
SUPREME COURT OF FLORIDA
Case No. SC05-2045

S AND T BUILDERS, INC.

Petitioner,

vs.

GLOBE PROPERTIES, INC.

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT
L.T. No. 04-16367 CACE (04)

SUBMITTED BY:

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PREFACE

For ease of reference, wherever possible, the Appellant, S AND T BUILDERS, INC., will be referred to as “APPELLANT.” The Appellee, GLOVE PROPERTIES, INC will be referred to as “APPELLEE.”

APPELLANT never received a record from the Fourth District Court of Appeal, which should be quite small. The only citations in the record will be to an Appendix that was filed with the Appellate Court.

STATEMENT OF THE CASE

This Brief on the Merits requests that this Court resolve the certified direct conflict of S and T Builders, v. Globe Properties, Inc. 909 So. 2d 375 (Fla. 4th DCA 2005) in favor of Wagner v. Birdman, 460 So.2d 463 (Fla. 3rd DCA 1984) and determine that Florida Statute §48.23(3) does not authorize a trial court to include attorney fees in a *lis pendens* bond.

STATEMENT OF THE FACTS

PETITIONER, S&T BUILDERS, INC., as general contractor, filed an Amended Complaint for *inter alia*, Foreclosure of an Equitable Lien against RESPONDENT, GLOBE PROPERTIES, INC.’S commercial real property¹ and simultaneously recorded a notice of *lis pendens*.²

The Amended Complaint alleged that: PETITIONER bid the Project based on an original set of plans, created in 2002 [Amend. Compl. ¶21]; PETITIONER is currently conducting, and has furnished labor, services, and material to the Project based upon a different set of plans (“Substitute Plans”) which were submitted to the building department than what PETITIONER originally bid [Amend. Compl. ¶24]; The Substitute Plans were submitted to the building department, without any

¹ Appendix No. 2 – Amended Complaint.

² Appendix No. 3 – Notice of *Lis pendens*.

Change Orders, and without PETITIONER’S prior knowledge [Amend. Compl. ¶25]; The “Substitute Plans” require additional construction work to be completed by PETITIONER to the Project that was not required, contemplated, or indicated within the scope of the Original Plans or bid [Amend. Compl. ¶26]; PETITIONER discovered the changes only after incurring significant cost overruns, and work that would require Change Directives to be authorized and issued to reimburse PETITIONER [Amend. Compl. ¶27]; Switching the Original Plans for the Substitute Plans without PETITIONER’S knowledge or consent constituted a material misrepresentation, fraud, deception, misconduct, wrongdoing, or mistake [Amend. Compl. ¶40]; and by receiving the additional labor, services, or materials from PETITIONER, both the RESPONDENT and the Project have been unjustly enriched.

RESPONDENT filed a “Motion to Dissolve *Lis Pendens* or Alternatively to Require the Posting of a Bond”³ and set the hearing on the trial court’s five (5) minute motion calendar [Joint Statement of the Evidence ¶2].⁴ PETITIONER agreed that that the trial court was authorized to condition the *lis pendens* on a

³ Appendix No. 4 – Motion to Dissolve *Lis pendens* or Alternatively to Require the Posting of a Bond

⁴ Appendix No. 5- “Joint Statement of The Evidence” and “Order Approving Joint Statement of Evidence”

bond but objected to the trial court determining the amount without an *evidentiary* hearing [Joint Statement of the Evidence ¶11].

At the hearing, Guy Shir, Esq. appeared on behalf of RESPONDENT, [Joint Statement of the Evidence ¶4], and Randall Gilbert, Esq. appeared on behalf of PETITIONER [Joint Statement of the Evidence ¶5]. The hearing was not an evidentiary hearing [Joint Statement of the Evidence ¶3]. None of the parties were present [Joint Statement of the Evidence ¶6]. None of the parties testified [Joint Statement of the Evidence ¶7]. No affidavits or sworn statements were considered or provided [Joint Statement of the Evidence ¶8].

Over PETITIONER'S objection, the trial court set the bond amount at \$450,000.00 for the value of the property based only on the oral request of RESPONDENT'S attorney at the five minute hearing, and added an additional \$30,000.00 for anticipated attorney's fees incurred by RESPONDENT'S attorney in the event PETITIONER'S *lis pendens* was unjustified. [Joint Statement of the Evidence ¶41]. PETITIONER objected, stating that there was no right to recover attorneys fees based on an Equitable Lien, statutory or otherwise, and therefore, if a bond amount is going to be ordered it should not include attorneys' fees. [Joint Statement of the Evidence ¶42].

The Petition for writ of certiorari followed and pursuant to Article V section 4(b) of the Florida Constitution and Florida Rule of Appellate Procedure 9.130(a)(3)(b), the Fourth District Court of Appeal accepted jurisdiction to issue a writ of certiorari and review the trial court's non-final order. *See e.g., Panamericano of South Dakota, Inc. v. Suncoast Bay Development, Inc.*, 829 So.2d 1006 (Fla. 2nd DCA 2002) *citing: Chapman v. L & N Grove, Inc.*, 244 So.2d 154, 156 (Fla. 2nd DCA 1971) (reviewing an order requiring a bond to maintain a *lis pendens* as an interlocutory appeal); *Taylor v. Cesery*, 717 So.2d 1112 (Fla. 1st DCA 1998) (reviewing an order discharging notice of *lis pendens* as an interlocutory appeal of a non-final order); *Moss v. Arca Dev., Inc.*, 687 So.2d 70 (Fla. 3rd DCA 1997) (treating a petition for writ of certiorari to review an order discharging a *lis pendens* as a nonfinal appeal); *Med. Fac. Dev., Inc. v. Little Arch Creek Props., Inc.*, 656 So.2d 1300 (Fla. 3rd DCA 1995) (reviewing an order requiring a bond to maintain a *lis pendens* pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(B)), approved in part, quashed in part on other grounds, 675 So.2d 915 (Fla. 1996).

On August 3, 2005 the Fourth District Court of Appeal granted PETITIONER'S Petition for Writ of Certiorari in part and denied it in part and

remanded to the trial court for an evidentiary hearing. The Fourth District agreed with PETITIONER that “the trial court departed from the essential requirements of law by ordering the contractor to post a *lis pendens* bond without conducting an evidentiary hearing to determine the amount.” S and T Builders, v. Globe Properties, Inc. 909 So. 2d 375,376 (Fla. 4th DCA 2005). However, in certifying direct conflict with Wagner v. Birdman, 460 So.2d 463 (Fla. 3rd DCA 1984), the Fourth District Court of Appeal rejected PETITIONER’S argument and the Third District’s appellate decision that attorney fees should not be included in the amount of a *lis pendens* bond. Id.

The Fourth District also denied PETITIONER’S Motion to certify the following question as framed which was:

“CAN A TRIAL COURT INCLUDE ATTORNEY FEES IN THE AMOUNT OF A *LIS PENDENS* BOND, WHICH PURSUANT TO SECTION 48.23(3), FLORIDA STATUTES (2003), IS BASED ON AN ACTION NOT FOUNDED ON A DULY RECORDED INSTRUMENT OR A CHAPTER 713 LIEN WHEN THERE IS NO CONCOMITANT RIGHT FOR THE CONTRACTOR TO BE ENTITLED TO ATTORNEY FEES BASED ON ITS EQUITABLE LIEN CLAIM? WE CERTIFY DIRECT CONFLICT WITH WAGNER V. BIRDMAN, 460 SO.2D 463 (FLA. 3RD DCA 1984).”

Since then, the case was remanded, and the trial court immediately held an evidentiary hearing. The trial court issued another order and once again included

attorney fees in the bond amount consistent with the Fourth District Court of Appeal's Opinion which PETITIONER herein seeks review.

STANDARD OF REVIEW

Judicial review is required to interpret whether Florida Statute §48.23(3) permits the inclusion of attorney fees in a *lis pendens* bond. “Judicial interpretation of Florida statutes is a purely legal matter and therefore subject to de novo review.” See, Eng'g Contrs. Ass'n of S. Fla., Inc. v. Broward County, 789 So. 2d 445, 450 (Fla. 4th DCA 2001); Anthony v. Gary J. Rotella & Associates, P.A. 906 So.2d 1205, 1207 (Fla. 4th DCA 2005) (“The standard of review of a trial court's application and interpretation of Florida law is de novo.”).

SUMMARY OF ARGUMENT

PETITIONER filed a notice of *lis pendens* as a result of PETITIONER instituting an equitable lien claim against RESPONDENT'S commercial property. Relying on Florida Statute 48.23(3), the trial court included attorney fees in the amount of the *lis pendens* bond that PETITIONER was required to post.

Nowhere within Florida Statute section 48.23 are the words attorney fees mentioned. Well established Florida law provides that “each party is responsible for its own attorneys' fees unless a contract or statute provides otherwise.” Statutes

awarding attorney's fees must be strictly construed because an award of attorneys' fees is in derogation of common law. If a statute is to change the common law rule it must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard. However, 48.23 is silent on attorney fees.

The Third District Court of Appeal in Wagner v. Bridman, 460 So.2d 463 (Fla. 3rd DCA 1984) interpreted section 48.23 and found no authorization, statutory or otherwise, for the inclusion of attorney fees regarding a *lis pendens*,.

It has also been repeatedly held that there is no entitlement to attorneys' fees based on equitable lien claims. The Fourth District Court of Appeals inclusion of attorney fees as *damages* which the Owner/RESPONDENT may suffer was also erroneous since this Court has already stated that "in general, actual or compensatory damages are not defined as including attorney's fees." Price, infra.

ARGUMENT

I. FLORIDA STATUTE 48.23 DOES NOT EXPRESSLY PROVIDE FOR THE INCLUSION OF ATTORNEY FEES WHEN DETERMINING THE AMOUNT OF A *LIS PENDENS* BOND.

The notice of *lis pendens* was filed by PETITIONER as a result of PETITIONER instituting an equitable lien claim. Florida Statute section 48.23(3)

states that “[w]hen the initial pleading does not show that the action is founded on a duly recorded instrument or on a lien claimed under part I of chapter 713, the court may control and discharge the notice of *lis pendens* as the court may grant and dissolve injunctions.” Nowhere within section 48.23 are the words attorney fees mentioned. Notwithstanding the notable absence of such statutory language, the Fourth District Court authorized the trial court to include attorney fees in the amount of the *lis pendens* bond.

In determining whether Florida Statute section 48.23 authorizes attorney fees, the statute must be strictly construed. *See e.g., Gershuny v. Martin McFall Messenger Anesthesia Professional Ass'n*, 539 So.2d 1131, 1132 (Fla.1989) (“The rule in Florida requires that statutes awarding attorney's fees must be strictly construed.”); *Pepper's Steel & Alloys, Inc. v. U.S.*, 850 So.2d 462, 465 (Fla. 2003)(Statute “must be strictly construed because an award of attorneys' fees is in derogation of common law.”)

Consistently, “[t]his Court has held that a statute enacted in derogation of the common law must be strictly construed and that, even where the Legislature acts in a particular area, the common law remains in effect in that area unless the statute specifically says otherwise.” *E.g., Willis Shaw Exp., Inc. v. Hilyer Sod, Inc.*, 849

So.2d 276, 278 (Fla.,2003), *citing*, Major League Baseball v. Morsani, 790 So.2d 1071, 1077 -1078 (Fla. 2001). “A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard.” *E.g.* Carlile v. Game & Fresh Water Fish Comm'n, 354 So.2d 362, 364 (Fla.1977); Ady v. American Honda Finance Corp., 675 So.2d 577, 581 (Fla.1996)(“A court will presume that such a statute was not intended to alter the common law other than by what was clearly and plainly specified in the statute.”)

Section 48.23 does not speak in clear, unequivocal, plain terms explicitly mandating attorney fees be included in a *lis pendens* bond. “It is an elemental principle of law in this State that attorney's fees may be awarded a prevailing party only under three circumstances, viz: (1) where authorized by contract; (2) where authorized by a constitutional legislative enactment; and (3) where awarded for services performed by an attorney in creating or bringing into the court a fund or other property.” Price v. Tyler, 890 So.2d 246, 250 (Fla. 2004), *citing*, Kittel v. Kittel 210 So.2d 1, 3 (Fla. 1968).

The Third District Court of Appeal interpreted section 48.23 and found no authorization for the inclusion of attorney fees regarding a *lis pendens*. In Wagner

v. Bridman, 460 So.2d 463 (Fla. 3rd DCA 1984) the court found that no specific authority under Section 48.23(3) Florida Statutes (1983) exists which would permit the award of attorney fees to the owner.

Therefore, because section 48.23 does not expressly provide for the inclusion of attorney fees when determining the amount of a *lis pendens* bond: (1) the *lis pendens* previously recorded by PETITIONER should be reinstated e.g. Mr. Sign Studios, Inc. v. Miguel, 877 So.2d 47, Fn. 1 (Fla. 4th DCA 2004), *quoting*, Vonmitschcke-Collande v. Kramer, 841 So.2d 481, 482 (Fla. 3rd DCA 2002) (Stating that “the Florida Supreme Court made it abundantly clear that when an underlying case’s dismissal is reversed, the accompanying *lis pendens* is reinstated.”), *citing*, Crown Corp. v. Robinson, 128 Fla. 249, 174 So. 737 (1937); (2) The trial court should be directed to reduce the amount of the *lis pendens* bond to exclude attorney fees and to provide the PETITIONER with sufficient time to post the bond in the correct amount; and (3) the Fourth District’s opinion should be reversed in part consistent with this Court’s opinion.

II. ATTORNEY FEES ARE NOT AWARDABLE IN EQUITABLE LIEN CLAIMS, AND CANNOT BE INCLUDED IN A *LIS PENDENS* BOND IN THE FORM OF AN OWNER’S ANTICIPATED DAMAGES.

As stated previously, the notice of *lis pendens* was filed by PETITIONER as a result of PETITIONER instituting an equitable lien claim. It has been repeatedly held that there is no entitlement to attorneys' fees based on an equitable lien claim. *See e.g., Goldberg v. Banner Supply Co.*, 230 So.2d 714, 716 (Fla. 3rd DCA 1970)(No entitlement to attorneys fee on equitable lien claim because "The allowance of an attorney's fee against the opposing party is limited to those cases in which such allowance is provided by statute or contract or in which an attorney has created or brought into the court a fund or other property."); Largo Hospital Owners, Ltd. v. International Glass and Mfg. Co., Inc., 410 So.2d 518, 522 (Fla. 2nd DCA 1982)(attorneys fees not recoverable on equitable lien claim); Cape Cave Corp. v. Adams Const. Equipment Corp., 256 So.2d 413 (Fla. 2nd DCA 1972)(Striking attorney fee claim in Complaint alleging equitable lien count).

The Fourth District Court of Appeals acknowledged that "[a]lthough, generally, fees may not be recoverable in equitable lien claims, there are different concerns regarding *damages* for wrongful filing of a *lis pendens*. S and T Builders, v. Globe Properties, Inc. 909 So. 2d 375, 376 (Fla. 4th DCA 2005). However, attorney fees cannot be included under the guise of damages.

This Court in Price v. Tyler, 890 So.2d 246, 250 (Fla. 2004), disapproved Saporita v. Madras, 576 So.2d 1342, 1345 (Fla. 5th DCA 1991) to the extent that Saproita allowed attorney fees incurred in removing a *lis pendens* as a recoverable element of damages stating:

This Court has specifically addressed whether "actual or compensatory damages ... includ[e] attorney's fees," explaining: Actual or compensatory damages are those amounts necessary to compensate adequately an injured party for losses sustained as the result of a defendant's wrongful or negligent actions. However, the general rule is that attorney's fees incurred while prosecuting or defending a claim are not recoverable in the absence of a statute or contractual agreement authorizing their recovery. **Thus, in general, actual or compensatory damages are not defined as including attorney's fees.**

Price So.2d 246 at 251. Incidentally, Saporita recognized conflict with Wagner. Id. at 1345.

Allowing additional security to cover RESPONDENT'S prospective attorney fees would have effect of insuring one party's attorney fees without providing such insurance for the other party even though either party may prevail.

Well established Florida law provides that "each party is responsible for its own attorneys' fees unless a contract or statute provides otherwise," Price v. Tyler, 890 So.2d 246, 251 (Fla. 2004). There are no cases in Florida which permit the recovery of attorney fees on equitable lien claims. Moreover, Price, *supra*, which

although it dealt with a quiet title action, specifically held that attorney fees are not recoverable in equitable actions. Id. 251. Accordingly, it would be an essential departure from the requirements of the law to including attorneys' fees in the *lis pendens* bond which is filed based on an equitable lien claim when there is no substantive basis authorizing such an award.

CONCLUSION

For the foregoing reasons this Court should approve Wagner v. Birdman, 460 So.2d 463 (Fla. 3rd DCA 1984) and disapprove in part S and T Builders, v. Globe Properties, Inc. 909 So. 2d 375 (Fla. 4th DCA 2005) to the extent that it permits a trial court to include attorney fees in a *lis pendens* bond.

Upon remand: (1) the *lis pendens* previously recorded by PETITIONER should be reinstated; (2) The trial court should be directed to reduce the amount of the *lis pendens* bond to exclude attorney fees and to provide the PETITIONER with sufficient time to post the bond in the correct amount; and (3) the Fourth District's opinion should be reversed in part consistent with this Court's opinion.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was faxed and mailed this ____ day of _____ 2005 to: **Mr. Guy M. Shir, Esq.**, Law Offices of Kahan & Associates, P.L., 1800 NW Corporate Blvd. Suite 102 Boca Raton, Florida 33431. [Telephone: (561) 999-5999 • Facsimile: (561) 893-0999]; **Charles S. Dale, Esq.**, Charles S. Dale PA 414 NE Fourth Street Fort Lauderdale Florida 33301 [Telephone: (954) 462-7472 • Facsimile: (954) 462-5472].

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the font requirements of Rule 9.100(l) of the Florida Rules of Appellate Procedure.

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