Fourth DCA Addresses § 57.105(7) & "Defaulting Party" Fee Clauses

By Christopher R. Bruce

Florida's Fourth District Court of Appeal recently readdressed the reach of § 57.105(7) and the limited impact "defaulting party" fee clauses have in domestic relations litigation in *Sacket v. Sacket*, 38 Fla. L. Weekly D 1345, No. 4D12-1872 (Fla. 4th DCA June 19, 2013). Although Sacket initially appears to be just an appellate correction of a post-divorce attorney fee squabble the case will have future impact on both commercial contract cases and domestic relations disputes.

In *Sacket*, the parties' marital settlement agreement included the following provision for future attorney's fees and costs:

> "should either party to this agreement **default** in his or her obligation hereunder, the party in **default** shall be liable to the other party for all reasonable expenses, including attorney's fees…" (Emphasis Added).

The litigation that gave rise to the appeal in *Sacket* started with the former wife filing an emergency motion for temporary custody and contempt, alleging the former husband was not complying with the parties' timesharing schedule and parenting plan. The emergency motion requested the trial court to order former husband to pay the attorney's fees and costs related to the motion.

At the emergency hearing, the trial court found that the former husband was not in contempt of court. Shortly thereafter, the parties returned to court for an attorney's fee hearing. The former wife relied upon § 61.16 (Florida's "need and ability to pay" attorney fee statute) to argue that former husband should pay the attorney's fees related to her unsuccessful emergency motion. The former husband argued the parties' "defaulting party" attorney fee clause operated to eliminate former wife's entitlement to fees under § 61.16 for the emergency motion. He also argued that §57.105(7) created his entitlement to attorney's fees from his dependent former wife because he successfully defended against her action to enforce their marital settlement agreement.

The trial court agreed with the former husband, finding that § 57.105(7) applied to the parties' "defaulting party" fee clause to create former husband's entitlement to attorney's fees because he was found not to have defaulted on the terms of the parties' marital settlement agreement. The implied logic of the decision was that § 57.105(7) creates "reciprocity" for attorney fee clauses, and this "reciprocity" provision would require an "accused" defaulting party to receive fees if they are "exonerated" after hearing (because the party would have to pay fees if found in default)(and yes, this is a tricky analysis). The trial court found that $6,932 was a reasonable fee for the former husband's defense of the emergency motion and offset this amount from other money owed to former wife.

On appeal, the former wife argued that operation of § 57.105 was not triggered, because the "defaulting party" fee clause was a bilateral (and not unilateral) contractual fee provision. Further, former wife stressed the "defaulting party" clause was inapplicable since the trial court did not find either party in default. Therefore, the trial court should have awarded her attorney's fees related to her emergency motion under § 61.16 since the court determined at the fee hearing that she was otherwise entitled to attorney's fees from her bank-president former husband.

The *Sacket* court agreed with the former wife and reversed. The court noted § 57.105(7) "renders bilateral a unilateral contractual clause…for attorney's fees". However, § 57.105(7) was not applicable to the Sacket family's fee dispute because the "attorney's fee provision in the marital settlement agreement applied to both parties equally, and was therefore not a unilateral provision necessitating the application of § 57.105(7) for reciprocity purposes". In other words, § 57.105(7) does not apply to transform a "defaulting party" fee clause into a "prevailing party" fee clause.

The Sacket court also made clear that the mere existence of a "defaulting party" fee clause does not render inapplicable the § 61.16 "need and ability to pay" statute. If neither party is found to be in default the contractual fee provision does not apply and the divorce court judge must assess whether either party is entitled to fees under § 61.16.

Takeaways from Sacket

The *Sacket* decision clarifies that § 57.105(7) does not apply to effectively transform a "defaulting party" fee provision into a "prevailing party" fee provision. Furthermore, the case highlights how a "defaulting party" fee clause are mostly "useless" for discouraging unnecessary post-divorce litigation because a impecunious spouse can still seek attorney's fees for unsuccessful litigation based under the § 61.16 "need and ability to pay" statute.

Sacket shows why family law practitioners would be well served using "prevailing party" fee clauses in lieu of "defaulting party" clauses when the goal is discouraging meritless post-divorce litigation. When "prevailing party" clauses are used "the loser pays" and the "need and ability to pay" statute does not apply.

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