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SUPREME COURT OF FLORIDA

CAREERS USA, INC., a Pennsylvania corporation,

Appellant,

vs.

SANCTUARY OF BOCA, INC., a Florida corporation,

Appellee.
_____/

CASE NO. 90,579

District Court of Appeal, 4th District - Case No. 96-02357

APPELLANT'S AMENDED INITIAL BRIEF

Appeal from the Fourth District Court of Appeal

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PREFACE

Appellant, CAREERS USA, INC., will be referred to as "CAREERS."

Appellee, SANCTUARY OF BOCA, INC., will be referred to as "SANCTUARY."

The record will be cited as "R. __."

The transcript of the final hearing will be cited as "T.__."

STATEMENT OF THE CASE AND OF THE FACTS

On January 8, 1994, CAREERS, as Tenant, and SANCTUARY, as landlord, entered into a Retail Lease Agreement (the "Lease") for commercial office space situated at 4400 North Federal Highway, Boca Raton, Florida. On April 4, 1995, CAREERS filed a Complaint seeking declaratory relief regarding CAREERS' obligation to commence the payment of rent and common area maintenance charges (CAM), and further, to reform the lease in the event the lease was ambiguous. (R. 1) CAREERS alleged that the CAM charges were to be abated until certain improvements to be constructed by SANCTUARY were completed and CAREERS took occupancy, with base rent commencing three (3) months after the tenant's occupancy date. SANCTUARY took the position that CAM charges were to commence on August 1, 1994, and base rent to be payable three (3) months later. Also at issue was whether the increase in CAM charges for 1995 over the 1994 amount exceeded the maximum allowable under the terms of the Lease.

SANCTUARY filed a Motion for Summary Judgment on February 8, 1996. (R. 47) On March 7, 1996, the Circuit court granted SANCTUARY's Motion on the issue of the rent abatement, finding that the terms and conditions of the Retail Lease Agreement were clear and unambiguous as to CAREERS' obligation to pay operating costs as of August 1, 1994, and base rent as of November 1, 1994. (R. 68)

The only remaining issue after entrance of the Summary Judgment related to the interpretation of the CAM provision. On

April 9, 1996, CAREERS voluntarily dismissed the balance of its Complaint.

On April 15, 1996, SANCTUARY filed a Motion to Assess Attorney's Fees and Costs pursuant to Section 12.03 of the Retail Lease Agreement. (R. 78) Section 12.03 of the lease provides as follows:

> Costs/Attorneys' Fees. In any litigation between the parties hereto to enforce the terms and conditions of this lease, the prevailing party shall be entitled to recover all costs incurred in such action, including attorney's fees at all levels from the nonprevailing party. (R. 1, Exhibit A)

In opposition, CAREERS argued that the nature of this litigation was one for declaratory relief, and that the lease provision precluded the recovery of attorney's fees. (T. 6-7, 13-17)

On June 14, 1996, the Court entered an order denying SANCTUARY's Motion to Assess Attorney's Fees finding that there was no entitlement to fees under the terms of the lease for the action which was before the Court. (R. 92) As a result of the denial, SANCTUARY filed an appeal to the District Court of Appeal.

The Fourth District reversed the Circuit Court order denying SANCTUARY's Motion to Assess Attorney's Fees. Sanctuary of Boca, Inc. v. Careers USA, Inc., 691 So.2d 596 (Fla. 4th DCA 1997). The Fourth District certified conflict with Ocala Warehouse Invs., Ltd. v. Bison Co., 416 So.2d 1269 (Fla. 5th DCA 1982) and Martin L. Bobbins, M.D., P.A. v. I.R.E. Real Estate Fund, Ltd., 608 So.2d 844 (Fla. 3d DCA 1992). As a result, CAREERS has filed this Appeal.

ISSUE

The issue on appeal is whether a party who is not in breach of an agreement but rather seeks an interpretation of that agreement based on a perceived entitlement of a refund exposes itself to liability with respect to an attorney fee provision because the request for a judicial interpretation is deemed an act of enforcement of the agreement.

SUMMARY OF ARGUMENT

The Fourth District's decision reversing the trial court's denial of SANCTUARY's Motion to Assess Fees should be reversed. The Supreme Court of Florida should adopt the holdings of the Third and Fifth Districts in I.R.E. Real Estate and Ocala Warehouse. In both cases, the Courts determined that if the parties continued to perform during the pendency of litigation and there were no allegations of non-performance, then the declaratory relief action was not an "enforcement" proceeding for purposes of awarding attorney's fees. In contrast, in the decision rendered below, the Fourth District defines too broadly the term "enforcement." In so doing, the Fourth District contravenes the judicial policy of this State to narrowly construe attorney fee provisions.

ARGUMENT

The Third and Fifth Districts' decisions in I.R.E. Real Estate and Ocala Warehouse support the conclusion that CAREERS' payment to SANCTUARY of disputed rents during the pendency of the declaratory relief proceeding provides the basis for denying SANCTUARY's claim

for attorneys' fees. The Fourth District disagreed. It held that CAREERS' payment of disputed rents is not dispositive on the issue of whether the CAREERS' declaratory relief claim was an "enforcement" proceeding within the meaning of the lease fee provision. An analysis of the relevant holdings will demonstrate that the appropriate rule of law on this issue is set forth in I.R.E. Real Estate and Ocala Warehouse.

In Ocala Warehouse, the Fifth District reversed an award of attorneys' fees to the lessee in an action brought by the lessor for declaratory judgment concerning an interpretation of a rent escalation provision. Like the fee provision in the instant case, the Ocala Warehouse fee provision provided that the prevailing party in any action to "enforce" the lease would be entitled to recover its attorneys' fees. Ocala Warehouse, at page 1270. The Ocala Warehouse Court held that a declaratory relief action alleging a "difference of opinion" as to rent to be paid under the lease was not an action to enforce the lease. Significantly, the Court based its decision on the fact that there was no breach alleged. The Court stated: "no present delinquency was alleged nor was either party seeking to enforce any covenant thereof. Thus, nothing in the lease agreement entitles either party to recover attorneys' fees under the restricted language of the quoted provision." Id. at 1270.

In I.R.E. Real Estate Fund, the landlord and tenant both filed actions for declaratory judgment with respect to the landlord's right to charge parking fees. Like Ocala Warehouse and the case at

bar, the subject fee provision provided for an award of attorneys' fees only in "enforcement" actions. In reversing the trial court's award of attorneys' fees to the landlord, the Third District held:

> [T]he cases authorizing fees to the prevailing party for litigation arising out of the enforcement of leases is not applicable here since both parties filed for declaratory relief, and such actions are not for "enforcement" so as to justify a fee award.

I.R.E. Real Estate, at page 846.

Another decision out of the Third District, not discussed in the Fourth District's opinion below, is the case of Sky Lake Gardens Recreation, Inc. v. Sky Lake Gardens, 574 So.2d 1135 (Fla. 3d DCA 1991). In Sky Lake Gardens, the Third District reversed an award of attorneys' fees to a landlord who had successfully defended a declaratory judgment action brought by the tenant which challenged the validity of rent escalation provisions. In reversing the fee award, the Third District held that the landlord could not recover its fees because the tenant continued to perform under the lease during litigation. The Court stated: "[a]s to the fees incurred in defending the lessee's declaratory action, as long as lessees continued to perform during this litigation, neither enforcement nor failure of performance came into play." Sky Lake Gardens, at page 1138.

In Ocala Warehouse, I.R.E. Real Estate and Sky Lake Gardens, the District Courts narrowly construed the term "enforcement" in reversing fee awards. The Courts reasoned that by their nature, claims for declaratory relief are not enforcement proceedings. The District Courts looked to the form of the relief sought rather than

the effect of the claim. In each case, the effect of the declaratory relief would have resulted in the losing party paying more or receiving less under the lease. Nevertheless, the Third and Fifth Districts held that absent some claim of nonperformance, parties seeking declaratory relief do not bring into issue the "enforcement" of the lease.

The test forwarded by the Third and Fifth Districts on this issue is the correct one because it is consistent with prevailing case law requiring that attorney fee provisions be strictly construed. Moreover, the test is not burdensome in its application. The trier of fact need only determine whether there is a claim of nonperformance. Litigants with similar fee provisions can more readily predict exposure to fee awards. If they come into equity with clean hands, having fully performed under the lease, they will not be subject to attorneys' fees should the trial court favor their opponents interpretation of the lease provision in question.

By contrast, the Fourth District's decision rendered below broadens the meaning of "enforcement". The Fourth District held that the case of Casarella, Inc. v. Zaremba Coconut Creek Parkway Corp., 595 So.2d 162 (Fla. 4th DCA 1992), is controlling. The attorney fee provision in Casarella provides for an award of attorneys' fees to the prevailing party in "enforcement" actions. In Casarella, the tenant sued for breach of the lease, fraud in the inducement and violation of the Rico Statute. Clearly, the tenant's breach of contract claim involved "enforcement". Further,

the landlord's defense of the fraud in the inducement claim was an effort "to enforce" the lease. See, Katz v. Van Der Noord, 546 So.2d 1047 (Fla. 1989).

In the **appeal below**, CAREERS attempted to distinguish Casarella, arguing that CAREERS sought only declaratory relief and there were no allegations of nonperformance. CAREERS **argued that** the Fourth District in Casarella emphasized the existence of a breach claim in distinguishing the cases of Chesterfield Co. v. Ritzenheim, 357 So.2d 350 (Fla. 4th DCA 1977) and Fairways Royale Ass'n v. Hasam Realty Corp., 428 So.2d 288 (Fla. 4th DCA 1983).

The Fourth District stated:

> "At bar, the provision of the lease does not require the landlord to institute suit and a breach of the lease is alleged." Casarella, at page 163 (emphasis supplied by the District Court).

Despite these stated differences between the relief sought by CAREERS and the claims asserted by the tenant in Casarella, the Fourth District rejected CAREERS' attempts to distinguish the holding in Casarella. The Fourth District stated: "This attempted distinction belies the true nature of the relief sought in both cases and ignores the force and effect of a final declaratory judgment." Sanctuary, at page 598.

The Fourth District's holding below represents a departure from the holdings in Ocala Warehouse and I.R.E. **Real** Estate. Further, the holding demonstrates the Fourth District's willingness to look to the effect rather than the form of the claim when construing the applicability of fee provisions in declaratory

relief proceedings. Ironically, in Fairways Royale, the Fourth District rejected a landlord's request that the Court look to the "effect" rather than the "form" of a claim in construing the term "enforcement" in a fee provision. In Fairways Royale, the landlord recovered rent and successfully defended a counterclaim for breach of fiduciary duty. The landlord was awarded its attorneys' fees in defending the fiduciary duty claim and the tenant appealed. On appeal, the landlord argued that its defense of the counterclaim was "enforcement" because losing the case would have meant that its damage award would have been diminished. Citing Chesterfield Co., the Fourth District refused to consider the "effect" of the relief sought in construing the applicable attorney fee provision.

CAREERS does not cite Fairways Royale as persuasive authority. CAREERS agrees with the Fourth District's ruling in Fairways Royale. A breach of fiduciary duty claim is clearly not enforcement. In its opinion rendered below, the Fourth District acknowledges the airways Royale decision is distinguishable. However, Fairways Royale does provide some insight into the Fourth District's potential movement on the question of whether courts should look to the "effect" rather than the "form" of claims in construing the applicability of attorney fee provisions.

In its opinion, the Fourth District also cited Silver Blue Lake Apts. No.3, Inc. v. Manson, 334 So.2d 48 (Fla. 3d DCA 1976), as consistent authority. Unfortunately, the Silver Blue Lake opinion does not indicate whether the parties performed under the lease during the pendency of the claim. However, if the court

awarded the landlord its attorneys' fees when the tenant had paid the disputed rents under protest, Silver Blue Lake is clearly inconsistent with the more recent Third District decisions in I.R.E. Real Estate and Sky Lake Gardens and should be disregarded.

As an aside, CAREERS rejects any implication that its declaratory relief claim should be treated as if it were a "constructive" breach of contract action. CAREERS sought monies it claimed were extra-contractual overpayments. (R. 1) If CAREERS had been successful in securing a favorable lease interpretation, it would have asked the trial court to return these monies as part of its claim for equitable relief. A judgment by the trial court would have been more akin to a recovery for unjust enrichment then an action at law seeking damages.

In the case at bar, CAREERS and SANCTUARY are parties to a long-term lease. In pursuing its declaratory relief claim, CAREERS attempted to resolve the controversy early rather than continue making the alleged overpayments throughout the term of the lease. CAREERS' decision to seek declaratory relief was consistent with the policy to encourage potential litigants to utilize the equitable powers of the Court to declare rights under contracts. In "X" Corporation v. "Y" Person, 622 So.2d 1098 (Fla. 2d DCA 1993), the Court stated: "[t]o operate within this sphere of anticipatory and preventative justice, the Declaratory Judgment Act should be liberally construed." "X" Corporation, at page 1100. Adopting the holdings in Ocala Warehouse and I.R.E. Real Estate will encourage

further utilization of the Declaratory Judgment Act by litigants seeking to avoid costly lawsuits.

Finally, it is significant that the legislature did not provide a prevailing party fee provision in Chapter 86, Florida Statutes. CAREERS contends this omission indicates the legislatures intent to encourage rather than discourage claims for declaratory relief. Certainly, the results in each of the cases cited herein would probably be different if the subject attorney fee provisions provided that the prevailing party in any action would be entitled to recover its attorneys' fees. However, in the case at bar, although free to do so, the parties did not negotiate such a provision.

CONCLUSION

The decisions in Ocala Warehouse and I.R.E. Real Estate are consistent with the prevailing case law requiring the strict construction of attorney fee provisions. The Fourth District's broad construction of the term "enforcement" is a departure from this well-established rule of law and should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail on day 5th of September, 1997 to: Edward B. Cohen, Esquire, SCHWARTZ, GOLD, COHEN, ZAKARIN & KOTLER, P.A., 54 S.W. Boca Raton Blvd., Boca Raton, FL 33432 (Telephone: 561-361-9600; Facsimile: 561-361-9770).

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SUPREME COURT OF FLORIDA

CAREERS USA, INC., a Pennsylvania corporation,

Appellant,

vs.

SANCTUARY OF BOCA, INC., a Florida corporation,,

Appellee.

CASE NO. 90,579

District Court of Appeal, 4th District - Case No. 96-02357

APPENDIX FOR AMENDED INITIAL BRIEF

Opinion filed April 16, 1997 by Fourth District Court of Appeal: Sanctuary of Boca, Inc. v. Careers USA, Inc. App. 1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail on this of 5th September, 1997 to: Edward B. Cohen, Esquire, SCHWARTZ, GOLD, COHEN, ZAKARIN & KOTLER, P.A., 54 S.W. Boca Raton Blvd., Boca Raton, FL 33432 (Telephone: 561-361-9600; Facsimile: 561-361-9770).

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he attempted to defend himself, and also hit him with a laundry cart. The victim died from a rupture to his liver, causing him to bleed to death.

In an open plea, defendant pleaded nolo contendere to manslaughter. The guidelines scoresheet stated a recommended sentence of 74.4 months, with a permitted range of 55.8 to 93 months. The trial judge departed with an enhanced sentence of 10 years, followed by 5 years probation. The judge stated his reason by checking a box on the sentencing form and adding the following:?

"☐ Victim especially vulnerable due to age or physical or mental disability. ***Blow by defendant left victim particularly vulnerable to subsequent injuries suffered at his hand and hands of codefendants.***"

The state argues that this departure is proper, citing *Carter v.* State, 550 So.2d 1130 (Fla. 3d DCA 1989), *rev. denied, 553* So.2d 1164 (Fla.1989). Defendant argues that the stated reason is improper because it essentially inheres in the crime itself: i.e. it is little more than a holding that defendant's single blow was effective to its purpose. We agree and reverse.

[1] This statutory reason for an enhancement departure comes from section 921.0016(3)(j), Florida Statutes (1995), which provides:

"(3) Aggravating circumstances under which a departure from the sentencing guidelines is reasonably justified include ... (j) The victim was especially vulnerable due to age or physical or mental disability."

This statutory text clearly covers vulnerability due to age, physical disability, and mental disability. There is nothing in this provision, however, to suggest that it includes vulnerability arising from the crime itself.

In *Wemett v. State, 567* So.2d 882 (Fla. 1990), the court said "a departure cannot be based on factors common to nearly all victims of similar crimes." 567 So.2d at 886. Since the decision in *Wemett*, the legislature has substantially revised the sentencing guidelines, effective to crimes committed[2] after January 1, 1994. See Ch. 93-406, Laws of Fla. According to the supreme court:

"Existing caselaw construing the application of sentencing guidelines that is in conflict with the provisions of this rule or the statement of purpose or the principles embodied by the 1994 sentencing guidelines set out in subsection 921.001(4) is superseded by the operation of this rule."

Amendments to Florida Rules of Criminal Procedure re Sentencing Guidelines, 628 So.2d 1084, 1089 (Fla.1993); see also *Capers v.* State, 670 So.2d 967, 970 (Fla. 1st DCA 1995), *approved,* 678 So.2d 330 (Fla.1996).

121 Hence under the current law, it is perhaps more accurate to say that the sentencing guidelines do not allow departures based on reasons inherent in the crime itself unless the statute expressly and clearly permits such a departure. In this case, we agree with defendant that the statute does not clearly allow the precise reason given by the trial judge to authorize an enhancement of a sentence for victim vulnerability on the facts present here.

REVERSED AND REMANDED FOR RESENTENCING WITHIN GUIDELINES.

KLEIN and GROSS, JJ., concur.

SANCTUARY OF BOCA, INC., a Florida corporation, Appellant,

v.

CAREERS USA, INC., a Pennsylvania corporation, Appellee.

No. 96-2357.

District Court of Appeal of Florida, Fourth District.

April 16, 1997.

Tenant brought declaratory judgment action seeking determination that rental pay-

2. The trial court employed the sentencing form entitled: "RULE 3.990(b) SUPPLEMENTAL SENTENCING GUIDELINES SCORESHEET." bearing an effective date of January 1, 1994.

ments were less under lease than those demanded by landlord. After partial summary judgment in favor of landlord was entered and tenant voluntarily dismissed remainder of complaint, landlord moved for attorney fees pursuant to prevailing party clause in lease. The Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, James T. Carlisle, J., denied claim and found that attorney fee provision in lease was not activated by declaratory judgment as did not involve litigation between parties to enforce lease terms. Landlord appealed. The District Court of Appeal, Stevenson, J., held that landlord was entitled to attorney fees under prevailing party provision, even though action was for declaratory relief rather than breach of contract, as result was to enforce rights derived from lease.

Reversed and remanded.

Landlord and Tenant ⇐238

Landlord was entitled to attorney fees under prevailing party fee provision in lease where landlord successfully defended declaratory judgment action brought by tenant seeking determination that rent was less under lease than amount demanded by landlord; partial summary judgment was awarded in favor of landlord and tenant voluntarily dismissed remainder of complaint, and fact that case was for declaratory relief, rather than breach of contract, was irrelevant as result was to allow enforcement of rights derived from lease.

Edward B. Cohen of Schwartz, Gold, Cohen, Zakarin & Kotler, P.A., Boca Raton, for appellant.

Geoffrey C. Bennett of Sweetapple, Broeker & Varkas, Boca Raton, for appellee.

STEVENSON, Judge.

This is an appeal from a final order denying the landlord's motion for prevailing party's fees following a partial final judgment and a voluntary dismissal of an action filed by the tenant, which sought declaratory relief concerning the amount of rent due under a retail lease. Because the landlord's defense of the action was tantamount to an "enforcement" of its rights under the lease, we reverse.

The facts

Appellee, Careers USA, Inc., is the tenant, and appellant, Sanctuary of Boca Inc., is the landlord in a commercial lease arrangement for certain rental property in Boca Raton, Florida. Careers alleged that the lease provided for abatement of rent pending the completion of certain improvements. It alleged that its obligation to pay additional rent commenced on December 15, 1994, and its obligation to pay base rent commenced three months later on March 15, 1994. The landlord, Sanctuary, asserted that additional rent and base rent were due some four and one-half months earlier, on August 1, 1994 and November 1, 1994, respectively. On April 4, 1995, Careers filed an action for declaratory judgment concerning the parties' quarrel and stated in the complaint that it would deposit the disputed rental payments into the registry of the court until the case was resolved.

The complaint for declaratory relief

Count I of Careers' complaint sought a judgment declaring rent increases in keeping with its interpretation of the lease. Careers also sought a declaration prohibiting Sanctuary from increasing common area maintenance (CAM) charges more than 5% per year, alleging that the lease provided for this cap on operating costs. In Count IT of its com plaint, Careers sought reformation of the lease agreement, should an ambiguity exist.

Sanctuary moved for summary judgment on the issue of rent payments, asserting that the lease agreement was unambiguous and provided for commencement of the lease on August 1, 1994. The trial court found the lease to he unambiguous, and entered partial summary judgment in favor of Sanctuary on Count I of the complaint. Careers filed a notice of voluntary dismissal of the remainder of its: complaint approximately one month later.

Sanctuary filed a motion seeking prevailing party attorney's fees and costs pursuant to section 12.08 of the parties' retail lease agreement, which provides:

> Costs/Attorneys' Fees. In any litigation between the parties hereto to enforce the terms and conditions of this Lease, the prevailing party shall be entitled to recover all costs incurred in such action, including attorneys' fees at all levels from the nonprevailing party.

Careers argued that the attorney's fee provision was not activated because its declaratory judgment action did not involve litigation between the parties to "enforce" the terms and conditions of the lease. Rather, Careers argued that it was never in breach of the contract's provisions such as to require enforcement; its suit was merely to settle a difference of opinion concerning the lease's interpretation. The trial court accepted this argument and denied Sanctuary's claim for attorney's fees. We disagree and reverse.

Discussion

This case is controlled by our holding in *Casarella, Inc. v. Zaremba Coconut Creek Parkway Corp.,* 595 So.2d 162 (Fla. 4th DCA 1992). There, the tenant sued the landlord for breach of contract, fraudulent inducement, and violation of the RICO statute when common area maintenance charges escalated by over 400% within three years. As in this case, the landlord demanded more rent than the tenant felt was due under the lease; and, likewise, the tenant instituted the lawsuit. The lease agreement provided for the payment of fees in the event an attorney was needed to "enforce" any rights under the lease or to "collect" any sums due under the lease. *Id.* at 163. The tenant voluntarily dismissed its case on the day of trial. *Id.* The landlord was awarded prevailing party attorney's fees under the lease, and this court affirmed.

In *Casarella,* this court rejected the tenant's argument that the landlord was not entitled to fees because it was not enforcing any of its rights under the **lease by defending** against a suit filed by the tenant. ***Id.*** Appellee attempts to distinguish *Casarella* from the instant case on the basis that *Casarella* involved a suit for breach of contract, and this case involves an action for declaratory relief. This attempted distinction belies the true nature of the relief sought in both cases and ignores the force and effect of a final declaratory judgment.

Although one case was styled as a breach of contract, and the other, a request -for declaratory relief, there is no real substantive difference between the relief sought by the tenant in ***Casarella*** and the relief sought by appellee in the instant case. Each complained that the landlord was demanding more rent than was due under the lease. The tenant, in both *Casarella* and the instant case, sought an order from the circuit court determining that the rental payments should be less than those demanded by their respective landlords.

Nor do we agree with appellee that this case should be distinguished from *Casarella* on the basis that the tenant here continued to pay rent, albeit under protest. While we cannot say for certain whether or not the tenant in *Casarella* continued to make the disputed rental payments, we did not find that factor alone to be dispositive. Furthermore, because the tenant, and not the landlord, instituted suit for breach of contract, it seems safe to presume that the rent in *Casarella* was being paid.

As the court stated in *Casarella,* the landlord, **in defending itself,** was trying to **"enforce . . its rights under this lease"** and "collect . sums due to it." Td. Likewise, in the instant case, in order to protect and "enforce" its rights under the lease, Sanctuary was required to defend the action. Had Sanctuary not appeared in the declaratory action to defend its right to collect the amount it claimed, those rights may have been forever foreclosed; the trial court may have made a determination that Sanctuary was not entitled to collect the rent it claimed.

Appellee relies on two cases, *Chesterfield* Co. *v. Ritzenheim,* 350 So.2d 15 (Fla. 4th DCA 1977) and ***Fairways Royale Ass'n v. Hasam Realty*** Corp., 428 So.2d 288 (Fla. 4th DCA 1983), where attorney's fee awards were not allowed following litigation that arose out of controversies concerning leases, despite prevailing-party fee provisions. However, those cases are factually dissimilar. *Casarella* correctly distinguished *Chesterfield* on the basis that the fee provision there specifically provided for attorney's fees only in the event of a "b
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So.2d at 163.

We find our result
reached in ***Silver*** *I*
Inc. ***v.*** *Munson, 334*
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in the evunt of a "breach" of the lease, but the tenant, in seeking declaratory relief, did not allege any such breach. *Casarella*, 595 So.2d at 163. Fairways Roy& was also readily distinguished, as the tenant's complaint alleged a breach of fiduciary duty, and was not an action to "enforce" the contract, as the fee provision required. *Casarella*, 595 So.2d at 163.

We find our result consistent with the one reached in Silver Blue *Luke Apts., No. 3, Inc. v. Munson, 334* So.2d 48 (Fla. 3d DCA 1976). There, the court reversed an order denying an award of attorney's fees, where the parties' lease agreement provided for payment of attorney's fees if either the lessor or lessee were required to employ an attorney due to the failure of the other party to keep any covenant or agreement. Id at 49. The lessee was brought into court to defend a declaratory judgment action in which the lessor sought a declaration interpreting a provision of the lease providing for payment of rents on a percentage basis. *Id.* The court held the defendant/lessee was entitled to fees where he mounted a successful defense to the tenant's claims in a declaratory judgment proceeding. Id. In Silver Blue *Lake*, like the instant case, although the action was styled as one for declaratory relief, the result of the action was clcarlg to allow the "enforcement" of rights derived from the lease.

We acknowledge the different. result reached by the Third and Fifth Districts. In *Ocala Warehouse Investments, Ltd. v. Bison* Co., 416 So.2d 1269 (Fla. 5th DCA 1982), a lease provision providing for a fee award "in any action brought by Lessor or Lessee to enforce any of the provisions of this Lease" was held inapplicable in a declaratory judgment action concerning the interpretation of a rent escalation clause since the action did not involve allegations of a present delinquency, nor was either party seeking to enforce any covenant of the lease. Likewise, in *Martin L. Robbins, M.D., P.A. v. I.R.E. Real Estate Fund, Ltd,* 608 So.2d 844, 846 (Fla. 3d DCA 1992), *rev. denied* 620 So.2d *761* (Fla.1993), the Third District, citing *Ocala Warehouse,* reversed a landlord's fee award, holding that "[t]he cases authorizing fees to the prevailing party for litigation arising out of the enforcement of leases is not applicable here since both parties filed for declaratory relief," and "such actions are not for 'enforcement' so as to justify a fee award." We certify conflict with *Ocala Warehouse Investments* and *I.R.E. Real* **Estate** *Fund.*

Accordingly, the final order denying the motion for attorney's fees is reversed and this cause remanded for further proceedings.

REVERSED and REMANDED.

STONE and WARNER, JJ., concur.

Frank **PACE, Appellant,**

v.

STATE of Florida, Appellee.

No. 96-1916.

District Court of Appeal of Florida, Fourth District.

April 16, 1997.

Community control was revoked by the Fifteenth Judicial Circuit Court: Palm Beach County, Mary E. Lupo, J., and defendant appealed. The District Court of Appeal held that record supported determination of willful and substantial violation of condition prohibiting contact with victim.

Affirmed and remanded.

Criminal Law ⇐982.9(5)

Record in proceeding for revocation of community control supported determination of willful and substantial violation of condition prohibiting contact with victim; even assuming that defendant got on telephone without realizing that victim was on other end, he then willfully carried on upsetting and accusatory conversation with her instead of ending call.