[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-14374
Non-Argument Calendar

D.C. Docket No. 0:19-cv-60807-RKA

SIMON PROPERTY GROUP, L.P.,
a Delaware Limited Partnership,
SIMON MILLS III, LLC,
a Delaware Limited Liability Company,
SUNRISE MILLS (MLP) LIMITED PARTNERSHIP,
a District of Columbia Limited Partnership,

Plaintiffs - Appellees,

versus

SOL TAYLOR,
an individual, et al.,

Defendants,

CASINO TRAVEL, INC.,
c/o Diego Casaballe, Registered Agent
11990 NE 7 Avenue Miami, FL 33161
a Florida Corporation,
TOUR95 LLC,
c/o Diego Casaballe, Registered Agent
900 NE 195 Street #220 Miami, FL 33179
a Florida Limited Liability Company,

Defendants - Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(September 27, 2021)

Before JILL PRYOR, LUCK and MARCUS, Circuit Judges.

PER CURIAM:

Casino Travel, Inc. ("Casino Travel") and Tour95 LLC ("Tour95") appeal from the district court's denial of their request for attorneys' fees under both the Lanham Act and Florida law. The appellants claim that they were the prevailing party in the underlying trademark infringement suit, as required under both federal and state law to be entitled to attorneys' fees. After careful review, we affirm.

The relevant background is this. In 2018, Simon Property Group, L.P., Simon-Mills III, LLC, and Sunrise Mills (MLP) Limited Partnership (collectively, "Sawgrass Mills"), the owners of the Sawgrass Mills shopping center in Sunrise, Florida, renewed a service agreement with Casino Travel, whereby Casino Travel provided shuttle bus service to patrons traveling to and from Sawgrass Mills. At one point, Casino Travel transferred the Sawgrass Mills-branded shuttle buses and its website to John Sansac and Half Price Tour Tickets, LLC ("Half Price"). Learning of this, Sawgrass Mills terminated the contract. Around that time, Casino Travel went out of business and dissolved. Sawgrass Mills then filed a trademark

infringement action against Casino Travel, Tour95, Half Price, and Sansac.[1] The complaint alleged that the defendants continued to use Sawgrass Mills's trademarks on their shuttle buses and promotional materials, even after Sawgrass Mills terminated the service contract. The complaint sought injunctive relief and damages.

After Half Price and Sansac failed to appear in district court, the court entered default final judgments and permanent injunctions against both. The orders also enjoined "any persons acting in concert and participation with" Half Price and Sansac. Casino Travel and Tour95 did appear, and after conducting a hearing, the district court denied Sawgrass Mills's motion for a preliminary injunction as to those entities. The court reasoned that Sawgrass Mills had not shown "a substantial threat of irreparable injury" because at that point, the infringing buses and materials were operated entirely through Half Price and Sansac, which had already been enjoined. A few days later, because Casino Travel and Tour95 never filed an answer, Sawgrass Mills voluntarily dismissed them from the case without prejudice. See Fed. R. Civ. P. 41(a)(1)(A)(i).

At that point, Casino Travel and Tour95 moved for about $90,000 in attorneys' fees. The magistrate judge recommended that the district court deny the request. The appellants objected to the report and recommendation, but the district

[1] The complaint also named Sol Taylor as a defendant. Soon after filing the complaint, however, Sawgrass Mills voluntarily dismissed Taylor from the case.

court agreed with the magistrate judge. The court found that the appellants were not entitled to attorneys' fees under either federal or state law. This timely appeal followed.

We review the denial of a request for attorneys' fees for abuse of discretion, reviewing questions of law de novo and findings of fact for clear error. Bivins v. Wrap It Up, Inc., 548 F.3d 1348, 1351 (11th Cir. 2008). "A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous." Tobinick v. Novella, 884 F.3d 1110, 1116 (11th Cir. 2018) (quotations omitted).

First, we are unpersuaded by the appellants' argument that they were entitled to attorneys' fees under the Lanham Act. The Lanham Act provides that a district court may award "reasonable" attorney fees "in exceptional cases" to the "prevailing party." 15 U.S.C. § 1117(a). For starters, however, the appellants have waived any argument that this case was exceptional. In district court, the appellants moved for attorneys' fees only under Florida law. See Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1331 (11th Cir. 2004) (noting that this Court generally will not consider issues that were not first raised in the district court); Kelliher v. Veneman, 313 F.3d 1270, 1274 n.3 (11th Cir. 2002) ("Because [the appellant] made no arguments on the merits as to this issue, the issue is deemed waived."). Indeed, in

the reply brief they filed in district court, they explicitly claimed that they did not need to prove that the case was "exceptional." Cf. United States v. Silvestri, 409 F.3d 1311, 1337 (11th Cir. 2005) ("It is well established in this Circuit that to invite error is to preclude review of that error on appeal.").[2]

Moreover, we discern no error in the district court's determination that the appellants were not prevailing parties. To determine whether a defendant is a prevailing party, we ask whether the plaintiff was "rebuffed [in its] efforts to effect a material alteration in the legal relationship between the parties." Beach Blitz Co. v. City of Miami Beach, Fla., et al., 19-11380, manuscript op. at 14 (11th Cir. September 19, 2021). Additionally, "in order to confer prevailing party status, the rejection of the plaintiff's attempt to alter the parties' legal relationship 'must be marked by judicial imprimatur.'" Id. (quoting CRST Van Expedited, Inc. v. E.E.O.C., 136 S. Ct. 1642, 1646 (2016)); see also CRST, 136 S. Ct. at 1646 (noting that "Congress has included the term 'prevailing party' in various fee-shifting statutes, and it has been the Court's approach to interpret the term in a consistent manner" (citation omitted)).

[2] In any event, the district court did not abuse its discretion in finding that this case was not exceptional. This case is not "one that stands out from others with respect to the substantive strength of a party's litigating position" or "the unreasonable manner in which the case was litigated." Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 554 (2014); see Tobinick, 884 F.3d at 1117–18 (applying Octane Fitness standard to Lanham Act attorneys' fees claims).

Here, there was no prevailing party, because Sawgrass Mills dismissed the appellants from the case without prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A). See United States v. $70,670.00 in U.S. Currency, 929 F.3d 1293, 1303 (11th Cir. 2019), cert. denied sub nom. Salgado v. United States, 140 S. Ct. 2640 (2020) (holding that a dismissal without prejudice as a result of a motion for voluntary dismissal "places no judicial imprimatur on the legal relationship of the parties, which is the touchstone of the prevailing party inquiry." (quotations omitted)). SnugglyCat, Inc. v. Opfer Comm'ns, Inc., 953 F.3d 522, 527 (8th Cir. 2020) ("Where an action is dismissed without prejudice, there is no 'prevailing party' and, thus, neither party is entitled to seek an award of attorney fees under the Lanham Act."); Lorillard Tobacco Co. v. Engida, 611 F.3d 1209, 1215 (10th Cir. 2010) ("Voluntary dismissal of an action ordinarily does not create a prevailing party[.]"); RFR Indus., Inc. v. Century Steps, Inc., 477 F.3d 1348, 1353 (Fed. Cir. 2007) (holding that "a plaintiff's voluntary dismissal without prejudice pursuant to Rule 41(a)(1)[(A)](i) does not bestow 'prevailing party' status upon the defendant."). Under the plain language of the Rule, this kind of dismissal is "without a court order," Fed. R. Civ. P. 41(a)(1), and therefore the district court placed no judicial imprimatur on the disposition of Sawgrass Mills's attempt to change its legal relationship with the appellants. See Matthews v. Gaither, 902 F.2d 877, 880 (11th Cir. 1990) (noting that a dismissal under the Rule "is effective immediately upon the

filing of a written notice of dismissal, and no subsequent court order is required."). Nor does the district court's determination that the appellants' motion to dismiss was moot affect our analysis. The district court found that motion to be moot because the appellants had already been voluntarily dismissed from the case.

The appellants' argument that they were the prevailing parties because Sawgrass Mills never obtained injunctive relief against them also falls flat. The denial of the preliminary injunction did not rebuff Sawgrass Mills's effort to obtain a judicially sanctioned change in its legal relationship with the appellants. Beach Blitz, manuscript op. at 14. Instead, the district court denied the preliminary injunction because the appellants were not "actively engaged in any business at all" and it had already enjoined related defendants who were actively infringing on Sawgrass Mills's marks. Sawgrass Mills could also enforce those permanent injunctions against the appellants, if they became active again, as entities "acting in concert and participation with" Half Price and Sansac. Accordingly, the denial of the preliminary injunction did not confer prevailing party status upon the appellants in any way.

We are similarly unpersuaded by the appellants' claim for attorneys' fees under Florida law. The Florida misleading advertisement statute provides that "[a]ny person prevailing in a civil action for violation of this section shall be awarded costs, including reasonable attorney's fees." Fla. Stat. § 817.41(6). In contrast to

the Lanham Act, "[i]n general, when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party." Thornber v. City of Ft. Walton Beach, 568 So. 2d 914, 919 (Fla. 1990). At the same time, the Thornber court said that "[t]here must be some end to the litigation on the merits so that the court can determine whether the party requesting fees has prevailed," and noted that the plaintiff had dismissed the defendants "with prejudice, thus signalling an end to the litigation." Id. (emphases added). As we've detailed, here, the appellants were dismissed without prejudice and there was no adjudication on the merits.

Moreover, since Thornber, the Florida Supreme Court has clarified that "the party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees." Moritz v. Hoyt Enterprises, Inc., 604 So. 2d 807, 810 (Fla. 1992). Florida courts have heeded this guidance by recognizing an exception to the voluntary dismissal rule and permitting courts to "look behind a voluntary dismissal at the facts of the litigation to determine if a party has prevailed." Residents for a Better Cmty. v. WCI Communities, Inc., 291 So. 3d 632, 634 (Fla. Dist. Ct. App. 2020); see also Radosevich v. Bank of New York Mellon, 245 So. 3d 877, 881 (Fla. Dist. Ct. App. 2018); Blue Infiniti, LLC v. Wilson, 170 So. 3d 136, 138–39 (Fla. Dist. Ct. App. 2015); Tubbs v. Mechanik Nuccio Hearne & Wester, P.A., 125 So. 3d 1034, 1041 (Fla. Dist. Ct. App. 2013); Padow v. Knollwood Club Ass'n, Inc., 839 So. 2d 744, 746 (Fla. Dist. Ct. App. 2003)

(recognizing exception). Florida courts "look to the substance of litigation outcomes -- not just procedural maneuvers -- in determining the issue of which party has prevailed in an action." Residents for a Better Cmty., 291 So. 3d at 634.

We agree with the district court that Sawgrass Mills "prevailed on every significant issue." The injunctions Sawgrass Mills obtained effectively prohibited the appellants' use of its trademarks. Indeed, in denying preliminary injunctive relief against the appellants, the district court noted that Sawgrass Mills was "not without remedy" because of the injunctions it had already issued. Having obtained this relief, Sawgrass Mills "recovered the majority of what it sought by filing suit." Blue Infiniti, 170 So. 3d at 139. And the district court properly "avoid[ed] penalizing [Sawgrass Mills] with a substantial assessment of attorneys' fees for dismissing their claims where a continuation of the lawsuit 'would have been a waste of resources.'" Valencia Golf & Country Club Homeowners' Ass'n, Inc. v. Cmty. Res. Servs., Inc., 272 So. 3d 850, 852–53 (Fla. Dist. Ct. App. 2019) (quoting Padow, 839 So. 2d at 746).[3]

[3] The cases the appellants rely on are not persuasive. First, to the extent that Black Diamond Properties, Inc. v. Haines, 36 So. 3d 819, 822 (Fla. Dist. Ct. App. 2010), suggests that voluntary dismissals always confer prevailing-party status, that position is directly contrary to the well-established precedent of the Florida Supreme Court that we've already discussed. Next, in two cases the appellants cite, the District Courts of Appeal found that a voluntary dismissal without prejudice "'[i]n the face of a likely adverse ruling on [defendants'] motion for summary judgment' conferred prevailing party status upon defendants." Yampol v. Schindler Elevator Corp., 186 So. 3d 616, 617 (Fla. Dist. Ct. App. 2016) (quoting Alhambra Homeowners Ass'n, Inc. v. Asad, 943 So. 2d 316, 319 (Fla. Dist. Ct. App. 2006)). As the district court found, "Sawgrass Mills did not dismiss this case in the face of near-certain defeat, but Sawgrass Mills

Accordingly, we find no abuse of discretion in the district court's denial of the appellants' motion for attorneys' fees, and we affirm.

AFFIRMED.

dropped this case . . . because it had gotten what it wanted." Moreover, the Yampol court recognized that the facts of that case separated it from cases where the general rule was inapplicable. 186 So. 3d at 617. Indeed, it noted that the general rule would more likely be inapplicable where, as here, the voluntary dismissal is without prejudice. Id. Finally, in Mills v. Vero Beach Country Club, Inc., the district court looked at the circumstances of the case to determine the prevailing party, just as the court did here. No. 19-CV-81476-KAM, 2020 WL 1698117, at *5 (S.D. Fla. Apr. 8, 2020), aff'd sub nom. In re Mills, 829 F. App'x 938 (11th Cir. 2020).