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Locke Lord QuickStudy: Closing the Levee – Florida's Supreme ?Court's Levy Decision Narrows Applicability of ?Reciprocal Fee ?Statute

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Less than a year after issuing multiple opinions addressing the reciprocal fee provisions of Fla. Stat. § 57.105, the Florida Supreme Court has once again seen fit to issue an opinion interpreting Florida's controversial fee statute.

This time, Fla. Stat. § 57.105(7) came before the court in the context of a divorce proceeding in the matter of *Levy v. Levy*, 2021 WL 4614308 (Fla., 2021). Samuel Levy ("former husband") and Einath Levy ("former wife") entered into a Property Settlement and Support Agreement ("PSA") during the proceeding. The PSA included an attorney's fee provision in the event of non-compliance.

After dissolution of the marriage, the former husband filed a motion to compel the former wife to comply with the PSA and sought reasonable attorney's fees and costs for bringing the motion under the attorney's fees provision within the PSA. The former wife defended against the motion to compel and sought her reasonable attorney's fees expended in defending both under the attorney's fees provision in the PSA and pursuant to Fla. Stat. § 57.105(7).

Following an evidentiary hearing, the general magistrate found against the former husband and recommended denial of the motion to compel and, accordingly, the denial of the request for attorney's fees.

However, the magistrate also denied the former wife's request for attorney's fees for defending against the motion to compel. The magistrate acknowledged that the wife prevailed in defending the motion to compel, but denied her request based on the language found in the PSA's fee provision, stating that: "This type of relief is not encompassed in Paragraph 13 of the parties' PSA as entitlement to attorney's fees and costs is only contemplated against 'the party who is found to be in violation of th[e] Agreement.'"

The presiding judge approved the magistrate's recommendations, which effectively denied the former wife's request for prevailing-party attorney's fees under Fla. Stat. § 57.105(7).

Both parties appealed various aspects of the trial court's rulings. The Third District Court of Appeal affirmed on all issues except the rejection of former wife's attorney's fees under Fla. Stat. § 57.105(7).

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The Third DCA held that Fla. Stat. § 57.105(7) is applicable where the contract contains a prevailing party fee provision and the litigant seeking fees is a party to that contract. Not only did the Third DCA find the statute to be applicable, it found that a fee award was mandatory under the statute once the trial court determined a party had prevailed.

The former husband then sought discretionary review with the Florida Supreme Court, asserting a direct conflict with a decision out of the Fourth District Court of Appeal, *Sacket v. Sacket*, 115 So.3d 1069 (Fla. 4th DCA 2013). In *Sacket*, the Fourth DCA had found that Fla. Stat. § 57.105(7) did not apply to a similar attorney's fee provision.

Just as the court held last year when it interpreted Florida's fee statute in *Page v. Deutsche Bank Tr. Co. Americas,* 308 So.3d 953, 958 (Fla. 2020), it adhered to the "supremacy-of-the-text" principle to determine the meaning of the statute. In *Levy*, the Florida Supreme Court focused on the language in § 57.105(7) reflecting an intention that the provision only apply to "unilateral" fee provisions, as was the case last year in *Ham v. Portfolio Recovery Assocs., LLC,* 308 So.3d 942, 948 (Fla. 2020). As explained in *Ham*, the statute is intended "to help level the playing field when a contract contains a unilateral attorney's fee provision." *Id.* at 949.

The court found that the fee provision in the PSA between former husband and former wife was *not* unilateral. Instead, it held that the PSA entitled "either party" to an award of attorney's fees upon a showing that the other party violated the PSA. The court said that applying § 57.105(7) here would "confer a right on the former wife that neither party had under the contract, namely the right to fees absent proof of a violation of the PSA." Essentially the court found the specific language of the PSA controlled. That language did not allow for the recovery of attorney's fees expended in defending against an effort to compel compliance and only contemplated recovery of fees against a party found to be in violation of the PSA.

While the Florida Supreme Court's decisions in *Page* and *Ham* confirmed the mandatory nature of Fla. Stat. § 57.105(7), the decision in *Levy* limits its applicability to contracts with clearly unilateral fee provisions. Where § 57.105(7) is inapplicable, the contract language will be paramount in determining when an award of attorney's fees is appropriate.

This ruling potentially makes it more difficult for defensive parties to recover their attorney's fees, especially where the contract is either unclear as to the applicable parties or the requirements necessary for the award of attorney's fees.

The bottom line is that all contracts must be carefully crafted to ensure the parties' intentions are met. Fla. Stat. § 57.105 will only "level the playing field" where there is an enforceable contract between the parties that contains a clearly unilateral ?attorney's fees provision. Mutual provisions, however, according to the Florida Supreme Court in *Levy*, are not within the statute's purview and it will be up to the parties to accomplish their contractual goals. In short, the statute does not expand matters for which fees may be recovered (i.e. successful defense vs. successful prosecution) but will level the playing field if only one party to the contract may recover fees for any given reason.

For lenders and loan servicers, the Florida's Supreme Court's past year of §57.105(7) rulings are not only applicable to the interpretation of unilateral fee clauses in standard mortgage agreements, but they should also influence the drafting non-uniform instruments, settlement agreements and any other relevant contracts.

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