

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 2245

PATRICK AND BRENDA O'CONNELL

VERSUS

DALE BRAUD D/B/A DALE'S BUILDERS AND REMODELING

Judgment Rendered: **AUG 10 2011**

Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Suit number 90,266

Honorable Thomas J. Kliebert, Jr., Presiding

M. Brent Hicks
Katherine G. Eckert
Baton Rouge, LA

Counsel for Plaintiffs/Appellees
Patrick and Brenda O'Connell

Barbara Lane Irwin
Timothy E. Pujol
Matthew Pryor
Gonzales, LA

Counsel for Defendant/Appellant
Dale Braud d/b/a Dale's Builders and
Remodeling

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

gms
RHP by gms
SDH by gms

GUIDRY, J.

Dale Braud d/b/a Dale's Builders and Remodeling (Braud) appeals from a trial court judgment awarding Patrick and Brenda O'Connell attorney's fees pursuant to the New Home Warranty Act, La. R.S. 9:3141, et seq. For the reasons that follow, we affirm.

As set forth in O'Connell v. Braud, 10-1885(La. App. 1st Cir. 8/9/11), (unpublished opinion), the O'Connells filed a petition for damages against Braud on August 29, 2008, based on alleged defects in the construction of their home. Following a bench trial, the trial court signed a judgment on May 13, 2010, in favor of the O'Connells in the amount of \$57,214.00, plus attorney's fees to be fixed at a later date. On June 10, 2010, the O'Connells filed a rule to fix attorney's fees. At the July 30, 2010 hearing on the O'Connells' rule, the parties stipulated to attorney's fees in the amount of \$18,000.00. Thereafter, the trial court signed a judgment in conformity with the parties stipulation. Braud now appeals, asserting that the trial court erred in awarding the O'Connells attorney's fees. Specifically, Braud argues that the O'Connells requested attorney's fees only in conjunction with the fraud claim, and because that claim was dismissed by the trial court, they were not entitled to attorney's fees.¹

Attorney's fees, as items of special damages, must be specifically alleged in the petition. See La. C.C.P. art. 861; see also Box v. City of Baton Rouge, 02-0198, p. 5 (La. App. 1st Cir. 1/15/03), 846 So. 2d 13, 16. In their petition for damages, the O'Connells asserted that there were deficiencies in the home, which included, but were not limited to: (1) water penetration into the home on the west side of the home causing damage to the outer beam and cantilever beam, which

¹ Because this court has affirmed the trial court's May 13, 2010 judgment in the companion appeal, and because the parties have otherwise stipulated as to the amount of attorney's fees owed, we restrict our review to whether the trial court erred in finding that the O'Connells were entitled to attorney's fees.

could have been prevented if treated lumber had been used for the beams; (2) beam supporting screened porch and balcony/deck on main floor was rotten and deteriorated, putting the structure in danger of collapse, due to the failure to use treated lumber as required; and (3) beam supporting porch and running across the outer perimeter of the kitchen called for treated lumber, but untreated lumber was used, resulting in total deterioration of that beam and sagging of the porch, which would have led to its collapse. The O'Connells asserted that Braud was liable in fraud for all damages suffered and attorney's fees, and that he was also liable for the deficiencies pursuant to the terms and conditions of the New Home Warranty Act (NHWA). The O'Connells claimed that they incurred actual repair expenses totaling \$97,582.30 as a result of the deficiencies and prayed for judgment in their favor in an amount reasonable under the premises, plus attorney's fees and costs, as well as for all general and equitable relief.

Additionally, the O'Connells requested in the Joint Pre-Trial Order that "Braud be found liable for the damages set forth pursuant to the New Home Warranty Act ... that they be granted attorney's fees and costs pursuant to La. R.S. 9:3149,²]and for all other equitable relief."

From our review of the record, we find that the allegations of the O'Connells' petition, together with those made in the pre-trial order, gave Braud fair notice that the O'Connells were seeking attorney's fees, not only in

² Louisiana Revised Statute 9:3149(A) provides:

If a builder violates this Chapter by failing to perform as required by the warranties provided in this Chapter, any affected owner shall have a cause of action against the builder for actual damages, including attorney fees and court costs, arising out of the violation. The damages with respect to a single defect shall not exceed the reasonable cost of repair or replacement necessary to cure the defect, and damages with respect to all defects in the home shall not exceed the original purchase price of the home.

conjunction with the fraud claim, but also pursuant to the NHWA. Further, because we affirmed the trial court's judgment in favor of the O'Connells on the breach of warranty claim, we find no error in the trial court's judgment awarding the O'Connells attorney's fees pursuant to La. R.S. 9:3149(A).

Therefore, for the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to Dale Braud d/b/a Dale's Builders and Remodeling

AFFIRMED.