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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

HAYWARD BAKER, INC., a Florida
corporation,)
)
)
Appellant,)
)
v.)
)
WESTFIELD INSURANCE COMPANY, a)
foreign corporation; and THE DIAZ FRITZ)
GROUP, INC. (d/b/a Diaz Fritz Isabel), a)
Florida corporation,)
)
Appellees.)
_____)

Case No. 2D19-2893

Opinion filed December 30, 2020.

Appeal from the Circuit Court for
Hillsborough County; Steven Scott
Stephens, Judge.

Michael R. Carey, Angela M. Covington,
and Mariko Shitama Outman of Carey,
O'Malley, Whitaker, Mueller, Roberts &
Smith, Tampa, for Appellant.

Steven A. Nisbet, Justin R. Zinzow, and
John J. Thresher of Zinzow Law, LLC,
Trinity, for Appellees.

BLACK, Judge.

This case arises from the construction of an addition to the University
Community Hospital in Carrollwood. The Diaz Fritz Group, Inc. (DFI), the general

contractor, entered into a subcontract with Hayward Baker, Inc. (HBI), pursuant to which DFI agreed to pay HBI \$290,000 for foundation work. A dispute between the parties spawned three lawsuits, one of which also included Westfield Insurance Company, the surety on the payment bond to which DFI was the principal. Two of the cases were consolidated and tried before a jury while the third was settled. Following the jury verdict and entry of the final judgment in the consolidated cases, HBI and DFI both moved for attorneys' fees as the prevailing party in the litigation. The trial court denied the motions, finding that because both parties prevailed on significant issues in the litigation neither party was the prevailing party. On appeal, HBI argues that because it succeeded on significant issues in the litigation and achieved all of the benefit it sought while DFI and Westfield achieved nothing, the trial court abused its discretion in failing to find that HBI was entitled to attorneys' fees as the prevailing party. We agree and reverse the trial court's order denying HBI's motion for attorneys' fees.

HBI completed its work on the hospital project in September 2009. DFI, however, refused to pay HBI the \$290,000 owed under the subcontract, claiming that HBI was responsible for remediating or paying for the remediation of the damage it had caused to the hospital's existing building while performing the foundation work. HBI denied responsibility for the damage, and in December 2009, HBI recorded a claim of lien in the amount of \$290,000. The lien was transferred to Westfield's payment bond. Thereafter, in August 2010, HBI filed an action against Westfield as surety to enforce its \$290,000 claim of lien against the bond (hereafter referred to as the 2010 Case). Then in August 2011, DFI sued HBI for breach of contract seeking to recover the cost of remediating the damages—totaling \$581,437.38—it claimed that HBI had caused to the

existing hospital (hereafter referred to as the 2011 Case). HBI counterclaimed for breach of contract seeking to recover the entire amount due under the subcontract.

Finally, in February 2012, DFI filed an action in federal court against HBI's insurance carrier, Zurich American Insurance Company, asserting its entitlement to recover the same damages claimed in the 2011 Case. The parties reached a settlement in that case (the 2012 Case) whereby Zurich agreed to pay DFI \$450,000. Thereafter, the 2010 Case and the 2011 Case were consolidated and tried before a jury in April 2018. Shortly before the start of trial, the parties stipulated that HBI was entitled to \$290,000 pursuant to the subcontract. At the conclusion of the trial, the jury found HBI responsible for \$266,596.32 of the damages caused to the hospital. Taking into account the parties' stipulation that HBI was entitled to \$290,000 under the subcontract, the jury entered a net verdict of \$23,403.68 in favor of HBI. This amount was decreased to \$17,563.43 posttrial.

HBI then moved to set off the \$450,000 DFI had received from Zurich in the 2012 Case against the damages award entered against HBI in the consolidated cases. The trial court granted the motion, which resulted in DFI recovering nothing from the litigation and the entry of a final judgment in favor of HBI and against DFI and Westfield, jointly and severally, in the amount of \$290,000 plus prejudgment interest.¹

Following the entry of the final judgment, HBI and DFI moved for an award of attorneys' fees; Westfield did not move for an award of fees. As pertinent to this

¹DFI appealed the final judgment, primarily challenging the trial court's ruling on the setoff. This court upheld the final judgment in a per curiam affirmance. Diaz/Fritz Grp., Inc. v. Hayward Baker, Inc., No. 2D18-4284, 2019 WL 5424887 (Fla. 2d DCA Oct. 23, 2019) (table decision).

appeal, HBI asserted that it was entitled to an award of attorneys' fees as the prevailing party in the litigation against DFI and Westfield, jointly and severally, pursuant to the fees provision of the subcontract and section 713.29, Florida Statutes (2009), which allows for the recovery of attorneys' fees by the prevailing party in an action to enforce a lien or a claim against a bond. In analyzing the motion for fees under the significant issues test, the trial court determined that DFI had prevailed on some of its claims regarding HBI's liability for the damage to the hospital, that HBI had prevailed on its claim that DFI was required to pay the entire amount due under the subcontract, and that HBI had prevailed on its motion for setoff. The trial court nonetheless concluded that neither HBI nor DFI was the prevailing party for purposes of attorneys' fees under the subcontract, finding that the prevailing party determination would be "the same no matter what the ruling on the setoff question was." It further found that there was no prevailing party for purposes of section 713.29.

We review the trial court's determination of the prevailing party for an abuse of discretion. ERHM Orthopedics, Inc. v. Edwards, 260 So. 3d 559, 561 (Fla. 2d DCA 2019) (citing Tubbs v. Mechanik Nuccio Hearne & Wester, P.A., 125 So. 3d 1034, 1039 (Fla. 2d DCA 2013)). "[T]he party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees." Id. (alteration in original) (quoting Tubbs, 125 So. 3d at 1039). "A trial court's determination of the prevailing party depends on whether that party was successful 'on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit.'" Id. (quoting Trytek v. Gale Indus., Inc., 3 So. 3d 1194, 1200 (Fla. 2009)). Though the 2010 Case and the 2011 Case were consolidated for trial, that

fact generally does not alter a court's obligation to consider which party prevailed on the significant issues in each separate case. See Daake v. Decks N Such Marine, Inc., 296 So. 3d 563, 565 (Fla. 1st DCA 2020).

With regard to the 2010 Case, HBI succeeded in obtaining the full amount it sought from Westfield under its payment bond. Thus, HBI was the prevailing party in the 2010 Case. In the 2011 Case, HBI was found to be responsible for a portion of the damages to the hospital but was awarded the full amount due under the subcontract. The setoff issue was also a significant issue to be considered when making the prevailing party determination. See Trytek, 3 So. 3d at 1203 (holding that it is within the trial court's discretion to make a prevailing party determination after considering all the necessary factors, including setoffs); cf. Salame v. 1st Priority Restoration, Inc., 221 So. 3d 706, 708 (Fla. 3d DCA 2017) (holding that the trial court erred by determining the prevailing party in the litigation prior to resolving the setoff issue, a significant issue in the litigation); Schoenlank v. Schoenlank, 128 So. 3d 118, 121 (Fla. 3d DCA 2013) ("There were two major issues in this litigation: (1) the downward modification of [the appellant's] support obligations; and (2) the calculation and collection of the equitable distribution award minus any setoffs."). In the absence of the setoff, we would be inclined to agree with the trial court that there was no prevailing party in this case since DFI and HBI were both at fault for the failure of the subcontract. See KCIN, Inc. v. Canpro Invs., Ltd., 675 So. 2d 222, 223 (Fla. 2d DCA 1996); see also Schoenlank, 128 So. 3d at 121 ("[W]hen the litigation 'end[s] in a tie,' with each party 'prevail[ing] in part and los[ing] in part on the significant issues,' the trial court is well within its discretion to deny attorney's fees to both parties." (second and third alterations in original) (quoting

Loy v. Loy, 904 So. 2d 482, 484 (Fla. 3d DCA 2005))). But contrary to the trial court's finding that the prevailing party determination would be "the same no matter what the ruling on the setoff question was," the ruling on HBI's motion to set off the \$450,000 DFI had received from Zurich in the 2012 Case against the damages award entered against HBI was pivotal to the prevailing party determination. The result of applying the setoff against DFI's damages award was that DFI received none of the benefit it sought in the litigation: a judgment was not entered against HBI for any of the damage caused to the hospital property. On the other hand, HBI received all of the benefit it sought in the litigation, as it obtained \$290,000 plus prejudgment interest for the work it performed under the subcontract and it was relieved from paying any damages to DFI. HBI, therefore, was the prevailing party in the underlying litigation and entitled to an award of attorneys' fees. The trial court's finding to the contrary was error.

Because the trial court abused its discretion in finding that HBI was not the prevailing party for purposes of attorneys' fees under section 713.29 and the subcontract, we reverse the order denying HBI's motion for attorneys' fees and remand for further proceedings.

Reversed and remanded.

VILLANTI and ATKINSON, JJ., Concur.