IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FONTAINEBLEAU FLORIDA TOWER 2, LLC,

Plaintiff,

vs.

THE ESTATE OF ELENA GARCIA,

Defendant.
_____/

Case No.: 2012-16433 CA 04
Judge Bronwyn C. Miller

ORDER ON DEFENDANT'S MOTION FOR ATTORNEY'S FEES

THIS CAUSE having come before the Court Defendant's Motion for Attorney's Fees, the Court having considered the procedural history, all evidence adduced, the argument of counsel, and all relevant legal authority, the Court hereby **ORDERS** and **ADJUDGES** as follows:

***Background**:*

In 2012, Plaintiff, Fontainebleau Florida Tower 2, LLC (hereinafter "Fontainebleau"), filed a complaint against Elena Garcia (hereinafter "Garcia") alleging a breach of the Declaration of Fontainebleau II, a Condominium (hereinafter "the Declaration"), and seeking injunctive relief. Garcia owned a unit located in the Fontainebleau Florida Tower. Plaintiff, the owner of shared components located within the condominium, alleged that Garcia had made illegal, unauthorized modifications to her unit.

Garcia represented herself for the first several years of litigation. She filed numerous counterclaims against Fontainebleau and alleged selective enforcement. Garcia contended that Fontainebleau had made illegal entry into her unit, as evidenced by certain emails and key

records. She further contended that non-compliance with the Declaration was fabricated, as Fontainebleau was conspiring to divest her of her property by generating attorney's fees in order to create a lien, thus, setting the stage for an eventual foreclosure. Garcia was suffering from advanced cancer and receiving treatment in Spain. As a result, she attended all court hearings via Skype or telephone.

On January 20, 2015, Fontainebleau filed its Second Amended Complaint, again seeking the issuance of a permanent injunction. In June, 2015, Garcia passed away. On October 19, 2015, the Court granted a motion to substitute Garcia for the Estate of Elena Garcia (hereinafter "the Estate"). On December 9, 2015, the Estate filed its First Amended Counterclaim and Cross-Claim, against Fontainebleau and the Fontainebleau Condominium Association (hereinafter "the Association"), alleging breach of condominium covenants,[1] invasion of privacy, intentional infliction of emotion[al] distress, and negligent infliction of emotional distress. The allegations were premised, in part, upon videotaped entry of agents of Fontainebleau entering Garcia's residence without permission.

The parties engaged in protracted discovery and contentious litigation. The Estate voluntarily dismissed its cross-claim against the Association. During the litigation, the Estate maintained that Garcia was not a unit owner, thus, Fontainebleau could not maintain its cause of action. It also sought a judicial determination that fee shifting provisions set forth within the Declaration and Florida condominium law were inapplicable to the instant dispute. Fontainebleau vigorously disputed the Estate's position and contended that fee shifting provisions were applicable. The Court ruled in favor of Fontainebleau.

[1] The Estate was unable to proceed on its breach of covenants count following Garcia's death, as it was premised, in part, upon the failure of Fontainebleau and the Association to make records available for Garcia's (or her agent's) inspection. As Garcia was unable to testify, the count could not be sustained. Additionally, certain anti-trust counterclaims have been dismissed.

Throughout the litigation, the Estate sought to stay the proceedings in order to minimize litigation expenses. Fontainebleau opposed this effort. On March 30, 2017, a federal judge entered a Judgment of Forfeiture against the Defendant Property in Case No. 15-CV-20407, forfeiting Garcia's unit to the United States of America. The Estate moved for final summary judgment and set the same for hearing.

On May 12, 2017, immediately prior to the summary judgment hearing, the United States of America entered into an Agreement with Fontainebleau and a third-party wherein, *inter alia*, the United States was relieved of any obligation to perform any modifications to the acquired unit. The same day, Fontainebleau filed its Motion to Dismiss without Prejudice Second Amended Complaint, seeking leave of court to voluntarily dismiss its cause of action. The Estate opposed the motion, seeking a judicial determination on the merits of the claim. The Court permitted Fontainebleau to voluntarily dismiss its claim. Thereafter, the Estate filed the instant timely motion seeking an award of attorney's fees under section 718.303, Florida Statutes, section 542.335(1)(k), Florida Statutes,[2] and section 18.2 of the Declaration.

***Legal Analysis**:*

Section 718.303, Florida Statutes (2017) provides the following:

> **Obligations of owners and occupants; remedies.—**
>
> (1) Each unit owner, each tenant and other invitee, and each association is governed by, and must comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws which shall be deemed expressly incorporated into any lease of a unit. Actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association or by a unit owner against:
>
> (a) The association.

[2] Concluding that this statutory scheme is limited to restraints on trade or commerce, the Court declines to apply it to the instant dispute.

> (b) A unit owner.
>
> . . .
>
> The prevailing party in any such action . . . is entitled to recover reasonable attorney's fees. A unit owner prevailing in an action between the association and the unit owner under this section, in addition to recovering his or her reasonable attorney's fees, may recover additional amounts as determined by the court to be necessary to reimburse the unit owner for his or her share of assessments levied by the association to fund its expenses of the litigation. This relief does not exclude other remedies provided by law. Actions arising under this subsection may not be deemed to be actions for specific performance.

Id.

The Declaration contains the following provision:

> In any proceeding arising because of an alleged failure of a Unit Owner, a tenant or the Association to comply with the requirements of the Act, this Declaration. . . the prevailing party shall be entitled to recover the costs of the proceeding and such reasonable attorneys' fees (including appellate attorneys' fees).

Declaration at § 18.2. In the instant case, all proceedings relating to the "alleged failure of a Unit Owner . . . to comply with . . . [the] Declaration" have concluded.

When a plaintiff voluntarily dismisses a case, the defendant is generally recognized as the prevailing party. *Stuart Plaza, Ltd. v. Atlantic Coast Development Corp. of Martin County*, 493 So. 2d 1136, 1137 (Fla. 4th DCA 1986), *citing Gordon v. Warren Heating & Air Conditioning, Inc.*, 340 So. 2d 1234 (Fla. 4th DCA 1976); *Dolphin Towers Condominium Ass'n v. Del Bene*, 388 So. 2d 1268 (Fla. 2d DCA 1980). As discussed by the Third District Court of Appeal in *McKelvey v. Kismet, Inc.*, 430 So. 2d 919 (Fla. 3d DCA 1983), this remains true despite the pending counterclaim:

> Florida Rule of Civil Procedure 1.420(a)(2) acknowledges that it is possible to voluntarily dismiss the main claim of an action and leave for independent adjudication a pending counterclaim. However, costs in a dismissed action are to be assessed and a judgment entered for the costs in that action. Florida Rule of Civil Procedure 1.420(d) provides, inter alia:
> (d) Costs. Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action.

Id. at 922, *citing Gordon v. Warren Heating & Air Conditioning, Inc.*, 340 So. 2d 1234 (Fla. 4th DCA 1976) (trial judge cannot defer assessment of costs in the original action pending the outcome of a subsequent lawsuit on the same cause of action). "If by contract or statute attorney's fees are made a part of the costs between the parties, these fees must also be assessed and a judgment entered in that action." *Id*. at 922-23, *citing Paley v. Cocoa Masonry, Inc.*, 354 So. 2d 945 (Fla. 2d DCA), *cert. denied*, 359 So. 2d 1212 (Fla.1978); *Bankers Multiple Line Insurance Co. v. Blanton*, 352 So. 2d 81 (Fla. 4th DCA 1977).

There is, however, a recognized exception to the voluntary dismissal rule. When a plaintiff achieves all of the legitimate goals of its suit, it may be the prevailing party, despite the filing of a voluntary dismissal. *See Blue Infiniti, LLC v. Wilson*, 170 So. 3d 136, 139 (Fla. 4th DCA 2015). Fontainebleau argues this exception is applicable to the instant case. The Court disagrees.

Through this case, Fontainbleau sought to compel Garcia and then her Estate to remove unauthorized, illegal modifications to her unit. A cursory review of the litigation history, as evidenced by the docket, demonstrates that Fontainbleau engaged in "take no prisoners" litigation, from the inception. This buttressed Garcia's contention that the goal of the litigation was to generate attorney's fees that would eventually result in an overwhelming lien designed to culminate in foreclosure.

Garcia and then later, her Estate, factually disputed every contention relating to the alleged illegal authorized modifications. The record is replete with evidence of Garcia's compliance, including her production of independent testing documents, correspondence from municipal entities, and expert inspection reports. Additionally, Garcia and her Estate raised

compelling allegations of selective enforcement, and produced correspondence indicating waiver and preauthorization.

Fontainbleau opposed any effort to curtail litigation costs. Even after title to the unit passed to the United States, Fontainebleau remained steadfast in its refusal to dismiss the Estate. Finally, the Agreement presented in furtherance of Fontainbleau's position is not compelling. It releases the United States from liability relating to the purportedly unauthorized modifications, buttressing the Estate's position regarding selective enforcement, and assigns responsibility for future modifications to the unit to a future purchaser. Having carefully considered the scope and chronology of the instant litigation, the Court concludes that the Estate is the prevailing party.

***Conclusion**:*

In the instant case, Fontainebleau voluntarily dismissed the action and dissolved the lis pendens on the eve of the summary judgment hearing, thereby terminating its cause of action. As the remaining counts in the counterclaim do not relate to violations of the Declaration or section 718.303, Florida Statutes, the Court concludes that the Estate is the "prevailing party" in the litigation of Plaintiff's claim of violation of the Declaration and section 718.303, Florida Statutes for the purpose of the injunction count. *See Dolphin Towers Condominium Association, Inc. v. Del Bene*, 388 So. 2d 1268 (1980) (Finding that when a unit owner voluntarily dismissed an action against the condominium association, under section 713.303, Florida Statutes the association is the prevailing party and entitled to fees).

Accordingly, Defendant's Motion for Attorney's Fees is hereby **GRANTED**, and Defendant shall recover costs and fees, as the prevailing party.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 08/24/17.

BRONWYN C. MILLER
CIRCUIT COURT JUDGE

No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.