



IT IS ORDERED as set forth below:

Date: July 1, 2015

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

| | | |
|------------------------------|---|--------------------------|
| In re: | : | BANKRUPTCY CASE NO: |
| | : | |
| CATHERINE M. ZAHOS, | : | 13-67503-MGD |
| | : | |
| Debtor. | : | CHAPTER 7 |
| | : | |
| BEACH COMMUNITY BANK, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | ADVERSARY PROCEEDING NO: |
| | : | |
| CATHERINE M. ZAHOS, | : | 14-5023 |
| | : | |
| Defendant. | : | |
| | : | |

ORDER DENYING PLAINTIFF'S MOTION FOR ATTORNEY FEE AWARD

Before the Court is Plaintiff Beach Community Bank's ("Beach") Motion for Attorney Fee Award (Doc. 32), which the Court denies for the reasons set forth below.

I. Background

The facts of this case are recounted in the Court's February 3, 2015 Order Granting Plaintiff's Motion for Summary Judgment (Doc. 28). The Court restates the following facts relevant to the Motion for Attorney Fee Award for background. In 2010, Ms. Zahos and Beach entered into a series of agreements for the stated purpose of financing the purchase and furnishing of residential real estate for investment purposes. (Aff. Pritchard ¶¶ 5–6, Exs. 1-7, Doc. 24) (collectively, the "Agreement").¹ Ms. Zahos immediately defaulted on the Agreement and Beach filed suit in the Circuit Court of Walton County, Florida to judicially foreclose the property in 2011, obtaining a final judgment against her in 2012. (Aff. Pritchard ¶¶ 21–22, Ex. 8, Docs. 24-1 at 6–7, 24-2 at 36) (the "Money Judgment"). That Money Judgment included an award of attorney's fees of \$16,267.50. Beach domesticated the Money Judgment against Ms. Zahos in Georgia in 2012. (Aff. Pritchard ¶¶ 23–24, Ex. 9, Docs. 24-1 at 7, 24-2 at 46). Ms. Zahos filed a voluntary Chapter 7 petition on August 9, 2013, and Beach filed a Complaint seeking to except the Money Judgment from discharge on January 23, 2014. (Bankr. Docs. 1, 44). Beach moved for summary judgment on September 26, 2014, and the Court granted Beach's

¹ The two Commercial Loan Agreements, each Dated April 19, 2010, signed by Ms. Zahos as part of the Agreement, contain identical attorney's fees provisions at issue:

COLLECTION EXPENSES AND ATTORNEYS' FEES. To the extent permitted by law, Borrower agrees to pay all expenses of collection, enforcement and protection of Lender's rights and remedies under this Agreement. Expenses include, but are not limited to, reasonable attorneys' fees including attorney fees as permitted by the United States Bankruptcy Code, court costs and other legal expenses. These expenses will bear interest from the date of payment until paid in full at the contract interest rate then in effect for the loan. FL: Attorneys' fees will be 10 percent of the principal sum due or a larger amount as the court judges as reasonable and just.

(Aff. Pritchard, Exs. 1, 5, Doc. 24).

motion on February 3, 2015. (Doc. 28). It entered a nondischargeability judgment against Ms. Zahos the same day. (Doc. 29).

II. Discussion

The Money Judgment contained an attorney's fee award of \$16,267.50 based on an hourly rate. (Doc. 24-2 at 36). As Beach points out, the Agreement called for reasonable attorney's fees 10% of the principal sum, or a larger amount. (Motion ¶¶ 7–8). Beach essentially asserts that this Court should revisit the Walton County Circuit Court's decision to award less than 10% of the principal sum by calculating 10% of principal due under the Money Judgment and subtracting the amount of attorney's fees already awarded under the Money Judgment.

The Court concludes that Beach is not entitled to a further award attorney's fees for three reasons. First, Beach's Motion for Attorney Fee Award was untimely under the 2014 amendments to the Federal Rules of Bankruptcy Procedure. Second, Beach is not entitled to further fees under the Agreement for bringing the present case. Third, Beach is not entitled to post-judgment fees under Florida statutory law.

A. Beach's Motion was untimely.

Beach's Complaint was filed January 23, 2014 (Doc. 1). The rule governing attorney's fees in effect at that time was Former Bankruptcy Rule 7008(b).² That rule provided that "[a] request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate." Former Fed. R. Bankr. P. 7008(b) (amended 2014). Beach's complaint contains a request for fees in accordance with Former Bankruptcy Rule 7008(b). (Compl. Count III, Doc. 1).

² As used in this Order, "Bankruptcy Rule" refers to the Federal Rules of Bankruptcy Procedure and "Civil Rule" refers to the Federal Rules of Civil Procedure.

The United States Supreme Court, acting under its authority to prescribe general rules of practice and procedure under 28 U.S.C. § 2075, adopted amendments to the Bankruptcy Rules on April 28, 2014. Order Adopting Amendments to Federal Rules of Bankruptcy Procedure, 575 U.S. ____ (Apr. 28, 2014), *available at* http://www.supremecourt.gov/orders/courtorders/frbk14_d28l.pdf. The Order amending the Bankruptcy Rules specified that “the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2014, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.” *Id.* The amendments deleted Former Bankruptcy Rule 7008(b) and replaced it with new Bankruptcy Rule 7054(b)(2). That rule adopts Civil Rule 54(d)(2)(A)-(C) and (E) in adversary proceedings except for the reference in Rule 54(d)(2)(C) to Rule 78.³

³ Civil Rule 54(d)(2) as adopted by the Bankruptcy Rules provides as follows:

(A) Claim to Be by Motion. A claim for attorney’s fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

- (i) be filed no later than 14 days after the entry of judgment;
- (ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;
- (iii) state the amount sought or provide a fair estimate of it; and
- (iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) Proceedings. Subject to Rule 23(h), the court must, on a party’s request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

...

(E) Exceptions. Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

The Court entered judgment in the present case on February 3, 2015, after the revisions to the Bankruptcy Rules took effect. In its Order Granting Plaintiff's Motion for Summary Judgment, the Court declined to rule on Beach's count for attorney's fees in light of the amendment to the rule, instead specifying that "Beach may seek a determination of entitlement to attorney's fees for bringing this non-dischargeability action by separate motion, setting forth any supporting evidence and the applicable law under which the contractual provision would be enforceable post-judgment." (Order Granting Pl.'s Mot. Summ. J. at 11, Doc. 28). The above-styled adversary proceeding was closed on March 4, 2015, 29 days after the Court entered judgment. It was administratively reopened on March 12, 2015 to permit the filing of the instant motion, which Beach filed that day.

Under Revised Bankruptcy Rule 7054, Beach's Motion for Attorney Fee Award is not timely. A motion made under that rule must "be filed no later than 14 days after the entry of judgment." Fed. R. Civ. P. 54(d)(2)(B)(i).⁴ Beach's motion was filed 37 days after the Court entered judgment. Even excluding the time this adversary proceeding was closed, the Motion for Attorney Fee Award would still have been filed 15 days late. However, were Beach's motion timely, the Court would still deny it for the reasons set forth below.

⁴ That rule provides an exception if "the substantive law requires those fees to be proved at trial as an element of damages," which does not apply in this case. Fed. R. Civ. P. 54(d)(2)(A). Beach sought a declaration under 11 U.S.C. § 523 that a preexisting judgment debt was excepted from discharge, which did not require the Court to fix damages or enter a money judgment. The result would be the same even if the Court were to hold Florida law provided the rule of decision. *Cheek v. McGowan Elec. Supply Co.*, 511 So. 2d 977, 979 (Fla. 1987) ("A contractual provision authorizing the payment of attorney's fees is not part of the substantive claim because it is only intended to make the successful party whole by reimbursing him for the expense of litigation.").

B. Beach is not entitled to contractual attorney's fees.

As the Supreme Court has recently reaffirmed, in bankruptcy cases “[o]ur basic point of reference when considering the award of attorney’s fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney’s fees, win or lose, unless a statute or contract provides otherwise.” *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. ____ (2015) (slip op., at 3) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–253 (2010)).

A different set of concerns arises when considering whether attorney’s fees are dischargeable. For example, the Court held in *Cohen v. de la Cruz*, 523 U.S. 213, 223 (1998) that attorney’s fees already included in a judgment for a nondischargeable debt are nondischargeable. Relatedly, the Eleventh Circuit held in *TransSouth Financial Corporation of Florida v. Johnson*, 931 F.2d 1505, 1507 (11th Cir. 1991) that a bankruptcy court entering a money judgment alongside a nondischargeability judgment may “include a debtor’s contractual obligation to pay a creditor’s attorney’s fees.”

However, Beach’s instant request for attorney’s fees differs from those presented in *Cohen* and *TransSouth*. Not only has Beach secured an attorney’s fee award as part of the underlying Money Judgment as in *Cohen*, but it now seeks a further award for having litigated this nondischargeability proceeding as in *TransSouth*.

The court in *TransSouth* noted that enforceability of the attorney’s fees provision was an issue of local law. *TransSouth*, 931 F.2d at 1507. Beach asserts, and the Court agrees, that Florida law governs the enforceability of the provision. (Motion ¶ 4, Doc. 32). The question presented under Florida law is whether a judgment creditor who received a contractual award of attorney’s fees may enforce that contract post-judgment for an additional award of attorney’s fees. The

Court holds that under Florida law, the Agreement merged into the Money Judgment and thus that Beach's request for post-judgment contractual attorney's fees is barred.

The Florida Supreme Court examined the merger doctrine in *Whitehurst v. Camp*, 699 So. 2d 679 (Fla. 1997). That case involved a question of whether the contract rate of interest could apply to post-judgment interest. *Id.* at 680–82. The court concluded that, absent explicit contractual language about post-judgment interest, it did not. *Id.* at 683. It based this decision on “the application of the doctrine of merger by which the cause of action on the debt and damages recoverable on it merge into any judgment entered on the cause of action.” *Id.* at 682 (citing *Jax Ice & Cold Storage Co. v. South Florida Farms Co.*, 109 So. 212, 218 (Fla. 1926); *Gilpen v. Bower*, 12 So.2d 884, 885 (Fla. 1943)).

There is no sound reason why an attorney's fees provision should be treated any differently. The exact attorney's fee provision Beach raises before this Court was before the Walton County Circuit Court, and that court awarded attorney's fees as part of a judgment based upon the provision. Even if it was error under Florida law for Florida court to enter judgment for less than the 10% called for by the contract, Beach cannot relitigate this issue before this Court. Preventing a plaintiff from taking a “second bite at the apple” is exactly the point of the merger doctrine. Other bankruptcy courts have alluded to the merger issue under Florida law in the converse situation of a judgment debtor seeking attorney's fees under Florida's reciprocal fee statute; those courts avoided its application on judicial estoppel grounds. *In re Nabavi*, 514 B.R. 895, 904 (M.D. Fla. 2014); *In re Allen*, No. 10-38136-EPK, 2012 WL 1999532, at *2, 2012 Bankr. LEXIS 2444, *7 (Bankr. S.D. Fla. May 31, 2012); *In re Mowji*, 228 B.R. 321, 324 (Bankr. M.D. Fla. 1999). This case, however, squarely presents the merger issue, and the Court thus holds that merger bars Beach's request.

Beach cites several Florida cases for the proposition that “proof of attorney’s fees whether such fees are provided for by statute . . . or by contract may be presented for the first time after final judgment.” *Cheek v. McGowan Elec. Supply Co.*, 511 So. 2d 977, 979 (Fla. 1987). However, these cases refer to bringing ancillary proceedings before the court that itself entered the final judgment for pre-judgment fees. They do not address bringing a separate, second action for post-judgment fees.

There is a strong policy reason supporting the Eleventh Circuit’s award of fees in *TransSouth* not present in this case. Awarding attorney’s fees in cases where an unliquidated debt is reduced to a money judgment alongside a nondischargeability determination ensures a similar outcome in bankruptcy and nonbankruptcy courts. Where, as is presently the case, Beach has already been awarded attorney’s fees for liquidating the debt, there is no such justification.

The Court acknowledges that the Eleventh Circuit held in *Cadle Co. v. Martinez (In re Martinez)*, 416 F.3d 1286, 1290–91 (11th Cir. 2005) that an “award of attorney’s fees is without regard to whether ‘state law issues’ were ‘actually litigated’ in the bankruptcy dischargeability proceedings because the recoverability of attorney’s fees and costs under the facts and circumstances of this case is afforded by a matter of contract.” However, this case does not present “a matter of contract.” Having previously liquidated its claim by judgment, the sole issue before the Court was whether the judgment debt was dischargeable. As a matter of pure bankruptcy law, the American rule is the default.

Consequently, much like the issue of post-judgment interest, if Beach is entitled to post-judgment attorney’s fees, it must turn to the statutory law of the rendering jurisdiction. The Court next considers and rejects this possibility.

C. Beach is not entitled to statutory attorney's fees under Florida law for litigating a nondischargeability complaint.

Much like post-judgment interest, post-judgment attorney's fees are typically governed by statute. Florida has one such statute: Section 57.115: "Execution on judgments; attorney's fees and costs." That statute provides that a "court may award against a judgment debtor reasonable costs and attorney's fees incurred thereafter by a judgment creditor in connection with execution on a judgment." The Court next considers whether a "Complaint for a determination of non-dischargeability . . . [is] within the scope of the Florida Statute . . . [i.e.] 'in connection with execution on a judgment.'" *Hanft v. Church (In re Hanft)*, No. 02-21424-CIV-LENARD, 2003 WL 23811679, at *2 (S.D. Fla. Mar. 17, 2003).

The creditor in *Hanft* held a prepetition judgment and successfully obtained a nondischargeability judgment against the debtor. *Id.* at *1.⁵ Before the district court, the creditor sought an award of attorney's fees for litigating the nondischargeability complaint and related appeal. The court looked to Florida Statutes Section 57.115 (quoted above).

Noting that there were few Florida decisions on point, the court determined that Florida courts limited attorney's fee awards under Section 57.115 "to matters which are part of the execution on the judgment, and exclude collateral proceedings, even though those collateral proceedings may be undertaken for the purpose of giving effect to the judgment." *Id.* at *3. (citing *Paz v. Hernandez*, 654 So. 2d 1243 (Fla. Dist. Ct. App. 1995) (writs of garnishment not in connection with execution) and *Ocean Cruise Lines, Inc. v. Greenage Assoc., Inc.*, 643 So. 2d

⁵ The procedural history of the *Hanft* case is somewhat contorted. The bankruptcy court entered a nondischargeability judgment against the debtor. *In re Hanft*, 274 B.R. 917 (Bankr. S.D. Fla. 2002). The debtor appealed and the district court affirmed. *In re Hanft*, 315 B.R. 617 (S.D. Fla. 2002). The judgment creditor sought an award of attorney's fees from the district court, which referred the matter to a magistrate judge. *Hanft*, 2003 WL 23811679.

711 (Fla. Dist. Ct. App. 1994) (fraudulent transfer action against transferee from judgment debtor not in connection with execution)).

Likewise, it concluded that “the Complaint for non-dischargeability was a proceeding to determine whether the judgment could be executed on; it was not a proceeding to aid in the actual execution of the judgment” and therefore that it did not fall within Section 57.115. *Id.* The Court agrees with the *Hanft* decision. Litigating a complaint to determine dischargeability is a matter of bankruptcy law; it exists independently of execution.⁶

The Court lastly addresses Beach’s request for post-judgment interest at the federal rate (Motion ¶ 17, Doc. 32). The Court’s Judgment of February 3, 2015 was declaratory in nature; the Court did not enter a money judgment for a sum certain. The Money Judgment continues to bear interest at the Florida rate, and such post-judgment interest is nondischargeable under this Court’s February 3, 2015 Judgment. (Doc. 29).

IV. Conclusion

For the foregoing reasons, it is

ORDERED that Beach’s Motion (Doc. 32) is **DENIED**.

The Clerk shall serve a copy of this Order upon Plaintiff, Defendant, and counsel for Defendant.

END OF DOCUMENT

⁶ The Court does not express an opinion on Beach’s entitlement to fees for domesticating and executing on the Money Judgment within Georgia. Upon lifting of the automatic stay, the Georgia Superior Court may decide that Beach is entitled to attorney’s fees. Under *Cohen v. de la Cruz*, this sum would constitute part of the nondischargeable debt. 523 U.S. at 223.