



**In the Missouri Court of Appeals
Eastern District
DIVISION TWO**

LUCAS STUCCO & EIFS DESIGN, LLC,)	No. ED92941
)	
Respondent,)	Appeal from the Circuit Court of
)	St. Louis County
vs.)	
)	
LOREN L. LANDAU,)	Honorable Brenda Stith Loftin
)	
Appellant.)	FILED: February 2, 2010

Introduction

Loren Landau appeals the judgment of the Circuit Court of St. Louis County awarding Lucas Stucco & EIFS Design, LLC (“Lucas Stucco”): (1) \$4,900 for breach of contract and quantum meruit, and (2) \$10,567.04 in attorney fees under the Missouri Private Prompt Payment Act (PPPA), Mo. Rev. Stat. § 431.180. Mr. Landau appeals the trial court’s award of attorney fees. We reverse the portion of the judgment awarding attorney fees in favor of Lucas Stucco and against Mr. Landau.¹

Factual and Procedural Background

Lucas Stucco and Mr. Landau entered into a contract providing for Lucas Stucco to install stucco finishing on Mr. Landau’s commercial building in return for \$19,000. Lucas

¹ Lucas Stucco filed motions for damages for frivolous appeal and for an additional \$20,540.10 in attorney fees on appeal. In light of this opinion, the motions for damages and attorney fees are denied.

Stucco claimed that after it satisfied its obligations under the contract, Mr. Landau failed to pay Lucas Stucco \$4,900.

On November 1, 2007, Lucas Stucco filed a four-count petition against Mr. Landau seeking damages for breach of contract, action on account, quantum meruit/unjust enrichment, and detrimental reliance. In the prayer for relief following each count, Lucas Stucco asked that the trial court “enter judgment in its favor, and against Defendant Landau, for the sum of \$4,900.00, together with interest at the legal rate (including prejudgment interest), award it the reasonable attorney fees and costs incurred in bringing this action, and grant such other and further relief as the Court deems just and proper.” Lucas Stucco did not reference the PPPA in the body of the petition or the prayers for relief.

On January 8, 2009, the date originally set for trial, Lucas Stucco’s counsel first communicated to Mr. Landau’s counsel his intent to seek attorney fees pursuant to the PPPA.² The same day, Mr. Landau’s counsel renewed an earlier request for a continuance. The trial court continued the case one week and specified that “no further continuances” would be granted.

Lucas Stucco did not seek leave to amend its petition prior to trial to include a reference to the PPPA. The trial court heard the case on January 15, 2009. Lucas Stucco did not request

² The PPPA provides in pertinent part:

1. All persons who enter into a contract for private design or construction work after August 28, 1995, shall make all scheduled payments pursuant to the terms of the contract.
2. Any person who has not been paid in accordance with subsection 1 of this section may bring an action in a court of competent jurisdiction against a person who has failed to pay. The court may in addition to any other award for damages, award interest at the rate of up to one and one-half percent per month from the date payment was due pursuant to the terms of the contract, and reasonable attorney fees, to the prevailing party....

Mo. Rev. Stat. § 431.180.1-.2.

leave to amend its petition post-trial to reference an entitlement to attorney fees under the PPPA. On January 23, 2009, Lucas Stucco filed a motion for attorney fees specifically requesting attorney fees pursuant to the PPPA. Mr. Landau opposed Lucas Stucco's motion, inter alia, on the grounds that Lucas Stucco's petition was insufficient because it failed to state a claim for fees under the PPPA and Mr. Landau was prejudiced by Lucas Stucco's failure to plead its entitlement to fees under the PPPA and late notice of the specific statutory basis of its request for attorney fees.

On February 2, 2009, the trial court issued its judgment concluding: (1) Mr. Landau was liable to Lucas Stucco for breach of contract in the amount of \$4,000; (2) Mr. Landau was liable to Lucas Stucco in quantum meruit in the amount of \$900; and (3) Lucas Stucco was entitled to recover from Mr. Landau \$10,567.04 in attorney fees pursuant to the PPPA.

Standard of Review

“Although awards of attorney's fees are left to the broad discretion of the trial court and will not be overturned except for an abuse of discretion, this standard is based on the assumption that the court had the authority to award the fees.” Washington Univ. v. Royal Crown Bottling Co., 801 S.W.2d 458, 469 (Mo.App.E.D. 1990). The scope of the trial court's authority to award attorney fees is a legal issue which we review *de novo*. Roller v. Steelman, 297 S.W.3d 128, 131 (Mo.App.W.D. 2009).

Discussion

Mr. Landau claims that the trial court erred in granting Lucas Stucco's motion for attorney fees because Lucas Stucco did not specifically plead in its petition, which alleged only common law causes of action, that it was entitled to and was requesting attorney fees under the

PPPA.³ In response, Lucas Stucco asserts that it sufficiently pleaded its claim to attorney fees because its prayers for relief included general requests for attorney fees.

Missouri follows the American Rule, which provides that, with few exceptions, absent statutory authorization or contractual agreement, each litigant bears the expense of his or her own attorney fees. Royal Crown, 801 S.W.2d at 468. In the instant case, the trial court based its award of Lucas Stucco’s attorney fees on the PPPA. However, Lucas Stucco did not reference the PPPA as a basis for recovery in either the body of the petition, the prayer for relief, or any pre-trial or post-trial amended pleadings. The first written notification of Lucas Stucco’s intent to seek attorney fees pursuant to the PPPA came in a post-trial motion filed nearly a week after the trial.

“Pleadings present, define, and isolate issues, so that the trial court and all parties have notice of the issues.” Norman v. Wright, 100 S.W.3d 783, 786 (Mo. banc 2003). Accordingly, “[t]he relief awarded in a judgment is limited to that sought by the pleadings.” Id. Rule 55.19 requires specific pleading of items claimed as special damages. Supreme Court Rule 55.19; see also Mo. Rev. Stat. § 509.200. The purpose of this requirement is to prevent surprise by informing the defendant what damages are claimed. Fidelity State Bank & Trust Co. v. Gibson, 568 S.W.2d 574, 575 (Mo.App. 1978). Attorney fees are special damages and, therefore, must be specifically pleaded to be recovered. Ridgway v. TTnT Dev. Corp., 126 S.W.3d 807, 818 (Mo.App.S.D. 2004).

As an initial matter, Lucas Stucco argues that Mr. Landau waived a challenge to the award of attorney fees by failing to either move to strike the prayer for relief or move for a more

³ Mr. Landau originally raised two points on appeal. In point one of his brief, Mr. Landau argued that the PPPA did not apply to this case because the parties’ contract did not provide for scheduled payments. In light of our resolution of point two, we decline to address point one.

definite statement under Rule 55.27. Lucas Stucco also claims that its oral notice to Mr. Landau a week before trial that “it would be invoking the PPPA to claim entitlement” to attorney fees provided Mr. Landau “ample notice” consistent with Rule 55.19.

Lucas Stucco fails to cite any support for the notion that either a generic reference to attorney fees in a prayer for relief or an oral notice of a possible claim for attorney fees under a specific statute not referenced in the petition triggers a responsibility to either move for a more definite statement under Rule 55.27 or face waiver of a challenge to the adequacy of the petition.⁴ Moreover, Mr. Landau challenged Lucas Stucco’s claimed entitlement to fees under the PPPA at the earliest possible opportunity. Upon receiving written notice for the first time in a post-trial motion that Lucas Stucco intended to base its request for attorney fees on the PPPA, Mr. Landau immediately responded with a detailed written objection. Mr. Landau asserted, among other things, that Lucas Stucco failed to adequately plead its entitlement to attorney fees under the PPPA. Because Mr. Landau raised an objection to the court’s authority to award fees under the PPPA at the earliest possible juncture, he did not waive a challenge to the court’s award of attorney fees. Cf. Dygert v. Crouch, 36 S.W.3d 1, 8 (Mo.App.W.D. 2001).

Lucas Stucco contends that it adequately pleaded its request for attorney fees because the prayers for relief appended to its common law claims included requests for attorney fees. However, our review of cases invoking the PPPA discloses that parties awarded interest and/or attorney fees pursuant to the PPPA generally identified the PPPA as the source of the claimed entitlement either in the body of the petition or the prayer for relief. Significantly, in Vance, a case Lucas Stucco heavily relies on, the parties stipulated prior to trial that they “would allow the

⁴ In particular, we do not believe the Missouri Rules of Civil Procedure contemplate that defendants are required to respond, by way of a motion, to an oral notice of possible claims a plaintiff might seek to litigate.

pleadings to be amended to include a prayer for attorney fees pursuant to section 431.180.” Vance Bros., Inc. v. Obermiller Constr. Servs., Inc., 181 S.W.3d 562, 563 (Mo. banc 2006). The defendant in Vance also amended its answer, expressly acknowledging in its motion to amend that “[A]ll elements to bring [a claim under Section 431.180] have been set forth in Vance’s petition.” In Weis, Count I of the plaintiff’s petition pleaded a breach of contract and a “violation of the prompt payment act, sec. 431.180.” George Weis Co. v. Stratum Design-Build, Inc., 227 S.W.3d 486, 488 (Mo. banc 2007). Similarly, in Glenstone, the plaintiff’s petition coupled a request for a mechanic’s lien with a request for “interest on the balance owed to it...and...reasonable attorney’s fees incurred by it in the prosecution of [the] action all pursuant to the provisions of section 431.180.” Glenstone Block Co. v. Pebworth, 264 S.W.3d 703, 715 (Mo.App.S.D. 2008). In Walton, the subcontractor expressly prayed “for interest under section 431.080 (the Prompt Payment Act).”⁵ Walton Constr. Co. v. MGM Masonry, Inc., 199 S.W.3d 799, 808 (Mo.App.W.D. 2006).⁶ Based on the above, we find that a party seeking attorney fees pursuant to the PPPA must specifically invoke the Act in an initial or amended pleading.⁷

⁵ We also note that in Walton, the court rejected the plaintiff’s post-trial attempt to obtain pre-judgment interest under Section 408.020 because its prayer only sought interest under Section 431.180. Walton, 199 S.W. at 808.

⁶ See also Midwest Asbestos Abatement Corp. v. Brooks, 90 S.W.3d 480, 483 (Mo.App.E.D. 2002) (pleaded entitlement to interest and attorney’s fees under the PPPA in “its original complaint”); Bellon Wrecking and Salvage Co. v. Rohlfing, 81 S.W.3d 703, 708 (Mo.App.E.D. 2002) (Count I of the petition alleged “pursuant to Section 431.180, appellant was entitled to reasonable [attorney] fees and interest....”).

⁷ Plaintiffs seeking attorney fees pursuant to the PPPA’s counterpart, the Missouri Public Works Prompt Payment Act, Mo. Rev. Stat. § 34.057, file claims directly under that statute. See Jerry Bennett Masonry, Inc. v. Crossland Constr. Co., Inc., 171 S.W.3d 81, 87 (Mo.App.S.D. 2005); Mays-Maune & Assocs., Inc. v. Werner Bros., Inc., 139 S.W.3d 201, 203 (Mo.App.E.D. 2004); Leo Journagan Constr. Co., Inc. v. City Utilities of Springfield, Mo., 116 S.W.3d 711, 716 (Mo.App.S.D. 2003); City of Independence for Use of Briggs v. Kerr Constr. Paving Co., Inc., 957 S.W.2d 315, 318 (Mo.App.W.D. 1997).

In support of its argument that, by generally requesting attorney fees in the prayer for relief following each common law cause of action, it properly pleaded a PPPA claim for attorney fees, Lucas Stucco relies primarily upon Green v. Study, 286 S.W.3d 236 (Mo.App.S.D. 2009). In Green, the plaintiffs filed a petition in replevin seeking the return of sixteen head of cattle and damages for “their unlawful retention along with costs and attorney fees.” Id. at 239. At trial, the plaintiffs offered, without objection, evidence on the issue of attorney fees, and the trial court amended the pleadings and awarded \$1,000 on the grounds that there was “malicious action, oppression and a willful wrong.” Id. at 240. On appeal, “the only issue preserved for review [was] the applicability of the implied consent rule to the issue of attorney fees.” Id. at 244, n.9. The court ruled that the issue of attorney fees was properly raised by the respondents in their petition and thus the implied consent rule was not applicable. Id. at 244.

This case is clearly distinguishable from Green. First, here we are not determining the applicability of the implied consent rule – the only issue before the Green court with respect to attorney fees. Second, there is no question that the cause of action identified in the Green petition and the source of the requested attorney fees were identical, i.e., the replevin action.⁸ Thus, Green does not mirror the situation here: a petition that contains only common law causes of action with no reference to the statutory source of the claimed attorney fees, a prayer for relief that does not reference the source of the claimed attorney fees, and a post-trial motion that for the first time expressly identifies a different source of attorney fees than the causes of action described in the petition.

⁸ The court was careful to note that the defendant “did not challenge the actual award of attorney fees...and limits his complaint to the application of the implied consent rule.” Green, 286 S.W.3d at 244, n.9. Thus, the propriety of attorney fees in a replevin action was not considered. See McClure v. Nowick, 382 S.W.2d 731, 734 (Mo.App. 1964).

Conclusion

Under the circumstances here, Lucas Stucco failed to properly plead its entitlement to attorneys fees under the PPPA. The portion of the judgment awarding attorney fees in favor of Lucas Stucco and against Mr. Landau is reversed.

Patricia L. Cohen, Judge

Sherri B. Sullivan, P.J., Concurs
Robert G. Dowd, Jr., J., Concurs