



Litigation Trends in Florida

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Filing a Motion for Attorney's Fees Under Section 57.105, Florida Statutes, Does Not Waive the Defense of Lack of Personal Jurisdiction

Section 57.105, Florida Statutes, provides the basis for sanctions against parties and attorneys who assert frivolous claims or pursue litigation for the purpose of delay. The purpose of the statute is to "discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing the price tag of attorney's fees awards on the losing parties." *Murphy v. WISU Props., Ltd.*, 895 So. 2d 1088, 1093 (Fla. 4th DCA 2004) (internal citations omitted). Used appropriately, this statute can be a powerful litigation device to achieve justice for your client. While, in particular cases, the right to relief may be so clear that professional responsibility compels the service of a section 57.105 motion, whether an attorney chooses to assert section 57.105 is otherwise a professional judgment. Regardless of the many reasons to tread lightly in filing a section 57.105 motion, the fear of waiving a defense of lack of

personal jurisdiction by virtue of filing such a motion should not be one of them.

In *Two Worlds United v. Zylstra*, 46 So.3d 1175 (Fla. 2d DCA 2010), the Second District Court of Appeal addressed the issue of whether filing a section 57.105 motion for attorney's fees waives the defense of lack of personal jurisdiction. The Court held that "because a motion for fees in this case was defensive and did not seek affirmative relief, the defense of lack of personal jurisdiction was not waived when Zylstra filed the motion." *Two Worlds United v. Zylstra*, 46 So. 3d at 1177. The Court reasoned that "a motion for fees pursuant to section 57.105 directly relates to the opposing party's cause of action and is substantively defensive in nature because it seeks to dissuade the opposing litigant from proceeding with allegedly frivolous litigation." *Id.*; see also *Dep't of Highway Safety & Motor Vehicles v. Salter*, 710 So. 2d 1039, 1041 (Fla. 2d DCA 1998) ("The purpose of [section 57.105] is to dissuade litigants and attorneys from pursuing 'baseless claims, stonewall defenses, and sham appeals in civil litigation by placing a price tag ... on losing parties

who engage in these activities.'" (*Whitten v. Progressive Cas. Ins. Co.*, 410 So. 2d 501, 505 (Fla.1982)); see also *Heineken v. Heineken*, 683 So. 2d 194, 197-98 (Fla. 1st DCA 1996) (holding that request for attorney's fees incurred in prosecuting motion to dismiss for lack of personal jurisdiction was a defensive-in-nature request and did not seek affirmative relief and therefore did not serve to waive objection to personal jurisdiction).

In *Two Worlds United v. Zylstra*, *Two Worlds*, a Florida not-for-profit corporation whose principal place of business is in Tampa, filed suit alleging that Zylstra, a California resident, and other defendants posted defamatory statements on a website owned and operated by Zylstra. *Two Worlds* alleged the following causes of action against Zylstra: defamation, tortious interference, civil conspiracy, and negligent blogging. In response to the complaint, Zylstra filed a motion to quash service of process and to dismiss, asserting that Zylstra is not a resident of Florida. That same day, Zylstra filed a motion for attorney's fees pursuant to section 57.105, Florida Statutes (2007). Zylstra then filed an amended motion to dismiss, asserting lack of

personal jurisdiction, which was accompanied by an affidavit from Zylstra. In opposition, Two Worlds relied upon an affidavit of a legal assistant from a law firm in California and the depositions of Zylstra and defendant Richard Jackson. The trial court granted Zylstra's motion to dismiss "[a]fter reviewing the affidavits, materials and memoranda on file and after hearing argument of counsel." *Two Worlds United v. Zylstra*, 46 So. 3d at 1176.

On appeal, Two Worlds first claims that Zylstra waived his objection to personal jurisdiction by seeking affirmative relief by virtue of his motion for attorney's fees. A defendant waives an objection to personal jurisdiction by going beyond matters of defense and by seeking affirmative relief from the trial court. *Id.*; see also *Babcock v. Whatmore*, 707 So. 2d 702, 704 (Fla.1998). The Court found that in the instant case, Zylstra did not seek affirmative relief. Rather, Zylstra filed a defensive motion for attorney's fees as sanctions against Two Worlds for filing suit against him when the Florida court lacked jurisdiction over him.

Plaintiffs should keep in mind that in order to establish personal jurisdiction over a nonresident defendant, a plaintiff must satisfy a two-part test. The first part of the test is whether the complaint alleges sufficient jurisdictional facts to satisfy Florida's long-arm statute, section 48.193. *Internet Solutions Corp. v. Marshall*, 39 So.3d 1201, 1207 (Fla.2010)

(*Wendt v. Horowitz*, 822 So. 2d 1252, 1257 (Fla. 2002).). The second part of the test is whether it has been demonstrated that the defendant has had sufficient minimum contacts with Florida to satisfy due process requirements "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Two Worlds United v. Zylstra*, 46 So. 3d at 177. (quoting *Wendt*, 822 So. 2d at 1257).

Once a nonresident defendant files an affidavit contesting the allegations contained within a complaint concerning personal jurisdiction, the burden shifts to the plaintiff to prove by affidavit the basis for personal jurisdiction (*Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla.1989)). If the affidavits can be reconciled or harmonized, the trial court can decide the matter without the need for an evidentiary hearing. *Id.* at 503. Defendants and their counsel should not shy away from serving and filing a "57.105 motion," if appropriate, as a defendant does not waive his objection to personal jurisdiction unless he seeks affirmative relief from the court.

***Stern v. Marshall* - Authority of Bankruptcy Courts to Decide State Law Claims**

A recent Supreme Court decision in what is generally known as the "Anna Nicole Smith" case may have profound effects on what types of matters can be litigated in bankruptcy courts. Although

the case, *Stern v. Marshall*, 564 U.S. ___, 131 S. Ct. 2594 (2011), is fairly limited in its holding, its implications have already been far more reaching. In fact, *Stern* likely represents the most significant Supreme Court ruling on the authority of bankruptcy courts since the Court's 1982 decision in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*

The facts of the case are long and complicated, but the basics are that Vickie Lynn Marshall (a/k/a Anna Nicole Smith) filed bankruptcy and Pierce Marshall, the son of billionaire Howard Marshall, the deceased former husband of Vickie/Anna, filed a claim in her bankruptcy case asserting that her prior public allegations that Pierce has caused his father to effectively cut her out of his will constituted defamation. Vickie then filed a counterclaim against Pierce based on his alleged interference with her inheritance. The Bankruptcy Court entered judgment in Vickie's favor for more than \$400 million, and Pierce appealed, eventually to the Supreme Court.

In the June 23, 2011, majority opinion, the Court effectively overturned a long-standing rule that bankruptcy courts have authority to finally determine all matters defined by Congress as "core" matters. Specifically, the Court held that bankruptcy courts don't necessarily have constitutional authority to determine a claim brought against a debtor simply

because the claim is brought as a counterclaim to a debtor's claim. The Court concluded that, although Congress had determined that bankruptcy courts have authority to "hear and determine" all matters Congress defined as "core" matters, including counterclaims against a debtor, certain of those matters can only be determined by Article III judges, i.e., federal district court judges.

The Court also decided that, although Pierce had filed a proof of claim in Vickie's bankruptcy case and, by doing so, had consented to the bankruptcy court ruling on his claim, he did not consent to the bankruptcy court ruling on Vickie's counterclaim, effectively overturning a long-held and widely accepted premise, based on a prior Supreme Court case, that when a party files a proof of

claim, it effectively submits to the jurisdiction and authority of the bankruptcy court.

Since the *Stern* decision, courts and practitioners nationwide have been struggling to determine what the decision means with respect to other matters that bankruptcy courts were previously presumed to have the authority to decide. Although the *Stern* decision has spurred much debate, at least one thing is clear – bankruptcy courts have authority to decide matters that either stem from the bankruptcy itself (such as the allowance or disallowance of claims) or would necessarily be resolved in the claims allowance process. In other words, the bankruptcy court has authority to decide matters that must be decided in claims allowance process. However, what is not yet clear is whether bankruptcy courts have authority to decide matters previously considered

integrally related to the function of bankruptcy courts, such as fraudulent and preferential transfers claims.

So, while in *Stern*, the Court resolved a narrow question of law, it opened the door to an array of questions, including whether litigants with what are traditionally considered state law causes of action can now be required to litigate such claims in the bankruptcy courts. ■

**Courtesy of Berger Singerman's Dispute Resolution Team with offices in Fort Lauderdale, Miami, Boca Raton and Tallahassee.*

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