IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT IN AND
FOR ST LUCIE COUNTY, FLORIDA.
APPELLATE DIVISION

Circuit Case No. 17-AP-1
Lower Tribunal No. 15-CC-446

ALLSTAR ANIMAL REMOVAL, INC.,

Appellant,

v.

FEDERATED NATIONAL INSURANCE COMPANY,

Appellee.
_____/

Not final until time expires for filing motion for rehearing, and if filed, disposed of.

Decision filed December 19, 2017.

Appeal from the County Court for St. Lucie County; Nirlaine Smartt, Judge.

Gray Proctor, Fox & Loquasto, Orlando, and John Salcedo, The Mineo Salcedo Law Firm, P.A., Davie, for appellant.

Warren Kwavnick, Cooney Trybus Kwavnick Peets, Plc, Fort Lauderdale, for appellee.

PER CURIAM.

Lissette Reyes ("Reyes") owned a home located at 374 SW Kestor Drive in Port St. Lucie, and she insured it through the Appellee ("Federated National"); her name alone was on the property record card and the insurance policy. On January 25, 2014, either she or her fiancé contacted the Appellant ("Allstar") because animal noises were heard in the attic.[1] Allstar inspected the attic and determined that a raccoon had gained entry and caused extensive damage. Allstar wrote up an inspection report, which was signed by Reyes' fiancé, Richard Bernstein[2], as he was the only one present during the inspection ("Bernstein"). Bernstein also signed the "Agreement with Homeowner", which attempted to assign Reyes' post-loss insurance benefits to

[1] The parties disputed who actually contacted and hired Allstar.
[2] Reyes and Bernstein later married on March 29, 2014 (R328).

Allstar; Reyes did not sign it. Allstar alleges that it faxed an estimate for $16,634.00 to Federated National on January 28, 2014, but it could not produce a fax confirmation showing that it went through. On February 26, 2014, Allstar called Federated National, and it was informed that a payment of $9,775.89 was paid to Reyes. Allstar performed the cleanup work for Reyes, and then it demanded payment from her through various phone calls. Eventually on May 5, 2014, it invoiced her for $9,775.89, and she wrote it a check for that amount. On November 5, 2014, Allstar filed a supplemental claim with Federated National for $7,298.11, which was denied.

On February 27, 2015, Allstar filed a complaint for breach of contract based on the assignment signed by Bernstein.[3] Federated National filed a motion for summary judgment, alleging that Allstar did not have a valid assignment of benefits because it was not signed by the insured. In response, Allstar argued that the assignment was valid because Reyes gave Bernstein the actual or apparent authority to execute it. The trial court granted Federated National's motion for summary judgment, finding that Bernstein did not have an ownership interest in the property, was not an insured, did not have actual or apparent authority to sign the assignment, and finally, Federated National never acknowledged the validity of the assignment since it made its payment to Reyes. The order stated that "the authority to sign an assignment of benefits relating to real property on behalf of a property owner should be granted by the property owner to his or her agent in writing pursuant to the Statute of Frauds." Allstar took particular issue with this finding in its motion for rehearing, arguing that the right to insurance proceeds is a chose in action, so the statute of frauds does not apply. Federated National filed a response, and the trial court denied the motion for rehearing.

The standard of review of a trial court's order granting a motion for summary judgment is de novo. *Ergas v. Universal Property and Cas. Ins. Co.*, 114 So. 3d 286, 288 (Fla. 4th DCA 2013) (citing *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla.2000).

The trial court erred when it found that Bernstein did not have the authority to sign the assignment of benefits because the Statute of Frauds required Reyes to grant him that authority in writing. That is an incorrect statement of law, as this transaction did not involve the sale of land or any interest in it.

[3] The complaint identifies Bernstein as "Richard Reyes" repeatedly, but the assignment attached is signed by Bernstein and is the same on found repeatedly throughout the case file. His name is not, and appears to have never been, Richard Reyes (R9-11, 14).

§725.01 states:

> No action shall be brought whereby to charge any executor or administrator upon any special promise to answer or pay any debt or damages out of her or his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person or to charge any person upon any agreement made upon consideration of marriage, or **upon any contract for the sale of lands, tenements or hereditaments, or of any uncertain interest in or concerning them**, or for any lease thereof for a period longer than 1 year, or upon any agreement that is not to be performed within the space of 1 year from the making thereof, or whereby to charge any health care provider upon any guarantee, warranty, or assurance as to the results of any medical, surgical, or diagnostic procedure performed by any physician licensed under chapter 458, osteopathic physician licensed under chapter 459, chiropractic physician licensed under chapter 460, podiatric physician licensed under chapter 461, or dentist licensed under chapter 466, unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized.

(Emphasis added). When the trial court stated in the order granting motion for summary judgement that "the authority to sign an assignment of benefits relating to real property on behalf of a property owner should be granted by the property owner to his or her agent in writing pursuant to the Statute of Frauds", it confused the issue in this case. The assignment of benefits does not relate to real property; it relates to a claim on an insurance policy, which is a chose in action. *One Call Property Services Inc. v. Security First Ins. Co.*, 165 So. 3d 749, 753 (Fla. 4th DCA 2015). A "chose in action" is the "right to bring an action to recover a debt, money, or thing." *Id*. at 756. citing *Black's Law Dictionary* (9th ed. 2009). Consequently, the Statute of Frauds was not applicable, and the trial court applied the wrong law. Therefore, the trial court improperly granted the motion for summary judgment on the basis that the record lacked a writing executed by Reyes giving Bernstein the authority to assign her claim.

Allstar filed a motion for appellate attorney's fees. Appellate attorney's fees can be awarded if authorized by contract or statute. *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 254 (Fla. 2006). Pursuant to Fla. R. App. P. 9.400, a party must specify the statutory, contractual, or substantive basis for an award. *Id*. Allstar cites §627.428(1) as the basis for the award:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

Therefore, as the prevailing party on appeal, we provisionally award Allstar its appellate attorney's fees, if it ultimately prevails before the trial court.

Reversed and remanded.

BUCHANAN, MCNICHOLAS, JJ., and ROBERTS, Acting Circuit Judge, concur.

Copies of above decision
were furnished to the attorneys/parties
of record on the same date
the decision was filed.