Standing and Attorney's Fees in Mortgage Foreclosure and Collections Cases

Matt Bayard Esq.

Legal Services of Greater Miami Inc.

Entitlement to Attorney's Fees

- American Rule: Attorney's fees may only be awarded by a Court when authorized by a contract or statute.
- Fla. Stat. 57.105(7): "If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in *any action*, whether as plaintiff or defendant, *with respect to the contract*."

57.105(7)-cont.

- The purpose of the statute is to, "level the playing field between parties of unequal bargaining power and sophistication". *Port-A-Weld Inc. v. Padula & Wadsworth*, 984 So. 2d 564 (4th DCA 2008).
- "The legislature could have, but did not, limit this reciprocal attorney's fees provision to breach of contract actions. Instead the legislature provided for an award of attorney's fees when a party prevails in any action 'with respect' to the contract . . ." From an unreported Duval County decision.

Standing in Foreclosure Cases

- "Mortgage follows the Note"
- A Promissory Note ("Mortgage Note", "Note") is a negotiable instrument evidencing a debt. It can be transferred by indorsement.
- When indorsed in blank a Note becomes payable to its bearer. See Fla. Stat. 673.3011
- See *BAC Funding Consortium v. Jean-Jacques*, 28 So. 3d 936 (Fla. 2nd DCA 2010); or, about a hundred other cases.
- Fla. Stat. 702.105(4) requires foreclosing Plaintiff to certify possession of the Note at the outset.

Contractual Fees

- Homeowner wins her case!
- Look to the provisions of the mortgage contract.
- Typical Mortgage Provision of Fees: “Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorney’s fees and cost of title evidence”

Circuit Court Split

- Third DCA: *Bank of New York Mellon v. Fitzgerald*, 215 So. 3d 116 (3rd DCA 2017)
- Homeowner prevailed at non-jury trial because there was no evidence of assignment or transfer of the mortgage to Bank. Trial Court awarded $34K to homeowner's attorney in fees.
- Third DCA reversed on fees and found, "In awarding final judgment to Fitzgerald, the trial court determined that no contract *existed between* the Bank and Fitzgerald."
- Because no contract *existed between* the parties, there was no basis to invoke the "compelled mutuality provisions" of 57.105(7).

Circuit Court Split-Cont.

- 5th DCA: *HFC Collection Center Inc. v. Alexander*, 190 So. 3d 1114 (5th DCA 2016)
- Not a foreclosure, a credit card collection case.
- Debt buyer (HFC) failed to prove it was a real party in interest by way of assignment and defendant prevailed.
- However, 5th DCA reversed award of fees finding that Alexander could not employ 57.105(7) after she proved that HFC was never a party to the contract.
- 5th DCA rejected Alexander's argument that HFC should be estopped from taking inconsistent positions regarding its standing during the course of the proceedings.
- However, the Court remanded the proceedings to determine if a basis for fee award existed under 57.105(1) for HFC's baseless claim.
- See also *Bank of New York v. Mestre*, 159 So. 3d 953 (5th DCA 2015) : defendant's signature on mortgage was forged and mortgage was void; no contract *ever* existed and therefor no attorney's fees.

Circuit Court Split-Cont.

- First DCA: *Bank of New York v. Williams*, 979 So. 2d 347 (1st DCA 2008). Bank failed to show it owned mortgage and promissory note. Defendant prevailed and was awarded attorney's fees with a multiplier of 2.5
- Second DCA: *Peters v. Bank of New York Mellon*, 2017 WL 2304263; *Digiovanni v. Deutsche National Trust Co.,* 2017 WL 1277737; *Corrigan v. Bank of America, N.A.,* 189 So. 3d 187; *Stoltz v. Aurora Loan Servs. LLC,* 194 So. 3d 1097. All of these cases involve homeowners who prevailed on standing grounds and were awarded prevailing party attorney's fees.

Fourth DCA: Nationstar v. Glass

- *Nationstar v. Glass*, 219 So. 3d 896 (4th DCA 2017)
- In *Glass*, homeowner asserted four distinct arguments in a Motion to Dismiss a foreclosure case, one of which was lack of standing.
- Trial court dismissed the case without making findings of fact and Nationstar appealed.
- Nationstar later voluntarily dismissed its appeal, at which point Glass's attorney moved for fees.

Glass –cont.

- 4th DCA denied Glass's attorney's entitlement to fees.
- Court found that Glass had prevailed at trial specifically on lack of standing grounds (Glass disputes this finding)
- Court reasoned, "[W]here a party prevails by arguing the plaintiff failed to establish it had the right pursuant to the contract to bring the action, the party cannot simultaneously seek to take advantage of a fee provision of the same contract." Court cited to *Fitzgerald* and *Alexander*.
- Glass appealed the 4th DCA decision to the Florida Supreme Court, which accepted jurisdiction. *Glass v. Nationstar*, 2018 WL 2069328

Glass' Arguments to S. Court

- Glass asserts that she raised 4 distinct grounds to dismiss foreclosure to trial court. The trial court dismissed the case without finding of fact.
- Nationstar appealed, then voluntarily dismissed its appeal. Glass is entitled to attorneys fees pursuant to *Thornber v. City of Walton Beach*, 568 So. 2d 914 (Fla. 1990). Fourth DCA "re-wrote" trial court's ruling to rest solely on standing grounds.
- Litigation Estopple: "If a plaintiff claims standing by filing suit, that plaintiff should not be permitted to disavow the legal status claimed in having filed suit in order to avoid a fees claim." See *MCG Fin. Servs., LLC v. Technogroup, Inc.* 149 So. 3d 118 (Fla. 4th DCA 2014).

Plain language meaning of 57.105(7)

- 57.105(7) applies to "any action . . . with respect to the contract."
- Fourth DCA incorrectly reads the word "party" to mean "party to the contract". The correct meaning under the statute should be "party to the lawsuit" or "party to the litigation." Under this reading Nationstar clearly falls within the ambit of 57.105(7).
- Fourth DCA incorrectly conflates the unenforceability of a contract by a party with the non-existence of a contract.

Policy Argument

- "Not only will [Connecticut's reciprocal fees statute] discourage frivolous suits, but it will place the burden where it belongs-on the party with the poorly thought out complaint or hastily conceived writ." *Bank of New York v. Bell*, 23 A.3d 121 (Conn. Super. Ct. 2011)
- Not allowing defendants to recover attorney's fees will result in a chilling effect on attorneys decisions to represent defendants, even in meritorious cases.
- Without competent legal representation, many Floridians will be denied meaningful access to the courts, and thus meaningful access to justice.
- Denying defendants the right to recover their attorney's fees in these cases defeats the purpose of 57.105(7), which is to provide parity between parties of unequal bargaining power.

Nationstar's Response

- 57.105(7) should be narrowly construed as a derogation of the common law "American Rule"
- The legislative history of 57.105(7) shows that the legislature intended that the statute apply to "parties to a contract", consistent with the 4th DCA's reading.
- The moving party (Glass) bears the full burden of establishing a right to attorney's fees.

Alternative Recovery Theories

- *Madl v. Wells Fargo Bank*, 244 So. 3d 1134
- Foreclosing Plaintiff must prove that it had standing at the outset of the case. *McLean v. JP Morgan Chase*, 79 So. 3d. 170 (4th DCA 2012)
- In *Madl*, plaintiff produced the original promissory note during the course of the litigation, but did not have standing at the time the suit was filed.
- Court found the plaintiff was a party to the mortgage and awarded fees to the defendant.

Alternative Recovery Theories

- Attorney's Fees as Sanctions
- 57.105(1): when a court finds that a losing party's claim was not supported by material facts or would not be supported by application of law to material facts.
- Unless the position is a good faith argument for extension, modification, or reversal of existing law.
- Requires a 21-day "Safe Harbor" period.
- Can be done on the Court's initiative (*HFC v. Alexander*)
- For foreclosure cases remember: Plaintiff must verify allegations in Complaint under penalty of perjury and must certify possession of promissory note.

Alternative Recovery Theories

- Offer of Judgment: Fla. Stat. 768.79 and Fla. R. Civ. P. 1.442
- A party serves a written offer for settlement to an opposing party. If the offer is not accepted by the opposing party and a subsequent judgment obtained by the opposing party is at least 25% less than the offer (or if there is a judgment of no liability) then the offering party can recover fees.
- Fees in this circumstance begin to accrue from the time the offer was served.
- There is a “good faith” requirement for the offer, opinions differ as to whether nominal offers meet the good faith requirement.

Alternative Recovery Theories

- Counterclaims which provide attorney's fees:
- FCCPA-Fla. Sta. 559.72(9): Prohibits any person from threatening to enforce a legal right which that person knows does not exist.
- Attorney's fees are available under 559.77
- FCCPA generally applies to mortgage servicers, however, certain claims may be barred by litigation privilege. *Solis v. Citimortgage*, 699 Fed Appx. 891
- Bona fide error defense is available

Account Stated

- Common Law Cause of Action
- For an Account Stated cause of action to exist, there must be an agreement between the parties that a certain balance is correct and an express or implied promise to pay that balance. *Merrill-Stevens Dry Dock v. Corniche Express*, 400 So 2d 1286 (3rd DCA 1981)
- "The account stated generally arises from the rendition of a statement of transactions between the parties with a failure on the part of the party to whom the account was rendered to object within a reasonable time or an expressed acquiescence in the account rendered." *Rauzin v. Kupper*, 139 So. 2d 432 (3rd DCA 1962)
- Typically, a creditor will attach copies of credit card billing statements to its Complaint.

Bushnell v. Portfolio Recovery Associates LLC

- P sued D for an account stated claim, as opposed to a breach of K claim.
- D raised affirmative defenses and demanded attorney's fees. Eventually P voluntarily dismissed the case.
- D introduced the credit card agreement, which provided for the creditor's recovery of attorney's fees. D moved for fees.
- Trial Court denied D's motion, reasoned that the underlying action was not an action to enforce a contract.

Bushnell v. PRA (Cont.)

- On appeal, Trial Court certified this question to the 2nd DCA: "IS AN ACCOUNT STATED CAUSE OF ACTION TO COLLECT ON AN UNPAID CREDIT CARD ACCOUNT AN ACTION TO ENFORCE A CONTRACT, SUCH THAT THE PREVAILING PARTY IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER § 57.105(7), FLORIDA STATUTES?"
- 2ND DCA rephrased the question as follows: "IS AN ACCOUNT STATED CAUSE OF ACTION TO COLLECT ON AN UNPAID CREDIT CARD ACCOUNT AN ACTION 'WITH RESPECT TO THE CONTRACT' SUCH THAT THE PREVAILING PARTY IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER § 57.105(7), FLORIDA STATUTES (2015)?"

Bushnell v. PRA-2nd DCA

- 2nd DCA reversed trial court and remanded to determine the reasonable amount of attorneys fees. 2018 WL 4374251
- DCA proposed an "inextricable intertwined" test based on Fla. S. Ct. precedent *Caufield v. Cantele,* 873 So 2d 371 (FL. 2002)
- Court considered whether the account stated cause of action could have occurred *absent the existence* of a credit card contract.
- "Simply put, if there had been no credit card contract the amount due would not have accrued in the first place. The credit card contract and the account stated cause of action are therefore inextricably intertwined."
- Court found that the lawsuit was "with respect to" the credit card agreement.

Bushnell v. PRA-Supreme Court?

- PRA has invoked conflict jurisdiction to the Fla. Supreme Court
- PRA argues the 2nd DCA's decision conflicts with Fla. S. Ct. precedent in *Lewis v. Guthartz*, 428 So. 2d 222 (Fla. 1982), a landlord/tenant case.
- PRA also argues that 2nd DCA decision conflicts with other DCA decisions narrowly construing the application of 57.105(7)
- Fla. Supreme Court has not yet determined whether it will exercise conflict jurisdiction of the appeal

The End…For Now