

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR BROWARD COUNTY

CASE NO.: 12-034123 (07)

P&S ASSOCIATES, GENERAL
PARTNERSHIP, etc., et al.,

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**DEFENDANTS FRANK AVELLINO AND MICHAEL BIENES' MOTION FOR
SANCTIONS PURSUANT TO SECTION 57.105, FLORIDA STATUTES**

Defendants, Frank Avellino (“Avellino”), and Michael Bienes (“Bienes”) file this Motion for Sanctions against Plaintiffs, Philip Von Kahle, as Conservator of S&P Associates, a General Partnership (“S&P”) and P&S Associates, a General Partnership (“P&S”) (the “Conservator”), Plaintiffs S&P and P&S and Plaintiff’s counsel, pursuant to Section 57.105, *Florida Statutes*, and as grounds therefore state as follows:

1. On October 5, 2015, Plaintiffs filed their Motion to Strike Pleading, and in the Alternative Motion for Adverse Inference (“Motion to Strike”).
2. An award of reasonable attorneys’ fees to Defendants, payable in equal parts by the Plaintiffs and their attorneys, is appropriate because Plaintiffs and their attorneys knew or should have known their Motion to Strike is not supported by the material facts or the application of existing law to those facts:

Upon the court’s initiative or motion of any party, the court shall award a reasonable attorney’s fee to be paid to the prevailing party in equal amounts by the losing party and the losing party’s attorney on any claim or defense at any

time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts.

§ 57.105(1), Fla. Stat.

3. A claim is subject to sanctions if a party or his counsel knew or should have known, at the time of filing or any time prior to trial, that the claim was not grounded in fact, not warranted by existing law, or not supported by reasonable argument for extension, modification, or reversal of existing law. *Gopman v. Dep't of Educ.*, 974 So. 2d 1208, 1210 (Fla. 1st DCA 2008). A reasonable argument for extension, modification, or reversal requires the party first to acknowledge that they are seeking such an extension, modification, or reversal of the existing law; to be reasonable, the argument must be made in good faith, and to be made in good faith, the argument must acknowledge the state of the current law. *Id.* at 1210 n.1. For the reasons stated below, this exception does not apply in this instance.

4. Section 57.105 is designed "to discourage baseless claims, stonewall defenses, and sham appeals in civil litigation by placing a price tag through attorneys' fees awards on losing parties who engage in such activities." *Renfro v. Dodge*, 520 So. 2d 690, 692 (Fla. 4th DCA 1988). The post-1999 version of the statute has greatly expanded the Court's power to award attorneys' fees under such circumstances. *See Peyton v. Horner*, 920 So. 2d 180 (Fla. 2d DCA 2006). Defendants are not required to show a complete absence of a justiciable issue of fact or law to be awarded sanctions; rather they must show only that the basis for the alleged Motion to Strike is insufficiently supported. *See Wendy's of N.E. Fla., Inc. v. Vandergriff*, 865 So. 2d 520, 523 (Fla. 1st DCA 2003).

5. Plaintiffs' Motion to Strike is premised upon the following allegations:

- Defendants have not produced documents of communications with Michael Sullivan. Motion to Strike, p. 2;
- Defendants' failure to produce documents evidencing the transfer of funds to them by or on behalf of Michael Sullivan. Motion to Strike, p. 2;
- Defendants have failed to produce all documents exchanged between Defendants. Motion to Strike, p. 2;
- Defendants failed to produce e-mail communication because they deleted such communications. Motion to Strike, p. 2;
- Defendants destroyed evidence at a time when they had a duty to preserve such evidence. Motion to Strike, p. 3;
- The emails between Michael Sullivan and Defendants that Defendants destroyed are critical to Plaintiffs' claims. Motion to Strike, p. 5.

6. Since the filing of the Motion to Strike:

- Defendants have produced documents of their communication with Michael Sullivan;
- Defendants have produced documents of the transfer of funds to them by or on behalf of Michael Sullivan;
- Defendants have produced non-privileged documents exchanged between them and filed a privilege log as to the privileged communications withheld;
- No email communication has been withheld from production because it was deleted;
- No evidence has been destroyed at a time when a duty to preserve it

existed; and

- Plaintiffs have all emails between Defendants and Michael Sullivan having obtained them from Michael Sullivan before the filing of their Motion to Strike.

7. Moreover, since the filing of the Motion to Strike, Plaintiffs filed a Motion to Compel the Production of Defendants' Computers ("Motion to Compel") which motion was premised on the same factual allegations as the Motion to Strike. On January 8, 2016, the Court entered an Order denying Plaintiffs' Motion to Compel finding that "Plaintiffs have failed to provide evidence that Defendants destroyed evidence or otherwise thwarted discovery...." Order, p. 3.

8. It has been a month since the Court denied Plaintiffs' Motion to Compel for lack of the same evidence which is the basis for the Motion to Strike, yet Plaintiffs have not withdrawn the motion, but rather, have rescheduled the motion for hearing on March 14, 2016. Plaintiffs' current position, particularly in light of the discovery which has been provided since the filing of the Motion to Strike and the Court's January 8, 2016, order is neither supported by the materials facts necessary to establish their claim nor by the application of current law to those facts.

9. Therefore, pursuant to Section 57.105, *Florida Statutes*, attorney's fees and costs incurred must be assessed against Plaintiffs and their counsel. In fact, such an award is *mandatory* under the circumstances. Section 57.105(1) mandates that a court award fees to the movant to be paid in equal amounts by the losing party and the losing party's attorney where the court finds they knew or should have known that a claim or defense was not supported by the application of then-existing law to the material facts. *Smith v. Gore*, 933 So. 2d 567, 568 (Fla. 1st

DCA 2006) (“We again remind the bar that section 57.105 expressly states courts ‘shall’ assess attorney’s fees for bringing, or failing to timely dismiss, baseless claims or defenses.”). The word “shall” underscores “the legislative intent to impose a mandatory penalty in the form of reasonable attorney’s fees to discourage baseless claims, by placing a price tag on losing parties who engage in these activities.” *Albritton v. Ferrera*, 913 So. 2d 5, 8-9 (Fla. 1st DCA 2005); see also *In re Ridley Owens, Inc.*, 391 B.R. 867 (Bankr. N.D. Fla. 2008).

10. Accordingly, the Court must assess attorneys’ fees to be paid in equal parts by the Plaintiffs and their counsel if the Court finds they knew or should have known the Motion to Strike was not supported by the material facts or the application of existing law to those facts. As detailed above, there simply can be no other finding. Therefore, the Plaintiffs’ and their attorneys’ failing to withdraw the Motion to Strike, despite demand, entitles Defendants to an award of their attorneys’ fees as sanctions in accordance with Section 57.105, Florida Statutes and the authorities cited herein.

11. Pursuant to Section 57.105, *Florida Statutes*, Avellino and Bienes are serving this motion upon Plaintiffs and their counsel via e-mail delivery, but this motion will not be filed or presented to the court unless within 21 days after service of this motion Plaintiffs fail to withdraw their Motion to Strike, the failure of which will result in Avellino and Bienes filing this motion with the court and seeking an award of attorney’s fees and expenses incurred against Plaintiffs and their attorneys.

WHEREFORE, Defendants, Frank Avellino and Michael Bienes,, request that this court enter an order finding that Avellino and Bienes are entitled to an award of attorney’s fees, together with expenses and costs incurred in refuting and defending Plaintiffs Motion to Strike, against Plaintiffs and their counsel pursuant to Section 57.105, *Florida Statutes*.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served on those on the attached service list by email on February 11, 2016 and is being served on those on the attached service list by electronic service as filed via the Florida Court E-Filing Portal in compliance with Fla. Admin. Order No. 13-49 this 4th day of March, 2016.

/s/ Gary A. Woodfield
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