

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR OSCEOLA COUNTY, FLORIDA

Portfolio Recovery Associates, LLC,

Appellant,

CASE NO.: 2015-AP-27
LOWER COURT CASE NO.:
2014-CC-1554-CL

v.

Makeda A. Benjamin,

Appellee.

Appeal from a final judgment
of the Osceola County Court,
Stefania C. Jancewicz, County Judge.

Carla Reece, Esq., and Jeremy L. Kahn, Esq.,
for Appellant.

Heather A. Harwell, Esq., for Appellee.

Before TENNIS, MARQUES, and POLODNA, J.J.

PER CURIAM.

**FINAL ORDER AFFIRMING
FINAL JUDGMENT AWARDING ATTORNEY'S FEES**

Portfolio Recovery Associates, LLC, appeals the trial court's "Final Judgment Awarding Defendant's Attorney's Fees and Costs." We have jurisdiction. § 26.012(1), Fla. Stat. (2015); Fla. R. App. P. 9.030(c)(1)(A).

Portfolio Recovery filed a complaint against Makeda A. Benjamin for account stated on July 24, 2014, alleging that it is the assignee of Citibank, which established a credit account and issued a credit card to Benjamin. Portfolio Recovery voluntarily dismissed the case.

Benjamin moved for an attorney's fees award under Florida Statute section 57.105(7). Section 57.105(7) is Florida's reciprocal fee provision and permits a party to recover attorney's fees if the contract allows an award of attorney's fees to the other party to the contract. The credit card agreement that Benjamin relies on for entitlement to an attorney's fees award states, "To the extent permitted by law, you are liable to us for our legal costs if we refer collection of your account to a lawyer who is not our salaried employee. These costs may include reasonable attorneys' fees. They may also include costs and expenses of any legal action." (R. 105.)

To determine whether the trial court erred in granting Benjamin's motion for an award of attorney's fees, the Court must interpret both Florida Statute section 57.105(7), and the contractual provision regarding attorney's fees in the credit card agreement. Thus, the standard of review is *de novo*. *Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A.*, 971 So. 2d 955, 956 (Fla. 5th DCA 2007) ("when entitlement to attorney's fees is based on the interpretation of contractual provisions, or a statute, as a pure matter of law, the appellate court undertakes a *de novo* review." (citations omitted)).

Portfolio Recovery argues that Benjamin is not entitled to an award of attorney's fees under section 57.105(7), Florida Statutes, because Portfolio Recovery did not allege a contract and it did not make a claim for attorney's fees.

Section 57.105(7) states,

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*.

(Emphasis added.)

The complaint contains one cause of action for account stated. The contractual provision in this case refers to recovering attorney's fees incurred in collection attempts, which was the nature of this action. Thus, it falls under the scope of the attorney's fee provision in the credit card agreement. Section 57.105(7) states that the party may recover attorney's fees "when that party prevails *in any action . . . with respect to the contract.*" (Emphasis added.) Here, Benjamin prevailed in Portfolio Recovery's action to collect under an account created via the credit card agreement. Because this was an action to collect by an attorney who was not a salaried employee, the attorney's fee provision in the contract applies. Section 57.105(7) applies because the action to collect the debt was "with respect to" the credit card agreement.

In *Escambia County v. U.I.L. Family Ltd. Partnership*, 977 So. 2d 716, 717 (Fla. 1st DCA 2008), the attorney's fee provision in the contract stated that the county could recover attorney's fees if it had to file suit to enforce the guarantee. The court held that section 57.105(5)¹ applied to permit an award of attorney's fees to the developers, even though the developers brought a declaratory judgment action asking the court to declare its rights to building permits under their contract with the county. *Id.* at 716, 717. The building permits were denied in reliance on the guarantees, but the trial court found the guarantees unenforceable. *Id.* at 717. The attorney's fees provision contemplated "a lawsuit in which the parties litigate their rights and obligations under the guarantees, which would inevitably result in a judicial construction of the contract language." *Id.* The developers' action was no different from the action expressed in the attorney's fees provision in the contract, and thus section 57.105(5) applied. *Id.*

Here, just as in *Escambia County*, the lawsuit encompassed the situation that the attorney's fee provision contemplated. An attorney who was not a salaried employee brought this

¹ At the time of *Escambia County*, the reciprocal fee provision was contained in subsection five, rather than subsection seven, of section 57.105. *Id.* at 716.

collection action, and the attorney's fee provision states that attorney's fees are recoverable in any collection action pursued by such a person. The complaint may have been couched in terms of an account stated, but it was to collect the debt arising under the credit card agreement.

Additionally, this Court, sitting in its appellate capacity, has previously ruled that the defendant in an action to collect credit card debt may recover attorney's fees under section 57.105(7), even when the plaintiff did not sue for breach of contract. In *Portfolio Recovery Associates, LLC v. Allman*, 22 Fla. L. Weekly Supp. 512 (Fla. 9th Cir. Ct. 2014), the same appellant as the appellant here argued that the appellee could not recover her attorney's fees under section 57.105(7) in the credit card debt collection action because the suit was for money lent and unjust enrichment, not to enforce the credit agreement. This Court rejected that argument and looked to the phrasing of section 57.105(7), which states that it applies to "any action to enforce the contract." *Id.* If the Legislature wanted the statute to only apply to breach of contract actions, then it would have so stated. *Id.* The Court stated that if the Credit Agreement had not existed, then no credit would have been extended to the appellee to incur the debt. *Id.* See also *Cunliffe v. Portfolio Recovery Associates, LLC*, 20 Fla. L. Weekly Supp. 1125 (Fla. 9th Cir. Ct. 2013) (holding that defendant could seek attorney's fees under section 57.105(7) even though Portfolio Recovery sought to recover credit card debt under a claim for account stated).

Portfolio Recovery relies on *Tylinski v. Klein Automotive, Inc.*, 90 So. 3d 870 (Fla. 3d DCA 2012). In *Tylinski*, there were multiple contracts between the parties regarding the sale of a car. 90 So. 3d at 871-72. The dealership sought recovery under the contract that did not contain an attorney's fee provision. *Id.* at 872. Because of this, the court held that the buyers could not recover attorney's fees under section 57.105(7) because there was no attorney's fee provision to apply reciprocity to. *Id.* at 872-73. The court rejected the buyers' argument that attorney's fees

could be awarded under section 57.105(7) because the sale would not have gone through without the other contract between the parties that did contain an attorney's fee provision. *Id.* at 872.

In *Tylinski*, the contract sued upon did not contain an attorney's fee provision. *Id.* Here, the cause of action for account stated is "with respect to the contract" that does contain an attorney's fee provision. § 57.105(7). *Tylinski* is therefore inapplicable.

Portfolio Recovery did not cite any binding cases, and the Court did not find any, where a court held that section 57.105(7) did not apply, even though the situation fell squarely within the attorney's fees contractual provision, because of the cause of action that was pled. As the claim for account stated was with respect to the agreement containing the attorney's fee provision, and this Court has previously ruled that a defendant in a credit card collection case can obtain an award of attorney's fees under section 57.105(7), even if the cause of action is not for breach of contract, the Court denies the petition for writ of certiorari.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The "Final Judgment Awarding Defendant's Attorney's Fees and Costs," filed on July 23, 2015, is **AFFIRMED**.

2. Benjamin's motion for appellate attorney's fees, filed on February 11, 2016, is **GRANTED**, and the assessment of those fees, including whether any paralegal time should be included, is **REMANDED** to the trial court.

DONE AND ORDERED in Chambers, at Kissimmee, Osceola County, Florida, on this 18th day of April, 2016.

/S/

DIANA M. TENNIS
Presiding Circuit Judge

MARQUES and POLODNA, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **The Honorable Stefania C. Jancewicz, Osceola County Judge**, Osceola County Courthouse, 2 Courthouse Square, Kissimmee, FL 34741; **Carla Reece, Esq., and Jeremy L. Kahn, Esq.**, Hunt & Kahn, P.A., 5233 Coconut Creek Parkway, P.O. Box 934788, Margate, FL 33093-4788; and **Heather A. Harwell, Esq.**, Law Office of Heather A. Harwell, P.A., 27446 Cashford Circle, Suite 101, Wesley Chapel, FL 33544, on this 18th day of April, 2016.

/S/ _____
Judicial Assistant