

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA**

BARBRA R. JOYNER,

Appellant,

v.

ONE THOUSAND OAKS, INC.,

Appellee.

CASE NO.: 2012-CV-000003-A-O

Lower Case No.: 2010-CC-010676-O

Appeal from the County Court,
for Orange County, Florida
Wilfredo Martinez, County Judge.

Barbra R, Joyner, Esquire, Appellant
and Nicholas A. Shannin, Esquire, for Appellant.

Robyn Marie Severs, Esquire, for Appellee.

Before JOHNSON, EVANS, and SHEA, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant, Barbra R. Joyner timely appeals the Trial Court's "Final Judgment of Foreclosure and Award of Attorneys Fees and Costs Nunc Pro Tunc to September 28, 2012" and "Order on Defendant's Motion and Affidavit for Disqualification of Judge Martinez" entered on September 28, 2012. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

Summary of Facts and Procedural History

Appellant, Barbra R. Joyner (“Joyner”) was the resident and owner of a condominium unit in Orange County, Florida, maintained by Appellee, One Thousand Oaks, Inc. (“OTO”), a condominium association. On July 19, 2010, OTO filed a two count complaint to foreclose a lien for assessments on Joyner’s condominium unit and for collection of unpaid homeowner’s assessments. Joyner filed affirmative defenses which included a defense of selective enforcement.

After pleadings were filed and discovery conducted, both parties brought motions for summary judgment. On May 31, 2011, a hearing was held addressing both motions for summary judgment. Following the hearing, the Trial Court entered an Order denying Joyner’s Motion for Final Summary Judgment and an Order denying in part and granting in part OTO’s Motion for Partial Summary Judgment. On October 24, 2011, a jury trial was also held solely to address Joyner’s affirmative defense of selective enforcement and a verdict was entered in favor of OTO.

On December 16, 2011, the Trial Court entered a Final Judgment incorporating both the jury’s verdict as to the selective enforcement defense and the Trial Court’s prior rulings as to both parties’ motions for summary judgment. Specifically, the Final Judgment ordered that OTO was due from Joyner assessments, interest, late/administrative fees, and attorneys’ fees and costs from the collection of assessments and the lien foreclosure lawsuit, in amounts to be determined by further Order of the Trial Court.

Joyner appealed the Final Judgment. In response, OTO filed a Motion to Dismiss arguing that the Final Judgment was not a final order because the language in the Order indicated that further judicial labor was required to dispose of the case. Further, OTO argued that the appeal should be dismissed or in the alternative, jurisdiction relinquished to the Trial Court for

further proceedings. Upon finding that the Final Judgment order appeared to be a non-final order, this Court on appeal directed Joyner to show cause why the appeal should not be dismissed for lack of jurisdiction. Joyner argued that the Final Judgment was a final order and that OTO was not entitled to a hearing to determine the amount of damages because no evidence of damages was presented at trial.

Thereafter, this Court found that, although the Trial Court's Order was titled "Final Judgment," it did not state the amount of assessments due, but instead, stated that the amount was to be determined by further Order of the Trial Court. Thus, the language in the Order indicated that it did not end judicial labor or resolve the issues between the parties. Accordingly, this Court determined that the Order on review was not a final order and on August 9, 2012 entered an Order relinquishing jurisdiction to the Trial Court and abating the appeal for sixty days for the Trial Court to enter an appealable final order. In response to this Court's Order, an evidentiary hearing was scheduled for September 28, 2012. Also, on September 27, 2012, Joyner moved to disqualify the Trial Court Judge, Wilfredo Martinez, by filing her "Motion and Affidavit for Disqualification of Judge Martinez" ("Motion to Disqualify"). Subsequently, at the evidentiary hearing, Judge Martinez first addressed Joyner's Motion to Disqualify finding that the affidavit included with the motion was not verified and failed to contain any language that it was made under penalty of perjury or otherwise sworn. Thus, Judge Martinez denied the Motion on the record and entered an Order finding that it was legally insufficient primarily because the affidavit was not sworn to and thus, not an affidavit.

The evidentiary hearing then proceeded to address the assessments and other amounts owed from Joyner including attorneys' fees and costs. Thereafter, on October 17, 2012, the Trial Court entered the "Final Judgment of Foreclosure and Award of Attorneys Fees and Costs Nunc

Pro Tunc to September 28, 2012” that this Court finds is a final order. Thereafter, Joyner filed an Amended Initial Brief and the appeal resumed.

Arguments on Appeal

In her Amended Initial Brief, Joyner argues: 1) Proper application of due process, the rules of civil procedure, and Florida Statutes regarding foreclosure of a condominium association’s lien, requires that resolution of all matters to be tried, and the failure of OTO to produce any testimony or evidence at trial regarding damages was fatal to its ability to procure those damages at a later date; 2) Proceeding with a full evidentiary hearing regarding attorneys’ fees and costs when no notice was received or provided regarding the nature of the proceedings and where even the Judge was uncertain at the beginning of the hearing as to what was to follow, is an abandonment of due process and requires reversal; 3) Her motion to disqualify Judge Martinez was improperly denied as lacking an affidavit because her affidavit was clearly incorporated in the motion and therefore the denial of that motion constitutes error; and 4) Lastly, Joyner seeks appellate attorneys’ fees per sections 57.105(7), 59.46, and 718.303, Florida Statutes, and section 11.C and 14.B. of the Declaration of Condominium of One Thousand Oaks, Inc. (“Declaration”) provided she prevails in this appeal.

Conversely, OTO in its Answer Brief argues that this Court should affirm the decision of the Trial Court because: 1) The Trial Court did not violate Joyner’s due process rights regarding its determination of amounts due to OTO; 2) Joyner was afforded due process by the post-trial evidentiary hearing; 3) The Motion to Disqualify the Trial Court Judge was legally insufficient; and 4) Lastly, OTO, seeks appellate attorney’s fees per sections 59.46, 718.116(6)(a), and 718.303, Florida Statutes, and sections 11.C and 14.B of the Declaration provided it prevails in this appeal.

Analysis

Joyner's First and Second Arguments - Due Process & Damages Issues

From what this Court can discern for Joyner's first argument, she was not provided due process including adequate notice that the issue of damages i.e. the assessments, interest, late/administrative fees and also attorney fees and costs would be addressed at the September 28, 2012 evidentiary hearing. Her second argument is that OTO should be precluded from an award of damages because the issue of damages was not presented at trial.

These arguments require various standards of review. First the Order on appeal, "Final Judgment of Foreclosure and Award of Attorneys Fees and Costs Nunc Pro Tunc to September 28, 2012", derived from: 1) the Trial Court's prior rulings addressing both parties motions for final summary judgment; 2) the jury trial addressing Joyner's selective enforcement defense; and 3) the evidentiary hearing addressing the determination of amounts owed from assessments, interest, late/administrative fees and also attorneys' fees and costs. Again from what this Court can discern, Joyner's arguments in the appeal do not to address the Trial Court's rulings on the motions for summary judgment nor the jury trial addressing her selective enforcement defense. Instead her arguments hinge on the Trial Court's actions and rulings at the evidentiary hearing addressing the determination of amounts owed.

First, Joyner's arguments hinge on her claim that she was not afforded due process because of a lack of notice as to the nature of the evidentiary hearing resulting in her inability to sufficiently prepare and acquire her own witnesses for the hearing. The legal conclusions related to the constitutional issue of due process should be reviewed de novo. *See Nelson v. State*, 850 So. 2d 514, 521-522 (Fla. 2003); *Connor v. State*, 803 So. 2d 598, 605 (Fla. 2001).

Second, Joyner appears to argue that the Trial Court erred by allowing the post-judgment evidentiary hearing to include the presentation of testimony and other evidence addressing the damages issue i.e. determination of amounts owed and the attorney fees and costs. Generally, the standard of review for the admission of evidence including testimony is generally governed by the abuse of discretion standard. *See Stewart & Stevenson Services, Inc. v. Westchester Fire Insurance Company*, 804 So. 2d 584, 587 (Fla. 5th DCA 2002) (explaining that a trial court's decision to admit or exclude evidence is reviewed by utilizing the abuse of discretion standard of review); *see also Forester v. Jewell*, 610 So. 2d 1369, 1372 (Fla. 1st DCA 1992) (holding that the admission of evidence is within the sound judicial discretion of the trial judge whose decision in such regard must be viewed in the context of the entire trial).

Third, in addressing the Trial Court's award of damages from the amounts owed from assessments, interest, and late/administrative fees, this Court must determine whether the Trial Court's findings from the evidentiary hearing are supported by competent substantial evidence. *See Emerald Pointe Property Owners' Ass'n, Inc. v. Commercial Construction Industries, Inc.*, 978 So. 2d 873, 879 (Fla. 4th DCA 2008) (holding that a trial court's award of damages must be affirmed if it is supported by competent substantial evidence).

Lastly, generally when reviewing a trial court's determination regarding entitlement and the award of attorney fees, the standard of review is abuse of discretion. *Musselwhite v. Charboneau*, 840 So. 2d 1158, 1160 (Fla. 5th DCA 2003); *Joachim v. Joachim*, 942 So. 2d 3, 4 (Fla. 5th DCA 2006).

From review of the lower court record, the procedural history and substance of the pleadings, discovery, motions, and the Trial Court's rulings in this case negates Joyner's arguments as follows: During the discovery stage, on October 20, 2010, Joyner filed an

Admission of Liability as to nonpayment of monthly assessments from October 2009 through January 2010. Thereafter, Joyner filed a Motion for Final Summary Judgment on March 7, 2011 followed by a second Motion for Final Summary Judgment on April 26, 2011. In her second Motion for Final Summary Judgment, Joyner addressed her Admission of Liability that she had unconditionally tendered the unpaid assessments, late fees, interest, costs, and reasonable attorney's fees. Also addressed in her Motion was her affirmative defense for selective enforcement where she asserted that the only issue remaining in the case was whether OTO was entitled to recover attorneys' fees, or whether it was barred from doing so, due to selective enforcement. Not addressed in Joyner's second Motion for Final Summary Judgment was her other affirmative defenses of waiver, estoppel, and lien invalidity. In OTO's Motion for Partial Summary Judgment, OTO requested the Trial Court: 1) to determine that OTO was entitled to levy and collect assessments, interest, attorneys' fees and costs from Joyner and 2) to reserve jurisdiction as to the amount of the assessments, interest, late fees, attorneys' fees and costs at the conclusion of the case.

On May 31, 2011, a hearing was held addressing both parties' motions for summary judgment and per the minutes from the hearing, Joyner admitted in open court that she had failed to pay assessments for five months and that she was liable for such assessments. Upon conclusion of the hearing, the Trial Court denied Joyner's Motion for Final Summary Judgment and granted in part OTO's Motion for Partial Summary Judgment as to Joyner's liability, denied in part OTO's motion as to Joyner's affirmative defense of selective enforcement, and provided Joyner the opportunity to raise that defense at trial. On October 24, 2011, the jury trial was held solely to address Joyner's affirmative defense of selective enforcement.

The Trial Court's Final Judgment Order entered on December 16, 2011, incorporated the jury's verdict as to the selective enforcement defense and the Trial Court's prior rulings as to both parties' motions for summary judgment. Specifically, the Final Judgment ordered that OTO was due from Joyner assessments, interest, late/administrative fees, and attorneys' fees and costs from the collection of assessments and the lien foreclosure lawsuit, in amounts to be determined by further Order of the Trial Court. Accordingly, at this juncture in the case, the proceedings and Orders entered provided Joyner with notice that: 1) she was liable for the damages i.e. assessments, interest, and late fees; 2) because she did not prevail as to the selective enforcement defense, she was also liable for attorney fees and costs; 3) the amounts owed for the damages and attorney fees and costs were to be determined by further order of the Trial Court; and 4) as OTO points out in its Answer Brief, OTO filed motions and affidavits as to the attorneys' fees and costs; the record reflects that early on in the case the parties disputed the attorneys' fees and costs; and Joyner consulted her own attorney fees expert before the jury trial.

Further, the procedural history of this appeal negates Joyner's arguments because sufficient notice was provided to Joyner via this Court's Order entered on August 9, 2012 relinquishing jurisdiction to the Trial Court for a final order that was to include the amounts owed and also via the 2 hour evidentiary hearing that was properly noticed and set for September 28, 2012 putting Joyner on notice that the issue of damages and attorneys' fees and costs were to be addressed at that hearing.

Lastly, from review of the transcript from the evidentiary hearing, this Court concurs with OTO that Joyner had ample opportunity to present evidence, arguments, and cross examine witnesses. Specifically, as OTO argues in its Answer Brief, at the hearing the Trial Court allowed each side to argue the purpose of the hearing since no motion for the hearing had been

filed with the Notice of Hearing or Amended Notice of Hearing. After hearing arguments from both sides, reviewing the court docket, and reviewing the order relinquishing jurisdiction, the Trial Court concluded that the hearing was to determine amounts due, including attorneys' fees and costs, and that Joyner had received adequate notice that the hearing was to be on those matters. The hearing transcript also reveals that Joyner cross-examined all of the witnesses, voir dired the witnesses to determine each witness' qualifications to testify as to the subject to which they were testifying, and even called one of OTO's witnesses as her own. She also testified on her own behalf. Further, she was provided time to review the proposed Final Judgment before it was entered and was allowed to place her objections to it on the record. After reviewing the proposed Final Judgment, the Trial Court determined that it accurately represented what had transpired in the case.

In conclusion, this Court first finds that from review of the record, competent substantial evidence existed that Joyner was afforded due process including adequate notice and an opportunity to be heard, to present evidence, and to cross-examine witnesses throughout the proceedings in the lower case including the evidentiary hearing. Second, from review of the hearing transcript, the Trial Court did not abuse its discretion as to the admission of evidence at the evidentiary hearing, including the witnesses' testimony and documents. Third, the Trial Court did not abuse discretion in finding that OTO was entitled to an award of attorneys' fees and costs as the prevailing party per the applicable statutes and the Declaration. Lastly, the evidence presented at the evidentiary hearing provided competent substantial evidence in support of the Trial Court's findings as to the amount of damages i.e. the assessments, interest, late/administrative fees and also attorneys' fees and costs as stated in the "Final Judgment of Foreclosure and Award of Attorneys Fees and Costs Nunc Pro Tunc to September 28, 2012".

Joyner's Third Argument – Motion to Disqualify

Joyner's Motion to Disqualify was not verified and failed to contain any language that it was made under penalty of perjury or otherwise sworn. Joyner argued at the evidentiary hearing and on appeal that her Motion to Disqualify was legally sufficient because it had been personally signed by her as the client and as a licensed attorney and officer of the court; thus, it was not necessary that her signature be sworn. At the evidentiary hearing, the Trial Court denied her Motion to Disqualify finding that it was legally insufficient due to the fact that it was not sworn to. In the "Order on Defendant's Motion and Affidavit for Disqualification of Judge Martinez" entered on September 28, 2012, the Trial Court states: "DEFENDANT'S MOTION AND AFFIDAVIT FOR DISQUALIFICATION OF JUDGE MARTINEZ IS HEREBY DENIED. THE MOTION IS LEGALLY INSUFFICIENT. AS A MAJOR FACTOR FOR DENIAL (ALONG WITH LESSOR ONES) THE MOTION IS NOT SWORN TO (NOT AN AFFIDAVIT)."

First, this Court reviews Joyner's Motion to Disqualify to determine whether it was legally sufficient. Whether a motion to disqualify a judge is legally sufficient is a question of law and thus, the standard of review is de novo. *Barnhill v. State*, 834 So. 2d 836, 843 (Fla. 2002). Section 38.10, Florida Statutes, and Florida Rule of Judicial Administration 2.330 address the disqualification of trial judges and Rule 2.330(c) specifically states that the requirements for a motion to disqualify must: 1) be in writing; 2) allege specifically the facts and reasons upon which the movant relies as the grounds for disqualification; 3) be sworn to by the party by signing the motion under oath or by a separate affidavit; and 4) include the dates of all previously granted motions to disqualify filed under this rule in the case and the dates of the orders granting those motions.

This Court finds that the Trial Court correctly held that Joyner's Motion to Disqualify was legally insufficient because it failed to contain any statement under oath or under penalty of perjury as required under Florida Rule of Judicial Administration 2.330(c)(3) and section 38.10, Florida Statutes. *See McGibney v. Smith*, 511 So. 2d 1083 (Fla. 5th DCA 1987) (holding that the motion for disqualification of the judge was legally insufficient for failing to include a sworn affidavit as required by statute). Further, this Court finds that an attorney's unsworn statement is not sufficient even if the attorney is also the party to the matter. *See Murphy v. State*, 667 So. 2d 375 (Fla. 1st DCA 1995) (explaining that while attorneys are subject to disciplinary actions for making false statements to the court, representations made by an attorney not under oath is not evidence); *State v. McIntosh*, 116 So. 3d 582, 584 (Fla. 5th DCA 2013) (citing *Murphy* by noting that counsel's representations not made under oath are not evidence); *see also DiSarrio v. Mills*, 711 So. 2d 1355, 1356-1357 (Fla. 2d DCA 1998) (holding that the attorney's motion asserting excusable neglect, but was unverified, unsworn, and not otherwise testified under oath, was legally insufficient and thus, consisted only of legal conclusions and not any evidence).

Appellate Attorneys' Fees

This Court finds that OTO as the prevailing party in both the lower court and on appeal is entitled to an award of appellate attorney fees per sections 59.46, 718.116(6)(a), and 718.303(1), Florida Statutes, and sections 11.C and 14.B of the Declaration.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Trial Court's "Final Judgment of Foreclosure and Award of Attorneys Fees and Costs Nunc Pro Tunc to September 28, 2012" is **AFFIRMED**. Also, Appellee's "Amended Motion for Attorneys' Fees" filed July 2, 2013 is **GRANTED** and the assessment of those appellate attorneys' fees is

REMANDED to the Trial Court. Lastly, “Appellant’s Motion for Attorneys’ Fees” filed August 13, 2013 is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this 31st day of December, 2013.

/S/

ANTHONY H. JOHNSON
Presiding Circuit Judge

EVANS and SHEA, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Barbra R. Joyner, Esquire**, Law Office of Barbra R. Joyner, P.A., 1470 East Michigan Street, Orlando, Florida 32806, bjoyneresq@aol.com; **Nicholas A. Shannin, Esquire**, The Shannin Law Firm, P.A., 214 East Lucerne Circle, Suite 200, Orlando, Florida 32801, service@shanninlaw.com; and **Robyn Marie Severs, Esquire**, Becker & Poliakoff, P.A., 31 Lupi Court, Suite 220, Palm Coast, Florida 32137, rsevers@bplegal.com on the 31st day of December, 2013.

/S/

Judicial Assistant