

72992-6

FILED
Apr 07, 2015
Court of Appeals
Division I
State of Washington

72992-6

No. 72992-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LEDCOR INDUSTRIES (USA) INC.,

Respondent/Cross-Appellant,

vs.

STARLINE WINDOWS, INC.,

Appellant/Cross-Respondent.

On Appeal from the Superior Court of King County
The Honorable Roger Rogoff, Judge
No. 08-2-29583-4

BRIEF OF APPELLANT/CROSS-RESPONDENT
STARLINE WINDOWS, INC.

Martin J. Pujolar, WSBA #36049
Kenneth J. Cusack, WSBA #17650
**Attorneys for Appellant/Cross-
Respondent**

FORSBERG & UMLAUF, P.S.
901 5th Avenue, Suite 1400
Seattle, WA 98164-2047
Telephone: 206-689-8500
Facsimile: 206-689-8501

TABLE OF CONTENTS

TABLE OF CONTENTS i

A. INTRODUCTION1

B. ASSIGNMENTS OF ERROR.....2

 1. Assignment of Error2

 2. Issues Relating to Assignments of Error2

C. STATEMENT OF THE CASE3

D. ARGUMENT.....6

 1. Standard of Review.....6

 2. An Award of Attorney Fees to the Prevailing Party
 is Mandatory7

 3. The Trial Court Erroneously Determined That
 Ledcor Was a Prevailing Party7

E. CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

<i>Bordak Brothers, Inc. v. Pacific Coast Stucco, LLC et al.</i> , 169 Wn. App. 1008 (2012) (unpublished).....	4
<i>CHD, Inc. v. Boyles</i> , 138 Wn. App. 131, 157 P.3d 415 (2007).....	6
<i>Crest, Inc. v. Costco Wholesale Corp.</i> , 128 Wn. App. 760, 115 P.3d 349 (2005)	6, 9
<i>Eagle Point Condo. Owners Ass'n v. Coy</i> , 102 Wn. App. 697, 9 P.3d 898 (2000)	7
<i>Gander v. Yeager</i> , 167 Wn. App. 638, 282 P.3d 1100 (2012).....	6
<i>Hawkins v. Diel</i> , 166 Wn. App. 1, 269 P.3d 1049 (2011)	7, 9
<i>Marassi v. Lau</i> , 71 Wn. App. 912, 859 P.2d 605 (1993).....	8
<i>Singleton v. Frost</i> , 108 Wn.2d 723, 742 P.2d 1224 (1987).....	7
<i>Transpac Development, Inc. v. Oh</i> , 132 Wn. App. 212, 130 P.3d 892 (2006)	8, 9
<i>Unifund CCR Partners v. Sund</i> , 163 Wn. App. 473, 260 P.3d 915 (2011)	6
<i>Wachovia SBA Lending v. Kraft</i> , 138 Wn. App. 854, 158 P.3d 1271 (2007)	9

Rules

CR 54(f)(2)	6
RAP 18.1.....	11
RAP 5.2(a)	6
RAP 5.2(f).....	6

A. INTRODUCTION

This appeal raises the single issue of whether Starline Windows, Inc. ("Starline") was the substantially prevailing party when it prevailed on each summary judgment motion it brought, including its motion to limit Ledcor's claim for defense costs to \$19,101.20. Starline's summary judgment motions resulted in the dismissal of all of Ledcor Industries (USA) Inc.'s ("Ledcor's") claims against Starline for breach of contract and for indemnity, under the various legal theories Ledcor asserted. Starline's motions also resulted in the trial court deciding that Ledcor's claim for defense costs was limited to \$19,101.20, as Starline argued, rather than the approximately \$190,000 Ledcor claimed.

The trial court erred when it decided that both parties were prevailing parties, and therefore neither party was entitled to an award of attorney fees allowed by the parties' contract. The trial court acknowledged that Starline had earlier prevailed on all of its summary judgment motions to dismiss Ledcor's claims for breach of contract and indemnity. The trial court also acknowledged that Starline prevailed in its motion that Ledcor's claim for defense costs was properly limited to ten percent of the amount Ledcor claimed. Nevertheless, the trial court determined that because judgment was entered in Ledcor's favor, albeit in

the amount argued by Starline, Ledcor was also a prevailing party. Implicit in the trial court's decision was an erroneous determination that Starline did not substantially prevail.

This appeal is a companion case to Ledcor's appeal in *Ledcor v. Starline*, No. 72317-1-I. Interestingly enough, in that appeal Ledcor assigned error to the trial court's award of \$19,101.20 in defense costs to Ledcor. Even Ledcor does not believe that it prevailed on the only issue the trial court decided it did.

Starline asks this Court to reverse the trial court's ruling that Starline did not substantially prevail, and remand to the trial court to determine Starline's reasonable attorney fees and costs.

B. ASSIGNMENTS OF ERROR

1. Assignment of Error

The trial court erred in denying Starline's motion for an award of prevailing party attorney fees as the substantially prevailing party in the trial court.

2. Issues Relating to Assignments of Error

Is a party who prevails on summary judgment, resulting in dismissal of all claims against it for breach of contract and indemnity, and who prevails on motions to limit the opposing party's claim for defense fees to ten percent of the opposing party's claim, the substantially

prevailing party for purposes of awarding attorney fees pursuant to the parties' contract?

C. STATEMENT OF THE CASE

Ledcor, the general contractor on the Admiral Way Condominium project ("Project"), sued Starline along with several other suppliers and subcontractors, for damages asserted against Ledcor by the Condominium Owners Association ("Association") and the developer, Admiral Way, LLC ("LLC"). CP 1-35, in Case No. 72317-1-I (Ledcor's appeal to which this is a companion appeal). Ledcor asserted claims against Starline for breach of contract and indemnity, pleading various legal theories. CP 1-35, in No. 72317-1-I. Starline supplied window products to Ledcor for the Project. CP 91-92, in No. 72317-1-I. Before Ledcor added Starline as a defendant in its lawsuit against its subcontractors, Starline had already settled all of the claims against its window products directly with the Association. CP 67-70, CP179-182, No. 72317-1-I.

Starline moved for summary judgment to dismiss all of Ledcor's claims for breach of contract and indemnity that were based upon claims being made against Ledcor. CP 66-85, No. 72317-1-I. The trial court granted Starline's motion. CP 2180-2182, No. 72317-1-I. Ledcor appealed the dismissal of its indemnity claims asserted against Starline

and the other subcontractor defendants. This Court affirmed the trial court's dismissal. *Bordak Brothers, Inc. v. Pacific Coast Stucco, LLC et al.*, 169 Wn. App. 1008 (2012) (unpublished).

After this Court affirmed the trial court, litigation resumed on Leducor's remaining claims. Starline moved for summary judgment on Leducor's two remaining claims against it: (1) that Starline breached its contract with Leducor by failing to name Leducor as an Additional Insured under Starline's policies; and (2) Starline owed Leducor approximately \$190,000 in defense costs under the parties' contract. CP 554-565, CP 745-751, No. 72317-1-I.

The trial court granted Starline's summary judgment motion dismissing Leducor's claim that Starline breached its contract by failing to name Leducor as an Additional Insured. CP 2183-2185, No. 72317-1-I. Additionally, the trial court agreed with Starline that the defense costs owed to Leducor, by properly applying the proportionate share method Leducor opted to use, was \$19,101.20 rather than the \$190,000 claimed by Leducor. CP 2187-2189, No. 72317-1-I.

The trial court entered partial judgment against Starline on June 4, 2014 for \$19,101.20, with a direction that Leducor's claim for prejudgment

interest, and the determination of prevailing party attorney fees would be decided by subsequent motion. CP 1-4, in No. 72992-6-I (this appeal).

Starline and Ledcor filed competing motions for prevailing party attorney fees and Ledcor included in its motion a motion for prejudgment interest. CP 5-162, No. 72992-6-I. On July 7, 2014 the trial court decided the competing motions for prevailing party attorney fees without oral argument, but did not decide Ledcor's motion for prejudgment interest. CP 163-165, No. 72992-6-I. The trial court's order was filed with the clerk of court but not distributed to the parties. CP 163-165, No. 72992-6-I.

The trial court decided that Starline was a prevailing party because of its successful summary judgment motions, and that Ledcor was also a prevailing party because judgment was entered in its favor, despite the fact that the judgment amount was 10% of Ledcor's claim and was the amount Starline had argued was the proper amount. CP 163-165, No. 72992-6-I.

Ledcor then filed a notice of appeal in No. 72317-1-I on August 5, 2014. CP 2176-2190. In its appeal Ledcor assigned error to (1) the trial court's summary dismissal of its claims for breach of contract, breach of warranty, breach of indemnity, contribution, and subrogation, (Ledcor failed to address some of these issues in its brief); and (2) the trial court summarily ruling on damages and entering a partial judgment against

Starline for Ledcor's defense cost claim. CP 2177, Brief of Appellant in No. 72317-1-I, at pp. 3-4.

Starline filed a cross-appeal regarding the trial court's denial of Starline's motion for prevailing party attorney fees. CP 166-168. Starline's cross-appeal was timely. RAP 5.2(a), (f), and CR 54(f)(2). By notice dated February 2, 2015, this Court assigned case number 72992-6-I to Starline's cross-appeal (this appeal).

D. ARGUMENT

1. Standard of Review

Appellate courts review a trial court's initial determination on whether a contract, statute, or equitable ground requires an award of attorney fees as a question of law to be reviewed de novo. *Gander v. Yeager*, 167 Wn. App. 638, 646, 282 P.3d 1100 (2012), citing *Unifund CCR Partners v. Sund*, 163 Wn. App. 473, 484, 260 P.3d 915 (2011).

Appellate courts review the reasonableness of an attorney fee award, for an abuse of discretion. *Gander v. Yeager, supra., CHD, Inc. v. Boyles*, 138 Wn. App. 131, 140, 157 P.3d 415 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable. *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 772, 115 P.3d 349 (2005).

The determination of who is a "prevailing party" is a mixed question of law and fact that appellate courts review under an error of law

standard. *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 713, 9 P.3d 898 (2000).

2. **An Award of Attorney Fees to the Prevailing Party is Mandatory**

When a contract provides for prevailing party attorney fees, an award to the prevailing party is mandatory. *Singleton v. Frost*, 108 Wn.2d 723, 729, 742 P.2d 1224 (1987), *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P.3d 1049 (2011). Ledcor agrees. CP 63. The trial court correctly recognized that an award is mandatory. CP 164.

3. **The Trial Court Erroneously Determined That Ledcor Was a Prevailing Party**

The trial court found that both Starline and Ledcor substantially prevailed. Starline is a prevailing party because the trial court granted all of its summary judgment motions dismissing Ledcor's claims for breach of contract, breach of warranty, indemnity, subrogation, and product liability arising from Ledcor's construction of the Admiral Way Project. Ledcor argued at various times that the value of these claims against Starline was in excess of \$700,000, CP 554-565, No. 72317-1-I, or in excess of \$3 million *Brief of Appellant* in No. 72317-1-I, at p. 22.

The trial court found that Ledcor was also a prevailing party based upon the judgment entered in Ledcor's favor in the amount of \$19,101.20 for its defense cost claim against Starline. The trial court determined that

Ledcor prevailed on this issue despite acknowledging that the amount of the judgment was approximately ten percent of Ledcor's claim, and was the amount Starline had argued was the proper amount. Thus Starline prevailed even on this issue, i.e. the amount owed to Ledcor for its defense costs. Given these undisputed facts, the trial court committed an error of law when it determined that Ledcor was also a prevailing party.

This Court has held that although a finding that attorney fees may be denied because either both parties prevailed or neither party prevailed is "appropriate in some cases," it is inadequate where "multiple distinct and severable contract claims are at issue." *Transpac Development, Inc. v. Oh*, 132 Wn. App. 212, 218, 130 P.3d 892 (2006), citing *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605 (1993). Even if Ledcor was properly determined to be a prevailing party on the defense cost issue, a "proportionality approach" is the preferred procedure. *Transpac, supra* citing *Marassi, supra*. Under that approach, each party would be awarded the attorney fees associated with the issues it prevailed upon, and the fees award would then be offset. *Marassi, supra*.

However, the *Marassi* analysis is not appropriate under these facts because Ledcor was not a prevailing party. Although a prevailing party is usually the party who receives a judgment in its favor, if neither party

wholly prevails, the party who substantially prevails is the prevailing party. That determination turns on the extent of the relief awarded the parties. *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 772, 115 P.3d 349 (2005), *Transpac, supra*, at 217.

A defendant generally prevails by successfully defending a contract action. *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 859, 158 P.3d 1271 (2007), *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P.3d 1049 (2011). A party need not prevail on the entire claim in order to be the prevailing party. If neither party wholly prevails, the party who substantially prevails is the prevailing party. *Crest, supra, Hawkins, supra*.

Here, Starline successfully defended against Ledcor's multiple claims for breach of contract, breach of warranty, indemnity, and tort. The trial court dismissed all of the claims Ledcor sought to pass through from the Association and from the LLC to Starline. This Court affirmed the trial court's dismissal of Ledcor's indemnity claims. After remand, the trial court dismissed Ledcor's claim that Starline breached its contract by failing to add Ledcor as an Additional Insured on Starline's policies.

Finally, the trial court compelled Ledcor to respond to discovery seeking the amount and basis for its defense cost claim. CP 554-565, No.

72317-1-I. When Ledcor finally quantified its claim, Starline challenged it and prevailed on the proper application of the proportionate share method Ledcor elected to use. Starline successfully limited the amount of Ledcor's claim to slightly more than \$19,000, in sharp contrast to the \$190,000 Ledcor claimed. The trial court erroneously determined that Ledcor prevailed on this issue. The trial court's error is underscored by Ledcor's appeal of this issue in the companion case to this appeal, No. 72317-1-I. Ledcor is now taking contradictory positions on this issue. It is appealing the defense cost issue while arguing at the same time that it prevailed on that very issue.

E. CONCLUSION

Starline prevailed on all issues in the trial court. All of Ledcor's claims were dismissed, save its claim for defense costs. Even as to that claim, the amount of the defense cost awarded was the amount Starline argued was the proper amount under the proportionate share method selected by Ledcor. That amount was ten percent of the amount Ledcor claimed, and Ledcor is now appealing that decision. For all of these reasons, Starline was the prevailing party and the trial court made an error of law when it decided that Ledcor was also a prevailing party. The trial

court's decision should be reversed and remanded to the trial court for a determination of Starline's reasonable attorney fees.

Starline should be awarded its fees and costs on appeal, pursuant to RAP 18.1 and its contract with Ledcor.

DATED this 7th day of April, 2015, at Seattle, Washington.

FORSBERG & UMLAUF, P.S.

By: 

Martin J. Pujolar, WSBA #36049
Kenneth J. Cusack, WSBA #17650
Attorneys for Appellant/Cross-
Respondent Starline Windows, Inc.

CERTIFICATE OF SERVICE

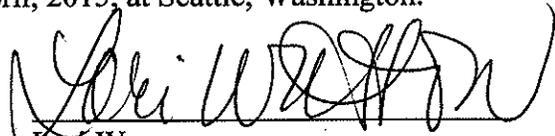
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing BRIEF OF APPELLANT/ CROSS-RESPONDENT STARLINE WINDOWS, INC. on the following individuals in the manner indicated:

Richard L. Martens
Matt Kennedy
Jane Matthews
Martens + Associates, P.S.
705 Fifth Avenue South, Suite 150
Seattle, WA 98104

Via Email (*with Recipient's Approval*)

SIGNED this 7th day of April, 2015, at Seattle, Washington.


LORI WUSSOW