FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-661

FLORIDA FIRST FINANCIAL SERVICES, LLC,

Appellant/Cross-Appellee,

v.

ANGEL RANDOLPH and DONALD EDWARDS,

Appellees/Cross-Appellants.

On appeal from the County Court for Leon County.
Nina Ashenafi Richardson, Judge.

November 9, 2022

WINOKUR, J.

We consider three issues in this appeal. In the first issue, Appellant Florida First Financial Services, LLC ("Florida First") argues that the trial court erred by awarding attorney's fees under section 57.105(7), Florida Statutes, after finding that Florida First had waived its right to argue that the Alabama choice-of-law provision in a contract barred attorney's fees under that statute. In the second issue, Florida First argues that, if the choice-of-law provision does not apply, any fee award under section 57.105(7) should be limited to the language set out in the contractual

provision. On cross-appeal, Appellees Angel Randolph and Donald Edwards argue that the trial court abused its discretion by awarding fees that contradicted its express findings without explanation. Because we reverse on the first issue, we need not address the second issue or the cross-appeal issue.[1]

This case arose out of a Retail Installment Sale Contract for the purchase of an automobile by Appellees. The contract included both a provision for attorney's fees in the event of a default and an Alabama choice-of-law provision. The unilateral fee provision set the maximum award of attorney's fees to fifteen percent of the amount found to be owed by the debtor after default. Appellees subsequently defaulted on their loan, and Santander Consumer USA Inc. ("Santander"), the original loan servicer, notified them of its intent to repossess and sell the subject vehicle. Notably, the notice of intent to sell did not identify the secured creditor. After the sale of the vehicle, Santander notified Appellees of their remaining obligation under the contract. Santander's interest under the contract was subsequently assigned to Florida First.

Florida First filed a complaint to enforce the contract and collect the remaining balance due. Appellees responded with a counterclaim in which they argued that Florida First could not recover because, by failing to identify the secured creditor, Santander had not disposed of the collateral in a commercially reasonably manner under section 679.614, Florida Statutes. The trial court ultimately granted summary judgment in favor of Appellees on their counterclaim, finding that the notice did not comply with section 679.614 and, as a result, the disposition of the collateral was commercially unreasonable as a matter of law.

Appellees then sought attorney's fees under section 57.105(7). This subsection provides, "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 the party prevails in any action, whether as plaintiff or defendant, with

[1] Florida First also seeks fees as a sanction against Appellees under section 57.105(1), Florida Statutes, which we deny.

respect to the contract." § 57.105(7), Fla. Stat. In response, Florida First argued that the Alabama choice-of-law provision applied to the substantive attorney's fees issue. Because Alabama does not have a reciprocal attorney's fees statute like section 57.105(7), Florida First argued that Appellees were not entitled to attorney's fees under the contract. The trial court granted Appellees' motion for attorney's fees, rejecting Florida First's argument that the choice-of-law provision applied. The trial court found that Florida First had waived its right to argue that the applicability of the choice-of-law provision by failing to invoke the foreign law prior to the final judgment.

On appeal, Florida First argues that the trial court erred by awarding attorney's fees under section 57.105(7) despite the inclusion of an Alabama choice-of-law provision in the contract. When the determination of entitlement to attorney's fees depends on the trial court's interpretation of a contractual attorney's fees provision or a statute, this Court reviews the order de novo. *See Walton Plantation Master Ass'n, Inc. v. OPO, LLC*, 320 So. 3d 255, 257–58 (Fla. 1st DCA 2021); *Decks N Such Marine, Inc. v. Daake*, 297 So. 3d 653, 655 (Fla. 1st DCA 2020).

Florida courts typically favor enforcing contractual provisions without regard to the fact that one of the parties may have made a particularly harsh bargain. *See Giles v. Portfolio Recovery Assocs., LLC*, 317 So. 3d 1287, 1288 (Fla. 1st DCA 2021) (Bilbrey, J., concurring); *cf. Universal Med. Inv. Corp. v. Mike Rollison Fence, LLC*, 331 So. 3d 242, 247 (Fla. 1st DCA 2021) (recognizing that a court may not modify a contract to make it more reasonable or advantageous to one of the contracting parties). Generally, choice-of-law provisions are presumptively valid and will be enforced "unless the law of the chosen forum contravenes strong public policy." *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000) (noting that a party is neither required to brief the substantive law of the foreign state nor obligated to demonstrate conflict between the foreign state and forum state where a choice-of-law provision is involved); *see Sw. Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 80 (Fla. 2012). Appellees did not argue that any strong public policy supporting the award of reciprocal fees in this case outweighed the policy protecting the freedom to contract. Instead, the gist of their

argument was that Florida First waived the right to argue Alabama law by failing to properly invoke foreign law prior to the final judgment.

In most contexts, a party must plead or prove foreign law applies before a trial court may consider its applicability. *See Kingston v. Quimby*, 80 So. 2d 455, 456 (Fla. 1955): *see also Turner Murphy Co. v. Specialty Constructors, Inc.*, 659 So. 2d 1242, 1244 (Fla. 1st DCA 1995) ("A party cannot rely on foreign law without pleading reliance in the trial court."). The purpose of this procedural requirement is to put the adverse party on notice of the intention to rely upon foreign law. *See Fed. Deposit Ins. Corp. v. Grasso*, 364 So. 2d 26, 27 (Fla. 2d DCA 1978); *Schubot v. Schubot*, 363 So. 2d 841, 842 (Fla. 4th DCA 1978). Where contracts are concerned, parties are expected to be aware of the terms and conditions of their bargain. *See Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 993 (Fla. 4th DCA 2014). They are presumed to be on notice of the application of an agreed-upon choice-of-law provision. *See Precision Tune Auto. Care, Inc. v. Radcliffe*, 815 So. 2d 708, 711 (Fla. 4th DCA 2002). Therefore, the concerns underpinning the pleading requirement are not present where a contract includes a choice-of-law provision. To the extent that it needed to plead and prove the application of foreign law, Florida First's attachment of the contract containing the choice-of-law provision to the complaint at the outset of the lawsuit was sufficient. *See* Fla. R. Civ. P. 1.130(b) ("Any exhibit attached to the pleading must be considered a part thereof for all purposes.").

Appellees submit that Florida First should not be allowed to invoke the protections of Florida law and then switch over to foreign law when it becomes more beneficial. Because Florida law was predominantly argued prior to the final judgment, Appellees contend that Florida First waived its right to rely on Alabama law for the post-judgment attorney's fees issue. In support of their contention, Appellees rely on *Marine Environmental Partners, Inc. v. Johnson*, which held in part that a choice-of-law provision in a Licensing Agreement had been waived where both parties "relied heavily on Florida law as controlling." 863 So. 2d 423, 425–26 (Fla. 4th DCA 2003). However, *Johnson* is inapposite as the complaint "did not sound in contract" and did not have any contracts attached

to it. *Id.* at 425 & n.1. In the instant case, the contract formed the basis for the lawsuit and was attached to the complaint.

Even so, Florida First cannot be said to have waived its right to rely on Alabama law by virtue of the fact that it argued against a counterclaim under Florida law. Where both foreign law and the law of the forum state could apply, foreign law need not be specifically argued until it "is claimed to be dispositional." *Jackson v. State*, 18 So. 3d 1016, 1029 (Fla. 2009) (quoting *Mills v. Barker*, 664 So. 2d 1054, 1058 (Fla. 2d DCA 1995)). This is so because, unless the law of the foreign state is specifically pleaded, Florida courts will presume that the foreign law is the same as Florida law. *See id.*; *see also Gustafson v. Jensen*, 515 So. 2d 1298, 1300 (Fla. 3d DCA 1987) ("A principle of the choice-of-law doctrine applicable herein presumes that, where a party seeking to rely upon foreign law fails to demonstrate that the foreign law is different from the law of Florida, the law is the same as Florida.").[2] Up until the motion for attorney's fees under section 57.105(7), Alabama law would not have been dispositive as the counterclaim raised allegations of actions taken in Florida that failed to comply with a Florida statute. Moreover, the counterclaim attacked a notice, not the contract. As a result, Florida First's reliance on Florida law in

---

[2] In spite of this presumption, the dissent argues that Florida First nonetheless waived reliance on Alabama law because it did not rely on Alabama law in opposing the counterclaim. We disagree for two reasons. First, even if we were to ignore the presumption that Alabama law regarding the counterclaim issue is the same as Florida law, in fact it is the same. *Compare* § 679.627, Fla. Stat. *with* Ala. Code § 7-9A-627. Second, the dissent correctly notes that a waiver must include an "intention to relinquish the right." Dissenting op. at 7 (quoting *Taylor v. Kenco Chem. & Mfg. Corp.*, 465 So. 2d 581, 587 (Fla. 1st DCA 1985)). Yet the record does not reflect that Florida First intentionally relinquished its right to rely on Alabama law, or more specifically, its right to rely on the choice of law provision. Appellees' argument suggests the opposite, that Florida First lost the right to rely on the choice of law provision by its *failure* to intentionally rely on Alabama law. This would be a forfeiture of a right, not a waiver of it, and it would rob the word "intentional" of all reasonable meaning.

defending against the counterclaim did not amount to a "voluntary and intentional relinquishment of a known right." *Running Cars, LLC v. Miller*, 333 So. 3d 1177, 1179 (Fla. 1st DCA 2022) (quoting *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005)); *Johnson*, 863 So. 2d at 426.

When it became clear that Alabama law was dispositive, Florida First argued its applicability. Appellees could not have been blindsided by Florida First's argument that a choice-of-law provision in the contract—a contract that Appellees assented to and that was attached to the complaint—applied to bar their entitlement to attorney's fees under section 57.105(7). *See Radcliffe*, 815 So. 2d at 711 (explaining that a party who enters into a contract with a choice-of-law provision, applying the law of a state that does not have its own reciprocal attorney's fees statute, would reasonably expect that only the party that is entitled to fees under the unilateral fee provision has the right to attorney's fees under the contract). The choice-of-law provision is crucial because the contract formed the basis for the fees and Appellees sought to utilize a Florida statute to rewrite a unilateral fee provision that they originally agreed to. *See id.* Alabama law, which does not contain a "statute that transforms the one-sided provision into a reciprocal provision," is dispositive of Appellees' entitlement to fees under the contract. *Levy v. Levy*, 326 So. 3d 678, 681 (Fla. 2021). Accordingly, the trial court erred by finding that Florida First waived its right to argue that the choice-of-law provision in the contract barred the application of section 57.105(7) and by awarding fees under the same.

AFFIRMED in part; REVERSED in part; and REMANDED.

LONG, J., concurs; BILBREY, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

BILBREY, J., dissenting.

I would affirm the order finding Appellees to be entitled to attorney's fees under the reciprocal fee provision in section 57.105(7), Florida Statutes. Since the majority opinion reverses, I respectfully dissent.

In the order granting entitlement to fees, the trial court held, "that the Plaintiff [Florida First] waived the choice of law provision in the contact because it did not plead or prove that this case was governed by Alabama law prior to the Court's rendering final summary judgment in favor of the Defendants [Appellees]." The trial court's holding was correct.

Waiver has three elements: "(1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right." *Taylor v. Kenco Chem. & Mfg. Corp.*, 465 So. 2d 581, 587 (Fla. 1st DCA 1985) (citations omitted). All three elements of waiver are met here.

First, rights established in a contract can be waived. *Pearson v. Peoples Nat. Bank*, 116 So. 3d 1283, 1284 (Fla. 1st DCA 2013). A choice of law clause is a contractual right. *See generally Mazzoni Farms, Inc. v. E.I. DuPont De Nemours and Co.*, 761 So. 2d 306 (Fla. 2000) (discussing the enforcement of choice of law provisions in a contract).

Second, by being a party to and then attaching the Retail Installment Sale Contract to the complaint, Florida First is presumed to have known about the Contract including the choice of law clause. *See CEFCO v. Odom*, 278 So. 3d 347, 354 (Fla. 1st DCA 2019) ("one who signs a contract is presumed to know and agree to its terms"). Florida First knew about the clause as shown by its raising the clause in opposition to Appellees' motion for attorney's fees.

Third, Florida First relinquished its right to apply the Alabama choice of law clause in the Contract. It argued Florida law in its filing in opposition to Appellees' motion for summary judgment. And it did not raise Alabama law until after judgment

was entered for Appellees, over two and a half years after Florida First filed its complaint. Appellees' motion for summary judgment did not concern their counterclaim but instead sought to (and ultimately did) defeat the claim brought by Florida First on the Contract.*

In its filing in opposition to summary judgment, Florida First cited six Florida state court cases and a Florida statute, while making no argument under Alabama law. The trial court then decided Appellees' motion for summary judgment under Florida law citing various Florida cases and statutes. Florida First should not be permitted to argue Florida law when it believes our law is useful to its position and then switch to a different state's law when it believes that law is more favorable. "Waiver may be express, or implied from conduct or acts that lead a party to believe a right has been waived." *Taylor*, 465 So. 2d at 587 (citations omitted).

Finally, the majority opinion distinguishes *Marine Environmental Partners, Inc. v. Johnson* by noting that it did not involve a contract claim and that no contracts were attached to the complaint at issue there. 863 So. 2d 423, 425, 425 n.1 (Fla. 4th DCA 2003). But the cause of action asserted in *Marine Environmental Partners* was immaterial to the waiver of the Colorado choice of law provision in a contract between the parties. Instead, what mattered was that the parties satisfied the elements of waiver since they knew of the choice of law provision in the contract and relinquished their right to use the provision by not arguing its application. *Id*. at 426–27. The *Marine Environmental Partners* court stated,

> However, in this case neither party has argued the applicability of Colorado law (either below or in their briefs) and both have cited only sparse lower federal authorities, apparently as merely persuasive. By contrast, both parties have relied heavily on Florida law as controlling. In this situation, the choice of law issue is

---

* The majority opinion is correct that Florida First also argued Florida law in opposition to Appellees' counterclaim.

> deemed waived and the court is free to apply the law of the forum.

Id. at 426. Appellees are correct that this same rationale should apply here.

Thus, the trial court correctly found waiver of Alabama law by Florida First and correctly applied Florida law to find Appellees to be entitled to attorney's fees. Since the majority opinion reverses that decision, I respectfully dissent.

Amanda C. Rolfe of Rolfe & Lobello, P.A., Jacksonville, for Appellant/Cross-Appellee.

David H. Abrams, Orlando, for Appellees/Cross-Appellants.