



KeyCite Yellow Flag - Negative Treatment

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2007 WL 2323492

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

S & A REALTY CORP., Plaintiff-Respondent,
v.
KEARNY INDUSTRIAL ASSOCIATES,
LLP, Defendant-Appellant.

Argued Aug. 7, 2007.

|

Decided Aug. 16, 2007.

On appeal from the Superior Court of New Jersey, Law
Division, Hudson County, Docket No. 486-05.

Attorneys and Law Firms

[Norman A. Doyle, Jr.](#) argued the cause for appellant (Law
Office of Norman A. Doyle, attorney; Mr. Doyle, on the
brief).

Jeffrey M. Pollock argued the cause for respondent ([Fox
Rothschild](#), attorneys; (Mr. [Pollock](#), of counsel and on the
brief; [Mukti N. Patel](#) and [Joel M. Ferdinand](#), on the brief).

Before Judges S.L. Reisner and [LYONS](#).

Opinion

PER CURIAM.

*1 Defendant, Kearny Industrial Associates, LLP (Kearny),
appeals from a final judgment entered August 26, 2005,
awarding plaintiff, S & A Realty Corp. (S & A), \$106,073 in
legal fees and costs arising out of an earlier lawsuit between
the parties and this lawsuit.

The relevant facts and procedural history are as follows. On
May 7, 2002, S & A filed a complaint against Kearny alleging
that Kearny breached a real estate purchase agreement
between the parties dated February 7, 2001. S & A alleged

that pursuant to the agreement, Kearny was contractually
obligated to vacate the property on October 31, 2001, and if
it failed to do so, it became a tenant at sufferance and was
committed to make payment at the rate of \$25,000 per month
to S & A for the use and occupancy of the site. In addition,
S & A alleged that Kearny owed money to S & A for real
estate and sewer charges on the property during that holdover
period. S & A also alleged that pursuant to the agreement,
Kearny had represented that there were no significant events
which would have a material adverse effect on the premises,
but that Kearny had failed to disclose significant information
regarding friable asbestos contamination on the property.

S & A's allegations were embodied in two counts. The first
count was for breach of contract for failure to pay the monthly
use and occupancy charges as well as taxes and sewer charges,
and the second count was for concealment of a real property
defect. A trial in the matter was held in July 2003, and at the
end of S & A's proofs, the trial judge granted Kearny's motion
to dismiss count two, the concealment of a real property
defect, based on insufficient legal proofs advanced by S & A.

On September 22, 2003, the trial judge ruled in favor of S &
A on count one and entered judgment in S & A's favor for
\$86,588. In this first action, there was no mention of counsel
fees in S & A's complaint, nor was any application for same
sought. On December 23, 2004, our court affirmed the trial
judge's judgment in favor of S & A. S & A did not appeal the
dismissal of count two of the complaint.

On January 24, 2005, S & A filed a new complaint against
Kearny. In this complaint, S & A alleged that under Section
20(l) of the real estate purchase agreement between the parties
dated February 7, 2001, it was the prevailing party in the
earlier action between S & A and Kearny and, therefore, was
entitled to its costs of litigation, including its court fees and
reasonable attorney's fees. Section 20(l) reads as follows:

[t]he prevailing party in any litigation
or arbitration arising under this
Agreement shall be entitled to receive
from the losing party the prevailing
party's cost of litigation or arbitration
incurred to enforce this Agreement
(including, without limitation, its court
fees and reasonable attorneys' fees).

Kearny filed an answer and counterclaim in response. It raised as a separate defense, the entire controversy doctrine as well as estoppel and other defenses. In count one of its counterclaim, Kearny sought its fees and costs for having prevailed with respect to the dismissal of count two contained in the earlier lawsuit. In count two of its counterclaim, Kearny asserted that it was entitled to counsel fees under the frivolous claim statute, *N.J.S.A. 2A:15-59.1*, and under *Rule 1:4-8*.

***2** Kearny moved for summary judgment against S & A and counsel fees. Its motion sought summary judgment dismissing counts one, two, and three of plaintiff's complaint and granting summary judgment to it on count two of its counterclaim, awarding counsel fees under the frivolous claim statute and rule.

S & A cross-moved for summary judgment seeking an order granting it summary judgment for its attorney's fees and costs for trial, its collection efforts, the appeal in the earlier matter and this case, and denying Kearny's motion entirely. Following oral argument, the trial judge granted S & A's motion for summary judgment and denied Kearny's motion for summary judgment. The trial judge then reviewed S & A's fee submission, and on August 26, 2005 entered final judgment.

In the first paragraph of the final judgment, the trial judge awarded fees to S & A incurred during the preparation and trial of the first lawsuit. In paragraph two, she awarded fees incurred during the "enforcement of Judgment No. J-288672-03," the docketed judgment in the earlier suit. In paragraph three, she awarded attorney's fees incurred in connection with the direct appeal of the final judgment of the earlier suit. In paragraph four, the trial judge awarded fees incurred in obtaining summary judgment in this case, and in paragraph five, she awarded costs incurred in the preparation and trial of the underlying case, the enforcement of the judgment, the direct appeal of the final judgment, and obtaining summary judgment in this case. The total awarded by the trial court was \$106,073.

In the trial court's oral decision, the judge reviewed the entire controversy doctrine and, relying primarily on *K-Land Corp. No. 28 v. Landis Sewerage Authority*, 173 N.J. 59 (2002), concluded that the claim for legal fees had not accrued at the time the earlier action was heard and, therefore, found no merit in the entire controversy defense raised by Kearny. The trial court also did not find S & A's suit to be frivolous under the statute or rule. This appeal ensued.

Kearny argues on appeal that the trial court erred in granting summary judgment to S & A because the claim should be barred by the entire controversy doctrine. Kearny argues that even if the claim for legal fees were deemed unaccrued, it should have been joined pursuant to *Rule 4:27-2*, and that pursuant to *Rule 4:42-9(d)*, an allowance for fees should not be by way of a separate order. Kearny argues *Rule 4:42-9(d)* implies that with respect to fees, such a claim should be brought in the underlying case. Kearny also argues that S & A's separate successive lawsuit for fees does not fall within any of the exceptions to the entire controversy rule and that pursuant to *Rule 1:10-3*, the trial judge in the earlier action, during the period of appeal, could have entertained a counsel fee application. Kearny further argues that this contractual attorneys' fee claim does not extend to post-judgment collection services, which were included in the trial judge's final judgment in this case. In addition, Kearny argues that it was the prevailing party in the first suit with respect to the second count of S & A's complaint and that it should have been accorded that status and awarded fees pursuant to count one of its counterclaim in this case. Lastly, Kearny argues that *Rule 2:11-4* requires our court to have been the forum for the determination of fees due on appeal and that it was error for the trial judge to make an award in that regard.

***3** We begin our analysis of Kearny's claims by restating applicable legal principles. "The entire controversy doctrine is an equitable preclusionary doctrine." *Bonaventure Int'l. v. Borough of Spring Lake*, 350 N.J.Super. 420, 440 (App.Div.2002). The doctrine "balances the objectives of efficiency and fairness." *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 294 (1995), *overruled on other grounds*, 150 N.J. 424 (1997). The doctrine has been applied to bar claims involving the same commonality of facts in cases involving piece-meal litigation where parties for strategic reasons have withheld claims concerning the underlying action, seeking two bites at the apple. *Bd. of Ed. v. Faridy Thorne Frayta, P.C.*, 321 N.J.Super. 275, 284 (App.Div.1999); *see, e.g., DiTrollo v. Antiles*, 142 N.J. 253, 269 (1995); *Cogdell v. Hosp. Ctr. at Orange*, 116 N.J. 7, 26 (1999). "Although the explicit wording of the rule governing the mandatory joinder of claims [*Rule 4:30A*] has remained unchanged, the Court continues to emphasize that equitable considerations should ease the path upon which the doctrinal bar travels." *Faridy, supra*, 321 N.J.Super. at 284. "As with other discretionary standards, 'a particularized evaluation is required to determine whether the policies sought to be fostered by the doctrine require its application

as a preclusive principle when balanced against a litigant's right to tailor separate causes of action.' " *McNally v. Providence Washington Ins. Co.*, 304 N.J.Super. 83, 93 (App.Div.1997) (quoting *DiTrollo v. Antiles*, 276 N.J.Super. 234, 247 (App.Div.1994), *rev'd on other grounds*, 142 N.J. 253 (1995)).

The Court has emphasized that "the polestar for the application of the [entire controversy] rule is judicial 'fairness.'" *Reno Auto Sales, Inc. v. Prospect Park Sav. and Loan Ass'n*, 293 N.J.Super. 624, 630 (App.Div.1990) (citing *Cogdell*, *supra*, 116 N.J. at 17). See also *K-Land*, *supra*, 173 N.J. at 74. The rule is to be applied with discretion "and clarification of the limits of the doctrine is best left to case-by-case determination" according to the Court. *Circle Chevrolet*, *supra*, 142 N.J. at 290. Given the equitable considerations which come into play when analyzing an issue arising under the entire controversy doctrine, we note that the Court has made it clear that preclusion should be a remedy of last resort. *Olds v. Donnelly*, 150 N.J. 424, 446-47 (1997); *Gelber v. Zito P'ship.*, 147 N.J. 561 (1997).

The doctrine though, "does not apply to bar component claims that are unknown, unarisen, or unaccrued at the time of the original action." *Circle Chevrolet*, *supra*, 142 N.J. at 294. See also *R.* 430A; *DiTrollo*, *supra*, 142 N.J. at 274-75; *Cafferata v. Peyser*, 251 N.J.Super. 256, 260 (App.Div.1991). Generally, a cause of action accrues upon the occurrence of a wrongful act resulting in injury for which the law provides a remedy. *Beauchamp v. Amedio*, 164 N.J. 111, 116 (2000).

*4 When reviewing legal fee claims, we are mindful that under the so-called "American Rule," generally each party is required to pay its own attorney's fees and other litigation costs. *Rendine v. Pantzer*, 141 N.J. 292, 322 (1995). Rule 4:42-9(a) recognizes certain exceptions to that rule. Contractually based claims, though, do not fall within any of the designated exceptions. *Kellam Assocs. v. Angel Projects, LLC*, 357 N.J.Super. 132, 138 (App.Div.2003). The rule, however, "does not preclude a party from agreeing by contract to pay attorneys' fees." *Ibid.* Such contractual provisions will, however, be strictly construed in light of the general policy disfavoring counsel fee awards. See *McGuire v. City of Jersey City*, 125 N.J. 310, 327 (1991). To obtain attorneys' fees, the parties seeking them must have prevailed in the underlying actions. *Kellam Assocs.*, *supra*, 357 N.J.Super. at 139. A party will be considered prevailing, "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *R.M. v. Supreme*

Court of New Jersey, 190 N.J. 1, 9-10 (2007) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L. Ed.2d 40, 50 (1983)). In order to collect attorneys' fees, the party seeking such fees must prove that: (1) the attorney's efforts were "necessary and important" factors in prevailing; and (2) "the relief granted had some basis in law." *Kellam Assocs.*, *supra*, 357 N.J.Super. at 139.

Our court has held that contractual agreements to pay attorney's fees must expressly provide for post-judgment collection services if they are to be enforceable. See *Hatch v. T & L Assocs.*, 319 N.J.Super. 644, 649 (App.Div.1999). The obligation to pay attorney's fees for post-judgment collection efforts has to be clear and specifically provided for. *Ibid.* Unless the agreement is express as to the obligation for post-judgment collection efforts, our court has declined to construe it as imposing that obligation. *Ibid.*

Rule 2:11-4 provides that an application for legal fees rendered on appeal shall be made by a motion to the appellate court, which motion is to be served and filed within ten days after the termination of the appeal. In *Viceroy Equity Interests, LLC v. Mt. Hope Dev. Ass'n.*, we noted the confusion which may result from Rule 4:42-9(a) and Rule 2:11-4 when there is a contractual provision for attorney's fees and an application for such fees based on an appeal is made. 350 N.J.Super. 1, 4 (App.Div.2002). Accordingly, in *Viceroy*, we relaxed the time limits set forth in Rule 2:11-4 to permit a motion to be filed with our court for contractual attorney's fees arising from an appeal. *Ibid.*

In this case, we concur with the trial judge's determination that the claim for contractually agreed upon legal fees was not barred by the entire controversy doctrine. The doctrine clearly does not bar unaccrued claims. *Circle Chevrolet*, *supra*, 142 N.J. at 294. As we have said, a cause of action accrues when there has been a wrongful act resulting in injury for which the law provides a remedy. *Beauchamp*, *supra*, 164 N.J. at 116. In this case, the wrongful act was a breach of Section 20(l) of the real estate purchase agreement which provides for legal fees and costs to be paid to the prevailing party in enforcing the terms of the agreement. The breach of the obligation to pay legal fees to the prevailing party could not have arisen until there was a breach of the agreement. In the action to enforce it, S & A was finally adjudicated to be the prevailing party, and Kearny refused to pay S & A's resultant legal fees. Hence, at the time of the earlier suit, the legal fee claim had not yet accrued. Accordingly, we do not find any merit in

Kearny's defense that the legal fees were barred by the entire controversy doctrine.

*5 We agree with Kearny that pursuant to *Rule* 4:27-2, the claim for legal fees could have been brought in the initial action and heard upon conclusion of the trial. We further concur that this would have been the better course because that practice assures that the same judge who heard the trial and witnessed a claimant's legal efforts would pass on the reasonableness of the fees for those efforts. Further, if an appeal were had after such an award, an appellate court would look not only at the merits of the case, but also the import of a contractual fee shifting provision and the reasonableness of any fee award. Such action would better promote efficiency and judicial economy. However, this does not obviate the fact that the claim did not accrue until the underlying litigation was concluded, and in this case the same trial judge happened to hear the second case. We see little prejudice to Kearny by the procedure followed here, although we stress that raising the claim for fees early and in one action would be the more efficient and preferable route.

We disagree with Kearny that the provisions of *Rule* 4:42-9(d) mandate an unaccrued claim be included in the underlying action and that *Rule* 1:10-3 would have specifically allowed legal fees on the underlying claim to be heard by the trial judge in the initial suit during pendency of the appeal. *Rule* 1:10-3 is directed at enforcing litigants' rights and permits a fee award for such applications. Absent a claim in a complaint for contractual legal fees which has been adjudicated, or a court rule or order, a litigant has no right to enforce a contractual legal fee obligation by motion under *Rule* 1:10-3 merely because it was contractually agreed upon.

We do, however, find merit in Kearny's argument that an award of legal fees of \$25,489 in paragraph two of the final judgment incurred during the enforcement of the judgment may be improper. In *Hatch*, we made it clear that unless the contractual agreement is express as to the post-judgment collection obligation, we will not construe it as imposing an obligation to pay legal fees for collection efforts following an award of a judgment. 319 *N.J.Super.* at 649. We, therefore, reverse paragraph two of the final judgment order and remand the matter to the trial court so a hearing can be had as to whether the parties, pursuant to *Hatch*, clearly and specifically provided for post-judgment attorney's fees in paragraph 20(l) of the real estate purchase agreement.

We also agree with Kearny that the \$41,178 awarded for attorney's fees on the direct appeal was not appropriately heard at the trial court level. See *Viceroy, supra*, 350 *N.J.Super.* at 4-5. In *Viceroy*, we noted that a plaintiff seeking legal fees on an appeal based on a contractual agreement "should have been guided by the general rubric that fee applications are made to the court in which the services claimed for were rendered." *Ibid.* Consistent with our holding in *Viceroy*, the time limit set forth in *Rule* 2:11-4 shall be relaxed and S & A is allowed to apply by motion to the Appellate Division for fees on the appeal within ten days of the determination of this appeal.

*6 With respect to paragraph five of the final order, the judge awarded \$5,276.94 for costs, including the trial of the underlying case, the appeal, the enforcement of the judgment and the summary judgment. We reverse and remand that award consistent with our findings set forth above. The trial judge must separate these costs and deal with them in accordance with our opinion.

Lastly, we note that Kearny argues that it was the prevailing party on count two of S & A's complaint in the underlying case and it should be awarded fees. We further note that in count one of Kearny's counterclaim in this case, it sought fees as the prevailing party. The trial court, however, entered "final judgment" in this case without addressing in the summary judgment motion or otherwise count one of Kearny's counterclaim in this case. Therefore, on remand the court is to determine whether Kearny was the prevailing party, utilizing the *Kellam* standards and, if so, whether any fee should be awarded to it.

We note further that the trial court in reviewing S & A's claim for legal fees as the prevailing party in the underlying suit must be mindful that if S & A achieved only limited relief in the underlying action compared to all the relief it sought, it must determine whether the expenditure of counsel's time on the entire litigation was reasonable in relation to the actual relief obtained and, if it was not, then it should reduce any award proportionately. *Kellam Assocs., supra*, 357 *N.J.Super.* at 142.

Accordingly, we hold that the entire controversy doctrine is not a bar to S & A's application. We reverse and remand paragraph one of the judgment for a hearing on whether Kearny is entitled to fees as the prevailing party on count two of S & A's underlying complaint, as well as whether there should be any reduction in an award to S & A because it

was not successful in pursuing count two of its complaint. We reverse paragraph two of the final judgment for the enforcement and collection of the judgment and remand that issue to the trial court for it to determine whether such fees were clearly and specifically provided for in the agreement. We reverse paragraph three of the final judgment awarding S & A fees for the direct appeal of the underlying case. Should S & A seek such fees, they should apply by motion within ten days of the determination of this appeal to the Appellate Division to entertain that application. We

affirm paragraph four. We reverse paragraph five of the final judgment providing an award for costs and remand that issue to the trial court to allocate the costs in accordance with our opinion.¹

We do not retain jurisdiction.

All Citations

Not Reported in A.2d, 2007 WL 2323492

Footnotes

- ¹ We note that there has been other litigation between the parties concerning legal fees. Perhaps given our determination of the issues raised in this appeal, the parties may wish to consider settlement efforts to avoid incurring any further litigation expenses.

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