IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

PETER A. COLOMBO,

Petitioner,

Case No. SC22-1121

v.

ROBERTSON, ANSCHUTZ & SCHNEID, P.L.,

Respondent.
_____/

AMENDED PETITIONER'S BRIEF ON JURISDICTION

On review from the Fourth District Court of Appeal of the State of Florida

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

RULES

STATEMENT OF THE ISSUES

The first issue is whether it is a violation of the Florida Consumer Protection Practices Act for a bank to send a debt collection letter which seeks payment for a debt which was undisputedly not owed by the borrower. The second issue is whether section 57.105(7), Florida Statutes, permits a party to a contract to recover attorneys' fees incurred in litigation that it lost through involuntary dismissal in a subsequent proceeding.

STATEMENT OF THE CASE AND FACTS

In 2006, Peter Colombo ("borrower") executed a note and mortgage on certain residential real property (A6). In 2008, U.S. Bank's predecessor in interest brought a foreclosure action against the borrower, who retained counsel to defend the case (A6). Ultimately, the trial court dismissed the foreclosure action for lack of prosecution (A6). Thereafter, the court entered an agreed order awarding the borrower $27,500 in prevailing party attorneys' fees (A6). The lender did not seek recovery of any of its attorneys' fees or costs in that action.

Years later, U.S. Bank filed a new foreclosure action against the borrower concerning the same property (A6). After the borrower disputed certain charges in a mortgage loan statement, U.S. Bank's counsel, Robertson, Anschutz & Schneid, P.L. ("RAS"), sent the borrower a Reinstatement Letter setting forth the amounts due to reinstate the loan (A6). That letter represented that part of the amount due, $3,733, was for "attorneys' fees paid to prior counsel in the current action" (A6). It is undisputed that there were no "prior counsel in the current action" (A6). RAS was the only law firm which had represented U.S. Bank in the second foreclosure action and the

amount sought was unrelated to any services rendered "in the current action."

After receiving the Reinstatement Letter, the borrower filed an Answer, Affirmative Defenses, and Counterclaim (subsequently amended) to the second foreclosure action which included a counterclaim against RAS. That counterclaim alleged a violation of the Florida Consumer Protection Practices Act ("FCCPA") based on RAS's false assertion of a debt in the Reinstatement Letter, *i.e.*, "attorneys' fees paid to prior counsel in the current action."

At some point after the borrower's receipt of the Reinstatement Letter, RAS acknowledged the falsity of the debt description but contended that the amount in dispute was actually for the attorneys' fees in the first foreclosure action which U.S. Bank was entitled to recover under the reinstatement provision, paragraph 19, of the mortgage. The borrower responded that recovery of those fees would be improper because they were incurred by the lender in the prior unsuccessful foreclosure action that was involuntarily dismissed for lack of prosecution (A6).

The law firm filed three motions for summary judgment on the FCCPA counterclaim, arguing, *inter alia*, that it was entitled to collect

attorneys' fees from the first foreclosure action despite having had that case dismissed for lack of prosecution (A6).

The trial court granted two of the motions for summary judgment determining that the law firm was entitled to collect attorneys' fees from the first foreclosure action despite its involuntary dismissal and that the borrower lacked standing to bring the FCCPA claim.

The borrower appealed and the Fourth District affirmed, determining that the bank could legitimately recover the attorneys' fees from the first foreclosure action under the reinstatement provision in the mortgage, and therefore the borrower's FCCPA claim failed, as a matter of law, because there was a legitimate debt.[1]

[1] The body of the Fourth District's opinion addresses only the argument regarding whether the bank could recover attorneys' fees incurred in the first foreclosure action, but the court stated in a footnote that since it found no violation of the FCCPA it was also affirming the judgment based on lack of standing (A11, n.3).

SUMMARY OF THE ARGUMENT

The Fourth District's opinion creates decisional conflict with the First District's decision in *Cole v. Echevarria, McCalla, Raymer, Barrett & Frappier*, 965 So.2d 1228 (Fla. 1st DCA 2007) with respect to the nature of a cause of action under section 559.72(9), Florida Statutes. The Fourth District only recognized a cause of action where there is a threat to enforce an illegitimate debt, and ignored the second disjunctive clause of that provision which creates a cause of action when a Reinstatement Letter asserts a legal right which the debt collector knows does not exist. The First District recognized and applied the second clause of subsection (9) in *Cole* and held that the sending of a Reinstatement Letter which asserts rights that the debt collector knew did not exist violates the statute. Thus, the two cases create conflicting law on the elements of a claim brought to pursuant to section 559.72(a).

The Fourth District's opinion also directly conflicts with this Court's decisions in *Ham v. Portfolio Recovery Associates, LLC*, 308 So.3d 942 (Fla. 2020) and *Page v. Deutsche Bank Trust Co. Americas*, 308 So.3d 935 (Fla. 2020), by not properly applying section 57.105(7), Florida Statutes. This Court held in *Ham* and *Page* that

subsection (7) was designed to "level the playing field" by mandating reciprocal rights with regard to prevailing party attorneys' fee provisions in contracts. Here, the Fourth District's decision "unleveled" the playing field by permitting the bank to recover attorneys' fees incurred in prior litigation that it lost through involuntary dismissal, in fact, a dismissal for lack of prosecution. The lender has no such rights under the mortgage or note and thus there is not the reciprocity required by section 57.105(7).

For these two reasons, this Court should accept jurisdiction and review the decision of the Fourth District on the merits.

ARGUMENT

POINT I

THE FOURTH DISTRICT'S DECISION CONFLICTS WITH THE FIRST DISTRICT'S DECISION IN *COLE V. ECHEVARRIA, MCCALLA, RAYMER, BARRETT & FRAPPIER*, 965 SO.2D 1228 (FLA. 1st DCA 2007) WITH RESPECT TO THE FCCPA CAUSE OF ACTION, AND WITH DECISIONS OF THIS COURT AS TO STATUTORY CONSTRUCTION.

The borrower's FCCPA claim was based on section 559.72(9), Florida Statutes, which identifies two potential violations in the disjunctive:

> In collecting consumer debts, no person shall …
>
> (9) Claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, **or assert the existence of some other legal right when such person knows that the right does not exist.** [E.S.]

The Fourth District determined that summary judgment was properly entered against the borrower because the borrower's "debt" for the lender's attorneys' fees from the first foreclosure action was "legitimate" pursuant to paragraph 19 of the mortgage contract. However, that was not the debt or right asserted in the Reinstatement Letter, and the Fourth District ignored the second clause of subsection (9) which makes it a violation to "assert the existence of

some other legal right when such person knows that the right does not exist." Here, in the Reinstatement Letter, RAS asserted U.S. Bank's right to recover "[a]ttorneys' [f]ees paid to prior counsel in the current action" which it knew was false because RAS was the only counsel who had appeared in the current action.

The Fourth District's decision conflicts with *Cole v. Echevarria, McCalla, Raymer, Barrett & Frappier*, 965 So.2d 1228 (Fla. 1st DCA 2007), which also addressed an FCCPA claim arising out of a reinstatement letter in a mortgage foreclosure context. The First District stated that:

> The causes of action for unfair debt collection and unfair trade practices are based on the act of making an unlawful demand in the reinstatement letter, not the ultimate consequence of the letter.

965 So.2d at 1231.

In *Cole* the First District also adopted the language of the trial court which had stated (*Id.*):

> [T]he act of sending the letter seeking to collect the unlawful charge triggers the violation of the FCCPA.

Here, it is undisputed that it was unlawful to assert in the Reinstatement Letter a right to collect fees for "prior counsel in the current action" since no such fees existed. Under *Cole*, as quoted

above, making that false demand in attempting to collect a debt is sufficient in itself for an FCCPA violation.

The Fourth District's opinion conflicts with *Cole*, holding that if the party who made the false assertion in the Reinstatement Letter later admits to the false statement and contends there is a different, but legitimate debt that can be substituted, there is no FCCPA violation. Under *Cole*, it is the sending of the letter containing the false assertion of a right that constitutes the FCCPA violation, so a later "correction" does not immunize that conduct.

The only way to reach the result adopted by the Fourth District is by ignoring the second clause in subsection (9), which makes it a violation to "assert the existence of some other legal right when such person knows that right does not exist."

This analysis also violates the bedrock principle that the statute's text is the most reliable and authoritative expression of the legislature's intent. *See Ham v. Portfolio Recovery Associates, LLC*, 308 So.3d 942, 946 (Fla. 2020).

This conflict is significant because, as noted by Justice Wells in his concurring opinion in *Cole v. Echevarria*, 950 So.2d 380, 387 (Fla. 2007):

> **Recipients of misleading or fraudulent reinstatement letters must be able to enforce Florida's Consumer Collection Practices Act (FCCPA)** and Deceptive and Unfair Trade Practices Act (FDUTPA), the statutory basis of the causes of action pleaded in *Echevarria*, for relief.

One of the reasons for that is that reinstatement letters give deadlines in which borrowers must pay the full amount of the underlying debt and (related charges) in order to reinstate the mortgage (in this case seven days). As a result, including misleading or fraudulent statements regarding charges which constitute part of the required payment severely impacts the debtors' ability to exercise their reinstatement rights. Given the extensive amount of foreclosure litigation in Florida and the number of situations in which such misconduct can occur, this Court should take jurisdiction to clarify this issue to clarify the law and protect the rights of Florida residents.

POINT II

THE FOURTH DISTRICT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS AS TO THE APPLICATION OF §57.105(7), FLORIDA STATUTES.

The Fourth District held that a lender can insist on payment of attorneys' fees expended in losing a prior foreclosure action as a prerequisite to reinstatement, when it inserts a provision into the contract granting it the right to recover "expenses incurred in enforcing this Security Instrument." This result is inconsistent with case law construing and applying section 57.105(7), Florida Statutes and is particularly repugnant where, as here, the prior action was dismissed as a sanction, that is, for lack of prosecution.[2]

In *Ham v. Portfolio Recovery Associates, LLC*, 308 So.3d 942 (Fla. 2020), this Court held that section 57.105(7) applies when:

> (1) [T]he contract includes "a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract," and (2) the other "party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

[2] It is well-settled that an involuntary dismissal pursuant to Fla.R.Civ.Proc. 1.420(e) is a sanction imposed on litigants who allow their cases to stagnate. *Sudduth Realty Co. v. Wright*, 55 So.2d 189 (Fla. 1951); *American Eastern Corp. v. Henry Blanton, Inc.*, 382 So.2d 863, 866 (Fla. 2nd DCA 1980).

See also Page v. Deutsche Bank Trust Co. Americas, 308 So.3d 935 (Fla. 2020).

There is no dispute that those two requirements existed here with respect to the first foreclosure action. In fact, the parties stipulated to the borrower's entitlement to an award of attorneys' fees incurred in that proceeding (A6). The lender did not request attorneys' fees or costs in that proceeding. Thus, application of section 57.105(7) there implemented the legislature's intent "to help level the playing field when a contract contains a unilateral attorneys' fee provision." *Ham*, 308 So.3d at 949.

However, contrary to *Ham*, the Fourth District permitted the lender to "unlevel" the playing field by inserting a provision entitling it to recover at a later time the fees incurred in the losing foreclosure action. The reinstatement provision in paragraph 19 of the mortgage required the borrower to pay, *inter alia*, "all expenses incurred in enforcing this security instrument, including, but not limited to, reasonable attorneys' fees" (A8). This severely tilted the playing field by permitting the lender to recover any amount of fees it claimed were expended in the first action, without any judicial determination of

reasonableness as required in litigation, and even though the first foreclosure action did nothing to "enforce this security instrument." Essentially, the Fourth District's ruling entitled the lender to undermine the effectiveness of section 57.105(7) by altering the mandated reciprocity. This result also eliminated the sanction intended to deter the failure to prosecute claims and effectively encouraged and rewarded the lender's sanctionable misconduct.

As noted in *Castellanos v. Reverse Mortgage Funding, LLC*, 320 So.3d 904, 906 (Fla. 3rd DCA 2021), section 57.105(7) "amends by statute all contracts with prevailing party fee provisions to make them reciprocal." Here, the Fourth District's holding does not make the contractual prevailing party fee provisions reciprocal, but gives the lender rights to recover fees in litigation that the borrower does not have. Moreover, the language from the reinstatement provision relied upon by the Fourth District assumes that the security interest was enforced ("expenses incurred in enforcing this Security Instrument") which requires some degree of success. But more importantly, the Fourth District's decision is inconsistent with the language or intent of the section 57.105(7) by allowing one party to

alter the balance of rights by inserting other non-reciprocal attorneys' fees provisions into the contract.

CONCLUSION

For the reasons discussed above, the Fourth District's decision expressly and directly conflicts with the decisions of this Court and another district court. This Court should accept jurisdiction in order to resolve these conflicts.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY a true copy of the foregoing was furnished to all counsel on the attached service list via the Florida Courts E-Filing Portal on September 29, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.045(e) and 9.210(a)(2)(B), Petitioner hereby certifies that the type size and style of the Jurisdictional Brief of Petitioner is Bookman Old Style 14pt and that the word count is 2,294.

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