

ORDERED.

Dated: December 07, 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-05209-FMD

Chapter 11

Feck Properties, LLC,

Debtor.

**ORDER DENYING DEBTOR'S MOTION FOR
ATTORNEY'S FEES UNDER FLA. STAT. § 57.105(7)**

THIS CASE came before the Court to consider Debtor's *Motion for Allowance of Fees and Costs Against Secured Creditor, Gina Hollis* (the "Fee Motion").¹ Debtor objected to the proof of claim filed by Gina Hollis ("Creditor"), the holder of a promissory note secured by Debtor's real property. After the underlying disputes were resolved, Debtor filed the Fee Motion asserting that it is the prevailing party

¹ Doc. No. 271.

and therefore entitled to an award of attorney's fees and costs under Fla. Stat. § 57.105(7).

The issue before the Court is whether Debtor was the prevailing party on the significant issues presented in its objection to Creditor's claim. Having carefully considered the Fee Motion, Debtor's memorandum in support of the Fee Motion,² Creditor's response,³ and Debtor's reply,⁴ the Court concludes that Debtor is not the prevailing party in the litigation and is not entitled to an award of attorney's fees and costs under Fla. Stat. § 57.105(7).

I. BACKGROUND

On March 1, 2016, Debtor purchased real property located at 2504-2510 N. Beach Road in Englewood, Florida (the "Englewood Property") from Asset Preservation, Inc. ("API"), an entity owned by Creditor. API financed Debtor's acquisition of the Englewood Property, with Debtor executing a purchase money promissory note (the "Note") in the amount of \$2.4 million with interest at the rate of 4.5% per annum.⁵ The Note was secured by a purchase money mortgage and security agreement (the "Mortgage") on the Englewood Property.⁶ Under the Note

² Doc. No. 281.

³ Doc. No. 283.

⁴ Doc. No. 284.

⁵ Claim 5-5, pp. 7-8.

⁶ Claim 5-5, pp. 10-15.

and Mortgage, Debtor was required to make monthly payments of \$13,339.98 beginning in June 2016 and continuing until the Note's maturity date of May 1, 2021.

Relevant here, the Note included the following provision:

[I]n any such event of default and acceleration, the undersigned maker shall also be obligated to pay, as part of the indebtedness evidenced by this Note, all costs of collection including any reasonable attorney's fees that may be incurred in the collection and enforcement hereof, including such fees as may be incurred on appeal or incurred in any proceeding under bankruptcy laws as they now or hereafter exist, including specifically but without limitation, claims, disputes, or proceedings seeking adequate protection or relief from the automatic stay.⁷

On August 29, 2016, API assigned the Note and Mortgage to Creditor.⁸ In March 2019, Creditor filed a foreclosure action against Debtor in the Circuit Court for Charlotte County, Florida, alleging a default in the monthly payments (the "Foreclosure Case").⁹ On July 7, 2020, before a judgment was entered in the Foreclosure Case,¹⁰ Debtor filed a petition under Subchapter V of Chapter 11 of the Bankruptcy Code.¹¹

During the Chapter 11 case, Creditor filed Claim No. 5-1 and four amended claims, and Debtor filed objections to each claim. The claims, Debtor's objections, and the Court's rulings are summarized follows:

⁷ Claim 5-5, p. 7.

⁸ Claim 5-5, pp. 9, 19.

⁹ Doc. No. 283, p. 3.

¹⁰ Doc. No. 281, p. 6.

¹¹ 11 U.S.C. § 1181, *et seq.*

In Claim 5-1, Creditor asserted that she was owed \$2,705,548.91. Debtor objected to Claim 5-1 on the grounds that Creditor (a) failed to provide receipts/year-end statements as required by Fla. Stat. § 687.08 and therefore forfeited the entire amount of interest due on the Note,¹² (b) improperly claimed that she had paid \$36,851.82 in real property taxes on the Englewood Property, (c) included premature interest charges as of April 1, 2016, and (d) charged late fees that Debtor had already paid.¹³

Debtor also filed a motion for summary judgment on its objection to Claim 5-1. Creditor responded, and Debtor replied.¹⁴ On March 11, 2021, the Court entered an order ruling (a) that Claim 5-1 was reduced by the \$36,851.82 that Creditor claimed for 2016 property taxes but had not paid, and (b) that interest on the Note began to accrue on May 1, 2016 rather than on April 1, 2016.¹⁵ The Court also directed Creditor to file an accounting of the amounts that she claimed and authorized Debtor to object to the accounting.

In Claim 5-2, Creditor asserted that she was owed \$2,631,812.71. She also filed an accounting of Debtor's payments on the Note and her application of the

¹² Fla. Stat. § 687.08(2) states: "Whoever refuses, upon demand, to give a receipt or statement complying with the requirements of this section shall forfeit the entire interest upon such principal sum to the borrower."

¹³ Doc. No. 68.

¹⁴ Doc. Nos. 108, 116, 118.

¹⁵ Doc. No. 121.

payments.¹⁶ Debtor objected to Claim 5-2 on generally the same grounds as its original objection.¹⁷ At a hearing on April 26, 2021, after reviewing Debtor's objection and Creditor's accounting, the Court instructed Creditor to remove all late charges for months in which Debtor had made timely payment. For example, the Court instructed Creditor to reduce the claim by approximately \$4,002.00, representing monthly late charges of \$667.00 that Creditor had claimed for December 2017 through April 2018 and July 2018.¹⁸ On April 28, 2021, the Court entered an order directing Creditor to file a second amended claim and authorizing Debtor to object thereto.¹⁹

Consistent with the Court's ruling, Creditor filed Claim 5-3 for \$2,584,654.46. Debtor objected to Claim 5-3²⁰ and filed a motion for summary judgment raising for the third time its argument that Creditor forfeited the interest due on the Note under Fla. Stat. § 687.08 because she failed to provide receipts/year-end statements.²¹ Creditor filed a response to Debtor's motion for summary judgment and attached a revised payment history.²² On October 25, 2021, the Court entered an order denying

¹⁶ Doc. No. 124.

¹⁷ Doc. Nos. 127, 128.

¹⁸ Doc. No. 124, p. 4; Doc. No. 131.

¹⁹ Doc. No. 132.

²⁰ Doc. Nos. 140, 175.

²¹ Doc. No. 176.

²² Doc. No. 182.

Debtor's motion for summary judgment and authorizing Creditor to file a third amended claim.²³

As directed by the Court, Creditor filed Claim 5-4 in the amount of \$2,570,289.76. Debtor objected to Claim 5-4 and filed another motion for summary judgment.²⁴ Debtor asserted that Creditor (a) failed to provide receipts/year-end statements and therefore forfeited the entire amount of interest due on the Note under Fla. Stat. § 687.08, (b) improperly claimed late charges, (c) included unliquidated attorney's fees, (d) failed to credit Debtor's payments, and (e) lacked good faith in filing the claim.

On January 31, 2022, the Court entered an order granting Debtor's motion for summary judgment "as to the payment of \$1,933.98, tendered on June 8, 2017, which shall be properly accounted for" in a further amended claim. The Court denied Debtor's motion for summary judgment in all other respects, including Debtor's request for the forfeiture of interest under Fla. Stat. § 687.08. The Court again authorized Creditor to file a further amended claim.²⁵

²³ Doc. No. 193. At a hearing on October 12, 2021, the Court instructed Creditor to file an amended claim that reflected the revised payment history attached to its response to Debtor's motion for summary judgment (Doc. No. 182, pp. 10-12; Doc. No. 185).

²⁴ Doc. Nos. 195, 198.

²⁵ Doc. No. 206.

And again as directed by the Court, Creditor filed Claim 5-5 in the amount of \$2,567,405.57. Debtor objected to Claim 5-5 asserting generally the same grounds as its prior objections.²⁶

On July 27, 2022, the Court entered an order directing Debtor and Creditor to meet and confer with the Subchapter V Trustee in an effort to come to a resolution.²⁷

Meanwhile, during the course of Debtor's Chapter 11 case, Debtor sold a portion of the Englewood Property (2504 N. Beach Rd.) for \$3.7 million.²⁸ The order approving the sale directed the closing agent to disburse the sum of \$2,107,682.01 to Creditor at closing, to be applied to principal on the Note and Mortgage, and to pay the sum of \$675,000.00 to Creditor's attorney to hold in escrow pending further Court order.²⁹

On September 14, 2022, after the parties conferred with the Subchapter V Trustee, they submitted and the Court signed an *Agreed Order Sustaining in Part Second Objection to Fourth Amended Claim No. 5 of Gina Hollis* (the "Agreed Order").³⁰ Under the Agreed Order, Creditor's attorney was directed (a) to disburse \$425,000.00 to Creditor and \$125,000.00 to Debtor from the funds that he held in trust, and (b) to hold the remaining \$125,000.00 in his trust account pending further Court order.

²⁶ Doc. No. 227.

²⁷ Doc. No. 253.

²⁸ Doc. No. 134.

²⁹ Doc. No. 146, ¶ 7.

³⁰ Doc. No. 269.

However, the parties did not resolve their Fee Dispute, defined in the Agreed Order as Creditor's claim to attorney's fees and costs in connection with the Foreclosure Case and the bankruptcy case, and Debtor's claim for a "set-off" of the attorney's fees and costs that it incurred due to Creditor's conduct in the Foreclosure Case and the bankruptcy case.³¹ The parties agreed to mutual releases as to all matters arising under the Note and Mortgage other than the Fee Dispute.

Generally, Debtor and Creditor agree that Creditor is entitled to an award of attorney's fees and costs under the fee provision of the Note, and Debtor objects only to the reasonableness of Creditor's attorney's fees.³² In its Fee Motion, Debtor asserts that it is also entitled to an award of attorney's fees and costs as the prevailing party under Fla. Stat. § 57.105(7); the parties agree that § 57.105(7) applies to Debtor's fee request.³³ Under the Agreed Order, the issue is whether Debtor may set off any attorney's fees that it is awarded under Fla. Stat. § 57.105(7) against any attorney's fees awarded to Creditor.

On October 14, 2022, the Court conducted a trial on the Fee Dispute and established a briefing schedule on the issue of Debtor's *entitlement* to attorney's fees and costs under Fla. Stat. § 57.105(7).³⁴ In other words, the issue before the Court is

³¹ Doc. No. 269, ¶ 3.

³² Doc. No. 283, p. 1; Doc. No. 284, p. 3.

³³ Doc. Nos. 281, 283.

³⁴ Doc. No. 277, 280.

whether Debtor is the prevailing party on its objections to Creditor's claim and, therefore, entitled as a legal matter to an award of attorney's fees and costs under Fla. Stat. § 57.105(7).³⁵ At this time, the Court does not address the issue of the reasonableness of the fees that the parties have each claimed.

Debtor contends that it is the prevailing party on its objection to Creditor's claim because (a) Creditor filed the Foreclosure Case based on a default date that Debtor proved false, and (b) Debtor proved that Creditor claimed more than \$130,000.00 in erroneous charges.³⁶ Specifically, Debtor asserts that its efforts "reduced the claim of [Creditor] from \$2,705,548.91, to \$2,567,405.57, a reduction of \$138,143.34."³⁷

Creditor contends that Debtor is not the prevailing party on its objection to her claim for at least two reasons. First, Debtor did not prove that the Foreclosure Case was wrongly filed because Debtor's principal admitted at trial that Debtor was in default under the Note when Creditor filed the Foreclosure Case.³⁸ Second, Creditor contends that "the final tally [on her claim] resulted from a settlement leading to the entry of Agreed Orders releasing funds totaling \$2,532,682.01 to the Creditor."³⁹

³⁵ Doc. Nos. 281, 283.

³⁶ Doc. No. 281, p. 6.

³⁷ Doc. No. 271, p. 4. Debtor states that it "disproved over \$130,000.00 in charges and proved that if [Creditor] applied the proper accounting, a foreclosure wouldn't have been filed." (Doc. No. 281, p. 6).

³⁸ Doc. No. 283, pp. 4-5.

³⁹ Doc. No. 283, p. 4.

Because the total amount disbursed to Creditor consists of (a) the sum of \$2,107,682.01, applied to principal, under the order approving the sale of the Englewood property,⁴⁰ and (b) the sum of \$425,000.00 under the Agreed Order,⁴¹ Creditor contends that she “lent the Debtor \$2.4 million and recovered more than \$2.5 million.”⁴²

II. DISCUSSION

Under Fla. Stat. § 57.105(7), if a contract allows attorney’s fees to a party who is required to take 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 related to the contract.⁴³ For purposes of awarding attorney’s fees in Florida, the prevailing party is “the party that prevailed on the significant issues in the litigation.”⁴⁴

Here, during the course of the parties’ dispute, the Court ruled that various iterations of Creditor’s claims included the following errors: (a) the claim incorrectly reflected the accrual of interest beginning on April 1, 2016, instead of May 1, 2016;⁴⁵ (b) the claim incorrectly included 2016 property taxes of \$36,851.82 that Creditor had

⁴⁰ Doc. No. 146, ¶ 7.

⁴¹ Doc. No. 269.

⁴² Doc. No. 283, p. 4.

⁴³ Fla. Stat. § 57.105(7).

⁴⁴ *In re Yormak*, 2021 WL 3056874, at *2 (Bankr. M.D. Fla. July 20, 2021) (citing *In re Basil Street Partners, LLC*, 2013 WL 4461566, at *3 (Bankr. M.D. Fla. Aug. 19, 2013) (citing *Moritz v. Hoyt Enterprises, Inc.*, 604 So. 2d 807, 810 (Fla. 1992)).

⁴⁵ Doc. No. 68, p. 3; Doc. No. 92, p. 4; Doc. No. 121, p. 1.

not advanced;⁴⁶ (c) the claim included \$4,002.00 in late charges for months in which Debtor made timely payments;⁴⁷ and (d) the claim failed to credit Debtor with a \$1,933.98 payment made in June 2017.⁴⁸ On these issues, Debtor was the prevailing party.

However, Debtor's primary objection to Creditor's claim was that Creditor had failed to comply with Fla. Stat. § 687.08 and thus had forfeited her right to any interest on the Note. Debtor raised this issue in each of its objections to Creditor's claims and motions for summary judgment related to the objections.⁴⁹ But Debtor never established that Creditor failed to comply with Fla. Stat. § 687.08, and the Court denied Debtor's motions for summary judgment on this issue.⁵⁰ For example, even though Debtor filed a certification of its foreclosure attorney with email correspondence requesting information regarding Creditor's loan,⁵¹ Debtor did not prove that it had made a "demand" upon Creditor for a receipt or statement, or that Creditor had "refused" to comply with a demand, as required by Fla. Stat. § 687.08 as a condition to the forfeiture of interest.⁵²

⁴⁶ Doc. No. 68, pp. 2-3; Doc. No. 92, p. 4; Doc. No. 121, p. 1.

⁴⁷ Doc. No. 124, p. 4; Doc. No. 131.

⁴⁸ Doc. No. 198, p. 9; Doc. No. 206, p. 1.

⁴⁹ Doc. Nos. 68, 108, 127, 176, 195, 198, 227.

⁵⁰ See Doc. Nos. 121, 193, 206.

⁵¹ Doc. No. 128, pp. 8-10.

⁵² Fla. Stat. § 687.08(2) states: "Whoever refuses, upon demand, to give a receipt or statement complying with the requirements of this section shall forfeit the entire interest upon such principal sum to the borrower."

In addition, Debtor repeatedly asserted throughout the claims process that Creditor used an erroneous default date in the Foreclosure Case, that Creditor added fees and charges to her claim based on the erroneous default date, and that Debtor proved that the default date was erroneous.⁵³ But at trial, Debtor's principal testified that Debtor was in default when Creditor filed the Foreclosure Case in March 2019, because its last payment was "effectively" made in September 2018, its arrearages approximated \$70,000.00 to \$85,000.00 by March 2019, and it had not paid the 2017 property taxes as of March 2019.

In the Fee Motion, Debtor states that its objections to Creditor's claim reduced the claim from \$2,705,548.91 to \$2,567,405.57, a difference of \$138,143.34 (or 5% of Creditor's claim).⁵⁴ In her response, Creditor states that she received a total amount of \$2,532,682.01 on her claim as a result of the order approving the sale of the Englewood Property (\$2,107,682.01, applied to principal), and the settlement and Agreed Order (an additional \$425,000.00).⁵⁵

The Court concludes that Debtor did not prevail on the most significant issue in the litigation—whether Creditor forfeited her right to the "entire interest" on the Note under Fla. Stat. § 687.08. In addition, the Court concludes that the secondary issue on which Debtor claims it prevailed—whether Creditor alleged an erroneous

⁵³ See Doc. No. 176, ¶ 11; Doc. No. 198, ¶ 16; Doc. No. 227, ¶ 15(b); Doc. No. 281, p. 6.

⁵⁴ Doc. No. 271, p. 4; Doc. No. 281, p. 6.

⁵⁵ Doc. No. 283, pp. 3-4.

default date in the Foreclosure Case—is not significant given the amount that Debtor admittedly was in default when Creditor filed the Foreclosure Case. Finally, the issues on which Debtor did prevail (a one-month difference in the date interest began to accrue on the Note, an improper charge for 2016 property taxes, late charges totaling \$4,002.00, and a single unapplied payment of \$1,933.98) resulted in a nominal recovery for Debtor in comparison to the original amount of Creditor's claim.

Therefore, because Debtor did not prevail on the significant issues in the litigation, it is not entitled to an award of attorney's fees under Fla. Stat. § 57.105(7).

Accordingly, it is

ORDERED that Debtor's *Motion for Allowance of Fees and Costs Against Secured Creditor, Gina Hollis* (Doc. No. 271) is **DENIED**.

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