NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION

WATERSIDE AT COQUINA KEY SOUTH CONDOMINIUM ASSOCIATION, INC.,
Appellant,

v.

Case No.: 15-000042AP-88A
UCN: 522015AP000042XXXXCI

VICTOR GAMBONI; CAROL GAMBONI; ROBINSON C. ANG; DUOC THANH TRAN and/or THE UNKNOWN TENANT OF 5066 COQUINA KEY DRIVE SE, ST. PETERSBURG; FLORIDA,
Appellees.

_____/

Opinion Filed _____

Appeal from Final Order
Pinellas County Court
Judge Kathleen T. Hessinger

Michelle A. Stellaci, Esq.
Mark A. Hanson, Esq.
Attorneys for Appellant

Rory B. Weiner, Esq.
Attorney for Appellees
Victor and Carol Gamboni

No appearance for
remaining appellees

PER CURIAM.

Appellant/Defendant-below, Waterside at Coquina Key South Condominium Association, Inc., appeals the June 5, 2015, final "Order Denying Entitlement To Attorney's Fees." Upon review of the briefs and the record on appeal, this Court dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. We affirm.

Statement of Case

Appellee/Plaintiffs-below, Victor and Carol Gamboni, filed an action in the County Court seeking injunctive and declaratory relief against the Association and Appellees/Defendants-below, Robinson C. Ang and Duoc Thanh Tran. On December 29, 2014, the trial court entered a final order on the Association's Motion to Dismiss the Second Amended Complaint. The trial court dismissed the action with prejudice.[1]

On January 7, 2015, the Association filed a "Motion To Tax Costs and Attorney's Fees" arguing it is entitled to an award pursuant to section 718.303, Florida Statutes (2014), and under the Declaration of Condominium. The Gambonis filed a Response to the request asserting that the Association had failed to comply with section 718.112(2)(a)2, Florida Statutes (2014), and, therefore, it was precluded from recovering attorney's fees and costs.

Attached to the Gambonis' Response is correspondence dated October 29, 2013, from the Gambonis directed to John Fossus, Manager of the Association; Ron Bennick, President of the Association; and Ken Bade of the Association's management company. This correspondence was delivered to the addressees by certified mail. On or about November 2, 2013, the Association through Ron Bennick sent an e-mail to the Gambonis with the subject "Certified letter" that also is attached to the Response.

After a hearing, the trial court entered an order on June 5, 2015, concluding that section 718.112(2)(a)2 is a condition precedent or prerequisite to obtaining attorney's fees pursuant to section 718.303. The trial court cited to Seagull Townhomes Condominium Association, Inc. v. Edlund, 941 So. 2d 457 (Fla. 3d DCA 2006), in support its ruling.

Further, the trial court found that the Gambonis' October 29, 2013, correspondence is a "written inquiry" and that the Association's November 2, 2013, e-mail response that it will take "whatever measures allowed by law" is not a substantive response as required by section 718.112(2)(a)2. The Association's motion for attorney's fees and costs was denied.

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[1] The Gambonis' appeal of the final order dismissing the action was voluntary dismissed on March 25, 2015. See Gamboni v. Waterside at Coquina Key S. Condo. Assoc., Inc., Case No. 15-000005AP-88B (Fla. 6th Cir. App. Ct. March 25, 2015).

Argument on Appeal

On appeal, the Association directs this Court to section 718.303(1) that states, when an action for damages or injunctive relief has been filed under the Condominium Act, the prevailing party is entitled to recover reasonable attorney's fees. Further, the Declaration of Condominium in section 20.3 states that in any proceeding arising for alleged failure to comply with the terms of the Condominium Act, the Declaration of Condominium, or the Articles or Bylaws of the Association, the prevailing party shall be entitled to recover reasonable attorney's fees and costs. It is asserted that the award of attorney's fees and costs under the Declaration is mandatory and not discretionary.

Further, the Association argues that the trial court erred when it found the Gambonis' October 29, 2013, letter to be a "written inquiry" rather than a written "complaint." It notes that prior to a 1997 amendment, section 718.212(2)(a)2 required the Association to respond to "complaints" by a unit owner. The Legislature amended the statute to change the wording to require responses to "written inquiries" rather than "complaints." See Ch. 97-301, § 1, Laws of Fla. The Association asserts that the October 29, 2013, letter was a complaint that did not require a response from the Association.

In the alternative, the Association argues that, assuming the Gambonis' letter could be construed as an inquiry under the statute, the trial court erred when it did not construe the e-mail from the Association's president as a substantive response

Standard of Review

Statutory construction is a question of law subject to de novo appellate review. Gulf Atl.c Office Props., Inc. v. Dep't of Revenue, 133 So. 3d 537, 539 (Fla. 2d DCA 2014). However, when there is a factual issue, the appellate court is not to reweigh the evidence but must look to whether the judgment is supported by competent, substantial evidence. Clegg v. Chipola Aviation, Inc., 458 So. 2d 1186, 1187 (Fla. 1st DCA 1984). "The resolution of factual conflicts by a trial judge in a nonjury case will not be set aside on review unless totally unsupported by competent substantial evidence." Id. (quoting Concreform Sys., Inc. v. R.M. Hicks Constr. Co., 433 So. 2d 50 (Fla. 3d DCA 1983)). "The preponderance of the evidence standard [is] evidence which as a whole shows that the fact sought to be proved is more probable than not . . . . Substantial evidence

has been defined as evidence 'which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.' " State v. Edwards, 536 So. 2d 288, 292 (Fla. 1st DCA 1988).

Further, appellate review of the trial court's application of law to undisputed facts is de novo. Faller v. Faller, 51 So. 3d 1235, 1236 (Fla. 2d DCA 2011).

Analysis

Issue of Law

The issue of law to be determined in this case is whether section 718.112(2)(a)2 is a condition precedent or prerequisite to recovery of attorney's fees by the Association under section 718.303 as a prevailing party.

In the Initial Brief and the Reply Brief, the Association presents argument concerning statutory construction of section 718.112(2)(a)2 and the words "inquiry" in the current version of the statute and the meaning of "complaint" in the prior version of the statute.

The Florida Supreme Court has stated: "When a statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." Lee County Elec. Coop., Inc. v. Jacobs, 820 So. 2d 297, 303 (Fla. 2002)(citations omitted). If the statute is clear and unambiguous, it is given its plain and obvious meaning without resorting to the rules of statutory construction and interpretation, unless this would lead to an unreasonable result or a result clearly contrary to legislative intent. Brown v. City of Vero Beach, 64 So. 3d 172, 174 (Fla. 4th DCA 2011).

Section 718.112(2) states that the provisions in the subsection, if not contained in the bylaws, shall be deemed to be included in the Bylaws of the Condominium. Therefore, section 718.112(2)(a)2[2] controls over the Declaration of Condominium as the provisions of the statute have been deemed included in the Bylaws.

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[2] Section 718.112(2)(a)2 states:

(2) Required provisions.--The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

(a) Administration.—

. . . .

Section 718.303(1) states in part: "The prevailing party in any [action for damages and/or for injunctive relief for failure to comply with Chapter 718] is entitled to recover reasonable attorney's fees." Section 718.112(2)(a)2 states in part: "The failure to provide a substantive response to the inquiry as provided herein precludes the board from recovering attorney fees and costs in any subsequent litigation, administrative proceeding, or arbitration arising out of the inquiry."

As the Florida Supreme Court noted in Murray v. Mariner Health, 994 So. 2d 1051, 1061 (Fla. 2008): "A rule of statutory construction which is relevant in this construction is that where two statutory provisions are in conflict, the specific provision controls the general provision. . . . A second relevant rule of statutory construction is that a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision."

This Court finds that the specific provision in section 718.112(2)(a)2, that attorney's fees and costs are precluded under certain conditions, controls over the general provision in section 718.303(1) that the prevailing party is entitled to attorney's fees. In a de novo review this Court concludes that the trial court did not err when it found that section 718.112(2)(a)2 is a condition precedent or prerequisite to obtaining attorney's fees pursuant to section 718.303.

Issues of Fact

The trial court's finding of fact to be reviewed are (1) was the October 29, 2013, from the Gambonis a "written inquiry" under section 718.112(2)(a)2, and (2) was the

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2. When a unit owner of a residential condominium files a written inquiry by certified mail with the board of administration, the board shall respond in writing to the unit owner within 30 days after receipt of the inquiry. The board's response shall either give a substantive response to the inquirer, notify the inquirer that a legal opinion has been requested, or notify the inquirer that advice has been requested from the division. If the board requests advice from the division, the board shall, within 10 days after its receipt of the advice, provide in writing a substantive response to the inquirer. If a legal opinion is requested, the board shall, within 60 days after the receipt of the inquiry, provide in writing a substantive response to the inquiry. The failure to provide a substantive response to the inquiry as provided herein precludes the board from recovering attorney fees and costs in any subsequent litigation, administrative proceeding, or arbitration arising out of the inquiry. The association may through its board of administration adopt reasonable rules and regulations regarding the frequency and manner of responding to unit owner inquiries, one of which may be that the association is only obligated to respond to one written inquiry per unit in any given 30-day period. In such a case, any additional inquiry or inquiries must be responded to in the subsequent 30-day period, or periods, as applicable.

(Emphasis added).

Association's November 2, 2013, e-mail response a substantive response as required by section 718.112(2)(a)2.

In the Order Denying Entitlement to Attorney's Fees" the trial court states in part:

> Upon review of the Plaintiff's letter, dated October 29, 2013, this Court finds that the letter was a written inquiry sent by certified mail. Plaintiffs, in their letter, set forth the past problems with their neighbor and the fact that they obtained assistance from the association in the past as to this problem. They state that the association told the neighbor that if the destructive behavior continued that the association would take legal action. Plaintiffs tell the association that it is time to take the legal action as the behavior is rapidly getting worse. Plaintiffs "implore" the association to "get legal advice and institute action to have him removed from our community." Plaintiffs provided proof of sending the letter by certified mail.

In reviewing the October 29, 2013, letter, this Court finds that there is competent, substantial evidence to support the trial court's finding that this letter constituted a written "inquiry" under the statute.[3]

The trial court examined the November 2, 2013, e-mail response on behalf of the Association and found:

> The emailed response, from Ron Bennick, states, in pertinent part, that he was not aware of the issue and he was sorry they had to endure the aggravation. He stated that "we will take whatever measures allowed by law to stop this harassment" and will keep them updated on [the Association's] actions. Section 718.112(2)(a)2, Fla. Stat. is very clear that the response must be a substantive response, whether it is from the board after legal opinion, from the board after advice from the division, or in a response directly from the board without legal opinion or division advice. (emphasis added) This Court finds that the board's response that is will take "whatever measures allowed by law" is not a substantive response.

(Emphasis in original). In reviewing the November 2, 2013, e-mail, this Court finds that there is competent, substantial evidence to support the trial court's finding that the Association's November 2, 2013, e-mail response did not constitute a substantive response under the statute.

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[3] The Association cites to numerous final orders from the Arbitration Section of the Department of Business and Professional Regulation in support of its argument that the October 29, 2013, letter is not a "written inquiry." These cases are not persuasive as they are not appellate decisions with the same standard of review, but are original orders by the Arbitrator ruling on requests for attorney's fees in arbitration proceedings.

Application of the Law to the Facts

The Association asserts that the trial court erred by "applying the previous version" of section 718.112(2)(a)2 to the facts of this case. There is no evidence to support this assertion as the trial court order quotes the current version of the statute and evaluates whether a "written inquiry" was made by the Gambonis.

Further, from a de novo review, this Court concludes that the trial court's application of law to the facts was correct when it found that the October 29, 2013, letter was a "written inquiry" and the Association's November 2, 2013, e-mail response did not constitute a substantive response, thereby precluding the award of attorney's fees and costs.

Conclusion

The final order denying the Association's entitlement to attorney's fees and costs is affirmed.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 3 day of November, 2015.

Original Order entered on November 3, 2015, by Circuit Judges Linda R. Allan, Keith Meyer, and Patricia Muscarella.

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Hon. Kathleen Hessinger