FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 5D2023-3395
LT Case No. 2020-CA-000147

CHRISTOPHER CATES and JOY CATES,

Appellants/Cross-Appellees,

v.

KEN SARBU CONSTRUCTION COMPANY, INC.,

Appellee/Cross-Appellant.

On appeal from the Circuit Court for Nassau County.
Eric C. Roberson, Judge.

Peter E. Nicandri and Pierce N. Giboney, of Milam Howard Nicandri & Gillam, P.A., Jacksonville, for Appellants/Cross-Appellees.

David H. Willis and Jonathan B.B. Lucas, of Willis Lucas Law Group, P.A., Jacksonville Beach, for Appellee/Cross-Appellant.

September 10, 2026

PER CURIAM.

Christopher and Joy Cates (the "Cates") and Ken Sarbu Construction Company, Inc., ("Sarbu Construction") sued each

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other after disputes arose about Sarbu Construction's work on the Cates' home. After a bench trial, the trial judge awarded Sarbu Construction $9,596.00 in damages arising from a change order to the main construction contract; the trial judge ruled, however, that neither party had proven a breach of any other contractual responsibilities. Based on this award, the trial judge concluded that Sarbu Construction was the prevailing party in the litigation. Both parties appealed.

We affirm the award of damages. As we read the record, the trial court found that the Cates breached their obligations under the change order. We reverse, however, the finding that Sarbu Construction was the prevailing party in the litigation because the trial judge applied an incorrect test. *See Corley v. Rivertown, Inc.*, 863 So. 2d 1244, 1246 (Fla. 5th DCA 2004) ("The test to determine the prevailing party provides that the party that prevailed on the significant issues tried before the court is the prevailing party entitled to an award of attorney's fees."). The trial judge shall apply the correct test on remand. We affirm as to all other issues raised on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

JAY, C.J., and EISNAUGLE, J., concur;
MAKAR, J., concurs in part and dissents in part, with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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MAKAR, J., concurring in part and dissenting in part.

This case involves a dispute about costly repairs to balconies on a private residence. Christopher and Joy Cates (the "Cateses") hired Ken Sarbu Construction Company, Inc. ("Sarbu Construction"), to remove and replace the balconies on their luxury home in an exclusive neighborhood on Amelia Island, Florida. The parties agreed the job would take approximately ten weeks, but was still incomplete six months after the building permit was issued, which caused the relationship between the parties to break down. Independently, and later through their legal counsel, the Cateses expressed their discontent and told Sarbu Construction that workers were no longer allowed on the property to perform work. At the time, Sarbu Construction had reconstructed the balconies, finished work on an executed change order, and completed various other aspects of the job. Several items, however, remained incomplete.

As a result, Sarbu Construction filed a claim of lien for the labor, services, and materials that it claimed remained unpaid. In the final payment affidavit, Ken Sarbu, the President of Sarbu Construction, swore that "[a]ll work to be performed under the contract has been fully completed[.]" Sarbu Construction then filed a breach of contract claim and sought to foreclose on the construction lien.

The Cateses filed counterclaims for breach of contract, a fraudulent lien, and negligence. They moved for final summary judgment as to both parties' lien claims and prevailed. The trial court found that the lien was fraudulent and subsequently discharged Sarbu Construction's claim of lien.

A bench trial was held to resolve the remaining claims. The trial court ultimately found that neither party had met its burden of proof for their breach of contract claims. The trial court determined that the greater weight of the evidence did not favor either side and that it was a "dead tie" as to which party breached the agreement. Even so, the trial court found that the change order

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executed by the parties was "something different," and awarded Sarbu Construction $9,596.00 for the substantial performance of that work. The Cateses were awarded nothing.

Both parties sought rehearing, in relevant part, to be named the prevailing party for the purpose of an award of attorney's fees. The trial court entered an order finding Sarbu Construction the prevailing party.

In this appeal and cross-appeal, the parties raise numerous issues in their extensive briefs. First, the Cateses challenge the trial court's monetary award to Sarbu Construction. The trial court made no finding that the Cateses breached the agreement with Sarbu Construction, including the change order. Rather, it found neither party met its burden of proof that the other had committed a breach. Based on well-established caselaw, the proper "measure of damages in a suit by a contractor against an owner *for breach of contract* when the contract has not been fully completed is either quantum meruit or the contractor's lost profit together with the reasonable cost of labor and materials incurred in good faith in partial performance of the contract." *Fid. & Deposit Co. of Md. v. Accel, Inc.*, 354 So. 2d 424, 426 (Fla 4th DCA 1978) (emphasis added). The trial court's finding that neither party met their burden of proof means no breach was established, particularly when the main contract defined change orders as part of the overall contract. Sarbu Construction, which did not claim relief under a quantum meruit theory, was not entitled to damages without an explicit finding of breach of the change order.

In addition, *Sampley Enterprises, Inc. v. Laurilla*, 404 So. 2d 841, 842 (Fla. 5th DCA 1981), states that the "measure of damages is the amount which the *innocent party* would have received if the contract had been performed, less any deductions for expenses not yet incurred." (Emphasis added). Sarbu Construction attempts to assert that it is the "innocent party" because the Cateses did not prove that it breached the contract. But Sarbu Construction, likewise, failed to prove that the Cateses breached the contract; therefore, neither party can be said to be the breaching party. The trial court's award of damages to Sarbu Construction is thereby unsupportable.

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Second, the Cateses challenge the trial court's finding that Sarbu Construction was the prevailing party under the lien statute, which applies a "significant issue" test under the caselaw. Although neither party proved a breach of contract—the most significant claims in the litigation—the trial court nonetheless concluded that Sarbu Construction was the prevailing party because it was awarded damages. The trial court narrowly focused on only the net award of damages, which was a much smaller amount in comparison to what each party sought. It thereby did not undertake the broader task under the "significant issue" test, which was to consider all relevant factors. As our supreme court has said:

> The overall purpose of section 713.29 and attorneys' fee statutes in general is to discourage rather than encourage needless litigation. Consistent with this purpose, we conclude that a trial court has the discretion to make a determination that neither party has prevailed on the significant issues in litigation *after a thorough examination of all the factors, including the issues litigated, the amount of the claim of lien versus the amount recovered on the lien, the existence of setoffs and counterclaims by the homeowner, and the amounts offered by either party to resolve the issues prior to the litigation*, assuming that those negotiations were not otherwise confidential either by agreement or statute.

Trytek v. Gale Indus., Inc., 3 So. 3d 1194, 1203 (Fla. 2009) (emphasis added). Applying the proper test—and considering that an award of damages to Sarbu Construction was unsupportable where no breach was proven—this is the rare case where neither party is the prevailing party.

In summary, I would reverse the award of damages to Sarbu Construction but agree that the trial court applied the incorrect test to determine a prevailing party. On the facts of this case, and the trial court's ruling that neither party proved a breach of contract, a remand for entry of an order finding no prevailing party is warranted. *See Snyder v. Davis*, 426 So. 3d 882, 883 (Fla. 4th DCA 2025) ("Only in rare instances—when the outcome is truly a draw—may a court find no prevailing party.").

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