

FSM SUPREME COURT TRIAL DIVISION

PACIFIC ISLANDS DEVELOPMENT BANK,)	CIVIL ACTION NO. 2019-027
)	
Plaintiff,)	
)	
vs.)	
)	
YOSLYN G. SIGRAH,)	
)	
Defendant.)	
_____)	

ORDER DENYING MOTION FOR ATTORNEY’S FEES

Larry Wentworth
Associate Justice

Decided: October 12, 2020
Entered: November 6, 2020

APPEARANCES:

For the Plaintiff: Maximo A. Mida, Esq.
Ramp & Mida Law Firm
P.O. Box 1480
Kolonia, Pohnpei FM 96941

For the Defendant: Yoslyn G. Sigrah, Esq.
P.O. Box 3018
Kolonia, Pohnpei FM 96941

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HEADNOTES

Civil Procedure – Motions; Civil Procedure – Service

An October 1, 2020 opposition is too late when, even if the motion was mailed on September 3, 2020, and the opponent would then have had until September 19, 2020, to oppose it because when service is by mail, six days are added to the prescribed ten-day period, and when the opponent gives no explanation for its tardiness. The court will therefore disregard the opposition as untimely. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 82 (Pon. 2020).

Civil Procedure – Motions – For Enlargement

A party’s motion to enlarge time to file a response may be granted, even though excusable neglect has not been shown, when it would be conducive to a speedy and inexpensive determination of the action, when the delay has not been long, and when no prejudice to the plaintiff is apparent. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 82 (Pon. 2020).

Attorney’s Fees – Court-Awarded

The court can only award attorney’s fees that it finds are reasonable, regardless of the basis for the

award (contractual, statutory, or other). Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 83 (Pon. 2020).

Attorney's Fees – Court-Awarded – Contractual

Inexperience should not be rewarded with larger attorney's fees. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 83 (Pon. 2020).

Attorney's Fees – Court-Awarded – Contractual

Except for unusual cases, a reasonable amount, not exceeding 15% of the outstanding principal and interest is the maximum allowed for attorney's fees in a collection case under FSM Supreme Court case law. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 83 (Pon. 2020).

Attorney's Fees – Court-Awarded

Although the general principle is that each party bears its own attorney's fees, the court may assess fees against a party when that party acts vexatiously, or in bad faith, or presses frivolous claims, or employs oppressive litigation practices. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 83 (Pon. 2020).

Attorney's Fees – Court-Awarded – Contractual; Civil Procedure – Defaults and Default Judgments – Damages

If a plaintiff, seeking a default judgment, wishes not to waive its rights to contractual attorney's fees, it should attach an affidavit detailing the attorney's fees it claims when it applies for a default judgment. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 84 (Pon. 2020).

Attorney's Fees – Court-Awarded – Contractual; Contracts – Damages

When the parties contractually provide for attorney's fees, the fee award is an integral part of the merits of the case. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 84 (Pon. 2020).

Attorney's Fees – Court-Awarded – Contractual; Civil Procedure – Defaults and Default Judgments – Damages; Contracts – Damages

When attorney's fees are damages that are an integral part of the plaintiff's claim for breach of contract, a plaintiff seeking fees in a breach of contract claim is generally required to prove its attorney's fees as part of its case-in-chief. This is true whether the plaintiff's case-in-chief is presented during a trial, or comes before the court on a summary judgment motion, or comes before the court on the plaintiff's request for the entry of a default judgment. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 84 (Pon. 2020).

Attorney's Fees – Court-Awarded

A trial court must distinguish between post-judgment prevailing party attorney fees, and fees owed as an integral part of a contractual obligation. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 84 (Pon. 2020).

Attorney's Fees – Court-Awarded – Contractual; Civil Procedure – Defaults and Default Judgments – Damages

A party seeking entry of a default judgment must apply for all of the relief sought including attorney fees, when application is made for entry of default judgment. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 84 (Pon. 2020).

Attorney's Fees – Court-Awarded – Contractual; Civil Procedure – Defaults and Default Judgments – Damages

A default judgment is intended to include all relief sought in the complaint and established by the plaintiff. Therefore, a plaintiff seeking an award of attorney fees from a defaulting defendant must request those fees when the plaintiff requests entry of default judgment. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 84 (Pon. 2020).

Attorney's Fees – Court-Awarded – Contractual; Civil Procedure – Defaults and Default Judgments – Damages; Contracts – Damages

When a plaintiff's claim for attorney's fees is contractually based and thus integral to the plaintiff's breach of contract claim, the time to prove them is before the entry of default judgment, not some indeterminate time post-judgment. A plaintiff's failure to seek attorney's fees in its motion for default judgment is a waiver of those fees. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 84 (Pon. 2020).

Attorney's Fees – Court-Awarded – Contractual; Civil Procedure – Defaults and Default Judgments

When a plaintiff has waived any claim for any prejudgment attorney's fees because it failed to include a claim for them when it applied for a default judgment, the plaintiff may still apply for attorney's fees incurred post judgment in the course of proceedings to enforce the judgment. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 84-85 (Pon. 2020).

Attorney's Fees – Court-Awarded – Contractual; Civil Procedure – Defaults and Default Judgments – Damages; Judgments – Relief from Judgment – Default Judgments

No authority allows the court to grant a prevailing party relief from a default judgment in its favor. Rule 60(b) is not an avenue that a plaintiff may use to add an attorney's fee award to a default judgment that the plaintiff has already obtained. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 85 (Pon. 2020).

Costs – Allowed

Costs are allowed as of course to the prevailing party. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 85 (Pon. 2020).

Costs – Procedure

When not included in the judgment, costs are taxable by the clerk post-judgment since costs may be taxed by the clerk on one day's notice. Costs are routinely awarded to the prevailing party on such a post-judgment application. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 85 (Pon. 2020).

Costs – Allowed

Service of process costs are always allowable as costs to a prevailing plaintiff. Pacific Islands Dev. Bank v. Sigrah, 23 FSM R. 79, 85 (Pon. 2020).

* * * *

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

This is before the court on the plaintiff's Motion for Attorney's Fees, filed August 11, 2020, and the Defendant's Opposition to Plaintiff's Motion for Attorney's Fees, filed September 14, 2020. Also before the court is the plaintiff's Opposition to Motion to Enlarge Time to File Opposition to Plaintiff's Motion for Attorney's Fees, filed October 1, 2020. The attorney's fees motion is denied. The reasons follow.

I. CASE POSTURE

On December 17, 2019, the plaintiff, the Pacific Islands Development Bank, filed suit against Yoslyn G. Sigrah and Jason F. Sigrah,¹ seeking a judgment for a loan balance not fully paid off. Yoslyn G. Sigrah

¹ Jason F. Sigrah was never served. The case against him was later dismissed without prejudice for the lack of service. FSM Civ. R. 4(j).

was served the complaint and summons on December 18, 2019. She did not answer the complaint or otherwise defend. On January 28, 2020, the clerk, on the bank's request, entered her default.

On February 26, 2020, the bank asked that a default judgment be entered against her. The bank contended that the \$7,869.19 it sought was a sum certain and therefore asked the court clerk to enter the default judgment. Since the \$7,869.19 sum sought included \$1,200 in attorney's fees that had been added to the loan principal, the court itself, not the court clerk, could enter any default judgment. Pacific Islands Dev. Bank v. Sigrah, 22 FSM R. 495, 497 (Pon. 2020). On March 2, 2020, the court, having determined the proper judgment amount, ordered the entry of a default judgment against Yoslyn G. Sigrah for \$6,869.19. *Id.* at 498.

On March 10, 2020, Sigrah moved to set aside the default judgment and asked the court to permit her to file an answer to the bank's complaint. The bank filed its opposition on April 2, 2020. On July 3, 2020, the court granted the motion in part, and reduced the March 2, 2020 judgment against Sigrah by \$410 to \$6,459.19 with 9% interest on that reduced amount from March 2, 2020, onward, until satisfied, because Sigrah had a meritorious defense for that \$410 – an uncredited \$410 payment made to the bank on December 13, 2019. Pacific Islands Dev. Bank v. Sigrah, 22 FSM R. 600, 607 (Pon. 2020).

On August 11, 2020, the bank filed this motion, asking that attorney's fees of \$7,275 and \$25 in costs be added to the default judgment. On August 26, 2020, Sigrah filed a motion to enlarge to September 14, 2020, the time to respond to the bank's attorney's fees motion, which the court granted the next day. Sigrah filed her opposition to the bank's attorney's fees motion on September 14, 2020. On October 1, 2020, the bank filed an opposition to Sigrah's August 26, 2020 motion to enlarge time. The bank asks the court not to consider Sigrah's opposition because her motion to enlarge was filed late and did not show the requisite excusable neglect.

II. ANALYSIS

A. *Bank's Opposition to Sigrah's Motion to Enlarge*

The bank opposes Sigrah's opposition to its motion for attorney's fees because Sigrah filed it after the ten-day period allowed by Rule 6(d) for filing a response to a motion, and therefore she needed to show excusable neglect in order to qualify for an enlargement, but, since her only ground was that she was very busy, she had not. The bank also contends that the motion to enlarge is defective because it did not contain a Rule 6(d) certification that opposing counsel had been contacted and their agreement or acquiescence the motion had been sought.

The court must reject the bank's opposition. The bank's opposition to the motion to enlarge is itself untimely. Even taking as true the bank's assertion that the motion to enlarge was not served on it (mailed) until September 3, 2020, the bank's October 1, 2020 opposition is too late. If Sigrah's motion was mailed on September 3, 2020, the bank would then have had until September 19, 2020, to oppose it. A "party opposing the motion shall not later than 10 days after the service of the motion upon that party, file and serve responsive papers," FSM Civ. R. 6(d), but, if service is by mail, "6 days shall be added to the prescribed period," FSM Civ. R. 6(e). The bank gives no explanation for its tardiness. The court will therefore disregard the bank's opposition as untimely.

The court further notes that a party's motion to enlarge time to file a response may be granted, even though excusable neglect has not been shown, when it would be conducive to a speedy and inexpensive determination of the action, when the delay has not been long, and when no prejudice to the plaintiff is apparent. Bank of Guam v. Ismael, 8 FSM R. 197, 198 (Pon. 1997). On that basis, the court may consider Sigrah's opposition.

B. *Bank's Attorney's Fees and Service Costs Claims*

The bank asks that it be awarded attorney's fees of \$7,319 and \$25 in costs, to be added to its default judgment against Sigrah.

1. *Attorney's Fees*

The bank seeks an attorney's fees award of \$7,319 consisting of 27½ attorney hours at \$150 an hour and 42 paralegal hours at \$75 an hour. The bank contends that Sigrah is liable for these fees as a contractual obligation. The bank does not seek attorney's fees under a fee-shifting statute or court rule, although it does seek to greatly exceed the usual 15% ceiling on debt collection cases because, in its view, Sigrah has engaged in vexatious litigation tactics.

a. *Reasonableness*

The requested hourly fees are broken down into 5 attorney hours for drafting a collection letter; 8¾ attorney hours and 12½ paralegal hours for drafting and filing the complaint; 1 paralegal hour and 1¼ attorney hours for drafting and filing the request for entry of default; 28½ paralegal hours and 4¾ attorney hours for drafting and filing the request for entry of a default judgment; and 7¾ attorney hours for drafting and filing the opposition to Sigrah's motion for relief from judgment. The bank contends that these fees are reasonable.

The court finds that while the hourly rates might be within the range of what is reasonable for a customary fee in the locality (Pohnpei) where the litigation occurred, see People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM R. 100, 101 (Yap 2010), the number of hours incurred is not. The court can only award attorney's fees, regardless of the legal basis for the award (contractual, statutory, or other), that it finds are reasonable. Senda v. Creditors of Mid-Pacific Constr. Co., 7 FSM R. 664, 673 (App. 1996).

This is a simple collection case. Five hours attorney work on a collection letter is just not reasonable. That it took 8¾ attorney hours and 12½ paralegal hours to draft and file the complaint; 1 paralegal hour and 1¼ attorney hours to draft and file the request for entry of default; and 28½ paralegal hours and 4¾ attorney hours to draft and file the request for entry of a default judgment is incomprehensible. In the past, this law firm or its predecessor (and other local law firms) generally took two to three attorney hours to accomplish this whole process from drafting the complaint to requesting the entry of a default judgment. Even accounting for inexperience (and inexperience should not be rewarded with larger fees), these hours are excessive. For the reasons discussed below in this part and the following part, the court will not reduce these requested hours to a reasonable number.

Except for unusual cases, a reasonable amount, not exceeding 15% of the outstanding principal and interest is the maximum allowed for attorney's fees in a collection case under FSM Supreme Court case law. FSM Dev. Bank v. Adams, 14 FSM R. 234, 244 n.4 (App. 2006); FSM Dev. Bank v. Gilmete, 21 FSM R. 236, 238-39 (Pon. 2017); Bank of Hawaii v. Jack, 4 FSM R. 216, 221 (Pon. 1990). The bank contends that it can exceed this amount because the debtor's conduct was vexatious. Although the general principle is that each party bears its own attorney's fees, the court may assess fees against a party when that party acts vexatiously, or in bad faith, or presses frivolous claims, or employs oppressive litigation practices. Semens v. Continental Air Lines, Inc. (II), 2 FSM R. 200, 208 (Pon. 1986).

The bank asserts that Sigrah's motion for relief from judgment was vexatious behavior and that it pressed frivolous claims. The bank asserts that the court should ignore that Sigrah obtained partial success on that motion because, in its view, Sigrah's uncredited payment would have come to light and been credited when the bank sought an order in aid of judgment or when further payments were made and credited to

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Sigrah's loan account. The court cannot agree. In the court's view, the bank, at the latest, should have already credited that payment when it sought a default judgment and attached an up-to-date affidavit from the responsible bank personnel attesting to the amount still due. And, if the bank wished not to waive its rights to attorney's fees, it should, for the reasons discussed below, also have attached an affidavit detailing the attorney's fees it claimed when it applied for a default judgment.

b. *Waiver*

The bank's claim for attorney's fees is based on Sigrah's contractual obligation in the promissory note that, in the event of a loan default and the bank obtaining an attorney, Sigrah would "be liable for such attorney's fees incurred . . ." Amended & Restated Promissory Note, para. 4 (Oct. 17, 2014). The bank's attorney's fees claim is thus an integral part of its breach-of-contract claim against Sigrah – part of the damages caused by her breach of the promissory note contract. "When the parties contractually provide for attorney's fees, the [fee] award is an integral part of the merits of the case." Ierna v. Arthur Murray Int'l, Inc., 833 F.2d 1472, 1476 (11th Cir. 1987) (citing cases).

Thus, when attorney's fees are damages that are an integral part of the plaintiff's claim for breach of contract, "a plaintiff seeking fees in a breach of contract claim is generally 'required to prove its attorney's fees as part of its case-in-chief.'" Business Loan Ctr. v. M/V Cape Florida, 2018 WL 1881262, at *4 n.4 (S.D. Ala. Apr. 19, 2018) (quoting Koninklijke Ahold, N.V. v. Millbrook Commons, LLC, 2013 WL 4045072, at *2-3 (M.D. Ala. Aug. 8, 2013)). This is true whether the plaintiff's case-in-chief was presented during a trial, or came before the court on a summary judgment motion, or, as here, came before the court on the plaintiff's request for the entry of a default judgment. See, e.g., Hill v. Premier Builders & Realty, LLC, 56 So. 3d 669, 676 (Ala. Civ. App. 2010) (plaintiff waived right to contractual attorney's fees when it did not object to jury instructions that did not include instructions about plaintiff's claim for reasonable attorney's fees).

"[A] trial court must distinguish between post-judgment prevailing party [attorney] fees, and fees owed as an integral part of a contractual obligation." RBC Bank (USA) v. Glass, 773 F. Supp. 2d 1245, 1247 (N.D. Ala. 2011). "[A] party seeking entry of a default judgment must apply for *all* of the relief sought—including attorney fees—when application is made for entry of default [judgment]." Garcia v. Politis, 122 Cal. Rptr. 3d 476, 478 (Cal. Ct. App. 2011) (emphasis in original). "[A] default judgment is intended to include all relief sought in the complaint and established by the plaintiff. Therefore, a plaintiff seeking an award of attorney fees from a defaulting defendant must request those fees at the time the plaintiff requests entry of default [judgment]." *Id.* at 479.

When a plaintiff's claim for attorney's fees is contractually based and thus integral to the plaintiff's breach of contract claim, "the time to prove them is prior to entry of default judgment, not some indeterminate time post-judgment." M/V Cape Florida, 2018 WL 1881262, at *4 (plaintiff's post-default judgment attorney's fees request disallowed for failure to make evidentiary showing to quantify those fees); see also Addicting Games, Inc. v. Addicting.com, 2020 WL 524341, at *1 n.3 (E.D. Va. Jan. 10, 2020) (failure to seek attorney's fees in motion for default judgment is a waiver of those fees); Brunswick Bank & Trust v. Affiliated Bldg. Corp., 111 A.3d 710, 715 n.11 (N.J. Super. 2015) (failure to quantify attorney fee request when applying for default judgment may be waiver of those fees).

Accordingly, the bank waived its breach-of-contract damages claim for attorney's fees by requesting a default judgment, but making no evidentiary showing of (and failing to quantify) the fees it claimed the promissory note entitled it to. Previous FSM case law has held that a plaintiff has waived any claim for any prejudgment attorney's fees when it submitted a form of judgment for a sum certain for the clerk's signature under FSM Civil Rule 55(b)(1), FSM Social Sec. Admin. v. Lelu Town, 13 FSM R. 60, 62 (Kos. 2004), since a default judgment request including attorney's fees is not one for a sum certain. "As to the fees incurred post judgment in the course of proceedings to enforce the judgment, the [plaintiff] may file an application

. . . for an award of those attorney's fees." Lelu Town, 13 FSM R. at 62.

The bank, however, has not yet incurred any such fees. On September 23, 2020, it filed a motion for an order in aid of judgment (for which the court has not yet set a hearing date since this motion for attorney's fees was pending and could have a large effect on the judgment amount to be paid). So the bank may still incur such fees in the future. The bank, however, does also contend that it should be awarded its fees for its opposition to Sigrah's motion for relief from judgment because the only relief Sigrah obtained from that motion (credit for the \$410 uncredited December 13, 2019 payment), the bank itself would have given her when it came time for any orders in aid of judgment or when the judgment was satisfied. As noted above in part II.B.1.a., the court does not agree.

c. Is the Bank Moving for Relief from Judgment?

The court could consider the bank's attorney's fee motion to be a motion for relief from its default judgment against so that the court could enter a new default judgment against her that included an attorney's fee award. But even then, the court must still deny it. The bank has not cited any authority that would allow the court to grant a prevailing party relief from a default judgment in its favor, and the court is aware of none. See Western Sales Trading Co. v. Billy, 13 FSM R. 273, 279 (Chk. 2005) (no cases support the claim that Rule 60(b) relief is available for a prevailing plaintiff to be granted relief from a default judgment in its favor when the defendant had not appeared in the case before the default judgment).

Furthermore, the bank has also made no showing that it brought this attorney's fees motion within a reasonable time, as required by Rule 60(b), and it has not shown it is entitled to relief under any of the grounds enumerated in Rule 60(b). Rule 60(b) is not an avenue that a plaintiff may use to add an attorney's fee award to a default judgment that the plaintiff has already obtained.

2. *Costs*

The bank also seeks \$25 for the cost of service of process on Sigrah. Unlike the bank's attorney's fees request, this award of costs need not be based on the bank's breach-of-contract claim. It could be based on the bank's status as the prevailing party that obtained a judgment. "[C]osts shall be allowed as of course to the prevailing party . . ." FSM Civ. R. 54(d). When not included in the judgment, costs are taxable by the clerk post-judgment since "[c]osts may be taxed by the clerk on one day's notice." *Id.*

Costs are routinely awarded to the prevailing party on such a post-judgment application. See George v. Albert, 17 FSM R. 25, 34 (App. 2010). Service of process costs are always allowable as costs to a prevailing plaintiff. Bank of the FSM v. Truk Trading Co., 16 FSM R. 467, 471 (Chk. 2009). Nonetheless, the better (and more efficient) practice would have been for the bank to have made its service-of-process cost request when it moved for the default judgment, since the amount was known then and could have been proven then. But since the bank has now shown that it expended \$25 for the service of process on Yoslyn Sigrah, that \$25 will be added to the bank's judgment against her.

III. CONCLUSION

Accordingly, the Pacific Islands Development Bank's motion for attorney's fees is denied, but it is awarded \$25 in costs, which will be added to its judgment. An amended judgment will issue.