

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

MIRANDA R. BALOG,
Appellant,

Case No.: 15-000050AP-88A
UCN: 522015AP000050XXXXCI

v.

CACH, LLC,
Appellee.

Opinion Filed _____

Appeal from Final Judgment for Costs
and Order Denying Defendant's Motion
for Attorney's Fees
Pinellas County Court
Judge Kathleen T. Hessinger

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PER CURIAM.

Opinion on Rehearing/Clarification

We grant Appellant, Miranda Balog's, Motion for Rehearing and Clarification to the extent that we withdraw this Court's Opinion rendered July 26, 2016, and issue the following opinion in its stead.

Miranda Balog appeals the "Final Judgment for Costs and Order Denying Defendant's Motion for Attorney's Fees" entered on August 11, 2015. Upon review of the briefs, the record on appeal, and the applicable case law, this Court dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. We affirm.

Statement of Case

On December 1, 2014, CACH, LLC, filed a two-count statement of claim in small claims court. CACH, as assignee of the original creditor, alleged unjust enrichment and

account stated in an attempt to collect a debt that originated from Balog's credit card. Balog filed a motion to dismiss, which included a pleading of entitlement to attorney's fees pursuant to section 57.105(7), Florida Statutes, under the original credit card agreement and Florida Rule of Civil Procedure 1.420. The Motion to Dismiss was denied, but CACH voluntarily dismissed the action the next day. After a hearing on Balog's Motion to Tax Attorney's Fees and Costs, the trial court entered the Final Judgment for Costs and Order Denying Defendant's Motion for Attorney's Fees, which is the subject of this appeal.

Argument on Appeal

In the Initial Brief, Balog asserts that the trial court erred by incorrectly concluding that she was not entitled to attorney's fees because the action was not "with respect to the contract" as required by section 57.105(7), Florida Statutes, which states in relevant part:

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.

Balog argues that CACH should not be able to avoid paying attorney's fees by simply choosing to collect the credit card debt under theories of account stated and unjust enrichment instead of breach of contract. CACH counters that the trial court properly found that attorney's fees were not awardable because CACH did not sue for breach of contract or even reference or attach a contract, and therefore, the contract was not part of the lawsuit. Furthermore, CACH contends that unjust enrichment and account stated are "separate and independent" from the original contract, and reciprocity of fees under section 57.105(7), Florida Statutes, is inappropriate because CACH did not request attorney's fees in the event that it prevailed since the action was not based on a contract allowing for fees.

Standard of Review

"When entitlement to attorney's fees rests on the interpretation of a statute or contract, appellate review is *de novo*." Vivot v. Bank of Am., NA, 115 So. 3d 428, 429 (Fla. 2d DCA 2013).

Analysis

"As a general rule, when a plaintiff voluntarily dismisses a complaint, the defendant is deemed to be the prevailing party for purposes of attorney's fees." Lopez v. Bank of Am., N.A., 153 So. 3d 922, 923 (Fla. 2d DCA 2014). "Because statutes awarding attorney's fees are in derogation of the common law rule requiring each party to pay its own attorney's fees,

they are to be strictly construed.” Saltzman v. Hadlock, 112 So. 3d 772, 774 (Fla. 5th DCA 2013).

While there is no controlling case law on point, Tylinski v. Klein Auto., Inc. is instructive. 90 So. 3d 870 (Fla. 3d DCA 2012).¹ In Tylinski, a car dealership brought a breach of contract action for a car purchase. The original transaction involved two contracts, one for the sale (“ROC”) and one for the financing (“RISC”). While both mentioned the down payment at issue, the dealer sued for breach of only the ROC contract. The purchasers were the prevailing party, but the court held that they were not entitled to attorney’s fees because only the RISC contract had a fees clause. The purchasers unsuccessfully argued that but for the RISC contract, there would have been no sale. The Third District Court held:

We understand the Tylinskis’ argument that, but for the financial commitment reflected in the RISC, the dealership would not have allowed them to drive the car off the lot. **Nevertheless, the dealership sought recovery under the ROC, not the RISC; there is no contractual avenue for recovering attorney’s fees based on the ROC**, and the Tylinskis did not plead any statutory basis for recovering attorney’s fees other than § 57.105(7).

Id. at 872-73 (citation omitted) (emphasis added).

In the instant case, although Balog would not have had the credit card debt but for the contract, CACH did not sue under the contract. CACH sought recovery under two causes of action that are not dependent on a contract: account stated and unjust enrichment. Accordingly, “there is no contractual avenue for recovering attorney’s fees.”

See id.

An action for “account stated is based on ‘the agreement of the parties to pay the amount due upon the accounting, and **not any written instrument.**” Farley v. Chase Bank, U.S.A., N.A., 37 So. 3d 936, 937 (Fla. 4th DCA 2010) (quoting Whittington v. Stanton, 58 So. 489, 491 (Fla. 1912)) (emphasis added). As the Fourth District Court of Appeal explained,

Proof of an account stated requires an express or implied agreement between the parties that a specified balance is correct and due and an express or implied promise to pay this balance. The cause of action is often based upon an implied promise. Thus, when an account statement has “been rendered to and received by one who made no objection thereto within a

¹ The Court notes that several other circuit courts sitting in their appellate capacity have opined on this issue: the Seventh, Fifteenth, and Eighteenth Circuit Courts have all based their opinions on Tylinski and held that attorney’s fees are improper in similar cases; the Ninth Circuit Court has determined that attorney’s fees can be properly awarded.

reasonable time,” a prima facie case for the correctness of the account and the liability of the debtor has been made.

Id. at 937 (quoting Daytona Bridge Co. v. Bond, 36 So. 445, 447 (Fla. 1904)) (internal citation omitted). Significantly, establishing “the nature of the original debt” is not required to maintain an action for account stated. Id. at 938. Accordingly, the law allows for an account stated action to recover the debt regardless of the underlying contract.

“[A] claim for unjust enrichment is an equitable claim based on a legal fiction which implies a contract as a matter of law even though the parties to such an implied contract never indicated by deed or word that an agreement existed between them.” 14th & Heinberg, LLC v. Terhaar & Cronley Gen. Contractors, Inc., 43 So. 3d 877, 880-81 (Fla. 1st DCA 2010). This implied in law, or quasi-contract, “is not a contract at all, but an obligation imposed by the court to bring about justice and equity, without regard to the intent of the parties and without regard to whether they have an agreement; it is a noncontractual obligation that is treated procedurally as if it were a contract.” Id. at 881 (quoting Williston on Contracts § 1:6). “Unjust enrichment cannot apply where an express contract exists which allows the recovery.” Atlantis Estate Acquisitions, Inc. v. DePierro, 125 So. 3d 889, 893 (Fla. 4th DCA 2013). Accordingly, a cause of action for unjust enrichment cannot be “with respect to the contract.”

Furthermore, a party has a right to choose what cause of action to pursue. See Feinberg v. Naile, 561 So. 2d 1307, 1308 (Fla. 3d DCA 1990) (“A plaintiff is not guaranteed success in the choice of remedies, only an opportunity to proceed under a theory which has been pled.”). CACH chose to pursue account stated and unjust enrichment actions, which do not rely on the existence or breach of a contract. Granting an award of attorney’s fees to Balog would undermine CACH’s ability to choose its cause of action. Because CACH chose to proceed under two viable causes of action that are independent of the original credit contract, the actions are not “with respect to the contract” pursuant to section 57.105(7), Florida Statutes.

Additionally, the Court notes that this case raises concerns from a policy perspective. CACH sued Balog to recover \$4,290 in overdue debt and voluntarily dismissed the action only one month after filing it. It would be inequitable to award Balog over \$18,000 in attorney’s fees when only \$985 was accrued up until the the date of the dismissal. Secondly, if CACH had prevailed at the trial level, it would not have been entitled to

attorney's fees; therefore, awarding attorney's fees under the reciprocity provision of section 57.105(7), Florida Statutes, would be contrary to legislative intent.

Conclusion

After a *de novo* review, this Court concludes that neither account stated nor unjust enrichment is an action "with respect to the contract" as required by section 57.105(7), Florida Statutes. The Final Judgment for Costs and Order Denying Defendant's Motion for Attorney's Fees is affirmed.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 20 day of September 2016.

Original Order entered on September 20, 2016, by Circuit Judges Linda R. Allan, Keith Meyer, and Patricia A. Muscarella.

Copies furnished to:

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