NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GENET ARIZONE and VANA SIMON, Appellants, v. HOMEOWNERS CHOICE PROPERTY & CASUALTY INSURANCE COMPANY, INC., Appellee.	)	Case No. 2D18-1116

Opinion filed March 17, 2021.

Appeal from the Circuit Court for Lee County; Keith R. Kyle, Judge.

Erin M. Berger and Melissa A. Giasi of Giasi Law, P.A., Tampa, for Appellants.

Andrew A. Labbe of Groelle & Salmon, P.A., Tampa, for Appellee.

BLACK, Judge.

Genet Arizone and Vana Simon appeal from the order awarding attorneys' fees and costs to Homeowners Choice Property & Casualty Insurance Company, Inc. The trial court determined that Homeowners Choice was entitled to attorneys' fees and

costs based upon the August 2019 proposals for settlement served by Homeowners Choice on Mr. Arizone and Mrs. Simon individually in response to their breach of contract action. Mr. Arizone and Mrs. Simon's argument on appeal that both proposals for settlement are unenforceable because they are not reasonable and were made in bad faith is without merit and does not warrant further comment. However, because the proposal for settlement served on Mrs. Simon was premature, in violation of Florida Rule of Civil Procedure 1.442(b), it is unenforceable. We therefore reverse in part.

Mr. Arizone and Mrs. Simon's home was insured under a homeowner's insurance policy issued by Homeowners Choice. On March 19, 2016, Mr. Arizone filed suit against Homeowners Choice for breach of contract after it denied coverage of a claim. On August 18, 2016, an amended complaint was filed adding Mrs. Simon as a plaintiff. Shortly thereafter, on August 29, 2016, Homeowners Choice served a proposal for settlement on Mr. Arizone in the amount of $500 and served a proposal for settlement for the same amount on Mrs. Simon. The proposals were not accepted. On December 22, 2016, Homeowners Choice again served Mr. Arizone and Mrs. Simon with proposals for settlement, which they declined to accept. The case ultimately proceeded to a jury trial in August 2017, with the jury returning a verdict in favor of Homeowners Choice. Following the entry of the final judgment,[1] Homeowners Choice filed a motion for attorneys' fees and costs based on the August 2016 proposals for settlement as well as the December 2016 proposals for settlement.

[1]Mr. Arizone and Mrs. Simon appealed from the final judgment, and this court affirmed. Arizone v. Homeowners Choice Prop. & Cas. Ins. Co., No. 2D17-3974 (Fla. 2d DCA Dec. 4, 2020).

At the hearing on the issue of entitlement to attorneys' fees and costs, the trial court found the December 2016 proposals for settlement to be unenforceable. With regard to the August 2016 proposals for settlement, which had been served pursuant to section 768.79, Florida Statutes (2016), and rule 1.442, counsel for Mr. Arizone and Mrs. Simon argued that the proposals were not reasonable and were made in bad faith. Additionally, with regard to the August 2016 proposal for settlement served on Mrs. Simon, counsel argued that it was filed prematurely in violation of rule 1.442(b). The trial court rejected these arguments and found that Homeowners Choice was entitled to an award of attorneys' fees and costs based on both August 2016 proposals for settlement. An evidentiary hearing was later held to determine the amount of the award, and the order awarding attorneys' fees and costs was entered thereafter.

"Appellate review of a party's entitlement to attorney's fees under section 768.79 and rule 1.442 is de novo." Bright House Networks, LLC v. Cassidy, 242 So. 3d 456, 458 (Fla. 2d DCA 2018) (first citing Anderson v. Hilton Hotels Corp., 202 So. 3d 846, 852 (Fla. 2016); and then citing Saterbo v. Markuson, 210 So. 3d 135, 138 (Fla. 2d DCA 2016)). The issue in this case concerns the time period for service of a proposal for settlement on a plaintiff following commencement of an action as set forth in rule 1.442(b):

> A proposal to a defendant shall be served no earlier than 90 days after service of process on that defendant; a proposal to a plaintiff shall be served no earlier than 90 days after the action has been commenced. No proposal shall be served later than 45 days before the date set for trial or the first day of the docket on which the case is set for trial, whichever is earlier.

(Emphasis added.) Mrs. Simon asserts that the date on which "the action has been commenced" must be analyzed as to each individual plaintiff and is not limited to the date the initial complaint was filed. Mrs. Simon argues that the date she was added as a plaintiff—August 18, 2016—was the date the action commenced as to her. As such, the proposal served on her a mere eleven days later was premature and therefore unenforceable. Homeowners Choice, on the other hand, contends that an action can be commenced only once—at the time the initial complaint is filed—and thus the ninety days should be calculated from that date regardless of when all of the plaintiffs have been added to the action.

The Third and Fourth Districts have addressed issues that are similar to the one before us. In Regions Bank v. Rhodes, 126 So. 3d 1259, 1259 (Fla. 4th DCA 2013), Interstate Citrus Partners filed a lawsuit in March 2010 against Sunset Lakes of St. Lucie, LLC. Paul Rhodes was substituted as plaintiff, and he filed the second amended complaint on May 27, 2010, adding Regions as a defendant. Id. Less than a month later, on June 30, 2010, Regions served Mr. Rhodes with a proposal for settlement pursuant to section 768.79, Florida Statutes (2010), and rule 1.442. Id. Final summary judgment was ultimately entered in favor of Regions, and then Regions filed a motion for attorneys' fees and costs based on the proposal for settlement. The trial court found the proposal to be premature under rule 1.442 and denied the motion for fees and costs. Id. at 1260. On appeal, the Fourth District relied upon Florida Rule of Civil Procedure 1.050, which provides that "[e]very action of a civil nature shall be deemed commenced when the complaint or petition is filed," and concluded that based on the language of that rule the second amended complaint was the only complaint filed

that included an action against Regions. 125 So. 3d at 1260. Because the second amended complaint was filed on May 27, 2010, the proposal for settlement served on June 30, 2010, was premature. Id. The Fourth District therefore affirmed the decision of the trial court, holding that the proposal for settlement did not comply with the plain language of rule 1.442(b) because it was served less than ninety days after the filing of the second amended complaint—the time at which the action commenced as to Regions. Id. at 1261.

Similarly, in Design Home Remodeling Corp. v. Santana, 146 So. 3d 129, 132-33 (Fla. 3d DCA 2014), the Third District concluded that a proposal for settlement was premature where an amended complaint adding a party had been filed. In that case, the plaintiffs filed a premises liability action against the owner of the premises in May 2009. Id. at 130. Almost one year later, in March 2010, the plaintiffs filed an amended complaint adding a second defendant, Design Home Remodeling Corporation. Id. Sixty days after that, Design Home served the plaintiffs with individual proposals for settlement pursuant to section 768.79, Florida Statutes (2010), and rule 1.442; the proposals were not accepted. Id. Final summary judgment was entered in favor of Design Home, and then Design Home moved for an award of attorney's fees based on the proposals for settlement. Id. The trial court determined that the proposals for settlement had been prematurely filed under rule 1.442(b) and denied the motion. On appeal, the Third District explained that Design Home's service of the proposal for settlement only sixty days after it had been added as a defendant in the action was "contrary to [rule 1.442(b)'s] requirement that 'a proposal to a plaintiff shall be served no earlier than 90 days after the action has been commenced.' " Id. at 132-33. The Third

District noted that the phrase "after the action has been commenced" in rule 1.442(b) means "after the action was commenced against Design Home—specifically, when [the plaintiffs] filed their amended complaint adding Design Home as a named defendant." Id. at 133 n.5 (citing Regions Bank, 126 So. 3d at 1260-61). The Third District therefore affirmed the trial court's order denying the motion for fees, holding that based on the express language of the rule and the fact that the rule must be strictly construed led to the conclusion that "Design Home's premature proposal for settlement violated the express ninety-day requirement of rule 1.442(b)." Id. at 133.

We find Regions Bank and Design Home to be persuasive and see no material difference in the fact that in this case the proposal for settlement was served by the defendant upon a plaintiff who was not a party to the action until the filing of the amended complaint. In accord with the conclusions reached in Regions Bank and Design Home, we hold that the critical date for determining whether the proposal for settlement served by Homeowners Choice on Mrs. Simon was timely was the date that Mrs. Simon commenced the breach of contract action—the date on which she became a plaintiff. Because Mrs. Simon did not become a plaintiff in the action until August 18, 2016, the proposal for settlement served on her on August 29, 2016, violated the express ninety-day requirement of rule 1.442(b) and was therefore unenforceable.

Accordingly, the trial court's finding of entitlement to attorneys' fees and costs based on the proposal for settlement served on Mr. Arizone is affirmed. However, we reverse the order to the extent that the trial court found that Homeowners Choice was entitled to attorneys' fees and costs based on the proposal for settlement served on Mrs. Simon. And because the trial court's order did not differentiate the award of fees

and costs that were based on the proposal for settlement served on Mr. Arizone from the award of fees and costs that were based on the proposal for settlement served on Mrs. Simon, we also reverse the amount of fees and costs awarded and remand for further proceedings. On remand, the trial court may conduct additional proceedings to determine the appropriate amount of the award of fees and costs in light of our holding.

Affirmed in part; reversed in part; remanded.

CASANUEVA and ATKINSON, JJ., Concur.