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

APPELLATE DIVISION (CIVIL)
CASE NO: 502007AP000192XXXXMB
L.T.: 502004CC006410XXXXNB
DIVISION: 'AY'

JOHN T. CLIXBY and
JUDITH M. CLIXBY,

Appellants,

v.

BARNARD J. MOORE and
AMY MOORE,

Appellees.
_____/

Opinion filed: AUG 0 1 2008

**Appeal from the County Court in and for Palm Beach County,
Judge Nancy Perez.**

For Appellant: John T. Clixby and Judith M. Clixby, *pro se*, 100 Waterway Road, #308E, Tequesta, Florida 33469.

For Appellee: Barnard J. Moore and Amy Moore, *pro se*, 8336 SE Boxwood Lane, Hobe Sound, Florida 33455.

REVERSED AND REMANDED.

(STERN, J.)

Background

This case presents the need for us to declare the nature and extent of the "significant issues" on which one must prevail in a breach of contract case, in order to be awarded attorney's fees as "the prevailing party." Because we find that the trial court abused its discretion in failing

to declare the Appellants the prevailing parties for having won on the significant issues, and in failing to award them attorney's fees, we reverse.

Appellants leased a condominium unit to Appellees. The lease was renewed, and during the renewal term, Appellees vacated the unit. Appellees gave a 45-day advance notice of vacating, which notice was required by the contract. Appellants sued for breach of the lease agreement, seeking one month's rent of $845.00 and $11,169.26 as the value of labor and materials which they alleged were necessitated by Appellees' alleged waste of the premises. After a nonjury trial, the court found that the Appellees had breached their agreement "by failing to leave the unit in good, clean condition, less wear and tear." The court awarded to Appellants a total of $1,130, consisting of $350.00 for cleaning and $780.00 for excessive depreciation to the carpeting.[1]

Following trial, the parties both moved for attorney's fees under the agreement and under §83.48, Fla. Stats. The trial court invoked the language of the Florida Supreme court in *Moritz v. Hoyt Enterprises, Inc.* wherein the Florida Supreme Court stated: "[i]t is our view that the fairest way to determine who the prevailing party is to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court." *Moritz v. Hoyt Enterprises, Inc.*, 604 So.2d 807, 810 (Fla. 1992).

In applying the "significant issues" test to the parties, the trial court found that the *Appellees (lessees) were not the prevailing party because they breached the agreement* "by failing to leave the unit in good, clean condition, less wear and tear." However, although it did not find that Appellants had breached the agreement in any way, the court found that they had not prevailed because most of the time spent during the trial had been consumed by presentation

[1] Much of the deterioration was found to have resulted from normal wear and tear, and the trial court declined to award $6,740 as the reasonable costs of labor which had been performed by one of the Appellants personally.

of testimony and other evidence by Appellees, resulting in substantial reduction in the amount finally awarded to Appellants. Specifically, the pertinent language in the trial court's final judgment reads as follows:

> The claim for attorney's fees was based on F.S. 83.48 and the contract. Here, the Plaintiffs [Appellants] achieved recovery of damages. However, the amount recovered was 8% of the total sought. The trial centered on the claim of entitlement to substantial renovation for the bathroom and kitchen when the only renovation to the unit in 20 years was painting and carpeting. Therefore, this Court finds the majority of time was spent on renovation issues which were not found to be recoverable. Therefore, the Plaintiffs did not prevail on the significant issues.
>
> Although, the Defendants reduced the damages, they breached the agreement and the statute by failing to leave the unit in good, clean condition, less wear and tear. Therefore, the Defendants also did not prevail.

The Appellants argue that they were the prevailing parties and should receive an award of reasonable attorney's fees. For the reasons set forth below, we agree, and reverse.

The Law As To "Significant Issues"

Recently, the District Court of Appeal for the Fourth District reiterated,

> Although some districts recognize that cases can sometimes be "ties," such that the parties can both be viewed as winners or losers, we have maintained that "[i]n a breach of contract action, one party must prevail." *Lucite Ctr., Inc. v. Mercede*, 606 So.2d 492 (Fla. 4th DCA 1992) (citing *Reinhart v. Miller*, 548 So.2d 1176, 1177 (Fla. 4th DCA 1989); *see also Green Cos., Inc. v. Kendall Racquetball, Inv., Ltd.*, 658 So.2d 1119 (Fla. 3d DCA 1995); *cf. Merchants Bonding Co. (Mut.) v. City of Melbourne*, 832 So.2d 184, [*sic*] (Fla. 5th DCA 2002); *KCIN, Inc. v. Canpro Invs., Ltd.*, 675 So.2d 222, 223 9Fla. 2d DCA 1996).

Port-A-Weld, Inc. v. Padula & Wadsworth Constn., Inc., __ So.2d __, 33 Fla. L.Weekly D1358, 2008 WL 2116645 (Fla. 4th DCA May 21, 2008).[2] After noting that one of the parties had

[2] In one case, *Hajianpour v. Maleki*, 975 So.2d 1288, 1290 (Fla. 4th DCA 2008), there is a gratuitous remark that "[i]t is not an abuse of discretion to decline to award attorney's fees when a court determines that neither party prevailed," citing only the Fifth DCA case of *Merchants Bonding Co. (Mut.) v. City of Melbourne, supra.* However, the *Hajianpour* court was affirming a denial of the *non*prevailing party's motion for attorney's fees, and noted that *the other party had prevailed* on the significant issues. That other party had apparently not moved for attorney's

clearly prevailed (as it had recovered the entire contract price, whereas the defendant had recovered none of the delay damages it claimed, and little of the offsets it claimed), the *Port-A-Weld* Court quoted the above-quoted "significant issues" language from *Moritz, supra.* Although there is a split between the District Courts of Appeal in Florida as to whether *Moritz* allows for the holding in a contract case that neither party is the prevailing party, we are bound by the decisions of the Court of Appeal for the Fourth District.[3] In order to apply *Moritz* to the case before this Court, it is necessary to examine the opinion in *Moritz* to discern what that case does, and does not, hold.

In *Moritz*, the plaintiffs, Mr. and Ms. Moritz, had contracted to purchase a house under construction by the defendant, Hoyt. The base price was to be $520,000. The Moritzes paid a 10% deposit of $52,000, plus an additional $5,877.45 for extra items or features, for a total deposit of $57,877.45. During the further course of construction, the plaintiffs decided that the quality of certain items, including the kitchen cabinets, was not up to the level of the promised luxurious custom home, and decided to purchase a different house from another seller. After closing on that second house, they sent defendant Hoyt a letter through their attorney, declaring that Hoyt had breached, and demanding return of the full deposit of $57,877.45.

Hoyt sold the house to another purchaser for $510,000.00, $15,877.45 less than the price for which the Moritzes had agreed to purchase it, $525,877.45. Hoyt offered to return the Moritzes' deposit, less the damages ($15,877.45) caused by the Moritzes' alleged breach. The Moritzes insisted on a return of the total deposit, $57,877.45. When Hoyt refused, they filed suit, alleging that Hoyt had breached their contract by failing to build the house in accordance with

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fees. The above-quoted remark is thus *obiter dictum*, and clearly ignores the other pronouncements to the contrary by the Fourth DCA.

[3] *Pardo v. State*, 596 So.2d 665, 666-67 (Fla. 1992), approving and citing primarily *State v. Hayes*, 333 So.2d 51, 53 (Fla. 4th DCA 1976).

the agreement and their desires and specifications. They further sought to obtain an equitable lien on the property. Hoyt answered by denying any breach by it, and counterclaimed for the down payment as liquidated damages, noting that it had offered to return the deposit ($57,877.45) less Hoyt's damages ($15,877.45), for a net return of $42,000.00.

In a partial summary judgment, the trial court in *Moritz* ruled that Hoyt was not entitled to the entire deposit as liquidated damages, and that Hoyt was limited to its actual damages, which the court determined to be the difference between the agreed purchase price ($525,877.45) and the actual value of the property at the time of the Moritzes' alleged breach. That court noted that the central issue was whether Hoyt had been guilty of a material breach of its contract: if so, the Moritzes would have been entitled to a return of their full deposit; if not, then the Moritzes' refusal to purchase the house would have been a breach and, held the trial court, Hoyt would be entitled to recover the difference between the value of the house at the time of the breach and the actual contract price, plus interest, less the amount deposited by the Moritzes.

The trial court decided that Hoyt had not breached, and that the Moritzes had been obligated to go through with the purchase. The trial court found that the reasonable value of the house at the time of the Moritzes' breach was $510,000.00, the price for which Hoyt sold to the successor buyer. The trial court found that the contract price, plus extras, totaled $526,861.00,[4] and concluded that Hoyt's damages were $16,861.00 plus interest of $3,718.56, for a *total damage to Hoyt of $20,579.56*. However, the trial court further found that *the Moritzes were entitled to have returned to them $45,525.90*, consisting of the difference between the Moritzes' deposit ($57,877.45) and Hoyt's damages ($20,579.56), plus interest on the difference, totaling $8,228.01.

[4] The opinion by the Florida Supreme Court does not explain how the trial court arrived at this figure.

Thus, Hoyt won on the central issue of who had breached the contract, but the Moritzes wound up with a far greater monetary recovery against Hoyt than Hoyt had against the Moritzes. The parties filed cross-motions for attorney's fees from one another, either one claiming to be the prevailing party. The trial court found that Hoyt had been the prevailing party, and granted Hoyt's motion for attorney's fees and denied the Moritzes' motion. On appeal, in a 2-1 decision, the Fourth District Court of Appeal affirmed, on the ground that Hoyt had prevailed on the central issue of who had breached the contract. The dissenting opinion chose to follow a Fifth District case,[5] which had held that the party winning the larger recovery in dispute should be deemed the prevailing party, regardless of who prevailed on the central issue of breach.

On appeal to the Florida Supreme Court, the Moritzes argued that the Fifth DCA case, and a Second DCA case[6] holding the same way (*i.e.*, that the party winning the largest amount is the prevailing party) mandated a reversal of the Fourth DCA in their case. The Florida Supreme Court in *Moritz* held flatly that Hoyt "prevailed on the significant issue in the case because it did not breach the contract and, consequently, should not be required to pay attorney's fees to the parties who did not prevail on their complaint and only partially prevailed on their defense to [Hoyt's] counterclaim [in which he sought to keep the entire deposit as liquidated damages]." Said the Court:

> It is our view that the fairest way to determine who is the prevailing party is to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court. Given the circumstances of this record, we find that the trial judge was within his discretion to grant Hoyt's motion for attorney's fees and costs.
>
> For the reasons expressed, we approve the decision of the district court and disapprove *Casavan* and *Daniels* [*see* notes 5 and 6, *supra*] to the extent they conflict with this decision.

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[5] *Casavan v. Land O'Lakes Realty, Inc.*, 542 So.2d 371 (Fla. 5th DCA 1989).

[6] *Casavan, supra* note 5, and *Daniels v. Arthur Johannesen, Inc.*, 496 So.2d 914 (Fla. 2d DCA 1986).

604 So.2d at 810. Thus, although the Moritzes were awarded from Hoyt nearly 4 times as much as Hoyt was awarded from them, Hoyt was the prevailing party, because Hoyt's award was based on the central issue of the case, *i.e.*, the cross-claims of breach.

Nothing in *Moritz* suggests that a trial court may find that neither party prevails in a contract action. It is difficult to imagine a situation in a contract action in which there is not claim of a breach, since an action based on a contract by its very nature alleges that the defendant failed to meet its contractual obligations, and *ipso facto* is a claim of breach. Such claims, the *Moritz* opinion makes clear, are "the significant issues tried" before the court.

Application of the Law to the Facts of This Case

In the case *sub judice*, the contract for attorney's fees provides for attorney's fees if, "in *a suit for any breach of this Agreement*," the lessee is found to be in breach.[7] Here, the trial court expressly found that the lessees (Appellees) breached the lease agreement. Far less money was awarded to Appellants than they sought, but they nonetheless prevailed on the significant issues in the case, *i.e.*, whether there was a breach and if so, who committed it.

The case before us is a breach of contract case. The trial court here ruled that the Appellants did not prevail on the significant issues, *despite its findings that Appellants had not breached and Appellees had*, and based its ruling (1) on a finding that much of the deterioration of the unit was ordinary wear and tear, not damage caused by the Appellees and that the bulk of the time was spent on evidence going to that issue, and (2) on the fact that the Appellant recovered only a small amount of what it sought. The trial court did *not* find that the Appellant had breached the contract.

[7] Under §57.105(7), Fla.Stats., this clause is automatically reciprocal, and covers a breach by the lessor.

Most important, the trial court found that the Appellees *did* breach the agreement, "by failing to leave the unit in good, clean condition, less wear and tear." That the trial court found that the Appellants did not breach, and that the Appellees did breach, means that the Appellants prevailed on the significant issues, just as happened in the *Moritz* case, where the prevailing party wound up paying to the other party a large amount, on counterclaims which were *not* the significant issues.

We hold that after finding that Appellees had breached and that Appellants had not, the trial court abused its discretion by denying reasonable attorney's fees to the Appellants. The showing by Appellees, that much of the deterioration of the premises was due to ordinary wear and tear and not to waste caused by them, resulted in a much lower award to Appellants for the Appellees' actions constituting the breach, but it did *not* result in a finding that Appellees had *not* breached, or that Appellants *had* breached.

The dissenting opinion in this case notes the Fourth DCA's statement in *Lucite Center, Inc. v. Mercede*, 606 So.2d at 1776, that "in a breach of contract action, one party must prevail," but contends that "[t]his single sentence, standing alone, is in direct conflict with the Fourth District's holding in *Thaller [v. Waterford Condo Apartments, Inc.*, 437 So.2d 248 (Fla. 4th DCA 1983)]." However, in *Thaller*, which involved foreclosure of a lien in favor of a condominium association for nonpayment of a special assessment, the Fourth DCA noted that, although the unit owner [appellant] raised numerous points on appeal, the DCA was "[affirming] the trial court on all points with the exception of its computation of the amount of principal and interest due appellee." Said the court, "[a]lthough our decision resulted in some economic benefit to the appellant, we must agree with appellee that it was the prevailing party in this appeal," and denied attorney's fees to the appellants. This tracks the situation in *Moritz* and

supports our ruling here. *Thaller* does not support the notion that there need not be a prevailing party in a contract action.

In fact, the dissent herein bases its reliance on *Thaller* on the fact that the Third DCA cited *Thaller* for the proposition that "[s]imply because a party has obtained some economic benefit as a result of a litigation, does not necessarily mean that party has succeeded on the major issue in the case." *Zhang v. DBR Asset Mgt., Inc.*, 878 So.2d 386, 387 (Fla. 3d DCA 2004). That very principle is precisely the principle that mandates our reversal of the trial court for the reasons explained above.

Conclusion and Holding

In the case *sub judice*, the lengthy efforts of Appellees Moore led to a reduction of the amount awarded against them in favor of prevailing parties Clixby, but those efforts did not produce a finding that Appellants Clixby had breached. Here, the Clixbys prevailed on the breach issue by proving that the Moores had breached, and the Clixbys also recovered money. In *Moritz*, the party (Hoyt) who won on the breach issue was the prevailing party even though it owed the Moritzes $42,000.00. Here, Appellants Clixby, who won on the breach issue, will recover money, although less than they had hoped to recover. They are the prevailing parties.

As the prevailing parties, the Appellants are entitled to their costs under §57.041(1). As to the trial court's denial of Appellants' costs for deposition transcripts not used at trial, it is noted that the Florida Supreme Court in 2005, in amending its Uniform Guidelines for Taxation of Costs, provided that, among the "Litigation Costs That Should Be Taxed" are:

> A. Depositions
> 1. The original and one copy of the deposition of court reporter's per diem for all depositions.

In re Amendments to Uniform Guidelines for Taxation of Costs, 915 So. 2d 612, 616 (Fla. 2005). Accordingly, on remand, the trial court should award said costs to Appellants.

The decision of the trial court is reversed, and this case is remanded to the trial court with directions to enter an award of entitlement to reasonable attorney's fees to Appellants and against Appellees, to conduct a hearing to determine the amount of reasonable attorney's fees to be awarded, and to award Appellants the costs of the original and one copy of the depositions not used at trial.

(HOY, J. concurring)

I concur that the Clixbys should recover the costs of their depositions. I concur only in the result with respect to attorney's fees. The trial court found no compelling circumstances to justify not finding a prevailing party. In awarding fees, the trial court should determine the reasonable time expended to obtain the result achieved.

(McCARTHY, J. dissents with opinion)

I respectfully dissent.

Overview

This is a case from County Court of Palm Beach County involving a landlord / tenant matter. The landlord moved for attorney's fees pursuant to F.S. 83.48 and the contract. The Appellants (landlord) appeal the trial court's finding that neither party is entitled to attorney's fees because neither party prevailed on a *significant* issue.

Standard of Review

This Court's standard of appellate review as to an award of attorney's fees is "a showing of clear abuse of discretion." *Turovets v. Khromov*, 943 So.2d 246 (Fla. 4th DCA 2007), *Nasser v. Nasser*, 975 So.2d 531 (Fla. 4th DCA 2008).

Facts

The parties entered into a residential Lease/Rental Agreement for a period of 17 months. The lease allowed the tenants to provide 45 days notice before vacating. On February 4, 2004, Appellees notified Appellants of their intent to vacate effective March 31, 2004 and requested application of their previously deposited last month's rent to the month of March. The Appellants in this case sought damages as follows:

One month's rent	$ 845.00
Labor for tile job	600.00
Carpet 2/3 value ($1,950 actual price)	1,289.00
Bathroom repair	183.00
Tile for kitchen and bathroom	1,236.26
Labor by Plaintiff	6,740.00
Cleaning	350.00
Total	$ 12,013.26[8]

After trial, the lower Court rejected all of the claims of both the landlords and tenants except that: "tenants are responsible for $350.00 of the cleaning, 2 years of carpeting depreciation over five years or $780.00." Both parties sought attorney's fees.

Discussion

In a later hearing in which the parties were seeking attorney's fees, the trial Court followed the Supreme Court's "significant issues" test stated in *Moritz v. Hoyt Enterprises, Inc.*, 604 So.2d 807 (Fla. 1992) and discussed the respective parties' failure to prevail on any significant issues. As to the claim for attorney's fees, the trial Court held in part:

• • •

> The claim for attorney's fees was based on F.S. 83.48 and the contract. Here, the Plaintiffs achieved recovery of damages. However, the amount recovered was 8% of the total sought. The trial centered on the claim of entitlement to substantial renovation for the bathroom and kitchen when the only renovation to the unit in 20 years was painting and carpeting. Therefore, this Court finds the

[8] The actual total is $11,243,26.

> majority of time was spent on renovation issues which were not found to be recoverable. Therefore, the Plaintiffs did not prevail on the significant issues.
>
> Although, the Defendants reduced the damages, they breached the agreement and the statute by failing to leave the unit in good, clean condition, less wear and tear. Therefore, the Defendants also did not prevail.

In *Moritz v. Hoyt Enterprises, Inc.*, the Supreme Court of Florida held: "It is our view that the fairest test to determine who is the prevailing party is to allow the trial Court to determine from the record which party has, in fact, prevailed on the significant issues tried before the Court . . . "

In *Zhang v. DBR Asset Management, Inc.*, 878 So.2d 386 (Fla. 3d DCA 2004), the Third District Court of Appeal cited a Fourth District case, *Thaller v. Waterford Condo Apartments, Inc.*, 437 So.2d 248 (Fla. 4th DCA 1983), for the proposition that "[s]imply because a party has obtained some economic benefit as a result of a litigation, does not necessarily mean that party has succeeded on the major issue in the case." *Zhang* at 387.

The majority relies on the District court's statement from *Lucite Center, Inc. v. Mercede*, 606 So.2d 492 (Fla. 4th DCA 1992) and *Port-A-Weld, Inc. v. Padula & Wadsworth Constn., Inc.*, __ So.2d __, 33 Fla. L.Weekly D1358, 2008 WL 2116645 (Fla. 4th DCA May 21, 2008) for the proposition that "in a breach of contract action, one party must prevail." *See Miller v. Weinhart*, 548 So.2d 1176.

This single sentence, standing alone, is in direct conflict with the Fourth District's holding in *Thaller, supra*; *Hutchinson v. Hutchinson*, 687 So.2d 912 (Fla. 4th DCA 1997) (there the Fourth District also recognized that in certain contract cases, no prevailing party may exist); *Zhang, supra* (an attorney's fee award is not required each time there is litigation involving a contract providing for prevailing attorney's fees); *Miller v Jacobs and Goodman*, 280 So.2d 438 (Fla. 5th DCA 2002) (a trial Court may properly determine that neither party had prevailed in the

contract action under compelling circumstances); and also *Merchants Bonding Company v. City of Melbourne*, 832 So.2d 184 (Fla. 5th DCA 2002) (no attorney's fees awarded where the breach of contract action was fought to a draw). In *KCIN, Inc. v. Canpro Investments, Ltd.*, 675 So.2d 222 (Fla. 2d DCA 1996), the Second District cited *Lucite Center, Inc.* for the proposition that "in a breach of contract action, one party must prevail", but went on to hold:

> We conclude that under the facts of this case, the trial court's ruling of no prevailing party was proper. Prevailing party attorney's fees are just and proper in the majority of contract litigation. We are concerned, however, with contracts that fail as a result of fault by both contracting parties. A rule which requires an award of prevailing party attorney's fees in all cases may result in an unjust reward to a party whose conduct caused the failure of the contract. The rule is especially inequitable in the ever increasing number of cases in which the attorney's fees far exceed the claims for damages arising from the contract. Therefore, we hold that an attorney's fee award is not required each time there is litigation involving a contract providing for prevailing party fees.

It should be noted that the Fourth District Court of Appeal in the *Lucite Center, Inc.* opinion as well as the recent opinion in *Port-A Weld v. Padula*, also included the recitation of the quoted language from *Moritz* requiring that the test be as to "*significant* issues." The majority ignores the Supreme Court's wording, "*significant*", from *Moritz* and requires that the test be changed to prevailing on "*any* issue."

A bright line rule that one party *must* prevail in a breach of contract action is not only contrary to established Florida law, it runs afoul of the test for *Moritz* that it is the "*significant* issues test" that the trial Court is to utilize. To require that the Court find *any* issue significant, would require us to ignore the clear language set forth by The Supreme Court in *Moritz*.

In this case, the trial judge explained her reasoning to support her conclusion that having rejected claims for rent, carpet value, bathroom repair, replacement of tiles and labor that her holding for $350.00 for cleaning and two years of carpet depreciation were simply not the significant issues tried before the Court.

Costs

The legal basis for recovering costs is set forth in Florida Statute §57.041 which provides:

> 57.041 Costs; recovery from losing party. - -
> (1) The party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment; but this section does not apply to executors or administrators in actions when they are not liable for costs.

Unlike *Moritz*, the test for the award of costs is not who prevailed on the significant issues, but rather who recovered the judgment. Here, the Appellants recovered the judgment.

I would REVERSE AND REMAND as to the Appellants' entitlement to recover "all his or her legal costs and charges" with instructions for the trial Court to award reasonably necessary costs at the time the action precipitating the cost was taken, *Nasser*, with due consideration given to *In re Amendments To Uniform Guidelines For The Taxation of Costs*, 915 So.2d 612 (Fla. 2005).

Conclusion

I would AFFIRM the trial Court's ruling as to attorney's fees and REVERSE AND REMAND as to costs.