Filing # 15294908 Electronically Filed 06/26/2014 04:11:41 PM

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA.

CASE NO. 502009CA040800XXXXMB

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

-vs-

SCOTT ROTHSTEIN, individually and BRADLEY J. EDWARDS, individually,

Defendant/Counter-Plaintiffs.
_____/

RESPONSE IN OPPOSITION TO PLAINTIFF/COUNTER-DEFENDANT'S MOTION FOR FEES AND COSTS

Defendant/Counter-Plaintiff, BRADLEY J. EDWARDS, by and through undersigned counsel, hereby files this Response in Opposition to Plaintiff/Counter-Defendant's Motion for Fees and Costs, and as grounds therefor would state:

INTRODUCTION

This case arises from Epstein's lawsuit against Edwards, when Epstein sued Edwards merely for his legal representation of people accusing Epstein of misconduct. Edwards counter-sued Epstein for, inter alia, malicious prosecution. Eventually, Epstein voluntarily dismissed his own lawsuit. As to Edwards' counter-claim, Epstein claimed that he was immune from liability under the litigation privilege, even though Epstein is a non-lawyer.

This Court dismissed Edwards' lawsuit, concluding it was bound under case precedent from a single case from the Third District to apply the litigation privilege. Epstein seeks attorneys' fees pursuant to his Proposal for Settlement served in 2011. Over Edwards objection,

*** FILED: PALM BEACH COUNTY, FL SHARON R BOCK, CLERK. ***

NOT A CERTIFIED COPY

Epstein has set this matter for UMC calendar this upcoming Monday, June 30, 2014. If this Court entertains this at UMC, this Court should stay this fee entitlement proceeding. Respectfully, there is a legitimate basis for appellate reversal of the dismissal and appellate reversal will automatically negate any basis for fees.

In moving for and obtaining dismissal, Epstein relied on a decision from the Third District Court of Appeal. See Wolfe v. Foreman, 128 So.3d 67 (Fla. 3d DCA 2013). No other reported decision in Florida – or any jurisdiction in the country – has extended absolute immunity of the litigation privilege to bar an otherwise properly pled claim for malicious prosecution. The parties will unnecessarily waste resources and the valuable judicial resources of this Court addressing fee entitlement (and fee amount if the Proposal is deemed valid). Furthermore, either party may appeal a fees decision by this Court, which would only further burden the resources of their parties and the judicial system.

Alternatively, if considered on the merits, this Court should deny Epstein's Motion for Fees because he served a defective Proposal for Settlement. He required Edwards to sign a confidentiality clause with vague and open-ended terms. Controlling precedent from the Fourth District precludes this type of clause. Furthermore, Epstein's Proposal is invalid because he failed to assign a monetary value to the confidentiality clause, and it is now impossible for him to prove he has "beaten" the Proposal.

NOT A CERTIFIED COPY

Epstein's Proposal for Settlement

Epstein's Proposal stated that as a "condition of this Proposal," Edwards was required to execute the "General Release" attached as Exhibit A. See ¶8, Proposal for Settlement. First, Edwards was required to remise, release, acquit, and discharge Epstein from all causes of action

arising from this lawsuit (Exhibit A, at p. 1). Additionally, Edwards was required to agree to confidentiality (Exhibit A, at pp. 1-2):

> As further consideration, I agree not to disclose the details of this release in settlement of all claims, including the nature or the amount paid and the reasons for the payment, to any person other than my lawyer, accountant, income tax preparer, or by valid order of a Court of competent jurisdiction whether directly or indirectly. To the extent that I must disclose any of the above information to any of the above named persons, I shall instruct that person or persons to keep the information confidential.

Epstein did not assign a monetary amount for the confidentiality clause, nor did he explain what portion of the $300,000 was for compensatory damages. Epstein did not state the length of time for the confidentiality, or explain the penalty for breaching the clause. Moreover, Epstein did not explain if he was subject to confidentiality, i.e., whether he was allowed to freely disclose matters regarding the lawsuit or settlement.

NOT A CERTIFIED COPY

ARGUMENT

Case Law on Proposals for Settlement

Because §768.79, Fla. Stat., and Fla.R.Civ.P. 1.442, act as penalizing mechanisms in derogation of the common law rule otherwise requiring each party to pay its own fees, the statute and rule must be strictly construed. See Campbell v. Goldman, 959 So.2d 223, 226 (Fla. 2007). Consistent with this principle, all terms of an offer must be stated with particularity. See Papouras v. BellSouth Telecommunications, Inc., 940 So.2d 479, 480 (Fla. 4th DCA 2006). As the First District Court of Appeal reminded parties earlier this week in striking a Proposal for failing to comply with Rule 1.442's provision on punitive damages; see R.J. Reynolds Tobacco v. Ward, 2014 WL 2852971, *1 (Fla. 1st DCA June 24, 2014):

> Our supreme court has recently and repeatedly said that the rule and statute must be strictly construed.

In Ward, the First District also cited numerous other cases where courts invalidated other proposals for failing to strictly comply with the rule and statute. Fla.R.Civ.P. 1.442(c)(2)(C) also requires proposals to "state with particularly all relevant conditions." Subsection (c)(2)(D) requires proposals to "state with particularity all nonmonetary terms." A proposal fails to satisfy the particularity requirement if an ambiguity could reasonably affect the offeree's decision to accept or reject. See Nationwide Mut. Fire Ins. Co. v. Pollinger, 42 So.3d 890, 891 (Fla. 4th DCA 2010).

As the Supreme Court has noted, State Farm Mut. Auto Ins. Co. v. Nichols, 932 So.2d 1067, 1079 (Fla. 2006):

> The rule intends for a proposal for judgment to be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions. Furthermore, if accepted, the proposal should be capable of execution without the need for judicial interpretation. Proposals for settlement are intended to end judicial labor, not create more.

The rule "requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification." Nichols, 932 So.2d at 1079. It is well-settled that "[t]he burden of clarifying the intent or extent of a settlement proposal cannot be placed on the party to whom the proposal is made." Saenz v. Campos, 967 So.2d 1114, 1116 (Fla. 4th DCA 2007).

NOT A CERTIFIED COPY

Epstein's Proposal for Settlement is Invalid Because it Failed to Include a Summary of Important Confidentiality Terms

As noted above, Epstein's Proposals required Edwards (but perhaps or perhaps not Epstein) to keep confidential the details of the settlement. The Proposal is invalid because Epstein failed to explain material terms of the confidentiality clause, and its implications.

In Swartsel v. Publix Supermarkets, Inc., 882 So. 2d 449 (Fla. 4th DCA 2004) the Fourth District invalidated an offer of judgment based in large part on similar deficiencies in the confidentiality provision (882 So.2d at 453):

> For example, with regard to the confidential settlement agreement being proposed, it would be crucial to know what is being made confidential, who is covered by the confidentiality, whether there is any period to the confidentiality, and what the remedies are in the event of a breach.

Here, the confidentiality provision did not explain or describe the terms of that agreement. There was no mention of the period of this confidentiality. Significantly, Epstein did not suggest what the remedies would be in the event of a breach. Would Epstein try and recover liquidated damages from Edwards if he breached the agreement? How would Edwards have to pay for a breach? Would he forfeit a portion of the settlement funds? All of it? Would Epstein sue Edwards for damages beyond the settlement funds? The inclusion of these terms was critical to Edwards' ability to make an informed decision of acceptance or rejection.

One aspect of Swartsel was disagreed with by the Supreme Court in Nichols. In Swartsel, the Fourth District held parties were required to specify all terms of a settlement (882 So.2d at 453). Then in Nichols, the Supreme Court held parties could summarize all material terms within the proposal -- as long as the proposal is "sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification" (932 So.2d at 1079).

NOT A CERTIFIED COPY

Swartsel's discussion of the importance of including confidentiality terms has never been disagreed with by any appellate court. Indeed, in Nichols, while the Supreme Court held a summary of release terms was sufficient, the Court also explained that the proposal must "eliminate[] any reasonable ambiguity about its scope" (932 So.2d at 1079).

Epstein's Proposal necessarily did not eliminate any reasonable ambiguity about its scope. He neglected to include relevant and material terms, which any person in Edwards' position would want to have specified within the Release. This is particularly true with an adversary such as Epstein, who, after all, sued Edwards for representing people accusing Epstein of misconduct.

Epstein's Confidentiality Clause is Also Invalid Because He Can Never Prove He Has Obtained a Better Result than He Proposed Within His Release

Epstein's Proposal is also invalid when he failed to apportion the monetary value of the confidentiality provision. It is clear that Epstein believed there was some value to this provision. See Danow v. Law Office of David E. Borack, P.A., 2010 WL 597213, at *2 (11th Cir. Feb. 22, 2010) ("[T]he Law Office's Offer of Judgment also contained a condition-that Danow sign a confidential release. While it is difficult to assess the value of this condition, it presumably was worth *something* to the Law Office, signifying that Danow's ultimate recovery, which did not contain this condition, was 'more favorable' to Danow than that provided in the Offer of Judgment") (italics in original).

In Danow, a defendant law firm offered to settle a debt collection lawsuit brought against it, by offering $1,000 in damages and $2,000 in fees and costs. The defendant law firm did not assign value for a required confidentiality clause. The plaintiff rejected the offer, the lower court

NOT A CERTIFIED COPY

eventually awarded the plaintiff $1,000 in damages, and both parties moved for fees. The lower court granted the plaintiff's request for fees.

On appeal, the defendant law firm asserted it was entitled to fees because the plaintiff received exactly what the defendant law firm offered him and which he rejected. The Eleventh Circuit affirmed the denial of fees (367 Fed. Appx. at 23-24). The Eleventh Circuit recognized that because the confidentiality clause had some (unspecified in the Proposal) monetary value, the defendant law firm could never prove if it had beaten the offer, at the conclusion of the case. After all, the defendant law firm now has no confidentiality clause.

Similarly, in this case, the fact the confidentiality clause had some monetary value makes it impossible to know whether Epstein beat the Proposal. The Fourth District has specifically contemplated that so-called non-monetary terms can have a monetary value, a principal which made the proposal invalid in Zalis v. M.E.J. Rich Corp., 797 So.2d 1289 (Fla. 4th DCA 2001). In that case, the inclusion of a condition of acceptance that the plaintiff and his attorneys would ever again bring another lawsuit against defendant and those associated with him rendered the proposal invalid. The appellate court explained (Id. at 1290-91):

> [t]he condition that a plaintiff relinquish all rights to sue about anything at any point in the future is intrinsically a condition incapable of being stated with the particularity required under section 768.79 of the Florida Statutes. No reasonable estimate can be assigned to such a waiver. The defendant's offer simply did not give the plaintiff a determinable value with which to weigh his chances at trial.

The Fourth District's reasoning was that the condition had a value which could not be known, thereby making the proposal invalid.

NOT A CERTIFIED COPY

Similarly, Judge Griffin noted in Dryden v. Pedemonti, 910 So.2d 854, 857 (Fla. 5th DCA 2005) (specially concurring), that the inclusion of such non-monetary terms with monetary value thwarted the calculation necessary to uphold the proposal:

> Section 768.79, Florida Statutes, appears to contemplate a straightforward and exclusively mathematical test: compare the amount of the rejected offer to the amount of the plaintiff's verdict, and apply the twenty-five percent differential. Under section 768.79, you offer an "amount," not a deal. You can't apply mathematics to "non-monetary offers."

As a later panel of the Fifth District noted, "One might logically posit, in fact, that 'the only enforceable non-monetary condition allowable under the rule is one that does not go beyond what the offeror would be entitled to by operation of law, upon settlement.'" Sparklin v. Southern Indus. Assocs., 960 So.2d 895, 897 n.1 (Fla. 5th DCA 2007) (quoting Dryden, 910 So.2d at 858 (Griffin, J., specially concurring)).

Judge Cope of the Third District came to the same conclusion in a special concurrence in Earnest & Stewart, Inc. v. Codina, 732 So.2d 364, 367-368 (Fla. 3d DCA 1999):[1]

> I disagree with the majority opinion, however, insofar as it suggests that a person making an offer of judgment could include the requirement that the offeree enter into a hold harmless agreement. A hold harmless agreement is in substance a contract of indemnity. It is "[a] contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility." Black's Law Dictionary 731 (6th ed.1990). The person making the offer of judgment would be demanding that the offeree hold the offeror harmless in the event of claims by third persons who are not parties to the action. Of course, if the case were tried to conclusion, there is no procedure by which the winning party can compel the losing party to execute a hold harmless agreement.

[1] The majority opinion in Codina was abrogated on different point in State Farm Mutual Ins. Co. v. Nichols, 932 So.2d 1067 (Fla. 2006).

NOT A CERTIFIED COPY

Judge Cope finished by explaining that because the theory of §768.79, Fla. Stat., is to have an "apples to apples" comparison between the offer and the judgment obtained in financial terms, the inclusion of a demand for another condition like a hold harmless agreement in the offer destroys the comparison because the financial worth of the offer cannot be meaningfully compared to the financial result of the trial. The confidentiality clause in this case similarly destroys the comparison. Epstein offered money, but with a confidentiality clause. Now Epstein does not owe Edwards any money, but he also has no confidentiality clause. Which is the better result for Epstein? This Court cannot make a conclusion that "no money owed plus no confidentiality clause = better result for Epstein." So, Epstein cannot claim entitlement to fees because he cannot prove he has beaten his Proposal, or even that he has equaled his Proposal. As the Florida Supreme Court explained in invalidating Proposals which include equitable claims, the rule and statute require a pure mathematical comparison between offer and result. This Court cannot determine if Epstein has any better, any worse, or the same result. See Diamond Aircraft Indus., Inc. v. Horowitch, 107 So.3d 362, 375 (Fla. 2013).

As further explained by the appellate decisions above, Epstein required Edwards to execute an agreement with the confidentiality clause which also definitely goes beyond what could be achieved in a trial of the claim. See, e.g., Dryden; Sparklin, supra. The Confidentiality Agreement would give Epstein rights that exceed those which could be obtained by a resolution of Edwards' claim. The Clause is accordingly not contemplated or permissible under Rule 1.442 or §768.79.

Some non-monetary terms are permissible. An example is a requirement that a party execute a stipulation of dismissal within ten days. But the ability to include some non-monetary terms does not mean that all non-monetary terms are proper. In this case, the addition of

NOT A CERTIFIED COPY

language attempting to get agreements and rights which are not part of the dispute makes the offer invalid. Because the offer would actually increase Edwards' risk, it is worth less than nothing to him.

A math example demonstrates: (1) that Epstein cannot prove he has beaten or even equaled his Proposal, and (2) that confidentiality clauses can never fit within Rule 1.442 and §768.79. If, for sake of argument, the Confidentiality Agreement has a value of $100,000, then the net damages value of the proposal would have been $200,000. But, the Confidentiality Agreement could just as well be valued at the full $300,000 to Epstein, or even beyond that $300,000 value to him. In that scenario, the net damages value of the proposal could be $0.00, or even have a negative value. It is easy to understand that for a public figure like Epstein, the Confidentiality Clause can be the entire value of the Proposal for Settlement.

Epstein now has no confidentiality clause, and a $0.00 judgment. A zero verdict/judgment at the end of a contested case would be exactly the same as the $0.00 compensatory value of the Proposal. And, if the confidentiality clause were worth more than the offer to Epstein, then he now has less than he offered, and has achieved a worse result. Epstein did not beat or even equal the proposal and is not entitled to fees. Epstein could never prove what the value of the proposal was, so he can never prove compliance with §768.79, Fla. Stat. This Court could not enforce Epstein's proposal without that proof.

Accordingly, this Court should defer ruling on Epstein's Motion for Fees or, alternatively, if heard on the merits, this Court should conclude Epstein is not entitled to Fees.

NOT A CERTIFIED COPY

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on June 26, 2014.

William B. King, Esq.
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
eservice@searcylaw.com
wbk@searcylaw.com
and
BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Suite 350
444 West Railroad Avenue
West Palm Beach, FL 33401
(561) 721-0400
Attorneys for Bradley J. Edwards
aah@FLAppellateLaw.com
jew@FLAppellateLaw.com

By: /s/ Andrew A. Harris
ANDREW A. HARRIS
Florida Bar No. 10061

NOT A CERTIFIED COPY

/jw

SERVICE LIST

Epstein v. Rothstein/Edwards
Case No. 502009CA040800XXXXMB

W. Chester Brewer, Jr., Esq.
W. CHESTER BREWER, JR., P.A.
250 S. Australian Ave., Ste. 1400
West Palm Beach, FL 33401
(561) 655-4777
wcblaw@aol.com
wcbcg@aol.com
Attorneys for Jeffrey Epstein

Jack Goldberger, Esq.
ATTERBURY, GOLDBERGER
& WEISS, P.A.
250 S. Australian Ave., Ste. 1400
West Palm Beach, FL 33401
(561) 659-8300
jgoldberger@agwpa.com
smahoney@agwpa.com
Attorneys for Jeffrey Epstein

Fred Haddad, Esq.
FRED HADDAD, P.A.
1 Financial Plaza, Ste. 2612
Fort Lauderdale, FL 33301
(954) 467-6767
haddadfm@aol.com
fred@fredhaddadlaw.com
dee@fredhaddadlaw.com
Attorneys for Jeffrey Epstein

Tonja Haddad Coleman, Esq.
TONJA HADDAD, P.A.
5315 SE 7th Street., Ste. 301
Fort Lauderdale, FL 33301
(954) 467-1223
tonja@tonjahaddad.com
efiling@tonjahaddad.com
Attorneys for Jeffrey Epstein

Mark Nurik, Esq.
LAW OFFICES OF MARC S. NURIK
1 E. Broward Blvd., Ste. 700
Fort Lauderdale, FL 33301
(954) 745-5849
marc@nuriklaw.com
Attorneys for Scott Rothstein

Bradley J. Edwards, Esq.
FARMER, JAFFE, WEISSING,
EDWARDS, FISTOS & LEHRMAN, P.L.
425 N. Andrews Ave., Ste. 2
Fort Lauderdale, FL 33301
(954) 524-2820
staff.efile@pathtojustice.com
brad@pathtojustice.com

NOT A CERTIFIED COPY