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

TANIA M. TORRUELLA AND LUXURY LIVING DEVELOPERS CORPORATION,

Appellants,

v. Case No. 5D19-3298

NATIONSTAR MORTGAGE, LLC AND CITY OF ORLANDO,

Appellees.

_____/

Opinion filed December 4, 2020

Appeal from the Circuit Court
for Orange County,
Kevin B. Weiss, Judge.

Adam H. Sudbury, of Apellie Legal, Orlando, for Appellants.

Nancy M. Wallace, of Akerman LLP, Tallahassee, and William P. Heller, of Akerman LLP, Fort Lauderdale, and Eric M. Levine, of Akerman LLP, West Palm Beach, for Appellee, Nationstar Mortgage, LLC.

No Appearance for Appellee, City of Orlando.

WALLIS, J.

Tania Torruella appeals the trial court's final order denying her motion to tax attorney's fees and costs against Nationstar Mortgage, LLC. Because we conclude that the trial court properly denied Ms. Torruella's motion, we affirm.

In 2009, an action was brought to foreclose a mortgage executed by Ms. Torruella on real property now owned by Luxury Living Developers Corporation. Ms. Torruella is the president of Luxury Living. Following unsuccessful efforts to serve process on either Ms. Torruella or Luxury Living between 2009 and 2019, the trial court dismissed the foreclosure action for lack of personal jurisdiction. Ms. Torruella and Luxury Living then sought attorney's fees and costs pursuant to the note, mortgage, and section 57.105(7), Florida Statutes (2018). After a hearing, the trial court denied Ms. Torruella and Luxury Living's motion.

On appeal, Ms. Torruella[1] contends that the trial court's denial was improper because while the trial court may not have had personal jurisdiction in the foreclosure action, a post-judgment attorney's fee claim is a separate collateral claim that is independent of the main claims and defenses considered in the underlying action. Hence, she argues that the trial court erred in determining that she was estopped or that it lacked jurisdiction to adjudicate the post-judgment claim to recover attorney's fees and costs after the underlying action was dismissed for failure to effectuate service of process. We disagree.

[1] While Luxury Living filed a notice of appeal, it properly concedes that it is not entitled to a fee award because it was not a party to the note and mortgage. See PNC Bank, N.A. v. MDTR, LLC, 243 So. 3d 456, 458 (Fla. 5th DCA 2018) (reiterating that stranger to contract cannot recover attorney's fees based on contract).

Florida follows the American Rule, which provides that litigants generally are not entitled to an award of attorney's fees for prevailing in litigation unless provided by statute or contact. See, e.g., In re Martinez, 416 F.3d 1286, 1288 (11th Cir. 2005); Johnson v. Omega Ins. Co., 200 So. 3d 1207, 1214-15 (Fla. 2016); Price v. Tyler, 890 So. 2d 246, 250 (Fla. 2004); State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830, 832 (Fla. 1993). Below, Ms. Torruella moved for attorney's fees pursuant to the note,[2] the mortgage,[3] and section 57.105(7), Florida Statutes (2018), which provides for a reciprocal right to attorney's fees if the borrowers are the "prevailing party" in any lawsuit to enforce the note and mortgage. "A trial court's determination of whether a party prevails on the 'significant issues' in litigation so as to designate that party the prevailing party for the purpose of awarding attorney's fees is reviewed for an abuse of discretion." MacKenzie v. Centex Homes, 281 So. 3d 621, 624 (Fla. 5th DCA 2019). "'However, to the extent a trial court's order on attorney's fees is based on its interpretation of the law,' an appellate court employs the de novo standard of review." Moore v. Estate of Albee by Benzenhafer, 239 So. 3d 192, 194 (Fla. 5th DCA 2018) (quoting Infiniti Emp't Sols., Inc. v. MS Liquidators of Ariz., LLC, 204 So. 3d 550, 553 (Fla. 5th DCA 2016)).

In Florida, the prevailing party is the party who succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Moritz

[2] Paragraph 7(E) of the note states in relevant part: "If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees."

[3] Paragraph 22 states, in pertinent part: "Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence."

v. Hoyt Enters., Inc., 604 So. 2d 807, 810 (Fla. 1992) ("[T]he fairest test to determine who is the prevailing party is to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court.") (embracing federal standard for prevailing party status set forth in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)); see Thornber v. City of Ft. Walton Beach, 568 So. 2d 914, 919 (Fla. 1990) (explaining that absent specific statutory provisions to contrary, party is deemed to be "prevailing" only at point where "[t]here must be some end to the litigation on the merits so that the court can determine whether the party requesting fees has prevailed"). This standard, utilized by federal and Florida courts, requires a determination of whether a court-ordered material alteration of the legal relationship between the parties has occurred. Smalbein ex rel. Estate of Smalbein v. City of Daytona Beach, 353 F.3d 901, 904-06 (11th Cir. 2003) (quoting Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 604 (2001)). "In other words, there must be: (1) a situation where a party has been awarded by the court 'at least some relief on the merits of his claim' or (2) a 'judicial imprimatur on the change' in the legal relationship between the parties." Id. at 905 (quoting Buckhannon, 532 U.S. at 603, 605).

A dismissal for lack of personal jurisdiction does not confer "prevailing party" status on the party over whom the trial court lacks jurisdiction because the trial court does not rule on any issue central to the merits of the dispute, and the legal relationship between the parties following such a disposition has not been materially changed. See, e.g., Am. Home Ass. Co. v. Weaver Agg. Transp. Inc., No. 10-cv-329, 2015 WL 12830413, at *7 (M.D. Fla. Jan. 14, 2015) (reiterating that dismissal for lack of personal jurisdiction does not confer "prevailing party" status on any party because party had mere procedural

victory but had not succeeded on significant issue in litigation that would achieve some of benefit sought in bringing suit); Equitrac Corp. v. Delany, No. 09-60629-CIV, 2009 WL 10667047, at *1 (S.D. Fla. Dec. 28, 2009) (stating that diversity case was dismissed for lack of personal jurisdiction, and defendant had not explained how this disposition—which was not on merits—made him 'prevailing party'); Flick Mortg. Investors, Inc. v. Metropolis Promotion Invest. & Props. (1993), Ltd., No. 04-cv-21900, 2008 WL 11417665, at *3 (S.D. Fla. Mar. 25, 2008) ("[A] dismissal for lack of personal jurisdiction does not make a defendant 'a prevailing party' for purposes of a fee provision."); see also Religious Tech. Ctr. v. Liebreich, 98 F. App'x 979, 986 (5th Cir. 2004) (applying Florida law and rejecting argument that finding that personal jurisdiction was wanting rendered defendant "the prevailing party" for purposes of fee provision in contract).

Here, the trial court only decided whether service of process was sufficient, not whether the foreclosure action had merit. Nationstar is still free to refile its action. Thus, at this stage of the proceedings, the legal relationship between the parties has not changed. While Ms. Torruella succeeded in dismissing the foreclosure action for lack of personal jurisdiction, she did not prevail on any "significant issue" in the overall litigation between the parties. Consequently, because "[t]he dismissal was based on procedural grounds and not a determination of any significant issue in the case[,] . . . . it [would have been] error to award Ms. [Torruella] prevailing party attorney's fees." See Shaw v. Schlusemeyer, 683 So. 2d 1187, 1188 (Fla. 5th DCA 1996).

Ms. Torruella's reliance on Finkelstein v. North Broward Hospital District, 484 So. 2d 1241 (Fla. 1986), and Martinez v. Giacobbe, 951 So. 2d 902 (Fla. 3d DCA 2007), is misplaced as neither of those cases concerned a dismissal for lack of personal

jurisdiction. As Ms. Torruella points out, in Finkelstein, the Florida Supreme Court recognized that "a post-judgment motion for attorney's fees raises a 'collateral and independent claim' [over] which the trial court has continuing jurisdiction to entertain within a reasonable time, notwithstanding that the litigation of the main claim may have been concluded with finality." 484 So. 2d at 1243; see Martinez, 951 So. 2d at 904 (quoting Finkelstein, and further clarifying that "specific reservation of jurisdiction mentioning attorney's fees is not required"). Finkelstein also recognized that a post-judgment motion for prevailing party attorney's fees raises a "collateral and independent" claim because "the prevailing party simply cannot be determined until the main claims have been tried and resolved." 484 So. 2d at 1243.

While Nationstar concedes that the court did not need to reserve jurisdiction in the dismissal order to have jurisdiction to award fees, that is not relevant here. Instead, for determining "prevailing party," the focus is on the litigation of the main claims. Here, the dismissal was based on inadequate service of process, i.e., lack of personal jurisdiction, and thus, the main claim—the foreclosure–has not been litigated, i.e., tried and resolved, with any finality. See Stockman v. Downs, 573 So. 2d 835, 837 (Fla. 1991) ("[T]he reference in [Finkelstein] to the 'collateral,' 'independent,' and 'ancillary' nature of claims for attorney's fees recognizes only that the proof required in such claims is not integral to the main cause of action."). Because the trial court did not have personal jurisdiction over Ms. Torruella to litigate the merits of the foreclosure action, it certainly would not have *continuing* jurisdiction to entertain a motion for attorney's fees.[4]

[4] Ms. Torruella's reliance on Prime Insurance Syndicate, Inc. v. Soil Tech Distributors, Inc., 270 F. App'x 962 (11th Cir. 2008), is equally unavailing because that case concerned an award of statutory attorney's fees under the insurance code, section

We conclude, as did the trial court, that Ms. Torruella was not a "prevailing party" for purposes of reciprocal attorney's fees under section 57.105(7). The dismissal of the foreclosure action for lack of personal jurisdiction did not render her a "prevailing party" to be entitled to an award of attorney's fees under the note, mortgage, and section 57.105(7). The court did not err in denying an award of attorney's fees and costs.

AFFIRMED.

SASSO, J., and ORFINGER, M.S., Associate Judge, concur.

627.428, Florida Statutes. The Eleventh Circuit held a dismissal for lack of subject matter jurisdiction did not prevent an award of fees because section 627.428 permits an "award[] [of] attorney's fees even in cases where the insured party did not prevail 'on the merits.'" Prime, 270 F. App'x at 964 (collecting cases). However, section 627.428 runs counter to common law, which ordinarily requires "[t]he prevailing party is the party that won on the significant issues in litigation." Wells Fargo Bank Nat'l Ass'n, as Tr. & Cust. for Morgan Stanley ABS Capital, MSAC 2007-HE3 v. Bird, 234 So. 3d 833, 834 (Fla. 5th DCA 2018); see also Hallmark Ins. Co. v. Maxum Cas. Ins. Co., No. 6:16-cv-2063-Orl-37GJK, 2017 WL 3723706, at *2 (M.D. Fla. May 25, 2017) (holding that section 627.428 "must be strictly construed because an award of attorneys' fees is in derogation of common law"). This case does not involve an insurance dispute or section 627.428, and thus, the common law rule applies. Moreover, the reasoning in Prime seems to conflict with Certain British Underwriters at Lloyds of London, England v. Jet Charter Service, Inc., 739 F.2d 534 (11th Cir. 1984), an earlier case which Prime did not discuss, and which stated that an award of fees under section 627.428 is integral to the merits of the claim. See S.-Owners Ins. Co. v. Maronda Homes, Inc. of Fla., No. 3:18-CV-1305-J-32MCR, 2020 WL 1451684, at *4 (M.D. Fla. Mar. 25, 2020).