SUPREME COURT OF FLORIDA

CASE NO. SC2020-1509

RICHARD J. DIAZ, and
RICHARD J. DIAZ, P.A.,

Petitioners,

v.

ROBERTO KASINSKY and
LEO BENITEZ,

Respondents.

APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM
THE THIRD DISTRICT COURT OF APPEAL

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Third District Court of Appeal

State of Florida

Opinion filed August 12, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1188
Lower Tribunal No. 09-93740

Richard J. Diaz and Richard J. Diaz, P.A.,
Appellants,

vs.

Roberto Kasinsky,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Miguel de la O, Judge.

Richard J. Diaz, for appellants.

Benitez & Associates and Leo Benitez, for appellee.

Before SALTER, MILLER and LOBREE, JJ.

LOBREE, J.

Richard John Diaz ("Diaz") and Richard J. Diaz, P.A. (the "law firm") seek review of the trial court's order denying rehearing of its prior order denying their

motion for additional attorneys' fees incurred in securing a Moakley[1] sanctions award against Roberto Kasinsky ("Kasinsky") and his counsel, Leo Benitez ("Benitez"). For the reasons articulated below, we affirm.

Facts and Procedural Background

In the underlying lawsuit, Kasinsky sued Diaz and his law firm for alleged failure to render legal representation in a family member's criminal case in Colombia, seeking to recover his retainer. Diaz and his firm defended on the basis that they were hired merely to refer the family member's case to a law firm in Colombia, which, after having been forwarded the fee payment, performed extensive legal services on his behalf, ultimately obtaining a favorable outcome. To defeat summary judgment later in the proceedings, Kasinsky submitted an affidavit of his family member, drafted by Benitez, attesting that the Colombian law firm Diaz allegedly referred his case to did not provide any legal services in his defense. Diaz and his law firm eventually proved that the allegations in the affidavit were false, and the court dismissed the case with prejudice. We affirmed per curiam. Kasinsky v. Diaz, 236 So. 3d 423 (Fla. 3d DCA 2017) (table).

Diaz and his law firm moved for sanctions against both Kasinsky and Benitez pursuant to section 57.105, Florida Statutes, and Moakley. After two evidentiary

[1] Moakley v. Smallwood, 826 So. 2d 221 (Fla. 2002).

hearings, the court awarded Diaz and his law firm attorneys' fees against both Kasinsky and Benitez pursuant to both section 57.105 and Moakley,[2] making findings of bad faith as to both. We again affirmed per curiam. Kasinsky v. Diaz, 280 So. 3d 486 (Fla. 3d DCA 2019) (table).

Diaz and his law firm then moved to recover additional attorneys' fees as compensation for their time incurred in pursuit of the Moakley award, which the trial court had reserved jurisdiction to determine.[3] The court denied the motion, concluding that to award "fees on fees" against Benitez, it would have to find that Benitez also acted in bad faith in defending the Moakley motion itself at the two evidentiary hearings, which it did not find. The court also determined that under its reading of Moakley, it lacked discretion to impose "fees on fees" solely based on the misconduct underlying the Moakley award itself. The court denied the motion for the same reason as to Kasinsky. Following the court's partial denial of a motion for rehearing, this appeal ensued.

[2] The court found Kasinsky knowingly filed the meritless lawsuit and participated in the creation of the false affidavit, and Benitez engaged in inexcusable, willful ignorance as of March 30, 2016.

[3] Here, we consider only the propriety of an award of "fees on fees" as a sanction pursuant to Moakley. In Silver Law Group, P.A. v. Bates, No. 3D19-933, 2020 WL 4495452 (Fla. 3d DCA Aug. 5, 2020) (citing Eisman v. Ross, 664 So. 2d 1128, 1129 (Fla. 3d DCA 1995)), we recognized that section 57.105, Florida Statutes, does not provide a basis for an award of fees for attorneys' time incurred litigating the amount of fees.

Standard of Review

"We review the trial court's ruling on the imposition of sanctions for bad faith conduct for an abuse of discretion." Goldman v. Estate of Goldman, 166 So. 3d 927, 929 (Fla. 3d DCA 2015) (quoting Boca Burger, Inc. v. Forum, 912 So. 2d 561, 573 (Fla. 2005)). To the extent the court's ruling in this respect was based on its interpretation of the law, we review the issue de novo. See Pub. Health Tr. of Miami-Dade Cty. v. Denson, 189 So. 3d 1013, 1014 (Fla. 3d DCA 2016).

Analysis

Diaz and his law firm contend that the trial court had discretion to award them "fees on fees" without their need to establish that the defense of the underlying Moakley motion was also conducted in bad faith, relying on Bennett v. Berges, 50 So. 3d 1154, 1161 (Fla. 4th DCA 2010) ("Because the trial court awarded fees as a sanction against Bennett, it was within its discretion to include 'fees on fees' for the time spent in litigating the amount of fees.").[4] We disagree.

"Florida generally follows the American Rule, under which each side pays its own attorney's fees. Courts can order losing parties to pay victors' fees, though, if

[4] Bates v. Islamorada, 939 So. 2d 171, 172 (Fla. 3d DCA 2006), also relied upon by Diaz, is distinguishable. While the opinion is silent as to the basis for the sanctions affirmed therein, the briefs in that case reveal that the sanctions at issue were levied pursuant to an agreed trial court order that authorized fees as a sanction for noncompliance. See Arnold Lumber Co. v. Harris, 503 So. 2d 925, 927 n.1 (Fla. 1st DCA 1987), for the proposition that a court may take judicial notice of its own files.

there is a contractual or statutory basis for doing so." Azalea Trace, Inc. v. Matos, 249 So. 3d 699, 701 (Fla. 1st DCA 2018) (citing Johnson v. Omega Ins. Co., 200 So. 3d 1207, 1214-15 (Fla. 2016)); Gilbert v. Gilbert, No. 3D19-858, 45 Fla. L. Weekly D1206 (Fla. 3d DCA May 20, 2020). Because fee shifting contracts, statutes or rules are in derogation of the common law, they must be strictly construed. See generally Kuhajda v. Borden Dairy Co. of Ala., LLC., 202 So. 3d 391, 394 (Fla. 2016); Gutierrez v. Royal Caribbean Cruises Ltd., No. 3D19-398, 2020 WL 4495461, at *1 (Fla. 3d DCA Aug. 5, 2020); Fla. Cmty. Bank, N.A. v. Red Rd. Residential, LLC, 197 So. 3d 1112, 1115 (Fla. 3d DCA 2016). Moreover, "[g]enerally, '[i]t is settled that in litigating over attorney'[s] fees, a litigant may claim fees where entitlement is the issue, but may not claim attorney's fees incurred in litigating the amount of attorney's fees.'" Burton Family P'ship v. Luani Plaza, Inc., 276 So. 3d 920, 922 (Fla. 3d DCA 2019) (quoting N. Dade Church of God, Inc. v. JM Statewide, Inc., 851 So. 2d 194, 196 (Fla. 3d DCA 2003)).

Moakley provides that a trial court has inherent authority to impose attorneys' fees against a party or the party's attorney for bad-faith conduct in the course of litigation. 826 So. 2d at 224-25. However, as Kasinsky correctly maintains, this inherent authority is not unlimited. "The inherent authority of the trial court, like the power of contempt, carries with it the obligation of restrained use and due process." Id. at 226-27; see also Wanda I. Rufin, P.A. v. Borga, 294 So. 3d 916, 918

(Fla. 4th DCA 2020) ("such a sanction is appropriate only after notice and an opportunity to be heard").

In Moakley, the court concluded that "the trial court's exercise of the inherent authority to assess attorneys' fees against an attorney must be based upon an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees." Moakley, 826 So. 2d at 227; see also Bitterman v. Bitterman, 714 So. 2d 356, 365 (Fla. 1998) ("The inequitable conduct doctrine permits the award of attorney's fees where one party has exhibited egregious conduct or acted in bad faith."). Further, "the amount of the award of attorneys' fees must be *directly related* to the attorneys' fees and costs that the opposing party has incurred as a result of the specific bad faith conduct." Moakley, 826 So. 2d at 227 (emphasis added); Denson, 189 So. 3d at 1015 (same). Accordingly, we hold that Moakley does not provide an *automatic* entitlement to additional attorneys' fees incurred in securing an underlying sanctions award.

Here, the trial court expressly found it could not justify imposing further sanctions or "fees on fees" against Benitez and Kasinsky based on their defense at

the evidentiary hearing on the sanctions motion.[5] Based on the record before us, this finding was not an abuse of discretion where the defense of the amount of sanctions to be imposed was reasonable. As such, we affirm.

[5] The court noted that the focus of that hearing was on: (a) when Benitez knew or should have known that the underlying litigation was brought in bad faith, and (b) the reasonable amount of fees and costs it should award.

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