SUPREME COURT OF FLORIDA

CASE NO. 81,232

DISTRICT COURT OF APPEAL
4TH DISTRICT - NO. 91-2930

A. PAUL PROSPERI,

Petitioner,

vs.

CODE, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

PAUL SAFRAN, JR., P.A.
265 Sunrise Avenue, Ste. 204
Palm Beach, FL 33480
(407) 832 5696
Fla. Bar No. 473278

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Issue I

IS AN OWNER WHO PREVAILS ON A COMPLAINT BY A CONTRACTOR OR A SUBCONTRACTOR TO ENFORCE A MECHANIC'S LIEN UNDER PART 1, CHAPTER 713, FLORIDA STATUTES (1989), ENTITLED TO ATTORNEY'S FEES UNDER 713.29, EVEN THOUGH, IN THE SAME SUIT, THE CONTRACTOR PREVAILED AGAINST THE OWNER ON A CLAIM FOR MONEY DAMAGES FOR BREACH OF THE CONTRACT, BOTH CLAIMS ARISING OUT OF THE SAME TRANSACTION?

Although not referenced in the certified question framed by the Fourth District Court of Appeal, it is important to note that the facts of this case establish that not only did Petitioner, A. PAUL PROSPERI, successfully defend against Respondent, CODE, INC.'S claim for a mechanic's lien, but it did so in light of the trial court's specific finding that "... the greater weight of evidence has proven that the attorney's fees and costs incurred in this action directly, naturally, and proximately, resulted from the filing of false affidavits. But for the filing of false affidavits, PROSPERI would have continued to have made all payments due under the contract and CODE would have continued to work on the project until it was properly completed." [A-1, p.2].

Respondent requests this Court, in its Answer Brief, to mechanically apply the "net judgment rule", without consideration for the specific facts of this case.

Initially, Respondent's contention that "although the

mechanic's lien statute has been amended and modified by the Florida Legislature since its original enactment its purpose has remained to afford a contractor, laborer or materialman assurance of being compensated for their labor or services," is misplaced. [Respondent's Answer Brief, p.10].

Clearly, the mechanic's lien statute was enacted to benefit both the owner and the lienors. As noted by the court in Bryan v. Owsley Lumber Company, 201 So.2d 246, 249 (Fla. 1st DCA 1967), "it appears to us to have been the legislative intent in the enactment of the mechanic's lien law to protect the owner from being required to pay more for his improvements than called for in his contract, provided he strictly complies with the requirements set forth in the law". Additionally, in Miller v. Duke, 155 So.2d 627, 630 (Fla. 1st DCA 1963), the Court specifically stated, "we hold that one of the purposes of the mechanic's lien law is to assure the owner, in an arm's length transaction, that so long as he complies in good faith with its provisions he will be able to construct a specific improvement on his property for a given contract price".

This Court, in Holding Electric Inc. v. Roberts, 530 So.2d 301, 303 (Fla. 1988), in construing Florida Statute § 713.06(3)(d)1, (a statutory provision at issue in this very case), held that, "the clear purpose of § 713.06(3)(d)1 is to protect the owner against the risk of having to pay for the same services or

materials more than once, and to allow the owner an opportunity to make proper payment before suit is filed."

It is well established that the provisions of the mechanic's lien statute are to be strictly construed. See, e.g., Leader Mortg. Co. v. Rickards Electric Service, Inc., 348 So.2d 1202 (Fla. 4th DCA 1977); Lehigh Structural Steel Co. v. Joseph Langner, Inc., 43 So.2d 335 (Fla. 1949) and Browne v. Park, 144 Fla. 696, 198 So. 462 (Fla. 1940).

Indeed, the 1977 Florida Legislature specifically added § 713.37 to the mechanic's lien statute, which provides, "this part shall not be subject to a rule of liberal construction in favor of any person to whom it applies."

Section 713.29, provides, "In any action brought to enforce a lien under Part I, the prevailing party shall be entitled to recover a reasonable fee for the services of his attorney for trial and appeal, to be determined by the court, which shall be taxed as part of his costs, as allowed in equitable actions."

An analysis of the legislative intent behind § 713.29 was articulated by J. Farmer, concurring specially in M & P Concrete Products, Inc. v. Woods, 590 So.2d 429, 431 (Fla. 4th DCA 1991), wherein he stated:

> "It seems rather clear to me from the text that it is the enforcement of a Part I Chapter 713 lien which implicates the right to attorney's fees, and not the joinder of that attempted enforcement with another non-

> statutory cause of action on which the lienor prevails. In other words, the Legislature appears to have been concerned with the attempted enforcement of defective liens (as well as the successful enforcement of valid liens) in allowing prevailing party fees.
>
> "From the language chosen, one can reasonably infer that the legislature was persuaded that the assertion of an invalid lien might have consequences affecting title to real property which the failed lienor should pay for in attorney's fees. At the same time, it appears to have concluded that those planning on using the device of a Chapter 713 lien to force another party to a transaction to pay money, which that party might not otherwise have paid in the absence of the invalid lien claim, might be dissuaded from the attempt by liability for fees."

The analysis provided by Judge Farmer above has special application where, as here, the trial court specifically found that "... the greater weight of evidence has proven that the attorney's fees and costs incurred in this action, directly, naturally and proximately resulted from the filing of the false affidavits." [A-1, p. 2].

Respondent, CODE, INC., in its answer recites a series of cases in which the "net judgment rule" has been applied. A. Paul Prosperi does not dispute the fact that courts have applied the net judgment rule in a variety of factual situations. However, a mechanical application of the net judgment rule is not warranted by the specific terms of the statute, nor is it required in order to do equity to the parties.

As the court noted in S.C.M. Associates, Inc. v. Rhodes, 395 So.2d 632, 634 n.2 (Fla. 4th DCA 1981), "while we need not rest our

decision on this point, a good argument can be made that when the Legislature amended § 713.29 in 1977, (Chapter 77-353, § 11, Law of Florida) to refer to the taxing of costs as allowed in equitable actions, it intended for the courts to have more discretion in deciding who is the prevailing party."

As stated previously, the mechanic's lien statute must be strictly construed. If a contractor brings an action against an owner under the mechanic's lien statute, he is charged with the duty and responsibility of insuring, prior to filing suit, his entitlement to a mechanic's lien. The Legislature, in enacting the mechanic's lien statute, gave the contractor remedies he would not be otherwise entitled to, including the right to foreclose upon the owner's real property. However, in order to avail himself of these additional rights, he must strictly comply with the terms of the mechanic's lien statute. If he is found not to be entitled to a mechanic's lien, he should not be heard to complain when he is assessed attorney's fees as a result of the owner's successful defense.

Furthermore, the legislative intent to protect the laborer or materialman as stated in Emory v. International Grass and Mfg. Co., 248 So.2d 496 (Fla. 2nd DCA 1971) is not defeated by refusal to mechanically apply the net judgment rule. As noted by the Court in Snaidman v. Harrell, 432 So.2d 809 (Fla. 1st DCA 1983), § 713.29

... does not allow attorney's fees for services in the whole litigation; it provides only for services incident to the foreclosure action." Accordingly, a contractor who brings a multi-count suit, for foreclosure of a mechanic's lien, and breach of contract, and who fails to establish his mechanic's lien, but otherwise is successful on his breach of contract count, should be required to pay attorney's fees to the owner for that portion of the lawsuit regarding the owner's successful defense of the mechanic's lien statute. There is nothing inequitable with this result. As stated previously, it is the contractor's obligation to insure compliance with the mechanic's lien statute before filing a complaint to foreclose his lien. His neglect in failing to make the proper assurances should be chargeable to him, and not to the owner who successfully defends against the lien.

As this Court stated in Holding Electric Inc. v. Roberts, 530 So.2d 301 (Fla. 1988), "we note that a contractor who fails to give the required affidavit prior to instituting the lien foreclosure suit should be subject to attorney's fees for that portion of the action attributable to his failure to comply with the statute, irrespective of what occurs in the rest of the lawsuit." Id., supra, (emphasis added).

Furthermore, Respondent's contention that Holding, does not apply to the instant case, because it construes Florida Statute §

713.06(3)(d)1, is misplaced. Mr. Prosperi required Respondent to provide partial payment affidavits, as a condition precedent to payment. [A-1, p. 2]. Florida Statute § 713.06(3)(c)1, provides that "the owner may require, and in such event, the contractor shall furnish as a prerequisite to requiring payment to himself, an affidavit as prescribed in subparagraph (d)1." (emphasis added). Accordingly, the identical statutory provision construed by this Court in Holding Electric, applies to the facts of the instant case.

More importantly, the facts of this case indicate that the actions of CODE INC. were infinitely more egregious than those of the contractor in Holding. In Holding, the contractor merely failed to timely provide the final affidavit, with no allegations of fraudulent conduct on behalf of the contractor. Here, however, the trial court specifically held that, "the affidavits were knowingly false, and submitted for the purpose of obtaining money in reliance on their accuracy." [A-2, p.2]. Indeed, the trial court further held that, " ... the greater weight of evidence has proven that attorney's fees and costs incurred in this action directly, naturally, and proximately, resulted from the filing of the false affidavits." [A-1, p. 2].

In applying the net judgment rule to the facts of the instant case, the courts have penalized Mr. Prosperi, by forcing him to

incur substantial legal expenses necessary to defend the mechanic's lien action, as a result of CODE INC.'s filing of false affidavits. Florida Statute § 713.29, by its very terms, entitles the prevailing party to attorney's fees. In the present case, the prevailing party on the mechanic's lien count is Petitioner, A. PAUL PROSPERI. Furthermore, equity dictates the awarding of attorney's fees to Mr. Prosperi, under the facts of the present case. This Court should disapprove of those decisions permitting a mechanical application of the net judgment rule. An owner who successfully defends against a mechanic's lien count should be awarded attorney's fees for that portion of the action, regardless of whether the contractor obtains a "net judgment", on his breach of contract action. By doing so, this Court would be giving effect to the legislative intent behind § 713.29 and § 713.37, as well as doing equity to the respective parties.

Issue II

DOES THE TEST OF Moritz v. Holtz, FOR DETERMINING WHO IS THE PREVAILING PARTY FOR THE PURPOSES OF AWARDING ATTORNEY'S FEES APPLY TO FEES AWARDED UNDER § 713.29, FLORIDA STATUTES.

In its order denying PROSPERI attorney's fees, the Fourth District Court of Appeal stated:

> "We acknowledge the Supreme Court's recent opinion in Moritz v. Hoyt Enterprises, Inc., 17 F.L.W. 465 (Fla. July 23, 1992), in which it held that the test for determining who was the prevailing party for purposes of

> awarding attorney's fees in a contract action is 'to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court.' Id., at 466. It may be that the Supreme Court will extend that test to cases involving attorney's fees awarded under § 713.29, Florida Statutes (1991). Indeed there is room in the statute for such an equitable approach. See, e.g., S.C.M. Associates Inc. v. Rhodes, 395 So.2d 632, 634 n. 2 (Fla. 2d DCA 1981).
>
> "However, given the heretofore uniform approach of most courts on this issue, we are loathe to upset this precedent without guidance from our higher authority." [A-3, p. 2].

On rehearing the Fourth District certified the question identified as Issue II in this action.

Respondent's analysis of the test enunciated in Moritz v. Hoyt Enterprises, Inc., is misplaced. In Moritz, this court was faced with a factual situation similar to the present case. In Moritz, the Moritz's entered into a contract with Hoyt for the purchase and construction of a single family home. Upon entering the contract, Moritz gave Hoyt a ten percent deposit of $52,000.00. During construction, the Moritz's complained that the property was not being built in accordance with the standards of a luxury home, and subsequently closed on a different house. Hoyt subsequently sold the home and the Moritz's sued alleging breach of contract and attempting to impose an equitable lien. Hoyt counterclaimed alleging repudiation of the contract. The trial court determined that Hoyt's actions "did not constitute a material breach going to

the essence of the contract, and thus did not excuse the Moritz' performance." Id. p. 809. Accordingly, the trial judge entered a judgment in favor of Hoyt in the amount of $16,861.00 plus interest in the amount of $3,718.56, representing the difference between the sale price of the house, and the contract price plus extras. The trial court also determined that the Moritz's were entitled to the difference between Hoyt's damages of $20,579.56, and the Moritz' deposits and advances of $57,877.45 plus interest in the amount of $8,228.01. Accordingly, a net judgment was awarded in favor of Moritz's in the amount of $45,525.90. The trial court then determined that Hoyt was the prevailing party, and granted Hoyt's motion to tax attorney's fees and costs. Id. p. 809.

On appeal, the Fourth District Court of Appeal relying upon its decision in Reinhart v. Miller, 548 So.2d 1176 (Fla. 4th DCA 1989) affirmed the trial court's order granting attorney's fees to Hoyt. A dissent was filed relying upon the decision of the Fifth District in Casavan v. Land-o-Lakes Realty Inc., 542 So.2d 371 (Fla. 5th DCA 1989), which held that the party recovering the larger portion of the sum in dispute should be the prevailing party for the purpose of awarding attorney's fees, even though that party breached the contract.

Thereafter, this court approved the decision of the Fourth District Court of Appeal and disapproved Casavan and Daniels v.

Arthur Johannessen, Inc., 496 So.2d 914 (Fla. 2d DCA 1986), and held that, "it is our view that the fairest test to determine who is the prevailing party is to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court. Given the circumstances of this record, we find that the trial judge was within his discretion to grant Hoyt's motion for attorney's fees and costs." Moritz, supra, p. 810.

In the instant case, the trial court found that,

> "as to count 2 of the Complaint, breach of contract, and the defendants' counterclaim, the court finds that the contract was originally breached by the plaintiff [CODE, INC.] by filing untrue affidavits and by inaccurately accounting to the defendant [PROSPERI]. The Defendant, [PROSPERI] by contract and law was entitled to an accurate accounting and the Plaintiff [CODE] was not entitled to be paid until it had adequately accounted. The affidavits were knowingly false, and submitted for the purpose of obtaining money in reliance on their accuracy. The Plaintiff [CODE] apparently believed that it was the Defendant that had breached the contract and so refused to continue to perform. At this point the Defendant [PROSPERI] had no practical choice but to engage assistance elsewhere in order to complete the contract and the Defendant [PROSPERI] was entitled to deduct the cost of completing the contract from any sums due to the Plaintiff. Therefore, the court finds that of the $31,898.01 unpaid under the contract the Defendant [PROSPERI] is entitled to a deduction as more fully detailed below of $14,588.95 leaving a balance of $17,309.06 due and payable under count 2 of the Complaint." [A-2, p. 2,3].

Respondent erroneously asserts that the policy considerations behind this court's ruling in Moritz is somehow related to the

Civil Rights Attorney's Fees Awards Act of 1976, 18 U.S.C. § 1988. [Respondent's Answer Brief, p. 29]. This contention is without legal basis. Although this court did indeed cite to Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40, (1983) and Nadeau v. Helgemoe, 581 Fed.2d 275, (1st Cir. 1978), the Civil Rights Award Act of 1976, 42 U.S.C. § 1988, was not before this Court in Moritz. As stated previously, Moritz was decided solely on a breach of contract/equitable lien action.

Additionally, Plaintiff's continued reliance upon Emory vs. International Glass and Manufacturing Inc., 249 So.2d 496 (Fla. 2d DCA 1971) is misplaced. Emory was decided before the Legislature amended § 713.29, Florida Statutes to provide that attorney's fees shall be taxed as costs as in equitable actions." Furthermore, the mechanic's lien statute is not essentially for the benefit of a claimant, as noted in Emory. See, e.g., Bryan v. Owsley Lumber Company, 201 So.2d 246 (Fla. 1st DCA 1962) and Miller v. Duke, 155 So.2d 627 (Fla. 1st DCA 1963).

Indeed, application of Moritz to the mechanic's lien statute merely gives effect to the 1977 amendment, referring to the taxing of costs as in equitable actions.

Again, Respondent refuses to address the specific factual findings of the present case, but rather relies upon a blind application of the "net judgment rule," in arguing that the

holdings of Moritz should not be applied to mechanic's lien actions. In doing so, Respondent cites Fixel Enterprises, Inc. v. Theis, 524 So.2d 1015 (Fla. 1988), and C.U. Associates, Inc. v. R. B. Grove, Inc., 472 So.2d 1177 (Fla. 1985). However, application of the holding in C.U. Associates, Inc., is supportive of both refusal to mechanically apply the net judgment rule as well as applying the test of Moritz to mechanic's lien actions. Indeed, the court in C.U. Associates held that "[f]orcing the loser to bear the cost and fees of producing the opponent's victory engenders a more realistic appraisal of the merits of the claim and discourages dilatory or obstructive tactics."

Lastly, Respondent argues that "there can be substantial argument that CODE, INC., the Respondent, in fact prevailed on the significant issues before the Court." [Answer Brief, p. 31]. This argument is without any support in the record. Initially, the trial court found that, "the contract was originally breached by the Plaintiff by filing untrue affidavits and by inaccurately accounting to the Defendant" [A-2, p. 2]. This finding squares firmly with this court's decision in Moritz wherein even though the Moritz's were awarded a fee substantially in excess of that awarded to Hoyt, nonetheless, Hoyt was determined to be the prevailing party in that the Moritz's breached the contract. Moritz, supra. Furthermore, Respondent is incorrect in his assertion that the

trial court found against Petitioner in defense of the mechanic's lien. [Respondent's Answer Brief, p. 32]. The Court specifically held that, "therefore, as to Count One, a claim for a mechanic's lien, the Court finds in favor of the Defendant [PROSPERI]." [A-2, p. 2]. Furthermore, Respondent was also unsuccessful on its claims for quantum meruit and account stated. It is incredulous to argue that CODE INC. substantially prevailed on the issues in this litigation, when it lost the mechanic's lien action, was awarded slightly more than fifty percent of its contract claim, lost on the quantum meruit claim, and lost on the account stated claim. As to its partial success on the breach of contract claim, the trial court specifically held that CODE INC. breached the contract first, and that had CODE INC. not breached the contract, PROSPERI would have continued to have made all payments.

This court should apply the holding of Moritz to actions involving Florida Statute § 713.29. Additionally, there is ample evidence in the record before this court to determine that Petitioner, A. PAUL PROSPERI, is the prevailing party in this action, and entitled to attorney's fees.

Issue III

THE AWARD OF APPELLATE ATTORNEY'S FEES TO CODE IS IN DIRECT CONFLICT WITH THIS COURT AND THE SECOND DISTRICT'S ANALYSIS OF ENTITLEMENT TO ATTORNEY'S FEES AND SHOULD BE REVERSED.

Respondent's assertions that it was somehow transformed into a prevailing party in the mechanic's lien action as a result of PROSPERI'S appeal is incredulous. The record clearly establishes that CODE did not prevail on its mechanic's lien. [A-2, p. 1]. Furthermore, there was no contractual provision for attorney's fees. [A-1, p. 1]. Lastly, CODE has not asserted entitlement to attorney's fees as a result of any common fund.

The argument presented by CODE is to the effect that since PROSPERI appealed the trial court's order denying his attorney's fees, and was unsuccessful on that issue, CODE is now a "prevailing party", pursuant to Florida Statute § 713.29 of the mechanic's lien statute. This argument defies logic.

Initially, CODE INC. has never appealed the trial court's finding that PROSPERI was the prevailing party under the mechanic's lien count. As such, that issue was not before the appellate court. Indeed, the only issue presented to the appellate court was PROSPERI'S assertion that the trial court erred in denying him attorney's fees for successfully defending against the mechanic's lien action. Again, Respondent never filed a cross appeal asserting that it was the prevailing party under the mechanic's lien statute. Nevertheless, Respondent now contends that since PROSPERI was unsuccessful at the appellate level, on the issue of attorney's fees, that somehow Respondent is now a prevailing party

under the mechanic's lien statute. Respondent, however, cites no authority for this proposition. On the contrary, ample authority exists for the proposition that Respondent is not entitled to appellate attorney's fees. See, e.g., Kittel v. Kittel, 210 So.2d 1 (Fla. 1967) and Israel v. Lee, 470 So.2d 861 (Fla. 2d DCA 1985).

Even more incredulous, is Respondent's assertion that, failing to award Respondent attorney fees in this action "undermines the prevailing party issue test of Moritz v. Hoyt Enterprises, Inc. 604 So.2d 807 (Fla. 1992), and runs contrary to the "equitable approach" acknowledged by the Fourth District Court of Appeal [A-3], and stated in S.C.M. Associates Inc. v. Rhodes, 395 So.2d 632-634 (Fla. 4th DCA 1981)", the very issues that Respondent said did not apply to mechanic's liens actions, in Issues I and II of Respondent's answer brief. [Respondent's Answer Brief, p. 38].

Respondent cites no authority for the award of attorney's fees in this action, other than his bare assertion that he was somehow a "prevailing party", under the mechanic's lien action, despite the trial court's specific finding to the contrary. As such, the award of appellate attorney's fees to Respondent must be reversed.

CONCLUSION

The question certified by the Fourth District Court of Appeal in M & P Concrete Products, Inc. v. Wood, should be answered in the affirmative. PROSPERI should be entitled to his attorney's fees as prevailing party pursuant to §713.29, and the holding in Holding Electric Inc. v. Roberts.

The question certified by the Fourth District Court of Appeal in this case should also be answered in the affirmative. The test articulated by this Court in Moritz v. Hoyt Enterprises Inc. applies to attorney's fee requests arising under § 713.29.

The order granting CODE'S appellate attorney's fees should be reversed, as CODE failed to prevail in its mechanic's lien foreclosure claim and is not otherwise entitled to fees pursuant to contract, statute, or a common fund.

This case should be remanded for the award of attorney's fees incurred by PROSPERI at trial and in this appeal pursuant to §713.29 and/or §713.06(3) and Holding Electric Inc. v. Roberts, supra.

Respectfully submitted,

PAUL SAFRAN, JR., P.A.
265 Sunrise Avenue, Ste. 204
Palm Beach, FL 33480
(407) 832 5696

By: _____
Paul Safran, Jr.
Fla. Bar No. 473278

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Richard Nadel, Esquire, Nadel & Associates, 12300 Alternate AlA, Suite 106, Palm Beach Gardens, Florida, 33410, by mail this 21st day of April, 1993.

By: Paul Safran
Paul Safran, Jr.

APPENDIX

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.
CIVIL DIVISION.

CASE NO. CL-89-6831-AN

ODE, INC.,

Plaintiff,

vs.

. PAUL PROSPERI,

Defendant.
/

ORDER

The Court previously entered a partial final judgment and deferred ruling pending the outcome of an award of attorneys fees for the Defendant. That matter has come before the Court and the Court having considered the arguments and authorities presented, finds, orders and adjudges as follows:

The Plaintiff did not prevail on its mechanic's lien but did ultimately in this action secure a judgment of money flowing in its favor. Consequently the Defendant Prosperi can not recover attorneys fees based upon the fact that they prevailed on the mechanic's lien part of the case because they are not actually a prevailing party. E.g., M & P Concrete Products v. Blaine, 16 F.L.W. D. 1731 (Fla. 4 DCA 1991).

On the contract count, there is no right to attorneys fees.

On the counterclaims the Court has already ruled on the counterclaims for negligence. There was a series of fraudulent affidavits but the very last affidavit was not fraudulent and it was the one upon which the claim of lien was based. In this case the lienor overstated the amounts he was due but eventually in the

and filed a lien that was not perjurious or fraudulent. Therefore the question remaining is whether or not the Defendant, Mr. Prosperi can recover attorneys fees incurred in the defense of the mechanic's lien and the prosecution of his counterclaims as a form of special damages, (since they are not recoverable on prevailing party, contractual, or fraudulent lien theories). It should be noted that the Court has awarded some attorneys fees already as special damages. These were attorneys fees needed by Mr. Prosperi to defend against subcontractors so that he would not have to pay twice for their work, having already paid Code in reliance upon false affidavits supplied by Code. The attorneys fees incurred in this case occurred after the lien was filed. At that point the Defendant/Counterclaimant was justifiably not willing to rely on the figures provided by Code.

The Court finds that the greater weight of the evidence has proven that the attorneys fees and costs incurred in this action directly, naturally, and proximately, resulted from the filing of the false affidavits. But for the filing of the false affidavits, Prosperi would have continued to have made all payments due under the contract and Code would have continued to work on the project until it was properly completed.

I can find no authority to support an award of attorneys fees as special damages arising from the presentation by Code of fraudulent affidavits (which were not used as the basis of the lien). E.g., Attorney's Fees as Recoverable in Fraud Actions, 44 ALR 4th 776.

In summary, the Court finds that the Defendant/Counterplaintiff is not entitled to attorneys fees based

in prevailing on the mechanic's lien, the fact that Code breached the contract, that the affidavits prior to the final one were fraudulent or as an element of special damages arising from the filing by Code of false affidavits.

ORDERED at West Palm Beach, Florida, this 26 day of August, 1991.

EDWARD FINE
Circuit Judge

Copies furnished:
Richard D. Nadel, Esq.
2300 Alternate A1A
Suite 106
Palm Beach Gardens, FL 33410

Neil Safran, Jr., Esq.
505 Sunrise Ave., #204
Palm Beach, FL 33480

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.
CIVIL DIVISION.

CASE NO. CL-89-6831-AN

CODE, INC.,

Plaintiff,

vs.

A. PAUL PROSPERI,

Defendant.
/

PARTIAL FINAL JUDGMENT

This action was tried before the Court without a jury on a complaint and a counterclaim and the respective answers.

As to the complaint: The Plaintiff's claim for a mechanics lien is denied for the following reasons: The parties had an agreement which was partially evinced by a written contract which was not actually the entire contract but contained certain terms which were the core of what was essentially a combination written and oral contract. The parties both relied upon the provisions of the written portion of the contract that had to do with payment. For example the Plaintiff cites the written contract in Item 17 of Plaintiff's composite exhibit where the Plaintiff brings attention to the Defendant of the terms of the contract claiming that payment was due in essence within 10 days, no later than the 10th and 25th of the month because these are the payment terms under which they employ subcontractors. This is illustrative of two points, one, that the Plaintiff was relying on this provision of the contract (actually the letter misrepresents the true facts, namely that the contractors subcontracts provide payment by Plaintiff on a monthly

not a twice monthly basis). Two, all dealings between the parties indicate that this was an agreement for reimbursement. The written contract provides that the Defendant is to reimburse the Plaintiff. The Plaintiff's subcontracts provide that the Plaintiff will only pay subcontractors reimbursement as work is done. The requests for payment submitted by the Plaintiff to the Defendant under oath were claims for reimbursement. These affidavits claimed that the amounts for which they sought reimbursement had been fully paid which as a matter of fact was untrue. (Actually Plaintiff was holding back 10% due to subs.) The Defendant was unaware that the Plaintiff was holding back 10%. The filing of untrue affidavits for payment by the Plaintiff in order to obtain payment from the owner deprives the Plaintiff of its lien. Therefore as to Count I, a claim for a mechanics lien, the Court finds in favor of the Defendant.

As to Count II of the complaint, breach of contract, and the Defendant's counterclaim the Court finds that the contract was originally breached by the Plaintiff by filing untrue affidavits and by inaccurately accounting to the Defendant. The Defendant by contract and law was entitled to an accurate accounting and the Plaintiff was not entitled to be paid until it had adequately accounted. The affidavits were knowingly false, and submitted for the purpose of obtaining money in reliance on their accuracy. The Plaintiff apparently believed that it was the Defendant that had breached the contract and so refused to continue to perform. At this point the Defendant had no practical choice but to engage assistance elsewhere in order to complete the contract and the Defendant was entitled to deduct the costs of completing the

contract from any sums due to the Plaintiff. Therefore the Court finds that of the $31,898.01 unpaid under the contract the Defendant is entitled to a deduction as more fully detailed below of $14,588.95 leaving a balance of $17,309.06 due and payable under Count II of the complaint.

Count III is denied since the Plaintiff has an adequate remedy at law.

Count IV is denied since this account was not agreed upon by the parties.

As to the counterclaim: The Court finds that certain work either remained incomplete or was carelessly done and needed to be repaired. This was the responsibility of the Plaintiff/Counterdefendant and is the same work deducted above and set forth below.

As to the construction defects: The Court notes that there was an architect, a mechanical and an electrical engineer involved in this action and that the engineers and architect were reporting directly to the owner and were not under the control of the Plaintiff/Counterdefendant. Therefore defects in electrical wiring were not proven by the greater weight of the evidence to have been attributable to the contract between the Plaintiff and the Defendant and the costs of their repair will not be awarded to the Defendant/Counterplaintiff. Setoff against the $31,898.00 owed are the following damages: $1,100.00 in attorneys fees, $1,700.00 roof repairs, 37% of the $6,000.00 fee paid to the general contractor ($2,220.00). 37% being the Court's assessment of the appropriate proportion of the fee allocable to the correction of construction

:ects attributable to Plaintiff-Counterdefendant. Liens paid
:,702.29. Two months lost rent $5,866.66.

A final judgment will be entered when the Court has
:etermined the amount of the award of attorneys fees and costs due
:o Defendant since that amount and the amount awarded today offset
:ach other.

ORDERED at West Palm Beach, Florida, this 16 day of May,
1991.

EDWARD FINE
Circuit Judge

Copies furnished:
Richard D. Nadel, Esq.
12300 Alternate A1A
Suite 106
Palm Beach Gardens, FL 33410

Paul Safran, Jr., Esq.
165 Sunrise Avenue
Suite 204
Palm Beach, FL 33480

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1992

A. PAUL PROSPERI,

Appellant,

v.

CODE, INC.,

Appellee.

CASE NO. 91-2930.

L.T. CASE NO. CL 89-6831 AN.

Opinion filed November 4, 1992

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Appeal from the Circuit Court for Palm Beach County; Edward Fine, Judge.

Paula Revene of Jones, Foster, Johnston & Stubbs, P.A., West Palm Beach, for appellant.

Richard A. Nadel of Nadel Associates, P.A., Palm Beach Gardens, for appellee.

PER CURIAM.

We affirm the order of the trial court denying attorney's fees to an owner who successfully defended a mechanics lien claim but against whom a judgment on a related breach of contract action was rendered. M & P Concrete Products, Inc. v. Woods, 590 So.2d 429 (Fla. 4th DCA), rev. dismissed, 589 So.2d 294 (Fla. 1991). See also AAA Sod, Inc. v. Weitzer Corp., 513 So.2d 750 (Fla. 4th DCA 1987); General Dev. Corp. v. John H. Bossett Const. Co., 370 So.2d 380 (Fla. 2d DCA), cert. denied, 379 So.2d 205 (Fla. 1979). We certify the same question as was certified in M & P Concrete Products.

We acknowledge the supreme court's recent opinion in Moritz v. Hoyt Enterprises, Inc., 17 F.L.W. 465 (Fla. July 23, 1992), in which it held that the test for determining who is the prevailing party for purposes of awarding attorney's fees in a contract action is "to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court." Id. at 466. It may be that the supreme court will extend that test to cases involving attorney's fees awarded under section 713.29, Florida Statutes (1991). Indeed there is room in the statute for such an equitable approach. See e.g. S.C.M. Assoc. Inc. v. Rhodes, 395 So.2d 632, 634 n. 2 (Fla. 2d DCA 1981).

However, given the heretofore uniform approach of most courts on this issue, we are loathe to upset this precedent without guidance from our higher authority.

WARNER, POLEN, JJ., and DIMITROULEAS, WILLIAM P., Associate Judge, concur.