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

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Appellant,

v.

CATHLEEN ALLMAN,

Appellee.

CASE NO.: 2014-CV-000030-A-O
Lower No.: 2011-CC-006397-O

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Appeal from the County Court, for Orange County,
Andrew L. Cameron, County Judge.

Robert E. Sickles and John P. Gaset, Esquire, for Appellant.

Heather A. Harwell, Esquire, for Appellee.

Before H. RODRIGUEZ, MUNYON, and EGAN, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant, Portfolio Recovery Associates, LLC, ("Portfolio") timely appeals the trial court's "Order Granting Defendant's Motion to Determine Entitlement to Attorney Fees and Costs" entered on December 5, 2013 and "Final Judgment Awarding Defendant's Attorney's Fees and Costs" entered on March 31, 2014. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

Summary of Facts and Procedural History

Cathleen Allman ("Allman") entered into a credit card agreement ("Credit Agreement") with HSBC Bank Nevada, N.A. Metris ("HSBC"). Allman made charges and payments on the account causing a balance on the account to accrue unpaid. After HSBC made a demand for payment of the balance due, Allman still did not pay it. Thereafter, the debt due from Allman's account was assigned by HSBC to Portfolio. In May 2011, Portfolio filed a two count complaint against Allman to collect the debt owed, specifically alleging money lent and unjust enrichment seeking damages totaling $7,773.47 plus interest and court costs. The subject Credit Agreement was not referenced or attached to the complaint. In June 2011, Allman filed her answer and affirmative defenses including that Portfolio failed to state a cause of action by not attaching the Credit Agreement to the complaint. Along with the answer and affirmative defenses, Allman included a claim for attorney fees and filed a discovery request for the Credit Agreement. Thereafter, further discovery ensued including the production of the Credit Agreement.

On May 2, 2013, Portfolio filed a voluntary dismissal of the action. On that same date, Allman filed a motion to determine her entitlement to tax reasonable attorney's fees and costs pursuant to sections 57.041, 57.105(1),(4), and (7), Florida Statutes, and rule 1.525, Fla. R. Civ. P. Discovery then ensued pertaining to the attorney fees and costs claimed. On August 5, 2013, Allman filed a "Notice of Intent to Use Sworn Affidavit of Custodian Business Records" that included the Credit Agreement. On September 13, 2013, a hearing was held addressing Allman's motion as to entitlement to attorney fees and costs. On December 5, 2013, the trial court entered the "Order Granting Defendant's Motion to Determine Entitlement to Attorney Fees and Costs". On March 31, 2014, a hearing was held where the trial court entered the "Final Judgment Awarding Defendant's Attorney's Fees and Costs".

Arguments on Appeal

Portfolio argues that the trial court erred by awarding Allman attorney's fees under section 57.105(7), Florida Statutes, and the Credit Agreement because: 1) Portfolio's action did not seek enforcement of the Credit Agreement and 2) The Credit Agreement contains an enforceable Arizona choice-of-law provision.

Conversely, Allman argues: 1) As the prevailing party in this case she is entitled to an award of attorney's fees pursuant to section 57.105(7), Florida Statutes, because this case involves a collection matter based upon a debt originally derived from the Credit Agreement that contains an attorney's fee provision and 2) Applicable foreign laws must be specified when elected pursuant to contract provisions or it is presumed that the foreign laws are the same as the applicable Florida laws; thus, Portfolio's failure to pled Arizona law precludes its applicability in this case. Lastly, Allman filed a motion for appellate attorney's fees per sections 57.104, 57.105(7), and 59.46, Florida Statutes, and Florida Rule of Appellate Procedure 9.400(b).

Standard of Review

A trial court's interpretation of statutes, written contracts, and procedural rules, including those pertaining to entitlement to attorney fees and costs, involve questions of law and thus, appellate review is de novo. *In re Guardianship of J.D.S. v. Dep't of Children & Families*, 864 So. 2d 534, 537 (Fla. 5th DCA 2004) (interpreting statutes); *Peacock Construction Company, Inc. v. Modern Air Conditioning, Inc.*, 353 So. 2d 840, 842 (Fla. 1977) (interpreting written contract); *Barco v. School Board of Pinellas County*, 975 So. 2d 1116, 1121 (Fla. 2008) (interpreting rule's time deadlines for serving motion for attorney fees and costs); *Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner*, P.A., 971 So. 2d 955, 956 (Fla. 5th DCA 2007) (interpreting contractual provisions and statutes as to entitlement to attorney fees).

Analysis

The issues in this appeal primarily center on the interpretation and applicability of section 57.105(7), Florida Statutes (2013), that 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**. This subsection applies to any contract entered into on or after October 1, 1988. [*Emphasis added*]

Portfolio's First Argument: Portfolio claims in its first argument that this statute does not apply to the causes of action alleged in the complaint because the allegations do not seek to enforce the Credit Agreement, but instead solely seek recovery under the theory that Allman had an obligation to repay money lent not arising from the Credit Agreement.

From the plain meaning of the statute, the language "any action to enforce the contract" and "prevails in any action…with respect to the contract" means that the award of attorney fees applies to a prevailing party in any action arising or involving a contract. Further as Allman points out, had the Florida Legislature intended that the statute apply only to breach of contract actions, the statute would have read "when that party prevails in a breach of contract action." Instead, the Legislature specifically stated "any action". "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (Fla. 1931); *Fla. Dep't of Revenue v. New Sea Escape Cruises, LTD.*, 894 So. 2d 954, 960 (Fla. 2005) (applying plain meaning of the statute and quoting *A.R. Douglas*); *Osorio, Sr. v. Board of Professional Surveyors and Mappers,* 898 So. 2d 188, 190 (Fla. 5th DCA 2005) (applying plain meaning of the statute).

Accordingly, in the instant case, it was reasonable for the trial court to find that the debt that Portfolio sought to collect from Allman derived from the Credit Agreement and to find section 57.105(7), Florida Statutes, applicable; thus, entitling Allman to an award of attorney fees as the prevailing party. Had the Credit Agreement not existed, no credit would have been extended to Allman to use the credit card and incur the debt. Also, importantly as Allman points out, a portion of the debt Portfolio sought from Allman included the assessment of finance charges and interest that was agreed to per the Credit Agreement. Lastly, as a side note, had Portfolio only sought from Allman the principal of the debt with interest at the statutory rate, then Portfolio's argument may have had some merit as the action to collect the debt would not have hinged on the Credit Agreement to the same degree as the debt sought here that includes finance charges and interest authorized per the Credit Agreement.

Portfolio also argues that the trial court's reliance on *Cunliffe v. Portfolio Recovery Associates*, LLC, 20 Fla. L. Weekly Supp. 1125b (Fla. 9th Cir. Ct. 2013), was misplaced because the issue in *Cunliffe* involved post-judgment discovery of the credit card agreement and the complaint's cause of action for account stated included an allegation referencing a contract for a revolving credit card account. This Court has reviewed *Cunliffe* and finds that the differences between it and the instant case are few compared to the similarities. Among the similarities is that both Cunliffe and Allman referenced the credit card agreements in their affirmative defenses. Therefore, this Court finds that the trial court's reliance on C*unliffe* was reasonable.

Portfolio's Second Argument: At the hearing on September 13, 2013, Portfolio argued that the conflict of laws provision contained in the Credit Agreement required that the trial court apply Arizona law in determining Allman's entitlement to reasonable attorney fees and costs. Thus, on appeal Portfolio argues that the Arizona choice-of-law provision in the Credit

Agreement is presumptively valid and must be enforced and that the trial court erred in finding that Portfolio waived its right to assert Arizona law under the Credit Agreement. Portfolio claims that it did not waive its right to apply Arizona law because as soon as the Credit Agreement became relevant to the underlying action, it asserted Arizona law.[1]

In addressing this issue, the trial court found that although the Credit Agreement stated that the laws of the State of Arizona govern the relationship between the parties, Portfolio waived any argument that Florida law should not apply to the interpretation of the Agreement by bringing its collection action in Orange County, Florida. Among the cases cited by the trial court in support of this finding were: *Owens-Corning Fiberglas Corporation v. Engler*, 704 So. 2d 594 (Fla. 4th DCA 1997) (explaining that where the law of a foreign forum is claimed to be dispositional, yet no foreign law is pled, the matter is to be determined by the law of the forum where the case was filed); *Aetna Casualty & Surety Co. v. Ciarrochi*, 573 So. 2d 990 (Fla. 3d DCA 1991) (explaining that the choice of law doctrine presumes that where parties seeking to rely on foreign law fail to demonstrate that the foreign law is different from the law in state, the law is the same as in state); *Kingston v. Quimby*, 80 So. 2d 455, 456 (Fla. 1955) (holding that where allegedly applicable foreign law was not pled and proven, the reviewing court could not consider contentions in briefs based upon foreign law).

Allman contends that it was logical for the trial court to find that Portfolio waived the application of Arizona law due to Portfolio's failure to plead the Arizona law provision and instead to only assert the provision after it dismissed the action. Allman further stresses that either Arizona law applies to the action as a whole, or it does not and Portfolio took the risk of

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[1] In the Initial Brief, Portfolio also included a footnote referencing Allman's eight affirmative defense that addressed the state forum selection clause. However, per the court record, on October 29, 2012, Allman filed a notice withdrawing that affirmative defense.

waiving it by choice just as it chose not to plead breach of contract. In addition to the cases, *Owens-Corning Fiberglass Corp.* and *Aetna Casualty & Surety Co.* cited by the trial court, among the cases cited by Allman in support of her argument are: *Lopes v. Lopes*, 852 So. 2d 402, 403 (Fla. 5th DCA 2003) (affirming the trial court's application of Florida law in annulling a marriage where the wife failed to plead either Connecticut or Dominican Republican law, in spite of wife's claim that a prior Dominican Republican divorce would have stood as valid under Connecticut and Dominican Republic law); *Columbian Nat'l Life Ins. Co. v. Lanigan*, 154 Fla. 760, 19 So. 2d 67, 70 (Fla. 1944) (explaining that when the law of a foreign state is relied on as governing a given transaction it must be pled and proven as any other issue of fact and the local courts will not take judicial notice of it; and holding that the Massachusetts law was not pled, thus, the law of the State of Florida, as applicable to the facts, must govern and the presumption is that when not pled and proven, the law of the sister state is the same as the law of the forum); *Jackson v. State,* 18 So. 3d 1016, 1029 (Fla. 2009) (quoting *Mills v. Barker*, 664 So.2d 1054, 1058 (Fla. 2d DCA 1995) that cites *Columbian*).

This Court finds that it was reasonable for the trial court to find that Portfolio waived the Arizona law provision based on the pleadings and procedural history of this case and the supporting case law cited by the trial court and Allman. Further, even if Arizona law applied, Allman would be entitled to attorney's fees as the prevailing party based on the plain language of section 12-341.01(A), Arizona Revised Statutes (2013) that provides for the award of attorney's fees to the prevailing party and states: "In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." *See Worldwide Asset Purchasing, LLC v. Perkins,* 17 Fla. L. Weekly Supp. 1248a (Fla. 13th Cir. Ct. 2010).

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

1. The trial court's "Order Granting Defendant's Motion to Determine Entitlement to Attorney Fees and Costs" entered on December 5, 2013 and "Final Judgment Awarding Defendant's Attorney's Fees and Costs" entered on March 31, 2014 are **AFFIRMED**.

2. Allman's "Appellee's Motion for Attorney's Fees" filed on September 8, 2014 is **GRANTED** and the assessment of the appellate attorney's fees is **REMANDED** to the trial court.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 18th day of December, 2014.

/S/________________________________
HEATHER PINDER RODRIGUEZ
Presiding Circuit Judge

MUNYON and EGAN, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Robert E. Sickles, Esquire and John P. Gaset, Esquire**, Hinshaw & Culbertson, LLP, 100 South Ashley Drive, Suite 500, Tampa, Florida 33602; **Heather A. Harwell, Esquire**, Law Office of Heather A. Harwell, P.A., 3632 Land O' Lakes Blvd., Suite 10620, Land O' Lakes, Florida 34639; **Michael Tierney, Esquire**, Michael Tierney, P.A., 918 Beard Avenue, Winter Park, Florida 32789; and **The Honorable Andrew L. Cameron, Orange County Judge**, 425 N. Orange Avenue, Orlando, Florida 32801, on this 18th day of December, 2014.

/S/________________________________
Judicial Assistant