

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

NATIONSTAR MORTGAGE LLC d/b/a
CHAMPION MORTGAGE COMPANY,
Appellant,

v.

**MARIE ANN GLASS, UNKNOWN SPOUSE OF MARIE ANN GLASS,
UNITED STATES OF AMERICA, ACTING ON BEHALF OF THE
SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
CITIBANK, NATIONAL ASSOCIATION SUCCESSOR BY MERGER TO
CITIBANK SOUTH DAKOTA, N.A.,
UNKNOWN TENANT #1, UNKNOWN TENANT #2,**
Appellees.

No. 4D15-4561

[April 12, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Joel T. Lazarus, Senior Judge; L.T. Case No. CACE13-027304(11).

Marc James Ayers of Bradley Arant Boult Cummings LLP, Birmingham, AL., for appellant.

Amy L. Fischer and F. Malcolm Cunningham, Jr. of The Cunningham Law Firm, P.A., for appellee Marie Ann Glass.

ON MOTION FOR ATTORNEY'S FEES AND COSTS

KUNTZ, J.

Nationstar Mortgage LLC appealed the court's dismissal with prejudice of its amended foreclosure complaint. After briefing, Nationstar filed a notice of voluntary dismissal and we dismissed the appeal. Prior to the dismissal, Marie Ann Glass timely filed a motion for appellate attorney's fees and costs. She has since filed a renewed motion stating that she is entitled to her attorney's fees and costs based upon a provision in the mortgage and the reciprocity provisions of section 57.105(7), Florida Statutes. We deny the motion for attorney's fees on the merits, and deny the motion for costs without prejudice to seek any taxable costs in the

appropriate court.

With regard to her request for attorney's fees, it is well established that Florida follows the "American Rule"; thus, attorney's fees may only be awarded when authorized by contract or statute. *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 614 (Fla. 1995) (Wells, J., concurring in part) ("There is a long-standing adherence in Florida law to the 'American Rule' that attorney fees may be awarded by a court only when authorized by statute or agreement of the parties.").

Here, Glass relies upon section 57.105(7), Florida Statutes (2016), in support of her motion. This section provides that a contractual fee provision is to be applied to the benefit of both parties even if the fee provision, as written, is one-sided. *HFC Collection Ctr., Inc. v. Alexander*, 190 So. 3d 1114, 1115 (Fla. 5th DCA 2016). However, because the statute is in derogation of the common law, it must be strictly construed. *Id.* (citing *Willis Shaw Express Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 278 (Fla. 2003)). The plain language of section 57.105(7) has two requirements. First, the party must have prevailed. Second, the party had to be a party to the contract containing the fee provision.

Glass prevailed in the circuit court based on her argument that Nationstar lacked standing under the contract. On appeal, she argued that the court correctly dismissed Nationstar's complaint for lack of standing. In a situation such as this, where a party prevails by arguing the plaintiff failed to establish it had the right pursuant to the contract to bring the action, the party cannot simultaneously seek to take advantage of a fee provision in that same contract. The result is different when the plaintiff was also the originating lender. *Nudal v. Flagstar Bank, FSB*, 60 So. 3d 1163 (Fla. 4th DCA 2011). In that situation, the lender was a party to the contract at issue.

The Third District recently addressed this issue in *Bank of New York Mellon Trust Company, N.A. v. Fitzgerald*, 42 Fla. L. Weekly D519 (Fla. 3d DCA Mar. 1, 2017). In *Fitzgerald*, following a non-jury trial, the trial court entered a final judgment in favor of the borrower after concluding that the bank failed to establish standing. *Id.* at D520. Relying on *Alexander*, the Third District held that, because the trial court found no contract existed between the parties which would entitle one to recover attorney's fees in the first place, there was no basis to invoke the compelled mutuality provisions of section 57.105(7). *Id.* at D521 (citing *Alexander*, 190 So. 3d at 1117). Therefore, the Third District concluded that the circuit court erred in awarding fees "based on a non-existent contract between the parties." *Id.*

Alexander relied in part on this court’s opinion in *Florida Medical Center, Inc. v. McCoy*, 657 So. 2d 1248, 1252 (Fla. 4th DCA 1995), where we held that if there is no contract between the parties, “there is no basis to invoke the compelled mutuality provisions” of the statute. The Fifth District also recently held that “a stranger to the contract cannot recover attorney’s fees based on the contract.” *Sand Lake Hills Homeowners Ass’n, Inc. v. Busch*, 42 Fla. L. Weekly D219 (Fla. 5th DCA Jan. 20, 2017).

Simply put, to be entitled to fees pursuant to the reciprocity provision of section 57.105(7), the movant must establish that the parties to the suit are also parties to the contract containing the fee provision. A party that prevails on its argument that dismissal is required because the plaintiff lacks standing pursuant to the contract sued upon cannot satisfy that requirement. Therefore, the motion for appellate attorney’s fees is denied.

We also deny her request for appellate costs without prejudice as a request for costs is not properly presented to the appellate court. Fla. R. App. P. 9.400(a) (“Costs shall be taxed by the lower tribunal on a motion served no later than 45 days after rendition of the court’s order.”). We make no determination that there are, or are not, any costs to be taxed should such a motion be timely filed in the circuit court.

Motion denied.

CIKLIN, C.J., and GROSS, J., concur.

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Not final until disposition of timely filed motion for rehearing.