NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-13110
Non-Argument Calendar

U.S. BANK NATIONAL ASSOCIATION,
as Trustee of J.P. Morgan Alternative Loan Trust 2006-S4,
Mortgage Pass-Through Certificates,

Plaintiff-Appellee,

versus

FERNANDO V. RIVABEM,
LISET RIVABEM,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:24-cv-20441-DPG

Before ROSENBAUM, GRANT, and LAGOA, Circuit Judges.

PER CURIAM:

Appellants Fernando and Liset Rivabem (collectively, the "Rivabems") appeal the district court's order adopting the magistrate judge's report and recommendation and denying their motion for attorneys' fees and costs. On appeal, they contend the district court erred in concluding they were not "prevailing parties" under Fla. Stat. § 57.105(7), applying an improper legal standard and relying on "outlier" caselaw. The Rivabems' request came after the district court had dismissed without prejudice the foreclosure action brought by Appellee U.S. Bank National Association ("U.S. Bank"). After careful review of the record and relevant authority, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

At the district court, U.S. Bank sought to foreclose on the Rivabems' real property and recover damages for the alleged breach of a promissory note executed by Fernando Rivabem. U.S. Bank holds both the promissory note, originally issued in the principal amount of $713,600.00, and the mortgage securing that note, which encumbers the Rivabems' property in Miami-Dade County, Florida (together, the "Loan Documents").

U.S. Bank alleges that the Rivabems defaulted on their payment obligations since October 1, 2009, and owe $684,777.57 to U.S. Bank under the loan documents, excluding accrued interest, late fees, escrow advances, and reasonable attorneys' fees. Thus, on February 2, 2024, U.S. Bank filed its complaint for two counts: (I) Foreclosure of Mortgage, and (II) Breach of Promissory Note.

Even so, U.S. Bank did not effectuate service on the Rivabems within the 90-day period after filing its Complaint. Hence, the Rivabems filed a Motion to Dismiss for Failure to Serve the Complaint within 90 Days and Insufficient Service of Process, contending that U.S. Bank had neither timely served the Rivabems nor requested additional time for service.[1] The district court noted that U.S. Bank did not "dispute that it failed to serve [the Rivabems] within 90 days after the Complaint was filed," and that U.S. Bank "did not timely move to extend the time to serve." Finding no "good cause to post hoc extend the deadline to serve the Rivabems," the district court dismissed U.S. Bank's claims without prejudice, pursuant to Federal Rule of Civil Procedure 4(m).[2]

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[1] U.S. Bank's process server represented that she left copies of the summons and complaint by the door at the Rivabems' home and advised Mr. Rivabem that he was being served on July 13, 2024. Notwithstanding that this was beyond the 90-day window for service, the Rivabems argued in their motion that U.S. Bank had not satisfied the requirements for service of the summons and Complaint. To support their position, the Rivabems included an affidavit, among other materials. But we need not parse through these filings, as the district court made no findings as to that issue.

[2] Rule 4(m) provides that: "[i]f a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice as to that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period."

On December 27, 2024, the Rivabems moved for an award of reasonable attorneys' fees and costs, based on the loan documents' provisions and Fla. Stat. § 57.105(7). The latter reads:

> 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.

Fla. Stat. § 57.105(7). As both the promissory note and mortgage entitled U.S. Bank to attorneys' fees for enforcing the documents, the Rivabems argued they were now entitled to recover fees and costs, having prevailed over U.S. Bank, given Fla. Stat. § 57.105(7)'s reciprocity provision. U.S. Bank opposed this request, arguing the Rivabems could not be considered a prevailing party in this matter, as the case was dismissed due to an issue with service.

The district court referred the Rivabems' motion to the magistrate judge, who recommended that this request be denied, as the Rivabems had not established that they are the prevailing party under § 57.105(7). The district court adopted the magistrate judge's report and recommendation in full. The Rivabems now appeal the district court's ruling that denied them attorneys' fees and costs.

II. STANDARD OF REVIEW

A district court's decision on whether to award attorneys' fees is reviewed for abuse of discretion. *Loggerhead Turtle v. Cnty.*

Council of Volusia Cnty., Fla., 307 F.3d 1318, 1322 (11th Cir. 2002) (citing *Barnes v. Broward Cnty. Sheriff's Office*, 190 F.3d 1274, 1276–77 (11th Cir. 1999)). But since entitlement to fees depends on the district court's interpretation of Fla. Stat. § 57.105(7), our review is *de novo*. *See, e.g.*, *Jones v. United Space All., L.L.C.*, 494 F.3d 1306, 1309 (11th Cir. 2007).

In reviewing the district court's prevailing-party analysis, "we review the court's underlying factual findings for clear error but review de novo the legal question of whether those facts suffice to render a party a 'prevailing party.'" *Royal Palm Props., LLC v. Pink Palm Props., LLC*, 38 F.4th 1372, 1375 (11th Cir. 2022) (citing *Beach Blitz Co. v. City of Miami Beach*, 13 F.4th 1289, 1297 (11th Cir. 2021)).

III. ANALYSIS

The Rivabems contend that the district court erred in concluding they were not entitled to attorneys' fees and costs under Fla. Stat. § 57.105(7). There is no material dispute regarding the underlying facts or procedural posture of this case. Further, the parties agree that the promissory note and mortgage provide for recovery of attorneys' fees and costs by U.S. Bank if enforcement of these documents becomes necessary. Hence, this appeal hinges on whether the Rivabems qualify as the prevailing party for the purpose of the statute. The Rivabems maintain that the district court, in finding they did not, applied an improper legal standard and relied on unsuitable authority to reach its conclusion.

We address the Rivabems' arguments in short order, and in our analysis, we apply Florida law. The Rivabems sought fees and

costs under Fla. Stat. § 57.105(7), and when a "claim for attorneys' fees sounds in state law and reaches us by way of federal diversity jurisdiction, we apply the substantive law of . . . the forum state."[3] *Trans Coastal Roofing Co. v. David Boland, Inc.*, 309 F.3d 758, 760 (11th Cir. 2002) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)); *see McMahan v. Toto*, 256 F.3d 1120, 1132 (11th Cir. 2001).

A. The *Moritz* "Significant Issues" Test

Under Florida law, a prevailing party is "the party that prevailed on any significant issue in the litigation." *Moritz v. Hoyt Enters., Inc.*, 604 So. 2d 807, 809–10 (Fla. 1992). Florida law looks for "(1) a situation where a party has been awarded by the court 'at least some relief on the merits of his claim' or (2) a 'judicial imprimatur on the change' in the legal relationship between the parties." *Smalbein ex rel. Est. of Smalbein v. City of Daytona Beach*, 353 F.3d 901, 905 (11th Cir. 2003) (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)) (cleaned up).

Drawing on two Florida state appellate court decisions, the Rivabems argue the district court erred by applying *Moritz*. We are not persuaded as a decision by Florida's Supreme Court, *Moritz*'s holding, provides the "final authority on state law." *Fid. Union Tr. Co. v. Field*, 311 U.S. 169, 177 (1940); *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1348 (11th Cir. 2011). Perhaps, this explains then why the Rivabems attempt to distinguish *Moritz* with

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[3] Because U.S. Bank is a citizen of Minnesota and the Rivabems are domiciled in Florida, we exercise diversity jurisdiction over this action.

another decision by the Florida Supreme Court, *Page v. Deutsche Bank Trust Co. Americas*, 308 So. 3d 953 (Fla. 2020). But *Page* does not apply here, as it concerns a dissimilar issue: "whether a unilateral attorney's fee provision in a contract is made reciprocal to a borrower under section 57.105(7) when the borrower prevails in a foreclosure action in which the plaintiff establishes standing at the time of trial but not at the time suit was filed." 308 So. 3d at 958. To the extent *Page* discusses whether a party had "prevail[ed] in any action . . . with respect to the contract[,]" the Florida Supreme Court noted this was "plainly satisfied[]" without further elaboration as to the appropriate standard. *Id.* at 959. A such, the district court was correct to characterize the Rivabems' reliance on *Page* as "misplaced" and to apply *Moritz*'s significant issues test.

Under *Moritz*, the Rivabems cannot be considered the prevailing party because they did not prevail on any significant issue in this litigation. In fact, the district court's dismissal did not resolve *any* disputed questions of fact or law, let alone the central issues on the merits of this matter. To the extent that the district court lacked personal jurisdiction here, it was not because of its own affirmative finding. It pointedly did not address the parties' competing affidavits nor did it reach the Rivabems' arguments about the improperness of U.S. Bank's attempted service on July 13, 2024. Instead, the district court relied on matters not in dispute: that U.S. Bank had failed to timely serve the Rivabems or properly seek additional time to do so. Because dismissal was not premised on any disputed issue, we conclude that the district court correctly

applied the *Moritz* test and concluded that the Rivabems should not be deemed the prevailing party.

IV. CONCLUSION

For the reasons discussed, we conclude that the district court did not err in finding that the Rivabems are not prevailing parties under Florida law and, thus, affirm the district court's order adopting the magistrate judge's report and recommendation denying their motion for attorneys' fees and costs.

AFFIRMED.