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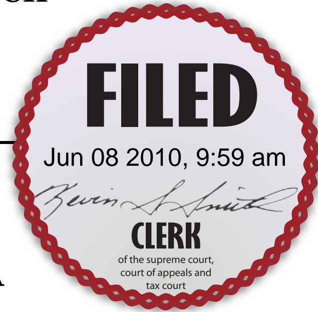

IN THE
COURT OF APPEALS OF INDIANA

JAMES CASHMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 53A01-0907-CV-369
	)	
THE GABLES AT BRIGHTON POINT, HOA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Valeri Haughton, Judge
Cause No. 53C08-0805-SC-02323

JUNE 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant James Cashman appeals the trial court's judgment in favor of Plaintiff-Appellee The Gables at Brighton Point, HOA ("The Gables"). We reverse in part and affirm in part.

ISSUES

Cashman raises three issues for our review, which we restate as:

I. Whether the trial court's award of amounts due and costs in favor of The Gables is clearly erroneous.

II. Whether the trial court's award of attorney fees to The Gables is an abuse of discretion.

III. Whether the trial court's denial of Cashman's claim for costs and attorney fees is erroneous.

FACTS AND PROCEDURAL HISTORY

The Gables is a non-profit homeowners' association organized under Indiana law for the purpose of managing and maintaining real property in Monroe County. Hallmark Rentals & Management, Inc. ("Hallmark") is The Gables' management company.

Cashman has been an owner at The Gables since 2003 and is subject to The Gables' assessments. Pursuant to Section 16(c) of the Declaration of Covenants, Conditions and Restrictions ("CCR"), regular assessments "shall be paid in twelve (12) monthly installments on the first day of each month beginning in January following the

adoption of the budget." (Appellant's App., Tab 5A at 17). Section 16(j) of the CCR provides that a late fee shall be paid for each thirty day period that the installment is late. The Section further provides, "In the event that any costs or expenses, including attorney fees, are incurred by or on behalf of [The Gables] with respect to the recovery or collection of any delinquent Assessment, all such costs and fees shall be due and payable immediately by such delinquent Owner . . . ." (Appellant's App., Tab 5A at 19).

As Cashman made payments on his account, the payments were credited against the accrued balance. Payments were not applied to the current month until the past due invoices were paid; in other words, payments were applied first to the outstanding balance. As the management company, Hallmark sent delinquency notices to homeowners as a courtesy to the owner, but it was not required to do so. Between 2005 and 2008, a number of delinquent notices were sent to Cashman for overdue assessments.

In its original "Notice of Small Claim," filed on May 7, 2008, The Gables asserted amounts due from Cashman of $841.00 for delinquent assessments and late fees. After the filing of the notice, the parties engaged in extended communications, and Cashman made payments on the account. To reflect these payments, The Gables filed an "Amended Notice of Small Claim" on June 9, 2008, which showed a total amount claimed of $89.11 plus costs and attorney fees.

Cashman filed a counterclaim on June 6, 2006, alleging that The Gables had failed to prove the validity of the disputed finance charges and late fees listed in the original notice. His counterclaim also alleged that The Gables violated the Fair Debt Collection

Act. Cashman also named Hallmark as a counterclaim defendant. Cashman filed an amended counterclaim on July 1, 2008, in which he added the law firm of Mallor, Clendening, Grodner, & Bohrer as a defendant.

On January 26, 2008, a hearing was held on the pending issues. The court entered judgment for The Gables on all issues, and it made findings of fact and conclusions of law in support of its judgment. Significant in the resolution of this small claims matter on appeal is the court's finding that "it also perfectly clear that this litigation was sparked in part and fed by a tremendous clash of egos." (Appellant's App., Finding of Fact #12, Tab 2 at 2). The court denied Cashman's motion to correct error. Cashman now appeals.

DISCUSSION AND DECISION

I. RECOVERY OF THE AMOUNT DUE AND COSTS

The trial court found that The Gables' "accounts receivable ledger in its several iterations appears to be quite straightforward," showing that Cashman had an extensive cycle of missed and make-up payments. (Appellant's App., Finding of Fact # 8, Tab 2 at 2). The trial court also found that "a review of the accounts receivable ledger shows reasonably well when and how the late fees/finance charges were calculated." (Appellant's App., Finding of Fact #9, Tab 2 at 2). The trial court concluded from its review of the ledgers that Cashman owed $89.11, court costs, and attorney fees. (Appellant's App., Finding of Fact #16, Tab 2 at 3).

Cashman contends that the trial court's findings are clearly erroneous. He argues that the ledgers clearly show that his post-filing payments established a credit in his account. He also points out that The Gables' witness, Brenda Lewis, admitted that the $89.11 was paid on June 16, 2008, and that Cashman had a credit of $18.83 at the time of the hearing.

On review of a judgment from a small claims action, we will not set aside the findings or judgment unless they are clearly erroneous. *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1067 (Ind. 2006). A finding is clearly erroneous if our review of the evidence leaves use with "a firm conviction that a mistake has been made." *Olympus Properties, LLC v. Plotzker*, 888 N.E.2d 334, 336 (Ind. Ct. App. 2008). We will reverse the judgment "only when there is no evidence supporting the findings or the findings fail to support the judgment." *Harbours Condominium Association, Inc. v. Hudson*, 852 N.E.2d 985, 989 (Ind. Ct. App. 2006). Our review is particularly deferential in small claims actions, where "the trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law." *Olympus,* 888 N.E.2d at 335-36.

Our review of the record in this case discloses that The Gables' witness testified that Cashman paid the outstanding amount before the hearing. We cannot accept The Gables' argument that double payment is due. Indeed, we note that The Gables' argument on this issue is not supported by citation to authority. The trial court's order on this issue is clearly erroneous. See *Indiana Insurance Co. v. Margotte*, 718 N.E.2d 1226,

1230 (Ind. Ct. App. 1999) (holding that once an amount owed is paid, it extinguishes the debt). Thus, on remand, the trial court shall vacate this portion of its judgment.

Cashman also claims that the award of costs is erroneous. He bases his claim on Ind. Code § 34-52-1-2(c), which provides in pertinent part that in actions for money demands on contract, commenced in circuit or superior courts, a defendant may recover costs if the judgment is reduced below $50.00 by proof of payments. In the present case, Section 16(j) of the CCR provides that The Gables shall recover costs and attorney fees from the delinquent homeowner "with respect to the recovery or collection of any delinquent Assessment…." (Appellant's App., Tab 5A at 19). Under the terms of the CCR, the judgment includes the attorney fees, which exceed the amount stated in Ind. Code § 34-52-1-2(c). The court did not err in awarding costs to The Gables.

II. ATTORNEY FEES

The trial court found in regard to Cashman's counterclaim raising the provisions of the Fair Debts Collection Act, it was "persuaded by the facts that [The Gables] actions comported with the letter and spirit of the Act." (Appellant's App., Finding of Fact #11, Tab 2 at 2). The trial court further found, "If the Court accepts, as it does, [that Cashman] owed on his account at the time of filing of the original complaint, the question of attorney fees must be addressed." (Appellant's App., Finding of Fact #13, Tab 2 at 2). The court ultimately found that Cashman owed $1682.00 in attorney fees to The Gables.

Cashman argues that the CCR does not allow the attorney fee award. Each party to an action is responsible for paying his or her own legal fees in the absence of a fee-shifting statutory or contractual provision. *Coffman v. Rohrman*, 811 N.E.2d 868, 873 (Ind. Ct. App. 2004). Where an award of attorney fees is premised on a contractual provision, the award will be limited to the terms expressly provided in the contract. *Burras v. Canal Construction & Design Co.*, 470 N.E.2d 1362, 1370 (Ind. Ct. App. 1984).

As noted above, Section 16(j) of the CCR provides that "[i]n the event that any costs or expenses, including attorney fees, are incurred by or on behalf of [The Gables] with respect to the recovery or collection of any delinquent Assessment, all such costs and fees shall be due and payable immediately by such delinquent Owner . . . ." (Appellant's App., Tab 5A at 19). The aforementioned section refers to costs, expenses, and attorney fees incurred by or on behalf of the Gables in recovering or collecting delinquent assessments. We hold that, to the extent that the attorney fee award encompasses a portion of the defense against the unsuccessful counterclaim, it is warranted by the CCR.

Cashman also argues that the evidence presented to the trial court was insufficient to support the attorney fee award. *Stepp v. Duffy*, 654 N.E.2d 767, 775 (Ind. Ct. App. 1995), *trans. denied*, states that when the "amount of the fee is not inconsequential, there must be objective evidence of the nature of the legal services and the reasonableness of the fee." We understand the wisdom of this general rule, and we hold that the goal of the

rule—the determination of a reasonable attorney fee award—is achieved in this case. The evidence presented to the trial court, which was not objected to by Cashman, shows that the claimed attorney fees were nearly $9,000.00. The trial court, apparently noting the fee customarily charged in the locality for similar services and/or the amount involved and the results obtained, considerations pursuant to Ind. Professional Rule 1.5(a), exercised its expertise to find that a much smaller attorney fee award was appropriate. We cannot say that the trial court abused its discretion in doing so.

III. THE DENIAL OF CASHMAN'S CLAIM FOR COSTS AND ATTORNEY FEES

Cashman claims that he is entitled to costs and attorney fees because (1) he is the prevailing party under Ind. Code § 34-52-1-1[1], and (2) The Gables and its attorneys were involved in "an unreasonable campaign of delay and obfuscation" to increase attorney fees by dragging out the court procedures. First, as we described in our discussion of Issue I, the judgment against Cashman included the attorney fee award; therefore, even though Cashman prevailed on a small portion of his defense, he was not the prevailing party. Second, we will not disturb a factual determination that the alleged plan did not occur. Furthermore, even if a plan to increase attorney fees was perpetrated against Cashman, justice was done when the court refused to award nearly $9,000 in attorney fees.[2]

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[1] Ind. Code § 34-52-1-1 provides that the party recovering judgment shall recover costs, and that part of these costs may be attorney fees.

[2] Cashman claims witness fees pursuant to Ind. Code 33-37-10-3. It is well settled that a party cannot recover witness fees, unless he has been summoned by his opponent. See *Goodwin v. Smith*, 68 Ind. 301, 1879 WL 5668 (1879).

CONCLUSION

We reverse the award of $89.11 and remand with instructions that the award be vacated. We affirm on all other issues.

RILEY, J., and MATHIAS, J., concur.