Filing # 206696731 E-Filed 09/11/2024 06:04:44 PM

IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D24-1075
L.T. No. 19-35220-CA-01

GENMAN CORP., SANJA CAPITAL, LLC, MASON DIGITAL MARKETING, LLC, RBG PLASTIC, LLC and LINCOLN ROAD CAPITAL, LLC,

Appellants,

v.

RICHARD RINELLA,

Appellee.
_____/

APPELLANTS' INITIAL BRIEF

Weiss Serota Helfman Cole & Bierman, PL
2255 Glades Road
Suite 200E
Boca Raton, FL 33432
Tel. (561) 835-2111

/s/*Howard D. DuBosar*
HOWARD D. DUBOSAR
Fla. Bar No. 729108
hdubosar@wsh-law.com
kdoyle@wsh-law.com
EDWARD G. GUEDES
Fla. Bar No. 768103
eguedes@wsh-law.com

and

Harrison R. DuBosar, P.A.
1680 Michigan Ave.
Suite 819
Miami Beach, FL 33139

/s/*Harrison R. DuBosar*
HARRISON R. DUBOSAR
Fla. Bar No. 1002241
hrd@dubolaw.com

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Rules

INTRODUCTION

This appeal arises out of the trial court's decision to deny Restaurantware Parties'[1] motion for entitlement to attorney's fees and costs sought in connection with Rinella's[2] voluntary withdrawal (and therefore dismissal) of two motions to vacate an arbitration award. The trial court erred when it failed to approve the Restaurantware Parties' claim for fees pursuant to an applicable prevailing party attorneys' fees clause, and focused solely on the fact that the motions to vacate were voluntarily withdrawn when Rinella was faced with a safe harbor letter and separate motion for sanctions pursuant to section 57.105, Florida Statutes. This Court should reverse and remand for further proceedings.

I. STATEMENT OF CASE AND FACTS

A. Nature of the Case

---

1 "Restaurantware Parties" collectively refers to Appellants, Genman Corp., Sanja Capital, LLC, Mason Digital Marketing, LLC, RBG Plastic, LLC and Lincoln Road Capital, LLC.

2 "Rinella" refers to Appellee Richard Rinella.

Although the record on appeal is voluminous,[3] the documents pertaining to this appeal are somewhat limited. This appeal arises out of a post-settlement valuation arbitration between the Restaurantware Parties and Rinella, Rinella's motions to vacate the arbitration award at issue, and the trial court's order denying Restaurantware Parties' entitlement to attorney's fees and costs. R. 6815-6817. Without delving too much into the protracted history of litigation among the parties, the following summarizes the factual background surrounding this appeal.

Since 2019, the parties were engaged in significant litigation resulting in the filing of seven different lawsuits in Miami-Dade County, Florida and Cook County, Illinois. R. 6392. At that time, certain parties were members of two entities, RBG Plastic, LLC and Lincoln Road Capital LLC, which comprise the business known as "Restaurantware." R. 6932. When litigation commenced, Restaurantware's membership consisted of Appellant Genman Corp. (46%), Appellant Sanja Capital, LLC (5%), Appellant Mason Digital Marketing, LLC (3%), and Appellee Richard Rinella (46%). R. 6932.

---

[3] The Record was transmitted in two parts, one containing the publicly available documents, and the other containing the sealed filings.

In order to resolve the many lawsuits, on July 23, 2021, those parties as well as related entities, entered into a 54-item Term Sheet (the "Term Sheet"). R. 6932; 9621-28. The Term Sheet was intended to form the foundation for a more comprehensive settlement agreement. R. 6392-93. The parties later entered into that final and more comprehensive Confidential Settlement Agreement dated January 19, 2022 (the "Settlement Agreement"). R. 9637-9798. Central to the parties' agreement was that the company would purchase Rinella's membership interests, with the value to be determined at arbitration. R. 6393; 9640-43.

Following an extensive audit and expert discovery, the parties attended the arbitration on May 15, 2023. R. 6398. The arbitrators unanimously selected the proposed valuation submitted by the Restaurantware Parties. R. 6398. The Settlement Agreement provided a strict procedure for challenging the arbitration award, as follows:

> **Finality of Arbitration.** The Arbitrators shall issue an award within 10 days after the conclusion of the Arbitration. The Parties agree that the arbitration decision is binding and only subject to challenge on grounds set forth in § 682.13, Fla. Stat., or a determination that the party engaged in improper ex parte prejudicial communications with an arbitrator prior to or during the arbitration proceedings and is otherwise non-appealable.

R. 9642. The Settlement Agreement is devoid of an obligation to seek confirmation of the award. The Settlement Agreement at section 20(k) also provides for prevailing party attorney's fees:

> **Attorney's Fees.** Each party will bear their own attorney's fees and costs through the execution of this document. In the event of litigation or proceedings arising out of or in connection with this Agreement, the prevailing party will be entitled to an award of its reasonable attorney's fees and costs, including for proceedings regarding entitlement and amount of fees.

R. 10647.

B. Course of the Proceedings

On July 17, 2023, Rinella filed his first motion to vacate the award, in which he sought vacatur on a variety of grounds. R. 9591-9614. As a part of this initial motion, Rinella stated that it was a mere "placeholder" motion, and despite stating in his motions to vacate that he knew his claims to be true, that he would require discovery to support his position. R. 9606 ("Therefore, this motion is essentially a placeholder while [Rinella] requests that the Court enter an order permitting [Rinella] to take limited discovery…."). The Restaurantware Parties timely responded to the motion to vacate. R. 6390-6416. Having the benefit of the response, Rinella filed a

subsequent motion to vacate adding new grounds. R. 10787-11749. In the motions to vacate, Rinella claimed that (1) an arbitrator was evidently partial as he worked 20 years prior at the same firm as Restaurantware Parties' expert, (2) Restaurantware Parties engaged in fraud by concealing a presentation by a sales company (despite having been provided with a copy in discovery), (3) the arbitrators engaged in misconduct by refusing to vary the terms of the Settlement Agreement and change the contractually agreed upon valuation date by an entire year so that Rinella could benefit from the year that Restaurantware operated without him, (4) the arbitrators exceeded their authority by allowing the arbitration to go forward on the date that it did, and (5) one customer agreed to increase its business with the Restaurantware Parties and this should have been factored into their expert's report on valuation. R. 6390-6416; 10787-11749. The Restaurantware Parties moved to strike Rinella's second motion contending it was untimely and violated section 682.13, Florida Statutes. R. 6442-6537. That second motion to vacate, filed more than ninety days following entry of the arbitration award, parroted the prior arguments for vacatur, and added a new one. R. 10787-11749.

The parties agreed it would be proper to have a status conference and hearing to determine the preliminary need for discovery on the motions to vacate. R. 6429-47. There, the Restaurantware Parties argued that not only was there no need for discovery for a variety of reasons, but that the motions to vacate did not even state a prima facie case for vacatur. R. 6781-6806. The trial court agreed, and authored a significant order denying the request to take discovery. R. 6746-64. Of note, on November 2, 2023, the trial court ordered as follows:

> On October 20, 2023, this Court heard arguments from counsel on whether Defendant should be entitled to take discovery on his Motion and Supplemental Motion. After considering arguments of counsel, as well as a review of the Motions and the Response filed by the [Restaurantware Parties], this Court denies Defendant's preliminary request to take discovery for the reasons set forth herein.

R. 6747.

> Here, the only factual basis alleged to support the assertion of evident partiality is that because (Restaurantware Parties' Expert) Dayal and Arbitrator Perez were both employed by MBAF for a period of two overlapping years almost twenty years ago, Arbitrator Perez was evidently partial to the point that the Award should be vacated. **Not only are there no allegations of fact that establish partiality, such a position is not supported by long standing precedent.** This association from almost two decades ago, absent any additional

> allegations, certainly does not give rise to the level of direct, definite and capable demonstration of clear partiality that is required. Moreover, it does not even show the potential for bias (which would not even be a ground to vacate).

R. 6751 (emphasis supplied).

> Had Defendant conducted the most basic due diligence on Arbitrator Perez, he would have been readily apprised of the fact that the expert and the arbitrator worked at the same firm many years ago. Burying his head in the sand, and then attempting to inject this as an issue post Awards is not legally permissible.

R. 6753.

> One would think that any prudent litigant would look up a potential arbitrator's bio before agreeing to use him.

R. 6754.

> As a preliminary matter, this claim (as to the sales pitch at issue) does not even rise to the heightened level of showing fraud as required. As stated in [Rinella's] own Motion, the Presentation was provided to [Rinella] before the final hearing. [Rinella] had the opportunity to depose [Restaurantware Parties' expert] prior to the final hearing, where he could have asked questions about the Presentation. He chose not to. Then, [Rinella] had the opportunity to cross examine Mr. Dayal at the final hearing, which he did. The Arbitrators then were able to weigh all arguments and lines of questioning, as well as the evidence (and specifically the Presentation). **Based on the Motion, there does not appear to have been any fraud in that regard.**

R. 6755 (emphasis supplied).

> Lastly, discovery is not necessary based on [Rinella]'s own words in his Motion that he "now has confirmation that this testimony was false." Motion at p. 22. **Inasmuch as he believes to have confirmation, the substance of which is not contained in the Motion**, he evidently does not need to take discovery. Moreover, although [Rinella] states in his Motion that this information was "not available to [him] on the date of arbitration," Motion at p. 22, clearly the presentation had been produced to him before the final hearing, yet he chose not to take [Restaurantware Parties' expert's] deposition and ask him questions regarding the document.

R. 6756 (emphasis supplied).

> The arbitrators correctly concluded that the request to rewrite the parties' agreement (as to moving the date of valuation) was beyond the scope of their authority. The arbitrators, much like this Court, cannot alter the terms of the Parties' Agreement. . . . Based on long standing precedent, the arbitrators had absolutely no authority or legal ability to grant the requested change in valuation date.

R. 6757.

> As a preliminary matter, the Parties' Agreement contemplated that while it was aspirational to arbitrate in April of 2022, there was always the potential it could not happen. See Agreement at §5 (the "Arbitration will occur in or around April of 2022 (***or as soon as otherwise possible...***.") . . . Moreover, the Settlement Agreement did not provide an outer limit for the date upon which the arbitration was required to take place.

R. 6758 (emphasis in original).

> Moreover, the arbitrators were certainly within their authority and scope (along with [Rinella's] actual

> cooperation) to alter or not alter the schedule for proceeding to a final hearing. Given [Rinella's] failure to object to the final hearing going forward, there is no reason to permit discovery on this topic.

R. 6760.

> [Rinella] had over two years to gather information related to the valuation, including interviews of Restaurantware's customers. As stated at the hearing, [Restaurantware Parties'] expert did just that. [Rinella's] expert did not. Now, much like the Presentation, [Rinella] is attempting to have yet another bite at the apple. Nonetheless, he may not. Arbitration is meant to give finality to the parties, and not serve as a precondition to litigation.

R. 6760.

Following entry of the order denying discovery, the Restaurantware Parties served Rinella and his counsel with a safe harbor notice and accompanying motion for sanctions pursuant to section 57.105, Florida Statutes. R. 11766-92. Conspicuously, neither the letter nor the motion mentioned the Settlement Agreement or fee provision therein or indicate that any contractual rights were being waived or abandoned. *Id.* On the twentieth day of the safe harbor period, Rinella filed a notice of voluntary withdrawal, effectively dismissing his motions to vacate. R. 11863-64. Thereafter, the Restaurantware Parties filed a motion for prevailing party attorney's fees, seeking the award of fees and costs based on section

20(k) of the Settlement Agreement. R. 6735-66. Rinella argued in opposition, that amongst other reasons, the motion for fees should be denied because he withdrew his motions to vacate the award within the 21-day safe harbor period. R. 11750-11872. The Restaurantware Parties argued in response that they were nonetheless entitled to fees from Rinella under a separate and independent prevailing party fee clause as agreed to and contracted for in the Settlement Agreement. R. 6735-66.

C. Disposition in the Lower Tribunal

The trial court expressed "reluctance" and denied the motion for fees because of general uneasiness due to the voluntary dismissal of the motions to vacate:

> [T]he Court finds that the [Rinella's] withdrawal of [his] Motion to Vacate Arbitration Award and Supplemental Motion to Vacate the Arbitration Award pursuant to a safe harbor notice sent under Section 57.105, Florida Statutes, is not tantamount to a voluntary dismissal of claims or the case such that [the Restaurantware Parties] should be deemed prevailing party . . . Moreover, **while there may be an arguable reading of the prevailing party provision in the parties' Settlement Agreement that may be triggered whereby a motion related to the arbitration was filed**, **the court is extremely reluctant to find that prevailing party fee provision enforceable where a litigant has withdrawn the subject Motions pursuant to a safe harbor notice sent under Section 57.105, Florida Statutes, and to treat the withdrawal of the**

> **Motions as a determination on the merits or [the Restaurantware Parties] as the prevailing party in this case.**

R. 6810-11 (emphasis supplied). This appeal timely ensued.

II. SUMMARY OF THE ARGUMENT

This Court should reverse and remand the decision of the trial court denying entitlement to an award of attorneys' fees and costs incurred in connection with the proceedings that followed arbitration. The Settlement Agreement explicitly provided for the award of attorney's fees for a proceeding arising out of or in connection with the Settlement Agreement, for events (other than the actual arbitration) arising after its execution. R. 10647. A motion or petition to vacate an arbitration award is by its very nature an "initial pleading" in a new proceeding, and the motions to vacate filed by the Rinella created a new "proceeding[ ] [that arose] out of or in connection with" the Settlement Agreement.

After receiving a significantly adverse order on discovery related to the motions to vacate, which made preliminary findings as to their merits, and when later faced with a motion for sanctions pursuant to section 57.105, Florida Statutes, asserted against he **and his counsel**, Rinella withdrew his motions to vacate. Such a withdrawal

is tantamount to a voluntary dismissal with prejudice, and Rinella can never move to vacate on the pled bases again. This brought finality to the post-arbitration proceeding, and Restaurantware Parties should be deemed nothing less than the prevailing party.

As a result, Restaurantware Parties are entitled to prevailing party attorneys' fees and costs pursuant to the Settlement Agreement. The fact that Rinella withdrew his motions to vacate when faced with the prospect of sanctions to himself and his counsel is of no consequence, because there was a separate and independent basis to award the Restaurantware Parties their attorneys' fees payable by Rinella (as opposed to his counsel). To refuse to award fees and costs on this basis renders the contracted for prevailing party attorneys' fees clause meaningless. Moreover, it casts a chilling shadow on serving a safe harbor letter pursuant to 57.105 or practically forecloses their use whenever a separate contractual basis for recovery of fees exists. The trial court's decision on entitlement should be reversed and the matter remanded for an award of fees against Rinella.

III. ARGUMENT

A. Standard of Review.

An order denying entitlement to attorney's fees such as the instant one is reviewed *de novo*. *Bank of N.Y. Melon Tr. Co., N.A. v. Fitzgerald*, 215 So. 3d 116, 118 (Fla. 3d DCA 2017) (stating "we review de novo a trial court's final judgment determining entitlement to attorney's fees based on a fee provision in the mortgage and the application of section 57.105(7)"). *See also Global Xtreme, Inc. v. Advanced Aircraft Ctr., Inc.,* 122 So. 3d 487, 490 (Fla. 3d DCA 2013) ("W]hen the issue is entitlement to fees based on the interpretation of a statute, however, the standard of review is *de novo*."); *Venezia v. JP Morgan Mortgage Acquisition Corp.* 279 So. 3d 145, 146 (Fla. 4th DCA 2019).

B. The Trial Court Erred When it Refused to Award Entitlement to Fees and Costs Pursuant to the Clear and Unambiguous Terms of the Settlement Agreement.

Section 20(k) of the Settlement Agreement confers, in no uncertain terms, the award of attorney's fees and costs to a party who prevails, as follows:

> **Attorney's Fees.** Each party will bear their own attorney's fees and costs through the execution of this document. In the event of **litigation or proceedings arising out of or in connection with this Agreement**, the prevailing party will be entitled to an award of its

> reasonable attorney's fees and costs, including for proceedings regarding entitlement and amount of fees.

R. 10647 (emphasis added).

Given the plain language of the provision, it should be construed in accordance with the principles of basic contractual interpretation.[4] "It is, of course, well settled that '[w]hen interpreting a contract, the court must first examine the plain language of the contract for evidence of the parties' intent.'" *Famiglio v. Famiglio*, 279 So. 3d 736, 740 (Fla. 2d DCA 2019) (quoting *Heiny v. Heiny*, 113 So. 3d 897, 900 (Fla. 2d DCA 2013)). Where a contractual provision is clear, a trial court "may not indulge in construction or modification and the express terms of the settlement agreement control." *Commercial Capital Resources, LLC v. Giovannetti*, 955 So. 2d 1151, 1153 (Fla. 3d DCA 2007) (quoting *Sec. Ins. Co. of Hartford v. Puig*, 728 So. 2d 292, 294 (Fla. 3d DCA 1999)). "Courts, without dispute, are not authorized to rewrite clear and unambiguous contracts." *Andersen Windows, Inc. v. Hochberg*, 997 So. 2d 1212, 1214 (Fla. 3d DCA 2008) (internal citation omitted).

---

[4] Settlement agreements are contracts, and are therefore interpreted and governed by contract law. *Cadie Co. v. Schecter*, 602 So. 2d 984, 985 (Fla. 3d DCA 1992); *Barone v. Rogers*, 930 So. 2d 761, 763-64 (Fla. 4th DCA 2006).

"The court should reach a contract interpretation consistent with reason, probability, and the practical aspect of the transaction between the parties." *Whitley v. Royal Trails Prop. Owner's Ass'n*, 910 So. 2d 381, 383 (Fla. 5th DCA 2005); *see also Publix Super Markets, Inc. v. Wilder Corp. of Del.*, 876 So. 2d 652, 654 (Fla. 2d DCA 2004) (holding that courts must construe contracts in such a way as to give reasonable meaning to all provisions); *Seabreeze Rest., Inc. v. Paumgardhen*, 639 So. 2d 69, 71 (Fla. 2d DCA 1994) ("An interpretation of a contract which gives a reasonable, lawful and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect.").

The fees provision located at section 20(k) of the Settlement Agreement is clear and unambiguous. There can be no question of interpretation, and the language undoubtedly provides for the award of attorney's fees to a party who prevails "[i]n the event of litigation or proceedings arising out of or in connection with this Agreement." R. 10647. Rinella's motions to vacate were, indeed, new litigation, or at the very least, a new proceeding arising out of or in connection with the Settlement Agreement. A motion to vacate an arbitration award is indeed an "initial pleading." *Bonar v. Dean Witter Reynolds,*

Inc., 835 F.2d 1378, 1382 (11th Cir.1988) ("[A]lthough not technically called a 'motion,' the papers filed by a party seeking to confirm or vacate an arbitration awards function as the initial pleadings in post-arbitration proceedings in the district court."); *See also Gidding v. Fitz*, No. 17-CV-01334-RM-NYW, 2018 WL 11000689, at *2 n, 2 (D. Colo. Apr. 16, 2018) (construing a motion to confirm an arbitration award "as substantially equivalent to a complaint") (citing *Bonar*, 835 F. 2d at 1382). As fully discussed in section III.D., *infra*, Restaurantware Parties were indeed the prevailing party in the new litigation or proceeding commenced by the motions to vacate. As discussed below, Rinella would never be able to re-file his motions to vacate given the strict time limitations of section 682.13, Fla. Stat. Finality was reached, and Rinella's voluntary withdrawal of his motions to vacate amounted to a dismissal with prejudice. Given the clear and unambiguous fees provision in the Settlement Agreement, Restaurantware Parties are entitled to an award of their reasonable fees and costs incurred in connection with the motions to vacate.

C. The Trial Court was Incorrect to Rely on Withdrawal of the Motions to Vacate as a Bar to Recovery of Fees and Costs Premised on an Independent Right to Recover Granted by the Settlement Agreement.

Rather than adhering to the clear and unambiguous terms of the Settlement Agreement, the trial court incorrectly relied on the withdrawal of the motions to vacate in the face of a threatened sanctions motion as an absolute bar to recovery.

1. The purpose of section 57.105.

Section 57.105(1) provides in whole the following:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.

§ 57.105(1)(a), (1)(b), Fla. Stat.

"Generally speaking, section 57.105 provides the basis for sanctions against parties **and counsel** who assert frivolous claims or defenses or pursue litigation for the purpose of unreasonable delay." *Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 944 (Fla. 2011). Section 57.105 thus authorizes as a sanction "an attorney's fees award to the

prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party." *Muckenfuss v. Deltona Corp.*, 508 So. 2d 340, 341 (Fla. 1987) (internal quotation omitted). Counsel for a party is under an obligation to, at the very least, "make an objectionably reasonable investigation of the purported facts supporting a claim." *AT&T Mobility, LLC v. Rigney*, 388 So. 3d 72, 84 (Fla. 3d DCA 2023) (*quoting Yang Enters., Inc. v. Georgalis*, 988 So. 2d 1180, 1185 (Fla. 1st DCA 2008)). Where counsel does not act in good faith in this respect, counsel is subject to sanctions independently of or together with its client. *See Tobin v. Bursch*, 977 So. 2d 745, 746 (Fla. 3d DCA 2008).

Section 57.105(1) is primarily focused on whether the party's "counsel knew or should have known that the claim or defense was not supported by the facts or an application of existing law." *Mark W. Rickard, P.A. v. Nature's Sleep Factory Direct, LLC*, 261 So. 3d 567, 569 (Fla. 4th DCA 2018) (quoting *Asinmaz v. Semrau*, 42 So. 3d 955, 957 (Fla. 4th DCA 2010)). Indeed, this statute is often used to sanction solely the attorneys for advancing frivolous claims on their client's behalf. *See, e.g., Wells v. Halmac Dev., Inc.*, 189 So. 3d 1015,

1021 (Fla. 3d DCA 2016) ("The fee award shall be taxed solely against counsel representing Castro at that time."); *See also Davis v. Ballynson*, 268 So. 3d 762 (Fla. 4th DCA 2019) ("We, as well as our sister courts, have consistently held that under 57.105(1)(b), *only* a party's attorney may be ordered to pay attorney's fees under section 57.105(3)(c)."") (emphasis in original); *Fla. Houndsmen Ass'n v. State*, 134 So. 3d 999, 1001 (Fla.1t DCA 2012) ("Because our decision is based on the lack of legal, rather than factual, merit, only appellants' attorneys shall be responsible for paying this award.").

2. A statutorily imposed sanction is evaluated separately and independently from a contractual right to prevailing party fees and costs.

Here, the contractual entitlement to attorneys' fees is a right that is separate and distinct from the potential ability to recover fees pursuant to section 57.105. It is evaluated separately from the statutory standards, while the statute is applied in a manner that affects not only the client, but his counsel. The purpose of a contractual right to attorney's fees is "to protect and indemnify the interests of the parties, not to enrich the prevailing party." *Lashkajani v. Lashkajani*, 911 So. 2d 1154, 1158 (Fla. 2005). In line with that purpose, contractual rights to fees are intended to make the

prevailing party whole through reimbursement of litigation expenses. *Cheek v. McGowan Elec. Supply Co.*, 511 So. 2d 977, 979 (Fla. 1987).

Although not implicating section 57.105, *Tierra Holdings, Ltd. v. Mercantile Bank* aids predominantly in this Court's analysis. 78 So. 3d 558 (Fla. 1st DCA 2011). There, the First District evaluated a trial court's denial of contractual attorney's fees where the non-prevailing party served an appropriate proposal for settlement pursuant to section 768.79, Florida Statutes. *Id.* at 560. In that case, the defendant was sued for breach of contract. *Id.* In the course of the proceedings, the defendant served a proposal for settlement on the plaintiff. *Id.* The plaintiff prevailed in litigation; however, following a appeal, the threshold amount of the final judgment did not surpass the amount required to trigger section 768.79. *Id.* at 561-61. The trial court then held a hearing on entitlement to fees and costs, where the "[plaintiff] conceded that the [defendant] was entitled to recover some fees and costs under section 768.79, and [defendant] conceded that [plaintiff] was the prevailing party in regard to the breach of contract claim." *Id.* The *plaintiff*, however, sought fees through the finality of the litigation, and beyond the cut-off date provided for in section 768.79. *Id.* The trial court rejected the defendant's argument that the

cut-off date for fees created by service of the proposal for settlement precluded the award of plaintiff's fees through finality. *Id.* The First District reversed the trial court's decision, held that the contractual right to prevailing party fees too had to be enforced, and reasoned as follows:

> In the case before us, nothing in the language of the contract limited a prevailing party's entitlement to an award of fees based upon the opposing party's offer to settle. Further, nothing in the language of section 768.79 authorizes the modification of a contractual right to attorney's fees. Reading an implicit cut-off into the offer of judgment statute, as advocated by Tierra, would deny Mercantile complete reimbursement for its litigation expenses and, thus, the contractual indemnification for which the parties bargained. Such a reading would also be contrary to the rules of construction set forth by the Florida Supreme Court.

Id. at 563 (internal citation omitted). Much like the statute on proposals for settlement, section 57.105 also does not authorize the modification of a contractual right to attorney's fees.

The First District went as far as to make the following distinction that is highly applicable to this appeal: "***a contractual attorney's fee provision does not implicate the same policy concerns as a statutory fee provision.***" *Id.* at 565 (citing *Fixel Enterprises, Inc. v. Theis*, 507 So. 2d 697 (Fla. 1st DCA 1987))

(emphasis supplied). This distinction between contractual versus statutory rights to fees is the precise reason why the trial court in this case should have evaluated the request for fees under the Settlement Agreement independent from the potential for the award of sanctions pursuant to section 57.105.

Although not directly on point, the Fourth District's decision in *Indemnity Ins. Co. of North Am. V. Chambers*, 732 So. 2d 1141, 1142-43 (Fla. 4th DCA 1999), also provides some guidance. There, the trial court entered both a prevailing party fee award and a fee award under Fla. R. Civ. P. 1.420 upon the entry of voluntary dismissal. *Id.* at 1142. The Fourth District reversed the fee award in part, and held that the two avenues to recover fees (rule and contract) stood separate and apart. The reason for reversal in part was that the language of the prevailing party fee clause at issue did not confer fees, *carte blanche*, and that only fees in certain circumstances were awardable. *Id.* at 1143. While the Fourth District affirmed the fee award pursuant to Florida Rule of Civil Procedure 1.420 on a separate basis, it drew a clear distinction between separate avenues to recover fees, and held that while one ground for fees may not be

applicable, a separate and independent one very well might. That is the case here.

D. Rinella's Voluntary Withdrawal of the Motions to Vacate was Tantamount to a Dismissal With Prejudice.

Pertinent to this appeal, the parties agreed to the finality of arbitration, as follows:

> **5(i). Finality of Arbitration.** The Arbitrators shall issue an award within 10 days after the conclusion of the Arbitration. The Parties agree that the arbitration decision is binding and only subject to challenge on grounds set forth in § 682.13, Fla. Stat. or a determination that the party engaged in improper ex parte prejudicial communications with an arbitrator prior to or during the arbitration proceedings and is otherwise non-appealable.

R. 9642. Notably, the Agreement did not require the prevailing party at arbitration to seek judicial confirmation. Although not significant, despite Rinella's statements to the contrary below, the statutes governing arbitration awards do not require such confirmation. *See* § 682.12, Fla. Stat. ("After a party to an arbitration proceeding receives notice of an award, the party *may* make a motion to the court for an order confirming the award at which time the court shall issue a confirming order." (emphasis added)). Given the language of the Settlement Agreement with regard to seeking vacatur, and the absence of any requirement to move to confirm an arbitration award,

there was no need to seek confirmation of the arbitration decision. The facts at hand do not present a situation where the decision required confirmation. Instead, a decision on *valuation* occurred so that the purchase price of Rinella's membership interests could be established.

It is well settled in Florida that "[a] very high degree of conclusiveness attaches to an arbitration award." *Deen v. Oster*, 814 So. 2d 1065, 1068 (Fla. 4th DCA 2001) (internal citations omitted). This is because without such conclusiveness, parties would be deprived of "perhaps arbitration's ultimate benefit of finality." *Visiting Nurse Ass'n of Fla., Inc. v. Jupiter Med. Ctr., Inc.*, 154 So. 3d 1115, 1136 (Fla. 2014). Florida law is clear that a motion to vacate, modify or correct an arbitration award of *damages* must be made within ninety days after the award is issued. § 682.13(2), Fla. Sta.; *see also Meade v. Lumbermens Mut. Cas. Co.*, 423 So. 2d 908, 910 (Fla. 1982) (requiring that a motion to vacate issues heard by arbitration must be filed within ninety days of the arbitration award); *Keyes Co. v. Spencer*, 16 So. 3d 213, 214 (Fla. 4th DCA 2009) (a party who seeks to modify an arbitration award must do so within ninety days of that award, otherwise that party forfeits the right to do so);

SEIU Fla. Public Servs. Union, CTW, CLC (FPSU) v. City of Boynton Beach, 89 So. 3d 960, 961 (Fla. 4th DCA 2012) (section 682.13, Fla. Stat.'s ninety day time limitation is "mandatory"). The only exception to this hard and fast 90- day rule is the discovery of fraud following entry of an arbitration award. *Haskell v. Forest Land and Timber Co.*, 408 So. 2d 811, n. 1 (Fla. 1st DCA 1982); § 682.13(2), Fla. Stat. As such, absent later found fraud, this hard and fast deadline signifies that a voluntarily withdrawn motion to vacate that is not re-filed prior to the expiration of the 90- day period concludes the proceedings with finality.

In Florida, a voluntary dismissal with prejudice operates as a final adjudication on the merits. *MBlock Investors, LLC v. Bovis Lend Lease, Inc.*, 274 So. 3d 504, 507 n. 4 (Fla. 3d DCA 2019) ("As a general rule, a voluntary dismissal with prejudice operates as an adjudication on the merits, barring a subsequent action on the same claim.") (*Quoting W & W Lumber of Palm Beach, Inc. v. Town & Country Builders, Inc.*, 35 So. 3d 79, 83 (Fla. 4th DCA 2010)). The scenario at hand is analogous to a case where a party takes a voluntary dismissal with prejudice. Rinella's motions to vacate commenced a new proceeding, and his withdrawal terminated that same new

proceeding in the identical way that a voluntary dismissal with prejudice would terminate a lawsuit. Accordingly, the voluntary withdrawal of the motions to vacate, which can only be taken with prejudice given the strict temporal requirements of section 682.13, Florida Statutes, operated as an adjudication on the merits. *Id.*

In further analysis of the exact procedural posture at hand, the Restaurantware Parties have conducted extensive research on the issue of finality for purposes of seeking fees pursuant to a contractual prevailing party fees clause where a party voluntarily withdraws a motion to vacate an arbitration award. Although the search did not yield any substantive Florida caselaw directly on point, other jurisdictions support the notion that where a party voluntarily withdraws a motion to vacate an arbitration award, the matter is final.

For example, the Court of Appeals (Division II) for the state of Arkansas has evaluated whether a motion to vacate was resolved to finality where a movant voluntarily withdrew its motion to vacate an arbitration award. *Unifirst Corp. v. Ludwig Properties, Inc.*, 2015 Ark. App. 694 (2015). The Court of Appeals of Arkansas held that the trial court did not abuse its discretion when it ordered a corporation to

pay attorney's fees after the corporation withdrew its motion to vacate an arbitration award. *Id.* at 855 ("[B]ecause appellant argues that its claim was voluntarily dismissed under Rule 41(a), it contends that appellee cannot be awarded attorney's fees. This argument is, however, without merit.").

There, after the arbitrator awarded an individual $6,000 in attorney's fees and costs pursuant to the parties' contract, the corporation filed a motion to vacate the arbitration award, alleging that the arbitration award should have been vacated because the arbitrator and one of the attorneys had attended law school together and failed to disclose that fact; the arbitrator showed partiality to that same party; and the arbitrator manifestly disregarded the law; and the award was procured by corruption, fraud, or other undue means. *Id.* at 853. The individual, in turn, responded to the motion by asserting that the corporation failed to comply with the arbitration award and that he should be awarded additional attorney's fees and costs for the instant action. *Id.* The individual then filed a motion for attorney's fees and costs in anticipation of the corporation withdrawing its motion to vacate the arbitration award. *Id.* at 854. The corporation did not withdraw its motion; instead, it filed a motion

to voluntarily dismiss its motion to vacate the arbitration award. *Id.* The corporation then contended that the individual was not entitled to attorney's fees because the corporation voluntarily dismissed the motion to vacate under Arkansas rules of civil procedure. *Id.*

At a hearing, the trial court awarded the individual additional attorney's fees as a prevailing party. *Id.* On appeal, the appellate court affirmed the trial court's decision, determining that the trial court had authority to award attorney's as the individual was the "***prevailing party after the circuit court registered and confirmed the arbitration award after a contested [motion to vacate the arbitration award] proceeding, regardless of the fact that [the corporation]'s motion to vacate the arbitration award was voluntarily dismissed***." *Id.* at 856 (emphasis supplied). Accordingly, finality was rendered on the motion to vacate in light of the voluntary dismissal (tantamount to voluntary withdrawal), and fees were awardable based on the applicable fee clause.

Next, in *Gen. Elec. Co. v. Anson Stamping Co., Inc.*, the Western District of Kentucky was faced with determining whether an arbitration award was deemed confirmed following the dismissal of a motion to vacate. 426 F. Supp. 2d 579, 581 (W.D. Ken. 2006).

Procedurally, an arbitration award was entered in favor of the defendant, and the plaintiff filed a motion to vacate. *Id.* The defendant then filed a motion to dismiss the motion to vacate the arbitration award, which was granted, and judgment was entered on the arbitration award. *Id.* The defendant later filed a motion to amend its judgment in order to properly address interest. *Id.* The plaintiff opposed the motion to amend on the basis that such a request was time-barred under 9 U.S.C. § 9, however, the trial court ultimately granted the motion. *Id.*[5]

In opposition to the motion to amend, the plaintiff relied primarily on the fact that a motion to confirm the arbitration award was never filed by the defendant, and therefore it could not be confirmed or amended after the passing of the time for seeking confirmation. *Id.* In granting the motion to amend, the trial court held that any discussion on time period to seek confirmation was inapplicable due to the fact that the dismissal of a motion to vacate

---

[5] 9 U.S.C. § 9 states, in pertinent part, that judgment on an arbitration must be applied for within a one-year time period, but similar to section 682.13, Florida Statutes, it is optional as "any party to the arbitration *may* apply to the court so specified for an order confirming the arbitration." (emphasis added).

was indeed the "procedural equivalent of a motion to confirm." *Id.* at 591.

Although the facts and circumstances in *Gen. Elec. Co.* are somewhat procedurally different, the trial court's treatment of dismissal of a motion to vacate an arbitration award is relevant. As discussed herein, Rinella moved to vacate the arbitration award. After being faced with both the trial court's order denying discovery and a safe harbor letter pursuant to section 57.105, Rinella, on his own initiative, voluntarily withdrew his motions to vacate, effectively dismissing them. Thus, Rinella's dismissal of his motions to vacate effectively confirmed the arbitration award, for which the prevailing party (the Restaurantware Parties) is entitled to recover its fees and costs under the Settlement Agreement. R. 9657.

It is reasonable to deem the voluntary withdrawal or dismissal of the motions to vacate final for purposes of the award of fees upon dismissal. Section 682.13 provides a strict window within which to seek vacatur, making the above-referenced caselaw logically applicable in light of the language in section 682.13, establishing a hard and fast 90-day period to move to vacate an arbitration award, absent a **later** discovery of fraud. As stated above, this deadline is

strictly enforced. *Mead*, 423 So. 2d at 910. Put differently, Rinella can never seek vacatur under the same grounds and facts asserted therein as the 90-day deadline has long elapsed (and had done so prior to the filing of Restaurantware Parties' fee motion).

Given that, pursuant to section 682.13, Rinella could never re-file his motions to vacate, which were "initial pleadings" and not a continuation of prior arbitration proceedings,[6] coupled with the caselaw on finality, it is evident that his voluntary withdrawal achieves finality. The Restaurantware Parties, therefore, were the prevailing party on the post-arbitration proceeding, and were entitled to an award of their reasonable fees and costs pursuant to section 20(k) of the Settlement Agreement

E. The Trial Court Erred When it Denied the Motion for Attorney's Fees on the Basis that the motions to Vacate were Voluntarily Withdrawn in the Face of a Motion Pursuant to Section 57.105(1).

Having reached finality, and being the prevailing party, the Restaurantware Parties were indeed entitled to the award of their reasonable fees and costs. *Bonar,* 835 F. 2d at 1382; R. 9657. The mere fact that Appellant's served a motion for sanctions pursuant to

---

6 *Bonar*, 835 F. 2d at 1382.

section 57.105 and the motions to vacate were voluntarily withdrawn on the 20th day of the safe harbor period is of no consequence. This fact should have no bearing on whether fees were awardable on the entirely independent provision in the Settlement Agreement. Indeed, Rinella asserted that he withdrew the motions to vacate not due to the safe harbor letter and motion for sanctions, but due to Rinella's alleged "decision to focus on" other litigation. R. 11757-59 ("Rinella Withdrew the Motions to Vacate for a Reason Unrelated to the Merits"). Ultimately, contractual provisions for fees such as section 20(k) of the Settlement Agreement, are not discretionary and must be enforced. *Tierra Holdings, Ltd.*, 78 So. 3d at 563 ("A trial court does not have discretion to decline to enforce such a provision once it is determined that a party prevailed in its claim under the contract.") (internal citation omitted).

Even if, contrary to his representations that he "withdrew the motions to vacate for a reason unrelated to the merits,"[7] Rinella *had* withdrawn pursuant to the safe harbor letter, the trial court erred when it failed to award fees based on the independent prevailing

---

[7] R. 11757.

party clause in the Settlement Agreement. In rendering its decision, the trial court held that it was

> **extremely reluctant to find that prevailing party fee provision enforceable where a litigant has withdrawn the subject Motions pursuant to a safe harbor notice sent under Section 57.105, Florida Statutes,** and to treat the withdrawal of the Motions as a determination on the merits or Plaintiffs as the prevailing party in this case.

R. 6810-11 (emphasis supplied). This reluctance, however, is not supported by caselaw.

What *is* supported by caselaw is the following: (1) a motion to vacate an arbitration award is an "initial pleading," rather than a continuation of prior proceedings;[8] (2) the dismissal of a motion to vacate an arbitration award renders finality to that matter;[9] and, (3) section 57.105, and grounds for the award of fees as sanctions against a litigant and/or his counsel stands separate and apart from a motion for fees pursuant to a prevailing party fee clause.[10]

There is a significant public policy concern in allowing a party to evade a contractual prevailing party fee clause when electing to

---

8 *Bonar*, 835 F. 2d at 1382.

9 § 682.13, Fla. Stat.; *Haskell*, 408 So. 2d at 811 n. 1.

10 *Tierra Holdings, Ltd.*, 78 So. 3d at 565.

withdraw its pleading after receiving (and not necessarily because of) a safe harbor letter and accompanying motion pursuant to section 57.105. This is particularly true where the safe harbor letter and motion for sanctions make no mention whatsoever of separate contractual rights or their voluntary waiver of abandonment of them should the claims be withdrawn. To do so would cast a chilling shadow on the use of section 57.105 to punish litigants and their counsel for seeking frivolous relief, simply because there is a risk that a contractual prevailing party fee claim could be inadvertently invalidated. Rather, the intent is to merely prevent the filing of such legally and factually unsupportable litigation, and to have a mechanism to hold counsel accountable for engaging in such unscrupulous practices.

"Sanctions" are entirely different than a contractual right. A prevailing party fee clause such as the one at issue here must be enforced independent of any separate motion for sanctions.

IV. CONCLUSION

The trial court erred when it denied the motion for entitlement to attorney's fees. The Restaurantware Parties had an independent right to contractual attorney's fees by way of the Settlement

Agreement. By serving a 57.105 notice, the Restaurantware Parties did not waive their right to enforce the Settlement Agreement's independent fee clause. Rinella's motions to vacate reached finality upon his voluntary withdrawal and the Restaurantware Parties could only be deemed to have prevailed. Therefore, this Court should reverse the trial court's order denying the Restaurantware Parties' entitlement to attorney's fees, and remand for further proceedings.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that in accordance with the Supreme Court of Florida's Administrative Order No. AOSC13-49, a true and correct copy of the foregoing has been filed with the Florida Courts eFiling Portal on this 11th day of September, 2024, and a copy of same will be sent by the Florida Courts eFiling Portal via email to: **Jordan A. Shaw, Esq**., jshaw@zpllp.com **Todd S. Payne, Esq**., tpayne@zpllp.com Zebersky Payne Shaw Lewenz, LLP, 110 S.E. 6th Street, Suite 2900, Ft. Lauderdale, FL 33301; and **Aaron Resnick, Esq**., aresnick@thefirmmiami.com; Efile@thefirmmiami.com; Law Offices Of Aaron Resnick, P.A., 100 Biscayne Boulevard, Suite 1607, Miami, FL 33132.

Weiss Serota Helfman Cole & Bierman
2255 Glades Road, Suite 200E
Boca Raton, Florida 33431
Phone: (561) 835-2111

By: */s/ Howard D. DuBosar*
Howard D. DuBosar; Fla Bar No. 729108
hdubosar@wsh-law.com
kdoyle@wsh-law.com
tnovak@wsh-law.com
Edward G. Guedes; Fla. Bar No. 768103
eguedes@wsh-law.com

And

Harrison R DuBosar P.A.
1680 Michigan Avenue, Suite 819
Miami, FL 33319

By: */s/ Harrison R. DuBosar*
Harrison R. DuBosar; Fla. Bar No. 1002241
hrd@dubolaw.com

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Appellants' Initial Brief was submitted in Bookman Old Style 14-point font in compliance with Fla. R. App. P. 9.045 and 9.210 and contains 7273 words.

/s/ *Harrison R. DuBosar*
Harrison R DuBosar
Fla. Bar No. 1002241
hrd@dubolaw.com