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SUPREME COURT OF FLORIDA

CASE NUMBER: SC20-1195

SAMUEL SALOMON LEVY,

L. T.CASE NO. 3D19-73; 3D19-318; 11-31255

Petitioner,

vs.

EINATH BACH LEVY,

Respondent.

_____/

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APPENDIX

1. July 15, 2020 Third District Court of Appeal Opinion.
2. August 31, 2020 Third District Court of Appeal Order denying rehearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via E- Mail to: ROBERT F. KOHLMAN, Esquire, 100 S.E. 2nd Street, Suite 3500, Miami, Fl 33131, robert.kohlman@kohlmanlaw.com; this 9th day of September, 2020.

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_____
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Third District Court of Appeal

State of Florida

Opinion filed July 15, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D19-73 and 3D19-318
Lower Tribunal No. 11-31255

Einath Bach Levy,
Appellant/Cross-Appellee,

vs.

Samuel Salomon Levy,
Appellee/Cross-Appellant.

Appeals from the Circuit Court for Miami-Dade County, George A. Sarduy, Judge.

KohlmanLaw LLLP, and Robert F. Kohlman, for appellant/cross-appellee.

Samuel Salomon Levy, in proper person.

Before EMAS, C.J., and FERNANDEZ, and SCALES, JJ.

FERNANDEZ, J.

On this consolidated appeal, appellant Einath Levy, the former wife, appeals the trial court's order which ratified and approved the Report of General Magistrate and denied her prevailing party attorneys' fees and costs in defending against Appellee Samuel Levy, the former husband's, Motion to Compel. The former husband cross-appeals the same order. We find no trial court error in the issues raised by the former husband and thus affirm on his consolidated cross-appeal without further discussion. However, we agree with the former wife's position on her direct appeal that she should have been awarded attorneys' fees and costs as the prevailing party, and thus reverse.

The former husband and the former wife dissolved their marriage and subsequently entered into a Consent Custody and Visitation agreement as well as a Property Settlement and Support Agreement ("PSA"). The issue on appeal stems from a prevailing party fee provision in the parties' PSA, which states:

> 13. ENFORCEMENT. In the event that either party should take legal action against the other by reason of the other's failure to abide by this Agreement, the party who is found to be in violation of this Agreement shall pay to the other party who prevails in said action, the prevailing party's reasonable expenses incurred in the enforcement of this Agreement, said expenses to include, but not be limited to, reasonable attorney's fees, court costs, filing fees, court reporter appearance fees, copying costs, travel costs and transcription fees.

The only other provision in the parties' PSA that addresses attorney's fees and costs states the following:

> 30. ATTORNEY'S FEES: Except as otherwise set forth above in Paragraph 13, each party shall bear his or her own attorney's fees and costs incurred in the negotiation, preparation, and execution of this Agreement, as well as his or her respective attorney's fees and costs incurred in obtaining an uncontested divorce.

The former husband filed a "Motion to Compel Former Wife to Reimburse the Former Husband for Support Overpayments, Children's Expenses, and Debt Incurred in the Name of the Former Husband, Motion for Credit Against Future Spousal Support Obligations as a Consequence of Money Advanced to the Former Wife, and Motion for Attorney's Fees and Costs" ("Motion to Compel"). The General Magistrate made recommended factual findings against the former husband on all claims in his Motion to Compel. However, the General Magistrate declined to award the former wife prevailing party fees for successfully defending against the former husband's Motion to Compel. The General Magistrate found that Paragraph 13 of the parties' PSA only contemplated entitlement to attorney's fees and costs against "the party found to be in violation of this Agreement." Additionally, the General Magistrate reserved on claims for attorney's fees and costs for both parties under section 61.61, Florida Statutes (2018). The former wife filed exceptions to these findings, which were denied by the trial court.

On appeal, the former wife argues that the trial court erred in denying her prevailing party attorneys' fees pursuant to the parties' PSA after she successfully defended against the former husband's Motion to Compel. We agree.

We review the order on appeal *de novo*, as the issue deals with the interpretation of a provision in the parties' PSA. Kipp v. Kipp, 844 So. 2d 691, 693 (Fla. 4th DCA 2003) (quoting McIlmoil v. McIlmoil, 784 So. 2d 557, 561 (Fla. 1st DCA 2001)) ("The interpretation of the wording and meaning of [a] marital settlement agreement, as incorporated into [a] final judgment, is subject to *de novo* review.").

Section 57.105(7), Florida Statutes (2011), states in part:

> (7) 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. This subsection applies to any contract entered into on or after October 1, 1988.

Section 57.105(7) amends by statute all contracts with prevailing party fee provisions to make them reciprocal. Thus, it also applies to those parties, like the former wife in this case, who successfully defend against a breach of contract action. The statute applies if the contract contains a prevailing party provision, and the litigant seeking fees is a party to the contract, Azalea Trace, Inc. v. Matos, 249 So. 3d 699, 702 (Fla. 1st DCA 2018), which is exactly the set of facts before the Court in this case. Thus, we would not be rewriting the parties' contract if the former wife is awarded prevailing party attorneys' fees because section 57.105(7) amends the prevailing party attorneys' fee provision by operation of law. The award is mandatory, once the lower court determines a party has prevailed. Landry v.

Countrywide Home Loans, Inc., 731 So. 2d 137 (Fla. 1st DCA 1999) (discussing section 57.105(2), which later became section 57.105(7)). Furthermore, the trial courts do not have discretion to decline to award prevailing party fees in a case such as this. Lashkajani v. Lashkajani, 911 So. 2d 1154, 1158 (Fla. 2005) ("Trial courts do not have the discretion to decline to enforce such provisions, even if the challenging party brings a meritorious claim in good faith. Such provisions exist to 'protect and indemnify' the interests of the parties, not to enrich the party.") (internal citations omitted).

Accordingly, section 57.105(7) requires that the former wife be awarded attorney's fees for successfully defending against the former husband's motion to compel. Therefore, concluding that the trial court erred in declining to award the former wife's motion for attorney's fees pursuant to the prevailing party fee provision as modified by section 57.105(7), we reverse the order on appeal and remand to the trial court with directions to determine the reasonable attorneys' fees and costs to be awarded to the former wife.

Affirmed in part; reversed in part and remanded with instructions.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

AUGUST 31, 2020

EINATH BACH LEVY,
Appellant(s)/Petitioner(s),
vs.
SAMUEL SALOMON LEVY,
Appellee(s)/Respondent(s),

CASE NO.: 3D**19-0073**, 3D19-0318

L.T. NO.: 11-31255

Upon consideration, Appellee/Cross-Appellant Samuel Salomon Levy's pro se Motion for Rehearing and for oral argument are hereby denied.

EMAS, C. J., and FERNANDEZ and SCALES, JJ., concur.

cc: Robert F. Kohlman Samuel Salomon Levy

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