2020 WL 2507500
District Court of Appeal of Florida, First District.

DECKS N SUCH MARINE, INC., Appellant,
v.
Thomas O. DAAKE Sr. and Adele Z. Daake, Husband and Wife, and Portfolio Recovery, LLC, Appellees.

No. 1D18-1396
|
May 15, 2020
|
Rehearing Denied July 6, 2020

Synopsis

Background: Contractor brought action against property owner for enforcement and foreclosure of its construction lien on property. General contractor later amended its claim to join junior lienholder. The Circuit Court, 1st Judicial Circuit, Walton County, David W. Green, J., granted junior lienholder's motion for summary judgment and awarded junior lienholder attorney's fees. Contractor appealed.

[Holding:] The District Court of Appeal, M. Kemmerly Thomas, J., held that as a matter of first impression, junior lienholder was not entitled to award of attorney's fees.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion for Attorney's Fees.

West Headnotes (7)

[1] **Appeal and Error** Authorization, eligibility, and entitlement in general; prevailing party

Generally, the District Court of Appeal reviews an order on attorney's fees for an abuse of discretion, but where entitlement to attorney's fees rests on an interpretation of statute, its review is de novo.

[2] **Mechanics' Liens** Fees and Costs

Junior lienholder on property was not entitled to award of attorney's fees in contractor's action to join lien against junior lienholder, where statute governing attorney's fees in construction lien actions unambiguously restricted attorney's fees award to prevailing party in action to enforce lien and junior lienholder was not "prevailing party" by grant of summary judgment and subsequent release from contractor's underlying lien enforcement action. Fla. Stat. Ann. § 713.29.

[3] **Statutes** Plain language; plain, ordinary, common, or literal meaning

When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

[4] **Costs** Effect of statutes

Statutes granting attorney's fees must be strictly construed because there is no right to attorney's fees at common law.

[5] **Costs** Effect of statutes

A statute must expressly provide for the authority to award attorney's fees.

[6] **Mechanics' Liens** Construction of lien laws in general

Construction lien law serves two purposes: (1) it protects suppliers who furnish labor and materials to the property by ensuring that they will receive full payment; and (2) it protects owners by requiring subcontractors to provide notice of possible liens, thereby allowing owners to prevent double payment to both a contractor and subcontractor, material supplier, or laborer, for provision of the same services or material

when the contractor and subcontractor are not in privity.

[7] **Mechanics' Liens** Fees and Costs

The "significant issue test" for determining the prevailing party under attorney fee provision of construction lien statute is applied even when the lienor obtains a judgment against an owner and attorney's fees are not automatically granted to either party. Fla. Stat. Ann. § 713.29.

On appeal from the Circuit Court for Walton County. David W. Green, Judge.

Attorneys and Law Firms

Robert A. Emmanuel, Cecily M. Parker, and Michael S. Thomas of Emmanuel Sheppard & Condon, Pensacola, for Appellant.

John R. Dowd Jr. of the Dowd Law Firm, Fort Walton Beach, for Appellees.

Opinion

M.K. Thomas, J.

***1** In this appeal, Decks N Such Marine, Inc. (DNS) challenges the trial court's award of attorney's fees under section 713.29, Florida Statutes (2018), to Bank of America (BOA), a junior interest holder, in an action brought to enforce a construction lien. DNS argues that the trial court improperly broadened the scope of the statute in awarding attorney's fees to BOA, an entity not the property owner or contractor. We agree and reverse.

Facts

This is one of multiple legal actions resulting from a home renovation project gone awry. After making substantial improvements to the home of Thomas and Adele Daake, DNS did not receive full payment and in 2006 filed an action for enforcement and foreclosure of its construction lien on the Daake's property. DNS did not file a notice of *lis pendens* until March 2013, seven years after the Daakes executed and delivered a mortgage on the property to BOA, which was recorded in the official records. In 2013, DNS amended its lien enforcement claim to include BOA because of its interest in the property. However, BOA sought and was granted summary judgment under section 713.22, Florida Statutes (2018), because of DNS's failure to timely record the notice of *lis pendens*. BOA then moved for an award of attorney's fees pursuant to section 713.29. [1]

At the attorney's fee hearing, DNS argued that section 713.29 could not serve as a basis for BOA's request because DNS did not attempt to "enforce a lien" against BOA, a junior interest holder, but only against the Daakes, the property owners. DNS further claimed that the statute does not contemplate attorney's fees for or against a junior interest holder but only as between the contractor and the property owner. In response, BOA argued that the statute provided attorney's fees to a "prevailing party" in a construction lien action, and it met the statutory qualifications. The trial court ultimately determined that the action was one to "foreclose against [BOA's] interest in the property" and that the verbiage of section 713.29 did not limit the available remedy to only those "actions against owners." The trial court awarded attorney's fees to BOA, finding it was a "prevailing party" as contemplated by section 713.29. [2] DNS appeals the award.

Legal Analysis

[1] Generally, this Court reviews an order on attorney's fees for an abuse of discretion, but where entitlement to attorney's fees, such as here, rests on an interpretation of statute, this Court's review is de novo. *See Rawson v. Gulf Coast Prop. Mgmt. Co.*, 261 So. 3d 721, 722 (Fla. 1st DCA 2018); *Jennings v. Habana Health Care Ctr.*, 183 So. 3d 1131, 1132 (Fla. 1st DCA 2015); *Raza v. Deutsche Bank Nat'l Tr. Co.*, 100 So. 3d 121, 123 (Fla. 2d DCA 2012).

***2** This case presents an issue of first impression in Florida—whether a junior interest holder [3] named in a construction lien enforcement and foreclosure action may recover attorney's fees under section 713.29. Section 713.29 provides as follows:

> In any action brought to enforce a lien or to enforce a claim against a bond under this part, the prevailing party is entitled to recover a reasonable fee for the services of her or his attorney for trial and appeal or for arbitration, in an amount to be determined by the court, which fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions.

This section is directed exclusively to actions brought to enforce a lien or to enforce a claim against a bond brought under chapter 713, the Construction Lien Law. [4]

DNS argues that the term "prevailing party" as referenced in section 713.29 requires strict interpretation and should not be read as encompassing junior interest holders. Thus, the trial court's broad reading of section 713.29 is inconsistent with cases that have tightly limited which parties may seek fees under this statutory section. Attorney's fees under section 713.29 are strictly limited to the portion of the action in which the enforcement of construction lien is litigated and limited to the parties litigating the construction lien. Furthermore, DNS emphasizes Florida's longstanding principle that statutes granting attorney's fees are to be narrowly construed. However, we are not persuaded by its argument that section 713.29 is ambiguous and that resort to canons of statutory interpretation is necessary to resolve this case.

Conversely, BOA argues that where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense. *See State v. Hagan*, 387 So. 2d 943, 945 (Fla. 1980). Thus, as BOA acquired substantially the relief it sought in the action, it is a "prevailing party" under the statute.

[2] **[3]** The Legislature understands the meaning of words and where words in a statute have a well-defined meaning, there is no place for construction, and the popular or generally accepted meaning must be taken. *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693, 694–95 (1918). "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Clines v. State,* 912 So. 2d 550, 555–56 (Fla. 2005) (quoting *A.R. Douglass, Inc. v. McRainey,* 102 Fla. 1141, 137 So. 157, 159 (1931)). We find the language of section 713.29 to be clear. Accordingly, we need not engage the rules of statutory construction to determine legislative intent. *Polite v. State*, 973 So. 2d 1107, 1111 (Fla. 2007). The statutory language —"[i]n any action *brought to enforce a lien ... the* prevailing party is entitled to recover *a* reasonable fee"—unambiguously restricts a fee award to the prevailing party in the action to enforce the lien. *See* § 713.29, Fla. Stat. (emphasis added).

***3** BOA's argument that "prevailing parties" are entitled to attorney's fees under section 713.29 assumes the statute implicitly allows multiple attorney's fee awards and that the phrase "in any action to enforce a lien" means any and all litigated matters arising from the underlying lien enforcement action. We reject this argument as it fails to apply the statutory language as written. Initially, the argument improperly incorporates a consideration of "prevailing parties." This inflectional affix substitution by BOA results in an impermissible rework of the statute. The plain and unambiguous language of section 713.29 references "*the* prevailing *party*" as entitled to recover a reasonable fee for the services provided. The language of the statute does not contemplate "prevailing parties" or "a prevailing party." The statute, through its basic terms, limits an award of attorney's fees to "*the*" party that prevails in the action to enforce the lien, if at the conclusion of the substantive litigation, there is a "prevailing party." The Florida Supreme Court has clarified that "a trial court has the discretion to make a determination that *neither* party has prevailed on the significant issues in litigation ..." and no attorney's fee is due under section 713.29. *Trytek v. Gale Indus.*, 3 So. 3d 1194, 1203 (Fla. 2009) (emphasis added).

[4] **[5]** Attorney's fees under section 713.29 have historically been awarded to the prevailing party in the underlying lien enforcement claim. *See Snaidman v. Harrell*, 432 So. 2d 809, 811 (Fla. 1st DCA 1983) (noting that section 713.29 provides only for fees incident to the foreclosure action); *Allied Glass Corp. v. The Austin Co.,* 453

So. 2d 195, 196 (Fla. 3d DCA 1984) (denying an attorney's fees award under 713.29 finding the party seeking fees did not participate in an action to "enforce a lien" as recognized under Construction Lien Law). Statutes granting attorney's fees must be strictly construed because there is no right to attorney's fees at common law. *Trytek*, 3 So. 3d at 1198–99. A statute must expressly provide for the authority to award attorney's fees. *Knealing v. Puleo*, 675 So. 2d 593, 596 (Fla. 1996). Adhering to these strict construction principles, courts have been reluctant to expand section 713.29 to parties and disputes not specifically enumerated in the statute. *See CDI Contractors, LLC v. Allbrite Elec. Contractors, Inc.*, 836 So. 2d 1031, 1033 (Fla. 5th DCA 2002) (requiring that fees be awarded to landowner and contractor for litigating only lien claims); *Metro-Centre Assocs. v. Envtl. Eng'rs, Inc.*, 522 So. 2d 967, 969 (Fla. 3d DCA 1988) (finding landowner entitled to attorney's fees only incurred in defeating contractor's lien foreclosure claim); *Allied*, 453 So. 2d at 196 (disallowing attorney's fees to third-party defendant building designer that was brought into the suit because of a defense to an action for breach of contract, negligence, and breach of warranty). [5]

Junior lienholders are addressed in sections 713.22 (providing that a lien that has been continued by the filing of an action is not enforceable against creditors or subsequent purchasers for valuable consideration without notice unless a *lis pendens* is recorded) and 713.26 (establishing that a person whose interest is sold has the right of redemption under the statute and follows the same procedure as redemption of real property from sales under mortgages) of the Construction Lien Law. In these statutes, the Legislature expressed its intent that the same process and protections of junior interest holders used in other types of foreclosure actions be utilized in a construction lien action. Practically, junior interest holders are a narrow class of mortgagees whose interest in the underlying property is recorded after the foreclosing contractor's claim of lien is filed. This class is routinely joined to the construction lien enforcement action under section 713.26 to allow the construction lienor to foreclose out the junior lienholder's interest in the property encumbered by the construction lien.

***4** **[6]** **[7]** Construction lien law serves two purposes: 1) it protects suppliers who furnish labor and materials to the property by ensuring that they will receive full payment; and 2) it protects owners by "requiring subcontractors to provide notice of possible liens, thereby allowing owners to prevent double payment to both a contractor and subcontractor, material supplier, or laborer, for provision of the same services or material when the contractor and subcontractor are not in privity." *Trytek*, 3 So. 3d at 1199 (quoting *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623, 626 (Fla. 1995)). Using equitable principles, the Florida Supreme Court has found that the policy underlying section 713.29 is to encourage settlement of disputes before litigation and acceptance of good faith offers for resolution. *Id*. at 1200 (discussing *C.U. Assocs., Inc. v. R. B. Grove, Inc.*, 472 So. 2d 1177 (Fla. 1985), and *Prosperi v. Code, Inc.*, 626 So. 2d 1360 (Fla. 1993)). Recognizing these policies, the court determined that between an owner and contractor, the prevailing party, if any, should be the party that "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id*. (citing *Prosperi*, 626 So. 2d 1360, and *Moritz v. Hoyt Enters.*, 604 So. 2d 807 (Fla. 1992)) (alteration in original). This "significant issue" test is applied even when the lienor obtains a judgment against an owner and attorney's fees are not automatically granted to either party. *Id*. at 1196.

DNS argues and we agree that including junior interest holders as entitled to attorney's fees in an action to enforce a lien would upset the equitable balance mandated by the Florida Supreme Court in naming "the prevailing party" under section 713.29. Application of the "significant issue" test laid out in *Prosperi* and *Trytek* would ill fit the relationship of a junior interest holder and a contractor. For example, at the conclusion of the action, the contractor or supplier who initiates the lien enforcement and joins a junior interest holder, as required by sections 713.22 and 713.26, either has priority over the junior interest holder, or it does not. Declaring junior interest holders as "the prevailing party" under such circumstances eviscerates a "significant issue" analysis and adopts an automatic liability assignment disapproved of in *Trytek*. 3 So. 3d at 1203–04.

An expansion of section 713.29 to include fee awards to junior interest holders would establish a statutory scheme and a balance of interests largely out of step with the process governing mortgage and other interest foreclosures, a process the Legislature referenced in section 713.26. Interpreting section 713.29 as allowing multiple attorney's fee awards to multiple parties in any litigation resulting from the lien enforcement would create liability for attorney's fees from both the construction lienor and the junior interest holder.

As such, if a prevailing construction lienor could recoup its attorney's fees against a junior interest holder, the lienholder would likely be required to pay attorney's fees in order to exercise its redemption rights under section 713.26. The potential for additional attorney's fee exposure to junior interest holders would dissuade construction lienors, like DNS, from joining the junior interest holder to the foreclosure action in contravention of the purposes of section 713.26.

Here, in the underlying lien enforcement action, DNS joined BOA as a junior lienholder due to its recorded mortgage on the subject property. DNS was not enforcing the construction lien against BOA but joining it to the underlying action to ensure determination of superiority of liens or security interests upon a foreclosure sale. Through summary judgment, BOA was subsequently released from the underlying lien enforcement action between DNS and the Daakes due to DNS's untimely filing of a *lis pendens*. Accordingly, BOA is not "the prevailing party" in the action to enforce the lien.

Conclusion

We apply section 713.29, per its plain and unambiguous language, and find that junior interest holders are not entitled to attorney's fees as the prevailing party in a lien enforcement action. Accordingly, the award of attorney's fees to BOA is reversed.

***5** REVERSED.

Ray, C.J., and Lewis, J., concur.

All Citations

--- So.3d ----, 2020 WL 2507500, 45 Fla. L. Weekly D1168

Footnotes

1 Portfolio Recovery, LLC was substituted as a party in place of BOA due to it being an assignee of the final judgment. For purposes of the appeal, BOA is referenced but with recognition of Portfolio Recovery, LLC's status as assignee.

2 The parties later litigated the amount of attorney's fees due, and the trial court entered a final judgment awarding $90,458.00 to BOA.

3 For purposes of this opinion, a "junior interest holder" refers to a party in BOA's position in this litigation.

4 As this case does not involve a bond action, reference is made only to lien enforcement.

5 Courts have similarly rejected expansion of section 713.29 and limited its application to actions brought to enforce a lien or to enforce a claim against a bond under chapter 713, and not if a payment bond was a common law bond. *See Continental Cas. Co. v. A.W. Baylor Versapanel-Plastering, Inc.*, 97 So. 3d 937, 941 (Fla. 5th DCA 2012).