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

AUTO GLASS STORE, LLC
d/b/a 800 A1 GLASS, LLC,

Appellant,

v.

DANNY VEREEN a/k/a
DANNY VAREEN,

Appellee.
_____/

CASE NO.: 2015-CV-000053-A-O
Lower Case No.: 2013-SC-001101-O

Appeal from the County Court,
for Orange County, Florida,
Tina Caraballo, County Judge.

David J. Pedersen, Esquire,
for Appellant.

Elizabeth C. Wheeler, B.C.S.,
for Appellee.

Before LAUTEN, ADAMS, G. and HIGBEE, JJ.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant, Auto Glass Store, LLC d/b/a 800 A1 Glass, LLC ("Auto Glass"), timely appeals the county court's "Order Granting Summary Disposition" in favor of Appellee, Danny Vereen a/k/a Danny Vareen ("Vereen"), entered on March 27, 2015. Both parties also ask this Court to award attorney's fees associated with this action. 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.

Facts and Procedural History

On May 10, 2006, Vereen entered into a written contract with Auto Glass whereby Auto Glass would replace the windshield of Vereen's automobile in exchange for $485.90, plus tax. The contract, entitled "Repair Order/Estimate/Invoice," included a "Directions to Pay" provision, wherein Vereen authorized Auto Glass "to receive payment directly from any insurance provider for repairs to my vehicle." The provision identified State Farm as Vereen's insurance carrier, but did not indicate a relevant policy number. The provision also included the following language:

> I [Vereen] hereby authorize the above repair work to be done along with the necessary material, and hereby grant you and/or your employees permission to operate the vehicle here in described for [t]he purpose of testing and/or inspection[.] If it becomes necessary for you to employ a collection agency and/or an attorney to collect [on] this account, I the undersigned agree to pay all court costs plus a reasonable attorney's fee. A storage fee [of] $25 [per] [d]ay will be charged 5 [d]ays after completion of repair.

The contract also included a provision entitled, "Assignment of Benefits," which provided in pertinent part:

> The undersigned [Vereen] agrees that he or she shall remain personally liable to any and all charges incurred for which the insurer determines there are no benefits payable and/or no coverages available. The undersigned also agrees that he or she shall remain personally liable for the unpaid portion of all charge[s]. Customer agrees to be responsible for all collection cost[s] including Attorney fee[s] for services provided by 800-A1-Glass LLC.

According to Auto Glass, it installed a new windshield in Vereen's vehicle on May 10, 2006, and Vereen accepted such windshield, but never paid the $485.90, plus tax. Over four years later, on September 8, 2010, Auto Glass submitted a claim to State Farm demanding

payment for the windshield. On January 17, 2011, State Farm rejected the claim, indicating that Vereen was not a State Farm insured.[1]

As a result, on January 30, 2013, Auto Glass filed a Statement of Claim alleging breach of contract and unjust enrichment. Subsequently, Vereen filed a "Motion to Dismiss," alleging that, in accordance with Florida Statutes section 95.11(2)(b) (2011), both counts were time-barred. Noting that Vereen's "Motion to Dismiss" was inappropriate in small claims court, and considering the content of Vereen's motion, the court treated the motion as one for summary disposition. The court heard Vereen's motion on the day the case was scheduled for trial.

After reviewing the contract, the court found that Vereen's obligation to pay was triggered upon entering into the agreement with Auto Glass on May 10, 2006. Accordingly, the court determined that, to be timely filed, Auto Glass needed to pursue its claims on or before May 10, 2011, five years following the alleged breach. Additionally, the court found that the applicable limitations period set forth in section 95.11(2)(b) was not tolled by any lack of discovery of the alleged breach.[2] Accordingly, the court found that there was no triable issue and entered summary disposition.

Arguments on Appeal

Auto Glass contends that the county court erred in its application of the five-year limitations period prescribed by section 95.11(2)(b). According to Auto Glass, the statute of limitations did not begin to run until State Farm refused to cover the costs of the windshield on January 17, 2011, rendering its January 30, 2013 cause of action timely. Auto Glass complains

[1] It appears that Auto Glass submitted the claim to State Farm listing the insured as, "Danny Vareen." In the "Repair Order/Estimate/Invoice," Vereen's last name is spelled both as "Vereen" and Vareen." Vereen's signature is spelled, "Vereen," and the printed name, "Vareen" as well as the indication that State Farm was an insurer appear to be written by someone other than the person who signed Vereen's name.

[2] Auto Glass does not contend that the county court erred in concluding that the discovery rule is inapplicable here. Indeed, Auto Glass agreed that the statute tolls regardless of whether a claimant is aware of the breach. (Reply Br. 4).

that the county court failed to determine at what point in time the subject contract was breached by never considering when Vereen became obligated to pay Auto Glass for its services.

Vereen counters that the county court correctly concluded that the limitations period commenced on May 10, 2006 and that, because the present appeal involves underlying issues of fact that this Court cannot resolve without a transcript of the county court proceedings, we cannot reverse the county court decision.

Standard of Review

Our review of the county court's "Order Granting Summary Disposition" is *de novo*. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Summary judgment—or summary disposition as regarded in small claims matters—is appropriate only when there are no genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. *Id.*[3]

Analysis

An action founded upon a written contract must be pursued within five years of the date the action accrues. § 95.11(b)(2), Fla. Stat. (2013). "A cause of action accrues when the last element constituting the cause of action occurs." § 95.031(1), Fla. Stat. (2003). A cause of action for breach of contract accrues, for limitations purposes, when the alleged breach occurred. *Medical Jet, S.A. v. Signature Flight Support-Palm Beach, Inc.*, 941 So. 2d 576, 578 (Fla. 4th DCA 2006). "Statutes of limitations on unjust enrichment or quantum meruit claims generally begin to run upon the occurrence of the event that created the uncompensated benefit in the defendant, i.e., the plaintiff performed the labor that benefitted the defendant or the defendant

[3] Auto Glass asserts that the county court should have treated Vereen's motion as a motion to dismiss rather than for summary disposition. In this instance, however, the treatment of the motion is inapposite because either manner would yield the same result—our standard of review of either type of motion is the same. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) (motion for summary judgment); *Nicarry v. Eslinger*, 990 So. 2d 661, 663 (Fla. 5th DCA 2008) (motion to dismiss).

obtained the subject property or goods." *Beltran v. Vincent P. Miraglia, M.D., P.A.*, 125 So. 3d 855, 859 (Fla. 4th DCA 2013), *review denied, Miraglia v. Beltran*, 137 So. 3d 1021 (Fla. 2014).

Auto Glass contends that the county court erred because it concluded that the statute of limitations began to run on the date into which the contract was entered—May 10, 2006—rather than the date on which the contract was breached. It complains that the court failed to find when the contract was breached. Auto Glass draws this Court's attention to the following language in the county court's order:

> This Court agrees with Vereen. The statute of limitations for breach of contract and unjust enrichment actions, founded on a written instrument, is five-years. [sic] See § 95.11(2)(b), Fla. Stat. (2011). As noted above, the underlying contract in this case was entered into by the parties on May 10, 2006. Thus, Auto Glass Store's complaint, which was filed on January 20, 2013, is time barred because it was filed well after the five-year limitation expired on May 10, 2011.

A reading of the court's order in its entirety reveals that the court based its conclusion that the action was time-barred on when Vereen's obligation to pay was triggered. Indeed, the court found that, "throughout the contract, Vereen was always responsible to pay." Auto Glass fails to consider that the date on which the contract was entered into could be the same date that the contract was breached. Auto Glass admits that the contract was breached on the date that Vereen's obligation to pay for the windshield arose. According to Auto Glass, however, this was January 17, 2011. But the county court found that this occurred on May 10, 2006, the date that Auto Glass alleged that it replaced Vereen's windshield and the date the contract was executed.

According to Auto Glass, pursuant to the "Directions to Pay" provision of the contract, Vereen's obligation to pay was not triggered until the alleged insurer, State Farm, failed to pay. It relies on the following language from the Florida Supreme Court and the District Courts of Appeal: "[T]he statute of limitations **for an action based on an insurer's failure to pay**

personal injury protection (PIP) benefits begins to run when the insurer breaches its obligation to pay." *State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818, 818 (Fla. 1996) (emphasis supplied). *See also Peachtree Cas. Ins. Co. v. Walden*, 759 So. 2d 7, 8-9 (Fla. 5th DCA 2000). These decisions are inapposite. Auto Glass's breach of contract action was not based upon State Farm's failure to pay benefits to its insured, but rather, was based upon a contract between Auto Glass and Vereen, wherein Vereen would remit payment in exchange for Auto Glass replacing his windshield. Moreover, the "Directions to Pay" provision merely permits Auto Glass to receive payment directly from an insurance company. It does not condition Vereen's obligation to pay.

Auto Glass's position is further belied by the plain language of the subject contract. The "Assignment of Benefits" section provides in pertinent part:

> The undersigned [Vereen] agrees that he or she shall **remain personally liable** to any and all charges incurred for which the insurer determines there are not benefits payable and/or no coverages available. The undersigned also agrees that he or she shall **remain personally liable** for the unpaid portion of all charge [sic].

(emphasis supplied).

"The parties' intention governs contract construction and interpretation; the best evidence of intent is the contract's plain language." *Whitley v. Royal Trails Prop. Owners' Ass'n Inc.*, 910 So. 2d 381, 383 (Fla. 5th DCA 2005). When interpreting such plain language, we look to commonly relied upon references, such as the dictionary. *Grove at Harbor Hills Homeowners v. Ass'n v. Harbor Hills Dev., L.P.*, 158 So. 3d 611, 612 (Fla. 5th DCA 2013). Auto Glass, the drafter of the contract, elected to use the word, "remain." Remain means: "to be left or left over when the rest has been taken away, destroyed, or disposed of in some way"; "to stay while others go"; to stay in the same place"; "to continue; go on being" ; "to continue to exist' endure'

persist' last" ; "to be left to be dealt with, done, said, etc." *Webster's New College Dictionary* 1211 (Michael Agnes et al. eds. 2005).

The contract's multiple use of the word, "remain" indicates that the parties intended and understood that Vereen was obligated to pay for the services upon signing the contract and accepting the new windshield. The Assignment of Benefits provision solidifies this understanding by clarifying that, should the listed insurer fail to pay for the services rendered, Vereen would "remain," or in other words, continue, to be responsible for payment.

Accordingly, the county court did not err in concluding that Auto Glass's causes of action for breach of contract and unjust enrichment were time-barred. The terms of the contract and the facts alleged in Auto Glass's Statement of Claim support the county court's finding that both causes of action accrued on May 10, 2006, when Auto Glass performed its end of the bargain by replacing the windshield, therefore triggering Vereen's obligation to pay and benefiting Vereen. *See Beltran*, 125 So. 3d at 859; *Medical Jet*, 941 So. 2d at 578. As such, Auto Glass was required to pursue its claims on or before May 10, 2011. *See* § 95.11(2)(b), Fla. Stat.

Furthermore, as Vereen points out, Auto Glass failed to include a transcript of the proceedings below. It appears that such transcript may not exist. This fact, however, did not preclude Auto Glass from utilizing an alternative method of preparing a record set forth in Florida Rule of Appellate Procedure 9.200(b)(4). "In the absence of a transcript, the trial court's factual findings are presumed correct." *Poling v. Palm Coast Abstract & Title, Inc.*, 882 So. 2d 483, 485 (Fla. 5th DCA 2004). Only where legal error is apparent on the face of the record can an appellate court reverse a lower court's judgment as a matter of law. *Id.* Here, this Court perceives no error apparent on the face of the record and, without a transcript or an otherwise

perfected appellate record, could not reverse the county court even if that court's factual findings appeared questionable. *See id.*

Motions for Attorney's Fees

Both parties seek attorney's fees pursuant to the terms of the subject contract. The contract twice provides for the recovery of attorney's fees: (1) "If it becomes necessary for you [Auto Glass] to employ a collection agency and/or an attorney to collect [on] this account, I the undersigned agree to pay all court costs plus a reasonable attorney's fee"; (2) "Customer agrees to be responsible for all collection cost[s] including Attorney fee[s] for services provided by 800-A1-Glass LLC."

As Vereen points out, section 57.105(7), Florida Statutes, renders the provision of the contract affording attorney's fees to Auto Glass reciprocal. *See Nudel v. Flagstar Bank, FSB*, 60 So. 3d 1163, 1164-65 (Fla. 4th DCA 2011). The section provides in pertinent part:

> If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

Accordingly, Vereen is entitled to attorney's fees as the prevailing party.

As to Auto Glass's motion, although the contract provides for fees associated with collecting on the account, implicit in that provision is the requirement that Auto Glass prevail in seeking collection. Auto Glass chose to sleep on its rights, waiting until after the limitations period to attempt collection. This Court will not award Auto Glass's heedlessness with attorney's fees.

Accordingly, this Court denies Auto Glass's motion for attorney's fees and costs, grants Vereen's motion for attorney's fees, and remands to the county court for assessment thereof. *See* Fla. R. App. P. 9.400.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED:**

1. The county court's "Order Granting Summary Disposition," entered on March 27, 2015, is **AFFIRMED**.

2. Auto Glass's "Motion for Attorney's Fees and Costs," filed July 20, 2015, is **DENIED**.

3. Vereen's "Motion for Appellate Attorney's Fees," filed August 3, 2015, is **GRANTED**, and the assessment of those fees is **REMANDED** to the trial court.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 11th day of December, 2015.

/S/
FREDERICK J. LAUTEN
Presiding Circuit Judge

ADAMS, G. and HIGBEE, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to **Judge Tina Caraballo**, at 425 N. Orange Avenue, Orlando, Florida 32801; **David J. Pedersen, Esq.**, *counsel for Appellant*, at 1901 Woodward Street Orlando, FL 32803; and **Elizabeth C. Wheeler, Esq.**, *counsel for Appellee*, at P.O. Box 2266 Orlando, FL 32802-2266, on this 11th day of December, 2015.

/S/
Judicial Assistant