ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ALLEN GREEN,

Petitioner,

vs.

SUN HARBOR HOMEOWNERS' ASSOCIATION, INC.,

Respondent.
_____/

CASE NO.: 89,911

*****

ON APPEAL FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA, 4TH DISTRICT

L.T. CASE NO.: 96-00158

*****

ANSWER BRIEF OF RESPONDENT

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STATUTES AND RULES

PREFATORY NOTE

Parties will be referred to in the following manner:

Petitioner, ALLEN GREEN, will be referred to as the "Green" and/or "Petitioner."

Respondent, SUN HARBOR HOMEOWNER'S ASSOCIATION, INC., will be referred to as "Homeowner's Association" and/or "Respondent."

References to the Record on Appeal will be as follows:

R-and the page number.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent, Sun Harbor Homeowner's Association, Inc., a Florida corporation not for profit, through counsel filed a complaint against the Petitioner, Green, (R-1-11) alleging that Petitioner had breached the Declaration of Covenants of the Homeowner's Association by marketing and renting his six townhomes as short-term, time share-type rentals. Petitioner filed a Motion to Strike and Dismiss the Complaint (R-12-14) which sought to dismiss or strike every count of the Complaint, in its entirety. Petitioner did not request attorney's fees in said Motion to Dismiss. Thereafter, both of the parties initiated discovery.

In early February, 1994, an extensive period of settlement negotiations commenced. In the midst of settlement discussions, by Order dated August 23, 1994, Respondent's attorney was permitted to withdraw (R-19). Settlement negotiations continued on through and including April, 1995 (R-24-31).

Notwithstanding ongoing settlement negotiations, on April 6, 1995, Petitioner filed a Motion to Dismiss for Failure to Prosecute (R-20-21). The Motion to Dismiss was vigorously contested and Respondent filed a Response to Defendant's Motion to Dismiss for Failure to Prosecute and Notice of Good Cause on April 13, 1995 (R-24-31). Petitioner did not request attorney's fees in his Motion to Dismiss for Failure to Prosecute (R-20-21).

After an initial hearing on the legal issues raised in Respondent's Response to Defendant's Motion to Dismiss for Failure to Prosecute, the Court granted an evidentiary hearing on the factual issues raised therein scheduling same to occur on May 18, 1995.

Two days prior to the scheduled hearing, upon the agreement of counsel, an Agreed Order on Defendant's Motion to Dismiss for Failure to Prosecute "pursuant to Florida Rules of Civil Procedure §1.420(b) "was entered by the Court (R-39); and the evidentiary hearing was canceled. Thereafter, Petitioner filed a Motion which, for the first time, alleged that Petitioner claimed an entitlement to attorney's fees (R-39). As authority for his alleged entitlement to attorney's fees, Petitioner specifically alleged in his Motion for Award of Attorney's Fees and Costs (R-39 at paragraph 2), as well as in his Memorandum in support thereof (R-40-44) that the Agreed Order entered "pursuant to Florida Rules of Civil Procedure §1.420(b) operates as an adjudication on the merits."

After a lengthy hearing, by Order dated September 30, 1995, the Trial Court denied the Petitioner's Motion for Attorney's Fees (R-83). On October 30, 1995, the Court entered an Order on Petitioner's Motion for Reconsideration and Clarification which stated, in pertinent part, as follows:

> Any claim for attorney's fees must be pled and may not be raised for the first time after an adjudication on the merits. Stockman v. Downs, 573 So.2d 835 (Fla. 1991). This Court finds that

> Defendant did not plead or otherwise raise on the record, the issue of attorney's fees, until after the entry of the Agreed Order on his Motion to Dismiss for Failure to Prosecute (R-84-85).

Petitioner appealed from the Order of September 30, 1995 which denied his Motion for Attorney's Fees, as well as the Order of October 30, 1995 on his Motion for Reconsideration and Clarification.

On November 20, 1996, the Fourth District Court of Appeal affirmed the Orders of the Trial Court and held, in pertinent part, that:

> ...a party may not recover attorney's fees unless he has put the issue into play by filing a pleading or Motion seeking fees...
>
> This notice requirement prevents a litigant from being blind-sided with a claim for fees after many litigation decisions have already been made without factoring in the additional risk.

Green v. Sun Harbor Homeowner's Association, Inc., 685 So.2d 23 (Fla. 4th DCA 1996).

In its Opinion, the Fourth District Court of Appeal certified conflict between the instant case and the case of Bruce v. Barcomb, 675 So.2d 219 (Fla. 2d DCA 1996).

SUMMARY OF THE ARGUMENT

Petitioner and Respondent entered into a specifically worded Agreed Order dismissing the case in Circuit Court "pursuant to Florida Rules of Civil Procedure §1.420(b)". As of the date the Agreed Order was entered, the record reflected a complete absence of any claim by Petitioner to any alleged entitlement to attorney's fees.

After the Agreed Order dismissing the case was entered, Petitioner claimed that he was entitled to attorney's fees based upon §15.03(a) of the Declaration of Covenants of the Respondent Association (R-45-50 at paragraph 3). This allegation of entitlement to attorney's fees had not been previously pled by Petitioner. This allegation of entitlement had not been previously mentioned of record by Petitioner. In fact, Petitioner had previously moved to dismiss or strike every part of Respondent's Complaint, including its claim for prevailing party attorney's fees. Since the Agreed Order of Dismissal operated as an adjudication on the merits, the Court denied the Motion for Attorney's Fees due to the fact that Petitioner had not pled or otherwise properly raised the issue before such adjudication. As the Trial Court's ruling was correct under the law, the ruling should be affirmed by this Court.

ARGUMENT

I. PETITIONER MAY NOT RECOVER ATTORNEY'S FEES WHERE HE HAS FAILED TO PROPERLY PLEAD ENTITLEMENT TO ATTORNEY'S FEES

This Court has stated, in the case of Stockman v. Downs, 573 So.2d 835 (Fla. 1991), that any claim for attorney's fees must be pled and may not be raised for the first time after an adjudication on the merits. In Stockman this Court specifically held as follows:

> ...[a] claim for attorney's fees whether based on statute or contract, **must be pled**....The existence or non-existence of a Motion for Attorney's Fees may play an important role in decisions effecting a case. For example, the potential that one may be required to pay an opposing party's attorney's fees may often be determinative in the decision of whether to pursue a claim, dismiss it, or settle. A party should not have to speculate throughout the entire course of an action about what claims ultimately may be alleged against him. Accordingly, we hold that a claim for attorney's fees whether based on statute or contract **must be pled. Failure** to do so **constitutes** a **waiver** of the claim.

The language of the Stockman holding would permit a subsequent hearing on attorney's fees if the issue had been previously pled or, arguably, if the issue had been previously raised by motion. In the instant case, Petitioner filed three Motions. An early Motion to Dismiss each and every allegation and count of Respondent's Complaint, an Ex-Parte Motion to Compel Discovery (R-15-16) and a second Motion to Dismiss for Failure to Prosecute (R-20-21). An exhaustive examination of each of

these Motions reflects that the issue of attorney's fees was never pled, raised or suggested by Petitioner.

Accordingly, pursuant to the holding in Stockman, Petitioner's failure to plead or otherwise seek attorney's fees constituted a waiver of any claim he may have had.

Petitioner attempts to persuade this Court that his after-the-fact Motion for Attorney's Fees should be acceptable under the narrow exception provided in Stockman that where an opponent "claims entitlement to attorney's fees and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, that party waives any objection to the failure to plead a claim for attorney's fees." Petitioner claims that Respondent's Complaint which sought attorney's fees pursuant to the Declaration of Covenants constitutes record notice of Petitioner's claim and excuses Petitioner from the requirement of pleading his own claim. That argument has previously been rejected by the Third District Court of Appeal in Res Panel Refrigeration Corp. V. Bill Collins Refrigeration Services, Inc., 636 So.2d 569 (Fla. 3d DCA 1994). In Res Panel, the Plaintiff had brought suit on a contract and requested prevailing party attorney's fees pursuant to the contract. The Defendants answered but did not assert a reciprocal claim for attorney's fees. After obtaining a judgment in their favor the Defendants moved for attorney's fees. The District Court of Appeal reversed the Trial Court's award of attorney's fees based on

the requirement in Stockman v. Downs, *supra*, that "[a] party seeking attorney's fees pursuant to a statute or contract must plead entitlement to such fees."

In the instant case, not only did Petitioner fail to plead or give any other record notice of a claim of entitlement to attorney's fees, Petitioner had moved to strike or dismiss all of the allegations contained in Respondent's Complaint including Respondent's request for prevailing party attorney's fees claiming, among other arguments, that Petitioner was prejudiced by Respondent's failure to attach a complete copy of the Homeowner Association's Declaration of Covenants. Although Petitioner previously sought dismissal of Respondent's request for attorney's fees based in part on Respondent's failure to attach a complete copy of the Declaration of covenants, Petitioner now seeks to reincarnate Respondent's request as his own even though Petitioner has never pled such a claim nor attached the alleged contractual basis for such a claim to any pleading.

Accordingly, since nothing done by Petitioner gave notice of his subsequently alleged claims, the above-referenced exception to the pleading requirement does not apply in this case.

II. THE FAILURE TO FULFILL THE REQUIREMENT THAT ATTORNEY'S FEES BE PLED OR OTHERWISE PROPERLY REQUESTED ON THE RECORD CANNOT BE CURED BY REFERENCE TO NON-RECORD, PRIVILEGED SETTLEMENT CORRESPONDENCE

In Stockman, this Court clearly indicated that a Court must "review the record" in order to determine whether there was prior notice of an intent to seek attorney's fees. (Stockman 838.) This Court explained that indeed it had reviewed the trial court record which "indicates that the [Defendants] claim for attorney's fees was not **before the court** prior to Final Judgment" (emphasis added).

In fact, the two cases cited by this Court in Stockman, as examples of adequate notice, reflect that the required notice of claim for attorney's fees was made, in each case, on the record by the party which later sought attorney's fees. Specifically, in Brown v. Gardens by the Sea South Condo Association, Inc. 424 So.2d 181 (Fla. 4th DCA 1983), although not pled, a request for attorney's fees was contained in a pre-trial statement **filed with the Court** which listed Defendant's entitled to attorney's fees as an issue.

Similarly, in Mainlands of Tamarac by Golf Unit No. 4 Association, Inc. v. Morris, 388 So.2d 266 (Fla. 2d DCA 1980), the parties had, **on the record, stipulated** during trial that the question of prevailing party attorney's fees would be heard subsequent to the final hearing.

By referring to these cases in Stockman, this Court instructed that any notice must be "of record" for the Stockman exception to pleading for attorney's fees to apply.

In the instant case, Petitioner had not pled or otherwise given any record notice of his intent to claim an entitlement to attorney's fees. Petitioner now attempts to claim that notice was provided by a letter dated October 31, 1994 which was not a part of the Court record until it was attached to Petitioner's Memorandum in Support of Attorney's Fees after the entry of the dismissal in this case.

As reflected in Stockman, any such notice must be "of record". Since the subject letter had never been introduced as evidence nor attached to any pleadings or motions previously, it was not a part of the record. In the instant case, the Fourth District Court of Appeal held that the October 31, 1994 settlement letter failed to satisfy the requirements of Stockman in two ways:

> First, it is an out of court communication, not a paper filed of record. Pleadings and motions distill the issues in litigation and are subject to the notice requirements of the rules of civil procedure. A letter between the parties has no such legal effect. Second, the letter's general reference to fees is merely posturing during negotiations, without setting forth the specific statutory or contractual basis for fees required under Stockman. *(Citations omitted.)*

Green v. Sun Harbor Homeowner's Association, Inc., 685 So.2d 23, 24 (Fla. 4th DCA 1996).

In fact, if the settlement letter could have hypothetically been found to have met the notice requirements, numerous additional issues would have to be addressed. For example:

* Could the non-record correspondence have been written before any litigation commenced? If so, would a prophylactic letter to parties to all contracts containing prevailing party attorney's fees provisions to the effect that "I will seek attorney's fees against you if you ever violate my rights under our contract" substitute for pleading entitlement to such attorney's fees in all future litigation?
* Would the foregoing example be treated any differently if the paragraph number of the attorney's fees provision were included?
* Could the non-record notice of intent to seek attorney's fees be furnished orally?
* If settlement correspondence[1] could be used to establish a right to attorney's fees, could settlement correspondence be used to otherwise prove the value of a claim contrary to existing law (*See* Rease v. Anhauser Busch, Inc., 644 So.2d 1383 (Fla. 1st DCA 1994).

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[1] Respondent has consistently maintained that the subject letter constitutes an offer to compromise or settle and cannot form the basis for relief for any party. Blackman v. Williams Island Associates, 592 So.2d 269 (Fla. 3rd DCA 1991).

* Rather than risk exposure of non-record communications, would litigants seek to protract lawsuits they would otherwise voluntarily dismiss or would agree to involuntarily dismiss (as in the case at bar) until after the answer is filed in order to rely on pleadings?

If this Court determines it is appropriate to review the contents of the October 31, 1994 settlement letter despite Petitioner's failure to properly introduce it as evidence below, this Court must determine if it constitutes the equivalent of the required notice discussed in Stockman, supra., and its progeny.

In United Pacific Ins. Co. v. Berry Hill, 620 So.2d 1077 (Fla. 5th DCA 1993), the Fifth District Court of Appeal held that in order to be entitled to attorney's fees, not only must the party seeking them request attorney's fees, but the party seeking them must also plead the correct entitlement. In United, the appellant had only pled Florida Statutes §57.105 (frivolous litigation) as a basis for an attorney's fees award. Neither the trial court nor the appellate court found that the litigation had been frivolous and therefore that statute could not be the basis for entitlement. However, attorney's fees were awarded by the trial court pursuant to §501.2105. The Fifth District Court of Appeal reversed this award because the statutory basis for it, as pled and awarded, had been erroneous.

In Dealers Insurance Co. v. Haidco Investment Enterprises, Inc., 638 So.2d 127 (Fla, 3rd DCA 1994), the Third District Court of Appeal held that the requirement of

Stockman v. Downs, that a claim for attorney's fees whether based on statute or contract must be pled "necessarily means that the requesting party must plead the statutory or contractual basis on which that party seeks attorney's fees." Dealers at 130.

In the case at bar, Petitioner did not claim entitlement to attorney's fees based upon the Declaration of Covenants until his Motion for Attorney's Fees was filed after the entry of the Agreed Order of dismissal. If the Court determines that it is appropriate to review the contents of the subject letter, on what basis would those contents be deemed a request for attorney's fees under the Declaration of Covenants? Under Florida Statutes §57.105? Under some completely different or inappropriate basis for attorney's fees?

The reason that the intent to seek attorney's fees must be pled, is to apprise a litigant of the extent of their potential exposure and avoid unfair surprise. As proffered at the hearing on this matter,[2] counsel for the Respondent reviewed the record prior to agreeing to the carefully worded Order which dismissed the action and agreed to the Motion to Dismiss upon determining that no claim for attorney's fees by Petitioner existed.

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[2] Although Petitioner is appealing the ruling of the Court on his Motion for Attorney's Fees, Petitioner did not include the transcript of the legal argument at the hearing on said Motion in the Record on Appeal.

When Respondent agreed to the Order granting Petitioner's Motion to Dismiss, Respondent agreed to the relief sought in said Motion, not such additional relief as Petitioner could subsequently conjure up.

As quoted from Stockman above, Respondent was not required to have speculated about what claims for attorney's fees could be pled, only what claims had been pled. It would not make sense to create a "bright line" which would, in effect, lend approval to "unfair surprise" provided it occurs before an answer is filed by Defendant.

Since it is impossible for Petitioner to now meet the burden of establishing that appropriate record notice of a claim of entitlement to attorney's fees was provided by Petitioner to Respondent prior to the entry of the dismissal which operated as an adjudication on the merits, this Appeal should be dismissed and the ruling of the trial court affirmed.

III. THE AGREED ORDER DISMISSING THE CASE OPERATED AS AN ADJUDICATION ON THE MERITS

The parties agreed to the entry of an Agreed Order on Defendant's Motion to Dismiss for Failure to Prosecute *pursuant to Florida Rules of Civil Procedure §1.420(b)* (emphasis added) not pursuant to the Rule of Civil Procedure ordinarily governing the failure to prosecute, to wit: Florida Rules of Civil Procedure §1.420(e).

Florida Rules of Civil Procedure §1.420(b) specifically states, in pertinent part, as follows:

> Unless the Court in its Order for dismissal otherwise specifies, a dismissal under this subdivision...operates as an adjudication on the merits.

There is no historical analysis of this Rule that can substantiate ignoring the plain meaning of its words. Petitioner is well aware that the Agreed Order dismissing the instant case under subdivision (b) of Rule 1.420 operates as an adjudication on the merits as reflected by Petitioner stating that fact twice in his Motion for Attorney's Fees and by including the above quotation from the rule in his Memorandum of Law which he emphasized the words "operates as an adjudication on the merits."

CONCLUSION

Petitioner failed to plead entitlement to attorney's fees, failed to request attorney's fees in his motions, and he failed to give any other record notice of his intent to claim entitlement to attorney's fees until after the entry of the Agreed Order dismissing the case which operated as an adjudication on the merits. Under the holding in Bruce v. Barcomb, *supra*, unfair surprise is impermissibly approved. Accordingly, the trial court's order on attorney's fees should be affirmed and Petitioner's Motion for Attorney's Fees should be denied in accordance with this Court's holding in Stockman v. Downs, that any claim for attorney's fees must be pled and may not be raised for the first time after an adjudication on the merits.

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MONICA I. SALIS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Respondent's Answer Brief has been furnished by U.S. Mail to STEVEN G. GLICKSTEIN, ESQUIRE, 6191 Southwest 45th Street, #6151A, Davie, Florida 33314 this 9th day of June, 1997.

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