UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 2:18-bk-05576-FMD
Chapter 7

Linda F. Polasky,

Debtor.
_____/

Feldy Boys, LLC,

Plaintiff,

vs. Adv. Pro. No. 2:18-ap-594-FMD

Linda F. Polasky,

Defendant.
_____/

ORDER (1) DENYING DEBTOR'S AMENDED MOTION TO TAX ATTORNEYS FEES AND (2) ALLOWING DEBTOR'S COSTS UNDER FED. R. BANKR. P. 7054(b)(1)

THIS PROCEEDING came before the Court for hearing on March 25, 2021, to consider Debtor's *Amended Motion to Tax Attorneys Fees* (the "Motion"), Plaintiff's objection, Debtor's reply, and Plaintiff's sur-reply.[1] In addition, Debtor filed a Bill of Costs, Plaintiff objected, and Debtor replied.[2]

In the Motion, Debtor seeks an award of attorney's fees as the prevailing party in this adversary proceeding under Fla. Stat. § 57.105(7). As set forth below, the Court finds that Ohio law, not Florida law, controls and under Ohio law, parties to litigation are responsible for paying their own attorney's fees unless a statute or contract provides for fees to the prevailing party or the unsuccessful party acted in bad faith. Here, there is no applicable statute, the parties' agreements do not provide for an award of attorney's fees to the prevailing party, and there has been no finding of bad faith. The Court will, therefore, deny the Motion.

However, under Fed. R. Bankr. P. 7054(b)(1), the Court may allow costs to a prevailing party unless a federal statute or rule provides otherwise. Debtor's request for costs is not prohibited by federal law and her transcript costs are allowable under 28 U.S.C. § 1920. Consequently, Plaintiff's objection to the Bill of Costs is overruled and the costs requested by Debtor are allowed.

A. The Adversary Proceeding

Debtor and her husband previously lived in Ohio and owned commercial real property located in Cincinnati (the "Property"). On September 4, 2017, Debtor and her husband entered into a contract (the "Purchase Contract") to sell the Property to Plaintiff, an Ohio limited liability company; the sale closed on October 30, 2017. On the closing date, Debtor's corporation, Identity Hair Salon ("Identity"), entered into an agreement to lease the Property from Plaintiff (the "Lease"), and Debtor guaranteed the lease (the "Guaranty").

The Lease entitled Plaintiff to all costs and reasonable attorney's fees incurred as a result of Identity's default,[3] and further provided that it was to be construed under the law of the State of Ohio.[4] The Guaranty also provided that if the Guaranty were "placed in the hands of an attorney," Debtor would reimburse Plaintiff "for all costs and expenses incurred, including reasonable attorney's fees."[5] However, the Guaranty did not include a choice-of-law provision.

Six months after the closing, Debtor notified Plaintiff that Identity was dissolving and no longer able to pay rent. Debtor later moved to Florida and filed a petition under Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* Plaintiff commenced an adversary proceeding (the "Adversary Proceeding") by timely filing a complaint alleging that Debtor induced Plaintiff to purchase the

[1] Doc. Nos. 81, 84, 85, 86.
[2] Doc. Nos. 78, 87, 89.
[3] Doc. No. 1, p. 67.
[4] Doc. No. 1, p. 70.
[5] Doc. No. 1, p. 74.

Property by falsely representing that Identity would be able to perform under the Lease; Plaintiff asked the Court to determine that Debtor's obligation under her Guaranty was nondischargeable. The Court conducted a two-day trial and, after weighing the evidence, entered its opinion finding that Plaintiff did not meet its burden of proving that Debtor made a fraudulent misrepresentation regarding Identity's financial condition or that Debtor fraudulently induced Plaintiff to purchase the Property.[6] On February 17, 2021, the Court entered a Final Judgment in favor of Debtor and against Plaintiff.[7]

In her Motion, Debtor asserts that she incurred attorney's fees to defend the Adversary Proceeding in the amount of $95,970.00; she seeks an award of the fees as the prevailing party under Fla. Stat. § 57.105(7). Debtor contends that her Guaranty of the Lease provides for attorney's fees to Plaintiff in any action to enforce the Lease, and that Fla. Stat. § 57.105 allows "reasonable attorney's fees to the other party when that party prevails" in the action.[8] In response, Plaintiff asserts that the issue of Debtor's attorney's fees is governed by Ohio law, not Florida law, and that Ohio law does not authorize an award of attorney's fees to the prevailing party under the circumstances presented here.

B. Choice of Law Analysis

In the absence of a compelling or significant federal interest, bankruptcy courts apply the choice-of-law rules of the state in which they sit.[9] In *In re Palm Beach Finance Partners, L.P.*,[10] the Court stated:

> As the Court has previously held, the "diversity jurisdiction approach" is the appropriate approach for bankruptcy courts to follow when determining which state's law applies to a particular issue. "Under the diversity jurisdiction approach, bankruptcy courts borrow from the 'law applicable in diversity cases to hold that *the forum state's choice of law rules are imposed on bankruptcy adjudications where the underlying rights and obligations are defined by state law*.'"[11]

Consequently, in *Palm Beach Finance Partners*, the Court held that "because this Court sits in Florida, Florida's choice of law rules govern the choice of law issue now before the Court."[12]

In contract cases, Florida's choice-of-law rule is *lex loci contractus*, which means that "in the absence of a contractual provision specifying governing law, a contract, other than one for performance of services, is governed by law of the state in which the contract is made."[13] And in tort cases, Florida's choice-of-law rule is the "significant relationships" test set out in the Restatement (Second) of Conflict of Laws.[14] Under the Restatement's "significant relationships" test, the applicable law is the "local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties" under choice-of-law principles. Contacts that courts consider under this test include (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, place of incorporation, and place of business of the parties, and (4) the place where the relationship between the parties is centered.[15]

Here, the Purchase Contract, the deed of the Property from Debtor and her husband to Plaintiff, the Lease, and the Guaranty were all executed in Ohio. In addition, (1) the Property is located in

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[6] Doc. No. 74.
[7] Doc. No. 75.
[8] Fla. Stat. § 57.105(7).
[9] *In re AA Ready Mix, LLC*, 2018 WL 9414347, at *2-3 (Bankr. M.D. Fla. July 20, 2018) (quoting *In re International Management Associates, LLC*, 495 B.R. 96, 102 (Bankr. N.D. Ga. 2013)). In *AA Ready Mix*, the Court saw "no federal interest at issue in this proceeding . . . . Therefore, the forum state's – i.e., Florida's – choice-of-law rules should apply here."
[10] 2014 WL 12498025 (Bankr. S.D. Fla. Dec. 10, 2014).
[11] *Id*. at *4 (emphasis added).
[12] *Id.*
[13] *In re AA Ready Mix*, 2018 WL 9414347, at *3 (citations omitted).
[14] *In re Palm Beach Finance Partners*, 2014 WL 12498025, at *5.
[15] Restatement (Second) of Conflict of Laws, §§ 6, 145 (1971).

Ohio, (2) Debtor resided in Ohio when she entered into the Lease on behalf of Identity and signed the Guaranty, (3) Identity was an Ohio corporation with its corporate office and business operations in Ohio, (4) Plaintiff is an Ohio limited liability company with its corporate office in Ohio, (5) all of the parties' negotiations leading up to the Purchase Contract, the Lease, and the Guaranty occurred in Ohio, (6) the sale closed in Ohio, and (7) the Lease provided that it would be construed under Ohio law.

In other words, the parties' relationship was centered solely in Ohio at the time of the events giving rise to Plaintiff's claim. The Court concludes that Ohio law governs Debtor's claim for attorney's fee regardless of whether the claim arose in the context of a contract case under the Guaranty or a tort case for fraudulent inducement.

C. Debtor is not entitled to an award of attorney's fees under Ohio law.

Debtor asserts that the Guaranty required her to pay Plaintiff's attorney's fees in the event that Plaintiff hired an attorney to enforce the Guaranty; therefore, because she prevailed in the Adversary Proceeding, Debtor contends she is entitled to an award of her reasonable attorney's fees.[16] But under Ohio law, parties to litigation are responsible for paying their own attorney's fees unless one of three exceptions applies.

> Ohio courts follow the so-called "American rule", which requires that each party involved in litigation pay his or her own attorney fees. But there are three well-recognized exceptions to this rule: (1) where statutory provisions specifically provide that a prevailing party may recover fees, (2) where there has been a finding of bad faith, and (3) where the contract between the parties provides for fee shifting.[17]

Stated another way, under Ohio law, a prevailing party in a civil action may not recover attorney's fees as part of the costs of litigation unless "a statute or an enforceable contract specifically provides for the losing party to pay the prevailing party's attorney fees, or [] the prevailing party demonstrates bad faith on the part of the unsuccessful litigant."[18] Ohio law differs significantly from Florida law in that, under Fla. Stat. § 57.105(7), unilateral fee provisions in contracts are made reciprocal to the prevailing parties.[19]

Here, neither the Purchase Contract, the Lease, nor the Guaranty provide for the losing party to pay the prevailing party's attorney's fees in the event of litigation. And Debtor did not contend that she is entitled to recover her attorney's fees based on any fee-shifting statute or because of Plaintiff's bad faith. The Court concludes that because no statute, contract, or finding of bad faith allows for Debtor, as the prevailing party, to recover her attorney's fees from Plaintiff under Ohio law, Debtor and Plaintiff are each responsible for their own attorney's fees. Accordingly, the Court will deny the Motion.

D. Debtor is entitled to reimbursement of costs under Rule 7054(b)(1).

Under Fed. R. Bankr. P. 7054(b)(1), courts "may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides."[20] Allowable costs are listed in 28 U.S.C. § 1920. Although courts have discretion to award costs under Rule 7054(b), there is a "strong presumption in favor of an award of costs to the prevailing party absent an affirmative showing by the losing party that 'the costs [] fall outside the parameters of § 1920, were not

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[16] Doc. No. 81, ¶ 2.

[17] *Professional Solutions Insurance Company v. Novak L.L.P.*, 2020 WL 5949853, at *4 (Ohio App. 8 Dist. Oct. 8, 2020) (quoting *Simbo Properties v. M8 Realty, L.L.C.*, 149 N.E.3d 941 (Ohio App. 8 Dist.)).

[18] *Catalanotto v. Byrd*, 97 N.E.3d 1016, 1023 (Ohio App. 9 Dist. 2017).

[19] *Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942 (Fla. 2020).

[20] Fed. R. Bankr. P. 7054(b)(1).

reasonably necessary to the litigator, or that the losing party is unable to pay.'"[21]

Debtor seeks the sum of $4,261.03 in her Bill of Costs.[22] The costs consist of fees paid to court reporting agencies to transcribe Debtor's § 341 meeting of creditors, Plaintiff's Rule 2004 examinations of Debtor and her husband, the deposition of Plaintiff's representative, the depositions of the two real estate agents involved in the sale of the Property, and the two-day trial in October 2020. Debtor filed copies of the court reporters' invoices for each of the transcripts.[23]

Under § 1920, allowable costs include fees for "printed or electronically recorded transcripts necessarily obtained for use in the case."[24] In its objection to Debtor's Bill of Costs, Plaintiff asserts that several of the transcripts were not "necessarily obtained for use in the case" because the testimony predated the filing of the dischargeability complaint. Plaintiff also asserts that Debtor unnecessarily ordered the trial transcript on a costly expedited basis.[25]

Debtor filed her bankruptcy case on July 3, 2018, and the § 341 meeting was held on August 7, 2018; the invoice for the § 341 transcript is dated November 28, 2018. Plaintiff's 2004 examinations of Debtor and her husband were held on December 3 and 4, 2018, and Plaintiff filed the dischargeability complaint on December 7, 2018. The Court finds that Debtor obtained the transcripts with a view to defending Plaintiff's claims against her, and that the transcripts were necessarily obtained for the litigation. In addition, as Debtor explained in her reply to the objection, she ordered the trial transcript at the Official Reporter's standard rate for the preparation and delivery of a transcript, which is greater than the rate paid by Plaintiff for a *copy* of the transcript.[26]

For these reasons, the Court finds that the costs listed in Debtor's Bill of Costs are allowed as requested in the amount of $4,261.03.

Accordingly, it is

ORDERED:

1. Debtor's *Amended Motion to Tax Attorney Fees* (Doc. No. 81) is **DENIED**.

2. Plaintiff's objection (Doc. No. 87) to Debtor's Bill of Costs is **OVERRULED**, and the costs requested in Debtor's Bill of Costs (Doc. No. 78) are **APPROVED** in the amount of $4,261.03.

DATED: April 8 , 2021.

/s/ Caryl E. Delano

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Caryl E. Delano
Chief United States Bankruptcy Judge

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[21] *In re Amodeo*, 2019 WL 10734046, at *4 (Bankr. M.D. Fla. July 30, 2019) (quoting *In re O'Callaghan*, 304 B.R. 887, 889 (Bankr. M.D. Fla. 2003)).
[22] Doc. No. 78.
[23] Doc. No. 80-1. Debtor listed one invoice as a non-attendance fee in the amount of $105.00, possibly for a scheduled deposition of Plaintiff's representative (*See* Doc. Nos. 19, 21).
[24] 28 U.S.C. § 1920(2).
[25] Doc. No. 87, pp. 4-5.
[26] Doc. No. 89, p. 4 (emphasis in original).