

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

In re	)	
	)	
LUCY M. ESTRADA,	)	Case No. 6:03-bk-09952-KSJ
	)	Chapter 7
Debtor.	)	
_____	)	
JULIA TESTER,	)	
	)	
Plaintiff,	)	Adversary No. 6:03-ap-348
	)	
vs.	)	
	)	
LUCY M. ESTRADA,	)	
	)	
Defendant.	)	
_____	)	

ORDER DENYING  
MOTION FOR REHEARING

This adversary proceeding came on for hearing on November 18, 2004, on the Motion for Rehearing to Clarify the Court’s Denial of Defendant’s Request for Attorney Fees Pursuant to Florida Statute 57.105(2) (the “Motion”) (Doc. No. 44) filed by the attorney for the debtor/defendant, Lucy M. Estrada. In the Motion, the debtor/defendant’s attorney asserts that the plaintiff, Julia Tester, should pay his attorney’s fees because the debtor/defendant was the prevailing party in the adversary proceeding.

A trial in the adversary proceeding was conducted over two days, August 30, 2004, and September 20, 2004. After listening to considerable testimony, the Court found that, although Ms. Tester had raised judiciable issues on her complaint objecting to the dischargeability of a debt due to her by the debtor/defendant, that the debt was dischargeable. The complaint was neither specious nor unfounded. Rather, the debtor/defendant simply succeeded in

demonstrating that she should receive a discharge and her debt, unarguably due to the plaintiff, was dischargeable.

The debt was incurred when the debtor purchased a beauty salon and related equipment from the plaintiff, Julia Tester. Exhibits 3 and 4 introduced at the trial were the relevant Business Asset Purchase Agreement and related Promissory Note. The agreement required the debtor to pay \$12,000 in cash to Ms. Tester and to execute a promissory note for the sum of \$6,800, to be paid at six percent interest over two years. Ms. Estrada paid the \$12,000 cash and made several payments on the promissory note before she defaulted. She later filed this bankruptcy case on August 26, 2003. The Promissory Note provides that:

“In the event of default in the payment of this Note...the undersigned [Ms. Estrada] hereby agrees to pay all costs of collection including a reasonable attorney’s fee.”

Accordingly, if Ms. Tester had succeeded in making the debt nondischargeable, she could have recovered all of her costs of collection, including the cost related to proceeding with this dischargeability adversary proceeding. However, she did not succeed. Judgment was entered in favor of the debtor and against Ms. Tester.

Therefore, debtor/defendant’s counsel relies upon Florida Statute Section 57.105(2) to recover attorney’s fees of approximately \$5,000 against the plaintiff, Ms. Tester. Section 57.105 provides:

If a contract contains a provision allowing attorney’s fees to a party when he 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.)

Further, debtor/defendant’s attorney relies upon the decision of the bankruptcy court in In re Hunter, 243 B.R. 824 (Bkrtcy. M.D. Fla. 1999), that allowed attorney’s fees under this statute in a similar dischargeability adversary proceeding context.

Without specifically declining to follow the precedent set in In re Hunter, the Court in this case declines to exercise her jurisdiction to impose attorney's fees against the plaintiff here. Section 57.105(2) is clearly discretionary providing that the court "may" allow attorney fees to the prevailing party in a contractual dispute. In this case, it would add insult to injury for a plaintiff who had a legitimate claim but who ultimately failed to be required to pay the attorney's fees of the opposing side. Shifting of fees in this case would be unjust. However, the Court does not reject the possibility that such fees may be appropriate in other cases. For example, when an overreaching creditor files a complaint in bad faith, attorney's fees may be appropriate. Here, there is no indicia of bad faith or overreaching. As such, the Court declines to award attorney's fees under Section 57.105 of the Florida Statute. The Motion for Rehearing is denied. The Judgment Denying Plaintiff's Complaint (Doc. No. 42) which denies awards of attorney's fees to debtor/defendant's counsel will remain fully enforceable.

DONE AND ORDERED in Orlando, Florida, on the 10th day of December, 2004.

/s/ Karen S. Jennemann

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KAREN S. JENNEMANN  
United States Bankruptcy Judge