

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 1647

VICTORINE BATTAGLIA WOODSUM

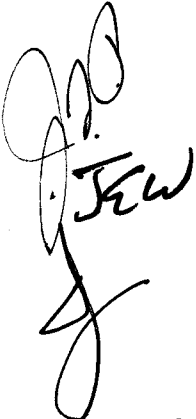
VERSUS

HUGH AND RHONDA BAGBY

Judgment rendered

JUN 05 2015

Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. #2012-12297
Honorable Scott Gardner, Judge



GEORGE R. BLUE, JR.
COVINGTON, LA

ALDRIC C. POIRIER, JR.
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MANDEVILLE, LA

ATTORNEY FOR
PLAINTIFF-APPELLANT
VICTORINE BATTAGLIA
WOODSUM

ATTORNEYS FOR
DEFENDANTS-APPELLEES
HUGH AND RHONDA BAGBY

BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

PETTIGREW, J.

This is an appeal by the plaintiff, Victorine Battaglia Woodsum (Ms. Woodsum), of two judgments ordering her to pay attorney fees to the defendants, Hugh and Rhonda Bagby (the Bagbys), Ms. Woodsum's next door neighbors, following a bench trial concerning which party was liable for drainage problems that arose in the common boundary between their two properties. Ms. Woodsum filed a motion and order for a suspensive appeal from both the July 12, 2013 and the July 8, 2014 judgments; however, on appeal, the only issues raised by Ms. Woodsum in her assignments of error concern the award of attorney fees she was ordered to pay the Bagbys. After a thorough review of the record and applicable law, we reverse the award of attorney fees.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Ms. Woodsum and the Bagbys are next door neighbors on Pencarrow Circle, in Arbor Walk subdivision in Madisonville, Louisiana. It is undisputed that, as owners of property located within the subdivision, the parties are bound by the architectural standards and use restrictions adopted by Arbor Walk Property Owners Association, Inc. (the Association), and are governed by the Restricted Covenants and Dedication of Servitudes and Easements for Arbor Walk subdivision adopted by the Association in July 2002 (the covenants).

Ms. Woodsum originally filed a petition for damages and mandatory injunction, claiming that the Bagbys raised the level of their lot when they built a basketball court in their backyard in 2011, ultimately causing flooding and erosion of her property. The Bagbys answered her suit admitting they constructed a one-half size basketball court with the express written approval of the governing Property Manager and Architectural Control Committee of their subdivision; the written approval was attached to their answer.

The Bagbys further asserted a reconventional demand against Ms. Woodsum and "John Doe Woodsum," as the putative owners and/or domiciliaries of the property next door to them, alleging that the Woodsums, in violation of the covenants, overfilled their property with dirt, causing a permanent and unnatural diversion of water onto the Bagbys' property. The Bagbys later argued that Ms. Woodsum (and John Doe Woodsum) also

without authority or approval, and in further violation of said covenants, placed sandbags along the boundary between the properties, and dug an open, uncovered, and unimproved trench in attempts to remediate the damages caused by her overfilling. The Bagbys claimed that those actions not only destabilized and facilitated the erosion of their property, but also created a physical hazard to anyone attempting to traverse the properties.

The Bagbys also filed a third party demand against the Association, as the governing body authorized to enforce the covenants, claiming that despite being informed of Ms. Woodsum's unauthorized actions, the Association failed to enforce the covenants or take any action against her, resulting in litigation at their expense. The Association filed an answer and asserted affirmative defenses and exceptions, including a peremptory exception raising the objection of no right of action and a motion for summary judgment. Following a hearing, the district court (at the time, Judge Hillary J. Crain) sustained the exception raising the objection of no right of action, gave the Bagbys thirty (30) days to amend their third party demand to cure the exception if possible, and rendered the motion for summary judgment moot because of the granting of the exception. The Bagbys did not amend their third party demand, and an order of dismissal was issued by the district court (at the time, Judge Scott Gardner), dismissing with prejudice the Bagbys' claims against the Association.

The matter then proceeded to trial, following which the district court (Judge Scott Garner) rendered judgment, dated July 12, 2013, in favor of the Bagbys and against Ms. Woodsum on the original petition, dismissing Ms. Woodsum's claims at her cost. The district court additionally found in favor of the Bagbys on their reconventional demand, noting in oral reasons that the expert testimony of licensed professional engineer Mr. Jean Thibodeaux established that the creation of the ditch and filling placed therein by Ms. Woodsum in the front yard, not only created a tripping hazard, but also obstructed the drainage of the front yard, to the detriment of the Bagbys' property.

In addition to ordering Ms. Woodsum, at her cost, to remove the filling to the extent that it encroached within five (5) feet of the property line, and to return the

elevation of the property to its original state as determined by the original developer's specifications, the district court assessed Ms. Woodsum with all costs of the litigation and awarded the Bagbys attorney fees that are the subject of this appeal.

Following the July 12, 2013 judgment, Ms. Woodsum filed a Motion for New Trial on two separate grounds: (1) that the award of attorney fees was manifestly erroneous; and (2) that, because she was ninety (90) years old, partially deaf, and prosecuted her claims against the Bagbys *pro se*,¹ she may have lost the chance to provide her own testimony and introduce her evidence as a result of alleged miscommunications during the trial. After a hearing on September 25, 2013 (during which Ms. Woodsum was represented by counsel, and was also allowed to testify regarding what her testimony and evidence would have been had she been allowed to present such at the original trial), the district court granted the motion in part, to allow a new trial solely on the issue of whether the award of attorney fees to the Bagbys was proper; in all other respects, the motion for new trial was denied. A judgment to that effect was signed on October 17, 2013. (The district court specifically found that his observations at the hearing on the motion for new trial, consistent with his observations during the original trial, led him to believe that Ms. Woodsum was not confused at the original trial, that she was able to hear and understand all of the questioning during the motion for new trial, from the same distance that she was during the original trial, and that nothing in her testimony at the hearing for a new trial added to the evidence and testimony presented at the original trial.)

However, prior to the new trial being set for hearing, the Bagbys filed a motion for summary judgment asserting there were no genuine issues of material fact and that they were entitled to the award of attorney fees incurred to date. Following the hearing on the motion for summary judgment, held on June 20, 2014, the district court, in a judgment

¹ We note that although Ms. Woodsum represented herself, her son and daughter were both present to assist her throughout the trial. Moreover, notwithstanding her allegations to the contrary, the record reveals the district court was very diligent in ensuring that Ms. Woodsum heard and understood what was going on throughout the trial.

dated July 8, 2014, granted the Bagbys' motion for summary judgment in part, awarding attorney fees incurred by them up to July 25, 2013, the date Ms. Woodsum filed her motion for a new trial, and denied the motion for summary judgment as to those attorney fees incurred by the Bagbys following the filing of Ms. Woodsum's motion for new trial.

As noted earlier, Ms. Woodsum appealed both judgments, the original July 12, 2013 judgment on the merits, which awarded attorney fees, and the July 8, 2014 judgment, again, awarding attorney fees. However, the only issues raised on appeal concern the award of attorney fees.

ATTORNEY FEES – APPLICABLE LAW

Attorney fees are not allowed under Louisiana law except where authorized by statute or contract. **Board of Supervisors of Louisiana State University v. Louisiana Agricultural Finance Authority**, 2007-0107 (La. App. 1 Cir. 2/8/08), 984 So.2d 72, 80. Attorney's fees are awarded to a successful litigant so that his recovery might not be diminished by the expense of legal representation. **Lamz v. Wells**, 2005-1497 (La. App. 1 Cir. 6/9/06), 938 So.2d 792, 798.

Further, when items of special damages are claimed, a litigant must specifically allege the claim in his petition. La. C.C.P. art. 861; **Box v. City of Baton Rouge**, 2002-0198 (La. App. 1 Cir. 1/15/03), 846 So.2d 13, 16. Attorney fees, as items of special damages, must be specifically alleged in the petition. *Id.*; see also, **Mix v. Mougeot**, 446 So.2d 1352, 1356 (La. App. 1 Cir. 1984); **O'Connell v. Braud**, 2011 WL 3806959, 2010-2245 (La. App. 1 Cir. 8/10/11)(unpublished opinion). The purpose of the specificity requirement is to avoid the imposition of surprise upon the defendant. **Stevens v. Winn-Dixie of Louisiana**, 95-0435 (La. App. 1 Cir. 11/9/95), 664 So.2d 1207, 1213. The only exception to this general rule is where otherwise inadmissible evidence of special damages is admitted without objection and the pleadings are thereby enlarged to encompass those special damages. *Id.*

DISCUSSION

In support of their motion for summary judgment concerning the award of attorney fees, the Bagbys argued the attorney fees are warranted by contract. In support

of this argument, the Bagbys attached a copy of the covenants, which explicitly conveyed the contractual right to claim attorney fees and court costs to the Association. The relevant provision, Article XII (General Provisions), Section 12.04 (Enforcement), of the covenants provides, in pertinent part:

Should the Developer or the Association employ legal counsel to enforce any of the foregoing, all costs incurred in such enforcement, including court costs and reasonable attorneys' fees, shall be paid by the violating Owner.

In addition to a copy of the covenants, the Bagbys also attached a copy of an assignment of rights, executed by the Association on September 24, 2013, which, in reference to the rights detailed above, provides: "[t]o the extent that the subrogation of the foregoing rights to Mr. and Mrs. Bagby are not inherent in Section 12.04 of the Covenants, the Association hereby assigns its rights to recover court costs and reasonable attorney's fees to Mr. and Mrs. Bagby, effective April 24, 2012." The Bagbys also attached a copy of the minutes of a special meeting of the board of directors of the Association, held on September 23, 2013, reflecting a unanimous decision by the board to execute the aforementioned limited assignment of rights to the Bagbys, allowing them to recover sums due to the Association for attorney fees and court costs, as appropriate under the covenants incurred by them as a result of litigation with Ms. Woodsum. The Bagbys contended that the issue was proper for summary judgment because the assignment of rights constituted a conventional subrogation by the Bagbys of the Association's contractual right to claim attorney fees. (We note that the meeting by the board was held two days prior to the hearing on the motion for new trial; the Assignment of Rights was executed the day before that hearing. The two documents were submitted into evidence at the hearing on the motion for new trial.) Also, at the hearing on the motion for new trial, they assert that Judge Crain's prior ruling -- that the Bagbys would stand in the shoes of the Association constituted law of the case -- entitled them to assert the Association's contractual right to claim attorney fees and court costs.

The Bagbys claim that the assignment of rights was executed "[t]o alleviate any doubt that the Association intended to subrogate its rights under the Covenants;" thus,

"memorializing the Association's position that Mr. and Mrs. Bagby would step into its shoes by enforcing the Covenants," including its right to collect reasonable attorney fees and costs incurred as a result of the enforcement.

Ms. Woodsum opposed the motion for summary judgment; first, on the ground that the new trial that she had been granted had not yet been set for hearing. Ms. Woodsum also argued that the covenants expressly conveyed the right to claim attorney fees only to the Association and/or the developer, and then, only if and when the Association or the developer employed legal counsel to enforce any of the covenants. Ms. Woodsum argued that the exclusion of the individual homeowners from the section conveying the right to claim attorney fees was intended and not accidental or an oversight. She noted that §12.04 of the covenants provides that individual aggrieved homeowners, as well as the Association and/or the developer, may institute an action to recover sums due, damages, and/or injunctive relief, for violations thereof; however, that same section specifies that only the Association and/or the developer can claim attorney fees from a violating homeowner *if* either should employ counsel to enforce the covenants.² Ms. Woodsum further argued that the assignment of rights by the

² The entirety of Article XII, §12.04 provides as follows:

Enforcement. Each Owner shall comply strictly with the By-Laws and published rules and regulations of the Association adopted pursuant to these Restrictive Covenants, as either of the same may be lawfully amended from time to time, and with the covenants, conditions, and restrictions set forth in these Restrictive Covenants and in the deed or other instrument of conveyance to his Lot or Dwelling, if any. Failure to comply with any of the same shall be grounds for imposing fines, suspending voting rights or rights of use in and to the recreational facilities, located in the Common Areas, or *for instituting an action to recover sums due, for damages, and/or for injunctive relief, such actions to be maintainable by the Developer, the Board of Directors on behalf of the Association, or by an aggrieved Owner.* Should the Developer or the Association employ legal counsel to enforce any of the foregoing, *all costs incurred in such enforcement, including court costs and reasonable attorneys' fees,* shall be paid by the violating Owner. Inasmuch as the enforcement of the provisions of these Restrictive Covenants, the By-Laws, and the rules and regulations of the Association are essential for the effectuation of the general plan of development contemplated hereby and for the protection of present and future Owners, it is hereby declared that any breach thereof may not adequately be compensated by recovery or damages, and that the Developer, the Association, or any aggrieved Owner, in addition to all other remedies, may require and shall be entitled to the remedy of injunction to restrain any such violation or breach or any threatened violation or breach. No delay, failure, or omission on the part of the Developer, the Association, or any aggrieved Owner in exercising any right, power[,], or remedy herein provided shall be construed as an acquiescence thereto or shall be deemed a waiver of the right to enforce such right, power, or remedy thereafter as to the same violation or breach, or as to a violation or breach occurring prior or subsequent thereto, and shall not bar or affect its enforcement. No right of action shall accrue nor shall any action be brought or maintained by anyone whatsoever against the Developer or the Association for or on account of any failure to bring any action on account of any violation or breach, or threatened violation or breach, by any person of the provisions of these Restrictive Covenants, the By-Laws, or any rules and regulations of the Association, however long continued. (Emphasis added.)

Association was invalid because the Association never filed suit, and therefore, the Association had no transferrable contractual right to claim attorney fees and court costs. Ms. Woodsum cited La. C.C. art. 2652, which governs the sale of litigious rights, in support of her argument.³ That article states that a litigious right is one that is contested in a suit already filed. Since no suit had been filed by the Association, Ms. Woodsum argued that pursuant to La. C.C. art. 2652, there was no litigious right for the Association to assign to the Bagbys. Thus, she claimed there was no statutory or contractual basis upon which the Bagbys could be awarded attorney fees.

At the hearing on the motion for summary judgment, in addition to urging all of the foregoing arguments (asserted in Ms. Woodsum's opposition memorandum), counsel for Ms. Woodsum further argued that even if the assignment of rights was valid, it did not have any effect as to Ms. Woodsum until she received notice thereof, pursuant to La. C.C. art. 2643, which provides that an assignment of rights is effective against the debtor and third persons only from the time the debtor has actual knowledge, or has been given notice of the assignment. Counsel noted that the assignment was not executed until the day before the hearing on the motion for new trial, he was unsure when Ms. Woodsum got notice thereof, but that the assignment was not part of the argument or evidence presented at the hearing on the motion for new trial. He further stated that even if Ms. Woodsum got notice thereof on the day of the hearing, it would be effective only from that date forward.

Finally, on appeal, Ms. Woodsum additionally asserts that the award for attorney fees was erroneous because they were never pled and, thus, were waived by the Bagbys. Our review of the record reveals that the Bagbys did not assert a claim for attorney fees in the reconventional demand against Ms. Woodsum. In fact, the first mention of the fact

³ Louisiana Civil Code article 2652 provides:

When a litigious right is assigned, the debtor may extinguish his obligation by paying to the assignee the price the assignee paid for the assignment, with interest from the time of the assignment.

A right is litigious, for that purpose, when it is contested in a suit already filed.

Nevertheless, the debtor may not thus extinguish his obligation when the assignment has been made to a co-owner of the assigned right, or to a possessor of the thing subject to the litigious right.

that the Bagbys were claiming attorney fees (by way of subrogation to the Association's contractual right to claim the same) was during closing argument by counsel for the Bagbys. Thus, Ms. Woodsum had no notice, either prior to trial or during trial, that the Bagbys were seeking an award of attorney fees. The purpose of specifically pleading such -- to avoid the imposition of surprise to the defendant -- is even greater in a case where the claim is based on a claim of contractual subrogation, which Ms. Woodsum also disputes. Further, we find that the pleadings were not enlarged to encompass that claim because the arguments supporting the Bagbys' claim were not presented at the original trial on the merits, following which the district court rendered the award, but, rather, were made after the district court granted Ms. Woodsum a new trial on the issue of the propriety of its earlier award.

Under these circumstances, we find the district court erred in awarding the Bagbys attorney fees that were not specifically pled prior to the trial.⁴ There was no statutory right asserted for the award, and Ms. Woodsum had no notice that the Bagbys were claiming contractual subrogation to the Association's purported right to claim such under the covenants.

Because we find reversible error in this assignment, we pretermite discussion of the remaining assignments of error as unnecessary. For the foregoing reasons, we find the district court erred in awarding the Bagbys attorney fees. Accordingly, the portion of the July 12, 2013 judgment that awarded attorney fees, and the July 8, 2014 judgment granting the Bagbys' motion for summary judgment are hereby reversed. Costs of this appeal are assessed to the Bagbys.

REVERSED.

⁴ We are mindful that La. C.C.P. art. 862 provides that a final judgment may grant a party such relief as he is entitled to, notwithstanding his failure to demand it in his pleadings. Pursuant to Article 862, a type of relief which is prayed for may be granted on a legal theory or principle, not specifically presented or urged by a litigant. This does not mean, however, that the courts can grant a type of relief for which a litigant has not prayed when the particular relief sought is one which must be specifically alleged as required by La. C.C.P. art. 861. **McGowan-Rigsby Supply, Inc. v. Charles Carter & Company, Inc.**, 268 So.2d 716, 721-22 (La. App. 1 Cir. 1972).