

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

October 16, 2009

CROWN CUSTOM HOMES, INC.,)	
)	
Appellant,)	
)	
v.)	Case No. 2D08-1612
)	2D08-1613
JOSEPH SABATINO and CAROL)	
SABATINO,)	<u>CONSOLIDATED</u>
)	
Appellees.)	
_____)	

BY ORDER OF THE COURT:

Appellant's motion for rehearing is denied. Appellant's motion for clarification is granted. The prior opinion dated July 31, 2009, is withdrawn, and the attached opinion is issued in its place. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

JAMES BIRK HOLD, CLERK

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

CROWN CUSTOM HOMES, INC.,)
)
 Appellant,)
)
 v.)
)
 JOSEPH SABATINO and CAROL)
 SABATINO,)
)
 Appellees.)
 _____)

Case Nos. 2D08-1612
2D08-1613

CONSOLIDATED

Opinion filed October 16, 2009.

Appeals from the Circuit Court for Collier
County; Dwight L. Geiger, Associate Senior
Judge.

Raymond L. Bass, Jr., of Bass Law Office,
Naples, for Appellant.

Jon D. Parrish and Kirt R. Posthuma of
Parrish, Lawhon & Yarnell P.A., Naples, for
Appellees.

CASANUEVA, Chief Judge.

Crown Custom Homes, Inc. (Crown), appeals the trial court's award of attorney's fees to the appellees, Joseph and Carol Sabatino. Finding error in the proceeding, we reverse and remand for a new evidentiary hearing.

Facts

Mr. and Mrs. Sabatino sued Crown, asserting multiple theories of recovery

arising from Crown's construction of their home. Crown counterclaimed against the Sabatinos asserting several claims, including a count seeking to foreclose a construction lien against the real property. Ultimately Crown prevailed on all counts save one. The court resolved the count to foreclose the construction lien in favor of the Sabatinos, finding that Crown failed to perfect its lien when it did not properly serve a notice to owner. The Sabatinos sought attorney's fees pursuant to the construction lien statute. The trial court conducted a hearing on the matter and found that "the prosecution of the various counts was so inextricably intertwined that most of [the] services must be said to be for the construction lien count, as well as other counts." The trial court awarded the Sabatinos attorney's fees in excess of \$118,000 plus costs in excess of \$14,000.¹

During the hearing on attorney's fees the Sabatinos called an expert on legal billing to the stand. The expert testified that he was unable to apportion the Sabatinos' attorney's time sheet records to the various causes of action raised at trial because, at least in part, the counts were intertwined. The expert further stated that "unfortunately all of us tend to throw the kitchen sink at it from a cause of action standpoint; and if you can not differentiate between those, then you're entitled to claim that under—in this case, the claim of lien, the cause of action." The Sabatinos' attorney also testified, stating that "to the greater extent I was not able to determine based on the billing time entries how to differentiate the various counts."

Crown now challenges the award of attorney's fees and costs.

¹It appears that several efforts were made to resolve the construction lien claim before trial on the same basis on which it was ultimately decided. We note that the pretrial resolution of this claim would have resulted in a significantly reduced award of attorney's fees.

Analysis

"[T]he party seeking fees has the burden to allocate them to the issues for which fees are awardable or to show that the issues were so intertwined that allocation is not feasible." Lubkey v. Compuvac Sys., Inc., 857 So. 2d 966, 968 (Fla. 2d DCA 2003); see also Ocean Club Cmty. Ass'n v. Curtis, 935 So. 2d 513, 517 (Fla. 3d DCA 2006) (holding that the party seeking an award of attorney's fees "bears 'an affirmative burden to demonstrate what portion of the effort was expended on the claim which allowed attorney's fees,' " (quoting Rockledge Mall Assocs., Ltd. v. Custom Fences of Brevard, Inc., 779 So. 2d 558, 559 (Fla. 5th DCA 2001))). We review whether the multiple claims are separate or intertwined under the de novo standard of review. See Ocean Club, 935 So. 2d at 516.

Here the trial court made no factual findings to support its legal conclusion that the counts were so intertwined as to make individual allocation of fees unfeasible. Additionally, the limited record before this court does not enable us to resolve that issue despite the scope of our review. Although the billing expert opined that the counts were sufficiently intertwined, "[t]he expert's opinion, lacking any factual foundation, was not competent proof." Lubkey, 857 So. 2d at 968. Therefore, on this record, we cannot sustain the fee order.

Crown also challenges the award of any costs it claims were not directly linked to the construction lien count. During the pendency of this appeal, the Supreme Court of Florida issued its opinion in Trytek v. Gale Industries, Inc., 3 So. 3d 1194 (Fla. 2009). In Trytek, one party prevailed on a construction lien by stipulation before trial but lost on the sole issue argued at trial. Id. at 1196-97. Each party subsequently claimed

it was the "prevailing party" for the purpose of determining fees "as part of the prevailing party's costs," pursuant to section 713.29, Florida Statutes (2005). Id. at 1197. The trial court applied the "significant issues" test set forth in Prosperi v. Code, Inc., 626 So. 2d 1360 (Fla. 1993), and determined that the party that won the issue argued at trial was the "prevailing party." Trytek, 3 So. 3d at 1197. The Fifth District reversed, certifying a question of great public importance. Id. at 1198. On review, the supreme court quashed the Fifth District's opinion and approved the trial court's use of the Prosperi "significant issues" test to determine the issue of "prevailing party." Trytek, 3 So. 3d at 1204. In this case, Trytek may impact the trial court's determination of "prevailing party" and, thus, the propriety of taxation of costs and fees on either party. Therefore, we must also reverse the award of costs.

Accordingly, we reverse the order on appeal in its entirety. On remand, the trial court shall hold a new hearing to consider both the application of Trytek to the facts of the case and to determine whether allocation of fees was appropriate. The trial court shall make appropriate factual findings to support its conclusions regarding these matters to ensure a complete record for appellate review. We caution that "[r]egardless of the expertise of the witness, generally, and his familiarity with legal concepts relating to his specific field of expertise, it is not the function of the expert witness to draw legal conclusions. That determination is reserved to the trial court." Palm Beach County v. Town of Palm Beach, 426 So. 2d 1063, 1070 (Fla. 4th DCA 1983).

Reversed and remanded with instructions.

SILBERMAN and CRENSHAW, JJ., Concur.