

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**

**DOLPHIN HOMES, INC.,
Appellant,**

**Case No.: 16-000019AP-88A
UCN: 522016AP000019XXXXCI**

v.

**BLACKER GREEN, INC.
d/b/a BLAIR'S AIR CONDITIONING
& HEATING,
Appellee.**

_____ /

Opinion Filed _____

Appeal from Order Denying the Parties'
Motions for Attorney's Fees
and Order Denying Defendant's Motion
for Rehearing of Order Denying Defendant's
Motion for Attorney's Fees
Pinellas County Court
Judge Edwin B. Jagger

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PER CURIAM.

Dolphin Homes, Inc. appeals the "Order Denying the Parties' Motions for Attorney's Fees" entered on January 20, 2016, and the "Order Denying Defendant's Motion for Rehearing of Order Denying Defendant's Motion for Attorney's Fees," entered on April 13, 2016. Upon review of the briefs, the record on appeal, and the applicable case law, this Court dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. We affirm.

Statement of Case

In January 2014, Appellee, Blacker Green, Inc. d/b/a Blair's Air Conditioning & Heating, filed a complaint for breach of contract against Appellant, Dolphin Homes, Inc. for failing to pay for labor, services, and materials for work done on a home remodeling job. Dolphin counterclaimed, alleging that Blair's negligence resulted in water damage to the subject home. After a nonjury trial, the lower court entered a final judgment finding in favor of Blair's on the breach of contract claim and in favor of Dolphin on the negligence claim. Both parties filed a motion for award of attorney's fees. Blair's claimed entitlement under the contract. Arguing that its negligence claim arose from the contract, Dolphin claimed entitlement under Florida Statutes section 57.105(7), which provides for reciprocity of unilateral contract provisions. After a hearing, the lower court denied both motions. Dolphin filed a motion for rehearing, which was denied on April 13, 2016. Dolphin then filed the instant appeal challenging the Order Denying the Parties' Motions for Attorney's Fees and the Order Denying Defendant's Motion for Rehearing of Order Denying Defendant's Motion for Attorney's Fees.

Argument on Appeal

In the Initial Brief, Dolphin asserts that the trial court erred by incorrectly concluding that it was not entitled to attorney's fees. Dolphin argues that because the negligence would not have occurred had there been no contract, the negligence action arose out of the contract; therefore, attorney's fees should have been awarded under the reciprocity provision of Florida Statutes section 57.105(7). Blair's counters that the trial court properly found that attorney's fees were not awardable because the attorney's fees provision in the contract only applies to collection actions, and the reciprocity of fees under section 57.105(7) only applies to the specific types of actions delineated in a contract. Additionally, Blair's contends that the negligence claim did not arise out of the contract because the contract did not involve Blair's connecting the drain line, and the negligence occurred during a separate visit after the contract was completed. In its Reply Brief, Dolphin also asserts that attorney's fees should be awarded because the negligence claim is a compulsory counterclaim.¹

¹ Because the record does not indicate that this issue was raised below and there was no transcript of the hearing on attorney's fees, the Court cannot address this issue. See Kass Shuler, P.A. v. Barchard, 120 So. 3d 165, 168 (Fla. 2d DCA 2013) (holding that when an appellant "provided neither transcripts of the hearings on attorney's fees nor a settled and approved statement of the evidence . . . , [u]nder clearly established law, the circuit court was obliged to affirm the county court's judgment").

Standard of Review

"[T]he award of attorney's fees is a matter committed to sound judicial discretion which will not be disturbed on appeal, absent a showing of clear abuse of discretion." DiStefano Const., Inc. v. Fid. & Deposit Co. of Maryland, 597 So. 2d 248, 250 (Fla. 1992) (citations omitted). However, the issue "of whether multiple claims within a lawsuit are separate and distinct is a matter of law to be reviewed de novo." Anglia Jacs & Co. v. Dubin, 830 So.2d 169, 171 (Fla. 4th DCA 2002) (citation omitted).

Analysis

Florida Statutes section 57.105(7) states that:

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 . . . with respect to the contract.

Section 57.105(7) provides reciprocity of attorney's fees in contract cases and "is designed to even the playing field, not expand it beyond the terms of the agreement." Florida Hurricane Prot. & Awning, Inc. v. Pastina, 43 So. 3d 893, 895 (Fla. 4th DCA 2010) (citations omitted). "Because statutes awarding attorney's fees are in derogation of the common law rule requiring each party to pay its own attorney's fees, they are to be strictly construed." Saltzman v. Hadlock, 112 So. 3d 772, 774 (Fla. 5th DCA 2013).

Dolphin cites Caufield v. Cantele for the proposition that because the negligence arose out of the contract, it is "inextricably intertwined" with the contract so fees are properly awardable. 837 So. 2d 371, 379 (Fla. 2002). In Caufield, however, the attorney's fee provision in the contract "provided that fees [would] be awarded to the prevailing party as the result of any litigation 'arising out of' the contract." Id. Here, the contract only allows for fees in the event of a collection's action. Blair's cites Pastina and other similar case law for the proposition that one can only receive reciprocity of fees for the same claim for which the drafting party could receive fees; therefore, since Blair's could not receive fees for a negligence action, neither can Dolphin. This is correct statement of the law and Dolphin does not dispute it. However, unlike the case law cited by Blair's, here the action brought by Blair's was a collection action that is entitled to fees under the contract. Accordingly, Dolphin maintains that the trial court should have engaged in a significant issues analysis to determine the prevailing party. However, because the trial court determined that the two claims were separate and distinct, the trial court correctly analyzed the fee awards

independently. See Fielder v. Weinstein Design Group, Inc., 842 So. 2d 879, 880 (Fla. 4th DCA 2003) (holding that because two “claims were distinct, there can be a prevailing party on each claim”).

In the Order Denying the Parties’ Motions for Attorney’s Fees, the trial court held that “[e]ach side recovered on their respective claim,” and that Blair’s and Dolphin’s “two claims were separate and distinct, and, as such, each party’s right to fees must be determined separately.” Thus, the trial court declined to award Dolphin entitlement under section 57.105(7) because it held that Dolphin’s negligence counterclaim was separate and distinct from Blair’s breach of contract claim. “[C]laims are separate and distinct when they could support an independent action and are not simply alternative theories of liability for the same wrong.” Avatar Dev. Corp. v. DePani Constr., Inc., 883 So.2d 344, 346 (Fla. 4th DCA 2004) (citing Folta v. Bolton, 493 So. 2d 440, 442 (Fla. 1986)). Although determining whether the claims are separate and distinct is a question of law to be reviewed de novo, the determination hinges on an issue of fact that was for the trial court to decide; namely, whether connecting the drain line to the air handler was part of the contract.

Witnesses for Blair’s testified that a Blair’s employee inspected the home’s air conditioners as a courtesy separate from the contract and after the contracted work was completed. It was at that time that Blair’s employee “hot-wired” one air conditioner, which had no thermostat and had not been previously running, to test it. During conversation, Blair’s employee explained to one of Dolphin’s employees how to hot wire the air conditioner. Blair’s employee undid the wiring and turned off the air conditioner before he left. Dolphin’s employee later independently hot-wired the air conditioner and left it running all night, causing the damage. However, there was a dispute as to whether the part of the contract requiring Blair’s to “reroute existing drain line for air handler in attic” would have required it to connect the line to the unit. Blair’s alleges that rerouting the drain line only required it to move the line and have the line where it needed to be for when the air conditioners were eventually hooked up. Dolphin argues that even though the contract does not say connect, that is common sense. Both parties agreed that the line not being connected was the reason the water caused damage to the home.

The Final Judgment states in relevant part:

On the evidence presented, the Court finds that Plaintiff performed the services pursuant to the contract and is entitled to recover the balance of payment claimed due (\$1,740). As for the counterclaim, the Court also finds

that Plaintiff was negligent in failing to connect the drain line to the unit, and is responsible for the resulting damage (\$6,191).

The trial court found that Blair's performed the services pursuant to the contract; thus, this Court can infer that the lower court did not consider connection of the drain line to be within the scope of the contract, even though it also found that Blair's was separately negligent for not connecting the line. Ordinarily, determinations of factual issues by a trial court "are not disturbed on appeal." Davidian v. JP Morgan Chase Bank, 178 So. 3d 45, 49 (Fla. 4th DCA 2015). Since the trial court determined that connecting the drain line was not within the scope of the contract, the negligence counterclaim could have been brought separately from the breach of contract action. Accordingly, the trial court properly held that the two claims are separate and distinct.

Conclusion

After a de novo review, this Court concludes that the negligence action was separate and distinct from the breach of contract action. Because no basis existed for the award of attorney's fees for the negligence claim, the trial court did not abuse its discretion in denying an award of attorney's fees to Dolphin. The Order Denying the Parties' Motions for Attorney's Fees and Order Denying Defendant's Motion for Rehearing of Order Denying Defendant's Motion for Attorney's Fees are affirmed. Dolphin's Motion for Appellate Attorney's Fees is denied.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this
5th day of May, 2017.

Original Order entered on May 5, 2017, by Circuit Judges Linda R. Allan,
Keith Meyer, and Patricia A. Muscarella.

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