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**ATTORNEY'S FEES AWARDABLE BY CONTRACT:
OFFERS OF JUDGMENT JUST GOT MORE DIFFICULT**

In *Tierra Holdings, Ltd. v. Mercantile Bank*, 36 Fla. L. Weekly D1049 (Fla. 1st DCA May 28, 2011), the defendant made an offer of judgment in accordance with F.S. § 768.79 for \$178,000. This amount included the attorney's fees and costs incurred by the plaintiff prior to the date of the offer of judgment. Plaintiff declined this offer and proceeded with litigation in which plaintiff only recovered \$16,232.

Based on the plaintiff's recovery, defendant was entitled to recover \$208,627 based on its offer of judgment. In turn, the defendant conceded that plaintiff was entitled to attorney's fees and costs up to the date the offer of judgment was served. However, in this case the parties disagreed about whether the plaintiff was entitled to attorney's fees **after** service of the offer of judgment.

The 1st DCA held that plaintiff was entitled to such fees after the offer of judgment and awarded plaintiff \$232,381. After setting off defendant's \$208,627 worth of attorney's fees, the plaintiff recovered a net judgment of \$23,753.

What makes this case unique is that the award of attorney's fees to plaintiff after the offer of judgment was not governed by Florida statutes because the governing contract between these parties permitted attorney's fees to the prevailing party. As a result, plaintiff was entitled to attorney's fees for the entire case and not just for the time period prior to the date that the offer of judgment was served.

The following two propositions can aid defendants in protecting themselves from paying attorney's fees to plaintiffs for post offer of judgment work. First, just because the plaintiff recovered a judgment for damages does not mean plaintiff is entitled to attorney's fees. The test in Florida which determine who is the prevailing party states that it is "the party who prevailed on the significant issue of the case." ***Moritz v. Hoyt Enterprises, Inc.***, 604 So. 2d 807 (Fla. 1989).

In Florida, the law is clear that courts have the discretion to rule that neither party prevailed. Therefore, in ***Tierra***, if the plaintiff recovered substantially less than the amount initially sought, defendant could have argued that plaintiff was not the prevailing party and thus, was not entitled to any attorney's fees either pre or post offer of judgment.

Second, at the same time the offer of judgment is served, defendant should tender the amount admittedly owed. A tender is different from an offer in that a tender is an unconditional offer and actual money is sent to the plaintiff. To make a tender a defendant must mail a certified check to the opposing party, which includes the admitted damages, the opposing party's costs, interest and attorney's fees that have been incurred prior to the tender, assuming plaintiff is entitled to attorney's fees by contract.

The primary benefit of using a tender is that if the amount recovered by plaintiff is less than the tender, plaintiff will not be permitted to recover attorney's fees after the date the tender was served. Had there been a proper tender in ***Tierra***, defendant would have still recovered its \$208,627 in attorney's fees based on its offer of judgment. It would have prevented

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the prevailing plaintiff from recovering attorney's fees from work that occurred after defendant's initial offer of judgment.

In sum, the crux of the 1st DCA's ruling is that a successful offer of judgment will not deprive the offeree from recovering attorney's fees after the offer of judgment is served if the offeree is the prevailing party. Thus, if the offeror wants to insulate itself from paying attorney's fees to a prevailing party after an offer of judgment is made, then the offeror must tender the money owed and not make an offer of judgment.

JLH/GRS/lcr/tsr

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