

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

SEA VILLA HOMEOWNERS)	
ASSOCIATION, INC.)	
)	
Plaintiff-below)	
Appellee,)	
)	
v.)	C.A. No. CPU6-14-000330
)	
ANNE R. LAVINE,)	
)	
Defendant-below)	
Appellant,)	
)	

John A. Sergovic, Jr., Esq., Attorney for Plaintiff/Appellee.
Anne R. Lavine, pro se, for Defendant/Appellant

Submitted: May 23, 2016
Decided: June 3, 2016

DECISION ON APPELLEE’S REQUEST FOR ATTORNEYS’ FEES

On February 24, 2016 the Court granted summary judgment in this matter in favor of Plaintiff/Appellee the Sea Villa Homeowners Association, Inc. (the “HOA”), and against Defendant/Appellant Anne R. Lavine in the amount of \$2,870.00, plus pre-judgment interest and reasonable attorney’s fees in an amount to be determined after Plaintiff’s submission of a fee request affidavit and calculated interest request. After considering Plaintiff’s submissions and Defendant’s response thereto, the Court finds and awards as follows¹:

¹ Plaintiff also filed a Motion to Strike Defendant’s reply to its fee request because the reply “was not authorized by the Court.” Defendant, however is entitled to respond to the fee request filing, and the Motion to Strike is denied.

Procedural History

On May 16, 2013, the HOA filed suit against Lavine in the Justice of the Peace Court seeking unpaid assessments dating back to 2008, as well as interest thereon and attorneys' fees. On April 2, 2014, default judgment was entered against Lavine for failing to appear for trial despite the J.P. Court's denial of her continuance request. The J.P. Court judgment included an attorney's fees award in the amount of \$2,050.44. Lavine timely filed an appeal *de novo* to this Court.

In this Court, both Lavine and the HOA filed several pre-trial motions, including motions to dismiss, motions to amend, and discovery motions. The parties appeared at hearings before both the Commissioner and Judge. After the Court granted Plaintiff's motion for summary judgment on its claim for \$2,870.00 in past-due homeowners' fees, Plaintiff's counsel submitted its affidavit seeking \$22,325.69 in attorneys' fees and related attorney expenses, as well as \$1,061.06 in pre-judgment interest.

Discussion

As more fully explained in the Court's summary judgment opinion in this matter, Defendant, as the record owner of a lot in the Sea Villa subdivision of Seal Colony, is obligated to pay annual assessments under the Declaration of Sea Colony, Inc. ("Declaration") dated August 7, 1972.

Article IV, Section 9 of the Declaration further provides:

If any assessment is not paid on the date when due (as specified in Section 7 hereof), then such assessment shall be deemed delinquent and shall together with such interest thereon and cost of collection thereof as are hereinafter provided, continue as a lien on the Lot...In addition to such lien rights, the personal obligation of the then Owner to pay such assessment, however, shall remain his personal obligation and shall not pass to his successors in title...If the assessment is not paid within thirty (30) days after the delinquency date, the assessment shall bear interest from the date of delinquency at the rate of eight percent (8%) per annum...in the event a judgment is obtained, such judgment shall include interest on the assessments above provided and a reasonable attorney's fee to be fixed by the court together with the costs of the action.

The Court has reviewed Plaintiff's pre-judgment interest calculation, and accepts the calculated prejudgment amount as \$1,061.06.

Courts give great weight to contract clauses creating the right to payment of attorney's fees in subsequent litigation. The contracting parties have the opportunity to negotiate for provisions within the contract that would require one party to pay the attorney's fees of the other if they do not abide by the terms of the contract.² In Delaware, both courts of law and equity "routinely enforce provisions of a contract allocating costs of legal actions arising from the breach of a contract".³

Counsel for Plaintiff has submitted a fee affidavit attesting to fees incurred at hourly rates of \$275.00, \$250 and \$200.00 for the three attorneys who worked on this matter, totaling \$21,200.98 in actual billable attorney time. Plaintiff also seeks related costs in the amount of \$1,124.71. The Court must decide the reasonableness of a grant of attorney's fees and costs in each particular case.

The *Delaware Lawyers Code of Professional Responsibility* DR-1.5 enumerates the factors to be considered in determining the reasonableness of a claim for attorney's fees:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fees customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.

² *Knight v. Grinnage*, 1997 WL 633299 at *3 (Del. Ch.).

³ *Id.*

- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

These factors are applied by Delaware Courts in awarding attorney's fees.⁴ In addition, the Court also may consider the ability of the losing party to pay attorney's fees.⁵

No information has been provided the Court by either party in relation to factors (2), (5) or (6), and the Court will not apply them to its fee determination in this case. Further, no direct evidence has been provided of Defendant's ability to pay fees, or her lack thereof. The Court will not consider this factor as well.

In reviewing the fee affidavit, the Court cannot find the time and labor documented to be generally within the range of effort typically exerted by counsel in this jurisdiction to litigate cases of similar complexity. However, the Court is aware that the self-represented Defendant filed numerous motions and objections that, although perhaps not technically frivolous, would not have been filed by competent counsel. Plaintiff vigorously opposed or otherwise responded to virtually all of Defendant's filings. The Court finds both parties share some of the blame for the level of litigiousness reached in the case, especially in light of the prior litigations of record between the parties *over virtually the same issues* as these annual homeowners' fees have come repeatedly due and repeatedly unpaid.

Defendant has not objected to the fee rates charged by Plaintiff, and the Court accepts that the rates charged in the affidavit are customary in this jurisdiction for

⁴ *Husband S. v. Wife S.*, 294 A.2d 89, 93 (Del. 1972); *General Motors Corp. v. Cox*, 304 A.2d 57 (Del. 1973).

⁵ *General Motors Corp. v. Cox*, 304 A.2d 57 (Del. 1973).

similar legal services performed by attorneys of counsel for Plaintiff's competence, reputation and experience.

However, in considering the amount involved and the results obtained, the principal amount sought was \$2,870.00; the fees expended on obtaining this amount was over \$22,000.00, *nearly eight times the amount sought*. Although no evidence has been presented regarding Plaintiff's fee arrangement with its attorney, and whether it is a fixed or contingent fee agreement, it is clear to the Court that no rational entity applying sound business judgment would venture to expend \$22,000.00 to collect \$2,870.00, unless some other intangible principle or issue was at stake in the litigation. The Court will not assess such excess expense against Defendant, and award it to Plaintiff, inasmuch as Plaintiff was plainly willing to expend the fees on principle notwithstanding the paltry amount in controversy and the ever-present uncertainty of a favorable judgment.

Moreover, the Court has previously held in this matter that Defendant's assessment obligation is created by an instrument under seal. Title 10, Section 3912 of the Delaware Code limits awards of reasonable attorneys fees in actions arising from a "note, bond, mechanics lien, mortgage, invoice or other instrument of writing" to a maximum of "20 percent of the amount adjudged for principal and interest."⁶ The statute applies to this assessment collection action. Twenty percent of the total judgment and prejudgment interest is \$786.20. However, the Court is cognizant that Plaintiff had to twice pursue this action, first in J.P. Court to a successful judgment, and then again, *de novo* in this Court upon Defendant's appeal. A *de novo* appeal of a J.P. Court decision to this Court is an appeal of right, independent of any claim of error

⁶ 10 Del.C. § 3912.

below. It is a “second bite of the apple” for the appellant, requiring the successful party to fully re-litigate the matter anew. The Court finds it appropriate and reasonable therefore to award a twice-successful litigant twice the maximum fee award; in this case, \$1,572.24. Even if §3912 were held inapplicable to this action, the Court nonetheless finds this amount, and no more, to be a reasonable fee in this matter under the above analysis.

As to any and all other issues raised by Defendant in her response to the fee request, the Court finds them either irrelevant or otherwise mooted by the Court’s decision herein.

CONCLUSION

In addition to the judgment entered in its February 24, 2016 decision, the Court further awards pre-judgment interest in the amount of \$1,061.06, and reasonable attorney’s fees against Defendant in the amount of \$1,572.40. The appeal bond posted by Defendant shall be applied to the entire judgment amount due, including post-judgment interest, to be remitted to Plaintiff. The balance of the bond, if any, shall be remitted to Defendant.

IT IS SO ORDERED this _____ day of June, 2016.

Kenneth S. Clark, Jr., Judge