

December 8, 2009

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*Plaintiff/Appellee*

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*Defendant/Appellant*

**Re: Leonard Dixon, et al v. Council of the Cliff House Condominium  
C.A. No. U407-10-076**

Dear Gentlemen:

This is the Court's decision after Appellee's Application for Attorney's Fees, Costs and Post Judgment Interest.

#### **Procedural History**

This case originated on April 4, 2007, when the Council of the Cliff House Condominium (hereinafter "Cliff House" or "Plaintiff/Appellee") filed a debt action in the Justice of the Peace Court against Leonard Dixon and Carmella M. Dixon (hereinafter "Dixons" or "Defendant/Appellant") to collect delinquent condominium assessments and fees.

A *de novo* appeal was then noticed by Dixons, and Cliff House filed a timely Complaint on November 9, 2007. In its Answer to this Complaint, Dixons sought to assert a counterclaim seeking declaratory relief. This counterclaim was not raised in the JP action below and thereby ran afoul of Court of Common Pleas Civil Rule 72.3(c) and the *Mirror Image Rule*. Counsel for Plaintiff/Appellee advised counsel for Defendant/Appellant of this procedural error and a Stipulation dismissing the Counterclaim was executed and filed on October 15, 2008, thus avoiding dismissal of Defendant's appeal (either by Plaintiff's motion or the Court, *sua sponte*) for lack of subject matter jurisdiction.

During the course of the appeal Dixons remitted payment in full of all past due assessments in the amount of \$573.95 and on January 8, 2008, this Court issued an Order granting Cliff House's Motion for Partial Summary Judgment, then dismissing the underlying collection action as being moot, and granting Cliff House the right to submit an application for attorney's fees, late charges, court costs and pre and post judgment

interest. The parties subsequently filed opening, answering and reply briefs. This is the Court's decision having reviewed the parties' submissions.

### **Background**

Cliff House is an unincorporated condominium council organized pursuant to 25 Del. C. § 2201, governed by a Declaration (hereinafter the "Declaration") and a Code of Regulations (hereinafter the "Code"), recorded on October 19, 1983, in the Office of the Recorder of Deeds in and for New Castle County. The Declaration is of record in Deed Record F, Volume 124 at page 1, and the Code in Deed Record F, Volume 124 at page 32.

Leonard and Carmella M. Dixon purchased Unit D-5 at the Cliff House Condominium on July 31, 1990. In January 2004, Susan Dixon, their daughter (a law school graduate), acting on behalf of the appellants pursuant to a power of attorney, complained to Cliff House that Dixons were being overcharged on monthly common assessment fees. However, this matter was resolved when the delinquency was paid in full in September, 2004. Two years later, in September 2006, Susan Dixon once again complained about the 2004 budget and again commenced making partial monthly common assessment payments. Cliff House commenced this proceeding as a result and sought to recoup the monies owed, along with an award of attorney's fees, late charges and interest from September 2006 forward. As noted above, at present the only matter at issue is whether attorney's fees and costs are due and owing as the underlying balance has been paid in full. At present, Cliff House is seeking \$17,800.00 in attorney's fees, and \$257.28 in costs for a total of \$18,057.28. In addition, Cliff House is seeking \$34.00 in court costs, and \$125.00 in late fees, with pre and post judgment in the amount of 18% commencing on September 1, 2006.

### **Parties Contentions**

Cliff House asserts that Dixons are subject to the provisions of the Cliff House Condominium Declaration and Code pursuant to their deed and, as such, are responsible for attorney's fees and costs associated with this litigation. Cliff House relies on the language of the Declaration provision 9.7 which states that, "From the date of assessment until paid in full, all assessments, together with interest and any allowable costs of collection, including attorney fees, shall be a lien against such unit and shall be the personal obligation of the record owner of such unit." (See ¶ 5, Opening Brief). Cliff House also points to § 8.2.1 of the Code which states that, "Failure to pay any assessment when due constitutes a default and subjects the unit owner responsible therefore to the Council's enforcement procedures." *Id.* Cliff House also relies on § 8.2.3 of the Code which authorizes Cliff House to accelerate and demand immediate payment of all monies past due and all future assessments due for the remainder of the fiscal year where any monthly assessment remains unpaid for more than sixty (60) days. This section also authorizes, "[t]he Council [to] take any and all steps available within the law to collect the amount due plus interest and attorney's fees." *Id.* Furthermore, Cliff House cites 25 Del. C. § 2233 as authorizing eighteen percent (18 %) interest on all delinquent

assessments and a Cliff House resolution effective February 1, 2006 authorizing the assessment of a \$25.00 dollar late fee. (See ¶ 6, Opening Brief).

Dixons oppose Cliff House's request for court costs and attorney fees because a 'judgment' was not rendered in Cliff House's favor and the amount of fees and costs sought are unreasonable. (See ¶ 6, Answering Brief). Dixons first argue that pursuant to the Code § 8.2.6 court costs and attorney's fees are justified only if a judgment is rendered against the unit owner. § 8.2.6 states that, "Every unit owner except the Declarant, against whom legal action is taken to collect and assessment or enforce any covenant, condition, obligation or restriction shall, *if judgment is rendered against him*, be liable for all court costs and for reasonable attorney's fee, the same as if such costs and fees were part of the original amount due, except that no interest shall be calculated on the costs and fees" (emphasis added). *Id.*

Dixons assert that the underlying action for the unpaid monthly assessments was dismissed by stipulation of the parties, as the matter was moot. Dixons further assert that the payment of the underlying fee sought meant that this Court lost its ability to adjudicate the issues because a case or controversy did not exist. Therefore, an entry of judgment was inappropriate, and absent a judgment in its favor, Cliff House is not entitled to recover its fees and costs pursuant to the language set forth in § 8.2.6 of the Code. (See ¶ 7, Answering Brief).

Additionally, Dixons argue that, even if Cliff House is entitled to attorney's fees, the amount sought is unreasonable under the standard set forth by *General Motors Corp. v. Cox*, 304 A.2d 57 (Del.1973). (See ¶ 8, Answering Brief). Dixons argue that the 88.9 hours spent by Cliff House's attorneys in prosecuting this matter was unreasonable given its relative simplicity. (See ¶ 9, Answering Brief). Dixons point to the fact that Cliff House was billed \$17,800 in fees for a debt action, thirty one (31) times the principal amount of \$573.95. *Id.* Dixons also note that Cliff House counsel has failed to adequately justify these discrepancies except to provide a list of tasks addressed during the course of the litigation. *Id.*

Finally, Dixons assert that Cliff House is not entitled to interest in recovering its fees and costs under any circumstances pursuant to the Code and Cliff House's failure to indicate whether any interest is due on the outstanding assessments. (See ¶ 10, Answering Brief).

### **Applicable Law**

The general rule is that each party must bear its attorney's fees and expenses of litigation unless there is a "contractual or statutory basis for liability." *Bergin v. McCloskey*, 2008 WL 4662378, at \*1 (Del.Com.Pl.) (Del.Com.Pl.,2008)(citations omitted). Although courts of equity are permitted to impose attorney's fees on the losing side if the prevailing party can show a compelling special equity, law courts in Delaware "may not order the payment of attorney's fees as part of costs to be paid by the losing

party unless the payment of such fees is authorized by some provision of statute or contract.” *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 370 (Del.Super.1982).

### Analysis

It is uncontroverted that the appellants Leonard Dixon and Carmella M. Dixon are owners of Unit D-5 at the Cliff House Condominiums and are thereby subject to the Declaration and Code. Cliff House asserts a claim for attorney’s fees under § 8.2.3 of the Code which authorizes Cliff House to accelerate and demand immediate payment of all monies past due and, “... take any and all steps available within the law to collect the amount due plus interest and attorney’s fees.” *Id.* As this claim for attorney’s fees arises from a dispute between the condominium association and the owner under the condominium Declaration and Code, the Court finds that the general rule that each party is to pay for their own attorney’s fees does not apply.

Consequently, the Court finds Cliff House’s argument that Dixons are liable for attorney’s fee, and costs due to their failure to pay the monthly common assessments to be meritorious. Dixons assertion that Cliff House is not entitled to attorney’s fees and costs because there was no entry of judgment is not persuasive. Dixons assert that the case was dismissed by stipulation of the parties because the matter was moot. (See ¶ 7, Answering Brief). This is factually incorrect. At the hearing on the Motion for Partial Summary Judgment, counsel for both parties were present and, on the record, indicated that an agreement had been reached whereby Cliff House’s motion for Partial summary Judgment would be granted. That same day, December 5, 2008, counsel for Cliff House delivered a form of order to the court accompanied by a cover letter copied to Stephen B. Braurerman, Esquire, counsel for Dixons. The court signed the Order on January 8, 2009 (The form of order indicated the year as 2008, and the Court failed to change the year to the correct year when signing the order). The order clearly indicates that the motion for Partial Summary *Judgment* is granted (emphasis added). The Order then goes on to indicate the payment of the debt in full, having rendered moot the collection action. The remaining action was then dismissed with Cliff House granted leave to submit an application for attorney fees, court costs and interest. This was not a stipulation signed by counsel for the parties but an order signed only by the Court. Regardless, a judgment was granted by the Court in favor of Cliff House.

Declaration provision 9.7 states that, “From the date of assessment until paid in full, all assessments, together with interest and any allowable costs of collection, including attorney fees, shall be a lien against such unit and shall be the personal obligation of the record owner of such unit.” (See ¶ 5, Opening Brief). § 8.2.1 of the Code which states that, “Failure to pay any assessment when due constitutes a default and subjects the unit owner responsible therefore to the Council’s enforcement procedures.” *Id.* § 8.2.3 of the Code further authorizes Cliff House to accelerate and demand immediate payment of all monies past due and all future assessments due for the remainder of the fiscal year where any monthly assessment remains unpaid for more than sixty (60) days. This section also authorizes, “[t]he Council [to] take any and all steps available within the law to collect the amount due plus interest and attorney’s fees.” *Id.*

Dixons do not contest being subject to the Declaration and the Code. By failing to make monthly common assessment payments Dixons were in default. Upon default, Cliff House was permitted to take any steps available at law to collect the amount due plus interest and attorney's fees. Dixons were made aware of the consequences of non payment at various times by separate written correspondence by 1) A.J. Cerce, Jr., President of Cliff House, 2) Brite Realty Services, Inc., Managing Agent for Cliff House Condominium Association and 3) legal counsel for Cliff House.

Dixons alternate assertion that Cliff House's attorney fees and costs are unreasonable requires a more in depth analysis. The award of reasonable attorneys' fees requires the exercise of judicial discretion after consideration of the following factors:

(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (b) The likelihood, if apparent to the client, that the substance of the particular employment will preclude other employment by the lawyer; (c) The fees customarily charged in the locality for similar legal services; (d) The amount involved and the results obtained; (e) The time limitations imposed by the client or by the circumstances; (f) The nature and length of the professional relationship with the client; (g) The experience, reputation, and ability of the lawyer or lawyers to perform the services; (h) Whether the fee is fixed or contingent; (i) The employer's ability to pay; and (j) Whether claimant's counsel has received or expects to receive compensation from any other source.

*General Motors Corp. v. Cox*, Del.Supr., 304 A.2d 55 (1973); *Digiacoimo v. Board of Public Education*, Del.Supr., 507 A.2d 542 (1986); *see also* Del. Lawyers' Rules of Prof 'l Conduct R. 1 .5(a).

The Court agrees that the factors discussed in *General Motors* and the Delaware Lawyers Code of Professional Conduct apply here. However, it must be noted that several of these factors deal with controversies between attorneys and *their own clients*.

For example, the likelihood, if apparent to the client, that the substance of the particular employment will preclude other employment by the lawyer; the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; whether the fee is fixed or contingent all clearly deal with fee disputes between clients and their own attorneys. These factors need not be considered in this case.

The Court agrees that the legal issues here are not novel, nor are they particularly difficult. Also, the monetary amount involved was very small. But it is Dixons themselves who have made several decisions that have caused Cliff House to incur attorney fees.

First, Dixons chose not to pay when only *de minimus* amounts were at issue. In her letter to Cliff House Council dated January 9, 2004, Susan Dixon writes:

“In addition, I have been overcharged 12 cents on my loan payment for the past 24 months, which totals \$2.88. You charged me \$51.80 for the loan payment, but my actual obligation is \$50.88. Consequently, I deducted \$2.88 for the overpayment and will continue to pay \$434.88 per month, not \$435.00.”

If Dixons wish to risk litigation over such *de minimus* amounts that is their right. After being warned in at least three separate writings over an extended period of time litigation was commenced. (This Court is reminded of the timeless adage of prospective litigants, i.e., “it’s not the money, it’s the principle (involved)”. It appears that Dixons may have taken this approach).

Also, there is no indication that Dixons attempted to enlist other unit owners to their cause, such that a “special meeting” be held to discuss budgetary issues, as permitted under Section 2.1.2. of the Code of Regulations. Again, not a requirement, but an alternative option to litigation.

The time and labor required is also a factor. In debt collection litigation the time involved to collect pennies is much the same as the time involved to collect many dollars. Unlike many attorneys who initially file collection actions, regardless of amount, in a court with law trained judges, counsel for Cliff House initiated this action in the Justice of the Peace Court, where costs are cheaper and pleadings are very basic. Dixons requested a Bill of Particulars, again their right, but requiring additional attorney time to respond. They then chose to appeal the JP ruling in favor of Plaintiff to this Court for *de novo* consideration, effectively starting the process again from the beginning. Consequently, much of the time spent by counsel for Cliff House was a result of procedural rights and options, exercised by Dixons.

Precedent also requires that this Court consider the experience, reputation and ability of the lawyer or lawyers performing the services as well as the fees customarily charged in the locality for similar services. *Id.* Mr. Bilodeau and his colleague, Daniel Losco, Esquire, have both been members of the Delaware Bar, for over twenty (20) years. In appearances before this Court, they have always been very talented legal practitioners. According to submissions made to this court, they are retained by Cliff House in this matter at an hourly rate of \$200.00 for Mr. Bilodeau and \$275.00 for Mr. Losco, the more senior attorney. The vast majority of the time in this matter has been performed by Mr. Bilodeau at the lower rate. The Court finds these rates to be very reasonable in this locality and under these circumstances for two talented, experienced attorneys. Also, there is no indication of an expectation of compensation from any source other than Cliff House.

Another significant factor for this Court's consideration is Dixon's ability to pay. While it could be argued that this factor should only apply to situations between attorneys and their own client, this Court finds it also appropriate to consider here.

It is significant that Dixons have been represented by legal counsel throughout the entirety of this dispute, even at the Justice of the Peace Court level. It is at least unusual, if not very rare, that the Defendant in a debt action for a very small dollar amount be represented, especially in JP Court. Dixons were not represented by current counsel at that level, but by James J. Haley, Esquire. In fact, Mr. Haley was counsel for Dixons at the filing of Notice of appeal in this Court, with current counsel appearing at a later time. Dixons have demonstrated an ability to pay counsel fees throughout the case, at every level.

More significantly, Dixons have shown, by their actions, not only an ability to pay but a willingness to litigate. After Cliff House counsel advised Dixons of their inability to counterclaim in the Court because of the *Mirror Image Rule*, Dixons chose to file an action in the Superior Court seeking the same relief as their prohibited counterclaim in this Court. That action is *Leonard Dixon and Carmella M. Dixon, Plaintiffs, v. Council of the Cliff House Condominium, Defendant*, Case No. 08C-10-286 JOH.<sup>1</sup> Dixons are represented by the same counsel in that action. Again, Dixons have unilaterally chosen a course of action that would necessitate attorney fees for themselves. There can be no doubt as to Dixons ability to pay as well as their willingness to litigate.

Finally, and most unusual of all, is the fact that Dixons originally claimed being charged too much (a de minimus amount) then paid the amount due, then raised the same issue again and eventually claimed that they were charged too little. And all the while, during this bizarre procedural behavior, Dixons exercised legal options that resulted in mounting attorney fees for themselves and Cliff House.

While the Court will not speculate on Dixons reasons or motives for such actions it is clear that Dixons themselves must be responsible for the Cliff House attorney fees. When a party Defendant, in a debt action for a de minimus amount conducts themselves within the litigation in a manner that results in considerable effort on behalf of opposing counsel to properly pursue their claim, Defendant cannot then claim that otherwise justifiable attorney fees are unreasonable because of the de minimus amount in question. To rule otherwise, this Court would be punishing the other 95 unit owners of Cliff House Condominium by having them absorb the attorney fees necessary to collect common area fee assessments from non paying unit owners.

Consequently, based on this extensive analysis, the Court finds Cliff House attorney fees to be reasonable under the totality of the circumstances. The Court hereby awards attorneys fees in favor of Plaintiff Council of Cliff House Condominium and against Defendants Leonard Dixon and Carmella M. Dixon, in the amount of \$17,800.00. The Court also awards late fees to Plaintiff in the amount of \$125.00.

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<sup>1</sup> Dixon's claim for Declaratory Relief was dismissed on October 29, 2009, when Cliff House's Motion for Summary Judgment was granted in Superior Court.

Plaintiff seeks \$257.28 in out of pocket expenses. No itemization of these expenses has been submitted and an award of out of pocket expenses is therefore denied.

Cliff House also seeks 18% post judgment interest from September 1, 2006, the date of the non payment. The Cliff House Code of Regulations § 8.2.6 provides that “. . . no interest shall be calculated on the costs and fees”. Therefore, no award of interest is made.

In summary, the Court enters judgment in favor of Cliff House Condominium, as follows:

Attorneys Fees	\$17,800.00
Late Fees	125.00
JP Court Costs	<u>34.00</u>
Total	\$17,959.00

Plus, Court of Common Pleas Court Costs

**SO ORDERED, this 8th day of December, 2009.**

cc: File  
Civil Clerk



