

IN THE SUPREME COURT OF FLORIDA

CASE NO: 70,704

FIXEL ENTERPRISES, INC.,

Petitioner

vs.

PETER M. THEIS and
DEBRA L. THEIS,

Respondents

FILED
SID J. WHITE

SEP 8 1987

CLERK, SUPREME COURT

By _____
Deputy Clerk

[Handwritten signature]

RESPONDENTS' BRIEF

Reese A. Waters Jr
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PREFACE

Petitioner herein was Appellant in the First District Court of Appeal and Defendant in the Trial Court. Respondents were Appellees in the First District Court of Appeals and Plaintiffs in the Trial Court. References to the Appendix shall be referred to as "A" together with the page number, example A-1 would refer to page 1 of the Appendix.

STATEMENT OF JURISDICTION

This appeal before this Court comes from the First District Court of Appeal and jurisdiction is based on Appellate Rule 9.030(a)(2)(A)(V).

STATEMENT OF THE CASE AND FACTS

Respondents adopt the Statement of the Case and Facts as set forth in Petitioner's Brief except as follows:

(1) The offer of Twenty Five Hundred Dollars (\$2,500.00) was by the affidavit of the Petitioner (A-16) a "cash offer to dispose of the matter". There is no indication in the record whether this refers only to Respondent claim or to the counter-claim of Petitioner or both. There is nothing in the record except this affidavit to support Petitioner's statement on page 1 of his brief that the offer was "in settlement of the entire case".

(2) The offer of Fifteen Hundred Dollars (\$1,500.00) was by the affidavit of the Petitioner (A-16) "in full settlement of this claim". There is no indication in the record whether this refers to Petitioner's counter-claim, Respondents' claim or both. There is nothing in the record except this affidavit to support Petitioner's statement on page 1 of his brief that this offer was "to dispose of the entire case".

(3) Petitioner never at any time made a written Offer of Judgment to Respondents.

CERTIFIED QUESTION

IS THE DEFINITION IMPOSED UPON THE TERM "PREVAILING PARTY" AS USED IN SECTION 713.29, FLORIDA STATUTE IN C.U.ASSOCIATES, INC., vs. R. B. GROVE, INC., 472 So. 2d 1177 (Fla. 1985), TO BE EXTENDED BEYOND THE CONTEXT OF THAT STATUTE.

ARGUMENT

Respondent will adopt its prior arguments which are set forth herein and, also, present its reasons why the Court should review its decision in C. U. Associates, Inc., v. R. B. Grove, Inc., 472 So 2d 1177 (Fla, 1985).

First, Respondent adopts the Argument contained in its Answer Brief which was as follows:

"The case law cited in the Appellant's Initial Brief is inapplicable to the facts of this case. The Appellant's cases cited in its Initial Brief referred to and defined Florida Statute, Section 713.219, which is entitled "Attorney's Fees". Said statute is self-explanatory and reads in relevant part:

. . . in any action brought to enforce a lien under Part I, the prevailing party shall be entitled to recover a reasonable attorney's fee for the services of his attorney for trial and appeal... (Emphasis Added).

Part I of Florida Statutes 713 is entitled "Mechanic's Lien". Explicitly Section 713.219 relates only to actions brought under Chapter 713 of the Florida Statutes, Mechanic's Lien. The case on appeal never presented that cause of action to the trial court. The law relevant to the interpretation of the Mechanic's Lien statute is inapplicable to the facts of this case and should not be a factor in the Appellate Court's decision making.

The Appellee cites Falovitch v. Gunn, 348 So. 2d 560 (3 D.C.A., 1977) for the proposition that strict compliance with the mechanic's lien law is an indispensable prerequisite to seeking affirmative relief thereunder. In this case, there is no reliance upon any of the provisions of Part I, Florida Statutes 713. The trial court never entertained a complaint to enforce an action under Florida Statutes 713. Clearly,

Section 713.219 of the Florida Statutes has no relevance in the case at issue.

Flaovitch, supra, also provides for prevailing parties similar to that which the Appellant would advance. It states a party who successfully resists a claim to enforce a mechanic's lien is the prevailing party and hence is entitled to a reasonable attorney's fee. Again, we reiterate the Appellee's position that this was not an action to enforce a claim of a mechanic's lien thereby rendering Florida Statute 713.219 inapplicable to the facts of the case. The Appellee cites The Leader Mortgage Company v. Rickard Electric Service, Inc., 348 So. 2d 1202 (4th D.C.A., 1977) which states:

. . .any doubt as to whether a contractor's affidavit is required as a condition pre-requisite to the enforcement of a mechanic's lien is resolved in favor of strict compliance with the lien law. . .

In the present factual situation no recourse to the Mechanic's Lien statute is had anywhere during the trial court proceedings and therefore, it is inappropriate to raise those issues on appeal.

The Appellant cites as his authority, C. U. Associates, Inc., vs. R. B. Grove, Inc., 472 So. 2d 1177 (Fla., 1985). This case is no relevant to the matters now before the Appellate Court in that the facts of C. U. Associates, Inc., supra, entails no action to enforce a Mechanic's Lien.

The Definition provided by both C. U. Associates, Inc., supra, as well as the other cited cases in the Appellant's Initial Brief are irrelevant because they are defining the term "prevailing party" within the context of Florida Statute Section 713.

The above cited authority specifically speaks to the interpretation of Florida Statute 713, which as set forth above is inapplicable to the facts of this case. That any definition provided by the aforecited case or the other cases cited in the Appellant's Initial Brief are irrelevant because they are defining the term prevailing party within the context of Florida Statutes 713 and said definition is not the all encompassing all prevailing definition of said terminology.

The construction of the language "prevailing party" as contained in the Standard Deposit Receipt and Purchase and Sale Agreement is the relevant determination to be made. It is submitted that the Appellant, to be persuasive, should have submitted case authority defining "prevailing party" within the context of the aforementioned sales agreement".

Second, the Court should revisit its decision in C. U. Associates, Inc. v. R. B. Grove, Inc., 472 So. 2d 1177. Rule 1.442 of the Florida Rules of Civil Procedure was an attempt to place formality and certainty into the negotiations and settlement process. From a policy standpoint, if a question arises as the scope and terms of a settlement offer after it is accepted, the accepting party is faced with new litigation. An Offer of Judgment, if accepted, immediately leads to a Final Judgment in the accepting party's favor with all the resulting legal rights connected therewith.

The Offer of Judgment provision also operates as a Statute of Frauds principle in the area of negotiations and settlement of litigated cases. It would solve the ambiguity of offers such as "to dispose of the matter" and "in full settlement of this claim" in multi-claim litigation. It would solve problems that would be presented by oral offers, such as in this case. See Ramos v. Ayala, et al, 16 Fl S 114.

The dissenting opinion by Justice McDonald in C. U. Associates, Inc. v. R. B. Grove, Inc., 472 So. 2d 1177 should be adopted by this court and a litigate who wish to limit his exposure on cost and attorney fees should be required to take timely advantage of the provisions of Rule 1.442.

CONCLUSION

The policy behind the adoption of Rule 1.442 of the Florida Rules of Civil Procedure and the demands of certainty and stability in the negotiation and settlement process requires that litigates who want to avoid or limit the payment of costs and attorney fees take timely advantage of the provisions of Rule 1.442.

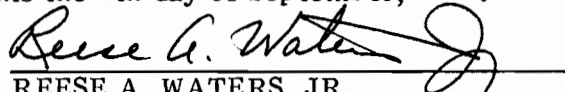
Respectfully submitted,



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to Borden Hallows, Esquire, Attorney for Petitioner, 3947 Boulevard Center Drive, Suite 1, Jacksonville, Florida 32207 by U.S. MAIL on this the 5th day of September, 1987.



REESE A. WATERS, JR.