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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ANASTASIA FARMAN,)	
)	
Appellant,)	
)	
v.)	Case No. 2D18-2022
)	2D18-2663
DEUTSCHE BANK NATIONAL TRUST)	
COMPANY, as Trustee for Long Beach)	CONSOLIDATED
Mortgage Loan Trust 2006-05,)	
)	
Appellee.)	
_____)	

Opinion filed August 12, 2020.

Appeal from the Circuit Court for
Hillsborough County; Gregory P. Holder
and Rex M. Barbas, Judges.

Anastasia Farman, pro se.

Teris A. McGovern of Bitman, O'Brien &
Morat, PLLC, Lake Mary, for Appellee.

SILBERMAN, Judge.

Anastasia Farman, pro se, appeals a final judgment that quiets title to real property in favor of Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-05 (the Trust), and that awards damages for breach of the parties' settlement agreement. She also appeals a final judgment for attorney's fees and costs (the fee judgment). This court consolidated for all purposes the appeal of the

final judgment entered by Judge Holder and the appeal of the fee judgment entered by Judge Barbas. We affirm the final judgment as to counts I, III, and IV without discussion. Because the Trust failed to seek restitution and failed to prove it had incurred any damages in count II for the breach of the settlement agreement, we reverse the final judgment as to that count and remand for the trial court to enter judgment in favor of Farman on count II. We reverse the fee judgment in favor of the Trust that was predicated on the prevailing party provision in the settlement agreement.

JUDGMENT FOR DAMAGES

The Trust obtained a final judgment of foreclosure against Anastasia Farman in 2014. While the final judgment was on appeal, the parties entered into a settlement agreement in June 2015; as a result, Farman voluntarily dismissed her appeal. The Trust purchased the property at a foreclosure sale, the certificate of sale was issued in November 2015, and the certificate of title was issued in December 2015. Farman later sought to vacate the sale, certificate of sale, and certificate of title on the basis of a typographical error in the legal description contained in the mortgage, judgment, certificate of sale, and certificate of title. She subsequently filed an action to quiet title and a lis pendens in January 2016. The Trust then filed its own action to quiet title in February 2016 and filed its first amended complaint (the amended complaint) in April 2016. In September 2016, Farman dismissed her quiet title action.

In count II of its amended complaint, the Trust alleged breach of the parties' settlement agreement. The Trust alleged that under the settlement the Trust was required to tender \$15,000 to Farman. Upon payment, "the Trust and SPS [the servicer] would be released and forever discharged from any claims that Farman

possessed against them arising from or related to the dispute." The Trust alleged that Farman committed a material breach in seeking to vacate the certificate of title, appealing the order denying her motion to vacate, and filing her quiet title action. The Trust alleged that it "has been damaged, and continues to be damaged, by the breach of this Settlement Agreement in the form of monetary damages, attorney's fees, court costs, and continued property preservation costs." In her answer, Farman denied the allegations that she materially breached the settlement agreement and that the Trust had been damaged.

At trial, the Trust sought to prove damages for breach of contract through the testimony of Andrew Benefiel, an employee of Select Portfolio Servicing (SPS), the servicer of the loan, and through Exhibit 10, a disbursement detail. The Trust also introduced as Exhibit 8 two limited powers of attorney (LPOAs) between JPMorgan Chase Bank, N.A. (JPMorgan), as servicer, and the Trust and two LPOAs between JPMorgan, as master servicer, and SPS, as subservicer. Benefiel testified that since Farman filed her motion to vacate on January 14, 2016, "the Plaintiff" had continued to make advancements for the property. SPS hired the law firm to bring the quiet title and breach of contract action. SPS made payments to the firm to pursue the breach of the settlement agreement.

On cross-examination, Benefiel acknowledged that the Trust is the plaintiff in this case. Benefiel testified that the disbursement detail shows all advances "done for escrow, for taxes, and insurance, any kind of REO preservation fees that were done." Benefiel stated: "To the best of my knowledge, anything after the foreclosure date, those are preservation fees that we and SPS incurred. As far as seeking them, I'm not

really sure at this point." Farman asked, "The attorney's fees?" Benefiel answered, "To my understanding, yes." Farman asked if it was his testimony that SPS was incurring the expenses and where in the LPOA did it say that the Trust had to reimburse SPS. The trial court sustained the objection that the question called for a legal conclusion. Upon questioning by the court, Benefiel then testified that the costs and fees in Exhibit 10 "are advances by SPS." SPS had not been reimbursed by the Trust. The trial court asked if the Trust had liability for that, and Benefiel responded, "I don't know that."

In closing argument, the Trust generally requested "a judgment of damages for its necessitated bringing this action [sic]." Farman argued in closing that the Trust is the plaintiff and that SPS was not joined as a plaintiff. She argued that SPS "testified that they incurred all of these expenses and they submitted evidence in support of that." She further argued that the LPOA demonstrated that the Trust "is not responsible for any costs, fees and expenses" incurred by SPS.

In its oral ruling with respect to count II, the trial court found that "the Plaintiff has been damaged and continues to be damaged by the breach of the settlement agreement in the form of monetary damages, attorney fees, court costs, and continued property preservation costs." The court stated it was assessing monetary damages on count II "consistent with the evidence introduced" and granted the damages from January 14, 2016, the date Farman filed her motion to vacate. The trial court stated that "[t]he monetary damages as it relates to the costs have been proven by the evidence introduced upon this trial." The court reserved jurisdiction on attorney's fees. When the court asked if it had addressed all the damages sought, the Trust's counsel responded, "Yes, Your Honor." Counsel did not mention the \$15,000 it paid

pursuant to the settlement agreement. The trial court directed the Trust's counsel to prepare a draft final judgment that incorporated the trial court's findings.

In the written judgment, the trial court awarded a total amount of \$56,912.02 as "fully liquidated and supported by the evidence introduced at trial" as follows: (1) \$15,000 for "[d]isgorgement of settlement proceeds paid to Defendant"; (2) \$3270 for Live Oak Preserve Association; (3) \$16,164 for insurance; (4) \$10,371 for taxes; (5) \$10,802.25 for property preservation; and (5) \$1304.77 for utilities.

Farman argues on appeal that the evidence was insufficient to show that the Trust had paid or was liable for the amounts in the disbursement detail and that the Trust failed to connect those expenses to any breach by Farman. In addition, she argues that the trial court erred in making the \$15,000 award when it was not sought as a remedy for the breach in the pleadings or at trial and when the trial court made no oral finding regarding it.

The Trust argues that Farman did not preserve these issues for review. To the extent that she raises the sufficiency of the evidence on damages, in a bench trial the sufficiency of the evidence may be raised on appeal even if a party did not object or move for rehearing. See Fla. R. Civ. P. 1.530(e); Winchel v. PennyMac Corp., 222 So. 3d 639, 644 (Fla. 2d DCA 2017). And Farman did expressly argue in the trial court that the Trust failed to prove its entitlement to the amounts shown in the disbursement detail.

Farman argues on appeal that damages are an essential element of a claim for breach of contract that must be proven. See Asset Mgmt. Holdings, LLC v. Assets Recovery Ctr. Invs., LLC, 238 So. 3d 908, 912 (Fla. 2d DCA 2018). To prove

breach of contract, the plaintiff must establish "(1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the breach." Id. (quoting Rollins, Inc. v. Butland, 951 So. 2d 860, 876 (Fla. 2d DCA 2006)). "Under Florida law, damages are an essential element of an action for breach of contract." Id. (quoting Siever v. BWGaskets, Inc., 669 F.Supp.2d 1286, 1300 (M.D. Fla. 2009)). Because the plaintiffs in Asset Management failed to introduce essential evidence to prove damages on their breach of contract claim, this court reversed and remanded for entry of an involuntary dismissal on that claim. Id. at 913.

Remedies available for a breach of contract are damages, restitution, and specific performance. Ocean Commc'ns, Inc. v. Bubeck, 956 So. 2d 1222, 1225 (Fla. 4th DCA 2007). On a claim for breach of contract, the purpose of a damages award "is to restore an injured party to the same position that he would have been in had the other party not breached the contract." Asset Mgmt., 238 So. 3d at 912 (quoting Verandah Dev., LLC v. Gualtieri, 201 So. 3d 654, 659 (Fla. 2d DCA 2016)). A damages award must be supported by legally sufficient evidence. See Branch Banking & Tr. Co. v. Kraz, LLC, 114 So. 3d 273, 275-76 (Fla. 2d DCA 2013) (determining that a party presented legally insufficient evidence of a credit due when a witness testified that the plaintiff "*may have* received a payment of *as much as* \$1.8 million from the FDIC but that further evidence would be needed to be sure"); see also Camper Corral, Inc. v. Perantoni, 801 So. 2d 990, 992 (Fla. 2d DCA 2001) (determining that the plaintiffs were not entitled to damages suffered by other entities for the defendants' breaches of fiduciary duties).

Here, the Trust's only witness, Benefiel of SPS, indicated that SPS had not been reimbursed by the Trust for SPS's advancements, and he did not know if the Trust was liable to reimburse SPS. The Trust asserts on appeal that the LPOAs authorize SPS to act on behalf of the Trust. But the Trust does not cite to any specific provision that establishes a financial obligation for the Trust to reimburse the servicer. Instead, the LPOAs provide that the servicer agrees to indemnify the Trust for all liabilities incurred in connection with the servicer's exercise "of the powers granted to it hereunder." We found no provision addressing the Trust's obligation to reimburse the servicer.

Thus, similar to the situation in Camper Corral, 801 So. 2d at 992, the Trust failed to prove that it was the entity that incurred the damages. Simply put, the Trust never proved that it spent a dime. Instead, the evidence showed that SPS paid the preservation costs that appeared to include attorney's fees as well as taxes, insurance, utilities, and association fees, as listed in the disbursement detail. But as noted previously, the witness was uncertain as to the Trust's liability to reimburse SPS.

Furthermore, Farman argues on appeal that at trial the Trust failed to establish by evidence or argue a theory that explained how her filings "came to be realized damages to the Trust." In its answer brief the Trust asserted, "The Trust was unable to sell the Property due to Farman's cloud." The Trust provided no record citation for this statement, and we found no testimony to support it. The Trust further asserted that "if Farman had not filed her Motions to Vacate, second appeal, or quiet title action, the Trust could have marketed and sold the Property, rather than being forced to continue paying taxes, utilities, insurance, etc." Again, we found no testimony

to support this statement. Thus, in addition to failing to prove that the Trust incurred those costs, the Trust did not prove that the carrying costs that normally would have been paid on the property were a result of Farman's breach.

Therefore, based on a lack of competent, substantial evidence to prove the Trust incurred the damages of association costs, insurance, taxes, property preservation, and utilities, we reverse count II as to those damages awarded totaling \$41,912.02. See Asset Mgmt., 238 So. 3d at 911 ("If the trial court employed the correct measure of damages, we review the damages award for support by competent, substantial evidence.").

As to the remaining \$15,000 disgorgement award, we note that the Trust argues that Farman did not preserve the issue and that she was not denied due process. The Trust then asserts that, in the alternative, if this court determines that the error was preserved and that the \$15,000 was improperly awarded, this court should merely strike the \$15,000 award.

With respect to the \$15,000 award, Farman contends on appeal, citing Hooters of America, Inc. v Carolina Wings, Inc., 655 So. 2d 1231 (Fla. 1st DCA 1995), that the trial court improperly awarded relief outside the pleadings as restitution was not pleaded or argued at trial in connection with the breach of contract claim. See also Camper Corral, 801 So. 2d at 991 ("[D]amages will be awarded only to the extent supported by the well-pleaded allegations of the complaint." (quoting Hooters of Am., 655 So. 2d at 1233)). In Hooters of America, which dealt with a default and the award of damages not sought in the complaint, the court stated that "[a]dequate notice is a fundamental element of the right to due process." 655 So. 2d at 1235. The court

determined that it was fundamental error to award damages for lost profits as to three restaurants "because the complaint failed to give notice that these restaurants were at issue." Id. If a party is deprived of due process, the party may raise the error for the first time on appeal as fundamental error. See Nationstar v. Mortg., LLC v. Weiler, 227 So. 3d 181, 184-85 (Fla. 2d DCA 2017); Walsh v. Walsh, 262 So. 3d 212, 216 n.2 (Fla. 5th DCA 2018). Here, Farman had no notice that the Trust sought the \$15,000 it had paid under the settlement agreement as a remedy for breach of contract based on the pleadings, the evidence or argument at trial, or the trial court's oral ruling.

Restitution is one of the remedies available for breach of contract. Ocean Commc'ns, 956 So. 2d at 1225. When "restitution is sought the plaintiff must return to the defendant any part performance of value rendered by defendant." Id. at 1226 (quoting Beefy Trail, Inc. v. Beefy King Int'l, 267 So. 2d 853, 858 (Fla. 4th DCA 1972)). Return of the \$15,000 consideration that the Trust paid to Farman would be a restitution remedy for breach of the contract. But the Trust did not assert a claim for restitution or even indicate that it was seeking return of the \$15,000 as a portion of its damages for breach of contract. In the context of the pleadings, the evidence, and the arguments at trial, it appears that the Trust alleged the \$15,000 payment in count II to prove consideration for the contract in order to establish the first element of its claim, that a contract existed. See Asset Mgmt., 238 So. 3d at 912. And at no point did the Trust address the obligation to return to Farman any part performance of value she rendered.

Notably, the trial court made no oral finding regarding the \$15,000 payment the Trust made to Farman under the settlement agreement, which is consistent with the fact that the Trust did not argue restitution or identify the \$15,000 as

a specific amount it sought to recover. The final judgment, however, included \$15,000 as "[d]isgorgement of settlement proceeds paid to Defendant." This relief was outside the pleadings, the evidence and argument at trial, and the trial court's oral ruling. Therefore, reversal of the \$15,000 award is warranted.

In summary, in count II the Trust did not seek restitution and did not properly prove any damages with competent, substantial evidence. Because damages are the third essential element of a breach of contract claim, the Trust failed to prove its claim, and we reverse the judgment on count II for breach of the settlement agreement. See *Asset Mgmt.*, 238 So. 3d at 912-13. Thus, we remand for the trial court to enter a judgment that finds in favor of Farman on count II.

THE FEE JUDGMENT

In its motion for attorney's fees and costs, the Trust asserted that it was entitled to recovery based on the prevailing party provision in the settlement agreement, but it did not specifically assert that it had paid those attorney's fees or costs. In addition, the Trust's Exhibit 1 is a fee transaction detail from the law firm of Pearson Bitman LLP, and on each entry claimed it has a notation that states "Select Portfolio Servicing, Inc." and "SPS v. Farman."

In her response to the motion Farman asserted, among other things, that it was SPS which incurred the fees and that SPS is not a plaintiff in this action, citing to the fee affidavit filed by one of the Pearson Bitman attorneys. The affiant asserted that SPS incurred the fees and that SPS was requesting an award of attorney's fees. We do not know if this was addressed at the fee hearing because we do not have a transcript of that hearing in our record.

Even if it were addressed at the hearing, based on the lack of proof of damages for breach of the settlement agreement, we are compelled to reverse the fee judgment. The Trust sought fees as a prevailing party under the settlement agreement. Because the Trust did not prove the third element of a breach of contract claim—damages—the Trust did not establish its cause of action for breach of the settlement agreement, as discussed above. Based on our reversal of the judgment as to the breach of the settlement agreement, the Trust is no longer the prevailing party on that claim and is not entitled to recover attorney's fees. Thus, we also reverse the fee judgment.

Affirmed in part, reversed in part, and remanded.

SLEET and ATKINSON, JJ., Concur.