

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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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 DETERMINING
AMOUNT OF ATTORNEY'S FEES**

THIS PROCEEDING came on for final evidentiary hearing on December 12, 2013, and April 1, 2014, for a determination of the amount of attorney's fees Defendants and Counterclaimants, F. Fred Pezeshkan, Iraj Zand, and Raymond Sehayek (collectively, "PZS") are entitled to recover from Plaintiff and Counterclaim Defendant, Antaramian Properties, LLC ("AP"), and Counterclaim Defendants, Jack J. Antaramian ("Mr. Antaramian"), Antaramian Family, LLC, and the Antaramian Family Trust (collectively, with AP, the "Antaramian Parties").

The Court previously entered its *Order Granting in Part Motion for Attorney's Fees, Paralegals' Fees, and Costs in Excess of Taxable Costs*, holding that PZS were the overall prevailing parties in this adversary proceeding and are entitled to recover their attorney's fees from the Antaramian Parties (the "Order Granting Motion

for Fees").¹ As set forth in the Order Granting Motion for Fees, PZS prevailed on certain of their affirmative defenses and counterclaims relating to their defense of claims asserted against them, but they did not prevail on their fraud-based affirmative defenses and counterclaims arising from alleged actions of AP's predecessor-in-interest, Regions Bank.

The Antaramian Parties do not contest the reasonableness of the hourly rates or the total amount of time spent by PZS's attorneys in the litigation. However, they contend that PZS are limited to the recovery of attorney's fees incurred in connection with the affirmative defenses and counterclaims on which they prevailed. The Antaramian Parties argue that because PZS did not allocate the fees incurred between their successful defenses and counterclaims and their unsuccessful defenses and counterclaims, PZS have not met their burden of proof and the Court should not award fees to them.

The Court concludes that although the defenses and counterclaims on which PZS did not prevail were not inextricably intertwined with the defenses and counterclaims on which they did prevail, all of PZS's defenses and counterclaims were part of the same overall defensive strategy. Accordingly, PZS were not required to allocate their fees among the successful and unsuccessful claims and defenses, and PZS are entitled to recover the full amount of their attorney's fees.²

Background

History of the Litigation

The history of the parties' dispute is as follows. Long-standing friends, Mr. Antaramian and PZS, through layers of corporate entities, owned Basil Street Partners, LLC ("Basil Street Partners"), the Debtor herein. Basil Street Partners was the developer of a resort known as Naples Bay Resort. In 2009, Regions Bank asserted a

¹ Doc. No. 281.

² This order is limited to attorney's fees only and does not address costs. The parties agreed to a stipulated judgment taxing costs against the Antaramian Parties (Doc. No. 364).

mortgage claim against the Naples Bay Resort property in the approximate amount of \$36,000,000.00. Mr. Antaramian and PZS had each personally guaranteed the loan, with each of PZS's guaranties being subject to a \$15,000,000.00 cap (the "Guaranties"). The loan went into default, and Regions Bank commenced a state court foreclosure action (the "State Court Action") which included claims against Mr. Antaramian and PZS on the Guaranties (the "Guaranty Claims"). Contrary to an agreement with PZS, Mr. Antaramian arranged for AP to acquire the bank's loan documents and the PZS Guaranties in exchange for a steeply discounted payment of \$8,668,000.00.

AP then continued to prosecute the State Court Action, including the Guaranty Claims against PZS. PZS defended against the 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.³ The breach of fiduciary duty claims and defenses 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, related to the alleged fraudulent conduct of Regions Bank arising from Regions Bank's alleged representation in 2008 that it would negotiate an extension of the loan. In addition, PZS asserted that AP's claim against Basil Street Partners was limited to its \$8,668,000.00 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 Basil Street Partners.⁴ Portions of the State Court Action, including the claims against PZS on the Guaranties, were removed to this Court.⁵ 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 the Guaranties were unenforceable; and that AP could enforce the face amount of its claim (which, at that point, totaled almost \$53,000,000.00 with accrued interest) against Basil Street Partners. The Court also held that the Antaramian Parties were the alter egos of each other for the purpose of acquiring the Guaranties and the subsequent attempt to enforce them against PZS.⁶ PZS were awarded nominal damages of \$1.00 on their breach of fiduciary duty counterclaims. PZS did not prevail on their counterclaim for fraud, and the Court entered judgment for AP and the Antaramian Parties on the fraud counterclaims.⁷

Thereafter, PZS filed their *Motion for Attorneys' Fees, Paralegals' Fees, and Costs in Excess of Taxable Costs*,⁸ seeking to recover their attorney's fees pursuant to the broad language of the Guaranties.⁹ The Guaranties state:

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 brought or, if brought, is prosecuted to judgment.¹⁰

³ Doc. No. 84-17.

⁴ 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.)

⁵ Doc. No. 16.

⁶ Doc. No. 250-2, p. 48.

⁷ Doc. No. 251.

⁸ Doc. No. 233.

⁹ As the Court found in the Order Granting Motion for Fees, the unilateral attorney's fee provision in favor of AP is rendered bilateral under Fla. Stat. § 57.105(7).

¹⁰ Doc. No. 4-31, pp. 51-60; Doc. No. 4-32, pp. 1-15.

In the Order Granting Motion for Fees, the Court found that although AP was the prevailing party on Counts I, II, and III of its Amended Complaint (in which AP, as assignee of Regions Bank, sought to enforce the loan documents against the Debtor), PZS were not named as defendants in those counts. The Court also found that although the Antaramian Parties had prevailed on the fraud-based affirmative defenses and counterclaims, PZS were the overall prevailing parties in the litigation.¹¹ The Court's finding was based on the fact that PZS had achieved their primary goal, which was to obtain a judicial determination that the Guaranties were unenforceable. PZS accomplished this by prevailing on their breach of fiduciary duty affirmative defenses and counterclaims (Counts I and II of their Counterclaims) against all of the Antaramian Parties. The Court further found that the PZS's fraud claims were not the main focus of the trial, but had been pursued by PZS as part of an overall defensive strategy.¹² As the Court stated in the Order Granting Motion for Fees,

PZS's theory was that if they recovered damages for the allegedly fraudulent conduct committed by Regions Bank's loan officers and employees, they would have an award of damages to offset any potential liability under the Guaranties.¹³

The Order Granting Motion for Fees awarded PZS, as the prevailing parties, their attorney's fees against the Antaramian Parties in an amount to be later determined.¹⁴

Evidence Presented at Evidentiary Hearing on the Amount of the Fees to Be Awarded

PZS's lead trial counsel, Robert Landon, III, testified that PZS's goal in defending the claims asserted against them and in prosecuting their counterclaims was to eliminate (or at least reduce as much as possible) PZS's liability under the Guaranties. To accomplish this goal, PZS

prosecuted both the breach of fiduciary duty defenses and counterclaims and the fraud defenses and counterclaims. Under their fraud theory, PZS attempted to attack the validity of the underlying debt itself because without a valid underlying debt, there would have been no basis for AP to pursue PZS on their Guaranties.

Although the Antaramian Parties did not contest the reasonableness of the hourly rates or the total number of hours expended, Mr. Landon testified regarding the amount of attorney's fees PZS seek to recover. Mr. Landon explained that PZS seek to recover the attorney's fees they incurred from September 29, 2010, through June 2013. Although PZS incurred attorney's fees prior to September 2010, the critical date in the litigation between PZS and the Antaramian Parties is September 29, 2010, the date that Mr. Antaramian, through AP, acquired the Guaranties from Regions Bank and attempted to enforce the Guaranties against PZS. Mr. Landon testified that as of September 2010, the focus of PZS's counsel shifted from the fraud claims to the breach of fiduciary duty claims.¹⁵

Mr. Landon testified that the total amount of attorney's fees incurred by PZS, including the fees for services rendered by the three law firms which represented them over the course of this litigation,¹⁶ is \$2,770,522.39.¹⁷ PZS agreed to a voluntary reduction of nearly \$74,000.00¹⁸ and seek a total award against the Antaramian Parties of \$2,696,705.14, representing 7,886.15 total hours of legal services provided.¹⁹ Douglas Szabo testified as an expert witness on the reasonableness

¹⁵ Doc. No. 339, pp. 62-63.

¹⁶ In addition to Mr. Landon's firm, Kenny Nachwalter, P.A., PZS were also represented by Knott, Ebelini, Hart, Swett & Haak, P.A., and Williams & Connolly LLP. All three firms rendered services on issues that were ultimately tried before this Court. The billing records from the Knott Ebelini firm and the Williams & Connolly firm were admitted into evidence as PZS's Exhibits 3 and 4, respectively.

¹⁷ PZS Exhibit 5.

¹⁸ PZS Exhibits 6-11.

¹⁹ PZS Exhibit 12. This exhibit provides a summary of the billable hourly rates for each attorney and paralegal that provided services to PZS in this litigation during the relevant time period.

¹¹ Doc. No. 281, pp. 6-8.

¹² *Id.* at p. 7.

¹³ *Id.*

¹⁴ *Id.* at pp. 18-19.

of the fees requested. Mr. Szabo opined that the amount of time expended by PZS's counsel was reasonable, that the hourly rates of all the attorneys who rendered legal services to PZS were reasonable, and that the total dollar amount requested is reasonable.²⁰

Although the Antaramian Parties do not object to the reasonableness of the hourly rates or the total amount of time expended, they object to the fees requested because PZS did not allocate the fees between the defenses and claims on which PZS prevailed and those on which they did not prevail. In support of this objection, the Antaramian Parties relied on the testimony of Michael Brychel, the legal audit director of the legal auditing firm Stuart Maue, and David S. Jennis, an experienced bankruptcy practitioner. Although PZS filed a motion *in limine* to exclude Mr. Brychel from testifying as an expert witness,²¹ the Court allowed his testimony subject to ruling on the motion *in limine*.

Using a proprietary software program that "sorted" PZS's attorneys' billing records by searching for designated key terms, Mr. Brychel prepared a report that allocates the time entries to PZS's defenses and claims. Mr. Brychel testified that of the total amount of attorney's fees sought by PZS, just under \$45,000.00 was incurred in connection with PZS's breach of fiduciary duty defenses and counterclaims.²²

For the reasons set forth in its order granting PZS's motion *in limine*, entered concurrently herewith, the Court finds that neither Mr. Brychel's report nor his testimony satisfies the requirements of Federal Rule of Evidence 702. Mr. Brychel's testimony was not based upon sufficient facts or data, and it was not the product of reliable principles and methods. Nor did Mr. Brychel reliably apply the principles and methods to the facts of this case. As a single example, Mr. Brychel's conclusion that the total fees incurred on the breach of fiduciary duty defense and counterclaims were only \$45,000.00 (less than two

percent of the total fees sought) is not credible in light of the trial time devoted to that issue.²³ Accordingly, the Court has not given any weight or consideration to Mr. Brychel's testimony.

Mr. Jennis testified that the billing statements submitted by PZS's counsel did not comport with the guidelines promulgated by the Office of the United States Trustee for the submission of fee applications in Chapter 11 cases, largely because they included "lump" or "block" billing (the inclusion of more than one task in a single time entry). Mr. Jennis is correct; the billing statements are not in compliance with the U.S. Trustee guidelines. But the U.S. Trustee guidelines are not applicable to this case. By definition, the *Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330 (Appendix A to 28 C.F.R. § 58)* promulgated by the United States Trustee in 1994 apply to compensation sought by, *inter alia*, professional persons employed under § 327 or § 1103 of the Bankruptcy Code.²⁴ The U.S. Trustee guidelines do not apply to a non-debtor's motion for prevailing party attorney's fees.

Therefore, absent an objection to the reasonableness of the amount of fees requested, the issue before the Court is a legal one: whether PZS may recover attorney's fees incurred in prosecuting defenses and counterclaims on which they did not prevail.

Legal Analysis

The general rule under Florida law is that a party seeking to recover attorney's fees from its opponent has the burden of allocating the fees to the issues for which fees are awardable or demonstrating that the issues were so intertwined that such an allocation is not feasible.²⁵ Florida courts have characterized claims as being

²⁰ Doc. No. 339, p. 155, ll. 13-17.

²¹ Doc. No. 321. PZS also filed a supplement to that motion (Doc. No. 326).

²² Doc. No. 339, p. 255, ll. 5-19.

²³ That being said, PZS evidently agreed with portions of Mr. Brychel's analysis and voluntarily reduced their request for fees for billing entries that did not relate to this litigation.

²⁴ 11 U.S.C. § 101, *et seq.*

²⁵ *Saunders v. Dickens*, 103 So. 3d 871, 880 (Fla. 4th DCA 2012); *Lubkey v. Compuvac Systems, Inc.*, 857 So. 2d 966, 968 (Fla. 2d DCA 2003).

“inextricably intertwined” when a determination of the issues presented in one claim is necessarily dispositive of the issues raised in the other claim.²⁶ Claims are not “inextricably intertwined” and should, instead, be considered “separate and distinct” when the claims could support an independent action and are not simply alternative theories of liability for the same wrong.²⁷

Although PZS contend that their breach of fiduciary duty claims and defenses and their fraud claims and defenses are “inextricably intertwined” because both sets of claims were compulsory counterclaims, the Court is unaware of any case law adopting that standard. Rather, the sole test for determining whether claims are inextricably intertwined is whether the claims *could* support an independent action. From that perspective, PZS’s breach of fiduciary duty claims are not inextricably intertwined with their fraud claims. The two sets of claims are separate and distinct, arising from different time periods (2008 and 2010) and relating to the independent actions of different parties (Regions Bank and the Antaramian Parties). And the resolution of one set of claims did not, of necessity, dispose of the other, as evidenced by the Court’s final judgment finding in favor of PZS on the breach of fiduciary duty claims and in favor of the Antaramian Parties on the fraud claims.

That being said, a prevailing defendant who successfully defeats the plaintiff’s claim is entitled to recover all of its attorney’s fees incurred in defense of the plaintiff’s claim, even if the defendant raised and pursued defenses that were ultimately unsuccessful. In *PNC Bank v. Branch Banking & Trust Co.*, PNC pursued a claim against BB&T for improper use of loan money.²⁸ BB&T asserted at least three defenses to this claim, but the court ruled in BB&T’s favor on only two of its defenses. When BB&T moved for an award of its attorney’s fees and costs against PNC, PNC argued that because BB&T had not prevailed on one of its theories of defense, BB&T should not be allowed

to recover the fees and costs associated with that theory. The court rejected that argument and held that BB&T did not need to allocate its fees and costs according to each theory of defense. The court stated:

BB&T asserted several alternative theories, which it was entitled to do, and it ultimately prevailed as to two of those theories, thereby making it the prevailing party as to PNC’s . . . claim. As the prevailing party on [that] claim, it is entitled to recover its fees and costs.²⁹

Like BB&T, PZS in this case asserted two alternative theories of defense as part of an overall defensive strategy to minimize their financial exposure under the Guaranties. PZS prevailed on one of those theories, which resulted in the complete elimination of their liability to AP on the Guaranty Claims. Accordingly, PZS may recover the entire cost of their defense from AP.

This leaves the question of PZS’s ability to recover fees for the unsuccessful pursuit of their fraud counterclaims. Technically, the counterclaims were asserted in the posture of a *plaintiff*, potentially implicating the line of cases requiring plaintiffs to allocate fees to the claims for which such fees are awardable.³⁰ However, PZS’s fraud-based counterclaims were identical to their fraud-based affirmative defenses, as both the defenses and the counterclaims arose from the same set of facts and relied upon the identical documents and witnesses. Therefore, PZS should not be subject to an artificial distinction between their defenses and counterclaims.

Lastly, the Court has considered the broad language of the attorney’s fee provision of the Guaranties. The Guaranties, drafted for the benefit of the lender and made reciprocal by virtue of Fla. Stat. § 57.105(7), do not limit the award of attorney’s fees to claims on which the lender (AP, by assignment) prevailed. Rather, they include:

²⁶ *Saunders v. Dickens*, 103 So. 3d at 880.

²⁷ *Avatar Development Corp. v. DePani Construction, Inc.*, 883 So. 2d 344, 346 (Fla. 4th DCA 2004) (citing *Folta v. Bolton*, 493 So. 2d 440, 442 (Fla. 1986)).

²⁸ 2010 WL 2821996, at *3 (M.D. Fla. July 16, 2010) (Bucklew, J.).

²⁹ *Id.*

³⁰ *See, e.g., Lubkey v. Compuvac Systems, Inc.*, 857 So. 2d 966 (Fla. 2d DCA 2003).

. . . *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 Guaranty³¹

(emphasis supplied).

Given this broad language, and for the reasons set forth above, the Court concludes that PZS, as the prevailing parties, may recover all of their attorney's fees from the Antaramian Parties.

Conclusion

For the foregoing reasons, PZS may recover all of their attorney's fees, in the total amount of \$2,696,705.14, from the Antaramian Parties. The Court will enter a separate judgment consistent with this order.

DATED: July 18, 2014.

/s/
Caryl E. Delano
United States Bankruptcy Judge

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

³¹ See note 9, *supra*.