IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

JERRELL M. DAVIS,

Appellant,

vs.

DON W. POWELL,

Appellee.
_____ /

CASE NO. CVA1-07-56
County Court Case No. 2005-CC-13172

Appeal from the County Court,
For Orange County,
Carolyn B. Freeman, Judge.

David S. Cohen, Esquire,
For Appellant.

Allen C. Askell, Esquire,
For Appellee.

Before POWELL, SHEA, TURNER, J.J.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING IN PART AND REVERSING IN PART THE TRIAL COURT'S FINAL JUDGMENT

Appellant Jerrell Davis (Appellant) timely appeals the trial court's final judgment, entered on June 25, 2007, in favor of Appellee Don Powell (Appellee). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A).

Appellee filed a complaint against Appellant and Partnership Roofing Company, Inc., a Florida corporation, alleging breach of a written contract wherein Appellant and Partnership Roofing were to construct a new roof on Appellee's rental property for the stated sum of

$15,680. The complaint requested damages for delay in completion, attorney's fees, pre-judgment interest and costs. The complaint attached a written contract which did not specify a completion date. Rather, the contract states in paragraph 2 that "[t]he Completion Date of this contract shall be the date final inspection is passed by the permitting authority." Also attached to the complaint was an addendum[1] signed by the parties on March 24, 2005, which states, "[t]he parties have entered into a 7 business day agreement for completion of the roof work. Contractor shall pay Owner a penalty of $100 per day for non-completion shall begin on the 10th business day and continue until the completion date of this contract."

A default final judgment for failure to plead was entered against Partnership Roofing on October 17, 2005, awarding Appellee $7,699.42 ($6,000 principle, $299.42 costs, and $1,400 attorney's fees). There were no findings in the default final judgment regarding attorney's fees. Appellee's attorney obtained two post-judgment writs of garnishment attempting to collect the judgment against Partnership Roofing. The default final judgment against Partnership Roofing was not appealed.

The case proceeded to non-jury trial against Appellant. On June 25, 2007, the trial court entered a final judgment in favor of Appellee in the amount of $12,716.45 plus interest ($6,000 principal, $5,250 attorney's fees, plus costs and interest). This appeal followed.

It is well established that in appellate proceedings the decision of a trial court is presumed to be correct and the burden is on the appellant to demonstrate error. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1980); Wright v. Wright, 431 So. 2d 177, 178 (Fla. 5th DCA 1983). In reviewing a judgment rendered in a nonjury case, it is not the function of an

[1] It should be noted that the addendum also referred to a written contract between the parties for the construction of a pool at Appellee's home. Apparently, the pool was completed properly and timely, and that contract is not a part of this appeal.

appellate court to substitute its judgment for that of the trial judge. Oceanic Intern. Corp. v. Lantana Boatyard, 402 So. 2d 507, 511 (Fla. 4th DCA 1981).

Unenforceable Penalty v. Valid Liquidated Damages Clause

Appellant argues that the use of the word "penalty," instead of "liquidated damages," in paragraph 3 of the addendum conclusively establishes that the provision is not a valid liquidated damages clause but rather an unenforceable penalty. Appellant does not cite a single legal authority to support his argument. Indeed, although there is no Florida case law on point, existing case law from other jurisdictions is just the opposite. See U.S. v. Bethlehem Steel Co., 205 US 105 (1907)(use of word "penalty" in and of itself is not conclusive; court will look to evidence of the parties' intent and facts and circumstances surrounding the agreement); Morgen & Oswood Constr. Co. v. Big Sky of Montana, Inc., 557 P.2d 1017 (Mont. 1972).

Appellant asserts that there is nothing in the record indicating that the sum is anything other than a penalty. Appellant also asserts that there was no evidence presented as to the actual damages occasioned. Further, there was no evidence at trial as to any efforts made by the parties to determine what the actual damages might be in the event of a breach of contract. Rather, the pleadings and record evidence establish that the penalty was an arbitrary amount intended to penalize Appellant in the event of a delay.

Alternatively, Appellee asserts that there was evidence introduced at trial regarding the basis of the $100 per day delay fee and such evidence meets the test for liquidated damages as set forth in Hyman v. Cohen, 73 So. 2d 393 (Fla. 1954); however, a transcript of the trial proceedings was not furnished.

The fatal flaw in Appellant's argument is that since he did not furnish a transcript of the trial proceedings or a statement of the evidence, affirmance of the trial court's award of damages for the construction delay is mandated. See 7550 Bldg., Inc. v. Atlantic Rack & Shelving, Inc., 999 So. 2d 663, 664 (Fla. 3d DCA 2008) (absence from appellate record of a transcript of the trial court proceedings required that the trial court's decision be affirmed unless error of law appears on the face of the final judgment).

Attorney's Fees Award

Appellant next argues that the trial court erred in awarding Appellee $5,520 in attorney's fees because there was no evidence presented as to the reasonableness of such fees. Appellant asserts that it is well settled in Florida that the trial court must set forth specific findings as to the hourly rate and the reasonableness of the hours expended. See Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1151 (Fla. 1985).

In response, Appellee contends that evidence was presented on the record regarding the hourly rate and total fees charged. Appellee further states that the trial judge specifically inquired of Appellee's attorney as to the requested fees and costs. The "Statement of Plaintiff's Attorney Regarding Fees" lists the hourly rate as $175 per hour and the total fees charged as $1,400.[1]

Alternatively, Appellee relies on section 687.06, Florida Statutes, which provides that a fee of 10% or less of the principal sum named in the contract is reasonable and may be awarded without further proof. However, this argument fails for two reasons. First, the statute is inapplicable to the subject roof contract because it does not expressly specify that the attorney's fees will be 10% of the principal sum stated in the contract as payment for the construction of the

[1] This document was unverified and not accompanied by an affidavit of Appellee's attorney or other attorney.

roof. See Sepler v. Emanuel, 388 So. 2d 28, 29 (Fla. 3d DCA 1980); Dean v. Coyne, 455 So. 2d 576, 576 (Fla. 4th DCA 1984); Sand Dollar Investments, Inc. v. Anja, Inc., 492 So. 2d 1, 1 (Fla. 4th DCA 1986). Second, even assuming that the statute did apply, Appellee's contention would still be incorrect because the fee awarded, $4,200, is more than 10% of the principal sum, $15, 680, stated in the contract.

The final judgment does not contain any findings regarding attorney's fees. It simply states that Appellee is awarded reasonable attorney's fees of $4,200 plus an additional $1,050 for two writs of garnishment. A final judgment or order assessing attorney's fees must expressly specify the reasonable number of hours necessarily expended multiplied by the reasonable hourly rate for like services in the community. See Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990); In re Estate of Platt, 586 So. 2d 328, 333-34 (Fla. 1991); Abernethy v. Fishkin, 638 So. 2d 160, 164 (Fla. 5th DCA 1994). Failure to make and include such findings in the judgment or order is reversible error. Id.

Finally, it is significant to note that the attorney's fee award was or may have been erroneous for two additional reasons: (1) there was no legal basis to award attorney's fees against Appellant for Appellee's pursuit of post-judgment writs of garnishment against co-defendant Partnership Roofing and (2) if Appellee's counsel billed Appellee $1,400, the award could not exceed that amount. See Rowe, 472 So. 2d 1145 (Fla. 1985); Perez-Borroto v.Brea, 544 So.2d 1022 (Fla. 1989).

The Court agrees with Appellant's argument that the attorney's fee award in the judgment must be reversed for lack of factual findings. On remand, the trial court should hold a

new hearing with notice as to the issue of the amount of attorney's fees, take evidence, make the required factual findings, and recite them in an amended final judgment.

Election of Remedies

The Court finds that Appellant's argument regarding the election of remedies doctrine is without merit.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's Final Judgment in favor of Appellee is **AFFIRMED** but **REVERSED** as to the issue of attorney's fees. This case is **REMANDED** to the trial court for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida this ___28____day of ____July_____, 2009.

_____/s/_____
ROM W. POWELL
Senior Judge

_____/s/_____
TIM SHEA
Circuit Judge

_____/s/_____
THOMAS W. TURNER
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **David S. Cohen, Esquire**, 5728 Major Blvd., Suite 550, Orlando, Florida 32819 and **Allan C. Aksell, Esquire,** Post Office Box 607734, Orlando, Florida 32860 on the ____28_____ day of _____July_____, 2009.

_____/s/_____
Judicial Assistant