

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2006

SUSAN YATES,
Appellant,

v.

PUBLIX SUPER MARKETS,
Appellee.

No. 4D04-2262

[March 8, 2006]

ON MOTION FOR REHEARING

FARMER, J.

We deny appellee's motion for rehearing. Appellant's motion for clarification requires rehearing and further comment.

Our opinion on the merits contained the following paragraph:

We note that the trial court held that the only cause of action allowed by section 440.39(7) is a spoliation of evidence claim. The trial court considered the additional theory under this statute of failing to cooperate because it had found the spoliation claim time barred. Because we conclude that the spoliation claim was not time barred, we have no occasion to consider the alternative theory of failing to cooperate.

On motion for clarification, plaintiff argues that her complaint alleged two separate theories of recovery against the employer: a failure to cooperate in the wrongful death action, and a separate failure to preserve evidence. The trial judge ruled that neither theory stated a cause of action and dismissed the complaint accordingly. Upon further review we conclude that our above quoted attempt at judicial parsimony was misplaced.

Spoliation of evidence is simply one form of failing to cooperate under

section 440.39(7). If the spoliation claim was not barred on its face by the statute of limitations, then neither was the failure to cooperate claim. Both theories have been sufficiently pleaded to escape being dismissed for failure to state a cause of action. *Shumrak v. Broken Sound Club Inc.*, 898 So.2d 1018, 1020 (Fla. 4th DCA 2005) (court must accept allegations in complaint as true and consider them in light most favorable to plaintiff). Under rule 1.140(b)(6) dismissal should be granted only when it has been conclusively demonstrated that plaintiff could prove no set of facts whatsoever in support of the cause of action. See *Ingalsbe v. Stewart Agency, Inc.*, 869 So.2d 30, 35 (Fla. 4th DCA 2004).

Thus at this point, we have determined only that plaintiff has pleaded enough to be able to offer evidence on her claims. Whether she has any evidence, and whether such evidence legally amounts to a failure to cooperate or spoliation within section 440.39(7) can all be tested after some discovery on a motion for summary judgment.

On remand the trial judge should be guided accordingly.

STONE and MAY, JJ., concur.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; 03-09739 (18) Ilona M. Holmes, Judge; L.T. Case No. 03-09739 (18).

Diran V. Seropian of Edna L. Caruso, P.A., West Palm Beach, and Andrew Moss of Kutner, Rubinoff & Bush, P.A., Miami, for appellant.

Richard A. Sherman of the Law Offices of Richard A. Sherman, P.A., Fort Lauderdale, and Samuel A. Coffey and Dennis M. O'Hara of Wicker, Smith, O'Hara, McCoy, Graham & Ford, P.A., Fort Lauderdale, for appellee.

Final upon release; no further motion for rehearing will be entertained.