

IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO.: 3D2024-0065
LOWER TRIBUNAL NO.: 21-010568-CC-23D

DHL EXPRESS (USA), INC.,

Appellee,

vs.

THE WELLNESS CENTER OF LONDON SQUARE, INC.,
Appellant.

APPELLANT'S INITIAL BRIEF

ON REVIEW FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

APPEAL OF COURT'S ORDER GRANTING AN AMOUNT ON
PLAINTIFF'S RENEWED MOTION FOR ATTORNEY'S FEES

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§ 57.1051

INTRODUCTION

Defendant, The Wellness Center of London Square, Inc. (hereafter “Plaintiff” or “Appellant”), appeals an Order Granting an Amount on Plaintiff’s Renewed Motion for Attorney’s Fees and Costs Pursuant to Section 57.105 Fla. Stat., dated December 13, 2023. For the reasons stated herein, this Court should reverse the decision of the Circuit Court with instructions to vacate and/or amend the Order granting an Amount on Plaintiff’s Renewed Motion for Attorney’s Fees.

STATEMENT OF CASE AND FACTS

On or about April 23, 2021, the Plaintiff filed a one count Complaint for breach of contract against the Defendant. (Appellant’s Appx. 1) In response to Plaintiff’s Complaint, on February 28, 2022, the Defendant filed an Answer, Affirmative Defenses and Counterclaim against the Plaintiff alleging violations of the Fair Debt Collection Practices Act and violations of the Fair Credit Reporting Act. (Appellant’s Appx. 2) On March 22, 2022, Plaintiff filed a Motion to Strike the Counterclaim and on March 29, 2022, the Plaintiff filed a Motion for Sanctions under Section 57.105 Fla. Stat. alleging that the claims as stated in the Counterclaim are not supported by the material facts and the application of existing law. (Appellant’s Appx. 3 and 4)

A hearing occurred on June 15, 2022, on Plaintiff's Motion to Strike and Motion for Sanctions. According to the Order entered on June 26, 2022, Plaintiff's Motion to Strike was granted as was Plaintiff's Motion for Sanctions under Section 57.105. (Appellant's Appx. 5) Immediately thereafter, on July 8, 2022, Defendant filed a Verified Motion to Vacate Order on Motion to Strike and Order granting Sanctions. According to the Verified Motion, counsel for the Defendant logged into the wrong Zoom Conference and as such, missed the hearings on Plaintiff's Motions. (Appellant's Appx. 6)

On November 15, 2022, the Court entered an Order Granting Defendant's Verified Motion to Vacated the Order on the Motion to Strike and the Order Granting Sanctions. (Appellant's Appx. 7) The Court's Order reset the hearing on the vacated Motions for February 28, 2023.

A hearing occurred on February 28, 2023, and the Court entered an Order on March 15, 2023, granting Plaintiff's Motion for Sanctions under Section 57.105 Fla. Stat. (Appellant's Appx. 8) On April 4, 2023, Plaintiff filed a Renewed Motion for Attorney Fees and included an Affidavit of Attorney's Fees and Costs in which the Plaintiff sought \$20,803.00 in fees and \$578.55 in costs. (Appellant's Appx. 9) On April 20, 2023, the Defendant filed a Response to Plaintiff's Renewed Motion for Attorney's Fees and Costs. (Appellant's Appx. 10)

A hearing occurred on September 7, 2023, on Plaintiff's Renewed Motion for Attorney's Fees and Costs. The hearing was held for the Court to assess an amount of attorney's fees to award to the Plaintiff as a result of the Court's prior order finding entitlement. The lower court entered an Order on December 13, 2023, granting an amount of \$20,803.00 in fees plus \$578.55 in costs to the Plaintiff. (Appellant's Appx. 11)

The Defendant/Appellant believes the lower court has made an error in the application of the law concerning amounts to be awarded pursuant to Fla. Stat. 57.105, and as such, has filed this appeal of the Order dated December 13, 2023.

STANDARD OF REVIEW

In reviewing an award of attorney's fees under section 57.105, an appellate court must look to see if the trial court abused its discretion in finding entitlement to fees based on a determination that there were no justiciable issues of fact or law. *Montgomery v. Larmoyeux*, 14 So. 3d 1067, 1073 (Fla. 4th DCA 2009). The amount of fees and costs awarded by the trial court also is reviewed for an abuse of discretion. *Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A.*, 971 So. 2d 955, 956 (Fla. 5th DCA 2007).

ARGUMENT

I. The Circuit Court Improperly Calculated the Amount of Attorney's Fees and Costs Awarded to Plaintiff

The Circuit Court disregarded fundamental tenets of Florida case law which provides that an award of reasonable attorney's fees as a sanction must be directly related to the attorney's fees and costs that the opposing party has incurred as a result of the specific bad faith conduct of the attorney. *Moakley v. Smallwood*, 826 So. 2d 221, 227 (Fla. 2002); *see also, Philip Morris U.S. Inc. v. Cohen*, 340 So. 3d 498 (Fla. Dist. Ct. App. 2022).

"[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)).

Here, the lower Court's Order, dated March 15, 2023, indicates that Plaintiff's Motion for Sanctions under Section 57.105 Fla. Stat. is Granted because Defendant's Counsel knew or should have known that Defendant's claims in Count I and Count II of the Counterclaim were not supported by the material facts necessary to establish such claims. The Order went on to state that Defendant willfully failed to respond to Plaintiff's 21-day Safe Harbor Notice and willfully failed to timely file a response in opposition to Plaintiff's Motion for Sanctions.

Plaintiff's 21-day Safe Harbor Notice was attached as Exhibit "A," to Plaintiff's Motion for Sanctions, dated March 29, 2022. The initial Order granting

Plaintiff's Motion for Sanctions occurred on June 26, 2022. The June 26, 2022 Order and all subsequent Orders granting Plaintiff's Motion for Sanctions are all based on the premises that Defendant or Defendant's Counsel knew or should have known that Defendant's claims in Count I and Count II of the Counterclaim were not supported by the material facts necessary to establish such claims. As such, any award of attorney fees as a sanction should be based upon the conduct surrounding Defendant's Counterclaim and resulting Motion for Sanctions.

A review of Plaintiff's Affidavit of Attorney Fees and Costs demonstrates that Plaintiff sought attorney fees for matters completely unrelated to the Counterclaim, the 21-day Safe Harbor Letter and Motion for Sanctions. Plaintiff's Affidavit of Attorney Fees and Costs contains 84 entries spanning the timeframe from February 23, 2022, through March 24, 2023. Plaintiff's first two entries on the Affidavit of Attorney Fees are dated February 23rd and 24th. Both of those dates were before the Defendant filed its Counterclaim on February 28th, as such, both of those entries should be excluded.

Additionally, there are eight (8) entries on the Affidavit dated between March 4, 2022 and March 10, 2022 that involve researching, drafting and filing responses to Defendant's discovery requests that also pre-date the filing of the Counterclaim. None of the discovery related entries on the Affidavit are in any way related to

Counterclaim or the Motion for Sanctions based upon the Counterclaim. As such, all eight (8) of those entries should be excluded.

On the second page of Plaintiff's billing records, there are eleven (11) entries, dated between March 30, 2022 and June 13, 2022, that involve reviewing, revising, preparing, drafting and filing discovery and discovery related motions. Again, none of these entries involve the Counterclaim or Motion for Sanctions. As such, all eleven (11) of these entries should be excluded.

Pages, three, four, and five of Plaintiff's billing records contain an additional five (5) entries related to discovery and motion to compel matters. As previously stated, these entries have no connection to the Counterclaim or Motion for Sanctions and should be excluded.

As previously indicated, the initial Order granting Plaintiff's Motion for Attorney Fees was granted on June 26, 2022. The Order was vacated and re-awarded on March 15, 2023. Aside from the previously mentioned billing entries, the entirety of Plaintiff's remaining billing entries are focused on litigating an award for sanctions. The Court in *Diaz v. Kasinsky*, 306 So.3d 1065 (Fla. 3rd DCA 2020) states "that Moakley does not provide an automatic entitlement to additional attorneys' fees incurred in securing an underlying sanctions award."

"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

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, — So.3d —, 2020 WL 2549513 (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, — So.3d —, —, 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)).

The Court in *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). The Court in *Kasinsky* agrees, holding "that *Moakley* does not provide an automatic entitlement to additional attorneys' fees incurred in securing an underlying sanctions award." *Diaz v. Kasinsky*, 306 So.3d 1065 (Fla. App. 2020).

As such, it is clear that a majority of Plaintiff's billing entries in its Affidavit for Attorney Fees and Costs relate to matters outside the scope of Defendant's

Counterclaim and resulting Motion for Sanctions and should have been excluded. The Plaintiff is certainly not entitled to attorney fees regarding matters of discovery or matters that occurred prior to the filing of the Counterclaim. Additionally, the law is clear that the Plaintiff is not entitled to attorney fees resulting from litigation involving the attorney fees. Therefore, a thorough review of Plaintiff's Affidavit of Attorney Fees would demonstrate that the lower court erred in awarding the entire amount requested by Plaintiff.

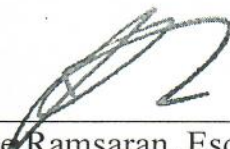
Additionally, as stated in Plaintiffs Renewed Motion for Attorney Fees, Plaintiff included an Affidavit of Attorney's Fees and Costs in which the Plaintiff sought \$578.55 in costs. (Appellant's Appx. 9). However, Fla. Stat. § 57.105 does not provide for an award of costs in addition to attorney's fees. The statute specifically addresses the award of a reasonable attorney's fee, including prejudgment interest, to the prevailing party in a civil proceeding or action under certain circumstances. The statute does not mention the award of costs. This is confirmed by the case of *Heldt-Pope v. Thibault*, 198 So.3d 650 (Fla. 2D 2015), which states that the statutory entitlement to attorney's fees under Fla. Stat. § 57.105 for sanctions does not carry with it a corollary statutory entitlement to costs. Therefore, while the court may award attorney's fees under this statute, it does not provide for the award of costs. As such, the lower court also erred in awarding the Plaintiff costs in this matter.

CONCLUSION

Based on the foregoing, the Order granting an Amount on Plaintiff's Renewed Motion for Attorney's Fees should be reversed with directions to the lower Court to re-hear the Renewed Motion for Attorney's Fees and award only those fees that relate to the Counterclaim and initial Motion for Sanctions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was furnished via eDCA/eServe/email and/or U.S. Mail this 9th day of February, 2024 to the attached service list.



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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing comports with the font and spacing requirements of Fla. R. App. P. 9.210.

A handwritten signature in black ink, appearing to read 'JR', is written above a horizontal line.

Jerome Ramsaran, Esq.