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FILED
May 27, 2015
Court of Appeals
Division I
State of Washington

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

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

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

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

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I. INTRODUCTION

Ledcor understandably does not contest the trial court's decision that Starline is a substantially prevailing party. After all, Ledcor cannot dispute that Starline prevailed on every dispositive motion it brought, resulting in the summary dismissal of all of Ledcor's damages claims, and a limitation of Ledcor's defense cost claim to ten percent of its request. Ledcor argues, however, that it also qualifies as a substantially prevailing party based solely on the fact a judgment was entered in its favor for defense costs, albeit in the amount Starline argued was proper. Contrary to Ledcor's argument and the trial court's decision, a judgment in Ledcor's favor does not necessarily mean it is a substantially prevailing party under Washington law.

Even if Ledcor can be deemed a substantially prevailing party, the trial court further erred when it decided that each party should bear its own costs and attorney fees. Instead, the trial court should have applied the proportionality approach to the award of attorney fees.

II. ARGUMENT

A. Ledcor Did Not Prevail on the Defense Cost Issue.

Ledcor argues that it prevailed on the defense cost issue because it received a judgment for that claim.¹ Although a party who receives a judgment in its favor is generally the prevailing party, it is not necessarily so. In *Crest v. Costco Wholesale Corp.*, 128 Wn. App. 760, 772, 115 P.3d 349 (2005), this Court held that the plaintiff was not the prevailing party merely because it received a judgment for prevailing on some smaller issues in the case. Instead, the defendant was the substantially prevailing party because it successfully defended the major claim in the case.

Here, although Ledcor received a judgment for a portion of its defense costs, it was only for ten percent of its claim because Starline prevailed on the central issue governing Ledcor's claim, i.e. the proper application of the proportionate share method, which Ledcor opted to use. The subject of Starline's successful summary judgment motion was not whether or not Starline owed Ledcor a defense. Instead, Starline's motion

¹ Ledcor argues that its appeal of the trial court's decision granting Starline's motion concerning defense costs is not an admission that it did not prevail on this issue. Ledcor argues that its appeal concerns only the amount of defense costs awarded, and that it still prevailed on Starline's duty to defend. Ledcor mischaracterizes its own appeal. In its companion appeal Ledcor assigns error to the trial court's summary determination of its defense cost claim because it denied Ledcor's constitutional right to a jury trial on that issue. Further, as pointed out later in this Reply, Starline's summary judgment motion did not concern whether or not it owed a defense duty, it only addressed the issue of Ledcor's allowable recovery. Ledcor did not prevail on this issue.

successfully argued that the proportionate share method resulted in recoverable defense costs of \$19,000 rather than the \$190,000 Ledcor claimed.

Ledcor's argument that Starline denied any duty to defend through four years of litigation, and only conceded the duty shortly before the scheduled trial mischaracterizes the facts. In 2010 Starline opposed Ledcor's motion for partial summary judgment that Starline had breached a defense duty. Starline opposed Ledcor's motion on the basis that Ledcor had failed to make the requisite showing under *George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc.*, 67 Wn. App. 468, 836 P.2d 851 (1992), that its defense duty had been triggered. CP 2214-2216. Starline simply argued that Ledcor was not entitled to summary judgment in 2010 because Ledcor's motion raised factual issues.

Also in 2010, Ledcor failed to provide responsive answers to Starline's discovery requests concerning Ledcor's claimed defense costs. CP 2211. The case in the trial court was then stayed pending Ledcor's interlocutory appeal. Following Ledcor's unsuccessful appeal, litigation in the trial court resumed. Ledcor again refused to respond to Starline's discovery requests concerning Ledcor's claimed defense costs, until the trial court ordered Ledcor to provide responsive answers. CP 2236-37. After Ledcor provided responsive answers, Starline moved for summary

judgment that Leducor's defense cost claim was approximately \$19,000. Starline prevailed on its motion.

Contrary to Leducor's suggestion, this litigation did not drag on because Starline denied it had a duty to defend.² Instead, this case took several years to resolve because Leducor aggressively litigated its claims, including an interlocutory appeal against several of its subcontractors, and because it refused to provide responsive discovery responses until the trial court compelled it to do so.³

B. Leducor's Defense Cost Claim Was Not a Major Issue.

In order for Leducor to qualify as a substantial prevailing party, it must prevail on a major issue in the litigation. *Transpac Development, Inc. v. Oh*, 132 Wn. App. 212, 217, 130 P.3d 892 (2006). Even if Leducor were deemed to have prevailed on the defense cost issue because it received a judgment on that issue, it was not a major issue in the case.

² Leducor notes in footnote 5 of its opposition Brief of Respondent/Cross-Appellant, at p. 7, that Starline's insurer, Zurich, participated in Leducor's defense. Given that admission, it is unclear what Leducor is actually seeking in these consolidated cross-appeals, unless this litigation is being driven by the desire of Leducor's insurer to recover additional defense costs from Starline's insurer.

³ Leducor's characterization of Starline's defense as "vexatious, time consuming and expensive" litigation is curious given the record in this appeal and the companion appeal. Leducor unsuccessfully pursued claims against Starline for damages allegedly suffered because of Starline's window products. Leducor pursued these claims despite knowing that Starline had settled with the underlying plaintiff in exchange for a release that included Leducor. Starline prevailed with its summary judgment motions dismissing all of Leducor's pass through claims, and limiting Leducor's defense cost claim to ten per cent of the amount alleged by Leducor. If any vexatious litigation has been pursued, it has been by Leducor.

Ledcor merely asserts, without citation to the record or to legal authority, that the defense issue was a major issue. Instead of citing to legal authority, Ledcor merely argues that Starline's contract with Ledcor is analogous to an insurance contract, in that the duty to defend is a main benefit of the contract.

Certainly, the duty to defend is a main benefit of an insurance contract. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992). In contrast to an insurance contract however, the main purpose of the contract between Starline and Ledcor was to supply window products to the Admiral Way Condominium Project, rather than to defend Ledcor against construction claims. Ledcor cites no authority for the proposition that the defense duty included in a supply contract is a main purpose of the contract.

The major issues in the litigation between Ledcor and Starline were Ledcor's claims for breach of contract, breach of warranty, products liability, indemnity, subrogation, and contribution. Ledcor sought reimbursement for liabilities it claimed it incurred to the Association because of Starline's window products. Ledcor valued those claims between \$700,000 and \$3,000,000 at various times during this litigation. Ledcor's recoverable defense costs of \$19,000 pales in comparison to the

amounts it claimed as damages. Further, the majority of litigation time dealt with resolving those claims rather than Ledcor's defense claim.

C. **Even If Ledcor Is Deemed to Be a Substantially Prevailing Party, the Trial Court Erred When It Ordered Each Party to Bear Its Own Costs and Attorney Fees.**

The trial court relied upon *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 915 P.2d 1146 (1996), to support its decision that each party should bear its own costs and attorney fees because each party prevailed on a major issue. Ledcor cites the same case in its Opposition brief (at p. 6). However, that approach is not favored in Division I.

In *Transpac, supra*, at 218, this Court reiterated the approach approved in *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605 (1993). There, a proportionality approach was favored over the approach taken by the trial court here (where each party bears its own costs and fees because each is a prevailing party). This Court held that the same approach adopted by the trial court here is "inadequate 'where multiple distinct and severable contract claims are at issue. In such a situation, the question of which party has substantially prevailed becomes extremely subjective and difficult to assess.'" Instead, a trial court should take a "proportionality approach" when requested to award prevailing party attorney fees. 'A proportionality approach awards the plaintiff attorney fees for claims it prevails upon, and likewise awards the defendant for the claims it has

prevailed upon. The fee awards then offset.” *Transpac, supra*, quoting *Marassi, supra* at 917. This Court went on to observe that the proportionality approach is “consistent with the general trend in Washington law toward establishing more specific standards for awarding attorney fees...” *Transpac, supra* at 219.

Based on well-settled Washington law, even if Ledcor is deemed to be a prevailing party on a major issue, the trial court erred by ruling that each party bore its own costs and attorney fees. Instead, the trial court should have used the proportionality approach.

III. CONCLUSION

The trial court erred when it found that each party prevailed on a major issue, and therefore each party should bear its own costs and attorney fees. Starline prevailed on every major issue of the case, obtaining summary judgment dismissal of all of Ledcor’s breach of contract, indemnity, and tort claims against Starline. The defense cost claim was not a major issue in the litigation. Nevertheless, Starline still prevailed on that issue because it prevailed on the fundamental question litigated for that issue, *i.e.* the proper application of the proportionate share methodology, resulting in a judgment in an amount one-tenth of Ledcor’s claim. Finally, even if the defense cost issue was a major issue, and even

if Leducor can be deemed the prevailing party on that issue, the trial court erred when it failed to apply the proportionality approach.

DATED this 26th day of May, 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
REPLY 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

(X) Via Email (*with Recipient's Approval*)

SIGNED this 27th day of May, 2015, at Seattle, Washington.


Lori E. Wussow