

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

Case No.3:09-bk-712-PMG

TIMOTHY A. TADLOCK, SR.,

Debtor.

Chapter 7

FIRST COAST EXCURSIONS, LLC,

Plaintiff,

vs.

Adv. No. 3:09-ap-475-PMG

TIMOTHY A. TADLOCK, SR.

f/d/b/a TC Enterprises,

a/k/a Tim Tadlock,

Defendant.

**ORDER ON MOTION FOR REHEARING OF ORDER DENYING
MOTION TO ABATE AND LEAVE TO SATISFY CONDITION PRECEDENT**

THIS CASE came before the Court for hearing to consider the Motion for Rehearing of Order Denying Motion to Abate and Leave to Satisfy Condition Precedent filed by the Plaintiff, First Coast Excursions, LLC. (Doc. 22).

As a condition precedent to bringing an action for civil theft, §772.11(1) of the Florida Statutes provides that a party claiming injury must first make a written demand for payment upon the party

allegedly liable for the claim. The issue in this case is whether the demand required by the statute may be made upon a debtor after the commencement of the debtor's bankruptcy case.

Background

The Debtor, Timothy A. Tadlock, Sr., filed a petition under Chapter 11 of the Bankruptcy Code on August 27, 2009. The Chapter 11 case was subsequently converted to a case under Chapter 7 of the Bankruptcy Code. (Main Case, Docs. 47, 52).

On September 17, 2009, James Kallaher filed a Complaint against the Debtor to determine the dischargeability of a debt. Shortly after the Complaint was filed, First Coast Excursions, LLC, was substituted as the Plaintiff in the adversary proceeding. (Docs. 5, 6).

The Complaint contains three Counts. Count I is an action to determine the dischargeability of a debt based on the Debtor's alleged fraudulent representations; Count II is an action to determine the dischargeability of a debt based on the Debtor's alleged fraud while acting in a fiduciary capacity; and Count III is an action to determine the dischargeability of a debt based on the Debtor's alleged civil theft.

In the Complaint, the Plaintiff alleges that the Debtor was a managing member of the Plaintiff, a limited liability company, and that the Debtor represented to James Kallaher (Kallaher) that the Plaintiff required a loan in the amount of \$10,000.00 to conduct the Plaintiff's daily business operations. Consequently, on June 12, 2008, Kallaher and the Plaintiff entered into a Standard Loan Agreement, and Kallaher issued a check payable to the Plaintiff in the amount of \$10,000.00. The Plaintiff alleges, however, that the Debtor did not deposit the check into the Plaintiff's operating account, but instead deposited the check into the account of a separate business entity. In Count III, therefore, the Plaintiff

asserts that the Debtor “knowingly obtained and used the money of the Plaintiff with the felonious intent to, either temporarily or permanently, deprive the Plaintiff of the right to the money and to appropriate the money to Defendant’s own use in violation of section 812.014(1) Florida Statutes.”

On November 16, 2009, the Plaintiff filed a Motion for Leave to Satisfy Condition Precedent and to Abate Case. (Doc. 8). In the Motion, the Plaintiff contends that the Complaint includes a claim for civil theft, and that §772.11(1) of the Florida Statutes requires a claimant alleging civil theft to make a written demand for payment upon the defendant as a condition precedent to filing a complaint. The Plaintiff acknowledges that it had not made the demand upon the Debtor prior to filing the Complaint, and therefore asks the Court for leave to serve the Debtor with the demand required by the statute, and to abate the adversary proceeding for thirty-five days to allow the Debtor to respond.

The Debtor opposed the Plaintiff’s request. (Doc. 12). On January 20, 2010, the Court entered an Order Denying Plaintiff’s Motion to Abate and Leave to Satisfy Condition Precedent. (Doc. 18).

The Plaintiff subsequently filed the Motion for Rehearing of the Court’s Order that is presently under consideration. (Doc. 22). In evaluating the Motion for Rehearing, the Court has considered the substantive elements required to establish the crime of theft under §812.014 of the Florida Statutes, the civil cause of action for a person injured by theft that is provided by §771.11 of the Florida Statutes, the nature and purpose of the demand that must be made prior to filing an action for civil theft pursuant to §772.11(1) of the Florida Statutes, and whether a plaintiff should be permitted to make the demand after the defendant has filed a bankruptcy case. Based on these considerations, the Court finds that the Motion for Rehearing should be granted.

Discussion

Count III of the Plaintiff's Complaint is a civil action for theft pursuant to §812.014(1) and §771.11(1) of the Florida Statutes.

Section 812.014(1) of the Florida Statutes provides as follows:

§812.014. Theft

(1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit from the property.

(b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

Fla. Stat. §812.014(1). Pursuant to §812.014(2)(c), it is a third degree felony if the property stolen is valued at \$10,000.00 or more, but less than \$20,000.00. Fla. Stat. §812.014(2)(c).

The civil cause of action for theft is provided in §772.11 of the Florida Statutes:

§772.11. Civil remedy for theft or exploitation

(1) Any person who proves by clear and convincing evidence that he or she has been injured in any fashion by reason of any violation of §§812.012-812.037 or §825.103(1) has a cause of action for threefold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of \$200, and reasonable attorney's fees and court costs in the trial and appellate courts. . . .

Fla. Stat. §772.11(1)(Emphasis supplied).

Before filing an action for damages under §772.11, the injured person must make a written demand for the treble damages amount:

§772.11. Civil remedy for theft or exploitation

(1) . . . Before filing an action for damages under this section, the person claiming injury must make a written demand for \$200 or the treble damages amount of the person liable for damages under this section. If the person to whom a written demand is made complies with such demand within 30 days after receipt of the demand, that person shall be given a written release from further civil liability for the specific act of theft or exploitation by the person making the written demand.

Fla. Stat. §772.11(1)(Emphasis supplied).

In its Motion for Leave to Satisfy Condition Precedent, the Plaintiff requested permission to make a written demand upon the Debtor for the damages that it sustained as a result of the Debtor's alleged theft, in accordance with §772.11 of the Florida Statutes.

A. A claim for civil theft

In pursuing its claim against the Debtor for civil theft, the Plaintiff is seeking to enforce its civil remedy against the Debtor for the Debtor's alleged violation of a criminal statute.

An action for civil theft arises from §812.014(1) of the Florida Statutes. Section 812.014(1) is included in the section of the Florida Statutes entitled Crimes. Chapter 812 of the section is entitled Theft, Robbery, and Related Crimes. Generally, §812.014, which is entitled Theft, provides that a person commits theft if he knowingly obtains or uses the property of another with the intent to deprive the other person of the right to the property.

The civil cause of action for an injury by theft is provided by §772.11 of the Florida Statutes. Chapter 772 is included in the section of the Florida Statutes entitled Torts. Chapter 772 is entitled Civil Remedies for Criminal Practices. Section 772.11 of Chapter 772 is entitled Civil Remedy for theft or exploitation.

In Palmer v. Gotta Have It Golf Collectibles, Inc., 106 F.Supp.2d 1289, 1303 (S.D. Fla. 2000), the Court explained the relationship between §812.014(1) and §772.11 of the Florida Statutes:

Under Florida law, a cause of action for civil theft “derives from two statutory sources: the criminal section setting forth the elements of theft, and the civil section granting private parties a cause of action for a violation of the criminal section.” *Ames v. Provident Life and Accident Insurance Co.*, 942 F.Supp. 551, 560 (S.D. Fla. 1994), *aff’d*, 86 F.3d 1168 (11th Cir. 1996).

According to the Court in Palmer, to establish a claim for civil theft, the plaintiff must establish the elements of the crime of theft that are set forth in §812.014(1). In other words, the plaintiff must show that the defendant knowingly obtained or used, or endeavored to obtain or use, property of another with the intent to either temporarily or permanently deprive the other person of a right to the property.

Palmer v. Gotta Have It Golf Collectibles, Inc., 106 F.Supp.2d at 1303.

First, to state a claim for civil theft under Florida law, [the plaintiff] must allege an injury resulting from a violation by [the defendant] of the criminal theft statute, Fla. Stat. §812.014. To do this, [the plaintiff] must allege that [the defendant] (1) knowingly (2) obtained or used, or endeavored to obtain or use, [the plaintiff’s] property with (3) “felonious intent” (4) either temporarily or permanently to (a) deprive [the plaintiff] of its right to or a benefit from the property or (b) appropriate the property to [the defendant’s] own use or to the use of any person not entitled to the property. Fla. Stat. §§772.11(providing civil remedy for theft or exploitation), 812.014(1)(criminal theft statute); *see Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1326-27 (11th Cir. 2006); *Gersh v. Cofman*, 769 So.2d 407, 409 (Fla. 4th DCA 2000)(“In order to establish an action for civil theft, the claimant must prove the statutory elements of theft, as well as criminal intent.”).

United Technologies Corporation v. Mazer, 556 F.3d 1260, 1270 (11th Cir. 2009). The elements of civil theft are the elements of the crime of "theft" that are set forth in §812.014 of the Florida Statutes.

“To state a claim for civil theft under Florida law, Plaintiffs must allege an injury resulting from a violation . . . of the criminal theft statute.” Seropian v. Wachovia Bank, N.A., 2010 WL 2949658, at 3 (S.D. Fla.).

Pursuant to §772.11(1) of the Florida Statutes, a person who has been injured by the theft “has a cause of action for threefold the actual damages sustained.” Fla. Stat. §772.11(1)(Emphasis supplied). A cause
Caulkins Indiantown Citrus Co., 829 So.2d 923, 925 (Fla. 4th DCA 2002)). Consequently, it appears that a cause of action for civil theft accrues when the plaintiff knows or reasonably should have known that the defendant knowingly obtained or used its property with the felonious intent to deprive the plaintiff of its right to the property.

B. The written demand

Prior to filing an action for civil theft, a plaintiff must make a written demand upon the defendant for payment. If the defendant complies with the demand within thirty days after receipt, he is released from further liability for the specific act of theft. Fla. Stat. §772.11(1).

Generally, courts have not dismissed civil theft claims based upon the plaintiff’s failure to make the written demand required by the statute, unless the applicable statute of limitations expired before the demand was served.

Although there appear to be no Florida cases on the failure to comply with the demand requirements of section 772.11, the supreme court has indicated in an analogous context that the failure to comply with pre-suit notice requirements should not result in dismissal of a complaint unless notice cannot be given within the limitation period. *See Hospital Corp. of America v. Lindberg*, 571 So.2d 446 (Fla. 1990).

Seymour v. Adams, 638 So.2d 1044, 1049n.9 (Fla. 5th DCA 1994). In Seymour, therefore, the Court determined that summary judgment should not be entered against the plaintiff for failure to comply with the demand requirement, unless the plaintiff was unable to comply with the requirement because the statute of limitations had expired. See also Canseco Insurance Compnay v. Clark, 2006 WL 2024401, at 5 (M.D. Fla.)(The plaintiff was allowed to issue the pre-suit notice required by §772.11 and amend

his pleadings); Korman v. Iglesias, 736 F.Supp. 261, 267 (S.D. Fla. 1990)(The plaintiff was permitted to comply with the statute after the action was filed, since the failure was the result of excusable neglect); and Nerbonne, N.V. v. Lake Bryan International Properties, 689 So.2d 322, 326 (Fla. 5th DCA 1997)(Summary judgment based on the plaintiff's failure to comply with the pre-suit notice requirement is inappropriate unless the record reflects that the statute of limitations has expired).

Consequently, it appears that courts generally decline to terminate a civil theft action based solely upon the plaintiff's failure to comply with §772.11 before the action was filed. The reason for this practice of allowing a plaintiff to cure the omission may be to promote the policy underlying the demand requirement. Although no Florida cases have been found which address the purpose of the requirement, the statute may be intended to encourage negotiation and settlement prior to the commencement of litigation.

The simple fact is that the pre-suit notification requirements set forth in Tex. Fin.Code §305.006(c) are the type that the Texas Supreme Court has identified as "unable to agree" requirements. *See generally Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 184 (Tex. 2004). Thus, the purpose of the requirement is to "forestall litigation and to prevent needless appeals to the courts when a matter may have been settled by negotiations between the parties." *Id.*(quoting *County of Nueces v. Rankin*, 303 S.W.2d 455, 457 (Tex.Civ.App. 1957)). Under these circumstances, where the party required to provide pre-suit notice has failed to do so, the Texas courts have long held that the proper treatment is abatement and not dismissal. *See id.*

In re Chari, 2005 WL 4030034, at 14 (Bankr. S.D. Ohio). In other words, a pre-suit notice requirement may simply constitute a provision to promote settlements in cases where no judicial intervention is needed, rather than an element of the underlying cause of action.

As shown above, §772.11(1) of the Florida Statutes provides that a person who receives a demand must be released from all further liability if he complies with the demand within thirty (30) days. In

such a case, of course, the claim is resolved before the claimant is compelled to resort to the judicial system. Consequently, it appears that the demand requirement of §772.11(1) is designed to “forestall litigation and to prevent needless appeals to the courts when a matter may have been settled by negotiations between the parties.” In re Chari, 2005 WL 4030034, at 14.

Under §772.11(a), a plaintiff has a cause of action for civil theft if he proves that the defendant committed the crime of theft. The demand requirement, however, is not an element of the crime of theft under §812.014 of the Florida Statutes or the civil cause of action under §772.11 of the Florida Statutes.

On the contrary, it appears that the purpose of the demand requirement is to provide an opportunity for, and thereby encourage, settlement negotiations prior to the commencement of litigation. Consequently, it is generally held that plaintiffs who have not complied with the demand requirement should be allowed to cure the omission, provided the cause of action is not barred by the statute of limitations.

C. "Cause" for lifting the automatic stay

In this case, the Debtor asserts that the Plaintiff should not be permitted to make the written demand required by §772.11(1), because the demand constitutes an act to collect or assess a debt that is prohibited by §362 of the Bankruptcy Code. (Doc. 27, p. 5).

Section 362(a) of the Bankruptcy Code provides that a bankruptcy petition operates as a stay of a broad range of actions against the debtor, property of the debtor, or property of the estate. In re Wynne, 422 B.R. 763, 766 (Bankr. M.D. Fla. 2010). Section 362(d)(1) of the Bankruptcy Code, however, provides that the Court may grant relief from the automatic stay for “cause.” 11 U.S.C. §362(d)(1). Courts have interpreted “cause” under §362(d)(1) to include a broad range of circumstances. In re Mack, 347 B.R. 911, 915 (Bankr. M.D. Fla. 2006). Since the term “cause” is not defined in the

Bankruptcy Code, Courts determine whether relief is appropriate on a case-by-case basis. In re Joyner, 416 B.R. 190, 191 (Bankr. M.D. N.C. 2009).

In this case, the Court finds that “cause” exists to modify the automatic stay for the limited purpose of allowing the Plaintiff to make the demand for payment required by §772.11(1). In determining that the stay should be modified, the Court considered the following factors:

1. As discussed above, the demand requirement is not an element of the crime of theft or the civil cause of action for theft, but instead serves the beneficial policy of encouraging settlement.

2. The claim for civil theft was asserted prior to the deadline for filing dischargeability complaints in the Debtor’s bankruptcy case, and the Debtor does not contend that the state statute of limitations expired before the claim was filed.

3. The Plaintiff filed its Motion for Leave to make the demand within two months after filing the Complaint, and before the Debtor had answered or otherwise responded to the Complaint.

4. The Complaint filed by the Plaintiff against the Debtor is a three-count complaint to determine the dischargeability of a debt. Count III, the civil theft claim, arises from the same facts and transactions as the other Counts in the Complaint that are based on fraud. The Debtor has answered the fraud claims, and the parties will proceed to trial on the fraud claims regardless of the demand.

5. The relief granted can be limited in scope to the service of the statutory demand, and is without prejudice to all other defenses that the Debtor may assert in the dischargeability action.

Based on these factors, the Court finds that it is appropriate to exercise its discretion to modify the automatic stay for “cause,” to allow the Plaintiff to make a written demand for payment upon the Debtor pursuant to §772.11 of the Florida Statutes. See In re Halas, 194 B.R. 605, 615 (Bankr. N.D. Ill.

1996)(A creditor showed “cause” for modifying the stay in order to serve notices on the debtor relating to a tax deed.).

Conclusion

The matter before the Court is a Motion for Rehearing on Plaintiff’s Motion for Leave to Satisfy Condition Precedent and to Abate Case. (Doc. 22). The Court finds that the Motion should be granted, and that the Plaintiff should be permitted to make a written demand for payment upon the Debtor pursuant to §772.11 of the Florida Statutes.

To establish a claim for civil theft, a plaintiff must prove the elements of the crime of theft that are found in §812.014 of the Florida Statutes. Palmer v. Gotta Have It Golf Collectibles, Inc., 106 F.Supp.2d at 1303. The civil cause of action for theft and the demand requirement, however, are found in §772.11(1) of the Florida Statutes, which provides a civil remedy for persons injured by the alleged theft. The demand requirement is not an element of the crime of theft under §812.014 or the civil cause of action for theft under §772.11(1). On the contrary, the requirement serves the salutary purpose of encouraging settlement prior to the commencement of any litigation. Consequently, courts generally have not dismissed actions for civil theft solely because the plaintiff failed to make the demand. Instead, the claim is permitted to proceed unless the notice cannot be given within the limitation period. In this case, the automatic stay of §362 should be modified for “cause” to permit the Plaintiff to serve the statutory demand, despite the Debtor’s intervening bankruptcy case.

Accordingly:

IT IS ORDERED that:

1. The Motion for Rehearing on Plaintiff's Motion for Leave to Satisfy Condition Precedent and to Abate Case filed by the Plaintiff, First Coast Excursions, LLC, is granted.

2. Within twenty-one (21) days of the date of the date of this Order, the Plaintiff, First Coast Excursions, LLC, may comply with §772.11(1) of the Florida Statutes by making a written demand for payment upon the Debtor, Timothy A. Tadlock, Sr.

3. This adversary proceeding is abated for a period of sixty (60) days.

DATED this 2 day of September, 2010.

BY THE COURT

/s/ Paul M. Glenn

PAUL M. GLENN
Chief Bankruptcy Judge