryphon Invs., Inc., 32 So. 3d 668, 670 (Fla. 2d DCA 2010). If there are no genuine issues of material fact, then the correctness of a summary judgment is reviewed as a question of law. See Hartford Ins. Co. v. St. Mary's Hosp., Inc., 771 So. 2d 1210, 1212 (Fla. 4th DCA 2000).

In reviewing an award of attorney's fees under section 57.105, an appellate court must look to see if the trial court abused its discretion in finding entitlement to fees based on a determination that there were no justiciable issues of fact or law.³ Montgomery v. Larmoyeux, 14 So. 3d 1067, 1073 (Fla. 4th DCA 2009). The amount of fees and costs awarded by the trial court also is reviewed for an abuse of discretion. Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A., 971 So. 2d 955, 956 (Fla. 5th DCA 2007).

Summary Final Judgment on the Merits of the Complaint

³ It should be noted that when entitlement to attorney's fees is based on the interpretation of a statute, rather than as a sanction, it is a pure matter of law with a de novo review. See Save On Cleaners of Pembroke II Inc. v. Verde Pines City Ctr. Plaza LLC, 14 So. 3d 295, 297 (Fla. 4th DCA 2009); Allstate Ins. Co. v. Regar, 942 So. 2d 969, 971 (Fla. 2d DCA 2006).

Presentation of Evidence

The Law Office filed its complaint on January 31, 2008. Simultaneously it filed a notice of service of interrogatories, request for production, and request for admissions. WorkNet filed responses to the discovery on March 25 and 26, 2008. A pre-trial conference was conducted on March 25, 2008. The "Pre-trial Conference Order and Notice of Trial" states that trial was scheduled for May 28, 2008. WorkNet's motion for summary judgment was filed on April 3, 2008, pursuant to Florida Rule of Civil Procedure 1.510. The Law Office did not respond to the motion for summary judgment on the merits of the complaint and did not file any affidavits in opposition to the motion for summary judgment. At the time of the summary judgment hearing, there were no outstanding discovery requests by the Law Office, no depositions had been scheduled, and there were no motions to compel discovery.

Prior to the hearing on the motion for summary judgment, WorkNet filed the affidavit of Edward Peachey, its executive director and a copy of the facsimile coversheet, the document offering WorkNet's free services, and an order form. The Law Office did not file a motion for continuance of the hearing on the motion for summary judgment and did not indicate that it was not prepared to continue at the hearing on the motion for summary judgment.

At the summary judgment hearing, the Law Office attempted for the first time to introduce into evidence a print-out of documents taken from WorkNet's internet website. The trial court sustained WorkNet's objection to the introduction of this evidence. The Law Office as the adverse party had not filed of record any summary judgment evidence upon which it intended to rely, nor had it filed any opposing affidavits prior to the hearing. The complaint does not reference the website or claim that the facsimile transmission was a pretext to draw the recipient to WorkNet's website for commercial activities. The Law Office argued unsuccessfully that the trial court should take judicial notice of WorkNet's website in support of the Law Office's argument that the facsimile was sent for commercial purposes. The trial court properly refused to entertain this new argument and refused to take judicial notice of an internet website.⁴

⁴ The Law Office argues that it was not required to file an affidavit in opposition to the motion for summary judgment because this is a small claims case and the motion was proceeding

Telephone Communications Protection Act (TCPA)

The TCPA, among other things, makes it unlawful for any person within the United States to use a facsimile machine to send an unsolicited advertisement. 47 U.S.C. §227(C). There are no Florida cases discussing the type of commercial advertisement prohibited by the TCPA. However, the Federal Communications Commission clarified that "messages that do not promote a commercial product or service . . . are not unsolicited advertisements under the TCPA." Phillips Randolph Enters., LLC v. Adler-Weiner Research Chicago, Inc., 526 F. Supp. 2d 851, 852 (N.D. Ill. 2007)(quoting In re Rules and Regulations Implementing the Tele. Consumer Prot. Act Of 1991 (Junk Fax Prevention Act Of 2005), 21 F.C.C.R. 3787, 3810 (April 6, 2006)). Generally, the federal courts have concluded that offering a free service does not violate the TCPA. Id. at 852 (dismissing TCPA violation claim because facsimile offered a free opportunity and did not promote commercial product); Lutz Appellate Serv., Inc. v. Curry, 859 F. Supp. 180, 182 (E.D. Pa. 1994) (holding unsolicited facsimile offering employment opportunity did not advertise commercial availability of property, goods, or services, and did not violate the TCPA).

The Law Office argues that because the facsimile contains the web address for WorkNet, and the website offers goods and services for a fee, therefore, the facsimile is of a commercial nature. However, as discussed above, this argument was first submitted orally at the summary judgment hearing and this claim was not included in the complaint. The Law Office did not move to amend the complaint to include this new allegation.⁵

under Florida Small Claims Rule 7.135, Summary Disposition which states, "At pretrial conference or at any subsequent hearing, if there is no triable issue, the court shall summarily enter an appropriate order or judgment." The Law Office's argument is not persuasive. The trial court refused to admit the documents printed out from WorkNet's website into evidence because there were no allegations in the complaint that the facsimile was a pretext to draw the recipient to the website for alleged commercial activities. This evidence was not relevant to the claims presented in the complaint.

⁵ In the Answer Brief, WorkNet states that had the print-out from its website been admitted into evidence it would have shown that the services which the Law Office asserts transforms the facsimile into a commercial transaction were not available at the time the facsimile was sent to the Law Office.

In the present case, upon a de novo review of the evidence in the record, this Court concludes that the trial court correctly found that the facsimile in question offered free employment matching services that did not constitute commercial availability of goods or services and was not of a commercial nature.⁶ The trial court correctly concluded that there are no genuine issues of material fact, that the Law Office failed to prove the existence of genuine triable issues, and WorkNet is entitled to a judgment as a matter of law. The summary final judgment for WorkNet is affirmed.

Final Judgment for Attorneys' Fees

Sanctions pursuant to section 57.105

The statute provides that the court shall award a reasonable attorney's fee to the prevailing party on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) was not supported by the material facts necessary to establish the claim or defense; or (b) would not be supported by the application of then-existing law to those material facts. A determination of whether the claim or defense is frivolous is left to the sound discretion of the trial court. Bowen v. Brewer, 936 So. 2d 757, 762 (Fla. 2d DCA 2006). To exercise this discretion, the trial court must make "an inquiry into what the losing party knew or should have known during the fact-establishment process, both before and after suit is filed." Id. at 763.

Section 57.105(4) provides a twenty-one day safe-harbor period during which the party against whom sanctions are sought to be imposed can drop the claim and avoid imposition of sanctions. See also Hustad v. Architectural Studio, Inc., 958 So. 2d 569, 570-571 (Fla. 4th DCA 2007) ("The failure of a trial court to consider a motion for award

⁶ Additionally, WorkNet points to the exception to the bar to unsolicited facsimiles stated in 47 U.S.C. § 227(b)(1)(C)(ii)(II), when the facsimile number is included in a directory, advertisement, or internet website. It argues that the exception is applicable in the present case because the Law Office voluntarily communicated its facsimile number to WorkNet by posting an advertisement containing the number in the St. Petersburg Times newspaper. This argument is without merit because this exception is applicable only when the parties have an existing business relationship. See Gottlieb v. Carnival Corp., 635 F.Supp. 2d 213, 215 (E.D. N.Y. 2009)(citing In re Rules and Regulations Implementing the Tele. Consumer Prot. Act of 1991 (Report and Order), 7 F.C.C.R. 8752 (Oct. 16, 1992)); Gene & Gene LLC v. BioPay LLC, 541 F. 3d 318, 322 n.3 (5th Cir. 2008). There is no evidence that the parties in this case had an existing business relationship as defined in 47 U.S.C. §227(a)(2).

of section 57.105 attorney's fees merely because the lawsuit has been voluntarily dismissed is an abuse of discretion.")

Entitlement to Sanctions

Attached to the Law Office's complaint is a copy of the facsimile that is the subject of this matter. The facsimile specifically states:"Through various revenue sources including the State of Florida, and the Department of Labor we are able to offer our service **FREE OF CHARGE** to both employers, and job seekers. Here are a few of the **FREE** services we provide:" (Emphasis in original). At the hearing on the motion for attorneys' fees, correspondence between counsel for the Law Office and counsel for WorkNet concerning the demand letter of the Law Office and WorkNet's motion for sanctions was admitted into evidence. In "Defendant's exhibit #1," a letter dated July 10, 2006, WorkNet stated that it had reviewed the Law Office's demand letter alleging violations of TCPA and FDUTPA. It informed the Law Office that WorkNet is a not-for-profit agency and its services are free of charge. WorkNet stated,

[T]he facsimile you received is not an advertisement for the sale of goods or services, and therefore, does not involve a commercial purpose. As such, it is our position that the relevant statutes are not applicable in this instance. We trust upon further consideration, you will decline to pursue this matter against WorkNet.

WorkNet argued to the trial court that this letter demonstrated that at the time the Law Office filed its complaint it was aware that the facsimile was not a commercial advertisement for the sale of goods and did not involve a commercial purpose which would bring it under the dictates of TCPA and FDUTPA.

Also admitted into evidence was "Defendant's exhibit #2," correspondence sent to the Law Office by WorkNet dated February 26, 2008, which accompanied a copy of the motion for sanctions pursuant to section 57.105. In this letter counsel for WorkNet noted that the Law Office had filed a complaint alleging a violation of TCPA and FDUTPA. The letter continues:

However, you were notified by me on July 10, 2006 that WorkNet is a registered not-for-profit agency that provides individuals and businesses in our local community with *free* employment and job matching services. Clearly, WorkNet's facsimile transmissions do not fit the prohibited transmissions of the TCPA, nor do the transmissions establish a FDUTPA claim.

.....

Pursuant to § 57.105 of the Florida Statutes, we hereby demand that you immediately drop your claims against WorkNet. If you do so with prejudice, we will agree to forego seeking any entitlement to attorneys' fees. If, however, you fail to do so within twenty-one (21) days of your receipt of this correspondence, we will vigorously pursue attorneys' fees on § 57.105 grounds. Enclosed herewith is a copy of the motion that will be filed in this matter if you do not dismiss your suit.

Also admitted into evidence as "Defendant's exhibit #3," a print-out of a portion of the content on the Law Office's website. In a section under "Telemarketer, Spam & Junk Fax Litigation" WorkNet pointed out that the website states that in order to recover under the TCPA, "[t]he offending fax must be an advertisement selling either goods or services, or one leading to the sale of goods or services." WorkNet informed the trial court that James Thomas, Esq., the principle of the Law Office "is a self identified and professed junk fax expert." It was argued that the website entry demonstrates that the Law Office was aware that the complaint was not supported by material facts at the time it was filed.

The Law Office presented to the trial court "Plaintiff's exhibit #2," a letter dated March 27, 2008, sent in response to WorkNet's February 26, 2008, letter. Attorney Thomas stated in the letter that he had "recently reviewed evidence proffered by your client in response to our interrogatories and request for production. Considering the business of your client, we now offer to mutually dismiss this case with each party to bear their own fees and costs." This Court notes that the Motion for Sanctions had been filed on March 26, 2008. This letter demonstrates that the Law Office knew or should have known that its claims: (a) were not supported by the material facts necessary to establish the claims; or (b) would not be supported by the application of then-existing law to those material facts. However, the Law Office failed to dismiss its complaint within the twenty-one day safe-harbor time period.

Once again the Law Office attempted to argue that the facsimile contains the web address for WorkNet, and because that website offers goods and services for a fee the facsimile is of a commercial nature. The trial court rejected the Law Office's argument that the court should inferentially deduct this allegation from a claim in the complaint that the facsimile was sent to "mislead" the recipient. The website print-out

that was not admitted into evidence. This Court concludes the evidence was properly excluded.

In making its oral ruling, the trial court concluded that the claims under the TCPA were "devoid of any facts that would sustain that claim that you made. They were completely untenable, and it would have been unreasonable to proceed in light of the nature of the transaction that was received by Plaintiff. In fact, that portion of the statement of claim was frivolous." With regard to the claim under the FDUTPA the trial court stated that it found

there was nothing that indicated that this was any type of solicitation for any commercial purpose. The Plaintiff obviously should have known that there was no solicitation. The Complaint that was filed by the Plaintiff is devoid of any facts that show that this solicitation was made for commercial purposes. The filing of the complaint for the recovery under Florida's Unfair and Deceptive Trade Practices Act was not made in good faith, it was frivolous, and it was completely untenable and unreasonable under the circumstances.

Although the Law Office did dismiss the claim under the FDUTPA, it did not dismiss it during the twenty-one day safe-harbor period. Therefore, the dismissal of the baseless claim did not preclude the imposition of sanctions under section 57.105. See Hustad, 958 So. 2d at 570-571.

Upon review of the evidence relied upon by the trial court and its reasoning, this Court concludes that the trial court did not abuse its discretion in finding entitlement to fees under section 57.105 based on a determination that there were no justiciable issues of fact or law. See Montgomery, 14 So. 3d at 1073; Bowen, 936 So. 2d at 762. The trial court's determination that WorkNet is entitled to attorney's fees is affirmed.

The trial court awarded WorkNet its costs as the prevailing party below. See § 57.041(1), Florida Statutes (2006). The trial court has no discretion to deny costs to the prevailing party under section 57.041. On appeal, an abuse of discretion standard is used to review the trial court's decision as to which party was the prevailing party, for purposes of entitlement to costs. Granoff v. Seidle, 915 So. 2d 674, 677-78 (Fla. 5th DCA 2005). This Court concludes that the trial court's determination that WorkNet is entitled to costs is affirmed.

Determination of the Amount of Costs and Attorneys' Fees

The record on appeal does not contain a transcript of the December 12, 2008, hearing on the amount of fees and costs to be awarded to WorkNet.

The trial court found that WorkNet was entitled to attorneys' fees only through the entry of the August 26, 2008, order granting the motion for sanctions, but not through the date of the hearing on the reasonableness of fees and costs. The order states that testimony was received that costs incurred by WorkNet through August 26, 2008, were \$1,332.68.

The trial court found "that the blended hourly rate of \$192.85 for WorkNet's attorneys, along with 96.3 hours expended by its attorneys is reasonable." The trial court awarded fees in the amount of \$18,570.55 to WorkNet. WorkNet's expert, Charles A. Samarkos, Esq., testified at the December 12, 2008, hearing concerning the reasonableness of the fees sought by WorkNet. The trial court found that Atty Samarkos expended three hours in review of this matter and to testify at the hearing at a rate of \$320 per hour. The trial court found the amount of time and the hourly rate to be reasonable and awarded Atty Samarkos \$960 to be paid by the Law Office.

Affidavits were filed by counsel for WorkNet, Charles Harris, Esq., dated October 30, 2008. Billing records were attached to the affidavit. The affidavit stated that the following time had been expended by WorkNet attorneys and staff at the rate indicated:

Atty Harris, Shareholder	\$320/hour	12 hours	\$ 3,840.00
	340/hour	8.5 hours	2,890.00
Lisa Easler, Esq., Associate	\$170/hour	65.7 hours	\$11,169.00
	190.00	18.7	3,553.00
Susan Martin, Paralegal	\$150/hour	0.8 hours	\$ 120.00
TOTAL		105.70 hours	\$21,572.00

The affidavit of Atty Samarkos dated October 29, 2008, filed of the record states that attorney's fees in the amount of \$24,021.39 at the blended hourly rate of \$204.09 for 117.7 hours are reasonable in this matter.

The affidavit in the record demonstrates that WorkNet was seeking \$21,572.00 for work performed through October 30, 2008. The trial court concluded that a lesser amount of fees was reasonable.

Because there is no transcript of the December 12, 2008, hearing in the record, this Court cannot conclude that the trial court abused its discretion in calculating the

amount of fees and costs to be awarded. The award of attorney's fees and costs is affirmed.

AFFIRMED.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 17th day of August, 2010.

Original order entered on August 17, 2010 by Circuit Judges Linda R. Allan, George W. Greer, and John A. Schaefer.

Copies furnished to:

James M. Thomas, Esq.
2141 Main Street, Ste. Q
Dunedin, Florida 34698

Marie Tomassi, Esq.
Charles M. Harris, Jr., Esq.
Lisa Easler, Esq.
P.O. Box 3542
St. Petersburg, Florida 33731

Hon. Myra Scott McNary
Hon. Karl B. Grube