IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT IN AND
FOR INDIAN RIVER COUNTY, FLORIDA.
APPELLATE DIVISION

Circuit Case No. 18-AP-19
Lower Tribunal No. 18-SC-1070

TOQUON SERVICES d/b/a WET OUT RESTORATION a/a/o DONNA CROSBY,

Appellant,

v.

UNIVERSAL INSURANCE COMPANY OF NORTH AMERICA,

Appellee.
_____/

Not final until time expires for filing motion for rehearing, and if filed, disposed of.

Decision filed September 24, 2019.

Appeal from the County Court for Indian River County; Joe Wild, Judge.

Gray Proctor, Richmond, Virginia, and L. Dick Ducheine, The Diener Firm, P.A., Plantation, for appellant.

Lars Bodnieks, Quintairos Prieto Wood & Boyer, P.A., Miami, for appellee.

MIRMAN, C.J.

Facts

A homeowner, insured by Universal Insurance Company ("Universal"), incurred water damage. Plaintiff, Toquon Services ("Toquon") contracted with the homeowner to make repairs. Toquon received an assignment of benefits from the homeowner to enforce rights under the insurance policy.

Thereafter, Toquon submitted a claim to Universal for $5,788.31. Universal sent Toquon a letter acknowledging the invoice. The letter cited a policy provision allegedly limiting payment to $3,000.00, which states in relevant part as follows:

2. Reasonable Emergency Measures

***

a. We will pay up to the greater of $3,000 or 1% of your Coverage A limit of liability for the reasonable costs incurred by you for necessary measures taken solely to protect covered property from further damage, when the damage or loss is caused by a Peril Insured Against.

b. We will not pay more than the amount of a. above, unless we provide you approval within 48 hours of your request to us to exceed the limit in a. above. In such circumstance, we will pay only up to the additional amount for the measures we authorize.

The letter enclosed a $3,000 check made out to Toquon. Toquon cashed the check. Toquon then sued for the amount claimed in excess of $3,000: $2,788.31.

Both parties filed motions for summary disposition. The trial court granted Universal's motion for summary disposition based solely on the theory of statutory accord and satisfaction. The trial court wrote in its order "UICNA has satisfied its burden of establishing the use of a conspicuous statement indicating that the instrument was tendered as full satisfaction of the claim."

Standard of Review

The standard of review for an order granting summary judgment is de novo. *Maguire-Ress v. Stettner*, 268 So. 2d 171, 172 (Fla. 4th DCA 2019).

Statutory Accord and Satisfaction

§673.3111, Fla. Stat. (2018) is the Uniform Commercial Code ("U.C.C.") provision governing "accord and satisfaction by use of instrument." Unlike common law accord and satisfaction, which is based upon mutual assent to resolution of a claim by reference to the circumstances, this U.C.C. provision creates a method by which a claim can be subject to discharge based upon clear, conspicuous facial language of an instrument and its subsequent endorsement by the claimant. The essential elements of this provision require a conspicuous statement alerting the claimant that the endorsement of the instrument results in full satisfaction of the claim, thus ending the matter. The statute states, in relevant part:

> (1) If a person against whom a claim is asserted proves that that person in good faith tendered an instrument to the claimant as ***full satisfaction of the claim***, that the amount of the claim was unliquidated or subject to a bona fide dispute, and that the claimant obtained payment of the instrument, the following subsections

apply.

> *(2) Unless subsection (3) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.*

(Emphasis added) §673.3111, Fla. Stat. (2018). In order to give rise to discharge under these sections, the language of the instrument must clearly convey an intent to fully satisfy the claim, and the language must be conspicuous.

The trial court relied on one sentence in Universal's payment letter in determining that Universal proved that the letter contained a clear, conspicuous statement that the $3,000 payment was intended to be full satisfaction of the claim: "(p)ayment has been limited to the amount of $3,000 as we were not notified by you of the estimated mitigation costs nor did we receive your request to exceed the $3,000 policy limit…" As a matter of law, we disagree that these facts satisfy the statutory requirement.

First, rather than using any of the suggested U.C.C. form language for satisfaction by indorsement or cashing, Universal amorphously stated, "(p)ayment has been limited to the amount of $3,000 as we were not notified by you of the estimated mitigation costs nor did we receive your request to exceed the $3,000 policy limit…" 2 Fla. UCC Forms F.S.A. § 673.3111 Form 1 (4th ed.). This was not a clear, unequivocal expression of intent to fully discharge the claim by subsequent endorsement.

Second, neither the check nor the accompanying letter sent by Universal was conspicuous, as required by the statute. Whether or not notice was conspicuous is a question of fact to be resolved by the trial court. However, §671.201(10), Fla. Stat. (2018)[1] includes examples of when notice is "conspicuous:"

> "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" is a decision for the court. Conspicuous terms include the following:
>
> (a) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the

[1] §673.1031(4), Fla. Stat. (2018) provides for the definitions in chapter 671 to apply to chapter 673 ("In addition, chapter 671 contains general definitions and principles of construction and interpretation applicable throughout this chapter). Therefore, the definition of "conspicuous" as enumerated in §671.201(1), Fla. Stat. (2018) is relevant to this analysis.

> surrounding text of the same or lesser size; and
>
> (b) Language in the body of a record or display in larger type than the surrounding text or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

The sentence relied upon by the trial court is the second sentence in the second paragraph of Universal's one and a half page letter. *See* §671.201(10)(b), Fla. Stat. (2018). The type of the sentence is not larger than the surrounding text or set off from the surrounding text by symbols or other marks that call attention to the language. *Id*. There is no heading near the sentence, much less one that is in capitals or contrasting type, font, or color. §671.201(10)(a), Fla. Stat. (2018). The sentence was not written or presented in a way that a reasonable person ought to have noticed it. In fact, no attention was drawn to it at all.

For purposes of summary disposition, Universal's language failed on both accounts: it was not a clear, unequivocal expression of intent to discharge, and any such language was not conspicuous. The notice language in this case does not fit so squarely within the statutory examples to declare as a matter of law that it constitutes conspicuous notice of intent to fully discharge. Universal's amorphous expression is subject to other interpretations such as tendering limited partial payment at this time under a reservation of rights to assert a limitation claim. Conspicuously absent from Universal's language was the term "FULL PAYMENT" or "PAYMENT IN FULL."

As referenced above, examples of when such language is so conspicuous and clear, as a matter of law, to warrant summary disposition is contained within the suggested U.C.C. form for satisfaction by indorsement or cashing. That form reads as follows:

> § 673.3111 Form 1 Satisfaction by Indorsement or Cashing
>
> This check [draft] is issued in full payment of all obligations of the drawer to the payee arising out of .
>
> [or]
>
> Indorsement of this check [draft] constitutes acceptance hereof in full payment of drawer's obligations under the claim of payee dated
>
> [or]
>
> The indorser hereby releases the drawer from all obligations arising out of the transaction identified on the front of this draft.
>
> [or]
>
> The indorsement and negotiation of this instrument by the payee shall constitute an acknowledgment by him of satisfaction of the

> claim of [name of payee] against [name of drawer] based upon [or arising from] [briefly indicate or describe basis of claim, as: fire insurance policy (number) issued by (name of drawer) in favor of (name of payee) on premises (identify or state address of insured property)].
>
> [or]
>
> This check given in full payment and satisfaction of the following accounts:
>
> [specify]
>
> [or]
>
> PAYMENT IN FULL
>
> [or]
>
> Full payment of disputed debt.
>
> [or]
>
> This check is tendered as FULL PAYMENT of my debt to you.
>
> [or]
>
> NOTE—This is offered as full payment.

2 Fla. UCC Forms F.S.A. § 673.3111 Form 1 (4th ed.). The commentary in relation to this form is also telling. It states, inter alia, "*There is no magic language*, but such provisions are effective in a particular case only if they are tendered in good faith, relate to a claim that is unliquidated or subject to a bona fide dispute, *are conspicuous*, and the claimant obtains payment of the instrument…...See F.S.A. § 671.201(10) for a definition of "conspicuous."" (Emphasis added) *Id*.

At trial, the finder of fact could conclude that accord and satisfaction otherwise applied in this case; but, the facts were not so clear as to warrant summary disposition based upon §673.3111(2), Fla. Stat. (2018).

The trial court's order denying rehearing in this matter supports this court's conclusion because the trial court cited that the Plaintiff "was not an unsophisticated customer." This reference shows that the language on the face of instrument did not rise, as a matter of law, to the clear standard required to support statutory summary disposition, via §673.3111(2, Fla. Stat. (2018) Rather, the court looked beyond the face of the instrument.

Tipsy Coachman Theory

Universal also argued that it is entitled to prevail under §673.3111(4), Fla. Stat. (2018)

because the Universal allegedly proved that "(w)ithin a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim."

On this point, we note that the trial judge's order clearly is not based upon this theory. Pursuant to the tipsy coachman doctrine, we have scoured the record to find what might be considered an independent basis to support summary disposition under this alternate theory. *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002). In their pleadings and arguments before the court, both parties pointed to deposition statements of Toquon's representatives to argue this point. Significantly, however, the actual depositions are not contained within the court record. Universal's counsel read into the record the following at the hearing:

> Question: So, at least between May, 17th, when this letter was sent by Miss Starks – referring to her email – until the lawsuit was filed in June, you were pretty much aware that the position of Universal was that they were not going to pay more than the $3,000 check that had been cashed?
>
> Answer: Quote, by what they were saying, yeah.

During the hearing, Universal's counsel cited this language and then argued that the letter's language satisfied statutory accord and satisfaction because the letter's language was conspicuous, not because it satisfied section (4)'s requirement. Toquon's counsel rebutted Universal's argument with the following:

> "Mr. (Toquon) Starks testified at his deposition – he was asked this question: So from the letter, I mean, would you agree with me they're making it pretty clear they are not going to pay more than $3,000? His answer is: I don't know."

Additionally, Toquon's response to Universal's motion for summary judgment summarized the deposition as follows: "Plaintiff received the correspondence, and in his deposition testified that he did not know that the $3,000.00 check issued to Plaintiff would be all that Defendant would pay in his invoice. Plaintiff believed, that this was not the final payment amount that Defendant would issue to satisfy this invoice and he would litigate this invoice and more funds would be issued. *See Deposition of Wet Out Designated Corporate Representative Tuquon Starks attached hereto as Exhibit F pg 96 line 24-25, pg 97 line 1-11. See email correspondence dated May 17,*

2018 attached as Exhibit G.[2]*"*

"A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it." *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985). This record evidence is not so clear as to support summary judgment under this alternate theory of §673.3111(4), Fla. Stat. (2018).

Appellate Fees

Pursuant to §627.428(1), Fla. Stat. (2018), as the prevailing party on appeal, Toquon is entitled to an award of its appellate attorney's fees, if it ultimately prevails before the trial court. *Hallandale Chiropractic Center v. United Auto. Ins. Co.*, 79 So. 3d 868 (Fla. 4th DCA 2012).

Reversed and remanded for further proceedings.

BAUER, J. and WATERS, Acting Circuit Judge, concur.

Copies of above decision
were furnished to the attorneys/parties
of record on the same date
the decision was filed.

[2] Due to a clerical error, the deposition referenced was not attached to the pleading when Toquon filed it in the court file. Consequently, the deposition cited is not part of the record on appeal.