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

BAYVIEW LOAN SERVICING, LLC,

Appellant/Cross-Appellee,

v.

Case No. 5D18-2797

JASON CROSS AND SHERWOOD FOREST HOMEOWNER'S ASSOCIATION OF ORLANDO, INC.,

Appellees/Cross-Appellants.

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Opinion filed November 15, 2019

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

Jonathan Blackmore, of Phelan Hallinan Diamond & Jones, PLLC, Ft. Lauderdale, for Appellant/Cross-Appellee.

Ryan N. Ghantous, of Ghantous & Branch, PLLC, Orlando, for Appellee/Cross-Appellant, Jason Cross.

No Appearance for Other Appellee/Cross-Appellant, Sherwood Forest Homeowner's Association of Orlando, Inc.

TATTI, A.M., Associate Judge.

Bayview Loan Servicing, LLC, ("Bayview") appeals the final judgment awarding contractual attorney's fees to Jason Cross, which was entered after this court affirmed

the involuntary dismissal of Bayview's mortgage foreclosure action against Cross. Bayview raises several issues on appeal, and Cross filed a notice of cross-appeal seeking reversal on two issues. After carefully considering each issue raised by the parties, we affirm on all but two of the issues without further discussion. However, for the reasons explained below, we reverse the trial court's award of attorney's fees incurred in litigating the amount of the award and the trial court's denial of Cross's request for prejudgment interest.

"FEES FOR FEES"

Bayview argues that the trial court erred in awarding to Cross attorney's fees for litigating the amount of attorney's fees. "Typically, the appellate court applies an abuse of discretion standard in reviewing a trial court's award of attorney's fees, usually with regard to the amount of an award rather than the actual entitlement to an award." *Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A*., 971 So. 2d 955, 956 (Fla. 5th DCA 2007) (citing *DiStefano Constr., Inc. v. Fid. & Deposit Co*., 597 So. 2d 248, 250 (Fla. 1992)). However, when entitlement to attorney's fees is based on the interpretation of contractual provisions or a statute, as a pure matter of law, the appellate court undertakes a de novo review*. Id.* Because the question of whether a trial court may award attorney's fees for litigating the amount of those fees is one of law, our standard of review is de novo. *See Ailles v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010) (citing *Kirton v. Fields*, 997 So. 2d 349, 352 (Fla. 2008); *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003)).

As a general rule, attorney's fees incurred in litigating the amount of attorney's fees to be awarded are not recoverable. *See N. Dade Church of God, Inc. v. JM Statewide,*

Inc., 851 So. 2d 194, 196 (Fla. 3d DCA 2003) (addressing a contractual attorney's fees award in a mortgage foreclosure action and holding that "[i]t is settled that in litigating over attorney'[s] fees, a litigant may claim fees where entitlement is the issue, but may not claim attorney's fees incurred in litigating the amount of attorney's fees" (citing *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832–33 (Fla. 1993))). However, in finding that Cross was entitled to an award of attorney's fees incurred in litigating the amount of his attorney's fees, the trial court relied upon an exception to that general rule that applies where an attorney's fees provision in a contract is "broad enough to encompass fees incurred in litigating the amount of fees." *See Trial Practices, Inc. v. Hahn Loeser & Parks, LLP*, 228 So. 3d 1184, 1189 (Fla. 2d DCA 2017), *quashed on other grounds*, 260 So. 3d 167 (Fla. 2018); *Waverly at Las Olas Condo. Ass'n v. Waverly Las Olas, LLC*, 88 So. 3d 386, 389 (Fla. 4th DCA 2012).

In *Waverly*, the Fourth District Court interpreted a contractual attorney's fees provision that authorized the award of prevailing party fees "[i]n the event of any litigation between the parties under [the agreement]." 88 So. 3d at 387. The court found that the phrase "any litigation" rendered the provision to be "broad enough to encompass fees incurred in litigating the amount of fees." *Id.* at 389.

In *Trial Practices*, the Second District Court interpreted a contractual attorney's fees provision containing the following pertinent language: "prevailing party in any action arising from or relating to this agreement will be entitled to recover all expenses of any nature incurred in any way in connection with the matter . . . including, but not limited to, attorneys' and experts' fees." 228 So. 3d at 1187. The court found that the language permitting recovery of "all expenses of any nature incurred in any way" rendered the

provision to be "broad enough to encompass fees incurred in litigating the amount of fees." *Id.* at 1189 (quoting *Waverly*, 88 So. 3d at 389).

We find that *Waverly* and *Trial Practices* do not support the application of the exception to the general rule against "fees for fees" in the instant case and hold that the trial court erred in awarding to Cross his attorney's fees incurred in litigating the amount of his fees award. There are three applicable contractual attorney's fees provisions in the note and mortgage in the instant case, none of which includes such broad and undefined language analogous to the "*any* litigation" and "*all* expenses of *any* nature incurred in *any* way" language present in *Waverly* and *Trial Practices*. Rather, the first fee provision in the instant case provides for the recovery of attorney's fees incurred "in enforcing th[e] Note" and "to the extent not prohibited by applicable law." The second fee provision authorizes recovery of attorney's fees incurred in pursuing the remedies provided in Section 22 of the mortgage, which Section 22 defines as "acceleration" and "foreclosure." Finally, the third fee provision provides for the recovery of attorney's fees incurred on appeal and in a bankruptcy proceeding. These three fee provisions are not broad enough to encompass attorney's fees incurred in litigating the amount of attorney's fees to be awarded, and we find that the general rule prohibiting such awards applies in the instant case.

Furthermore, because the attorney's fees provisions in the instant case would not authorize Bayview to recover attorney's fees for litigating the amount of attorney's fees, the reciprocity provision of section 57.105(7), Florida Statutes (2005), cannot function to authorize Cross to recover such fees that are not authorized for Bayview in the contract. *See Escambia Cty. v. U.I.L. Family Ltd. P'ship*, 977 So. 2d 716, 717 (Fla. 1st DCA 2008)

(holding that the reciprocity provision of section 57.105 "is limited to the specific terms of the attorney's fees provision in a contract" (citing *Subway Rests., Inc. v. Thomas*, 860 So. 2d 462, 463 (Fla. 4th DCA 2003); *Anderson Columbia Co. v. Fla. Dep't of Transp.*, 744 So. 2d 1206, 1207 (Fla. 1st DCA 1999))). Therefore, we reverse that portion of the trial court's attorney's fees award to Cross that awarded fees incurred in litigating the amount of the award.[1]

PREJUDGMENT INTEREST

Cross argues that the trial court erred in denying his request for prejudgment interest accruing from December 27, 2016, the date that the trial court fixed his entitlement to attorney's fees.[2] "A trial court's decision concerning a [party's] entitlement to prejudgment interest is reviewed de novo." *Sterling Vills. of Palm Beach Lakes Condo. Ass'n v. Lacroze*, 255 So. 3d 870, 872 (Fla. 4th DCA 2018) (alteration in original) (quoting *Berloni S.p.A. v. Della Casa, LLC*, 972 So. 2d 1007, 1011 (Fla. 4th DCA 2008)).

[1] We reject Cross's argument that reversal is improper because the record on appeal does not reveal how much, if any, of the 147.1 billable hours allowed as reasonable by the trial court consisted of time spent litigating the amount of attorney's fees. Bayview has demonstrated legal error on the face of the final judgment, where the trial court wrote to defend its award of attorney's fees for litigating the amount of attorney's fees, which would not have occurred if the trial court did not, in fact, award such fees for litigating the amount of the fees. Cross has failed to carry his burden of demonstrating that the error was harmless. *See Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256–57 (Fla. 2014) (providing that under the harmless error test in civil appeals, the beneficiary of an error has the burden to prove that there is no reasonable possibility that the error contributed to the verdict or judgment resulting from the underlying proceedings).

[2] We reject Bayview's argument that Cross failed to preserve this issue for appellate review. Cross requested prejudgment interest before the trial court; argued that he was entitled to prejudgment interest accruing from December 27, 2016, because that is when the trial court fixed his entitlement to attorney's fees; and cited to appropriate authority in support of that argument.

At the December 27, 2016 hearing on Cross's motion for attorney's fees, the trial court orally pronounced that it was granting Cross's motion as to entitlement. Shortly thereafter, on January 4, 2017, the trial court entered a written order that was consistent with its oral pronouncement at the hearing, granting Cross's motion as to entitlement and reserving on the issue of the amount of the attorney's fees award. Bayview filed a motion for reconsideration on July 12, 2017. The trial court conducted a hearing on the motion for reconsideration on October 2, 2017, and it entered a written order denying the motion that same day.

In the final judgment under review, the trial court expressed that prejudgment interest was "not applicable" in the instant case because "[Bayview] continued to dispute [Cross's] fee entitlement." The trial court therefore concluded that the final judgment was "the operative legal document that establishe[d] entitlement *and* amount of the attorney's fees due to [Cross]." These findings were erroneous.

"[I]nterest accrues [on an award of attorney's fees] from the date the entitlement to attorney fees is fixed through agreement, arbitration award, or court determination, even though the amount of the award has not yet been determined." *Quality Engineered Installation, Inc. v. Higley S., Inc.*, 670 So. 2d 929, 930–31 (Fla. 1996). In the instant case, the trial court's determination at the December 27, 2016 hearing that Cross was entitled to attorney's fees fixed such entitlement, irrespective of Bayview's position that it should not have to pay those fees; and the trial court's denial of Bayview's motion for reconsideration left that December 27, 2016 determination of entitlement in place, unchanged. Therefore, Cross's entitlement to attorney's fees was fixed on December 27, 2016, and Cross is entitled to an award of prejudgment interest from that date through

the rendition of the new final judgment entered upon remand after further proceedings that are consistent with this opinion.

We find untenable the suggestion that a party against whom attorney's fees are assessed may avoid the opposing party's entitlement to the award from being fixed by merely continuing to dispute entitlement. Furthermore, such reasoning is contrary to the basis of the Florida Supreme Court's opinion in *Quality Engineered*, where the supreme court held:

> We reach this conclusion on the basis that the burden of nonpayment is fairly placed on the party whose obligation to pay attorney fees has been fixed. Using the date of the entitlement as the date of accrual serves as a deterrent to delay by the party who owes the attorney fees and is appropriate in conjunction with our decision that attorney fees are not to be assessed for litigating the amount of an attorney-fee award.

Id. at 931.

We reverse the award of fees incurred in litigating the amount of the attorney's fees award, and we reverse the denial of Cross's request for prejudgment interest. We affirm the final judgment in all other respects, and we remand with directions to: (1) reduce Cross's attorney's fees award by reducing the 147.1 billable hours that the trial court found to be reasonable by the number of those hours that the trial court finds to have been devoted solely to litigating the amount of the attorney's fees award; and (2) calculate and award prejudgment interest from December 27, 2016, through the date of rendition of the new final judgment.

AFFIRMED in part; REVERSED in part; and REMANDED with directions.

ORFINGER and SASSO, JJ., concur.