UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re: Case No. 9:11-bk-19510-FMD
Chapter 11

Basil Street Partners, LLC,

Debtor.
_____/

Antaramian Properties, LLC,

Plaintiff,

v. Adv. No. 9:12-ap-00863-FMD

Basil Street Partners, LLC,
F. Fred Pezeshkan, Iraj Zand, and
Raymond Sehayek,

Defendants.
_____/

ORDER GRANTING IN PART MOTION FOR ATTORNEY'S FEES, PARALEGALS' FEES, AND COSTS IN EXCESS OF TAXABLE COSTS (Doc. No. 233)

THIS PROCEEDING came on for hearing on April 24, 2013, of the *Motion for Attorney's Fees, Paralegals' Fees and Costs in Excess of Taxable Costs* and memorandum in support thereof (Doc. Nos. 233, 259) (the "Fee Motion") filed by individual Defendants and Counterclaimants, F. Fred Pezeshkan, Iraj Zand, and Raymond Sehayek (collectively, "PZS") and the response filed by Plaintiff and Counterclaim Defendant, Antaramian Properties, LLC ("AP"), and Counterclaim Defendants, Jack J. Antaramian ("Mr. Antaramian"), Antaramian Family, LLC, and the Antaramian Family Trust[1] (collectively, with AP, the "Antaramian Parties") (Doc. No. 268) (the "Response"). Subsequent to the oral arguments at the hearing, at the Court's request, the parties filed supplemental memoranda of law (Doc. Nos. 278, 279).

In the Fee Motion, PZS claim that they are the prevailing parties in this adversary proceeding and are entitled to attorney's fees and other fees and non-taxable costs against the Antaramian Parties. The Antaramian Parties contend that PZS are not the prevailing parties and that PZS waived any claim for attorney's fees by failing to properly plead their claim as required by both Florida law and the Federal Rules of Bankruptcy Procedure.

After careful consideration of the legal issues involved, the Court finds:

(a) PZS are the prevailing parties in this adversary proceeding;

(b) PZS properly pleaded their claim for attorney's fees under Florida law and, therefore, did not waive their right to seek attorney's fees;

(c) Rule 7008(b) of the Federal Rules of Bankruptcy Procedure does not apply to the Fee Motion;

(d) PZS are entitled to judgment for their attorney's fees against each of the Antaramian Parties, in an amount to be determined; and

(e) PZS are not entitled to an award of their costs in excess of taxable costs.

Background

On February 13, 2013, shortly after the conclusion of an eight-day trial, the Court orally announced its ruling in this adversary proceeding. The Court entered written Findings of Fact and Conclusions of Law,[2] which incorporated the transcript of the Court's oral ruling, and a Final Judgment.[3] The Court's Findings of Fact and Conclusions of Law are incorporated herein.

In brief, long standing friends Mr. Antaramian and PZS, through layers of corporate entities, own Basil Street Partners, LLC, the debtor herein (the "Debtor"). The Debtor owned a resort known as Naples Bay Resort. In 2009, the Naples Bay Resort property was subject to a loan held by Regions Bank in the approximate amount of $36,000,000. Mr. Antaramian and PZS had each personally guaranteed the loan, with PZS's guaranties being subject to a $15,000,000 cap (the "Guaranties"). The loan went into default, and Regions Bank commenced a state court foreclosure action, which included claims against Mr. Antaramian and PZS on the Guaranties (the "State Court Action").

As co-defendants in the state court action, Mr. Antaramian and PZS reached an agreement as to how they would negotiate with Regions Bank in an effort to resolve the Guaranties. But contrary to his agreement

[1] Mr. Medwed, as a co-trustee of the Trust, is not personally liable for the obligations of the Trust.

[2] Doc. No. 250.
[3] Doc. No. 251.

with PZS, Mr. Antaramian negotiated on his own behalf with Regions Bank. He arranged for AP to acquire the bank's loan documents and the PZS Guaranties in exchange for a steeply discounted payment of $8,668,000.

AP then continued to prosecute the State Court Action, including the guaranty claims against PZS. PZS defended against AP's guaranty claims and also filed counterclaims against the Antaramian Parties for breach of fiduciary duty, against AP for fraud, and against the other Antaramian Parties for aiding and abetting the alleged fraud.[4] The breach of fiduciary duty claims arose from AP's acquisition of the Regions Bank loan documents and the Guaranties. The fraud claim against AP, as Regions Bank's successor-in-interest, arose from the alleged fraudulent conduct of Regions Bank. In addition, PZS asserted that AP's claim against the Debtor was limited to its $8,668,000 cost of acquiring the loan.

While the State Court Action was pending, AP, joined by three other petitioning creditors, filed an involuntary bankruptcy petition against the Debtor.[5] The State Court Action was removed, with the consent of all parties, to this Court.[6] At the conclusion of the trial, the Court held that Mr. Antaramian and the Antaramian Parties owed fiduciary duties to PZS; that those fiduciary duties had been breached; that PZS's Guaranties were unenforceable; and that AP could enforce the face amount of its claim (which, at that point, with accrued interest totaled almost $53,000,000) against the Debtor. The Court also held that the Antaramian Parties were the alter egos of each other for the purpose of acquiring the Guaranties and subsequently attempting to enforce them against PZS.[7] PZS were awarded nominal damages of $1.00 on their breach of fiduciary duty claims. The Court entered judgment for AP and the Antaramian Parties on PZS's fraud claims.

PZS timely filed a Bill of Costs[8] and the Fee Motion. In the Fee Motion, PZS seek (i) an award of all of their attorney's fees against the Antaramian Parties, pursuant to the attorney's fee provision in the Guaranties and Fla. Stat. § 57.105(7); and (ii) an award of costs in excess of taxable costs. The costs in excess of taxable costs total $379,206.64, and consist of expert witness fees; attorney and paralegal expenses, including travel and meals; witness travel expenses in excess of taxable costs, including airfare and hotel costs for the parties; attorney pre-trial travel expenses; computerized legal research charges; long distance telephone conference charges; and Federal Express delivery charges.[9]

The Antaramian Parties oppose the Fee Motion, arguing that PZS were not the prevailing parties in the adversary proceeding, and that, in any event, PZS did not specifically plead a claim for attorney's fees in their answer and counterclaims as required by Florida law and Fed. R. Bankr. P. 7008(b). The Antaramian Parties also argue that because the only basis for awarding the fees is the attorney's fee provision set forth in the Guaranties, and because only AP was a party to the Guaranties, any award of fees can be made against AP alone, and not against the other Antaramian Parties. Lastly, the Antaramian Parties argue that PZS are not entitled to any costs in excess of taxable costs.

Legal Analysis

I. As Prevailing Parties, PZS May Recover Fees from the Antaramian Parties.

Having prevailed on the guaranty-based claims, PZS seek to recover their attorney's fees pursuant to Section 8 of the Guaranties and by operation of Fla. Stat. § 57.105(7).

Section 8 of the Guaranties states in full:

> In the event that it be necessary for Bank [i.e., AP as the Bank's successor-in-interest] to enforce any of its rights under the Loan Documents, Guarantor will pay to Bank all costs of collection or enforcement, including reasonable attorneys' fees, paralegals' fees, legal assistants' fees, costs and expenses, whether incurred with respect to collection, litigation, bankruptcy proceedings, interpretation, dispute, negotiation, trial, appeal, defense of actions instituted by a third party against Bank arising out of or related to the Loan, enforcement of any judgment based on this Guaranty, or otherwise, whether or not a suit to collect such amounts or to enforce such rights is

[4] Doc. No. 84-17.
[5] Main Case Doc. No. 1. The Debtor later filed a motion to convert the involuntary Chapter 7 case to a voluntary Chapter 11 case. (Main Case Doc. No. 241.) The Court granted this motion. (Main Case Doc. No. 306.)
[6] Doc. No. 16.
[7] Doc. No. 250-2, p. 48.
[8] Doc. No. 253.
[9] Doc. No. 233.

> brought or, if brought, is prosecuted to judgment.[10]

This attorney's fee provision is clearly a unilateral provision in favor of AP. However, under Florida law, any unilateral contractual attorney's fee provision is considered to be reciprocal:

> 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. . . .[11]

The parties agree that Florida's body of "prevailing party" case law governs the outcome of this dispute.[12] Therefore, the Court must decide whether PZS are the prevailing parties in the adversary proceeding and, if so, against whom PZS may recover their attorney's fees. The Court will address each issue in turn.

A. PZS Are the Prevailing Parties.

PZS and the Antaramian Parties each contend that they are the prevailing parties in this adversary proceeding. This difference of opinion arises because none of the parties prevailed on every one of its claims. However, under Florida law, the prevailing party for purposes of attorney's fees is the party that prevailed on the significant issues in the litigation.[13] AP argues that its guaranty claims against PZS were not the most significant issues in the litigation. Rather, AP contends that Counts I, II, and III of its Amended Complaint (in which it sought to enforce the loan documents against the Debtor) encompassed the most significant issues of the litigation. AP argues that because it prevailed on those counts and received a judgment for nearly $53 million against the Debtor, it is the prevailing party in the litigation as a whole.[14]

But AP overlooks the fact that PZS were not parties to Counts I, II or III of AP's Amended Complaint. In fact, AP could have prosecuted two separate lawsuits, one against the Debtor to enforce the loan obligations and a second lawsuit against PZS to recover on the Guaranties. The fact that AP prevailed on its claims against the Debtor does not mean that AP was also the prevailing party as against PZS. Just because AP chose to include all its claims against the Debtor and PZS in a single action does not cloud the prevailing party analysis. As the court in *Caplan v. 1616 East Sunrise Motors, Inc.* stated, "no amount of success against one defendant – even if sufficient to fully compensate the plaintiff – can be considered success against a different defendant."[15]

The testimony at trial demonstrated that PZS were most concerned with avoiding their collective $45,000,000 liability under the Guaranties. Their primary goal was to obtain a judicial determination that the Guaranties were unenforceable. PZS accomplished this goal by prevailing on their affirmative defenses and their breach of fiduciary claims (Counts I and II of their Counterclaims) against all of the Antaramian Parties.

The question, then, is whether the fact that the Antaramian Parties prevailed on the fraud claims (Counts III and IV of PZS's Counterclaims) changes this analysis. The answer is no. Under Florida law, when a defendant prevails on each count in which it was named as a defendant, it is the prevailing party, regardless of whether the defendant also unsuccessfully brought counterclaims against the plaintiff.[16] In this case, PZS prevailed on each count in which they were named as defendants. The fact that they did not prevail

---

[10] Doc. No. 4-31, pp. 51-60; Doc. No. 4-32, pp. 1-15. The Guaranties are in evidence as Plaintiff's Trial Exhibits 20, 21, and 22.

[11] Fla. Stat. § 57.105(7).

[12] Section 18 of the Guaranties states that they will be enforced and governed by Florida law.

[13] *Moritz v. Hoyt Enterprises, Inc.*, 604 So. 2d 807, 810 (Fla. 1992).

[14] AP did not file a motion for attorney's fees on account of its having prevailed on Counts I, II and III. This is likely because AP, as the proponent of the Chapter 11 plan which this Court confirmed (Main Case Doc. Nos. 598, 600), agreed to subordinate the payment of its unsecured deficiency claim to the claims of other creditors. AP was already the holder of a large unsecured claim because the value of the Naples Bay Resort property was far less than the amount of AP's claim. *See* 11 U.S.C. § 506(b) (authorizing attorney's fees only to over-secured creditors).

[15] 522 So. 2d 920, 921 (Fla. 3d DCA 1988). *See also Ivans v. McKid Ltd.*, 642 So. 2d 798, 799 (Fla. 3d DCA 1994) (a plaintiff's success against some defendants does not necessarily make it the prevailing party against all defendants).

[16] *See Scutti v. Daniel E. Adache & Associates Architects, P.A.*, 515 So. 2d 1023 (Fla. 4th DCA 1987) ("where a plaintiff loses on his complaint, the defendant is the prevailing party whether he is a successful counterclaimant or not"); *Stout Jewelers, Inc. v. Corson*, 639 So. 2d 82 (Fla. 2d DCA 1994) (holding that defendant was prevailing party even though it did not succeed on its counterclaim); *McKelvey v. Kismet, Inc.*, 430 So. 2d 919, 922 (Fla. 3d DCA 1983) (stating that a plaintiff who loses on its own claim but prevails on a defendant's counterclaim has "at most . . . [won] only a battle while still losing the war").

on all of their counterclaims against AP is irrelevant. In addition, while PZS did not prevail on their fraud claims against the Antaramian Parties, those claims were not the main focus of the trial. Rather, PZS pursued the fraud claims as part of an overall defensive strategy. PZS's theory was that if they recovered damages for the allegedly fraudulent conduct committed by Region Bank's loan officers and employees, they would have an award of damages to offset any potential liability under the Guaranties.

Notwithstanding the significant amount of money at stake in the fraud claims, the Court finds that the guaranty-based claims, including the breach of fiduciary duty counterclaims against all of the Antaramian Parties, encompassed PZS's overarching concern in the adversary proceeding, and were more significant than the fraud claims. The Court concludes that PZS were the prevailing parties as against AP and the other Antaramian Parties in the adversary proceeding.

However, because PZS did not prevail on their fraud claims against the Antaramian Parties, they cannot recover fees incurred in connection with those claims unless they establish that the fraud claims were inextricably intertwined with their breach of fiduciary duty claims.[17] The parties' arguments on that issue are preserved and will be resolved in connection with the Court's ruling on the amount of fees to which PZS are entitled.

B. PZS May Recover Attorney's Fees from Each of the Antaramian Parties.

The next question is whether PZS may be awarded fees against Mr. Antaramian, Antaramian Family, LLC, and the Antaramian Family Trust – who, unlike AP, were not parties to the Guaranties.[18]

In *Mesa Petroleum Co. v. Coniglio*, the Eleventh Circuit held that a party who had not signed a promissory note which included an attorney's fees provision could nevertheless be liable for the opposing party's attorney's fees where she was the alter ego of the signatory to the note.[19] In *North American Clearing, Inc., v. Brokerage Computer Systems, Inc*., the Eleventh Circuit relied on an alter ego theory to permit the sole shareholder of a party to a contract to recover attorney's fees even though the shareholder was not himself a party to the contract.[20]

In this case, the Court found that Mr. Antaramian's breach of fiduciary duty to PZS was fully attributable to the other Antaramian Parties. Specifically, the Court found that Mr. Antaramian created, serves as a co-trustee, and is a beneficiary of the Antaramian Family Trust (the "Trust"). The Trust is the entity which Mr. Antaramian initially proposed to Regions Bank as the purchaser of the loan documents, including the Guaranties. The Trust is the 60% owner of Antaramian Family, LLC, and holds 100% of the voting rights of Antaramian Family, LLC. Antaramian Family, LLC, in turn, is the entity through which Mr. Antaramian owned his indirect interest in the Debtor. Mr. Antaramian is the sole manager of Antaramian Family, LLC.

After Mr. Antaramian decided that he would not use the Trust to acquire the loan documents and the Guaranties, he formed AP for the sole and express purpose of acquiring the loan documents and Guaranties from Regions Bank. Mr. Antaramian was the initial majority owner of AP, and is now the sole owner of AP. And at all times, Mr. Antaramian was the sole manager of AP and possessed 100% of the voting rights of AP. The Trust, controlled by Mr. Antaramian, provided the funds to AP that enabled AP, in addition to funds provided by another investor, to purchase the loan documents and Guaranties from Regions Bank.[21] AP has since acquired the interest of the other investor.[22]

In announcing its Findings of Fact and Conclusions of Law, the Court stated that it

> [could] not think of a more appropriate case in which the legal principle applies which allows the court of equity to disregard the corporate fiction when the separate corporate existence is used "merely as a convenience for accomplishing an unconscionable transaction" if it inures to the benefit of the individual controlling the corporation.[23]

Although the Court did not find Mr. Antaramian to be the alter ego of the other Antaramian Parties for all purposes, it did find that the Antaramian Parties,

---

[17] *Davis v. National Medical Enterprises, Inc*., 253 F.3d 1314, 1320 (11th Cir. 2001); *Saunders v. Dickens*, 103 So. 3d 871, 880 (Fla. 4th DCA 2012).

[18] As the successor-in-interest to Regions Bank, AP is considered a party to the Guaranties.

[19] 787 F.2d 1484, 1489 (11th Cir. 1986).

[20] 395 F. App'x 563, 566-67 (11th Cir. 2010).

[21] Plaintiff's Trial Exh. 644.

[22] Doc. No. 250-2, p. 47.

[23] *Id.* at p. 48 (citing the Florida Supreme Court's decision in *Fickling Properties v. Smith*, 123 Fla. 556 (1936)).

including Mr. Antaramian, were alter egos of each other for the purpose of acquiring the Guaranties and subsequently attempting to enforce them against PZS.[24] The Court's ruling was not appealed and is now final.

Because of the Court's alter ego findings, and consistent with Eleventh Circuit case law, the Court finds that PZS may recover attorney's fees from each of the Antaramian Parties.

II. PZS Properly Pleaded Their Claim for Attorney's Fees Under Florida Law.

Under Florida law, the inclusion of a demand for attorney's fees in a pleading's "wherefore" clause or prayer for relief is sufficient to notify one's adversary of a claim for attorney's fees.[25] In *Stockman v. Downs*, the Florida Supreme Court explained that claims for attorney's fees must be pleaded because the fundamental concern is one of notice, so as to prevent unfair surprise:

> Raising entitlement to attorney's fees only after judgment fails to serve either of these objectives. The existence or nonexistence of a motion for attorney's fees may play an important role in decisions affecting a case. For example, the potential that one may be required to pay an opposing party's attorney's fees may often be determinative in a decision on whether to pursue a claim, dismiss it, or settle.[26]

Although the Antaramian Parties argue that Florida law requires a contractual right to attorney's fees to be specifically pleaded, each of the cases they cite for this proposition addresses a party's total failure to plead entitlement to attorney's fees. In each case, there was no mention of attorney's fees anywhere in the requesting party's pleadings. Rather, the first time the issue of entitlement to attorney's fees was raised occurred in a post-judgment motion.[27] But as required by *Stockman*, PZS *did include* a request for attorney's fees as part of their prayer for relief in their affirmative defenses to the guaranty claims and in each of their five counts of their counterclaims.[28] The Antaramian Parties cannot argue that PZS failed to put them on notice of their attorney's fees claim, or that the first time PZS made a request for attorney's fees was in the Fee Motion.

The Antaramian Parties' argument might be more persuasive if Florida law required parties to plead the specific basis for their asserted entitlement to attorney's fees, as PZS did not specifically cite to either the Guaranties or Fla. Stat. § 57.105(7) in connection with their request for attorney's fees. But Florida law does not require such specific pleading.[29]

Accordingly, the Court finds that PZS's general demand for attorney's fees as part of their prayer for relief is sufficient to satisfy the requirements of Florida law.

III. Federal Rule of Bankruptcy Procedure 7008(b) Does Not Apply.

Rule 7001 of the Federal Rules of Bankruptcy Procedure[30] states that "[a]n adversary proceeding is governed by the rules of this Part VII" and sets forth a list of adversary proceedings including "a proceeding to determine a claim or cause of action removed under 28 U.S.C. § 1452."[31] Under Rule 9027(g), the Part VII rules govern procedure in adversary proceedings *after* removal to the bankruptcy court.

It is true, as the Antaramian Parties contend, that Rule 7008(b) states that "[a] request for an award of attorney's fees shall be pleaded . . . as may be appropriate," and that courts have generally held that a party fails to satisfy Rule 7008(b) if attorney's fees are requested in the prayer for relief only.[32] At least one court has held that a claim for attorney's fees must be pleaded as a separate claim, and must state the legal basis for the pleader's entitlement to fees and the facts that support the pleader's recovery of fees under the

---

[24] *Id.*

[25] *See Raza v. Deutsche Bank Nat. Trust Co.*, 100 So. 3d 121, 124 (Fla. 2nd DCA 2012); *American Exp. Bank Intern. v. Inverpan, S.A.*, 972 So. 2d 269, 270 (Fla. 3d DCA 2008) (denying fees because the plaintiff did not request fees in either the body of the complaint or in the "wherefore" clause).

[26] 573 So. 2d 835, 837 (Fla. 1991).

[27] *See Globe Auto Imports, Inc. v. Golden*, 567 So. 2d 899 (Fla. 2d DCA 1990); *Stockman v. Downs*, 573 So. 2d at 836; *Heartland Fertilizer Co. v. Carpenter*, 827 So. 2d 1103 (Fla. 2d DCA 2002); and *C & C Wholesale, Inc. v. Fusco Mgmt. Corp.*, 564 So. 2d 1259 (Fla. 2d DCA 1990).

[28] Doc. No. 84-17, pp. 23, 46, 47, 49, 51, 53.

[29] *See Caufield v. Cantele*, 837 So. 2d 371, 377-78 (Fla. 2002) (holding that the specific statutory or contractual basis of a claim for attorney's fees need not be pleaded).

[30] Unless otherwise stated, all citations to rules are to the Federal Rules of Bankruptcy Procedure.

[31] Fed. R. Bankr. P. 7001(10).

[32] *See, e.g., In re DeMaio*, 158 B.R. 890 (Bankr. D. Conn. 1993); *In re Ramsey*, 424 B.R. 217, 226 (Bankr. N.D. Miss. 2009).

applicable count and statutory or common law principle.[33]

In their answer, affirmative defenses and counterclaims, PZS did not plead a separate claim for attorney's fees; express references to and requests for attorney's fees are included only in the wherefore clauses of their affirmative defenses and counterclaims.[34] The question, then, is whether Rule 7008(b), and the requirement that attorney's fees be specifically pleaded, applies to PZS's answer and counterclaims. Although there does not appear to be any case law directly on point, in *In re Section 20 Land Group, Ltd.*,[35] the bankruptcy court held in a removed action that the defendant's request for "court costs" in its answer and affirmative defenses preserved its claim for attorney's fees and was not deemed to be deficient under Rule 7008(b).[36]

The Court is mindful that federal courts are bound to follow state courts on substantive state law issues,[37] and that the award of attorney's fees under Fla. Stat. § 57.105 is a substantive, rather than a procedural, state law issue.[38] This is particularly true in this case, where the claims that were prosecuted were state law claims for relief, not claims arising under the Bankruptcy Code. And, in a removed action, the court accepts the parties' pleadings as they have been removed, unless the Court specifically orders repleading as set forth in Rule 9027(g). In this case, the parties did not supplement or amend their state court pleadings, and the Court did not order repleading. Instead, the parties relied upon the pleadings as filed in the State Court Action.[39]

The Antaramian Parties argue that PZS should have amended their purportedly deficient pleadings when the Court gave them the opportunity to do so, pointing to the Court's statement at an October 30, 2012 hearing.[40] But the Court's statement at that hearing must be placed in its proper context. In ruling on the Anataramian Parties' argument that PZS had raised new claims for relief for the first time at the summary judgment stage, the Court stated:

> To the extent that issues weren't teed up by the pleadings, I'm not going to grant summary judgment on them. We will deal with them, if appropriate, at trial and the appropriate motion to conform the . . . pleadings to the proof can be made.[41]

It is clear that the Court was responding to the Antaramian Parties' concern that PZS's counsel was raising entirely new legal theories of relief at the summary judgment hearing. Neither the Court nor the parties addressed the issue of attorney's fees, which, of course, makes sense, as there was no need to address an award of attorney's fees until the Court had ruled on the merits of the parties' claims. Thus, the Court's statement regarding amending the pleadings did not apply to claims for attorney's fees or otherwise implicate repleading under Rules 7008(b) or 9027(g).

Accordingly, the Court finds that PZS's requests for attorney's fees are not subject to Rule 7008(b). And even if Rule 7008(b) could be read as applying to PZS's claim for attorney's fees, it would be patently unfair to penalize PZS for a technical non-compliance with the rule when they were not given an opportunity to replead and when their claims for attorney's fees were properly pleaded under Florida law.[42]

IV. PZS May Recover Only Their Taxable Costs.

Section 8 of the Guaranties permits the recovery of "all costs of collection or enforcement, including reasonable attorneys' fees, paralegals' fees, legal assistants' fees, costs and expenses." Under Rule 7054(b), the Court has discretion to award costs to the prevailing party. But those costs are limited to taxable costs under 28 U.S.C. § 1920. In addition to the costs requested in their Bill of Costs,[43] PZS argue that their non-taxable costs for expert witness fees, travel expenses, and the like, are recoverable under the broad language of the Guaranties.

---

[33] *In re Antioch Co.*, 451 B.R. 810, 816 (Bankr. S.D. Ohio 2011).
[34] Doc. No. 84-17.
[35] 252 B.R. 812, 817 (Bankr. M.D. Fla. 2000).
[36] However, the court held that the defendant's motion for sanctions (in the form of fees and costs) was untimely and therefore denied the motion.
[37] *In re Grubbs Const. Co.*, 306 B.R. 372, 375 (Bankr. M.D. Fla. 2004).
[38] *See Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 948 (Fla. 2011).
[39] *See* Transcript of October 30, 2012 hearing (Doc. No. 81, p. 19).
[40] *See* Antaramian Response (Doc. No. 268, pp. 18-19).
[41] *See* Transcript of October 30, 2012 hearing (Doc. No. 81, pp. 112-113). *See also* Transcript of December 6, 2012 hearing (Doc. No. 111, p. 23); December 7, 2012 *Order on Motions for Summary Judgment* (Doc. No. 104, p. 22) (same).
[42] *See In re May*, 448 B.R. 197, 201 (W.D. Mich. 2011) (affirming the bankruptcy court's rejection of a "hyper-technical reading of Rule 7008(b)").
[43] Doc. No. 253. The Court will address PZS's entitlement to taxable costs by separate order.

In order to recover any non-taxable costs under the Guaranties, PZS must rely on the operation of § 57.105(7). But § 57.105(7) is limited by its express language only to attorney's fees; it does not mention costs. After considering the parties' supplemental briefs, the Court finds for several reasons that costs, including non-taxable costs, may not be awarded to a prevailing party by operation of Fla. Stat. § 57.105(7).

First, numerous Florida courts have awarded attorney's fees—but not costs—to a prevailing party under § 57.105(7), despite the fact that the underlying agreements between the parties allowed for the recovery of both fees and costs.[44] While none of these cases addressed the precise issue of whether § 57.105(7) permits an award of costs, because costs were recoverable under the parties' agreements, but were not awarded by the courts, it may be inferred that the award of only attorney's fees was intentional.

Courts have described the purpose of § 57.105(7) as providing for "mutuality of attorney's fees as a remedy in contract cases."[45] Courts have also explained that the statute renders unilateral provisions for prevailing party attorney's fees bilateral.[46] Notably, though, those cases do not describe the statute as providing for mutuality of costs or rendering unilateral costs provisions bilateral. Nor is the Court aware of any authority that expressly makes a unilateral *cost* provision bilateral.

There is a plausible explanation for the lack of such authority: Fla. Stat. § 57.041 provides for the award of costs to a prevailing party independent of any contractual agreement.[47] Thus, it is entirely possible that the legislature did not deem it necessary to include—and deliberately excluded—costs from the scope of § 57.105(7). Indeed, some Florida courts have differentiated an award of attorney's fees under § 57.105(7) from an award of costs under § 57.041.[48] However, the Court need not speculate about the legislature's intent in drafting the statute because, as explained more fully below, the statute is clear and unambiguous.

Second, the well-established canons of statutory interpretation dictate the conclusion that costs are not recoverable under the statute. When interpreting a statute, courts must give effect to the plain language of the statute.[49] When the statutory language is clear and unambiguous, it is unnecessary—and improper—to resort to rules of statutory interpretation and construction.[50] Section 57.105 does not address costs, and to read the term "costs" into the statute would be to re-write the statutory text under the guise of judicial interpretation, an encroachment into the legislative realm.[51]

If the legislature wished to make both attorney's fees and costs recoverable under § 57.105(7), it could have done so. In fact, a Westlaw search of the phrase "fees and costs" in the Florida Statutes un-annotated database returns over 400 results, including five from Chapter 57 alone.[52] But the legislature did not include the term "costs" in § 57.105(7). Because courts must presume that the legislature says what it means and means what it says, the starting point (and the ending point in a clear, unambiguous statute) is always the language itself.[53] And in § 57.105(7), the legislature said that only attorney's fees are recoverable.

Third, and perhaps most directly on-point, several Florida courts have held that § 57.105 does not authorize an award of costs. In *Ferdie v. Isaacson*, the court held that the trial court's award of costs as a sanction under § 57.105(1) constituted reversible error because the statute "makes no mention of costs."[54] The courts in *Ferere v. Shure*[55] and *Santini v. Cleveland Clinic Florida*[56] reached the same conclusion. While

---

[44] *See, e.g., Raza*, 100 So. 3d at 125; *Nudel v. Flagstar Bank, FSB*, 60 So. 3d 1163, 1165 (Fla. 4th DCA 2011); *Land & Sea Petroleum, Inc. v. Business Specialists, Inc.*, 53 So. 3d 348, 355 (Fla. 4th DCA 2011); *Valcarcel v. Chase Bank USA NA*, 54 So. 3d 989, 991 (Fla. 4th DCA 2010); *Vivot v. Bank of America, NA*, 115 So. 3d 428, 429-30 (Fla. 2d DCA 2013).

[45] *See, e.g., Florida Hurricane Protection & Awning, Inc. v. Pastina*, 43 So. 3d 893, 895 (Fla. 4th DCA 2010) (internal citations omitted).

[46] *Port-A-Weld, Inc. v. Padula & Wadsworth Construction, Inc.*, 984 So. 2d 564, 570 (Fla. 4th DCA 2008) (referring to Fla. Stat. § 57.105(7) as "the attorney's fee reciprocity statute"); *Holiday Square Owners Ass'n, Inc. v. Tsetsenis*, 820 So. 2d 450, 453 (Fla. 5th DCA 2002); *Indemnity Ins. Co. of North America v. Chambers*, 732 So. 2d 1141, 1143 (Fla. 4th DCA 1999).

[47] *Port-A-Weld, Inc.*, 984 So. 2d at 568.

[48] *See, e.g., Land & Sea Petroleum, Inc.*, 53 So. 3d at 355-56; *Islander Beach Club Condominium v. Skylark Sports, L.L.C.*, 975 So. 2d 1208, 1212 (Fla. 5th DCA 2008) (declining to award attorney's fees under § 57.105(7) because the contractual provision, as written, was unenforceable, but still awarding costs under § 57.041).

[49] *Atwater v. Kortum*, 95 So. 3d 85, 90 (Fla. 2012).

[50] *Id.*

[51] *See Olmstead v. F.T.C.*, 44 So. 3d 76, 85 (Fla. 2010).

[52] *See, e.g.*, Fla. Stat. § 57.111(2), (3)(a).

[53] *Corey v. Corey*, 29 So. 3d 315, 319 (Fla. 3d DCA 2009); *Vargas v. Enterprise Leasing Co.*, 993 So. 2d 614, 618 (Fla. 4th DCA 2008).

[54] 8 So. 3d 1246, 1251 (Fla. 4th DCA 2009).

[55] 65 So. 3d 1141, 1145 (Fla. 4th DCA 2011).

[56] 65 So. 3d 22, 36 (Fla. 4th DCA 2011).

these courts were addressing the award of sanctions under § 57.105(1), the reasoning applies equally to § 57.105(7), because the term "costs" is not mentioned in *any* of the sub-sections of § 57.105.

Fourth, two federal courts in Florida have also interpreted § 57.105(7) to allow for an award of only attorney's fees. In *Placida Professional Center, LLC v. F.D.I.C.*, the court observed that

> the reciprocal provision of Fla. Stat. § 57.105(7) only addresses "attorney's fees." Thus, because the reciprocal provision of Florida law does not address the award of costs, the loan agreement's choice of law does not provide for the award of costs.[57]

Accordingly, the court limited the recoverable costs to only those taxable costs enumerated in 28 U.S.C. § 1920.[58] Likewise, in *U.S. v. Skanska USA Building, Inc.*, the court refused to award expert witness fees to the prevailing party under § 57.105(7).[59] While the court acknowledged the reciprocal effect of the statute, it concluded that the statute made only an award of attorney's fees reciprocal—not an award of expert fees.[60]

For those reasons, the Court concludes that costs are not recoverable under § 57.105(7). And even if the Court were to reach the opposite conclusion, there would still be an impediment to PZS's recovery of their non-taxable costs. The problem lies in the broad, non-specific language of the Guaranties, which provides for the recovery of "all costs of collection or enforcement, including . . . costs and expenses . . . ."

When faced with similar "all costs" or "all costs and expenses" language, Florida courts have expressly held that a party seeking to recover costs under such a contractual provision is limited to only taxable costs unless the contract specifically details which non-taxable costs may also be recovered.[61] Because contractual provisions that provide for recovery of "all costs" or "all costs and expenses" are not specific enough to warrant recovery of non-taxable costs, Florida courts use the Statewide Uniform Guidelines for Taxation of Costs[62] to determine what costs are recoverable.[63] In this case, because the Guaranties do not specify particular items of non-taxable costs that may be recovered, the Court looks to 28 U.S.C. § 1920 to determine what costs are recoverable. 28 U.S.C. § 1920 does not allow for the recovery of any non-taxable costs. Accordingly, even if the Court were to have found that costs could be recovered under § 57.105(7), PZS would still be limited to their taxable costs under 28 U.S.C. § 1920.

Although PZS have cited numerous cases in support of the proposition that courts have awarded both attorney's fees *and costs* under § 57.105(7), none of the cases cited specifically addressed the narrow issue of whether costs are also recoverable under the statute.[64] Instead, the courts in those cases appear to have simply assumed, without raising or analyzing the issue, that § 57.105(7) encompassed costs. Accordingly, the cases cited by PZS do not provide guidance on this issue.

Conclusion

As the prevailing parties on the most significant issues in the litigation, PZS may recover from each of the Antaramian Parties their reasonable attorney's fees, but not their non-taxable costs, in an amount to be

---

[57] 2012 WL 4903323, at *3 (M.D. Fla. Oct. 16, 2012), *rev'd on other grounds*, 512 F. App'x. 938 (11th Cir. 2013). In discussing § 57.105(7), the Eleventh Circuit stated that the statute "provides for reciprocity of prevailing party attorneys' fee provisions." 512 F. App'x at 952. That characterization, including the omission of the term "costs," could be considered an implicit endorsement of the district court's ruling on costs under § 57.105(7).

[58] 2012 WL 4903323, at * 3.

[59] 2005 WL 2179774, at *1 (M.D. Fla. Sept. 9, 2005), *aff'd in part, vacated in part*, 209 F. App'x 880 (11th Cir. 2006). The Eleventh Circuit vacated the award of attorney's fees because the district court did not allow the opposing party an opportunity to present evidence in opposition to the amount of fees sought. The Eleventh Circuit did not take issue with the district court's ruling that § 57.105(7) does not allow for the recovery of costs.

[60] 2005 WL 2179774, at *1 ("[T]he Court finds that Section 57.105 dictates the Court award attorneys fees only. . . .").

[61] *See, e.g., Midway Servs., Inc. v. Custom Mfg. & Eng'g, Inc.*, 974 So. 2d 427, 430 (Fla. 2d DCA 2007) ("[I]f the contract specifically provides for certain costs that are not recoverable under the uniform guidelines, the contract controls.").

[62] *In re Amendments to Uniform Guidelines for Taxation of Costs*, 915 So. 2d 612, 617 (Fla. 2005).

[63] *Wood v. Panton & Co. Realty, Inc.*, 950 So. 2d 534, 535 (Fla. 4th DCA 2007) (using the uniform guidelines to define costs when the contractual attorney's fees provision allowed for recovery of "all costs incurred including attorney's fees and legal assistant fees"); *Midway Servs., Inc.*, 974 So. 2d at 430. *Cf. Lewis v. Thunderbird Manor, Inc.*, 60 So. 3d 1182 (Fla. 2d DCA 2011) (relying on the uniform guidelines in reversing an award of non-taxable costs for postage and photocopies).

[64] *See* PZS's Supplemental Memorandum (Doc. No. 278, p. 2, n.1).

determined by the Court. The Court will schedule a further hearing by separate notice to determine the amount of attorney's fees PZS may recover from the Antaramian Parties.

DONE and **ORDERED** in Chambers at Tampa, Florida, on August 19, 2013.

/s/
Caryl E. Delano
United States Bankruptcy Judge

Attorney, Robert D. W. Landon, III, Esq., is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.