

Circuit Civil Court: ATTORNEY'S FEES – COSTS – Voluntary Dismissal – Loan Modification Agreement. Generally when Plaintiff voluntarily dismisses action, Defendant is the prevailing party for attorney's fees. Exception to the rule occurs when the parties have compromised and effectively agreed to settlement to end the mortgage foreclosure action. See Kelly v. BankUnited, FSB, 159 So. 3d 403, 405-07 (Fla. 4th DCA 2015)(involving short sale). Such a compromise occurs when parties enter into a FHA Home Affordable Modification Program (HAMP) Agreement. In present case, there is no prevailing party for attorney's fees. However, Defendant is entitled to costs. Wells Fargo Bank, N.A. v. Emad Hanna, No. 12-003024CI-20 (Fla. 6th Cir. Ct. May 18, 2016).

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION**

**WELLS FARGO BANK, N.A.,
Plaintiff,**

**Case No.: 12-003024CI-20
UCN: 522012CA03024XXCICI**

v.

**EMAD HANNA A/K/A EMAD N.
HANNA; et al.,
Defendants.**

**ORDER DENYING DEFENDANTS' MOTION FOR ATTORNEY'S FEES; GRANTING
DEFENDANTS' MOTION FOR COSTS; DIRECTIONS TO DEFENDANTS**

THIS MATTER came before the Court on Defendants, Emad Hanna and Maggi Hanna's, "Motion for Attorney's Fees and Costs" filed on October 9, 2015; and Plaintiff, Wells Fargo Bank, N.A.'s, Response in Opposition to the Motion filed on November 25, 2015. A hearing was conducted on April 27, 2016. Upon consideration of the motion, the response, the court file, argument of counsels, and applicable law, the Court finds as follows:

Statement of Case

On March 12, 2012, Wells Fargo Bank, N.A. (the "Bank") filed a Complaint for mortgage foreclosure. On September 15, 2015, the Bank filed a "Notice of Voluntary Dismissal Without Prejudice and Discharge of Notice of Lis Pendens." The Notice states in part:

The parties have entered into a Permanent Loan Modification Agreement. As a result of said Agreement and in the interest of justice, Plaintiff wishes to voluntarily dismiss the instant action without prejudice.

This is Plaintiff's first Voluntary Dismissal and thus does not constitute an adjudication on the merits under Florida Rules of Civil Procedure 1.420(a)(1) and all parties shall bear their own "fees and costs."

In the pending motion, Emad Hanna and Maggi Hanna (the "Hannas") seek their attorney's fees and costs under the terms of the Note and Mortgage and section 57.105(7), Florida Statutes (2015). The Hannas assert that based on the Bank's Notice of Voluntary Dismissal they are the prevailing parties. In response, the Bank points out that this mortgage foreclosure action was voluntarily dismissed because the parties entered into a FHA Home Affordable Modification Program (HAMP) Agreement dated August 19, 2015. (Bank Response, Ex. A). Therefore, it is argued, the Hannas are not the prevailing parties.

Discussion

Motion for Attorney's Fees

Generally, when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party. See Tubbs v. Mechanik Nuccio Hearne & Wester, P.A., 125 So. 3d 1034, 1040-41 (Fla. 2d DCA 2013). However, the courts have recognized exceptions to this general rule with regard to a request for prevailing party attorney's fees. See Kelly v. BankUnited, FSB, 159 So. 3d 403, 405-07 (Fla. 4th DCA 2015)(discussing Walter D. Padow, M.D., P.A. v. Knollwood Club Ass'n, 839 So. 2d 744 (Fla. 4th DCA 2003); Tubbs).

In Padow, during the pendency of the lawsuit, the defendant capitulated to the demands of the plaintiff and satisfied a substantial portion of the plaintiff's claim for outstanding financial obligations. The plaintiff later voluntarily dismissed its action. On motion, the defendant was found not to be the prevailing party. The trial court held: "[T]o find that Padow was the prevailing party under these circumstances would require a plaintiff to fight every case to judgment, even though it 'achieved all of the legitimate goals of [its] suit,' which was not a goal of the legislature in passing the statute." Padow, 839 So. 2d at 745. The trial court's reasoning was affirmed by the Fourth District Court of Appeal.

Similarly, in Tubbs, the foreclosure action was voluntarily dismissed because the plaintiffs' liens were foreclosed by a superior lien against the defendant's property. The Second District Court of Appeal noted that "the conclusion that neither of the parties achieved their litigation objectives in that case is inescapable." The appellate court noted:

Padow teaches that courts must look to the substance of litigation outcomes—not just procedural maneuvers—in determining the issue of which party has prevailed in an action. “ ‘[I]t is [the] results, not [the] procedure, which govern the determination’ of which party prevailed for purposes of awarding attorney's fees[.]” Bessard v. Bessard, 40 So. 3d 775, 778 (Fla. 3d DCA 2010)(second and third alterations in original)(quoting Smith v. Adler, 596 So. 2d 696, 697 (Fla. 4th DCA 1992)).

Tubbs, 125 So. 3d at 1041

The Kelly case is analogous to the present case. During the pendency of the foreclosure action, a notice of voluntary dismissal was filed because a short sale of Kelly's real property was accomplished. The present case involves a HAMP Loan Modification Agreement executed by the parties during the pendency of this foreclosure action. The sentiments of the Fourth District Court of Appeal in Kelly ring true in both factual situations:

Therefore, in a situation where both [defendant] and [plaintiff] compromised in effectively agreeing to a settlement to end their litigation, we will not hold [plaintiff] responsible for payment of [defendant's] attorneys' fees, as [plaintiff's] dismissal of the pending complaint following the settlement was the obvious and appropriate course of action. Where a plaintiff's voluntary dismissal results in neither party substantially prevailing in the litigation outcome, neither party is the prevailing party for purposes of attorneys' fees.

Id. 159 So. 3d at 407.

Neither party is the prevailing party in this action for purposes of attorney's fees. The Hannas' motion for attorney's fees is denied.

Motion for Costs

In Tubbs, the Second District Court of Appeal stated that when a plaintiff files a notice of voluntary dismissal the issue of taxable costs is considered separately from the attorney's fee award. Tubbs, 125 So. 3d at 1043-44. In awarding taxable costs to the defendant, the appellate court noted that Florida Rule of Civil Procedure 1.420(d)

provides in part, "Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action, once the action is concluded as to the party seeking taxation of costs." (Emphasis added.)

Therefore, upon the Bank filing the Notice of Voluntary Dismissal, the Hannas became entitled to their taxable costs. See Id. The Hannas' Motion for Costs is granted.

This Court shall consider the provisions set forth in the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions (Florida Rules of Civil Procedure, Appendix II) to determine the costs to be awarded. See In re Amendments to Unif. Guidelines for Taxation of Costs, 915 So. 2d 612 (Fla. 2005). The taxation of costs in any particular proceeding is within the broad discretion of the court. Id.; Winter Park Imports, Inc. v. JM Family Enters., Inc., 77 So. 3d 227, 230 (Fla. 5th DCA 2011).

Accordingly, it is

ORDERED AND ADJUDGED that Defendants, Emad Hanna and Maggi Hanna's, "Motion for Attorney's Fees" is **DENIED**.

IT IS FURTHER ORDERED AND ADJUDGED that Defendants, Emad Hanna and Maggi Hanna's, "Motion for Costs" is **GRANTED**. Within **twenty days of the date of this order**, Defendants shall file and serve a motion to determine the costs to be awarded and shall file and serve an Affidavit of taxable costs. If the parties cannot agree to the costs to be awarded, a hearing shall be scheduled at a time convenient to the parties.

DONE AND ORDERED in Chambers, in Clearwater, Pinellas County, Florida, this ___ day of May, 2016.

JOHN A. SCHAEFER, Circuit Judge

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