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

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

DAVID MILLER and BRANDY MILLER,
Appellants,
v.

HIGHLAND WOODS HOMEOWNERS ASSOCIATION,
Appellee.
_____/

Ref. No.: 17-000036-AP-88B
UCN: 522017AP000036XXXXCI

ORDER AND OPINION

Appellants appeal two orders rendered by the trial court on July 11, 2017; first, the Order Denying Defendants' [Appellants'] Motion to Tax Attorneys' Fees and Costs and second, the Order Granting Plaintiff's [Appellee's] Cross-Motion for Attorneys' Fees and Costs. 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.

Appellants contend they are entitled to attorneys' fees and costs because they are the prevailing party, rather than Appellee. For the reasons set forth below, we affirm in part, reverse in part, and remand the order denying fees and costs, and we dismiss the appeal of the order granting fees and costs since it is not ripe for review.

Facts and Procedural History

On August 25, 2014, Appellee's filed in the trial court a two-count complaint "to foreclose a lien for unpaid assessments due to a homeowners association" that named Appellants, David and Brandy Miller, as defendants. On April 5, 2016, before trial, Appellee voluntarily dismissed the complaint against Appellants. On April 18, 2016, Appellants filed a Motion to Tax Attorneys' Fees and Costs. On April 19, 2016, Appellee filed a Cross-Motion for Attorneys' Fees and Costs. On February 10, 2017, the trial court held a hearing on both motions. Counsel for both parties appeared, one witness for Appellee appeared, and Appellants appeared as defense witnesses. Thereafter, the parties filed supplemental documents and motions, and on July 11, 2017, the trial court rendered the two orders on appeal, after which Appellants filed the instant appeal.

Standard of Review

Generally, a trial court's determination of the prevailing party is reviewed for an abuse of discretion. *Tubbs v. Mechanik Nuccio Hearne & Wester, P.A.*, 125 So. 3d 1034, 1039 (Fla. 2d DCA 2013).

Discussion

Order Denying Defendants' [Appellants'] Motion to Tax Attorneys' Fees and Costs

Attorneys' Fees

When a plaintiff voluntarily dismisses its action, the defendant is generally considered the prevailing party. *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990). "However, the general rule does not apply without exception." *Tubbs v. Mechanik Nuccio Hearne & Wester, P.A.*, 125 So. 3d 1034, 1041 (Fla. 2d DCA 2013). "*Thornber* contemplates that after a voluntary dismissal a trial court must determine *whether* the party requesting fees has prevailed. This language indicates that a defendant is not automatically the prevailing party for the purpose of an attorney's fee statute when a plaintiff takes a voluntary dismissal." *Padow v. Knollwood Club Ass'n, Inc.*, 839 So. 2d 744, 746 (Fla. 4th DCA 2003) (internal citations and quotations omitted) (emphasis in original). "A court may look behind a voluntary dismissal at the facts of the litigation 'to determine whether a party is a "substantially" prevailing party.'" *Tubbs*, 125 So. 3d at 1041. If a plaintiff's voluntary dismissal follows the plaintiff's success on the primary issue in litigation, such as recovering payment of substantially all of the delinquent assessments that it sought from a defendant, then a defendant "cannot be a 'prevailing party'" because it paid a substantial part of the amount sought by the plaintiff. *See Padow*, 839 So. 2d at 746. In that circumstance, "*Padow* teaches that courts must look to the substance of litigation outcomes—not just procedural maneuvers—in determining the issue of which party has prevailed in an action." *Tubbs*, 125 So. 3d at 1041.

Here, the trial court found that Appellants paid a substantial part of the assessments sought by Appellee after the action was filed but before Appellee voluntarily dismissed it. Thus, under *Padow*, Appellants are not considered the prevailing party for purposes of attorney's fees. Appellants argue that the trial court could not properly look at the fact that Appellants paid Appellees. However, *Padow* and *Tubbs* clearly allow the trial court to conduct a limited review of the facts and substance of the litigation in determining the issue of which party has prevailed, even where the plaintiff has voluntarily dismissed the action before a traditional proceeding on the

merits has occurred. Thus, the trial court did not abuse its discretion in denying Appellants' motion for attorneys' fees.

Costs

Pursuant to Florida Rule of Civil Procedure 1.420(d), the court must award costs to the defendant when a plaintiff voluntarily dismisses its action. Fla. R. Civ. P. 1.420(d) ("Costs in any action dismissed under this rule *shall* be assessed and judgment for costs entered in that action, once the action is concluded as to the party seeking taxation of costs.") (emphasis added); *see Tubbs*, 125 So. 3d at 1043 ("We consider the propriety of the award of taxable costs separately from the attorney's fee award. . . . Thus, upon the filing of the [plaintiffs'] voluntary dismissal in the foreclosure case, [defendant] became entitled to an award of its taxable costs.")

Appellant did not raise this argument either below or on appeal, and "[g]enerally, if a claim is not raised in the trial court, it will not be considered on appeal." *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999). However, the appellate court may consider theories for the first time on appeal if fundamental error is present in the order on appeal. *Stevens v. Allegro Leasing, Inc.*, 562 So. 2d 380, 381 (Fla. 4th DCA 1990). Fundamental error "is error which goes to the foundation of the case or goes to the merits of the cause of action." *Id.* Here, failing to award Appellants' costs was fundamental error because the award of costs is non-discretionary and unaffected by the attorney's fees exception discussed above.

Order Granting Plaintiff's [Appellee's] Cross-Motion for Attorneys' Fees and Costs

An order that grants entitlement to fees and costs but does not determine the amount thereof is considered a nonfinal, nonappealable order that is not ripe to be considered on appeal. *See Nye v. HCI Mfg., Inc.*, 901 So. 2d 304, 304 (Fla. 2d DCA 2005) ("[W]e must decline to review fee orders which merely determine entitlement or reserve jurisdiction to make such a determination because they are nonfinal and nonappealable."); *Pinder v. Pinder*, 911 So. 2d 870, 873 (Fla. 2d DCA 2005) ("An order which grants a party's motion for cost but reserves jurisdiction to determine the amount of costs is a non-final, non-appealable order which this court lacks jurisdiction to review.").

Thus, because the Order Granting Plaintiff's [Appellee's] Cross-Motion for Attorneys' Fees and Costs merely grants entitlement to fees and costs and reserves jurisdiction to determine the amount of those fees and costs it is not ripe and we cannot review it. We do, however, trust the trial court will consider this Order and Opinion when making that determination.

Conclusion

Because the trial court did not abuse its discretion in denying Appellants' motion for attorney's fees, but improperly denied Appellants' motion for costs, it is

ORDERED AND ADJUDGED that the Order Denying Defendants' [Appellants'] Motion to Tax Attorneys' Fees and Costs is hereby **AFFIRMED in part and REVERSED AND REMANDED in part,** as discussed more fully above; it is further

ORDERED AND ADJUDGED that the appeal is hereby **DISMISSED** with regard to the Order Granting Plaintiff's [Appellee's] Cross-Motion for Attorneys' Fees and Costs, as it is not ripe for review; and

We reserve jurisdiction on Appellants' Motion for Appellate Attorney's Fees.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this _____ day of _____, 2018.

Original Order entered on March 27, 2018, by Circuit Judges Jack Day, Pamela A.M. Campbell, and Amy M. Williams.

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