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

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 502017AP000051CAXXMB
L.T. NO.: 502015SC004783XXXXMB

G&R PLUMBING, INC. A/A/O
DARRYL AND FRANKIE LE MASTER,
and FLORIDA PROFESSIONAL LAW
GROUP, PLLC.,
Appellant,
v.

AVATAR PROPERTY AND CASUALTY
INSURANCE COMPANY,
Appellee.
_____/

Opinion filed: FEB 0 5 2019

Appeal from the County Court in and for Palm Beach County, Judge Frank Castor


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PER CURIAM.

Appellant, G&R Plumbing, Inc., ("G&R"), appeals an "Order on Motion for Attorneys' Fees and Costs," which taxed the same against it in the amount of $15,438.00 and $5,600.00,

respectively. The trial court found that G&R filed an amended complaint against Appellee Avatar Property and Casualty Insurance Company, ("Avatar"), for breach of contract that had no basis in law or fact. G&R argues that the trial court erred, *inter alia*, by denying its motion to strike Avatar's motion for sanctions. We find that the trial court reversibly erred by denying G&R's motion to strike Avatar's motion for sanctions. We find no merit to G&R's remaining arguments on appeal.

On November 18, 2015, Avatar served—but did not yet file—a motion for sanctions alleging that the complaint had no basis in law or fact. On December 12, 2015, Avatar filed its motion for sanctions—twenty-two days after it served the motion for sanctions. G&R filed a motion to strike the motion for sanctions. In its motion to strike, G&R claimed that the motion for sanctions was filed prematurely in violation of the twenty-one day safe harbor provision of section 57.105(4) due to Florida Rule of Judicial Administration 2.514(b)'s five-day extension to the period for filing responsive documents after service by email. The trial court denied G&R's motion to strike and awarded attorney's fees and costs to Avatar.

The standard of review for determining whether a trial court erred in awarding section 57.105 attorney's fees is abuse of discretion. *Lago v. Lame By Design, LLC*, 120 So. 3d 73 (Fla. 4th DCA 2013). Legal determinations made during such a ruling are reviewed *de novo*. *Id.*

Section 57.105, Fla. Stat., (2016) provides the "safe harbor provision," which reads in relevant part:

> (4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

Florida Rule of Judicial Administration 2.514[1] provides in relevant part:

> (a) The following rules apply in computing time periods specified in any rule of procedure, local rule, court order, or statute that does not specify a method of computing time.
>
> . . . .
>
> (b) When a party may or must act within a specified time after service and service is made by mail or e-mail, 5 days are added after the period that would otherwise expire under subdivision (a).

Per the plain language of Rule 2.514(b), because the motion for sanctions was served via email, G&R had twenty-one days, plus five, to withdraw the challenged paper. *See McCray v. State*, 151 So. 3d 449 (Fla. 1st DCA 2014 (explaining the two step process for calculation of time periods). However, Avatar filed its motion for sanctions on the twenty-second day after it served that motion on G&R via email.

Avatar contends, via its Supplemental Authority, that Rule 2.514's five-day extension of time does not apply to section 57.105's procedure for serving and filing motions for sanctions. It cites *Wheaton v. Wheaton*, No. SC17-716, 2019 WL 99109 (Fla. Jan. 4, 2019), wherein the Florida Supreme Court recently noted a "fatal flaw" in *Matte v. Caplan*, 140 So. 3d 686 (Fla. 4th DCA 2014). However, both cases are inapplicable to the issue at hand, which is strictly one of time computation, rather than formatting, per Rule 2.516. To that effect, neither *Wheaton* or *Matte* cite Rule 2.514, which is the operative Rule in this case. Rule 2.514 applies "[w]hen a party may or must act within a specified time after service[.]" We find that this language applies directly to the procedure described in section 57.105. When a motion pursuant to 57.105 is served, the party

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[1] The Florida Supreme Court has amended this rule. *See* 2018 Florida Court Order 0045 (C.O. 0045). In the amendment, the Supreme Court eliminated the five-day extension. However, the text of the amendment states that it becomes effective on January 1, 2019. Because the proceedings in question occurred long before that effective date, the amendment does not apply.

"may" withdraw the challenged paper within twenty-one days. Accordingly, Avatar's motion for sanctions was filed prematurely, and the trial court erred when it denied G&R's motion to strike.

The next issue is whether the trial court's error was harmless. In *City of N. Miami Beach v. Berrio*, 64 So. 3d 713 (Fla. 3d DCA 2011), the Third District Court of Appeal held that the trial court reversibly erred by awarding fees to a movant when the movant did not comply with section 57.105's twenty-one day safe harbor provision. Similarly, Avatar's section 57.105 motion was filed prematurely, and the trial court's entry of a fee award thereunder was reversible error.

We also write to distinguish between the award of attorney's fees and costs in this case. G&R argues that the trial court improperly awarded costs to Avatar. We disagree. The "prevailing party" for purposes of taxing costs is the party who prevailed on the significant issues below. *Wyatt v. Milner Document Products, Inc.*, 932 So. 2d 487 (Fla. 4th DCA 2006). In most instances, "when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party." *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990).

Here, Avatar was the beneficiary of G&R's voluntary dismissal of its amended complaint. As such, Avatar is the prevailing party. Notwithstanding the impropriety of Avatar's motion pursuant to section 57.105, the trial court properly awarded it costs as the prevailing party.

Accordingly, we **REVERSE** the trial court's entry of an attorney's fee award and **AFFIRM** the trial court on all remaining issues.

CURLEY, NUTT, ARTAU, JJ., concur.

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Opinion/Decision filed: FEB 05 2019

Appeal from Palm Beach County Court
Judge Frank Castor

Date of Appeal: March 31, 2017

DATE OF PANEL: JANUARY 15, 2019

PANEL JUDGES: CURLEY, NUTT, ARTAU

AFFIRMED/REVERSED/OTHER: REVERSE

PER CURIAM OPINION/DECISION BY: PER CURIAM

| CONCURRING: | DISSENTING: With/Without Opinion | CONCURRING SPECIALLY: With/Without Opinion |
|---|---|---|
| 2/4/19 | | |
| DATE: J. | J. | J. |
| DATE: 2/8/19 J. | J. | J. |
| DATE: 2/5/19 J. | J. | J. |