

# In the District Court of Appeal Fourth District of Florida

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CASE NO. [REDACTED]

(Circuit Court Case No. [REDACTED])

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[REDACTED] [REDACTED]

Appellant,

v.

FLAGSTAR BANK, FSB, et al.,

Appellees.

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ON APPEAL FROM THE FIFTEENTH JUDICIAL  
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

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## INITIAL BRIEF OF APPELLANT

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Respectfully submitted,

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## **ISSUE PRESENTED**

Under Florida law when a case is dismissed before the filing of an answer, the defendant must raise a claim for attorneys' fees and costs either in the motion to dismiss or by a separate motion which must be filed within thirty days following dismissal of the action, otherwise the claim is waived. The BANK's case was dismissed on [REDACTED] motion before the time to file an answer. [REDACTED] moved for attorneys' fees and costs by separate motion filed seventeen days after dismissal. Was the claim for attorneys' fees and costs properly raised?

## STATEMENT OF THE CASE AND FACTS

This is an action brought by the Plaintiff, FLAGSTAR BANK, FSB, (“BANK”) to foreclose a mortgage on the home of the Defendant, [REDACTED] [REDACTED] (“[REDACTED]”<sup>1</sup> [REDACTED] moved to dismiss the amended complaint.<sup>2</sup> The lower court granted the motion and the case was dismissed “without prejudice.”<sup>3</sup> [REDACTED] then timely moved, under Fla. R. Civ. P. 1.525, 1.420(d), and Florida Statute § 57.041, for attorneys’ fees and costs based upon the prevailing party fee-shifting provisions contained in the promissory note and mortgage, as well as Florida Statute § 57.105(7).<sup>4</sup>

At the fee hearing, the BANK argued that [REDACTED] had waived the right to attorneys’ fees and costs because [REDACTED] motion to dismiss the amended complaint did not specifically request attorneys’ fees and costs.<sup>5</sup> Over objection, the BANK relied on previously undisclosed cases, to argue that a party who does

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<sup>1</sup> Complaint (A. 1); Agreed Order Granting Plaintiff Leave to Amend Complaint (A. 6); Amended Complaint (A. 7).

<sup>2</sup> Defendant [REDACTED] [REDACTED] Motion to Dismiss Amended Complaint, dated November 13, 2009 (A. 44).

<sup>3</sup> Order Upon Defendant [REDACTED] [REDACTED] Motion to Dismiss Amended Complaint, dated March 24, 2010 (A. 61); Final Judgment of Dismissal, dated March 29, 2010. (A. 62).

<sup>4</sup> Defendant [REDACTED] [REDACTED] Motion for Attorneys’ Fees and Costs, dated April 15, 2010 (A. 64).

<sup>5</sup> Transcript of Hearing before the Honorable Jack H. Cook held on June 21, 2010 (“Fee Hearing”), p. 7-8 (A. 75-76).

not seek attorneys' fees and costs within their pleadings waives their right if they are not pled.<sup>6</sup> [REDACTED] pointed out that because no responsive pleading had yet been filed, no waiver could occur.<sup>7</sup>

The BANK also argued that fees were not permitted because the dismissal was based on lack of standing and therefore not an adjudication on the merits.<sup>8</sup> The lower court denied [REDACTED] motion for fees and costs on the grounds that [REDACTED] waived the right to attorneys' fees and costs by failing to ask for fees and costs in [REDACTED] motion to dismiss.<sup>9</sup> This timely appeal ensued.

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<sup>6</sup> *Id.* at 10 (A. 78).

<sup>7</sup> *Id.* at 11 (A. 79).

<sup>8</sup> Fee Hearing, p. 9 (A. 77).

<sup>9</sup> Order Denying Defendant [REDACTED] [REDACTED] Motion for Attorneys' Fees and Costs, dated June 21, 2010 (A. 89).

## **SUMMARY OF THE ARGUMENT**

██████████ properly raised a claim for attorneys' fees and costs. To raise such a claim when a case is dismissed prior to the time to file an answer, the claim must be raised in the motion to dismiss or by filing a separate motion within thirty days of the dismissal.

In this case, ██████████ became the prevailing party when she obtained a judgment dismissing the BANK's case without prejudice to re-file. At that time, ██████████ was not yet required to answer the amended complaint. ██████████ then properly raised the claim for attorneys' fees and costs by filing a separate motion seventeen days after the dismissal.

Under Florida Statute § 57.105(7), if a contract upon which a party sues provides for the recovery of fees to one party, the court may award fees to either party that prevails. The promissory note and mortgage sued upon by the BANK provide for the recovery of attorneys' fees and costs to the BANK. Therefore, ██████████ is entitled to recover attorneys' fees and costs in this case.

Accordingly, the order should be reversed with directions for the lower court to enter an order granting ██████████ entitlement to attorneys' fees and costs.



## STANDARD OF REVIEW

Issues concerning entitlement to attorneys' fees present a pure legal issue. *Save on Cleaners of Pembroke II Inc. v. Verde Pines City Ctr. Plaza LLC*, 14 So. 3d 295, 297 (Fla. 4th DCA 2009). Such legal issues are reviewed *de novo*. *First Union Nat. Bank v. Turney*, 839 So. 2d 774, 776 (Fla. 1st DCA 2003). *See Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A.*, 971 So. 2d 955, 956 (Fla. 5th DCA 2007) (When entitlement to fees is based on the interpretation of contractual provisions, or a statute, as a pure matter of law, the appellate court undertakes a *de novo* review.). The issue of whether [REDACTED] properly raised a claim and is therefore entitled to attorneys' fees and costs is a pure issue of law to be reviewed *de novo*. There is simply no factual dispute.

## ARGUMENT

### I. [REDACTED] Is Entitled to Recover Her Attorneys' Fees and Costs As The Prevailing Party.

On [REDACTED] motion the BANK's case was dismissed without prejudice to re-file the case. Therefore, [REDACTED] was the prevailing party. *See e.g., Green v. Sun Harbor Homeowners' Ass'n, Inc.*, 730 So. 2d 1261, 1263 (Fla. 1998); *Moritz v. Hoyt Enter., Inc.*, 604 So. 2d 807, 809-10 (Fla. 1992) (“[T]he party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney’s fees.”). Additionally, Florida law provides that, if a contract upon which a party brings an action provides for recovery of fees to one party, the court may award fees to either party that prevails.

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.

§ 57.105(7), Fla. Stat. (2009).

In this case, it is undisputed that the note and mortgage provided for recovery of attorneys’ fees by the mortgagee and note holder. The mortgage provides:

14. **Loan Charges.** Lender may charge Borrower fees for services performed in connection with Borrower’s default, for the purpose of protecting Lender’s interest in the Property and rights under this

Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees.

Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

**24. Attorneys' Fees.** As used in this Security Instrument and the Note, attorneys' fees shall include those awarded by an appellate court and any attorneys' fees incurred in a bankruptcy proceeding.<sup>10</sup>

The note provides:

**(E) Payment of Note Holder's Costs and Expenses**

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

Note, ¶ 7.(E).<sup>11</sup> Once the BANK's case was dismissed without leave to amend the complaint, [REDACTED] was entitled to recover attorneys' fees (and costs) as the prevailing party.

The BANK raised two arguments at the hearing. First, that attorneys' fees and costs were waived because [REDACTED] did not specifically request such attorneys' fees and costs in her motion to dismiss,<sup>12</sup> and second, that fees are not

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<sup>10</sup> Mortgage attached to Amended Complaint, ¶¶ 14, 22, 24 (A. 12, 20).

<sup>11</sup> Note attached to Amended Complaint (A. 28, 30).

<sup>12</sup> Transcript of Hearing before the Honorable Jack H. Cook held on June 21, 2010, p. 7-8 (75-76).

permitted because the dismissal was based on lack of standing and therefore not an adjudication on the merits.<sup>13</sup> Both arguments will be addressed in turn.

**A. [REDACTED] properly raised a claim for attorneys' fees and costs.**

To collect fees when a case is dismissed before the time to answer the complaint, a defendant must have raised a claim for attorneys' fees in the defendant's motion or by a separate motion which must be filed within thirty days following dismissal of the action. *Green v. Sun Harbor Homeowners' Ass'n, Inc.*, 730 So. 2d 1261, 1263 (Fla. 1998); *see also* Fla. R. Civ. P. 1.525. If the claim is not made within this time period, the claim is waived. *Green*, 730 So. 2d at 1263. Therefore, a defendant need not raise a claim for attorneys' fees prior to dismissal of a case so long as the time period to answer the complaint has yet to mature. In such cases, a motion for attorneys' fees and costs filed within thirty days of the dismissal properly raises the claim. *See Green*, 730 So. 2d at 1262-63.

Here, the BANK's case was dismissed before the time to file an answer and [REDACTED] moved for attorneys' fees and cost by separate motion filed within thirty

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<sup>13</sup> *Id* at 9 (A. 77).

days of the dismissal.<sup>14</sup> The BANK nevertheless argues that the right to raise a claim for attorneys' fees was waived because it was not requested in the motion to dismiss<sup>15</sup>—a position rejected outright by the Florida Supreme Court. *See Green*, 730 So. 2d 1261, 1262-63.

In *Green*, the defendant moved to dismiss the case and the plaintiff entered an agreed order dismissing the case. *Id.* at 1261-62. The defendant then moved for attorneys' fees within thirty days. *Id.* at 1262. The trial court denied the motion finding that the defendant did not raise a claim for attorneys' fees until after the entry of the dismissal. *Id.* The Florida Supreme Court reversed, finding that no waiver could have occurred prior to the time the answer was due and that a claim for attorneys' fees could be raised by separate motion after the dismissal. *Id.* at 1262-63.

Since [REDACTED] was not yet required to file, and had not filed, a responsive pleading at the time the complaint was dismissed, the claim for attorneys' fees and costs was properly raised by the filing a motion for fees and costs within thirty days of the dismissal.

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<sup>14</sup> *See* Final Judgment of Dismissal, dated March 29, 2010. (A. 62); Defendant [REDACTED] [REDACTED] Motion for Attorneys' Fees and Costs, dated April 15, 2010 (A. 64).

<sup>15</sup> Transcript of Hearing before the Honorable Jack H. Cook held on June 21, 2010, p. 7-8 (75-76).

**B. The BANK led the lower court into error.**

At the hearing, the BANK represented that under *Stockman v. Downs*, 573 So. 2d 835 (Fla. 1991), attorneys' fees, whether based on statute or contract, must be pled and failure to do so constitutes a waiver unless some other notice is given. *Id.* at 837-38. While this is true in cases where a defendant has filed a pleading, *Green* laid that very argument to rest over a decade ago in cases where there is pre-answer dismissal as discussed above. *See Green supra.* In doing so, the *Green* court distinguished *Stockman* by stating:

This case presents a situation different from that in *Stockman*. In *Stockman*, there had been a responsive pleading (an answer) and also a trial before the defendant moved for attorney fees. In this case, there had been only a complaint and a motion to dismiss before the defendant moved for attorney fees. This case had not proceeded to the point at which the defendant was required to answer. . . . Because the defendant had not "pled" at the time the action was dismissed, the defendant's failure to file a claim for attorney fees in his motion to dismiss is not considered to be a waiver of his entitlement to attorney fees.

*Green*, 730 So. 2d at 1262. The court read the phrase "must be pled" in accord with Florida Rules of Civil Procedure to be "complaints, answers, and counterclaims" under rule 1.100(a). *Id.* Using that rationale, the court found that a motion to dismiss is not a pleading and *Stockman* is to be read to hold that failure

to set forth a claim for attorneys' fees in a complaint, answer, or counterclaim, if filed, constitutes a waiver. *Id.*

Ultimately, the court required the claim to be raised in the pleadings or by motion filed within thirty days of dismissal:

Until a rule is approved for cases that are dismissed before the filing of an answer, we require that a defendant's claim for attorneys' fees is to be made either in the defendant's motion or by a separate motion which must be filed within 30 days following dismissal of the action. If the claim is not made within this time period, the claim is waived.

*Id.* at 1263. There is no discernable difference between this case and *Green*. Accordingly, *Stockman* is distinguishable on the same grounds as outlined in *Green*.

The BANK also cited *Sardon Foundation v. New Horizons Service*, 852 So. 2d 416 (Fla. 5th DCA 2003), which relies on *Stockman*. In *Sardon* an answer was filed and no claim for fees was raised. *See Id.* at 418. Clearly, a claim for attorneys' fees and costs is waived if not raised in the pleadings when pled. The case law is equally clear that a claim for attorneys' fees and costs can be raised within thirty days of a dismissal if no answer is yet due. *Sardon*, therefore, is distinguishable on the same grounds as *Stockman*.

The very fact that the BANK's counsel failed to bring *Green* to the attention of the lower court is itself sanctionable conduct. Not only did the BANK overlook

the dispositive Florida Supreme Court case but it sandbagged [REDACTED] counsel, over objection, with case law that was not provided in advance.<sup>16</sup> Judicial resources, time, and expense could have been saved if only the BANK would have either properly researched the issue itself or provided the case law before the hearing. The lower court was misled into error and the order denying [REDACTED] entitlement to attorneys' fees should be reversed.

## **II. A Defendant is Entitled to Attorneys' Fees Even Though a Final Judgment of Dismissal is Not an Adjudication on the Merits.**

Given that even a voluntary dismissal will support an award of attorneys' fees, the BANK's argument that there must be an adjudication on the merits before a defendant is entitled to fees is clearly erroneous. The fact that the final judgment of dismissal in this case is not an adjudication "on the merits" is, therefore, irrelevant to the fee issue. *See Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990); *Alhambra Homeowners Ass'n v. Asad*, 943 So. 2d 316, 318-19 (Fla. 4th DCA 2006).

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<sup>16</sup> *Id.* at 10 (A. 78).



### **III. Rule 1.420(d) Provides a Separate Basis for an Award of Costs and Fees.**

Florida Rule of Civil Procedure 1.420(d) provides that costs are to be assessed immediately after a dismissal is entered by the trial court issuing the dismissal. *Caufield v. Cantele*, 837 So. 2d 371, 376 (Fla. 2002); *McKelvey v. Kismet, Inc.*, 430 So. 2d 919, 921-22 (Fla. 3d DCA 1983); *Wilson v. Rose Printing Co.*, 624 So. 2d 257, 258 (Fla. 1993) (“this Court has consistently held that where a statute or agreement of the parties provides that the term ‘costs’ includes attorneys’ fees such fees are taxable under rule 1.420(d)”).

### **IV. Florida Statute Section 57.041 Provides a Separate Basis for an Award of Costs and Fees.**

Florida Statute Section 57.041 also provides that “[t]he party recovering judgment shall recover all his or her legal costs and charges...” Courts use the prevailing party standard to determine entitlement to costs under this statute. *Granoff v. Seidle*, 915 So. 2d 674, 677 (Fla. 5th DCA 2005); *see Wyatt v. Milner Document Prods., Inc.*, 932 So. 2d 487, 490 (Fla. 4th DCA 2006) (providing trial costs are governed by section 57.041, Florida Statutes, “which hinges on whether the party seeking to tax costs is considered the prevailing party”).

## CONCLUSION

NUDEL properly raised the claim for attorneys' fees and costs by filing a motion raising the claim within thirty days of the judgment of dismissal. Accordingly, the lower court's ruling denying NUDEL an award of attorneys' fees and costs should be reversed and remanded to the lower court with directions to enter an order granting entitlement to attorneys' fees and costs in favor of NUDEL and against the BANK.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing along with the appendix to the initial brief was served by U.S. Mail this September ~~24~~<sup>25th</sup>, 2010 to all parties on the attached service list.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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