

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

EDUARDO PUJOL,
Appellant,

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 502013AP000066
L.T. No.: 502012SC010302

v.

CAPITAL ONE BANK,
Appellee.

Opinion filed: **APR 29 2015**

Appeal from the County Court in and for Palm Beach County,
Judge Ted Booras

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PER CURIAM.

THIS CAUSE came before the Court on Appellant's, Eduardo Pujol, Motion for Rehearing (the "Motion") filed on December 9, 2014. The motion was timely filed within 15

days of rendition of the opinion in this case. *See* Fla. R. App. P. 9.330. The Motion requests the Court to grant a rehearing on the Court's opinion affirming the trial court's order denying Pujol's motion for section 57.105(7) attorney's fees.

Appellant's Motion for Rehearing is **GRANTED**, and we withdraw our opinion dated November 24, 2014, and enter this **opinion** in its place:

Appellant, Eduardo Pujol, appeals the denial of a Motion for Attorney's Fees and Cost after the Appellee/Plaintiff, Capital One Bank (USA), N.A ("Capital One") voluntarily dismissed its Complaint. Capital One filed a Complaint against Pujol for open account and account stated that alleged that Pujol owed Capital One for a balance on a credit card. A two-page account summary was attached to the Complaint, and the second page of the document included the following language: "[y]ou will also be required to pay all of our actual collection expenses, attorneys' fees and court costs unless the law does not allow us to collect theses amounts."

Pujol filed a Motion to Dismiss, Answer, Affirmative Defenses, Demand for Jury Trial, and Demand for Attorney's Fees, and in the affirmative defense section of the motion, Pujol specifically stated that 1) there was no signed agreement between the parties, and 2) Pujol "never entered into any contractual or debtor/creditor arrangements with the Plaintiff [Capital One]." Pujol also requested all reasonable attorney's fees and costs as a result of the law suit. Pujol filed a Motion to Dismiss and for Sanctions under 57.105.

Capital One filed a Notice of Voluntary Dismissal Without Prejudice. Pujol filed a Motion for Attorney's Fees and Costs pursuant to section 57.105(7), section 57.105(1), and Florida Rule of Civil Procedure 1.420(d). Attached to the motion was a two-page account statement and Capital One Customer Agreement; both documents included the following language: "[y]ou will also be required to pay all of our actual collection expenses, attorneys' fees and court costs unless the law does not allow us to collect theses amounts." A hearing on the

motion for attorney's fees and costs was held, and the trial court denied the motion. Pujol filed a Motion for Clarification and/or Rehearing and/or Reconsideration of the trial court's denial which was also denied. Pujol appealed.

A. Attorney's Fees Under Section 57.105(7)

The Court finds that Pujol is not entitled to attorney's fees under section 57.105(7) pursuant to a customer agreement or the account statement attached to the complaint. Section 57.105(7) states:

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. (emphasis added).

However, an open account is an "unsettled debt arising from items of work or labor, goods sold and other open transactions not reduced to writing." *H & H Design Builders, Inc. v. Travelers' Indem. Co.*, 639 So. 2d 697, 700 (Fla. 5th DCA 1994). Claims for an open account should not include express contracts or other obligations that have been reduced to writing. *Id.* An account stated is "an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions, and promising payment." *Farley v. Chase Bank, U.S.A., N.A.*, 37 So. 3d 936, 937 (Fla. 4th DCA 2010). An account stated is established through "an express or implied agreement between the parties that a specified balance is correct and due and an express or implied promise to pay this balance." *Id.* "Thus, when an account statement has 'been rendered to and received by one who made no objection thereto within a reasonable time,' a prima facie case for the correctness of the account and the liability of the debtor has been made." *Id.* Consequently, an account stated claim is not based upon a contract; it is based upon an agreement to pay the amount owed based upon accounting. *Id.*

In this instance, the claims against Pujol were not based upon the customer agreement. The Third District Court of Appeal has held that a defendant is not entitled to prevailing party

attorney's fees pursuant to a contract when the claim is not pursuant to the contract that includes such provision. In *Tylinski*, the defendant purchased a vehicle from the plaintiff; such purchase included two contracts a 1) Retail Order Contract (the "ROC") which did not contain an attorney fee provision, and 2) Retail Installment Sale Contract (the "RISC") which contained an attorney's fee provision. *Tylinski v. Klein Auto., Inc.*, 90 So. 3d 870, 872 (Fla. 3d DCA 2012), *reh'g denied* (July 9, 2012). The plaintiff filed suit for breach of contract upon the ROC, and the court entered a final judgment in favor of the defendant. *Id.* The defendant sought prevailing party attorney's fees under section 57.105(7), and the court found that, even though the financial obligation sued upon arose from the RISC, because the claim was brought under the ROC and not the RISC, the defendant could not recover attorney's fees under section 57.105(7) as the ROC did not contain an attorney's fee provision. *Id.*

In this case, as in *Tylinski*, the causes of action are not based upon a contract that includes an attorney fee provision. Capital One has a claim of open account and account stated against Pujol without relying on the customer agreement, the contract with the attorney fee provision. Yet, Pujol requested prevailing party attorney's fees based upon a contract and argues that Capital One would not have had a cause of action absent the customer agreement. Although it is likely that there was a customer agreement with an attorney fee provision between Capital One and Pujol,¹ Capital One did not choose to bring a claim under such contract nor did Capital One specifically state in the Complaint that there was a contract between the parties. *See Dodge Enterprises, Inc. v. Williams*, 21 Fla. L. Weekly Supp. 374a (Fla. Seminole Cty. Ct. Dec. 18, 2013) (finding that the account stated claim does not provide for attorney's fees, and the plaintiff did not bring an action under the credit card agreement and thus, the provision in the credit card agreement for attorney's fees was inapplicable.) Pujol also explicitly denied that a contract

¹ Although a customer agreement was in the record, there was not a customer agreement signed by Pujol to definitively indicate that Capital One and Pujol had a valid contract.

existed in his answer and affirmative defenses. Consequently, this case is not an action to enforce a contract because Capital One did not rely on the customer agreement to bring the claims against Pujol and thus, the trial court did not abuse its discretion in denying Pujols motion for attorney's fees pursuant to the customer agreement.

The Court notes that there are multiple county court cases that have found that a prevailing defendant in an account stated claim can recover prevailing party attorney's fees pursuant to a credit card agreement even when the cause of action is not based upon the credit card agreement. See *Cach v. Iurescia*, 21 Fla. L. Weekly Supp. 190a (Fla. Palm Beach Cty. Ct. Sept. 18, 2013) (holding that the plaintiff could not avoid attorney's fees pursuant to section 57.105(7) by not alleging the existence of a contract and seeking recovery under alternate theories); *Portfolio Recovery Associates, LLC v. Eads*, 20 Fla. L. Weekly Supp. 424b (Fla. Pinellas Cty. Ct. Dec. 20, 2012) (holding that after the plaintiff voluntarily dismissed its account stated claim, the defendant was entitled to attorney's fees under section 57.105(7) even though the express contract was not a part of the cause of action). However, in such cases the customer agreement is usually alleged or alluded to in the pleadings whereas, in this case, Pujol explicitly stated that there was not an agreement between him and Capital One. Additionally, such cases fail to distinguish the holding in *Tylinski*. Therefore, despite the fact that the debt arose from a credit card, because Capital One's claim is not an action to enforce the customer agreement, Pujol cannot use the customer agreement's attorney's fee provision to apply section 57.105(7).

As to attorney's fees pursuant to the account statement, the issue is whether the account statement qualifies as a contract as to make section 57.105(7) applicable. A contract is "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." Black's Law Dictionary, contract (9th ed. 2009). The account stated cause of action is premised on the fact that there is "an agreement between persons who have had

previous transactions, fixing the amount due in respect of such transactions, and promising payment.” *Farley*, 37 So. 3d at 937. Consequently, if in fact Capital One had an agreement with Pujol pursuant to the account statement attached to Capital One’s Complaint, then the agreement included the attorney’s fees language as well. However, because the claim was never heard in court and was voluntarily dismissed, it cannot be determined whether there was ever an agreement pursuant to the account statement.

Pujol became the prevailing party when the case was voluntarily dismissed. However, in this case, Pujol specifically denied being a party to the agreement. Consequently, although the voluntary dismissal by Capital One made Pujol the prevailing party on the account stated claim, it would be inconsistent for this Court to award Pujol attorney’s fees pursuant to an agreement to which he denied being a party. Additionally, because the claim was voluntarily dismissed, the Court made no determination as to the existence of an agreement between the parties. Section 57.105(7) does not simply permit an award of attorney’s fees to the prevailing party; it permits an award of attorney’s fees pursuant to a provision in a contract. In this instance, because there was no finding of an agreement between Pujol and Capital One pursuant to the account statement and because there was a denial by Pujol of the claim that he was a party to the agreement, there is no basis pursuant to contract for Pujol to receive section 57.105(7) attorney’s fees. Thus, the trial court did not abuse its discretion in denying attorney’s fees pursuant to the customer agreement and account statement and thus, the trial court’s denial of attorney’s fees under 57.105(7) is affirmed.

B. Attorney’s Fees under 57.105(1)

The Court finds that the trial court properly denied Pujol attorney’s fees under section 57.105(1). Under section 57.105 (1) a party is entitled to reasonable attorney’s fees when the losing party knew or should have known that the claim was not supported by material facts or

would not be supported by then-existing law. The trial court's decision to award attorney's fees under section 57.105(1) must include specific findings in the order "that there was a complete absence of a justiciable issue of law or fact raised by the plaintiff in the action." *Palm Beach Polo Holdings, Inc. v. Stewart Title Guar. Co.*, 134 So. 3d 1073, 1078 (Fla. 4th DCA 2014) (citing *Vasquez v. Provincial S., Inc.*, 795 So. 2d 216, 218 (Fla. 4th DCA 2001)).

In this case, the trial court's order denied Pujol's requests for attorney's fees and specifically addressed his requests under section 57.105(7), but did not specifically address the attorney's fees request under section 57.105(1). Although the trial court is required to include specific findings of fact when awarding attorney's fees under 57.105(1), there is no requirement for the trial court to make specific findings to deny an award of attorney's fees. *Raza v. Deutsche Bank Nat. Trust Co.*, 100 So. 3d 121, 127 (Fla. 2d DCA 2012), *reh'g denied* (Nov. 6, 2012). Pujol also failed to include a transcript or statement of the evidence regarding the hearing on his motion for attorney's fees and costs. See *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) (holding that when a party asks an appellate court to resolve issues of facts or draw conclusions from evidence, the appellate court must have a proper record to conclude that the trial court's decision is not supported by the evidence). Therefore, because Pujol has not demonstrated that the trial court erred in denying attorney's fees under 57.105(1) the trial court's denial of attorney's fees under 57.105(1) is affirmed.

C. Prevailing Party Costs

The Court finds that the issue of prevailing party costs has not been addressed at the trial court level and thus, the Court lacks jurisdiction over this issue. A circuit court's appellate jurisdiction is limited to the review of 1) final orders of lower courts, 2) non-final orders of lower courts, and 3) administrative action if provided by general law. In this case, Pujol filed a Motion for Attorney's Fees and Costs, yet the trial court did not make a determination as to the award of

costs. Rather, the trial court entered an order denying the award of attorney's fees, made no reference to the requests for costs, and only referenced Pujol's motion as a "Motion for Attorney's Fees." Thus, the trial court did not enter a final or non-final order with regard to Pujol's requests for costs. Therefore, because the trial court did not enter a final or non-final order on whether Pujol is entitled to costs, the case is remanded to the trial court to address the issue of costs.

D. Appellate Attorney's Fees

The Court finds that Pujol is not entitled to appellate attorney's fees and costs pursuant to Florida Statutes section 57.105(7). "It is well-settled that attorney's fees can derive only from either a statutory basis or an agreement between the parties." *Florida Hurricane Protection and Awning, Inc. v. Pastina*, 43 So. 3d 893, 895 (Fla. 4th DCA 2010). As stated *supra* this case does not arise from the customer agreement and thus, the customer agreement and statute do not allow Pujol to obtain prevailing party attorney's fees. Therefore, because the claim does not arise from the customer agreement and Pujol is not the prevailing party on appeal, Pujol's motion for appellate attorney's fees is denied.

Therefore, the Court **AFFIRMS** the trial court's denial of the Motion for Attorney's Fees and Costs as to attorney's fees, **REMANDS** as to the issue of prevailing party costs as the trial court did not enter a final order as to costs, and **DENIES** the Motion for Appellate Attorney's fees.

BLANC, SASSER, and SMALL, JJ., concur.