In the Appellate Court of The Sixth Judicial Circuit

CASE NO. 17-000036-AP

(County Court Case No. 14-006888-CO)

DAVID MILLER and BRANDY MILLER,

Appellants,

v.

HIGHLAND WOODS HOMEOWNERS ASSOCIATION, INC.,

Appellee.

ON APPEAL FROM THE COUNTY COURT
IN AND FOR PINELLAS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

I. Introduction

David Miller and Brandy Miller ("the Homeowners") seek review of the orders denying their motion for attorney's fees and granting the fee motion filed by Highland Woods Homeowners Association, Inc. ("the HOA") entered after the HOA voluntarily dismissed its lawsuit against the Homeowners. The Homeowners raise two issues on appeal:

- Whether the Homeowners were the prevailing party below and therefore entitled to an award of their attorneys' fees.
- Whether the HOA could ever be considered a prevailing party entitled to fees despite voluntarily dismissing its case.

II. Appellants' Statement of the Facts

The HOA initiated this action when it filed its two-count complaint to foreclose allegedly unpaid homeowners' association assessments and for damages.[1] The Homeowners, acting *pro se*, immediately responded to the complaint with a motion to dismiss asserting that they had, in fact, paid the

[1] Complaint, August 25, 2014 (R. 11-14).

assessments before the lawsuit was filed and attaching exhibits evidencing payment.[2]

The HOA ignored the Homeowners' motion and moved for summary judgment[3] averring that over $2,400.00 in assessments, interest, and collection costs were due.[4] The Homeowners' opposed the motion with an affidavit from Ms. Miller averring that the HOA did not send her the statutorily required notices prior to foreclosure and that she paid all the assessment fees allegedly due and owing.[5] Both the Homeowners' motion to dismiss and the HOA's motion for summary judgment were denied.[6]

The Homeowners then retained counsel who filed an answer denying the material allegations of both counts[7] and raising various affirmative defenses including payment; tender; accord and satisfaction; waiver; equitable estoppel; and failure to comply with the statutory conditions precedent of notice before

[2] Motion to Dismiss with attached Exhibits A-E, September 19, 2014 (R. 30-38).

[3] Motion for Summary Judgment, November 7, 2014 (R. 49-51).

[4] Affidavit of Amount Due, November 7, 2014, ¶ 4 (R. 61).

[5] Affidavit of Brandy Miller in Opposition to Plaintiff's Motion for Summary Judgment, December 5, 2014, ¶¶ 3, 5-6 (R. 78).

[6] Order Denying Plaintiff's Motion for Summary Judgment and Defendant's Motion to Dismiss, February 24, 2015 (R. 90).

[7] Answer, April 28, 2015, ¶¶ 1-13 (R. 110-111).

institution of the action.[8] The Homeowners' pleading also contained a demand for attorney's fees.[9]

The trial court convened a "final hearing" which was continued, in part, because the HOA did not have a witness.[10] Nearly a year later, and before any new trial date was set, the HOA voluntarily dismissed its lawsuit asserting, without any documentary support, that each party was to "bear[] its own fees and costs."[11]

The Homeowners' timely served a motion for attorney's fees and costs.[12] And despite having voluntarily dismissing its lawsuit (with the allegation that each party was responsible for their own fees), the HOA filed a "cross-motion" for fees and costs.[13] It also filed a "motion in limine" admitting that it had received over $1,600.00 from the Homeowners "[s]ometime between August 29, 2014 and September 10, 2014"[14] but then arguing that the Homeowners "still carried a balance for the interest, administrative collective costs, and attorneys' fees and

[8] Affirmative Defenses, April 28, 2015, ¶¶ 1-7 (R. 112-115).

[9] Demand for Attorney's Fees and Costs, April 28, 2015 (R. 116).

[10] Court Worksheet, April 29, 2015 (R. 118).

[11] Notice of Voluntary Dismissal, April 5, 2016.

[12] Defendants' Motion to Tax Attorneys' Fees and Costs, April 18, 2016 (R. 120-122).

[13] Plaintiff's Cross-Motion for Attorneys' Fees and Costs, April 19, 2016 (R. 123-128).

[14] Plaintiff's Motion in Limine, February 6, 2017, ¶ 5 (R. 132).

costs that had accrued after…May 8, 2014."[15] In any event, the HOA argued that the trial court should exclude any and all evidence or argument related to the "merits" of the case:

> A determination as to fees must not be predicated on a consideration as to the merits of the case and, therefore, any and all evidence, documentation, testimony, argument, or comment which is solely applicable to the merits of this action…must not be heard or otherwise entertained by this Court.[16]

The HOA then reiterated its limine motion at the fee hearing, arguing that "[t]he Second and Fourth DCA have expressly rule that the merits of the case are outside the bounds of this hearing."[17] The hearing also included testimony from Ms. Miller that she first found out about the HOA had a lien against her property from a neighbor.[18] Ms. Miller also testified that she immediately called the HOA's property management firm who told her the amount to pay, and that she paid this amount along with the next month's assessment which was not even due.[19] This testimony was bolstered by Mr. Miller's testimony that he was not aware of

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[15] Motion in Limine, February 6, 2017, ¶ 7 (R. 132).

[16] Motion in Limine, February 6, 2017 (R. 137).

[17] Transcript of Hearing Before the Honorable John Carassas, February 10, 2017 (R. 228; "T. ____") at 14-15.

[18] T. 76-77.

[19] T. 77.

receiving any notices from the HOA and that he first found out about the lien through a neighbor.[20]

The HOA's case-in-chief consisted of testimony from Jason Kupperman, the HOA's president.[21] And when asked on direct examination why the HOA dismissed the lawsuit, all Kupperman could say was that "the juice wasn't worth the squeeze to continue pursing litigation to what we figured to be…a very insignificance in the money…"[22]

After the close of testimony and evidence, the Homeowners filed a supplemental memorandum in support of their position.[23] The Homeowners also responded to a motion to strike that the HOA filed arguing, in part, that the HOA had blatantly misstated the holding of a key case the HOA relied on in support of its position that it was entitled to attorneys' fees despite voluntarily dismissing its case.[24]

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[20] T. 103.

[21] T. 106.

[22] T. 118.

[23] Supplemental Memorandum, March 22, 2017 (R. 194-202).

[24] Response to Plaintiff's Motion to Strike, March 24, 2017, ¶¶ 1-7 (R. 213-215).

Nevertheless, the trial court denied the Homeowners' motion and granted the HOA's "cross-motion."[25] The Homeowners timely appealed.[26]

[25] Orders, July 11, 2017 (R. 287-331).

[26] Notice of Appeal, August 4, 2017 (R. 332-358).

SUMMARY OF THE ARGUMENT

Initially, the trial court erred when it denied the Homeowners' motion for attorney's fees. First, the HOA waived any right it may have had to look beyond the voluntary dismissal because its motion in limine expressly disclaimed any interest in the merits of the action. But even if the trial court could have looked beyond the dismissal, it still should have granted the motion because the Homeowners were the prevailing party to the lawsuit.

The trial court also committed an independent error when it granted the HOA's "cross-motion" for fees. There is no authority standing for the proposition that a plaintiff may take a voluntary dismissal and then turn around and seek fees. Thus, the best the HOA could have hoped for was a finding that no one was the prevailing party to this lawsuit and therefore no one was entitled to fees. And so in awarding the HOA fees in a case it voluntarily dismissed, the trial court trampled all over the Homeowners' due process rights.

Therefore, the Court should reverse the orders denying the Homeowners' motion for attorney's fees and granting the HOA's motion for fees with instructions that on remand, the trial court grant the Homeowners' fee motion.

STANDARD OF REVIEW

While normally reviewed for abuse of discretion, "to the extent a trial court's order on attorney's fees is based on its interpretation of the law, we have de novo review." *Ferere v. Shure*, 65 So. 3d 1141, 1144 (Fla. 4th DCA 2011). Likewise, whether a party's due process rights were violated is subject de novo review. *Skelton v. Lyons*, 157 So. 3d 471, 472 (Fla. 2d DCA 2015).

ARGUMENT

I. The Homeowners were the prevailing party in this lawsuit and therefore entitled to their attorney's fees and costs.

It is black letter law that when a plaintiff takes a voluntary dismissal the defendant is the prevailing party and entitled to an award of his attorney's fees and costs if authorized by statute or contract. *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990) ("In general, when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party."); *Ajax Paving Industries, Inc. v. Hardaway Co.*, 824 So. 2d 1026, 1029 (Fla. 2d DCA 2002) ("Generally, when a plaintiff voluntarily dismisses an action, the defendant is deemed the prevailing party for purposes of attorney's fees.").

Here, the declarations attached to the complaint permitted the HOA to recover its attorney's fees if it had prevailed in the lawsuit.[27] And this unilateral contractual provision requires mutuality of attorney's fees under the law. *See* § 57.105(7), Fla. Stat.; *Raza v. Deutsche Bank Nat. Trust Co.*, 100 So. 3d 121 (Fla. 2d DCA 2012) (mortgagor entitled to attorney's fees under one-way fee provision found in the mortgage).

[27] Declarations, Art. V, § 12 (R. 20-22).

Therefore, the trial court could have only denied the Homeowners' motion upon some proof that they were not the prevailing party. Such proof was sorely lacking.

The HOA's "motion in limine" waived any right it may have had to look beyond the voluntary dismissal.

As a threshold matter, the Court should summarily reverse the order denying fees because the HOA's motion in limine demanded that the trial court exclude any evidence or argument related to the merits of the case.[28] It therefore waived any right it may have had to look beyond the voluntary dismissal.

"Waiver is the voluntary and intentional relinquishment of a known right, or conduct which implies the voluntary and intentional relinquishment of a known right." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 n. 12 (Fla. 4th 2001). Here, it was the HOA's duty to argue that the merits of the case warranted a finding that it was the prevailing party, not the trial court's. *Elman v. U.S. Bank, N.A.*, 204 So. 3d 452, 455 (Fla. 4th DCA 2016) ("Many of our decisions on this and other issues are decided based upon the arguments presented to us. We do not formulate those arguments, but are required to rule on them."). *See also TransAm Trucking, Inc. v. Admin. Review Bd., United States Dep't of Labor*, 833 F.3d 1206,

[28] Motion in Limine, February 6, 2017 (R. 137); T. 14-15.

1216 (10th Cir. 2016), (Gorsuch, J. dissenting) ("We don't normally make arguments for litigants … and I see no reason to make a wholly uninvited foray into [issues not raised].").

Since the HOA expressly disclaimed any interest in the merits of the lawsuit, it was simply left with a voluntary dismissal containing a self-serving statement that each party was supposed to bear its own fees. And because there was no evidence that the Homeowners agreed to this term, the trial court was obligated to grant their fee motion. *Tunison v. Bank of America, N.A.*, 144 So. 3d 588, 591-592 (Fla. 2d DCA 2014) (reversing order denying attorney's fees to defendant after voluntary dismissal because "[t]he condition in the notice of voluntary dismissal purporting to preclude Mr. Tunison from recovering his attorney's fees is not binding upon him.").

Even if the Court were to look beyond the voluntary dismissal, the Homeowners were still the prevailing party.

The "prevailing party" perhaps best understood as the party that prevails on the significant issues in the litigation. *Trytek v. Gale Industries, Inc.*, 3 So. 3d 1194 (Fla. 2009). And so, in order to deny the Homeowners' fee motion, the trial court had to conclude that they did not prevail on any significant issues. This was an error.

First, the complaint alleged that the Homeowners failed to pay $1,099.12 in assessments[29] and the HOA actually claimed $2,400.00 in assessments, interest, and collection costs due at summary judgment.[30] But the Homeowners repeatedly denied that any money was due and owing because all assessments had been paid before the lawsuit was filed and because the HOA failed to comply with statutory conditions precedent to foreclosure.[31]

But the only competent evidence before the trial court at the fee hearing was the Homeowners' testimony that had been notified of the HOA's lien by a neighbor and that they immediately paid the amounts due and owing (plus the next month's assessment).[32] In fact, all the HOA could muster was its president's testimony that it voluntarily dismissed the case because "the juice wasn't worth the squeeze."[33]

But this testimony departs from logic for two reasons. First, if the HOA had received the Homeowners' payment "[s]ometime between August 29, 2014 and

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[29] Complaint, August 25, 2014, ¶ 5 (R. 12).

[30] Affidavit of Amount Due, November 7, 2014, ¶ 4 (R. 61).

[31] Motion to Dismiss with attached Exhibits A-E, September 19, 2014 (R. 30-38); Affidavit of Brandy Miller in Opposition to Plaintiff's Motion for Summary Judgment, December 5, 2014, ¶¶ 3, 5-6 (R. 78); Affirmative Defenses, April 28, 2015, ¶¶ 1-7 (R. 112-115).

[32] T. 76-77; T. 103.

[33] T. 118.

September 10, 2014"[34] as it alleged in its motion in limine then there was no need for it to continue to prosecute the action for another two and a half years. Second, if the majority of what the HOA sought was paid to it by September 10, 2014 then it never should have went under oath and claimed that $2,400.00 in assessments, interest, and collection costs due nearly two months later.[35]

The only logical explanation for the HOA's actions, therefore, are that it attempted to shake down *pro se* litigants for amounts that the HOA was never entitled to in the first place. Indeed, the "final hearing" on the matter was continued because the HOA, most likely banking that *pro se* litigants did not know how to try a case, did not even bother to bring a witness to trial.[36]

But in the end, the Homeowners were never even given the opportunity to try the issues they raised in the pre-trial motions and answer because the HOA tucked its tail and ran from a trial. It therefore could not have prevailed on any significant issues in this case.

[34] Plaintiff's Motion in Limine, February 6, 2017, ¶ 5 (R. 132).

[35] Affidavit of Amount Due, November 7, 2014, ¶ 4 (R. 61).

[36] Court Worksheet, April 29, 2015 (R. 118).

II. The HOA should not have been permitted to voluntarily dismiss its lawsuit and then claim that it was entitled to attorney's fees.

The trial court also committed an independent error when it not only denied the Homeowners' fee motion but also granted the HOA's "cross-motion." Therefore, the Court should reverse that order as well.

There is no authority standing for the proposition that a plaintiff may take a voluntary dismissal and then claim it is entitled to fees.

The HOA relied on the Fourth District's decisions in *Padow v. Knollwood Club Ass'n*, 839 So. 2d 744 (Fla. 4th DCA 2003) and *Blue Infiniti, LLC v. Wilson*, 170 So. 3d 136 (Fla. 4th DCA 2015) for the remarkable proposition that it was entitled to fees despite the fact that it voluntarily dismissed its case. But neither case even remotely comes close to this mind-splitting idea.

Indeed in *Wilson*, the Fourth District did not remand "the case with instruction for the trial court to consider plaintiff's request for an award of prevailing party attorneys' fees following dismissal" as the HOA asserted in its filings.[37] Rather, it remanded the case with instructions that the trial court hold an evidentiary hearing on the defendant's motion for attorney's fees under § 57.105, Fla. Stat. *Id*. at 141.

[37] Plaintiff's Memorandum, March 13, 2017 (R. 186).

Likewise, the Court in *Padow* did not "expressly affirm[] the trial court's ruling that plaintiff is entitled to fees following dismissal."[38] In fact, the Fourth District could not make such a determination because all the trial court did in that case was deny "Padow's motion, devoting much of its thoughtful order to the issue of whether Padow was the 'prevailing party' within the meaning of section 718.303(1)." *Id*. at 746.

In short, there is no authority standing for the proposition that a plaintiff may voluntary dismiss its case and then turn around and seek fees from the defendant. Indeed, the authority suggests that the opposite is true: that if the parties reach a settlement agreement, no one is the prevailing party and therefore no one is entitled to fees. *Kelly v. BankUnited, FSB*, 159 So. 3d 403, 407 (4th DCA 2015) ("Where a plaintiff's voluntary dismissal results in neither party substantially prevailing in the litigation outcome, neither party is the prevailing party for purposes of attorneys' fees. In such a case, as here, neither the general rule, nor the exception in *Padow*, applies.").

But even if *Padow* was decided as the HOA erroneously claimed that it was, the Court should still reject the HOA's position because it violates basic due process guarantees.

[38] Plaintiff's Memorandum, March 13, 2017 (R. 186).

Permitting a plaintiff to recover attorney's fees after dismissal is an impermissible attempt to shield a ruling from appellate review.

Indeed, allowing the HOA an award of fees without a trial denies the Homeowners a fundamental protection which the Rules of Civil Procedure and the Rules of Appellate Procedure, as well as the Florida and United States Constitutions, were specifically and carefully designed to provide—appellate review. Art. I, §§ 9, 21, Fla. Const.; Art. V, § 4, Fla. Const.; Amend. XIV, § 1, U.S. Const.; *Lehmann v. Cloniger*, 294 So. 2d 344, 347 (Fla. 1st DCA 1974) ("Access to the courts and appellate review are constitutionally recognized rights and any restrictions thereon should be liberally construed in favor of the right.")

The entire edifice of the judicial system presumes that the trial courts will determine issues on their merits and erroneous decisions can be rectified by the appellate court. *See Combs v. State*, 420 So. 2d 316, 317 (Fla. 5th DCA 1982) *approved*, 436 So. 2d 93 (Fla. 1983) (equating rulings that effectively deny appellate review with violations of due process rights); *Bain v. State*, 730 So. 2d 296, 298 (Fla. 2d DCA 1999) (Art. V, Section 4(b)(1), Fla. Const. provides a right to appeal all final orders and that the Florida Supreme Court determines which non-final orders may be appealed).

The basic due process guarantee of the Florida Constitution provides that neither life nor liberty nor property will be deprived without due process of the law. Art. I, § 9, Fla. Const. Procedural due process therefore acts as a medium that ensures fair treatment to all litigants through the proper administration of justice where substantive rights are at issue. *Department of Law Enf. v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991).

There is no bright-line rule that courts follow in determining whether the requirements of due process have been met in a particular case. *Hadley v. Department of Admin.*, 411 So.2d 184, 187 (Fla. 1982). However, at a minimum, procedural due process under the Florida Constitution contemplates that a litigant will be given notice and a real opportunity to be heard before the litigant's substantive rights are decided by the court. *General Elec. Capital Corp. v. Shattuck*, 132 So. 3d 908, 911 (Fla. 2d DCA 2014). *See also State ex rel. Gore v. Chillingworth*, 171 So. 649, 654 (1936).

There is therefore no dispute that the Homeowners' due process rights were violated by the trial court's order awarding the HOA its fees. By allowing the HOA to stroll into court on a bogus lawsuit, voluntarily dismiss its claims when it became clear that it could not prove them at trial, and then turn around and sue the Homeowners for the HOA's attorney's fees, the trial court shielded the HOA from

appellate review and trampled on the Homeowners' right for a full and impartial hearing. The order should therefore be reversed. *See Dobson v. U.S. Bank National Association*, 217 So. 3d 1173 (Fla. 5th DCA 2017)

CONCLUSION

The Court should reverse the orders denying the Homeowners' motion for attorney's fees and granting the HOA's motion for fees with instructions that on remand, the trial court grant the Homeowners' fee motion.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this November 6, 2017 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this November 6, 2017.

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