2013 WL 6646818 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Eleventh Judicial Circuit
Miami-dade County

IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, Appellant,
v.
PREMIUM QUALITY MEDICAL CENTER, Corp., Appellee.

No. 13-177 AP.
December 4, 2013.

*1 Appellate Division
Lower Court No: 2012004701CC25
Not Final Until Time Expires to File Rehearing Motion, and if Filed, Disposed of

Trial Order

Christopher J. Bailey, Esq., and Elizabeth K. Russo, Esq., for Appellant.

Christian Carrazana, Esq., for Appellee.

Jose L. Fernandez, Maria Verde, Miguel M. de la O, Judge.

Opinion filed: December 4,2013,

An Appeal from the County Court for Miami-Dade County, Florida, Judge Michaelle Gonzalez-Paulson.

Christopher J. Bailey, Esq., and Elizabeth K. Russo, Esq., for Appellant.

Christian Carrazana, Esq., for Appellee.

Before, JOSE L. FERNANDEZ, MARIA VERDE, MIGUEL M. DE LA O, JJ. DE LA O, J.

Plaintiff/Respondent, Premium Quality Medical Center, Corp. ("Premium"), sued Defendant/Petitioner, Imperial Fire and Casualty Insurance Company ("Imperial"), on July 5, 2012. Premium seeks reimbursement for medical treatments it provided to Javier Reyes, Imperial's insured, under a Personal Injury Protection ("PIP") Insurance Policy. Five months after it was sued, Imperial filed a motion for attorney's fees pursuant to Florida Statute Section 57.105. Imperial's motion alleged that Premium and its attorney knew or should have known *Imperial Fire and Casualty* v. *Premium Quality Medical Center, Corp*. that Premium was not entitled to recover PIP benefits from Imperial due to alleged misrepresentations by Premium as to the number of treatments Premium provided to Javier Reyes.

Premium had 21 days, pursuant to the section 57.105's safe harbor provision, to withdraw the claim and thereby moot Imperial's motion for attorney's fees. Rather than withdrawing the claim, or proceeding with the lawsuit to prove that the claim was supported by the facts and the law, Premium filed a motion titled "Motion for Enlargement of Time re: Defendant's Motion to Tax Fees Under § 57.105, Fla. Stat. (2012)." [1] The trial court granted the motion and allowed Premium 10 additional days (*after* it completes the deposition of Javier Reyes) to avail itself of the safe harbor provision of section 57.105(4). [2] Despite

the trial court's April 1,2013 order, Premium had not yet scheduled or conducted the deposition of Javier Reyes as of the date of oral argument (October 17,2013). [3]

***2** Premium's motion for enlargement of time cites no statutory provision or reported case that supports its request to waive the time limit set forth in section 57.105(4); nor any that would clothe the trial court with the discretion to grant such an enlargement of time. We conclude the trial court erred in granting Premium's motion for enlargement of time.

It is well-settled that Florida Statute section 57.105 generally, and the 21-day safe harbor provision of section 57.105(4) particularly, are substantive in nature. *See Bionetics v. Kenniasty*, 69 So. 3d 943, 948 (Fla. 2011) (we hold that the safe harbor provision contained in section 57.105(4) is substantive in nature); *Moser* v. *Barron Chase Sec, Inc.*, 783 So. 2d 231, 236 (Fla. 2001) ("the statutory right to attorneys' fees is not a procedural right, but rather a substantive right."); *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873, 878 (Fla. 2010) (same).

Given the substantive nature of section 57.105, it appears logical to conclude that proceedings pursuant section 57.105's provisions are "special statutory proceedings" under Florida law. However, we could find no case addressing whether section 57.105 is a special statutory proceeding. Nor could we find precedent clearly delineating the characteristics of a special statutory proceeding. *See In re Commitment of Cartwright*, 870 So. 2d 152,162 (Fla. 2d DCA 2004) ("Although there is no specific definition of 'special statutory proceedings,' it would be unreasonable to understand that term as excluding the Ryce Act from its scope."). Nevertheless, we conclude that section 57.105 is a special statutory proceeding because it shares sufficient traits with proceedings supplementary (Florida Statutes section 56.29) that we must treat it similarly. *See Sanchez v. Renda Broad. Corp.*, 2013 WL 6030085 (Fla. 5th DCA, November 15, 2013) ("Proceedings supplementary under section 56.29 are special statutory proceedings."). Both are essentially collateral proceedings stemming from the original claim; involve the assessment of liability against the principals involved or third parties; and contain procedures and deadlines for perfecting the claim.

If section 57.105 is a special statutory proceeding, then the trial court's order is contrary to law. Trial courts have no authority to extend statutory deadlines imposed by the Legislature for special statutory proceedings unless the Florida Rules of Civil Procedure provide otherwise. *See* Fla. R. Civ. P. 1.010 ("time for pleading in all special statutory proceedings shall be as prescribed by the statutes governing the proceeding unless these rules specifically provide to the contrary."); *Dracon Const, Inc. v. Facility Const. Mgmt, Inc.*, 828 So. 2d 1069, 1071 (Fla. 4th DCA 2002) ("In a special statutory proceeding, ... the trial court does not have the same discretion to bend time requirements that might be allowed under the rules of civil procedure.").

In addressing another special statutory proceeding, the Third DCA has noted that the time limits set forth in the statute are not subject to judicial discretion.

The legislature, in Chapter 713, has conferred upon materialmen, workmen, and certain other groups, the special privilege of asserting a mechanic's lien against real property. Section 713.21, Florida Statutes (1993), provides the means by which a properly perfected lien may be discharged. The procedures in this section are considered special statutory proceedings, and in these cases, the Florida Rules of Civil Procedure do not apply to the "form, content, procedure and time for pleading...." Fla. R. Civ. P. 1.010. "Consequently, the statute is not subject to the ordinary exercise of judicial discretion." *Matrix Constr. Corp.*, 578 So. 2d at 389. The time limits delineated in the statute must be strictly observed.

***3** *Sturge v. LCS Dev. Corp.*, 643 So. 2d 53, 54 (Fla. 3d DCA 1994) (citations omitted).

It may well be that the trial court will decide that the enlargement of time expired and the safe harbor period has closed because Premium did not comply timely with its order. This possibility, along with the possibility that the facts and the law support Premium's lawsuit, leads us to conclude that we cannot grant Imperial's Petition for Certiorari even though the trial court erred in grant the motion for enlargement of time.

Certiorari is "an extraordinary remedy and should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of non-final orders." *Martin-Johnson, Inc. v. Savage*, 59 So. 2d 1097,1098 (Fla. 1987). Unless Rule 9.130 provides for interlocutory review, a non-final order is reviewable by certiorari only in "limited circumstances," *id*. at 1099, where the non-final order "departs from the essential requirements of law, and thus causes material injury to the petitioner throughout the remainder of the proceedings, effectively leaving no adequate remedy on appeal." *Allstate* v. *Boecher*, 733 So. 2d 993, 999 (Fla. 1999).

We agree that the trial court's order departed from the essential requirements of law, but it is unknown whether Imperial will suffer prejudice as a result of the enlargement of time granted by the trial court. It could be that Premium never takes advantage of the safe harbor period after the enlargement of time expires; it could be that the enlargement of time has already expired and Premium is already liable to Imperial if the trial court later determines that there was an absence of facts or law to support the claim; or, it could be that Premium prevails in the underlying lawsuit. None of these potential eventualities are known at this time. Indeed, the Florida Supreme Court has noted that "[i]t is extremely difficult, if not impossible, for a party to plead in good faith its entitlement to attorney's fees under section 57.105 before the case is ended. *Ganz* v. *HZJ, Inc.*, 605 So. 2d 871, 872 (Fla. 1992). The Third DCA agrees:

It is only after the case has been terminated that that a sensible judgment can be made by a party as to whether the adverse party raised nothing by frivolous issues in the cause, and, if so, to file an appropriate motion, as here, seeking an entitlement to said attorney's fees under Section 57.105, Florida Statutes (1979).

Autorico, Inc. v. Government Employees Ins. Co., 398 So. 2d 485, 487-88 (Fla. 3d DCA 1981).

The fact that Imperial must continue to litigate the claim until these eventualities become known does not constitute sufficient prejudice to warrant certiorari review.

In order to invoke common law certiorari review of an interlocutory order, a party must first establish that without the use of this extraordinary writ, the party will suffer irreparable harm that cannot be remedied on appeal. However, this Court has never held that requiring a party to continue to defend a lawsuit is irreparable harm for the purposes of invoking the jurisdiction of an appellate court to issue a common law writ of certiorari. In fact, in *Martin-Johnson*, 509 So. 2d at 1100, we recognized that to establish the type of irreparable harm necessary in order to permit certiorari review, a party cannot simply claim that continuation of the lawsuit would damage one's reputation or result in needless litigation costs. To hold otherwise would mean that review of every non-final order could be sought through a petition for writ of certiorari. Under such a ruling, appellate courts would be inundated with petitions to review non-final orders and trial court proceedings would be unduly interrupted.

***4** *Citizens Prop. Ins. Corp. v. San Per dido Ass'n, Inc.*, 104 So. 3d 344,353 (Fla. 2012).

Moreover, any prejudice Imperial suffers due to the trial court's order, can be easily remedied on appeal. If the trial court finds that Premium's claim was "not supported by the material facts necessary to establish the claim or defense; or... by the application of then-existing law to those material facts," but refuses to award attorney's fees to Imperial due to its enlargement of time as to the safe harbor provision of Florida Statute § 57.105, Imperial can appeal that determination.

PETITION DENIED.

JOSE L. FERNANDEZ and MARIA VERDE, J.J., concur.

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JOSE L. FERNANDEZ

Circuit Judge

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MARIA VERDE

Circuit Judge

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MIGUEL M.DELA O

Circuit Judge

Footnotes

1 Imperial suggests that the motion for enlargement of time is an implicit admission by Premium that it did not conduct any good faith investigation prior to filing the lawsuit to determine if it was entitled to recover PIP benefits from Imperial on behalf of Javier Reyes. Although not every such motion for enlargement of time can be construed as an implicit admission of a party's failure to conduct a reasonable investigation, the argument carries more weight here where the discovery Premium seeks is of its own patient/assignor.

2 The trial court's order provides, *inter alia*:
[M]otion is granted. [Plaintiff] shall have an additional 10 days following the deposition of Javier Reyes to decide whether this action should be dismissed [without] exposure to attorney fees under F.S. 57.105. Said deposition shall be coordinated [within] 30 days and shall take place within 60 days.

3 Javier Reyes is Premium's patient and assignor. If the underlying claim is legitimate, Premium should have a treasure trove of documents substantiating the services it provided to Javier Reyes. The need for Premium to take Javier Reyes' deposition to determine if its claim is legitimate, escapes us.

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