

ATTORNEYS' FEES – DEMAND THEM OR THEY ARE WAIVED, MAYBE.

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One very important question that is asked by many litigants is, “Can I recover my attorneys’ fees for this case?”. The American Rule on attorneys’ fees is generally that each litigant or party is responsible for payment of his/her/its own attorney’s fees. The entitlement to recovery of attorneys’ fees generally hinges on whether there is a contract that allows a prevailing party to recover fees or whether a statute authorizes the prevailing party to recover fees. So for my client’s, there is hope if they have a properly written contract or a statutory claim (i.e., construction lien, restrictive covenant, trade secret, or condominium lien) which authorized such fee recovery.

In order to even seek attorney fee recovery, the party must allege (plead) the entitlement to fees and make a demand for recovery in the *Wherefore* or addendum clause. Failure to plead entitlement and demand attorney’s fees will result in waiver of that portion of the claim. Green v. Sun Harbor Homeowners' Ass'n, 730 So. 2d 1261, 1263 (Fla. 1998) (citing Stockman v. Downs, 573 So. 2d 835, 837 (Fla. 1991)). Recently, the Second District Court of Appeals enforced this rule, in Imseis v. Zaher, 83 So.3d 1014 (Fla. 2d DCA 2012). There, the court stated, “A claim for attorneys' fees must be pleaded, whether based on contract or statute.” Id.

The fundamental concern is notice. Stockman, 573 So.2d at 837. By pleading entitlement to attorneys' fees, the claimant puts the opposing party on notice, thereby preventing unfair surprise. Id. The specific statutory or contractual basis for a claim for attorney's fees need not be specifically pled, and the failure to plead the basis of such a claim will not result in waiver of the claim. Caufield v. Cantele, 837 So. 2d 371, 378 (Fla. 2002).

However, it is not sufficient to simply allege the party retained counsel and was obligated to pay fees to that firm. Am. Express Bank Int'l v. Inverpan, S.A., 972 So.2d 269, 270 (Fla. 3d DCA 2008). In Inverspan, the plaintiff included only an allegation that he had retained counsel in its complaint but “[n]either the body of the complaint nor the "wherefore" clause include[d] a demand or request for fees.” Id. The Third District Court of Appeals held this was insufficient and plaintiff waived its claims for attorney’s fees. Attorneys’ fees must be requested specifically, either in the body of the complaint or the wherefore clause, or both.

There are two escape hatches. When the pleading deficiency is discovered, simply amend the operative pleading to include the entitlement and demand. Amendments are freely granted when justice so requires and amending can correct the omission. However, sometimes the case has progressed to a point where no more amendments are permitted. In this situation, the acquiescence exception can be argued, if it has been set up properly. Where a party has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, that party waives any objection to the failure to plead a claim for attorney's fees. Stockman, 573 So.2d at 838 (*citing* Brown v. Gardens by the Sea S. Condo. Ass'n, 424 So.2d 181 (Fla. 4th DCA 1983) (defendant's failure to raise entitlement to attorney's fees until after judgment not fatal to claim where issue of attorney's fees was raised at pretrial conference and plaintiff's pretrial statement listed defendant's entitlement to fees as an issue) and *see* Mainlands of Tamarac by Gulf Unit No. Four Ass'n v. Morris, 388 So. 2d 226 (Fla. 2d DCA 1980) (parties' stipulation during trial that the question of attorney's fees would be heard subsequent to final hearing would permit recovery of attorney's fees despite failure to plead entitlement to fees).

A party may raise the issue of attorney fees in post-pleading documents, motions, settlement talks, and pretrial statement to fall within the acquiescence exception. The Fourth District Court of Appeals has also applied the Stockman acquiescence exception to award attorney fees to a party when that party failed to plead fees. Save on Cleaners of Pembroke II Inc. v. Verde Pines City Ctr. Plaza LLC, 14 So.3d 295 (Fla. 4th DCA 2009). In Save on Cleaners, the defendant failed to plead fees in a pleading, but subsequently filed court documents that included claim for fees: a motion to dismiss and two memorandum. Further, while in settlement negotiations, defendant offered, among other things, to waive its claim for attorney fees. The plaintiff never objected to the claim of fees. The court found these actions sufficient to fit the Stockman acquiescence exception and explained that “an implicit rationale for Stockman’s exception . . . is that under [Rule 1.190(b)], Rule of Civil Procedure, the failure to object to a claim not pleaded may operate as a consent to amendment of the pleading to include the claim.” Id. at 296-98.

In summary, read your contract to determine whether you have the right to recover attorneys’ fees in the event of litigation. If the contract is silent on the topic you may want your attorney to assist you in drafting such a provision. Additionally, in the absence of a contractual fee provision, you may have a statutory attorney fee claim. After that, you are running the risk of having the opposing party acquiesce to the fee claim, and they may not. The bottom line: If you want to recover your attorneys’ fees, you have to plead the entitlement AND demand them in your addendum clauses.