

# Third District Court of Appeal

## State of Florida

Opinion filed April 22, 2020.

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No. 3D19-139  
Lower Tribunal No. 17-25120

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**VME Group International, LLC, et al.,**  
Appellants,

vs.

**The Grand Condominium Association, Inc., et al.,**  
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Veronica Diaz,  
Judge.

Law Offices of Karen J. Haas, and Karen J. Haas; Law Offices of Mark A.  
Dienstag, and Mark A. Dienstag, for appellants.

Cole, Scott & Kissane, P.A., and Melinda S. Thornton; Roniel Rodriguez  
IV, P.A., and Roniel Rodriguez IV, for appellees.

Before SCALES, HENDON and LOBREE, JJ.

ON MOTION FOR REVIEW

SCALES, J.

Appellants VME Group International, LLC and Omni Property Management, LLC (collectively, “VME”) seek review of the trial court’s January 15, 2020 order awarding appellate attorneys’ fees to appellee Stuart Kalb pursuant to this Court’s September 25, 2019 fee entitlement order. Because the trial court was without jurisdiction to enter the challenged order, we vacate that order. We also take this opportunity to modify this Court’s September 25, 2019 fee entitlement order to clarify that it is conditioned upon the appellees<sup>1</sup> ultimately prevailing in the underlying litigation.

## **I. RELEVANT BACKGROUND**

On July 26, 2018, VME filed in the lower court its second amended complaint against Kalb and others, raising claims against Kalb for declaratory relief, breach of fiduciary duty, civil conspiracy and violation of restraint of trade. The same day, VME sought a temporary injunction based on its underlying claims for declaratory relief. The trial court denied VME’s motion for a temporary injunction and VME appealed to this Court the trial court’s non-final order denying temporary injunctive relief to VME.

On September 25, 2019, this Court affirmed the trial court’s order denying VME temporary injunctive relief, reproducing the trial court’s order in full in our

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<sup>1</sup> This Court’s September 25, 2019 fee entitlement order also granted the motion of co-appellee, The Grand Condominium Association, Inc. (“the Association”), seeking appellate attorneys’ fees.

opinion. See VME Grp. Int'l, LLC v. Grand Condo. Ass'n, 44 Fla. L. Weekly D2420, 2019 WL 4656226 (Fla. 3d DCA Sept. 25, 2019). Also on September 25, 2019, this Court entered an order granting Kalb and the Association's motions for appellate attorneys' fees and "remanded to the trial court to fix the amount." Regrettably, our September 25, 2019 fee entitlement order did not contain language indicating that the appellees' entitlement to fees was conditioned upon Kalb or the Association ultimately prevailing in the litigation.

VME timely filed in this Court a motion for rehearing and rehearing *en banc* of our September 25, 2019 affirmance opinion, which we denied on October 25, 2019. On November 1, 2019, VME's counsel filed a motion to withdraw that included a request for a thirty-day delay in the issuance of our mandate to allow VME to obtain new counsel. On November 5, 2019, we entered an order granting VME's motion. The order required VME to obtain new counsel within thirty days, and our order also noted that the Court's mandate would be issued "thirty-one (31) days thereafter." Notwithstanding this Court's November 5, 2019 order, on November 20, 2019, the mandate was inadvertently entered; the mandate was recalled that same day by separate Court order. No mandate enforcing our September 25, 2019 affirmance opinion or our September 25, 2019 fee entitlement order has yet issued from this Court.

Notwithstanding the fact that no mandate has issued from this Court, on December 6, 2019, Kalb, relying on this Court’s September 25, 2019 fee entitlement order, filed a motion in the lower court seeking a determination of the amount of appellate attorneys’ fees he was entitled to recover.<sup>2</sup> The trial court held an evidentiary hearing on Kalb’s attorneys’ fees motion and, on January 15, 2020, entered the challenged order awarding Kalb \$38,250 in appellate attorneys’ fees, plus statutory interest.<sup>3</sup> VME timely seeks appellate review of the lower court’s January 15, 2020 attorneys’ fees order. See Fla. R. App. P. 9.400(c) (“Review of orders rendered by the lower tribunal under this rule shall be by motion filed in the court within 30 days of rendition.”).

## **II. ANALYSIS**

In its motion for review, VME argues, among other things, that: (1) the trial court lacked jurisdiction to enter the January 15, 2020 attorneys’ fees order because the mandate from this Court – finalizing both our September 25, 2019 affirmance opinion and the accompanying September 25, 2019 fee entitlement order – had not yet issued; and (2) awarding unconditional, appellate attorneys’ fees to Kalb at this

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<sup>2</sup> The Association also filed a similar motion, but did not seek to have its appellate attorneys’ fees immediately determined and awarded by the trial court, and has not yet set for hearing its motion to determine fees.

<sup>3</sup> VME asserts that Kalb has already executed on this order by garnishing VME’s bank account.

stage of the proceedings was premature because no prevailing party has been established in the lower tribunal. We agree with VME on both points and address each in turn.

*A. The trial court was without jurisdiction to enter the January 15, 2020 attorneys' fees order prior to this Court's mandate issuing*

An appellate court's order is not final until its issuance of the mandate. See Fla. R. App. P. 9.340; Henderson v. State, 679 So. 2d 805, 808 n.1 (Fla. 3d DCA 1996) ("Opinions of appellate courts are not final until the time for rehearing and the disposition thereof, if any, has run."). The mandate of an appellate court is the official method of communicating its judgment to the lower tribunal. Colonel v. Reed, 379 So. 2d 1297, 1298 (Fla. 4th DCA 1980). The appellate court does not lose jurisdiction over the matter until the mandate is issued; therefore, the trial court cannot regain jurisdiction over the matter until the appellate court issues its mandate. Id. A trial court lacks jurisdiction to render an order on a matter prior to the appellate court's issuance of a mandate on that matter, and such a premature order is subject to vacatur by the appellate court. Id.; see also Richardson v. State, 257 So. 3d 605, 606 (Fla. 1st DCA 2018); Jimenez v. State, 215 So. 3d 1259, 1259-60 (Fla. 3d DCA 2017); Leatherwood v. State, 168 So. 3d 328, 330 (Fla. 3d DCA 2015); State v. Sharp, 564 So. 2d 217, 217 (Fla. 4th DCA 1990).<sup>4</sup>

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<sup>4</sup> We are aware that, absent a stay, during the pendency of appellate review of a non-final order, Florida Rule of Appellate Procedure 9.130(f) expressly authorizes a trial

Therefore, we vacate the trial court's January 15, 2020 attorneys' fee order because it was entered without jurisdiction. The trial court shall take the necessary actions to restore the parties to their respective positions as if the January 15, 2020 attorneys' fee order had not been entered.

*B. Our September 25, 2019 fee entitlement order should have been conditioned upon Kalb ultimately prevailing in the matter*

In his motion seeking appellate attorneys' fees filed in this Court, Kalb relied upon a contractual provision contained within the Association's Declaration of Condominium and section 718.303 of the Florida Statutes, both of which condition entitlement to fees on being the prevailing party below. As this Court's prior opinion affirming the denial of temporary injunctive relief makes clear, however, several of VME's "remaining claims for injunctive relief all turn on the payment of funds or loss of potential short-term rental income. As such, they present claims for quantifiable damages and are all remediable at law." VME Grp. Int'l, LLC, 2019 WL 4656226 at \*2. Put another way, while Kalb prevailed on VME's temporary injunction motion, Kalb ultimately might not prevail in this litigation. Hence, this

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court, to "proceed with all matters, including trial or final hearing, except that the lower tribunal may not render a final order disposing of the cause pending such review absent leave of the court." We do not, however, read this rule to authorize a trial court to enter a judgment fixing the amount of appellate attorneys' fees for an appeal that is not final and over which the appellate court still retains jurisdiction. Indeed, until the mandate issues, the appellate court's opinion, and any fee award that may be intertwined with the opinion, is not final. See Fla. R. App. P. 9.340; Henderson, 679 So. 2d at 808 n.1.

Court's September 25, 2019 fee entitlement order should have conditioned Kalb's entitlement to appellate attorneys' fees on Kalb ultimately prevailing in the underlying case.

This Court's September 25, 2019 fee entitlement order instructing the trial court to "fix the amount" of appellate fees was premature, because VME's underlying claims have not yet been resolved. See *Balmaseda v. Okay Ins. Exch. of Am. LLC*, 240 So. 3d 146, 148 (Fla. 3d DCA 2018) ("Based on our review, we conclude that this Court's instructions to the trial court 'to fix amount' has caused the trial court to prematurely address and rule on Okay Insurance's motion for appellate attorney's fees because Okay Insurance's counterclaim has not yet been fully resolved."). We therefore modify, *nunc pro tunc*, this Court's September 25, 2019 fee entitlement order to clarify that Kalb's entitlement to appellate attorneys' fees in this appeal is conditioned upon Kalb ultimately prevailing in the lower proceedings on VME's claims against him.<sup>5</sup> Id. ("The order granting Okay Insurance's motion for attorney's fees should have provided that the fees were

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<sup>5</sup> As referenced in footnote 1, *supra*, this Court's September 25, 2019 fee entitlement order also awarded appellate attorneys' fees to the Association, which also based its entitlement to fees on the Association's Declaration of Condominium and section 718.303. We therefore modify, *nunc pro tunc*, this Court's September 25, 2019 fee entitlement order to clarify that, as with Kalb's entitlement to fees, the Association's entitlement to fees is similarly conditioned upon the Association ultimately prevailing in the lower proceeding on the claims against it.

contingent on Okay Insurance ultimately prevailing in the lower tribunal on its counterclaim against Balmaseda.”).

### **III. CONCLUSION**

The trial court lacked jurisdiction to enter the January 15, 2020 attorneys’ fee order awarding Kalb appellate attorney’s fees because the mandate from this Court for the subject appeal had not yet issued.<sup>6</sup> Therefore, we vacate the trial court’s January 15, 2020 attorneys’ fee order and instruct the trial court to take the necessary actions to restore the parties to their respective positions as if the January 15, 2020 attorneys’ fee order had not been entered. Further, we amend, *nunc pro tunc*, this Court’s September 25, 2019 fee entitlement order to clarify that the appellees’ entitlement to attorneys’ fees in this appeal are conditioned upon the appellees ultimately prevailing in the lower court proceedings.

Lower court’s attorneys’ fee order vacated, with instructions; this Court’s fee entitlement order modified.

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<sup>6</sup> The Clerk of this Court is directed to issue, immediately following the issuance of this opinion, the mandate that finalizes both our September 25, 2019 affirmance opinion and, as modified herein, our accompanying fee entitlement order.