SUPREME COURT OF FLORIDA

EDWARD B. CAUFIELD, et al.,	*	
	*	
Petitioners,	*	
	*	CASE NO.: 1999-95
vs.	*	5th District - No. 98-2960
	*	District Court of Appeal
GINO CANTELE,, et al.,	*	
	*	
Respondents	*	
	*	

* *

RESPONDENTS' ANSWER BRIEF

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CERTIFICATE OF TYPE SIZE AND STYLE

Respondents hereby certify that the type size and style of the Answer Brief of Respondents is Arial 14.

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PRELIMINARY STATEMENT

In this brief, Edward B. Caufield and Rose Caufield will be referred to as Caufields or petitioners, and Gino Cantele and Armando Cantele will be referred to as Canteles or respondents. References to the trial court record will be made by the letter "R" and the appropriate page number in the trial court record. The record includes the decision of the Fifth District Court of Appeal, and references thereto will be made by the letter "A" and the appropriate page number in the appendix.

STATEMENT OF THE CASE AND FACTS

The respondents adopt the statement of the case and facts in the petitioners' amended initial brief.

SUMMARY OF THE ARGUMENT

The proper method for review of orders denying or granting attorney fees following a voluntary dismissal is by plenary appeal, and not by petition for certiorari.

In order to recover attorney fees, a claim for such must be properly pled so as to put the opposing party on notice as to the entitlement as well

as the claim.

Attorney fees are not recoverable in a tort action for fraudulent misrepresentation.

ARGUMENT

POINT I

THE PROPER METHOD OF REVIEW OF AN ORDER GRANTING OR DENYING ATTORNEY'S FEES, AFTER A VOLUNTARY DISMISSAL, IS BY PLENARY APPEAL, NOT PETITION FOR CERTIORARI.

The Fifth District's decision holding that a plenary appeal is the correct method for review of orders denying or awarding attorney fees following a voluntary dismissal is correct and should be affirmed. The substantive rights of a party to attorney fees can be determined with finality when no more judicial labor is contemplated. Blethen v. Henry, 661 So. 2d 56 (Fla. 2nd DCA 1995); McKelvy v. Kismet, Inc., 430 So. 2d 919 (Fla. 3rd DCA), rev. denied, 440 So. 2d 352 (Fla. 1983).

POINT II

ENTITLEMENT TO ATTORNEY'S FEES MUST BE PLED SO AS TO PLACE THE OPPOSING PARTY ON NOTICE OF THE CLAIM.

This court held in Stockman v. Downs, 573 So. 2d 835 (Fla. 1991), "that a claim for attorney's fees, whether based on statute or contract, must be pled." The purpose is to serve notice to the opposing party of the claims alleged and prevent unfair surprise. As Justice Grimes correctly observed in a footnote, ". . . Stockman might have chosen to drop her contractual claims and go to trial only on her claim of fraud had she been put on notice that the Downs were seeking attorney's fees under the contract." Stockman, 573 So. 2d at 837, n.3.

That is essentially what happened in the instant case. The Fifth District noted that the trial court ordered "the single count Complaint shall be considered and solely treated as a Complaint based upon a theory of intentional misrepresentation and a prayer for monetary damages for correcting alleged latent defects in the wastewater treatment plant." (A-3) This was pursuant to an announcement by respondents in court that their single count complaint was restricted to a claim for intentional misrepresentation and a prayer for monetary damages for correcting

alleged latent defects in the wastewater treatment plant. (A-3)

The instant case involved intentional misrepresentations made by petitioners prior to respondents entering into a written agreement for the sale and purchase of a recreational vehicle park. Respondents never requested the contract be rescinded as in Katz v. VanDerNoord, 546 So. 2d 1047 (Fla. 1989) quoted in David v. Richman, 568 So. 2d 922 (Fla. 1990) which held ". . . when litigation ensues in connection with a validly formed contract, attorney's fees may be recovered under a prevailing-party provision of the contract even though the contract has been rescinded or held to be unenforceable." Katz involved an initial complaint for breach of contract, a counterclaim for breach, and rescission of a contract. This action was not on the contract, but was a one-count complaint on the intentional misrepresentations of petitioners. Unlike Kelly v. Tworoger, 705 So. 2d 670 (Fla. 4th DCA 1998), this case was not predicated merely on a failure to disclose, but rather on the affirmative intentional misrepresentations of petitioners. This case did not involve nondisclosure in the sale of a residence as in Johnson v. Davis, 480 So. 2d 625 (Fla. 1985), which is distinguishable by its facts.

Katz, supra, held that it would be unjust to preclude the prevailing

party to the dispute over the contract which led to its rescission from recovering the attorney's fees which were contemplated by that contract. However, respondents did not seek to have the contract rescinded or held unenforceable, nor did they plead fraud in the inducement. Instead, they sought damages arising from petitioners' affirmative intentional misrepresentations prior to the contract. The reasoning in both Katz and Tworoger, supra, do not apply to the facts of the case at hand.

In response to respondents' complaint, petitioners filed a motion to dismiss the complaint stating that it was "impossible for Defendants to determine if the complaint is based on contract, fraud or some other theory of relief." (R-49). On July 18, 1995, respondents filed a response to motion to dismiss and motion to strike wherein they stated "the basis for plaintiffs' complaint is for damages for materially misrepresenting and intentionally concealing defects in the waste water treatment plant . . . ." (R-54) The trial court did not order respondents to file an amended complaint, but it ordered petitioners to file a responsive pleading within twenty days. It is clear from their response to petitioners' motion to dismiss and motion to strike, as well as their announcement in court and the September 16, 1996, (R-71) order entered by the trial court, that respondents were not seeking

relief based on the contract. Although the pleadings in the trial court admittedly were not artfully drafted, it cannot be correctly said that respondents dropped their breach of contract cause of action. Their action was not based on breach of contract, as clarified by their response to petitioners' motion to dismiss and motion to strike, as well as their announcement in court and the order entered by the trial court. The contract was clearly not the basis of respondents' claim.

On November 27, 1996, petitioners filed an answer and affirmative defenses, wherein no counterclaim was alleged. (R-73-76) Had petitioners wanted the written contract to be the basis of a claim in litigation, they could have brought a counterclaim based on the contract. Instead, they chose to treat the contract only as an affirmative defense. The written contract may have prevented respondents from succeeding on the merits of their complaint. That does not, however, change respondents' tort claim of intentional misrepresentation into a breach of contract action upon which petitioners can rely in claiming entitlement to attorney's fees.

Respondents deny that petitioners sought attorney fees pursuant to the written contract. The record is devoid of any citation by petitioners to statutory or contractual authority to support their request for attorney's fees

prior to respondents' voluntary dismissal. (R-128) Had respondents prevailed on their claim for intentional misrepresentation, they would not have been entitled to recover attorney fees. Accordingly, petitioners are not entitled to recover attorney fees in defending the tort action.

In Stockman, supra, this court in addressing the issue of pleading entitlement to attorney's fees said, "Early Florida cases held that a claim for attorney's fees should be pled specifically." This court went on to say, "Our review of the case law leads us to the conclusion that the better view is the one expressed in our earlier cases — a claim for attorney's fees, whether based on statute or contract, must be pled. Id at 837.

Petitioners used the following language: "Defendants pursuant to Stockman v. Downs, 573 So. 2d 835 (Fla. 1991) prays [sic] for attorney fees" literally in their motions to dismiss and strike. (R-49-52) However, petitioners did not plead entitlement to any attorney fees as required by Stockman. Petitioners failed to specifically plead the statute or contract on which they relied to support their claim for attorney's fees. A general request for attorney's fees in the wherefore clause does not satisfy the pleading requirements of Stockman. Dealers Insurance Co. v. Haidco Investment Enterprises, Inc., 638 So. 2d 127, 129 (Fla. 3rd DCA 1994).

On November 27, 1996, petitioners filed their answer and affirmative defenses and stated "Defendants have been compelled to employ the undersigned attorney and Plaintiffs are obligated to pay Defendants' attorney fees," (R-76) without stating the statute or contract on which their request for attorney fees was based, as is required under Stockman. Citing the Stockman case and/or stating that a party is entitled to attorney's fees does not put the opposing party on notice as to the legal basis of the attorney fee request. Respondents are under no legal obligation to guess or assume the legal basis for petitioners' demand for attorney fees.

Stockman recognizes an exception to the pleading rule: "Where a party has notice that 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." Id at 838.

There is nothing in the record to indicate that respondents stipulated or waived the issue of attorney fees. Respondents timely filed their objections to petitioners' motion to tax cost and award attorney fees. Prior to respondents' voluntary dismissal (R-128), petitioners never alleged any statutory or contractual authority on which they based their request for

attorney fees.

"In order to be entitled to attorney fees, a party seeking them must plead the correct entitlement." United Pacific Insurance Company v. Berryhill, 620 So. 2d 1077 (Fla. 5th DCA 1993) citing Stockman, supra. In United Pacific Insurance Company the court reversed an attorney's fee award because the statutory basis for it, as pled, was erroneous. Prior to respondents' voluntary dismissal (R-128) petitioners failed to properly plead any statutory or contractual authority to support their request for attorney's fees.

POINT III
(Restated Point)

AN ACTION FOR INTENTIONAL MISREPRESENTATION AND FOR DAMAGES FOR CORRECTING LATENT DEFECTS DOES NOT ARISE OUT OF THE CONTRACT FOR SALE AND PURCHASE OF REAL PROPERTY.

The Fifth District noted that the trial court ordered "the single count Complaint shall be considered and solely treated as a Complaint based upon a theory of intentional misrepresentation and a prayer for monetary damages for correcting alleged latent defects in the wastewater treatment plant." (A-3) This was pursuant to an announcement by respondents in

court that their single count complaint was restricted to a claim for intentional misrepresentation and a prayer for monetary damages for correcting alleged latent defects in the wastewater treatment plant. (A-3)

The instant case involved intentional misrepresentations made by petitioners prior to respondents entering into a written agreement for the sale and purchase of a recreational vehicle park. Respondents never requested the contract be rescinded as in Katz v. VanDerNoord, 546 So. 2d 1047 (Fla. 1989) quoted in David v. Richman, 568 So. 2d 922 (Fla. 1990) which held ". . . when litigation ensues in connection with a validly formed contract, attorney's fees may be recovered under a prevailing-party provision of the contract even though the contract has been rescinded or held to be unenforceable." Katz involved an initial complaint for breach of contract, a counterclaim for breach, and rescission of a contract. This action was not on the contract, but was a one-count complaint on the intentional misrepresentations of petitioners. Unlike Kelly v. Tworoger, 705 So. 2d 670 (Fla. 4th DCA 1998), this case was not predicated merely on a failure to disclose, but rather on the affirmative intentional misrepresentations of petitioners. This case did not involve nondisclosure in the sale of a residence as in Johnson v. Davis, 480 So. 2d 625 (Fla. 1985), which is

distinguishable by its facts.

Petitioners' representations that "Prior to the trial court confirming that the single count was to be treated solely as an action for intentional misrepresentation, CAUFIELDS were compelled to defend an action for breach of contract" is at odds with their pleadings. In response to respondents' complaint, petitioners filed a motion to dismiss the complaint stating that it was "impossible for Defendants to determine if the complaint is based on contract, fraud or some other theory of relief." (R-49) After being ordered by the court to file a responsive pleading, on November 27, 1996, petitioners filed an answer and affirmative defenses, wherein no counterclaim was alleged. (R-73-76) Prior to filing the answer and affirmative defenses, petitioners did not present a defense, whether to a perceived contract action or otherwise. Had petitioners wanted the written contract to be the basis of a claim in litigation, they could have brought a counterclaim based on the contract. Instead, they chose to treat the contract only as an affirmative defense. The written contract may have prevented respondents from succeeding on the merits of their complaint. That does not, however, change respondents' tort claim of intentional misrepresentation into a breach of contract action upon which petitioners

can rely in claiming entitlement to attorney's fees. Petitioners' attempt to bootstrap their position by alleging a novel theory of "totality of the pleadings" is not supported by any authority.

Petitioners are not entitled to recover their attorney fees as a prevailing party in the tort action by respondents. Even if the pleadings were construed as creating an action arising out of the contract, petitioners are not entitled to recover attorney fees because of their failure to properly plead entitlement under Stockman.

CONCLUSION

This court should invoke its discretionary jurisdiction based upon the certified conflict from the district court, and should affirm the Fifth District decision in all respects.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. mail this ____ day of February, 2000, to: Robert Bruce Snow, Esquire, 112 North Orange Avenue, Brooksville, FL 34601; John H. Anderson, Esquire, and Ralph Artigliere, Esquire, Anderson & Artigliere, P.A., Post Office Drawer 6839, Lakeland, FL 33807-6839.

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