

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

IN RE:

CASE NO.: 09-3529-3F3

JACQUES D. PERREAULT,

Debtor.

_____ /

JACQUES D. PERREAULT,

Plaintiff,

v.

Adversary No.: 10-26

RUTHERFORD MULHALL, P.A.,

Defendant.

_____ /

ORDER GRANTING PERREAULT'S MOTION FOR ATTORNEY'S FEES

This proceeding came before the Court upon Plaintiff's Motion for Attorney's Fees (the "Motion") (Doc. 52), Defendant's Response to Plaintiff's Motion for Attorney's Fees (the "Response") (Doc. 53), and Plaintiff's Reply to [the Response] (the "Reply") (Doc. 54). Upon a review of the Motion, the Response, and the Reply, the Court finds it appropriate to grant the Motion.

Background

On August 5, 2008, Plaintiff ("Perreault") retained Defendant (the "Law Firm") to represent him in a dissolution of marriage proceeding in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. The parties entered into a Standard Service and Retainer Agreement (the "Retainer Agreement") in connection with the representation. The Retainer Agreement included certain "Standard Provisions". Paragraph 19 of the Standard Provisions provides that Florida law applies to the retainer agreement. Paragraph 16 of the Standard Provisions relates to attorney's fees and provides in relevant part:

Collection of Fees and Costs

In the event it is necessary to institute suit for the collection of fees and costs due the Firm by Client, Client will pay, in addition to such fees and advances, all expenses necessitated thereby, including reasonable attorney's fees and court costs. In the event the Firm utilizes its attorneys to perform collection services, the Firm will be entitled to its prevailing rates for legal services and costs incurred.

Paragraph 15 of the Standard Provisions provides in relevant part:

Property/Charging/Retaining Lien

The Firm shall have a consensual lien against any financial recovery or benefit, or any property inuring to the benefit of Client as a result of the Firm's representation of Client, including but not limited to, property or proceeds from the sale of property which is deemed exempt property not liable to execution by creditors, including but not limited to, the homestead of the Client. . . .

On January 27, 2009, Perreault was indebted to the Law Firm in the amount of \$31,886.24 for outstanding and unpaid legal fees and costs. On that day, which was less than a week before Perreault's divorce trial was set to begin, Perreault signed a Secured Promissory Note in favor of the Law Firm (the "Note"). Pursuant to the terms of the Note, Perreault affirmed and acknowledged the validity of the Retainer Agreement, the outstanding debt in the amount of \$31,886.24, and agreed to pay additional fees incurred in accordance with the provisions of the Note. The Note required Perreault to use any and all financial resources available to him, including retirement accounts and otherwise exempt assets, to pay the attorney's fees he owed to the Law Firm. Paragraphs 4 and 5 of the Note provide, in relevant part:

Payment. The Debtor agrees to utilize any and all financial resources available to him in order to pay to the Creditor the sums due the Creditor. All financial resources include, but are not limited to, any of the following assets of the Debtor: all earnings, retirement funds, stock accounts, money market accounts, any and all bank savings accounts and checking accounts, as well as the proceeds from the sale of any assets or from any monies borrowed against such assets.

Waiver of Exemptions. The Debtor agrees to use assets owned by him which may be exempt from the claims of his creditors under Chapter 222, Florida Statutes to pay the sums due. Debtor further agrees to waive any exemptions that he may have related to his interest in the former marital residence owned by him and his wife to satisfy his obligations under this Note. ...

The Note also contains a provision related to attorney's fees. Section 8 of the Note provides in relevant part:

Attorney's Fees

If this note is placed in the hands of an attorney for collection, including any attorney employed directly by [Defendant], [Plaintiff] promises to pay [Defendant]'s costs, disbursements and attorney's fees incurred in connection therewith, including those incurred for appellate, bankruptcy, or administrative proceedings.

Finally, the Note provides in Section 11 that it "shall be governed by, and construed and enforced in accordance with, the laws of the state of Florida."

On May 2, 2009 Perreault filed a Chapter 13 bankruptcy petition. On his bankruptcy schedules Perreault listed the Law Firm as an unsecured creditor with a disputed claim of \$31,886.24. On August 4, 2009 the Law Firm filed a complaint seeking to except Perreault's debt of \$57,974.50 to the Law Firm from Perreault's discharge pursuant to 11 U.S.C. § 523(a)(2). Perreault filed a Motion to Dismiss the Complaint alleging, upon other things, that the Complaint failed to plead fraud with particularity. On October 5, 2009 the Court dismissed the Complaint based upon the Law Firm's failure to file an answer to the Motion to Dismiss.

On October 17, 2009, Perreault filed an Amendment to Schedule C to clarify the designation and dollar amount of certain retirement accounts (the "Retirement Accounts") and also claimed his interest in the Retirement Accounts was exempt pursuant to Section 222.21(2) of the Florida Statutes. In response, on October 19, 2009, the Law Firm filed a Motion for Relief

From Automatic Stay to enforce in state court its charging lien (the “Charging Lien”) against Perreault’s Retirement Accounts. On January 20, 2010, the Court entered an order which would have permitted the Law Firm to pursue all available *in rem* remedies with respect to the Charging Lien in the Retirement Accounts unless Perreault filed an adversary proceeding within 15 days of the January 11, 2010 evidentiary hearing.

On January 19, 2010, Perreault initiated this adversary proceeding by filing the Complaint. Count I of the Complaint sought a determination that the Law Firm’s Charging Lien in the Retirement Accounts was not valid and was unenforceable. Count II of the Complaint sought a determination that the Retirement Accounts were not subject to the Charging Lien because it was procured through coercive duress and a breach of fiduciary duty by the Law Firm. Count III sought a determination that the Retirement Accounts were not subject to the Charging Lien because the alleged attorney’s fees that form the basis of the Charging Lien were excessive and unreasonable. Both parties filed Motions for Summary Judgment as to Count I of the Complaint. On June 23, 2011 the Court entered an order granting [Perreault]’s Motion for Summary Judgment and Denying [the Law Firm]’s Motion for Summary Judgment. The Court determined that paragraphs 4 and 5 of the Note, which were designed to give the Law Firm an interest in Perreault’s otherwise exempt assets, do not create an enforceable interest in the Retirement Accounts because Perreault’s interest therein is not property of the estate. The Court held that the Law Firm may not enforce its Charging Lien against the Retirement Accounts.

Discussion

It is against this backdrop that Perreault seeks an award of attorney’s fees for the successful prosecution of this adversary proceeding. Perreault asserts that as the prevailing party in this adversary proceeding and by virtue of the above provisions in the Retainer Agreement and

Note, he is entitled to an award of attorney's fees against the Law Firm pursuant to Fla. Stat. § 57.105(7), Florida's attorney's fee reciprocity statute. Section 57.105(7) provides:

If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any 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, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

Notwithstanding the absence of a provision in section 523 of the bankruptcy code providing for an award of attorney's fees to a prevailing creditor, a prevailing creditor in a dischargeability proceeding may recover attorney's fees when such fees are provided for by an enforceable contract between the creditor and the debtor. TranSouth Fin. Corp. v. Johnson, 931 F.2d 1505, 1507 (11th Cir. 1991). Likewise, "[a] prevailing debtor in a dischargeability action brought by his creditor can recover his attorney's fees and costs incurred in those dischargeability proceedings if recovery of such are due under an enforceable contractual right, such as a statutory reciprocal attorney's fee provision, provided for by state law." Cadle Co. v. Martinez (In re Martinez), 416 F.3d 1286, 1288 (11th Cir. 2005).¹ Florida law does not permit one-sided attorney's fees provisions in enforcing a contract. Id. at 1290. The creditor in Martinez filed the dischargeability proceeding in an attempt to increase its likelihood of getting paid on the note pursuant to which the debtor borrowed money from the creditor. Id. at 1290. The note included a provision requiring the debtor to pay attorney's fees incurred by the creditor to enforce the note. Id. at 1288. Because the creditor, if it had prevailed, would have been entitled to attorney's fees based on the provision in the note, the debtor was similarly entitled. Id. at 1290. "It is as if the contract between [the creditor] and [the debtor]

¹ Section § 523(d) permits a prevailing debtor (in certain instances) to recover attorney's fees in an adversary proceeding in which a creditor seeks to have a consumer debt excepted from discharge under § 523(a)(2). Because the debt in Martinez was not a consumer debt, § 523(d) did not apply.

‘contained a clause reciting the language of Florida Statutes § 57.105(2).’” Id. (quoting In re Sheridan, 105 F.3d 1164, 1168 (Cudahy, J., dissenting)(7th Cir. 1997)).

The Law Firm contends that because the Charging Lien is an equitable lien, it was not founded upon the Retainer Agreement or the Note. Consequently, the Law Firm asserts that there is no attorney’s fee provision upon which a claim under § 57.105(7) may be based. In Florida, the elements of a valid charging lien are “1) an express or implied contract between attorney and client; 2) an express or implied understanding for payment of attorney’s fees out of the recovery; 3) either an avoidance of payment or dispute as to the amount of fees; and 4) timely notice.” Law Offices of David H. Zoberg, P.A. v. Rosen, 684 So. 2d 828, 829 (Fla. 3d Dist. Ct. App. 1996). While the Charging Lien is an equitable lien, it came about directly as a result of the contract between the parties.

If the Law Firm had prevailed in this adversary proceeding, it would have been entitled to attorney’s fees pursuant to the applicable provisions set forth in the Retainer Agreement and Note. An attorney’s supplemental proceeding to enforce a charging lien is an action, which meets the requirement of “necessary to institute suit for the collection of fees ... due a [law firm] by a [client].” Gossett & Gossett, P.A. v. Mervolion, 941 So. 2d 1207, 1210 (4th Dist. Ct. App. 2006).² The language in paragraph 16 of the Retainer Agreement is identical to that in Gossett. Additionally, the language in paragraph 8 of the Note contains similar language. Because the Law Firm would have been entitled to recover attorney’s fees if it had prevailed in this adversary proceeding, pursuant to Fla. Stat. § 57.105(7) Perreault is similarly entitled.

² While Perreault filed this adversary proceeding to determine the nature, extent, validity, or enforceability of the Law Firm’s Charging Lien, he did so as a result of the Court’s January 20, 2010 Order Granting Motion for Relief from Automatic Stay which would have otherwise permitted the Law Firm to pursue all available in rem remedies with respect to the Charging Lien in the Retirement Accounts. As such, the filing of this adversary proceeding is Perreault’s defense to the Law Firm’s enforcement of its Charging Lien.

The Law Firm also argues that because the substantive determination in this adversary proceeding was independent of the terms of the Retainer Agreement and Note, Perreault is not entitled to an award of attorneys fees under § 57.105(7). The Law Firm relies on In re Burns, 3 Fed. App'x 689, 691 (10th Cir. 2001). In that case the debtors prevailed in an adversary proceeding seeking to have their student loans discharged pursuant to 11 U.S.C. § 523(a)(8). Id. at 690. The debtors sought attorney's fees pursuant to an Oklahoma statute, which provides for an award of attorney's fees to the prevailing party in an action to recover on a contract. Id. The court noted that: 1) the debtors commenced the action only to determine the dischargeability of their student loans, "a substantive issue to be decided independently of the terms of the loan contracts" and 2) because "the substantive litigation raised federal bankruptcy law issues rather than basic contract enforcement questions, state law was not involved." Id. at 691. Accordingly, the court declined to apply the Oklahoma statute and held that the debtors were not entitled to attorney's fees. Id.

The holdings in TranSouth and Martinez are not limited to proceedings involving "basic contract enforcement questions" or state law. Like the creditor in Martinez, the Law Firm filed the Motion for Relief from Stay (and defended this adversary proceeding) in an attempt to increase its likelihood of getting paid on the Retainer Agreement and Note pursuant to which Perreault owed it attorney's fees. An award of attorney's fees is without regard to whether "state law issues" were "actually litigated" in this proceeding because the recoverability of attorney's fees and costs is a matter of contract and the reciprocity statute which was incorporated therein by operation of law. Martinez, 416 F.3d at 1290-1291.

The Court turns to the issue of the reasonableness of the fees. Perreault seeks an award of \$29,610.00 in attorney's fees. Perreault's attorney asserts that he spent 84.60 hours on this

adversary proceeding at the rate of \$350.00 per hour. In determining whether an attorney's fee is reasonable, a court must determine the lodestar, the product of the number of hours reasonably expended, and a reasonable hourly rate. Grant v. Schumann Tire & Battery Co., 908 F.2d 874, 877 (11th Cir. 1990) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). In order to apply the lodestar method an attorney must provide the Court with contemporaneous time records detailing the dates, amount, and specific services provided. See In re Newman, 2003 WL 751327 *3 (Bankr. M.D. Fla. February 18, 2003) (citing First Colonial Corp. of America, 544 F.2d 1291, 1300 (5th Cir. 1977)). Perreault's attorney has failed to submit contemporaneous time records to the Court. Accordingly, it is

ORDERED:

1. Perreault's Motion for Attorney's Fees is granted. However, the Court reserves jurisdiction to determine the amount in accordance with the above cited cases.
2. Within fourteen days of the date of this Order, Perreault's attorney shall file an affidavit, together with contemporaneous time records, detailing the time spent on this adversary proceeding.
3. To the extent that the Law Firm objects to the reasonableness of the fees sought, it shall file an objection thereto within fourteen days of the date of the affidavit, after which the Court will take the matter under advisement.

DATED this 23 day of September, 2011 in Jacksonville, Florida.

/s/ Jerry A. Funk

JERRY A. FUNK
United States Bankruptcy Judge

Copies to:

Robert L. Wunker, Attorney for Plaintiff

Andrew J. Decker, III, Attorney for Defendant

