

Case Law Update: Setoffs and the “Prevailing Party” Determination

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The Diaz Fritz Group Inc. was the general contractor for the construction of an addition to the University Community Hospital in Tampa, Florida. Diaz Fritz hired a subcontractor, Hayward Baker Inc., to perform foundation work on the project in exchange for \$290,000. When Hayward Baker completed its work, Diaz Fritz refused to pay claiming that Hayward Baker was responsible for damage caused to the hospital’s existing building. Hayward Baker denied responsibility and filed a claim of lien in December 2009 for the amount of the subcontract. The lien was transferred to a payment bond held by the surety, Westfield Insurance Co., and three lawsuits subsequently ensued:

- **2010 Case** — Hayward Baker sued Westfield to enforce its claim of lien against the bond.
- **2011 Case** — Diaz Fritz sued Hayward Baker for breach of contract, seeking to recover the cost of remediating the damage to the hospital, totaling \$581,437.38.
- **2012 Case** — Diaz Fritz sued Hayward Baker’s insurance carrier (Zurich) for the same damages claimed in the 2011 case.

The 2012 case settled, and Zurich paid Diaz Fritz \$450,000. The 2010 and 2011 cases were consolidated and tried before a jury. Before trial, the parties stipulated that Hayward Baker was entitled to the full amount of the subcontract — \$290,000. At trial, the jury found that Hayward Baker was responsible for \$266,569.32 of the damage caused to the hospital. Hayward Baker then moved to set off the \$450,000 Diaz Fritz had received from Zurich against the damages entered against Hayward Baker in the jury trial. The trial court granted Hayward Baker’s setoff motion, which resulted in Diaz Fritz recovering nothing from the litigation and the entry of final judgment in favor of Hayward Baker for \$290,000.

Following final judgment, Hayward Baker and Diaz Fritz both moved for an award of attorneys’ fees. Hayward Baker asserted that it was entitled to attorneys’ fees pursuant to Florida Statutes section

713.29, which allows for recovery of attorneys' fees by the prevailing party in an action to enforce a lien or claim against a bond. The trial court denied both parties' motions, finding that neither party was the "prevailing party" because Diaz Fritz prevailed on its claims regarding Hayward Baker's damage to the hospital and Hayward Baker prevailed on its breach of contract claim and its motion for setoff.

On appeal, the Second District Court of Appeal reversed the trial court finding that the setoff issue was a "significant issue to be considered when making the prevailing party determination." The court found that applying the setoff against Diaz Fritz's damages resulted in Diaz Fritz receiving none of the benefit it sought in litigation, even though it prevailed on the hospital damages issue. On the other hand, Hayward Baker "received all of the benefit it sought in the litigation" because it was relieved of paying any damages to Diaz Fritz due to the setoff. The court noted that the setoff was "pivotal to the prevailing party determination" and that "[i]n the absence of the setoff, we would be inclined to agree with the trial court that there was no prevailing party." However, because the setoff was a significant issue that deprived Diaz Fritz of the benefit it sought in litigation, Hayward Baker was the prevailing party and was entitled to an award of attorneys' fees.

Hayward Baker, Inc. v. Westfield Ins. Co., No. 2D19-2893 (Fla. 2d DCA Dec. 30, 2020).

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