

District Court of Appeal of Florida, Fourth District.
 ASPEN INVESTMENTS CORPORATION, Appellant,

v.

Helen E. HOLZWORTH, David Fraser, et al., Appellees.

No. 90-2914.

Oct. 2, 1991.

Rehearing Denied Nov. 20, 1991.

Action was brought to foreclose on mortgages executed by former director and shareholder of corporation, and corporation cross-claimed against director for his alleged civil theft and slander of title in executing mortgages without authority. The Circuit Court, Broward County, Robert C. Scott, J., directed verdict in favor of former director on corporation's cross-claims, and corporation appealed. The District Court of Appeal, Stone, J., held that: (1) former director's and shareholder's alleged liability for civil theft of corporate property was question for jury, and (2) corporation did not waive its slander of title claim against former director by electing not to pursue, in foreclosure action, its challenge to validity of mortgages executed by director.

Reversed and remanded.

West Headnotes

[1] Corporations 101 ⚡319(8)

101 Corporations

101X Officers and Agents

101X(C) Rights, Duties, and Liabilities as to Corporation and Its Members

101k319 Actions Between Corporation and Its Officers or Agents

101k319(8) k. Trial and Judgment. Most Cited Cases

Former director's and shareholder's alleged liability for civil theft of corporate property, in falsely representing that he still had authority to mortgage corporate land in order to obtain from mortgagee sums allegedly owing to him in connection with sale of stock, was question for jury; jury could conclude that by secretly mortgaging corporate land in return for loan, the proceeds of which he deposited in his personal account, former director was acting with intent to

deprive corporation of its property and appropriate it to his own use knowing that he was not entitled to do so. West's F.S.A. § 812.014(1).

[2] Trover and Conversion 389 ⚡40(1)

389 Trover and Conversion

389II Actions

389II(C) Evidence

389k40 Weight and Sufficiency

389k40(1) k. In General. Most Cited Cases

Intent necessary to commit civil theft may be shown by circumstantial evidence.

[3] Trover and Conversion 389 ⚡40(1)

389 Trover and Conversion

389II Actions

389II(C) Evidence

389k40 Weight and Sufficiency

389k40(1) k. In General. Most Cited Cases

Civil theft must be established by clear and convincing evidence. West's F.S.A. § 812.035(7).

[4] Trover and Conversion 389 ⚡13

389 Trover and Conversion

389II Actions

389II(A) Right of Action and Defenses

389k13 k. Nature and Scope of Remedy in General. Most Cited Cases

Existence of contractual relationship between parties does not preclude civil theft action for fraudulent conversion, embezzlement, or similar acts.

[5] Estoppel 156 ⚡52.10(3)

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52.10 Waiver Distinguished

156k52.10(3) k. Implied Waiver and Conduct Constituting Waiver. Most Cited Cases

Conduct is not held to constitute "waiver" unless it does so clearly.

[6] Estoppel 156 ↪52.10(3)

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52.10 Waiver Distinguished

156k52.10(3) k. Implied Waiver and Conduct Constituting Waiver. Most Cited Cases

By electing not to pursue, in foreclosure action, its challenge to validity of mortgages executed by its former officer and director, corporation did not thereby waive its slander of title claims against former officer and director for allegedly mortgaging corporate property without authority.

[7] Libel and Slander 237 ↪139

237 Libel and Slander

237V Slander of Property or Title

237k139 k. Actions. Most Cited Cases

Attorney fees are recoverable as element of damages for slander of title.

[8] Appeal and Error 30 ↪226(2)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k226 Costs

30k226(2) k. Fees. Most Cited Cases

Defendant waived right to object to reasonableness of attorney fees claimed by plaintiff as element of damages in slander of title action, by failing to object to plaintiff's lack of proof as to reasonableness of fees at time evidence of fees was admitted.

*1375 Gerald J. Houlihan, Norman Davis, Miguel M. de la O of Steel Hector and Davis, Miami, for appellant.

Layne Verebay and Bruce H. Freedman of Freedman & Verebay, P.A., North Miami Beach, for appellee-David Fraser.

STONE, Judge.

The trial court entered a directed verdict in favor of cross-defendant, Fraser, following a jury verdict for cross-plaintiff, Aspen Investments. We reverse. The case

began as a mortgage foreclosure. Prior to trial, Aspen settled with the mortgagees by stipulating to the foreclosure but expressly reserved its claims against Fraser.

Aspen's cross-claim was for civil theft and slander of title. The trial court found, as to the civil theft claim, that Aspen failed to prove criminal intent to steal and that a contractual relationship existed between the parties. As to the slander of title claim, the court found that a settlement with the mortgage holders eliminated Aspen's cross-claim against Fraser. As to damages, the trial court made a finding that Aspen failed to prove the reasonableness of attorney's fees incurred in defense of the mortgage foreclosure claims.

The evidence, taken most favorably to Aspen, reflects that Robert Braun acquired the Aspen stock from Fraser in connection with a payment of \$320,000 to the corporation. Although Fraser initially had a 90-day option, there was direct evidence that the transaction was a completed sale and not a loan. Fraser resigned as director, president, secretary, and treasurer. Braun was the sole officer and director. Aspen *1376 was the owner of twelve properties. Fraser, as Aspen's agent, continued to manage and to collect rent on the 12 units. Although Fraser was interested in reacquiring the units, he had no investment of his own in either Aspen or the units.

Fraser contended that he had authority to mortgage the units to obtain money that Braun owed him. He also asserted that the entire transaction was only as collateral for Braun's payment to Aspen. There was independent testimony that Fraser acknowledged Braun's ownership of the corporation and that counsel advised Fraser that encumbering Aspen's property would be engaging in criminal conduct. We note that Fraser's option to purchase expired prior to the mortgage loan transactions. Nevertheless, Fraser secretly purchased a second corporate seal and told the lender that he was the president and secretary of Aspen. In addition, Fraser never told Braun of the bank account he opened for the deposit of the loan proceeds. Fraser subsequently transferred these funds to his separate corporation account and then to his personal account. No mortgage payments were ever made.

We recognize that Fraser's testimony, if believed by the trier

of fact, would be consistent with his claim that he had authority. However, this is immaterial in a review of a directed verdict. In *Garrahan v. Sea Ray Boats, Inc.*, 569 So.2d 518 (Fla. 4th DCA 1990) we stated:

On appellate review, a directed verdict should be affirmed if, in viewing the evidence in a light most favorable to the non-moving party, it appears that the trier of fact could not have reasonably differed as to the establishment of material facts. It is reversible error to direct a verdict where there is some substantial evidence tending to prove the plaintiff's case.

[1] [2] [3] [4] As to the civil theft claim, a jury could conclude that Fraser committed the acts described with the intent to deprive Aspen of its property and appropriate it to his own use knowing that he was not entitled to do so. See section 812.014(1), Florida Statutes. Although intent may be shown by circumstantial evidence, civil theft must be established by clear and convincing evidence. Section 812.035(7).^{FN1} Here, the evidence, although conflicting, meets the standard. Cf. *Slomowitz v. Walker*, 429 So.2d 797 (Fla. 4th DCA 1983). Fraser asserts that essentially this is a breach of contract claim and that treble damages for civil theft may only be obtained in the absence of a contractual relationship. See *Rosen v. Marlin*, 486 So.2d 623 (Fla. 3d DCA), *rev. denied*, 494 So.2d 1151 (Fla.1986). However, this court has recognized that the existence of a contractual relationship does not preclude a civil theft action for fraudulent conversion, embezzlement, or similar acts. See *Trend Setter Villas of Deer Creek v. Villas on the Green, Inc.*, 569 So.2d 766 (Fla. 4th DCA 1990); *O'Donnell v. Arcoiries, Inc.*, 561 So.2d 344 (Fla. 4th DCA 1990). See also *Tinwood, N.V. v. Sun Banks, Inc.*, 570 So.2d 955 (Fla. 5th DCA); *Masvidal v. Ochoa*, 505 So.2d 555 (Fla. 3d DCA 1987).

FN1. Section 812.035(7) which previously applied to "any person," now applies only to the state and its agencies. Section 772.11 presently provides for treble damages upon a showing of clear and convincing evidence of an injury. See also *Warren v. Monahan Beaches Jewelry Center, Inc.*, 548 So.2d 870 (Fla. 1st DCA 1989).

[5] [6] With respect to the slander of title claims, the

settlement agreement with the mortgage holders provided:

1. The parties to this stipulation intend a compromise and settlement of the litigation between them with no effect on the validity of any claim that either party has or may have against David Fraser.

3. Aspen will voluntarily dismiss all of its pending claims against all the party plaintiffs in all six actions, but not against David Fraser. Aspen will pursue the remainder of the damages it suffered as a result of the wrongful acts of David Fraser directly against David Fraser.

4. Aspen does not concede that the mortgages in dispute are valid. Moreover,*1377 it maintains that David Fraser had no power or authority to encumber the properties owned by Aspen; that he did so dishonestly, and that he unlawfully appropriated the proceeds of the loan and mortgage to his own use to the detriment of Aspen. These claims are more fully set forth in pleadings filed in these cases. These actions shall survive this stipulation and judgment.

7. Aspen and the parties plaintiff expressly intend no waiver of any rights it or they have or may have against David Fraser.

Conduct is not held to constitute a waiver unless it does so clearly. Cf. *American Somax Ventures v. Tosma*, 547 So.2d 1266 (Fla. 4th DCA 1989). Even though Aspen elected not to continue its contest of the mortgagee claims, that alone does not constitute a waiver of the otherwise valid slander of title claim against Fraser, particularly as the language of the stipulation explicitly provides otherwise. See also *Woodgate Dev. Corp. v. Hamilton Inv. Tr.*, 351 So.2d 14 (Fla.1977).

[7] [8] Attorney's fees are recoverable as an element of damages for slander of title. E.g., *Bonded Inv. & Realty Co. v. Waksman*, 437 So.2d 162 (Fla. 2d DCA 1983); *Susman v. Schuyler*, 328 So.2d 30 (Fla. 3d DCA 1976). In *Behar v. Jefferson Nat'l Bank at Sunny Isles*, 519 So.2d 641 (Fla. 3d DCA 1987), *rev. denied*, 531 So.2d 167 (Fla.1988), the court stated that

the general rule of law is that where the wrongful act of the defendant has involved the claimant in litigation with others or placed him (or her) in such relation with others as makes it necessary to incur expenses to protect his interest, such costs and expenses, including attorney's fees, should be

treated as the legal consequences of the original wrongful act and may be recovered as damages.

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The record reflects some evidence of attorney's fees incurred by Aspen in attempting to remove the cloud and in defense of the mortgagees' claims. It is undisputed that no objection was raised at the time the evidence was accepted concerning Aspen's failure to prove the reasonableness of the attorney's fees incurred. ^{FN2} We are not concerned with the weight of the evidence that the fees were, in fact, incurred, but only with the cross-plaintiffs' failure to introduce testimony that the fees incurred were reasonable. Certainly, Fraser was entitled to require that reasonableness be proved as a predicate to admitting the evidence of the fee incurred. Still, Fraser's failure to object to the evidence on this ground waived any right to have it subsequently considered on a motion for directed verdict. To hold otherwise would allow a party to lure the other side into believing that evidence on a necessary element of proof is before the court by not objecting to its introduction and then permitting that party to subsequently ask the court to disregard that evidence after the opponent has rested.

FN2. We also note that there was proof of other special damages, lost value and lost rentals, in addition to the fees. The plaintiffs' right to claim these damages does not appear to be questioned.

Additionally, we find no abuse of discretion concerning the trial court's denial of Aspen's last minute motion for leave to amend to add a count.

The judgment is reversed. On the face of the trial court order it appears that Fraser's motion for a new trial was deemed moot by the trial court because of its other rulings. Therefore, upon remand, the new trial motion remains pending. Nothing contained in this opinion shall be construed as limiting the trial court's own evaluation of the record with respect to the new trial motion.

GARRETT and FARMER, JJ., concur.

Fla.App. 4 Dist., 1991.

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587 So.2d 1374, 16 Fla. L. Weekly D2564