

determining who pays attorney's fees

by Michael J. Gelfand, Esq.

Contractors had enormous leverage against Florida community associations when there was a construction lien lawsuit. Up until now, even if an association could prove the contractor's claim was not correct, if the contractor recovered just one dollar, then the contractor would recover all of the contractor's attorneys' fees to foreclose a contractor's lien.

The Supreme Court of Florida recently took up this issue, ruling that a trial court has the discretion to make a determination that neither party in a lawsuit was the prevailing party entitled to attorneys' fees. In *Trytek v. Gale Industries, Inc.*, 33 Fla. L. Weekly S945 (Fla., December 11, 2008), the Supreme Court addressed the following question:

Where a lienor obtains a judgment against a property owner in an action to enforce a construction lien brought pursuant to section 713.29, Florida Statutes (2005), are trial courts required to apply the "significant issues" test articulated in Prosperi v. Code, Inc., 626 So. 2d 1360 (Fla., 1993), in determining which party, if any, is the "prevailing party" for the purpose of awarding attorneys' fees?

Answering the question with a strong YES, the Supreme Court explained that it has consistently approached lien actions with equity or fairness. The Supreme Court held that there is no mandatory requirement that the trial court determine that one party is the prevailing party even when the lienor obtains a judgment on the lien.

In *Trytek v. Gale Industries, Inc.*, the Tryteks, who were building a new home, contracted with Gale Industries for insulation. Following a dispute, Gale industries sued to foreclose a construction lien of \$12,727. The only issue at trial was the amount of damages sought in the Trytek's counterclaim, \$11,770. The trial court entered judgment in favor of Gale Industries for only \$1525, far less than Gale Industries sought.

Each party moved for attorneys' fees as the prevailing party. The trial court found the Tryteks were the prevailing party because the Tryteks primarily prevailed in their counterclaim. On initial appeal, the Fifth District Court of Appeal reversed, concluding that a contractor who obtains any monetary judgment pursuant to a construction lien claim would be the prevailing party.

The Supreme Court of Florida reversed the District Court of Appeal. "The overall purpose of section 713.29 and attorneys' fee statutes in general is to discourage rather than encourage needless litigation," the Supreme Court stated. "Consistent with this purpose, we conclude that a trial court has the discretion to make a determination that neither party has prevailed on the significant issues in litigation after a thorough examination of all the factors including the issues litigated, the amount of the claim of lien versus the amount recovered on the lien, the existence of setoffs and counterclaims by the homeowner, and the amounts offered by either party to resolve the issues prior to the litigation, assuming that those negotiations were not otherwise confidential either by agreement or by statute."

This case should prove to be a benefit to Florida community associations in actions by contractors where associations substantially prevail on counterclaims.

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