IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CHARLES S. HAINES, ET. AL,

Appellants,

v.

Case Nos. 5D13-4417 and 5D14-1619

BLACK DIAMOND PROPERTIES, INC., ET. AL.,

Appellees.
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Opinion filed October 23, 2015

Appeal from the Circuit Court
for Citrus County,
Patricia V. Thomas, Judge.

Steve A. Rothenburg, Ocala, and John C. Bell, Jr., of Bell & Brigham, Augusta Georgia, for Appellants.

Jack J. Aiello and Edward A. Marod of Gunster, Yoakley & Stewart, P.A., West Palm Beach, for Appellees.

EDWARDS, J.

Charles S. Haines, Kathy Haines, Richard Conboy, Jackson Randolph, Larry Laukka, Angelo Masut, Brenda Masut, and Tom Howell ("Plaintiffs[1]") appeal the trial court's orders awarding attorney's fees and costs to Defendants, Black Diamond

[1] It appears that the parties considered Charles S. and Kathy Haines to be a single plaintiff and likewise considered Angelo and Brenda Masut to be a single plaintiff. They will be referred to as the Haines and Masuts.

Properties, Inc., Black Diamond Realty, Inc. ("Black Diamond Defendants"), and Stanley Olsen ("Olsen"), as prevailing parties. We reverse those awards because Defendants' motions were not timely filed. The trial court erred in ordering the return of a cash supersedeas bond to Defendants because all Plaintiffs obtained money judgments, which were affirmed on appeal, against Defendant Olsen. Under the circumstances, we need not rule on the other issues raised by Plaintiffs.

BACKGROUND MATTERS AND PROCEEDINGS

This case has been before this court repeatedly.[2] A brief summary of the claims and history will assist in understanding our ruling.[3]

In 2003, several of the Plaintiffs filed suit against the Black Diamond Defendants alleging false and misleading advertising in violation of section 817.41, Florida Statutes (2003), and for deceptive and unfair trade practices ("FDUTPA") pursuant to chapter 501, Florida Statutes (2003), all of which concerned the sale of certain golf memberships purchased by Plaintiffs. Both statutory actions permit an award of attorney's fees and costs to prevailing parties. In the early stages of the proceedings, the case was being pursued and had been certified as a class action. Defendants appealed and this court reversed the class certification because we found that significant individual issues predominated over common issues, given that each plaintiff would have to testify to establish individual contracts, misrepresentations and damages. *Black Diamond Props.,*

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[2] *Black Diamond Props., Inc. v. Haines*, 90 So. 3d 851 (Fla. 5th DCA 2012); *Black Diamond Props., Inc. v. Haines*, 69 So. 3d 1090 (Fla. 5th DCA 2011); *Black Diamond Props., Inc. v. Haines*, 36 So. 3d 819 (Fla. 5th DCA 2010); *Black Diamond Prop. Owners v. Black Diamond Props., Inc.,* 956 So. 2d 1199 (Fla. 5th DCA 2007); *Black Diamond Props., Inc. v. Haines*, 940 So. 2d 1176 (Fla. 5th DCA 2006).

[3] A detailed discussion of the claims and defenses is set forth in *Black Diamond Props., Inc. v. Haines*, 69 So. 3d 1090 (Fla. 5th DCA 2011).

Inc. 940 So. 2d at 1178-79. Furthermore, "given the varied circumstances and span of time over which the transactions occurred, defenses applicable to some plaintiffs will not be applicable to others." *Id.* at 1179.

By mid-2004, the remaining Plaintiffs had joined the lawsuit. At the end of 2007, Plaintiffs added the individual defendant, Olsen, to the suit and amended their complaint to include common law claims sounding in constructive fraud and breach of fiduciary duty against Defendants.

On December 7, 2009, shortly before trial, the trial court granted Defendants' motion for summary judgment against Plaintiffs Laukka and Randolph with regard to the misleading advertising claim asserted under section 817.41. Defendants moved for attorney's fees and costs against Laukka and Randolph pursuant to section 817.41. Defendants' motion was denied by the trial court's February 5, 2010 order.

The case proceeded to trial in December 2009. Because each Plaintiff's claims were distinct, a separate verdict form was used for each individual Plaintiff and for each of the married Plaintiffs, i.e., the Masuts and the Haines. The jury returned verdicts in favor of Plaintiffs Masuts, Haines, Conboy, and Howell on the misleading advertisement claims under section 817.41, against all Defendants. Additionally, the jury returned verdicts in favor of all Plaintiffs against Defendant Olsen, only, for breach of fiduciary duties and constructive fraud. Following trial, all Plaintiffs, except for Laukka and Randolph, moved for and were awarded attorney's fees as prevailing parties under section 817.41(6).

The jury also returned verdicts in favor of Defendants and against Plaintiffs regarding the FDUTPA claims. Defendants moved for attorney's fees and costs in the

trial court pursuant to section 501.2105 as prevailing parties on the FDUTPA claims, which motion was denied by the trial court's order dated February 5, 2010.

MATTERS NOT APPEALED

Neither Laukka nor Randolph appealed the December 7, 2009 summary judgment ruling in favor of Defendants, dismissing Laukka and Randolph's section 817.41 claims. Defendants did not appeal the lower court's post-trial order dated February 5, 2010, denying fees and costs against Laukka and Randolph. Plaintiffs did not appeal from the adverse FDUTPA verdicts and judgment; thus, Defendants were confirmed as the prevailing parties, as defined by FDUTPA, following trial. Defendants did not appeal the lower court's post-trial order denying their claim for FDUTPA fees and costs.

DEFENDANTS' SUCCESSFUL POST-TRIAL APPEALS

In *Black Diamond Props., Inc. v. Haines,* 69 So. 3d 1090 (Fla. 5th DCA 2011), Defendants appealed the adverse judgment entered against them on the section 817.41 misleading advertising claims in favor of Plaintiffs, other than Laukka and Randolph. In that appeal, we reversed the section 817.41 judgments in favor of Plaintiffs, the Masuts, Conboy, and Howell because the statute of limitations expired before they filed suit. 69 So. 3d at 1093-94. This court found that the Haines' claims were not time-barred; however, because there was an error in one jury instruction, the case was remanded for further proceedings on the merits of the Haines' section 817.41 claims. *Id.* at 1093-94. We affirmed all other aspects of the final judgment, which included the awards in favor of Plaintiffs against Olsen. The mandate from that appeal was dated October 12, 2011.

In a separate appeal, Defendants succeeded in overturning the trial court's award of fees in favor of Plaintiffs Masuts, Haines, Conboy, and Howell because those Plaintiffs

were no longer the prevailing parties under section 817.41. *Black Diamond Props., Inc. v. Haines,* 90 So. 3d 851, 851 (Fla. 5th DCA 2012). The mandate from that appeal was dated July 19, 2012.

POST-APPEAL PROCEEDING RE: ATTORNEY'S FEES

Long after the mandates issued from this court on both post-trial appeals, Defendants, on December 10, 2012, filed motions for attorney's fees and costs pursuant to both section 817.41 and FDUTPA. In an order dated April 5, 2013 the trial court ruled that the Black Diamond Defendants were prevailing parties, and were therefore entitled to recover fees under both section 817.41 and FDUTPA from all Plaintiffs. The trial court found Defendant Olsen to be the prevailing party and entitled to recover attorney's fees from Plaintiffs with regard to the section 817.41 claims prosecuted against him. An evidentiary hearing was held, and in an order dated November 25, 2013, the trial court awarded Defendants attorney's fees totaling $1,187,453.17 and costs totaling $292,468.41. The judgment allocated fees and costs on a joint and several basis in favor of the various Defendants and against the various Plaintiffs based upon the length of time each party had been involved in the litigation and related appeals. Plaintiffs brought this timely appeal regarding the orders of entitlement and awarding of attorney's fees and costs.[4]

PROCEDURE FOR SEEKING ATTORNEY'S FEES

The procedure for seeking attorney's fees and costs as a prevailing party is set forth in Florida Rule of Civil Procedure 1.525, which requires service of a motion for fees

[4] William Bristol was a plaintiff in the action. He voluntarily dismissed his claims, and paid Defendants the court-ordered $750 attorney's fees awarded against him. Bristol is not involved in the appeal or any other aspect of the case.

and costs within thirty days of the judgment, notice or order entitling the moving party to fees and costs. *See Siboni v. Allen*, 52 So. 3d 779, 780-81 (Fla. 5th DCA 2010). An order or judgment that entitles a party to attorney's fees triggers the thirty-day time limit of rule 1.525 for serving a motion seeking attorney's fees. *Cardillo v. Qualsure Ins. Corp.*, 974 So. 2d 1174, 1175 (Fla. 4th DCA 2008). "The district courts have taken a strict view of this rule." *Hart v. City of Groveland*, 919 So. 2d 665, 668 (Fla. 5th DCA 2006). The mandate of a court of appeal is a final judgment with regard to adjudication of the parties' rights and obligations. *O.P. Corp. v. Vill. of N. Palm Beach*, 302 So. 2d 130, 131 (Fla. 1974).

The thirty-day time limit set forth in rule 1.525 for serving a motion seeking attorney's fees and costs is "a bright-line time requirement." *Saia Motor Freight Line, Inc. v. Reid,* 930 So. 2d 598, 600 (Fla. 2006). Failure to serve a motion for attorney's fees on or before this thirty day deadline terminates the right to seek or recover fees. *Parrot Cove Marina, LLC. v. Duncan Seawall Dock & Boatlift, Inc.,* 978 So. 2d 811, 815 (Fla. 2d DCA 2008).

UNTIMELY FDUTPA MOTIONS FOR ATTORNEY'S FEES AND COSTS

Under FDUTPA, "the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, may receive his or her reasonable attorney's fees and costs from the nonprevailing party." § 501.2105(1), Fla. Stat. (2011). Here, Defendants obtained judgment in their favor against Plaintiffs in the trial court on the FDUTPA claims; there were no appeals of those judgments. "We find and hold that an appellate court's order becomes final upon issuance of a mandate . . . ." *Thibodeau v. Sarasota Mem'l Hosp.*, 449 So. 2d 297, 298 (Fla. 1st DCA 1984) (citing *O.P. Corp.,* 302 So. 2d at 131;

Robbins v. Pfeiffer, 407 So. 2d 1016, 1017 (Fla. 5th DCA 1982)). Thus, the judgment, notice, or order confirming Defendants to be prevailing parties entitled to seek attorney's fees and costs pursuant to FDUTPA was, at the latest, this court's October 12, 2011 mandate. Defendants' motion for attorney's fees under FDUTPA was served on December 10, 2012, far more than thirty days following issuance of the mandate, and is therefore untimely under rule 1.525. For that reason, we reverse the order awarding attorney's fees and costs to Defendants pursuant to FDUTPA and instruct the trial court to enter an order vacating that order.

UNTIMELY SECTION 817.41 ATTORNEY'S FEES AND COSTS MOTION

As for the misleading advertising claims brought against the Black Diamond Defendants under section 817.41, "[a]ny person prevailing in a civil action for violation of this section shall be awarded costs, including reasonable attorney's fees." § 817.41(6), Fla. Stat. (2011). The judgment, notice, or order that adjudicated Defendants to be the prevailing parties against Plaintiffs Conboy, the Masuts, and Howell was also this court's October 12, 2011 mandate. If Defendants wanted to recover their attorney's fees and costs pursuant to section 817.41, they were obligated by rule 1.525 to file their motion within thirty days following issuance of the mandate. However, the Defendants' section 817.41 motion for attorney's fees and costs was not filed until more than a year later, on November 27, 2012, making it untimely. Accordingly, we reverse and instruct the trial court to vacate the order against Conboy, the Masuts, and Howell, awarding Defendants their fees and costs under section 817.41.

Next, we address the award of attorney's fees and costs in favor of Defendants against Plaintiffs Laukka and Randolph. The Defendants' motion for summary judgment

seeking dismissal of Laukka and Randolph's section 817.41 claims was granted in December 2009; neither of those Plaintiffs appealed the ruling. The Defendants' post-trial section 817.41 motion for attorney's fees and costs against Laukka and Randolph was denied by the trial court's February 5, 2010 order. An order that denies a post-judgment motion for fees is immediately appealable and failure to appeal within thirty days waives the right to seek review. *Clearwater Fed. Sav. & Loan Ass'n v. Sampson*, 336 So. 2d 78, 79 (Fla. 1976); *see also Reliable Reprographics Blueprint & Supply, Inc. v. Florida Mango Office Park, Inc.*, 645 So. 2d 1040, 1042 (Fla. 4th DCA 1994) (dismissing an appeal of an order denying attorney fees where notice of appeal was filed more than thirty days after order that denied the motion was rendered.); *Black Diamond Props, Inc.*, 36 So. 3d at 821 (holding Black Diamond became prevailing party entitled to seek attorney's fees and costs upon conclusion of claims by one plaintiff's dismissal, despite the pendency of other section 817.41 claims). Because it was not appealed when it should have been, the original denial of Defendants' section 817.41 motion for attorney's fees and costs as to Laukka and Randolph was binding, final, and could not be relitigated by Defendants via the filing of a renewed motion in November 2012. *Valsecchi v. Proprietors Ins. Co.*, 502 So. 2d 1310, 1311 (Fla. 3d DCA 1987). Therefore, the trial court had no jurisdiction to consider Defendants' post-appeal motion for attorney's fees against Laukka and Randolph. *Lake Cty. v. Ronald E. Fox*, *P.A.*, 705 So. 2d 702 (Fla. 5th DCA 1998).

Additionally, Laukka and Randolph prevailed at trial and on appeal with no remand ordered, regarding their claims for actual damages against Defendant Olsen. *Black Diamond Props., Inc.*, 69 So. 3d at 1095 n.1. Since we have already ruled, that Defendants' motion for fees and costs under FDUTPA was untimely, there is no basis for

any award of fees and costs against Laukka and Randolph. Accordingly, we reverse and order the trial court to vacate the order awarding fees and costs in favor of any Defendant against Laukka and Randolph.

The Haines' section 817.41 claims were ordered to be retried by this court due to the use of an erroneous jury instruction. Instead of going forward with a trial, Defendants moved for summary judgment against the Haines. The trial court granted Defendants' motion for summary judgment; however, no judgment has been entered against the Haines or in favor of Defendants regarding the Haines section 817.41 claims; thus, attorney's fees are not recoverable against them at this time. Based upon our earlier ruling, Defendants' motion for fees and costs under FDUTPA was untimely. There is no basis for any award of fees and costs, at this time, against the Haines. Accordingly, we reverse and order the trial court to vacate the order awarding fees and costs in favor of any Defendant against the Haines.

JOINT AND SEVERAL AWARD OF FEES AND COSTS

Plaintiffs assert that the trial court erred by awarding fees and costs jointly and severally in favor of Defendants and against Plaintiffs. Plaintiffs accurately point out that no Florida cases analyze and approve the imposition of joint liability for fees and costs against plaintiffs asserting their separate claims in one action. Indeed in an earlier appeal involving this case, we stated that Defendants' "entitlement to recover fees and costs would generally be limited to those fees and costs directly and exclusively related to each claim" asserted by Bristol, a plaintiff who filed a voluntary dismissal, and "would exclude any fees or costs that would have been incurred even if Bristol had not been one of the named plaintiffs." *Black Diamond Props., Inc.*, 36 So. 3d at 822. We need not decide

this issue because we have vacated all awards of attorney's fees and costs in this case. However, we offer the following for guidance as it seems likely to be an issue for the trial court's consideration on remand. In cases where the prevailing parties may be entitled to fees regarding certain claims, but not for others, the party seeking fees has the burden of proving its entitlement. *Franzen v. Lacuna Golf Ltd. P'ship,* 717 So. 2d 1090, 1093 (Fla. 4th DCA 1998). "The trial court must assess each claim individually." *Id.* If the claims and legal services provided are so intertwined that it is impractical to separate the time spent for each claim, allowance of fees for all such intertwined services is appropriate. *Id.* Thus, it was appropriate for the trial court to apportion those fees and costs incurred by Defendants in litigating issues common to all Plaintiffs or Defendants based upon the corresponding time period or segment that each party was involved in the litigation.

Under that same reasoning, it would be appropriate to apportion the award of fees by ordering each Plaintiff to pay a proportionate amount of the fees and costs incurred in the common defense of all the claims, along with those directly and exclusively related to each Plaintiff's claim, rather than imposing liability for all attorney's fees and costs incurred during a segment of the case jointly and severally against each Plaintiff participating in the case during the time period in question. Defendants argue the propriety of the joint and several nature of the award by asserting that all of the Plaintiffs' claims were identical. However, Defendants successfully argued and obtained a ruling in their favor in an earlier appeal in this case, that the individual issues of each Plaintiff's claim predominated over common issues. *Black Diamond Props., Inc.*, 940 So. 2d at 1178-79. Defendants are

judicially estopped from changing positions on that point. *Brown & Brown, Inc. v. Sch. Bd. of Hamilton Cty.*, 97 So. 3d 918, 920 (Fla. 5th DCA 2012).

Defendants' additional rationale for approving joint and several liability for fees and costs is that any Plaintiff who paid more than its fair share of fees and costs could seek contribution from other Plaintiffs; however, that argument is flawed. Contribution is exclusively a statutory remedy provided in section 768.31, Florida Statutes (2014); *Horowitz v. Laske,* 855 So. 2d 169, 173 (Fla. 5th DCA 2003). Contribution under section 768.31(2) is available only between joint tortfeasors. Plaintiffs are not tortfeasors at all, nor is any aspect of their claims or relationships "joint."

SUPERSEDEAS BOND DISCHARGED IN ERROR

The Plaintiffs obtained money judgments against Olsen, and those judgments were affirmed on appeal. *Black Diamond Props. Inc.*, 69 So. 3d at 1095 n.1. Defendants deposited $461,129.77 with the clerk of the court to act as a supersedeas bond and to remove the judicial lien from real property they owned. Plaintiffs were entitled to execute on those judgments or proceed against the supersedeas bond immediately after this court's mandate issued affirming those judgments. *Superior Garlic Int'l, Inc. v. E & A Produce Corp.*, 934 So. 2d 484, 485 (Fla. 3d DCA 2004). Following issuance of this court's mandate from that appeal, Plaintiffs filed a motion seeking to have the court disburse the money deposited as a supersedeas bond to them; however, the trial court denied that motion. The trial court granted Defendants' motion to enter net judgments which set off the attorney's fees and costs awards in favor of Defendants against the money judgments previously obtained against Olsen by Plaintiffs. Later, the trial court granted Defendants' motion seeking return of the money deposited as a supersedeas

bond, and ordered the clerk to return the $461,129.77 to Defendants. The trial court lacked jurisdiction to effectively modify Plaintiffs' judgments by denying their immediate right to payment from the supersedeas bond, by entering net judgments which took into account the attorney's fees awards, and by returning the supersedeas bond money to Defendants. We reverse those three orders and direct the trial court to order Defendants to immediately deposit $461,129.77 with the clerk of the court. We further direct the trial court to order the clerk to pay each Plaintiff from the re-deposited funds, according to each Plaintiff's judgment including pre- and post-judgment interest.

ENTRY OF SUMMARY JUDGMENT ON REMAND

As discussed earlier, the Defendants motion for summary judgment was granted in their favor on the Haines' section 817.41 claims. However, the trial court did not enter a final summary judgment. As the trial court failed to enter a final judgment, the order granting summary judgment was not immediately appealable. We have already relinquished jurisdiction to the lower court twice before for the purpose of entering final summary judgment against the Haines, but it has failed to do so. On remand, the trial court shall promptly enter the final summary judgment against the Haines so that they may seek appellate review, if they wish.

Our rulings in the case have made consideration of the other issues raised by Plaintiffs unnecessary.

REVERSED AND REMANDED WITH INSTRUCTIONS.

ORFINGER and COHEN, JJ., concur.