

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

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 502017AP000159CAXXMB
L.T. NO.: 502016CC013895XXXXNB (RH)

GEORGE SCOTT CURRY,
Appellant,

v.

WOODBERRY LAKES HOMEOWNERS
ASSOCIATION, INC., a Florida
not-for-profit corporation,
Appellee.

Opinion filed: JAN 29 2019

Appeal from the County Court in and for Palm Beach County,
Judge Sandra Bosso Pardo

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PER CURIAM.

Appellant George Curry appeals a Final Judgment in favor of Woodberry Lakes Homeowners Association ("Association") entered after granting summary judgment. In the underlying action, Mr. Curry alleged that the Association violated section 720.303(5), Florida Statutes, when he requested to inspect documents and the Association did not turn them over within the statutorily required ten (10) days. On appeal, Mr. Curry argues the trial court erred by granting summary judgment in favor of the Association on his claim for a statutory violation of section

720.303, Florida Statutes, as well as for dismissing a claim for prevailing party attorney's fees arising from that claim. Mr. Curry also contends that the trial court erred by dismissing a claim for pre-litigation attorney's fees, a claim for injunctive relief, and a claim under the Marketable Record Title Act. Only the claims related to the statutory violation under section 720.303(5), Florida Statutes are addressed, as we find the additional claims to be without merit.

Mr. Curry contends that the trial court erred by granting summary judgment in favor of the Association on his claim of a statutory violation of section 720.303(5), Florida Statutes. He argues that an affidavit by a community manager was not sufficient to dissipate the rebuttable presumption that the Association willfully withheld the documents, and alternatively that if the presumption was dissipated, the trial court could not grant summary judgment because there remained a permissible inference or deduction that the documents were willfully withheld.

1. Rebuttable Presumption

Section 720.303(5), Florida Statutes (2015) provides in relevant part:

(5) INSPECTION AND COPYING OF RECORDS. The official records shall be maintained within the state for at least 7 years and shall be made available to a parcel owner for inspection or photocopying within 45 miles of the community or within the county in which the association is located within 10 business days after receipt by the board of its designee of a written request. ...

(a) **The failure of an association to provide access ... within 10 business days ... creates a rebuttable presumption that the association willfully failed to comply with this subsection.**

(b) A member who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply with this subsection. The minimum damages are to be \$50 per calendar day up to 10 days, the calculation to begin on the 11th business day after receipt of the written request.

(emphasis added). Neither party disputes the timeline of receipt of the request for documents to its ultimate tender. The Association admitted that it exceeded the ten (10) day period due to difficulty gathering all of the documents. The Association provided an affidavit of a community

manager to demonstrate that it “immediately” commenced gathering the documents upon receipt of Mr. Curry’s request, and encountered some difficulty in meeting all of Mr. Curry’s twenty-six (26) separate requests, and that some of the documents were not easily accessible, requiring responses of third parties. Mr. Curry thereafter submitted an affidavit of his attorney that contradicted the events as detailed by the affidavit of the Association’s community manager.

The rebuttable presumption created by section 720.303(5)(a), Florida Statutes, mandates that if the requested documents are not provided within ten days, it is presumed that the association *willfully* withheld the documents. Under section 90.302, Florida Statutes, once a rebuttable presumption is established, the burden shifts to the opposing party to introduce “credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact.” §90.302, Fla. Stat. (2015). Once such credible evidence is introduced, “the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption.” *Id.*

When the defendant produces evidence which fairly and reasonably tends to show that the rear fact is not as presumed, then the impact of the presumption is dissipated. Whether the ultimate fact has been established must then be decided by the jury from all of the evidence before it without the aid of the presumption. At this point the entire matter should be deposited with the trier of the facts to reconcile the conflicts and evaluate the credibility of the witnesses and the weight of the evidence.

Gulle v. Boggs, 174 So. 2d 26, 28-29 (Fla. 1965). Here, the trial court properly found that the affidavit of the community manager dissipated the presumption that the Association willfully withheld the requested documents, but erred by disposing of the count on summary judgment. *Id.* Because Mr. Curry submitted an affidavit contrary to the one provided by the Association, when the trial court granted summary judgment, it usurped the role of the fact-finder to weigh the credibility of the evidence. *Id.*

The Association contends that the issue of willfulness can be decided on a motion for summary judgment by citing to *Wekiva Springs Reserve Homeowners v. Binn*, 61 So. 3d 1190, 1191 (Fla. 5th DCA 2011). This contention is misplaced because in *Wekiva* the finder of fact was the court itself because that case involved a non-jury trial. *Id.* Here, Mr. Curry demanded a jury trial. We find that the trial court erred by granting summary judgment on the claim of a statutory violation of section 720.303(5), Florida Statutes, where there was a belated production of requested documents and the rebuttable presumption that the documents were willfully withheld had been dissipated, but an issue of fact remained due to contradictory affidavits.

2. Prevailing Party Attorney's Fees

Mr. Curry also contends that the trial court erred by dismissing his claim for prevailing party attorney's fees as it relates to his claim for a statutory violation under section 720.303(5), Florida Statutes. For authority for such fees, Mr. Curry cites to section 720.305, Florida Statutes (2015), which provides in relevant part:

(1) Each member and the member's tenants, guests, and invitees, and each association, are governed by, and must comply with, this chapter, the governing documents of the community, and the rules of the association. Actions at law or in equity, or both, to redress alleged failure or refusal to comply with these provisions may be brought by the association or by any member against:

- (a) The association;
- (b) A member;
- (c) Any director or officer of an association who willfully and knowingly fails to comply with these provisions; and
- (d) Any tenants, guests, or invitees occupying a parcel or using the common areas.

The prevailing party in any such litigation is entitled to recover reasonable attorney fees and costs.

(emphasis added). Mr. Curry sued for violation of section 720.303(5), Florida Statutes, and requested attorney's fees if he was the prevailing party pursuant to section 720.305. The Association argues that because section 720.303 contains no right to prevailing party fees, there is

no statute or contract available that provides for such fees. However, based on the plain language of section 720.305, which covers the entirety of chapter 720, to be entitled to attorney's fees there must be (1) an action based on the alleged failure or refusal to comply with chapter 720 or the Governing Documents, and (2) a prevailing party in that action.

The trial court erred when it prematurely dismissed Mr. Curry's claim for prevailing party attorney's fees because there was a pending action under section 720.303(5), Florida Statutes. Because we are reversing the trial court's summary judgment, we must also reinstate Mr. Curry's claim for prevailing party attorney's fees under section 720.305, Florida Statutes.

Accordingly, we **REVERSE** the trial court's granting of summary judgment on the claim of a statutory violation of section 720.303(5), Florida Statutes, as well as the trial court's dismissal of the prevailing party attorney's fees as they relate to that claim and **REMAND** to the trial court for proceedings consistent with this Opinion. We **AFFIRM** the remaining rulings associated with Mr. Curry's additional claims.

Given that both parties moved for prevailing party attorney's fees under section 720.305, Florida Statutes, and both parties have partially prevailed on appeal, we also conditionally **GRANT** reasonable Appellate Attorney's Fees to whichever party ultimately prevails on remand. The trial court shall award the prevailing party reasonable attorney's fees.

NUTT, CURLEY, and SASSER, JJ., concur.

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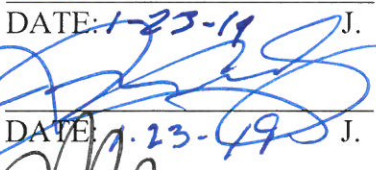
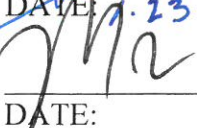
Date of Appeal: December 20, 2017

DATE OF PANEL: OCTOBER 15, 2018

PANEL JUDGES: NUTT, CURLEY, SASSER

AFFIRMED/REVERSED/OTHER: AFFIRM IN PART, REVERSE IN PART

PER CURIAM OPINION/DECISION BY: PER CURIAM

CONCURRING:)	DISSENTING:)	CONCURRING SPECIALLY:)
)	With/Without Opinion)	With/Without Opinion)
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DATE: <u>1-23-19</u> J.)))
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DATE: <u>1-23-19</u> J.)))
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