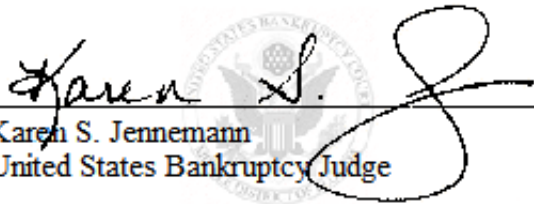


ORDERED.

Dated: November 18, 2021



Karen S. Jennemann  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
[www.flmb.uscourts.gov](http://www.flmb.uscourts.gov)

In re	)	Case No. 6:20-bk-01346-KSJ
	)	Chapter 11
Ellingsworth Residential Community	)	
Association, Inc.,	)	
	)	
Debtor.	)	
_____	)	

**ORDER DENYING ATTORNEYS' FEES AND COSTS**

Debtor, Ellingsworth Residential Community Association, Inc., seeks to recover the attorneys' fees and costs it incurred defending counterclaims brought by Alice Guan ("Guan"), a *pro se* creditor.<sup>1</sup> Debtor bases its request on section 57.105(1) of the Florida Statutes and Federal Rule of Bankruptcy Procedure 7054. Guan has filed a response in opposition.<sup>2</sup> The Court, finding Guan's counterclaims were not frivolous within the meaning of section 57.105(1) as to justify an award of fees, denies Debtor's request.

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<sup>1</sup> Doc. No. 770.

<sup>2</sup> Doc. No. 777.

Debtor is a homeowner's association representing 80 homes in three developments. They have a gate, common area property, and a fountain but no other amenities, such as a pool, community center, or playground. All 80 homeowners pay the same quarterly assessment of \$420 and are subject to the Declarations of Covenants, Conditions and Restrictions for Ellingsworth dated September 12, 2013 (the "Declarations").

On February 25, 2016, the developer, Meritage Homes, managed Debtor and, acting on behalf of Debtor, sued Guan in Florida State Court (the "State Court Lawsuit").<sup>3</sup> Guan owns a home in one of the managed developments and allegedly had violated certain association rules relating to landscaping on her property.<sup>4</sup> Guan filed counterclaims for abuse of process, violation of the Florida Civil Racketeer Influenced and Corrupt Organizations ("RICO") statute, intentional infliction of emotional distress, negligence, breach of contract, and declaratory relief (the "Counterclaims").<sup>5</sup>

During the State Court Lawsuit, Guan argued Debtor failed to pursue arbitration before suing her, as required in Debtor's Declarations. The trial court rejected this argument. Guan appealed; and the Fifth District Court of Appeal

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<sup>3</sup> The State Court Lawsuit was initially filed in Seminole County Court. Complaint, *Ellingsworth Residential Cmty. Ass'n v. Guan*, No. 2016-CC-000630 (Fla. Seminole Cnty. Ct. Feb. 25, 2016). In 2017, the State Court Lawsuit was transferred to Seminole County Circuit Court and was redocketed. Certified Copy of Order to Transfer with Entire Court File from County Court, *Ellingsworth Residential Cmty. Ass'n v. Guan*, No. 2017-CA-002697 (Fla. 18th Cir. Ct. Dec. 8, 2017).

<sup>4</sup> Trial Tr. 49:2-5, 54:2-7, Doc. No. 687.

<sup>5</sup> Debtor's Ex. 16, Doc. No. 595-16.

reversed.<sup>6</sup> Following reversal, the trial court dismissed Debtor's lawsuit, held Guan was entitled to attorneys' fees and costs, and retained jurisdiction to determine the amounts of Guan's trial-level and appellate-level attorneys' fees and costs.<sup>7</sup> Before the trial court could award attorneys' fees and costs or resolve Guan's pending Counterclaims, Debtor filed this Chapter 11 bankruptcy case on March 3, 2020.<sup>8</sup>

Guan filed two unsecured proofs of claim in this bankruptcy case.<sup>9</sup> In Claim 5-2, Guan asserted a general unsecured claim for damages against Debtor for \$1.6 million.<sup>10</sup> Claim 5-2 partially was based on the same Counterclaims that Guan filed in the State Court Lawsuit.<sup>11</sup> Guan's Counterclaims requested damages based on Debtor's decision to sue Guan in State Court rather than pursue arbitration.

Debtor objected to Claim 5-2. After a trial, this Court sustained Debtor's objection, finding that Guan's Counterclaims, as a matter of law, failed to state a claim.<sup>12</sup> Relying on section 57.105(1) of the Florida Statutes and Federal Rule of Bankruptcy Procedure 7054(b), Debtor now seeks to recover the attorneys' fees and

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<sup>6</sup> Guan's Ex. 8 at 27-30, Doc. No. 475; *Guan v. Ellingsworth Residential Cmty. Ass'n*, 278 So. 3d 840, 842 (Fla. 5th DCA 2019) (concluding Ellingsworth waived its claims against Guan when it failed to submit the dispute to arbitration within thirty days after termination of mediation and remanding to the trial court with directions that Ellingsworth's claim against Guan be dismissed with prejudice).

<sup>7</sup> Debtor's Ex. 15, Doc. No. 595-15; Guan's Ex. 1, Doc. No. 468.

<sup>8</sup> Doc. No. 1.

<sup>9</sup> Both of Guan's initial claims were filed May 12, 2020. The operative amended claims, Claim 4-3 and Claim 5-2, were filed on June 26, 2020.

<sup>10</sup> Claim 5-2 also included the same attorneys' fees and costs sought in Claim 4-3.

<sup>11</sup> Ultimately, Guan only pursued some of her Counterclaims. In her declaration filed on February 16, 2021, Guan asserted three claims against Debtor: (1) abuse of process, (2) violation of the Florida RICO statute, and (3) intentional infliction of emotional distress. Doc. No. 457 at 6. Guan acknowledged her declaratory relief claim was dismissed by the State Court, and she affirmatively withdrew her claims for negligence and breach of contract. This Court, on September 11, 2020, precluded Guan from filing any further amended claims, Doc. No. 308, so no other Counterclaims were allowed. Doc. No. 744 at 11 n.38.

<sup>12</sup> Doc. No. 744. Guan has appealed the Order Partially Allowing Claim 4-3 and Disallowing 5-2 (Doc. No. 745) and the Memorandum Opinion (Doc. No. 744). This appeal remains pending. *Guan v. Ellingsworth Residential Cmty. Ass'n*, No. 6:21-cv-01409-WWB (M.D. Fla. filed Aug. 26, 2021).

costs it incurred in rebutting Guan's Counterclaims in the State Court Lawsuit and Claim 5-2 in the Bankruptcy Court proceeding.<sup>13</sup>

Under Federal Rule of Bankruptcy Procedure 7054(b), "[t]he Court has broad discretion to determine whether and to what extent to award costs to prevailing parties."<sup>14</sup> Section 57.105(1) of the Florida Statutes provides for an award of attorneys' fees to the prevailing party if

the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

- (a) Was not supported by the material facts necessary to establish the claim or defense; or
- (b) Would not be supported by the application of then-existing law to those material facts.<sup>15</sup>

Courts have stated that section 57.105(1) "must be applied with restraint to ensure that it serves its intended purpose of discouraging baseless claims without casting 'a chilling effect on use of the courts.'"<sup>16</sup> "The statute is 'intended to address frivolous pleadings.'"<sup>17</sup> "Failing to state a cause of action is not, in and of itself, a sufficient basis to support a finding that a claim was so lacking in merit as to justify an award of fees pursuant to section 57.105."<sup>18</sup> Whether a claim is frivolous within the meaning of section 57.105 "is a matter left to the sound discretion of the trial

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<sup>13</sup> Motion for Award of Attorneys' Fees and Costs Against Alice Guan, Doc. No. 770. Guan has filed an Objection to Debtor's Motion for Award of Attorneys' Fees and Costs Against Alice Guan, Doc. No. 777.

<sup>14</sup> *Welch v. Marion Cmty. Hosp. (In re Amodeo)*, No. 8:17-BK-07965-RCT, 2019 WL 10734046, at \*4 (Bankr. M.D. Fla. July 30, 2019) (quoting *Bishara v. O'Callaghan (In re O'Callaghan)*, 304 B.R. 887, 889 (Bankr. M.D. Fla. 2003)).

<sup>15</sup> Fla. Stat. § 57.105(1).

<sup>16</sup> *MacAlister v. Bevis Constr., Inc.*, 164 So. 3d 773, 776 (Fla. 2d DCA 2015) (quoting *Swan Landing Dev., LLC v. First Tenn. Bank Nat'l Ass'n*, 97 So. 3d 326, 328 (Fla. 2d DCA 2012)).

<sup>17</sup> *Soto v. Carrollwood Vill. Phase III Homeowners Ass'n, Inc.*, No. 2D20-1944, 2021 WL 3934528, at \*2 (Fla. 2d DCA Sept. 3, 2021) (quoting *Peyton v. Horner*, 920 So. 2d 180, 183 (Fla. 2d DCA 2006)).

<sup>18</sup> *Id.* (quoting *Connelly v. Old Bridge Vill. Co-Op, Inc.*, 915 So. 2d 652, 656 (Fla. 2d DCA 2005)).

court.”<sup>19</sup> “To exercise this discretion, the trial court must make ‘an inquiry into what the losing party knew or should have known during the fact-establishment process, both before and after suit is filed.’”<sup>20</sup>

The facts do not support a finding for sanctions under section 57.105(1). Guan, who is *pro se*, has no legal experience. She should receive the benefit of the doubt.<sup>21</sup> Although Debtor provided safe harbor notices under section 57.105(4) and moved for Attorneys’ Fees and Sanctions in State Court, Debtor did not cite case law within the safe harbor notices.<sup>22</sup> Debtor improperly initiated the litigation against Guan, and Guan’s Counterclaims were brought in response to Debtor’s failure to first arbitrate their dispute. And, ultimately, the Fifth District Court of Appeal found that Debtor erred in failing to pursue arbitration.

Before this Court’s recent ruling on Claim 5-2, neither this Court nor the State Court had ruled on Guan’s Counterclaims. So, no judicial finding existed finding that the Counterclaims lacked substantial fact or legal support. And, although I did dismiss Guan’s Counterclaims, I do not find Guan’s Counterclaims or her actions to be

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<sup>19</sup> *Hustad v. Architectural Studio, Inc.*, 958 So. 2d 569, 571 (Fla. 4th DCA 2007) (citing *Bowen v. Brewer*, 936 So. 2d 757, 762 (Fla. 2d DCA 2006)); accord *Hendrix v. Evenflo Co.*, No. 307CV133/MCR/EMT, 2007 WL 3520815, at \*2-3 (N.D. Fla. Nov. 14, 2007) (citing *Wendy’s of N.E. Fla., Inc. v. Vandergriff*, 865 So. 2d 520, 523-24 (Fla. 1st DCA 2003)) (“Florida case law has established guidelines for determining whether an action is frivolous, including where a case is found: (1) to be completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) to be contracted by overwhelming evidence; (3) as having been undertaken primarily to delay or prolong the resolution of the litigation, or to harass or to maliciously injure another; or (4) as asserting material factual statements that are false.”).

<sup>20</sup> *Hustad*, 958 So. 2d at 571 (quoting *Bowen*, 936 So. 2d at 763).

<sup>21</sup> See *Huff v. Regions Bank*, No. 5:13-CV-63-OC-22, 2013 WL 5651807, at \*6 (M.D. Fla. Oct. 15, 2013).

<sup>22</sup> Had Debtor informed Guan of precedent where courts had rejected identical claims, there would be a stronger argument in Debtor’s favor. See *id.*

frivolous at inception or at a time before this Court's order disallowing Claim 5-2, as to warrant sanctions under section 57.105(1).<sup>23</sup> Accordingly, it is

**ORDERED:**

1. Debtor's Motion for Attorneys' Fees and Costs (Doc. No. 770) is **DENIED.**

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The Clerk will serve a copy of this order on all interested parties.

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<sup>23</sup> To the extent Debtor is seeking costs under Federal Rule of Bankruptcy Procedure 7054(b), this Court, in its discretion, declines to award costs. *See, e.g., Citizens First Nat'l Bank v. Hunter (In re Hunter)*, 243 B.R. 824, 827 (Bankr. M.D. Fla. 1999) ("The awarding of costs is discretionary, not mandatory.").