

582 B.R. 812  
United States Bankruptcy Court, M.D. Florida,  
Tampa Division.

IN RE: KRAZ, LLC, Debtor.  
Kraz, LLC, Plaintiff,  
v.  
Branch Banking & Trust Company, Defendant.

Case No. 8:15-bk-07039-MGW

Adv. No. 8:15-ap-00655-MGW

Signed March 29, 2018.

### Synopsis

**Background:** Chapter 11 debtor-mortgagor, a limited liability company (LLC), objected to proof of claim filed by mortgagee and counterclaimed for mortgagee's alleged breach of contract and tortious misconduct. The Bankruptcy Court, Michael G. Williamson, Chief Judge, 570 B.R. 389, ruled, inter alia, that mortgagee improperly forced debtor into bankruptcy, and that debtor was entitled to attorney fees it incurred in the bankruptcy case as damages. Debtor filed post-trial motion for additional fees.

**[Holding:]** The Bankruptcy Court, Williamson, Chief Judge, held that under Florida law, additional fees totaling \$207,454 that debtor sought as prevailing party were breach of contract damages that debtor was required to prove at trial.

Motion denied.

West Headnotes (1)

#### [1] Bankruptcy

🔑 Prevailing party

51 Bankruptcy

51II Courts;Proceedings in General

51II(C) Costs and Fees

51k2182 Grounds and Circumstances

51k2183 Prevailing party

Under Florida law, attorney fees totaling \$207,454 that Chapter 11 debtor-mortgagor sought in post-trial motion as prevailing party in adversary proceeding against mortgagee that improperly forced debtor into bankruptcy were breach of contract damages that debtor was required to prove at trial; the fees that debtor sought were all the fees debtor incurred in the bankruptcy case, which was the amount necessary to put debtor in the position it would have been had there been no bankruptcy. Fla. Stat. Ann. § 57.105.

Cases that cite this headnote

### Attorneys and Law Firms

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### MEMORANDUM OPINION AND ORDER DENYING DEBTOR'S MOTION TO TAX ATTORNEY'S FEES AND COSTS

Michael G. Williamson, Chief United States Bankruptcy Judge

After finding that Branch Banking & Trust Company improperly forced the Debtor into bankruptcy, the Court ruled that the Debtor was entitled to the attorney's fees it incurred in this bankruptcy case as damages. At trial, the Debtor put on evidence that it had already incurred \*813 nearly \$1 million in attorney's fees and costs and that it would incur another \$200,000 in attorney's fees to complete the case. So the Court awarded the Debtor nearly \$1.2 million in damages. But the Debtor actually incurred another \$407,454 in fees—\$207,454 more than it estimated. Can the Debtor recover the extra \$207,454 in fees under section 57.105, Florida Statutes, as the prevailing party in this proceeding?

While a party may recover prevailing party fees by post-trial motion, Bankruptcy Rule 7054 provides an exception when substantive law requires the fees to be proven at trial. Here, the \$207,454 in fees the Debtor now seeks were part of its breach of contract damages. Because substantive law required the Debtor to prove the extra \$207,454 in fees at trial, it cannot recover those fees now by post-trial motion.

### Background<sup>1</sup>

<sup>1</sup> The background is set forth in detail in the Court's April 18, 2017 Findings of Fact and Conclusions of Law. *Kraz, LLC v. Branch Banking & Trust Co. (In re Kraz)*, 570 B.R. 389, 392–399 (Bankr. M.D. Fla. 2017). The facts set forth here come from the Court's earlier findings of fact.

In 2009, BB&T acquired from the FDIC all of Colonial Bank's assets, including a \$5.2 million loan that Colonial Bank had made to the Debtor.<sup>2</sup> The loan was secured by a mortgage on a storage and commercial flex space facility the Debtor owned.<sup>3</sup> Within months of acquiring the loan, which Colonial Bank had improperly declared in default, BB&T sued to foreclose the mortgage on the Debtor's property.<sup>4</sup>

<sup>2</sup> *Kraz*, 570 B.R. at 393.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 394–95.

The state court denied BB&T's foreclosure claim because it concluded a bona fide default had never occurred.<sup>5</sup> So the state court extended the maturity date on the Debtor's loan fourteen months.<sup>6</sup> The state court also determined that because there had been no default, BB&T was not entitled to any accrued principal or interest payments.<sup>7</sup> By extending the loan's maturity date and determining that the Debtor did not owe any accrued interest, the state court was effectively putting the parties in the position they were in before the foreclosure action had been filed.<sup>8</sup>

<sup>5</sup> *Id.* at 395.

<sup>6</sup> *Id.* The fourteen-month extension ran from the effective date of the judgment against BB&T on its foreclosure claim

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

Yet when the Debtor sought an estoppel letter from BB&T so that it could sell its storage facility and pay off the bank's loan before it matured, BB&T insisted that the Debtor owed more than \$1.1 million in accrued interest.<sup>9</sup> The final estoppel letter that BB&T provided to the Debtor claimed that the Debtor owed BB&T \$6.9 million—\$2.1 million more than BB&T had previously conceded the Debtor owed.<sup>10</sup>

<sup>9</sup> *Id.* at 396–97. Not to mention, BB&T also sought more than \$650,000 in attorney's fees it had incurred in the foreclosure action.

<sup>10</sup> *Id.* at 397.

Because BB&T refused to provide an accurate estoppel letter, the Debtor was unable to sell (or refinance) its property before the extended maturity date.<sup>11</sup> When the maturity date passed, BB&T again sued to foreclose, this time in federal district \*814 court.<sup>12</sup> The Debtor was forced to file for bankruptcy to stop BB&T's second foreclosure action and preserve the equity in its property.<sup>13</sup>

<sup>11</sup> *Id.* at 397.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 397–98.

After filing for bankruptcy, the Debtor filed this adversary proceeding to object to the proof of claim BB&T filed and to recover damages caused by BB&T's failure to provide an accurate estoppel letter.<sup>14</sup> This Court ultimately concluded that BB&T's failure to provide an accurate estoppel letter precluded BB&T from recovering post-maturity default interest on its loan since the failure to provide an accurate estoppel letter essentially caused the maturity default. The Court also concluded that BB&T's failure to provide an accurate estoppel letter also entitled the Debtor to damages for breach of contract.<sup>15</sup>

<sup>14</sup> *Id.* at 398.

<sup>15</sup> *Id.* at 400–07.

In its Findings of Fact and Conclusions of Law, the Court discussed those damages. The Debtor claimed it had incurred nearly \$1 million in attorney's fees and that it estimated it would incur another \$200,000 in fees.<sup>16</sup> To put the Debtor in the position it would have been had it not had to file the bankruptcy case, the Court awarded the Debtor \$1,180,000 in fees that had been or would be incurred.<sup>17</sup>

<sup>16</sup> *Id.* at 406–07.

<sup>17</sup> *Id.* at 407.

As it turns out, the Debtor's underestimated its future fees by 50%. Rather than the \$200,000 it estimated, the Debtor actually incurred another \$407,454 in fees and costs. So the Debtor has moved to recover the extra \$207,454 in fees under section 57.105, Florida Statutes, as the prevailing party in this proceeding.<sup>18</sup>

<sup>18</sup> Adv. Doc. No. 268.

### Conclusions of Law

[1] Section 57.105, Florida Statutes, “renders ‘bilateral a unilateral clause for prevailing party attorney's fees.’ ”<sup>19</sup>

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.<sup>20</sup>

Here, the Debtor points to four different contracts—a construction loan, a promissory note, a mortgage, and a guaranty—containing prevailing party fee provisions in favor of BB&T.<sup>21</sup> BB&T does not dispute that section 57.105(7), Florida Statutes, renders those unilateral fee provisions in the loan documents bilateral or, for that matter, that the Debtor was the prevailing party in this adversary proceeding.

<sup>19</sup> *Florida Hurricane Protection & Awning, Inc. v. Pastina*, 43 So.3d 893, 895 (Fla. 4th DCA 2010) (quoting *Indemn. Ins. Co. of N. Am. v. Chambers*, 732 So.2d 1141, 1143 (Fla. 4th DCA 1999)).

<sup>20</sup> § 57.105(7), Fla. Stat.

<sup>21</sup> Adv. Doc. No. 268 at ¶ 31.

BB&T's objection is more fundamental: The Debtor's request for the extra \$207,454 is simply too late. BB&T acknowledges that Bankruptcy Rule 7054 ordinarily permits a claim for fees to be made by motion within fourteen days after a final judgment is entered.<sup>22</sup> There's no question that the Debtor moved for the \***815** additional fees within fourteen days of this Court's final judgment.

<sup>22</sup> Adv. Doc. No. 276 at 2–3.

Rule 7054, however, expressly provides an exception to the rule that fees may ordinarily be sought by post-trial motion: when substantive law requires that the fees being sought be proven at trial as an element of damages.<sup>23</sup> BB&T contends that the \$207,454 in fees the Debtor now seeks was part of its substantive damages claim. The Debtor argues that section 57.105, Florida Statutes—which the Debtor denominates as the relevant substantive law—permits a party to seek fees by post-trial motion.

<sup>23</sup> Fed. R. Bankr. P. 7054(d)(d)(A).

But the Debtor's argument merely begs the question. Section 57.105, as far as the Debtor's cited authorities show, allow a party to seek *prevailing party* fees by post-trial motion. In other words, the Debtor's argument is assuming the very issue this Court must decide: Are the fees it now seeks prevailing party fees, which can be asserted by post-trial motion, or damages that under substantive law must be proven at trial?

The Court concludes the fees are damages that were required to be proven at trial. In this adversary proceeding, the Debtor claimed BB&T breached the parties' mortgage by failing to provide an accurate estoppel letter. Under Florida law, the Debtor was entitled to recover, as damages for BB&T's breach of contract, the amount necessary to put the Debtor back in the same position it would have been in had it not been forced into bankruptcy.<sup>24</sup>

24 *Capitol Environ. Svcs., Inc. v. Earth Tech, Inc.*, 25 So.3d 593, 596 (Fla. 1st DCA 2009).

The Debtor was specific at trial about the amount necessary to put the Debtor in the same position it would have been in had there been no bankruptcy: The Debtor claimed it was entitled to all the fees that it incurred—and would incur—in this bankruptcy case. The damages the Debtor sought were not limited to just the fees incurred in the adversary proceeding, which would have been the case had the fees truly been prevailing party fees.

Nor are the fees the Debtor now seeks limited to fees incurred in the adversary proceeding.<sup>25</sup> The fees the Debtor sought—then and now—are all the fees they have incurred in this entire bankruptcy case, which is the amount necessary to put the Debtor in the position it would have been had BB&T provided an accurate estoppel letter. Because the fees the Debtor seeks to recover are part its breach of contract damages, the Court concludes the Debtor was required to prove them at trial.

25 Adv. Doc. No. 268, Ex. A.

The Debtor seems to suggest there was no way it could have proved the extra \$207,454 in fees it now seeks because

it had not incurred those fees until after the deadline for submitting exhibits. But the Debtor's evidence at trial belies that argument: At trial, the Debtor put on evidence of the fees it incurred after the exhibit deadline. It did so by having its expert estimate what those fees would be. And the Court accepted that testimony. So it's not that Debtor couldn't have proven the \$207,454 it now seeks, but that it just simply didn't do so.

### Conclusion

Although the Debtor did prevail in this proceeding, the fees it now seeks are really a measure of the breach of contract damages they were entitled to. Because the fees they seek are part of their damages, \*816 the Debtor was required to prove them at trial. Accordingly, it is

**ORDERED** that the Debtor's Motion to Tax Attorney's Fees and Costs is **DENIED**.

### All Citations

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