IN THE CIRCUIT COURT FOR THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT COURT CIVIL DIVISION

CASE NO. 13-08545 CA 23

BANK OF AMERICA, N.A.,

Plaintiff,

v.

UGO COLOMBO, an individual and UC CHALLENGER, LLC, a Florida limited liability company,

Defendants,

-AND-

UGO COLOMBO and CMC GROUP, INC.

Third-Party Plaintiffs,

v.

DACRA DEVELOPMENT CORP., CL36 LEASING, LLC and CRAIG ROBINS,

Third-Party Defendants.
_____/

ROBINS' AMENDED RESPONSE OPPOSING COLOMBO'S MOTION TO AMEND TO CLAIM PUNITIVE DAMAGES

Third-Party Defendant, Craig Robins, responds in opposition to Colombo's Motion for Leave to Amend to Assert a Claim for Punitive Damages against Craig Robins.

I. LEGAL STANDARD FOR PUNITIVE DAMAGES AMENDMENT

Colombo brings his motion to amend, to add punitive damages, "pursuant to . . . Fla. Stat. § 768.72(1)." *Colombo's Mot. at* pp. 1-2. There is recent appellate precedent on this statute, to wit:

> Section 768.72(1) creates a substantive legal right *not to be subject to* a punitive damages claim and ensuing financial worth discovery until the trial court makes a determination that there is a *reasonable evidentiary basis* for recovery of punitive damages. The procedural protection of this statute requires more than mere allegations . . . . [A]n evaluation of the evidentiary showing required by section 768.72 *does not contemplate the trial court simply accepting the allegations in a* complaint or *motion to amend as true*.
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> * * *
>
> The statute requires the trial court to act as a *gatekeeper* and *precludes* a claim for punitive damages where there is no reasonable evidentiary basis for recovery.

Bistline v. Rogers, 215 So.3d 607, 610-11 (Fla. 4th DCA 2017) (internal quotations/ brackets/citations omitted; emphasis added). Colombo cites the same court for the opposite proposition, arguing that the "reasonable showing" required by the statute "is similar to the test for determining whether a complaint states a cause of action," citing *Holmes v. Bridgestone/Firestone, Inc.*, 891 So.2d 1188, 1191 (Fla. 4th DCA 2005). However, in its 2017 decision the court rejects that construction of its opinion in *Holmes*. "[T]he trial court misapplied our decision in *Holmes*" when accepting the plaintiff's "allegations as true believing that the inquiry is akin to determining whether the pleader has stated a cause of action." *Bistline*, 215 So. 3d at 610 (internal quotations omitted). It was in 2017 that the court held that the statute "precludes a claim for punitive damages where there is no reasonable evidentiary basis for recovery," exercising its certiorari power to quash the trial court's order allowing an amendment to claim punitive damages. *Id.* at 611.

In order to seek punitive damages in a "business torts" case, the plaintiff must have evidence that conduct – which may otherwise constitute an intentional tort – is *also* "egregious and sufficiently reprehensible to rise to the level of truly culpable behavior deserving of punishment." *Bistline*, 215 So.3d at 609-10 (quashing trial court order allowing amendment to add punitive damages). "Mere proof of an intentional tort does not *ipso facto* entitle the plaintiff to punitive damages . . . ." *Genesis Publications, Inc. v. Goss*, 437 So.2d 169, 170 (Fla. 3rd DCA 1983) (reversing jury's award of punitive damages because trial court erred when allowing the jury to consider same) (internal quotations omitted).

II. COLOMBO MAKES NO EVIDENTIARY SHOWING WHICH JUSTIFIES AMENDING TO SEEK PUNITIVE DAMAGES

Colombo's motion is filled with pejorative characterizations of Robins' alleged conduct, arguing that "he stabbed his partner in the back" (*Mot. at* p. 3), that he is a "weasel" (*id.* at p. 6), that he had "a deep thirst for revenge" (*id. at* p. 9), and that his "misconduct" was "glaring." *Id.*

However, when it comes to identifying the conduct Colombo posits for a punitive damages amendment, Colombo falls short. Colombo's entire punitive damages argument hinges on two events.

First, Colombo alleges that Robins caused his company, CL36, to breach its loan agreement with the Bank of America, which in turn caused a "cross-default" breach of Colombo's loan agreement with the bank. *Id. at* pp. 2, 10.

Second, Colombo alleges that Robins caused his other company, Dacra, to breach its agreement to pay aircraft expenses, resulting in damages to Colombo. *Id. at* p. 8.

And, the only evidence Colombo puts forth is several lines of testimony by Robins, in a prior case, arguing that the testimony means that Robins was "tired" of the "situation," attributing this to Robins being "chronically angry at Colombo, with a deep thirst for revenge against him." *Colombo's Mot.,* p. 8 & Exh. 6 thereto. Of course, this proffered evidence does not set forth which conduct is "egregious and sufficiently reprehensible to rise to the level of truly culpable behavior deserving of punishment." *Bistline at* 609-10.

Furthermore, Colombo's argument is predicated on the supposition that an *intentional* breach of contract calls for punitive damages. In another recent (2017) decision, the Third District ruled that even where a principal *deliberately* causes his corporate entity to breach its contractual obligations, that does not convert contract damages to tort damages. *Peebles v. Puig*, 223 So. 3d 1065 (Fla. 3rd DCA 2017). In so ruling, the Third District stated:

> As reprehensible as the jury may have found Peebles's actions to be, those actions neither converted Puig's claim for contract damages into a claim for tort damages, nor imposed on Peebles personal liability for [his corporate entity's] contractual obligations.

223 So.3d at 1069. "[C]ourts have uniformly rejected requests for punitive damages for mere breach of contract, *regardless of the breaching party's conduct or motives*. *Allapattah Services, Inc. v. Exxon Corp.,* 61 F. Supp. 2d 1326, 1328 (S.D. Fla. 1999). "Not only are intentional breaches exempt from punitive damages, they are sometimes

encouraged. The law has long recognized the view that a contracting party has the option to breach a contract and pay damages if it is more efficient to do so." *Id.* (internal quotation omitted).

"Even if it is true that the" principal instructed its company "to breach" a contract, such "conduct, without more, does not constitute the type of improper conduct to pierce the corporate veil." *W.H. Smith, PLC v. Benages & Assoc.,* 51 So.3d 577, 583 (Fla. 3rd DCA 2010) (internal quotations omitted). Moreover, a contracting party "may elect to default and thereby breach the contract. In a sense, he has a 'right' to do so." *Alexander/Davis Properties, Inc. v. Graham*, 397 So.2d 699, 706 (Fla. 4th DCA 1981), *citing In re Estate of Donner*, 364 So.2d 742 (Fla. 3rd DCA 1978).

Colombo also argues that Robins' companies were unable to meet their contractual obligations without Robins advancing the funds, and when he did not do so, the companies breached. *Colombo's Mot. at* pp. 8, 12. Implicit in this argument is the supposition that a principal has an obligation to advance funds to its company to meet company obligations. There is no legal support for this supposition. The law is to the contrary. Electing not to fund one's company, causing it to default on an obligation, does not even "constitute the type of improper conduct which would warrant" reaching through the corporation to the principal, much less punitive damages. *Geigo Properties v. R. J. Gators,* 849 So.2d 1109, 1110 (Fla. 4th DCA 2003).

"[W]hen a contract is breached, the parameters of a plaintiff's claim are defined by contract law rather than by tort law." *Peebles at* 1068. In reaching this conclusion, the Third District made clear that this result governed notwithstanding the changing

interpretations of the economic loss rule. *Id. at* n. 4., *citing* the Florida Supreme Court's decision in *Tiara Condo. Assoc. v. Marsh,* 110 So.3d 399 (Fla. 2013). In *Tiara*, Justice Pariente concurred: "Basic common law principles already restrict the remedies available to parties who have specifically negotiated for those remedies . . . ." *Id. at* 408-09

Here, the parties negotiated contractual remedies for the alleged conduct. Colombo admits this, alleging in his operative complaint that "Colombo and Robins took great care to express their mutual financial duties and expectations in written contracts." *Colombo's Sec. Am. Third-Party Compl.*, ¶ 13 (AX 3) (AX cites are to the Appendix to [Robins, et al.] *Motion for Summary Judgment on Multiple Counts of Colombo's Third Party Claims*, being heard at the same time as Colombo's motion to amend to add punitive damages). As Colombo also alleges, the parties negotiated contractual remedies for both cross-defaults under the bank loan and failure to pay aircraft expenses, the conduct he claims gives rise to the punitive damages. This is set forth, chapter and verse, in the motion for summary judgment. *See MSJ*, pp. 3-9.

In negotiating their contractual remedies the parties even ruled out punitive damages. *Operating Agreement*, p. 10 (AX 37) ("Notwithstanding anything to the contrary in this Agreement, Losses indemnifiable hereunder shall expressly exclude . . . punitive damages . . . .").

Should this Court grant Robins' motion for summary judgment, on Colombo's tort claims, the separate issues set forth herein need not be reached, as without tort claims there can be no punitive damages. *See MSJ, filed* 9/5/17.

Conclusion

Colombo has failed to make the evidentiary showing necessary to overcome Robins's substantive legal right not to be subject to a punitive damages claim and ensuing financial worth discovery. *Supra*, p. 1. Colombo has failed to make an evidentiary showing of egregious and reprehensible conduct, beyond that necessary to establish a business tort, in order to claim punitive damages. *Supra*, pp. 3-4. In addition, the parties negotiated contractual remedies for the alleged breaches, and Colombo cannot convert contract damages to tort damages. *Id.* Finally, Colombo has no cognizable tort claims. Without tort claims, there can be no punitive damages. *See MSJ,* 9/5/17.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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