

ORDERED.

Dated: June 21, 2022



Caryl E. Delano
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re:

Case No. 2:20-bk-03093-FMD
Chapter 7

Timothy Yablonowski,

Debtor.

Richard B. Pfeil; Richard B. Pfeil as Trustee
of the Richard B. Pfeil Revocable Trust;
and David R. Brach as Trustee of the
M.J. Pfeil Special Trust No. 2,

Plaintiffs,

vs.

Adv. Pro. No. 2:20-ap-398-FMD

Timothy Yablonowski,

Defendant.

**ORDER DEFERRING RULING ON DEFENDANT'S
AMENDED MOTION FOR ATTORNEY'S FEES AND MOTION TO TAX COSTS**

THIS PROCEEDING came before the Court for hearing on June 2, 2022, on Defendant's *Amended Motion for Attorney's Fees and Motion to Tax Costs* (the "Amended

Motion”)¹ and Plaintiffs’ Objection and Response to the Amended Motion (the “Response”).² For the reasons explained in this Order, the Court will defer ruling on the Amended Motion.

On July 9, 2020, Plaintiffs filed a *Complaint to Determine Dischargeability of Certain Debt Pursuant to 11 U.S.C. § 523(a)(2)(A)* (the “Complaint”).³ In the Complaint, Plaintiffs alleged that they had filed a prior state court case against Defendant under the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), that Defendant had stipulated to entry of a judgment against him in the state court case, and that Defendant was therefore collaterally estopped from contesting the nondischargeability of the debt in his bankruptcy case. Defendant filed an answer to the Complaint, responded to Plaintiffs’ two motions for summary judgment on the Complaint, and filed a motion to dismiss Plaintiffs’ first amended complaint.

In its order partially granting Defendant’s motion to dismiss the first amended complaint, the Court allowed Plaintiffs to file a second amended complaint.⁴

On June 22, 2021, Plaintiffs filed a Second Amended Complaint,⁵ Defendant thereafter filed an answer and affirmative defenses to the Second Amended Complaint,⁶ and the parties filed cross-motions for summary judgment.⁷ On March 31, 2022, the Court entered an *Order (1) Denying Plaintiffs’ Motion for Summary Judgment as to Second Amended*

¹ Doc. No. 119.

² Doc. No. 122.

³ Doc. No. 1.

⁴ Doc. No. 70.

⁵ Doc. No. 71.

⁶ Doc. No. 74.

⁷ Doc. Nos. 84, 87.

*Complaint; (2) Granting Debtor/Defendant's Motion for Summary Judgment on Second Amended Complaint; and (3) Granting Debtor/Defendant's Motion to Exclude Portions of Mr. Jerry McHale's Testimony Pursuant to Fed. R. Evid. 702, and a Final Judgment in favor of Defendant (together, the "Judgment").*⁸ On April 14, 2022, Plaintiffs filed a Notice of Appeal of the Judgment,⁹ and Defendant thereafter filed the Amended Motion.

In the Amended Motion, Defendant asserts that Plaintiffs' claims against him were based on fraud and FDUTPA, that he is the prevailing party in the litigation, and that he is therefore entitled to an award of attorney's fees and costs under Fed. R. Civ. P. 54(d) and FDUTPA. In the Response, Plaintiffs contend that their claims were filed as nondischargeability claims under 11 U.S.C. § 523(a)(2)(A), and that Defendant cannot recover attorney's fees and costs in the dischargeability proceeding because the underlying debt was not consumer debt as required by § 523(d) for such an award.

As an initial matter, it appears that Defendant may be entitled to an award of the attorney's fees and costs that he incurred in defending Plaintiffs' FDUTPA and collateral estoppel claims up to the point that Plaintiffs filed the Second Amended Complaint.¹⁰ However, it also appears that the alleged debt in this case is not consumer debt and that § 523(d) would preclude an award of the attorney's fees that Defendant incurred after Plaintiffs filed the Second Amended Complaint under § 523(a)(2)(A).

⁸ Doc. Nos. 100, 102.

⁹ Doc. No. 106.

¹⁰ See *Diamond Aircraft Industries, Inc. v. Horowitch*, 107 So. 3d 362, 370-71 (Fla. 2013) (The Florida Supreme Court concluded that "Diamond Aircraft is entitled to attorney's fees for the period of litigation up to the point that the federal district court held that FDUTPA was not applicable to Horowitch's claim.").

To the extent that Defendant may be entitled to an award of attorney's fees and expenses under FDUTPA, such an award is available to a prevailing party after judgment in the trial court "and exhaustion of all appeals."¹¹ In addition, after it is determined that a party is the prevailing party under FDUTPA, a court has discretion to award or not award attorney's fees and costs based on its consideration of the equitable factors in the case, including the history of the litigation and the merits of the respective positions.¹²

Here, Plaintiffs appealed the Judgment, and the appeal remains pending. The issues on appeal include whether the entry of a summary judgment on Plaintiffs' Second Amended Complaint was appropriate on Plaintiffs' claims against Defendant for fraud.¹³ Defendant has requested an award of the attorney's fees and costs that he incurred in defending Plaintiffs' claims, but he did not provide an itemization of the fees by task or date of service, and he did not allocate the requested fees between the fees he incurred to defend Plaintiffs' FDUTPA claims and the fees incurred to defend Plaintiffs' fraud claims under § 523(a)(2)(A).

For these reasons, the Court finds that "the degree of [Defendant's] success and the value of these [legal] services will be more clear after the appeal is resolved."¹⁴ Therefore, the Court will exercise its discretion to defer ruling on Defendant's request for an award of attorney's fees and costs until after the appeal is concluded.

¹¹ Fla. Stat. § 501.2105(1).

¹² *Chow v. Chak Yam Chau*, 640 Fed. App'x 834, 838-39 (11th Cir. 2015).

¹³ Doc. No. 117.

¹⁴ *In re Kekaouha-Alisa*, 2013 WL 773096, at *2 (Bankr. D. Haw. Feb. 27, 2013). *See also In re Mongelluzzi*, 2020 WL 5742906 (Bankr. M.D. Fla. Jan. 7, 2020).

Accordingly, it is

ORDERED that the Court's ruling on Defendant's *Amended Motion for Attorney's Fees and Motion to Tax Costs* (Doc. No. 119) is **DEFERRED** pending resolution of Plaintiffs' appeal pending in the United States District Court, Middle District of Florida, as Case No. 2:22-cv-00242-SPC.

The Clerk's office is directed to serve a copy of this order on interested parties via CM/ECF.