

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

FORD MOTOR CREDIT CO.,

Appellant,

v.

ERIC BURMAN,

Appellee.

CASE NO.: 2013-CV-000042-A-O

Lower Case No.: 2006-CC-15044-O

Appeal from the County Court,
for Orange County, Florida,
Antoinette D. Plogstedt and Andrew Cameron,
County Judges.¹

Robert A. Vigh, Esquire, for Appellant.

Patricia K. Herman, Esquire, for Appellee.

Before J. KEST, ROCHE, and HIGBEE, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant, Ford Motor Credit Co. (“FMCC”), timely appeals the Trial Court’s “Order Granting Defendant’s Motion for Rehearing and Setting Aside the Order Denying Defendant’s Amended Motion for Attorney’s Fees Entered June 15, 2012” rendered October 8, 2012 and “Order Granting Defendant’s, Eric A. Burman, Amended Motion for Award of Attorney’s Fees and Costs” rendered April 15, 2013. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

¹ Judge Plogstedt entered the Order on October 8, 2012 and Judge Cameron entered the other Order on April 15, 2013. Both Orders are the subject of this appeal.

Summary of Facts and Procedural History

On September 29, 2006, FMCC filed a Complaint for a deficiency judgment against the Appellee, Eric Burman (“Burman”) pertaining to a Florida Simple Interest Vehicle Retail Installment Contract (“Contract”) purchased by FMCC. Ultimately, the Complaint was served on Burman on February 5, 2007. On March 1, 2007, Burman filed his Motion to Dismiss the Complaint. The Trial Court then entered an Order on May 23, 2007 denying the Motion and directing that a responsive pleading be filed within 15 days from the date of the Order. Burman did not file a responsive pleading within the time directed by the Order and FMCC simultaneously sought discovery from Burman.

On May 2, 2008, FMCC filed a Motion for Summary Judgment pointing out Burman’s failure to file a responsive pleading to the Complaint. On August 11, 2008, Burman filed his Answer and Affirmative Defenses and an Affidavit in Opposition to the Motion for Summary Judgment. On August 18, 2008, FMCC’s Motion for Summary Judgment was heard and was denied by the Trial Court. On August 26, 2008, FMCC filed its Motion for Rehearing on its Motion for Summary Judgment. Ultimately, FMCC’s Motion for Rehearing was heard on December 10, 2008 and was granted on December 12, 2008. Thereafter, FMCC’s Motion for Summary Judgment was again heard on February 25, 2009, and was denied on March 12, 2009.

The case was then set for a non-jury trial on April 14, 2009, and continued twice to later dates. Ultimately, on September 23, 2009, the trial was held and Burman’s Motion for Directed Verdict was granted. On June 25, 2010, the Final Judgment of Dismissal was entered. On July 27, 2010, Burman filed his Motion for Attorney’s Fees and Costs and Memorandum of Law in Support. On August 17, 2010, FMCC served its Request for Production of Documents relating to Burman’s attorney’s fees and costs. On November 10, 2010, FMCC filed a Motion to Compel

the production of the documents that was heard on January 20, 2011. At the hearing, Burman provided the requested documents to FMCC for review.

Nothing else occurred in the case until January 18, 2012 when Burman filed his Amended Motion for Attorney's Fees and Costs and Memorandum of Law in Support. On April 11, 2012, Burman filed the Affidavit from attorney, Michael Duncan, in support of his Amended Motion for Attorney's Fees and Costs. According to the court minutes, on April 13, 2012, a hearing was held on Burman's Amended Motion for Attorney's Fees and Costs and Michael Duncan testified. On May 24, 2012, a second hearing was held addressing the Amended Motion for Attorney's Fees and Costs that was denied by the Trial Court on June 18, 2012. Thereafter, on June 28, 2012, Burman filed his Motion for Rehearing as to the Amended Motion for Attorney's Fees and Costs that was heard on October 2, 2012 and granted on October 8, 2012. On October 19, 2012, FMCC filed its Motion for Rehearing. On March 6, 2013, Burman filed his Supplemental Affidavit of Time and Costs Expended. On March 11, 2013, a hearing was held where the Trial Court entered an Order denying FMCC's Motion for Rehearing and reserved ruling on Burman's Amended Motion for Attorney's Fees and Costs. On April 15, 2013, the Trial Court entered the Order granting Burman's Amended Motion for Attorney's Fees and Costs that FMCC now appeals along with the October 8, 2012 Order.

Arguments on Appeal

Ford argues: 1) The Trial Court erred in ruling that, although Burman failed to plead an entitlement to attorney's fees, FMCC had notice that Burman intended to seek such fees or otherwise, FMCC acquiesced to Burman's claim for attorney's fees and 2) The Trial Court erred in awarding Burman \$66,386.93 in attorney's fees and costs without conducting a full hearing on the amount of the fees and costs.

Conversely, Burman argues: 1) Without a record of the lower court proceedings, this Court cannot resolve the underlying factual issues to conclude that the Trial Court's Orders are not supported by the evidence or by an alternative theory; 2) The Trial Court did not err in ruling that FMCC had notice that Burman intended to seek attorney fees or that FMCC acquiesced in the claim for such fees; and 3) The Trial Court did not err in awarding Burman \$66,386.93 in attorney's fees and costs. Also, Burman filed a motion seeking an award of appellate attorney's fees and costs pursuant to Florida Rules of Appellate Procedure 9.400(a) and (b) and section 57.105(7), Florida Statutes, that provides for the reciprocal recovery of attorney's fees and costs in contracts.

Standard of Review

Generally, the standard of review of a trial court's order granting rehearing is abuse of discretion. *Monarch Cruise Line, Inc., v. Leisure Time Tours, Inc.*, 456 So. 2d 1278, 1279-1280 (Fla. 3d DCA 1984) (applying the abuse of discretion standard of review and holding that the record in the case did not establish that the trial court abused its discretion in granting the motion for rehearing and citing *Ford Motor Co. v. Kikis*, 401 So. 2d 1341 (Fla. 1981)). Appellate review of a trial court's determination of entitlement to attorney's fees ordinarily involves an issue of law to be reviewed de novo. *Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A.*, 971 So. 2d 955, 956 (Fla. 5th DCA 2007). Also, the standard of review as to a trial court's determination of the amount of attorney's fees to award is abuse of discretion. *DiStefano Construction, Inc. v. Fidelity and Deposit Co. of Maryland*, 597 So. 2d 248, 250 (Fla. 1992); *Hinkley* citing *DiStefano* at 971 So. 2d 956. Lastly, a decision of a trial court comes to the appellate court with a "presumption of correctness" and the burden is on the appellant to

demonstrate reversible error. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979).

Analysis

Entitlement to Attorney's Fees and Costs

First, it is undisputed that the subject Contract in this case provides for the recovery of attorney's fees and costs incurred in the collection of the balance of monies owed. Also, undisputed is the applicability of section 57.105(7), Florida Statutes, that states:

If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

At the non-jury trial, Burman prevailed on his Motion for Directed Verdict resulting in a Final Judgment of Dismissal. Therefore, applying section 57.105(7), Florida Statutes, Burman would be entitled to an award of attorney's fees in addition to an award of taxable costs. *Holiday Square Owners Assoc., Inc v. Tsetsenis*, 820 So. 2d 450, 453 (Fla. 5th DCA 2002) (holding that the statute makes a unilateral contract clause for a prevailing party's attorney's fees bilateral in effect; thus, the award is mandatory once the lower court determines that a party has prevailed). However, in the instant case, while FMCC in its Complaint pled entitlement to reasonable attorney's fees and costs, Burman did not plead entitlement to attorney's fees and costs in his Answer and Affirmative Defenses. Accordingly, the issue arises whether the Trial Court properly ruled that Burman was entitled to the attorney's fees and costs notwithstanding his failure to plead such entitlement.

Controlling case law exists addressing the issue of entitlement to attorney's fees and costs that was not properly pled. In *Stockman v. Downs*, 573 So. 2d 835, 837-838 (Fla. 1991), the

Florida Supreme Court held that claims for attorney fees, whether based on statute or contract, must be pled and failure to do so constitutes a waiver of the claim. However, the Supreme Court also recognized an exception to the pleading requirement in cases where a party has notice that the opposing party claims entitlement to attorney fees and by the party's conduct, recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement. Upon review of the case in *Stockman*, the Supreme Court found that the exception did not apply because the trial court order denying the motion for attorney's fees indicated that the claim for attorney's fees was not before the court prior to final judgment and the mere fact that Stockman sought attorney's fees under the same contractual provision was insufficient to warrant application of the exception to the rule. Further, the Supreme Court found that there was no action or inaction on Stockman's part that could be deemed to be a recognition of the fact that the other party intended to claim attorney's fees or deemed to be a waiver of objection to their failure to plead such a claim.

See Dickson v. Heaton, 87 So. 3d 81, 84 (Fla. 4th DCA 2012) (finding that the exception to the pleading requirement applied where all parties were aware of the attorney's fee provision in the operating agreement and of the intention of all parties to enforce it and where the joint pretrial stipulation included language addressing the issue as to entitlement to reasonable attorney's fees and costs and the stipulation that the determination of the amount of reasonable attorney's fees would be reserved for a subsequent proceeding); *see also Concrete & Lumber Enterprises Corp. v. Guaranty Business Credit Corp.*, 829 So. 2d 247, 248-249 (Fla. 3d DCA 2002) (holding that the prevailing party waived its contractual right to attorney's fees when it failed to allege in its answer any reciprocal claim for contractual attorney's fees, even though the party moved for an award of attorney's fees in a post-dismissal motion; thus, the Third District

concluded that the exception to the pleading requirement did not apply as a party cannot raise a claim for attorney's fees for the first time in a post-dismissal motion).

Accordingly, the next step in this analysis is to determine whether in the instant case Burman is entitled to attorney's fees and costs under an exception notwithstanding his failure to plead entitlement. In Burman's Motion for Rehearing on the Order that initially denied his Amended Motion for Attorney's Fees and Cost, Burman argued that on or about February 25, 2009, FMCC and Burman attended a pre-trial conference where both parties advised the Court that they were each respectively seeking an award of attorney's fees and costs and that evidence pertaining to same would be presented at a later hearing. From review of the record, there are court minutes of a hearing held on February 25, 2009 before Judge John E. Jordan that indicates that FMCC's Motion for Summary Judgment was heard and denied and that the case was to be set for a non-jury trial. While the minutes do not directly state that a pre-trial conference occurred at that hearing, it possible that pre-trial matters were discussed as the case was to be set for trial. However, a court reporter was not present at this hearing; thus, there is no transcript of the hearing. Therefore, this Court can only speculate as to what was discussed at the hearing.

Further, from review of the court minutes of Burman's Motion for Rehearing that was heard on October 2, 2012 before Judge Antoinette D. Plogstedt, again there was no court reporter present; thus, no transcript. Judge Plogstedt reserved ruling on the Motion and on October 8, 2012 entered the Order granting Burman's Motion for Rehearing and setting aside the previous Order denying Burman's Amended Motion for Attorney's Fees and Costs. In the Order, the Trial Court made the following findings:

A. The failure of the Defendant, Eric A. Burman, to set forth a claim for attorneys' fees in his answer, when the Plaintiff, Ford Motor Credit Company, served its Proposal for Settlement/Offer of Judgment upon the Defendant; agreed with the Defendant at the Pretrial Conference to a subsequent hearing on the issue

of attorney's fees and costs; agreed to the form and entry of the Final Judgment in this matter; and, propounded discovery requests specifically related to the amount of attorney's fees and costs incurred by the Defendant in the instant action; does not constitute a waiver of the claim for an award of attorney's fees and costs by the Defendant. (See, *Stockman v. Downs*, 573 So. 2d 35 (Fla. 1991); and *Dickson, et al v. Heaton, et al*, No. 4D11-2411, (4th DCA 2012) [sic];

B. The Plaintiff, Ford Motor Credit Company, had notice that the Defendant, Eric A. Burman, claimed an entitlement to attorney's fees and costs, and by its conduct, the Plaintiff recognized or acquiesced to that claim or otherwise failed to object to the failure to plead entitlement, and as such, pursuant to the exception created in *Stockman*, the Plaintiff has waived any objection to the Defendant's failure to plead a claim for attorney's fees and costs. (See, *Stockman v. Downs*, 573 So. 2d 835 (Fla. 1991); and *Dickson, et al v. Heaton, et al*, No. 4D11-2411, (4th DCA 2012) [sic];

Thereafter, FMCC filed a Motion for Rehearing arguing that there was no pretrial conference held; thus, no claim for attorney's fees was made by Burman prior to trial. According to the court minutes in the record, FMCC's Motion was heard on March 11, 2013 before Judge Andrew L. Cameron, again with no court reporter present. At the hearing, Judge Cameron denied FMCC's Motion and reserved ruling on Burman's Amended Motion for Attorney's Fees and Costs. On April 15, 2013, Judge Cameron entered the Order granting Burman's Amended Motion for Award of Attorney's Fees and Costs. Included in the findings in the Order, was that on or about March 11, 2013, testimony was received from Burman's fee expert Michael Duncan. However, the court minutes from that hearing do not note that Mr. Duncan testified. Instead, there are court minutes in the record from a hearing that was held on April 13, 2012 before Judge Plogstedt, again with no court reporter present. According to those court minutes, Burman's Amended Motion for Attorney's Fees and Costs was addressed, Michael Duncan testified, and Burman's counsel was to set a hearing on the Motion to Award Fees.

Because there are no transcripts or approved statement of proceedings from the hearings as discussed above, this Court's review is limited and without anything contrary in the court record, the Trial Court's findings must be presumed correct notwithstanding that different Judges presided over the hearings. *Applegate*, 377 So. 2d at 1152 (holding that in the absence of an adequate record, the appellate court will have no alternative but to presume the decision is correct); *Wright v. Wright*, 431 So. 2d 177, 178 (Fla. 5th DCA 1983) (explaining that it is well established that the findings and judgment of the trial court comes to the appellate court with a presumption of correctness, may not be disturbed in the absence of a record demonstrating error, and the burden is on the appellant to bring before the appellate court a record adequate to support the appeal). Therefore, this Court finds that based on the Trial Court's findings, specifically that the parties agreed at the Pretrial Conference to a subsequent hearing on the issue of attorney's fees and costs, FMCC recognized or acquiesced to that claim or otherwise failed to object to the failure to plead entitlement, and as such, pursuant to the exception as addressed in *Stockman*, Burman is entitled to attorney's fees and costs notwithstanding his failure to plead entitlement.

Award of Attorney's Fees and Costs

Next, this Court addresses FMCC's argument that the Trial Court erred in awarding Burman \$66,386.93 in attorney's fees and costs without conducting a full hearing on the amount of the fees and costs. Specifically, FMCC claims that there was no testimony taken of Burman's expert nor was the cross examination of Burman's counsel completed. Again because there are no transcripts from the hearings as discussed above, this Court must presume that the Trial Court's findings were correct. Further, the record evidence supports the Trial Court's findings including the Affidavit and Supplemental Affidavit of Attorney Time and Costs Expended filed by Burman's counsel and Michael Duncan's Affidavit Supporting Burman's Amended Motion

for Attorney's Fees and Costs. Accordingly, this Court finds that the Trial Court did not abuse its discretion as to the amount of attorney's fees and costs awarded in this case.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED:**

1. The Trial Court's "Order Granting Defendant's Motion for Rehearing and Setting Aside the Order Denying Defendant's Amended Motion for Attorney's Fees Entered June 15, 2012" rendered October 8, 2012 and "Order Granting Defendant's, Eric A. Burman, Amended Motion for Award of Attorney's Fees and Costs" rendered April 15, 2013 are **AFFIRMED**; and

2. Burman's "Motion for Appellate Attorney's Fees and Costs" filed August 22, 2013 is **GRANTED** as to the appellate attorney's fees and the assessment of those fees is **REMANDED** to the Trial Court. Also, Burman is entitled to have costs taxed in his favor by filing a proper motion with the Trial Court pursuant to 9.400(a), Fla. R. App. P.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 6th day of June, 2014.

/S/ _____
JOHN MARSHALL KEST
Presiding Circuit Judge

ROCHE and HIGBEE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Robert A. Vigh, Esquire**, Solomon, Vigh, Chatani and Solomon, P.A., P.O. Box 3275, Tampa, Florida 33602 and **Patricia K. Herman, Esquire**, 1631 Rock Springs Road, #305, Apopka, Florida 32712-2299 on the 6th day of June, 2014.

/S/ _____
Judicial Assistant