STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(FILED: November 20, 2014)

BENNIE SISTO, AS THE TRUSTEE OF THE GOAT ISLAND REALTY TRUST	:	
v.	:	**C.A. No. NC-2008-0119**
AMERICA CONDOMINIUM ASSOCIATION, INC. AND THE MEMBERS OF ITS EXECUTIVE BOARD, NATALIE D. VOLPE, MARY C. CONNOLLY, DIANE S. VANDEN DORPEL, EDMOND F. MCKEOWN AND SANDRA M. CONCA	:	

DECISION

CLIFTON, J. Defendants America Condominium Association, Inc. (America Condominium), Natalie D. Volpe, Mary C. Connolly, Diana S. Vanden Dorpel, Edmond F. McKeown, and Sandra M. Conca (collectively Defendants) move for the assessment of appellate attorneys' fees incurred in defending their anti-SLAPP action. G.L. 1956 § 9-33-1, et seq. The matter before this Court is whether there exists proper subject matter jurisdiction to award such fees. [1]

[1] The United States Supreme Court has noted that the term jurisdiction "is a word of many, too many, meanings," Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) (internal citations omitted); see Rumsfeld v. Padilla, 542 U.S. 426, 434 (2004) (noting that "the word 'jurisdiction,' of course, is capable of different interpretations[]"). In using the phrase "jurisdiction," Plaintiff seemingly refers to "subject matter jurisdiction," to wit, this Court's "'power to hear and decide a case[.]'" DeMarco v. Travelers Ins. Co., No. 2012-309-Appeal, 9 (R.I. Nov. 18, 2014) (quoting Narragansett Elec. Co. v. Saccoccio, 43 A.3d 40, 44 (R.I. 2012)).

I

Facts and Travel

The Rhode Island Supreme Court has previously recounted the underlying facts of this case in Sisto v. Am. Condo. Ass'n, Inc., 68 A.3d 603 (R.I. 2013); therefore, this Court undertakes only a minimal review of the facts pertinent to the assessment of appellate attorneys' fees. The instant action involves Plaintiff Bennie Sisto's (Plaintiff or Mr. Sisto) proposal to expand his townhouse, a unit within the Goat Island South Condominium community, on Goat Island in Newport, Rhode Island. On October 19, 2006, Mr. Sisto filed an application with the Coastal Resource Management Council (CRMC) to demolish his existing townhouse and construct a larger unit. In response, Defendants submitted to the CRMC an objection to this application, claiming, inter alia, that Plaintiff did not own the land on which the expanded townhouse was proposed and that the proposed project failed to comply with CRMC setback requirements. Consequently, Mr. Sisto filed suit against Defendants, alleging slander of title and breach of contract. In response, Defendants moved for summary judgment on these claims under Rhode Island's anti-SLAPP statute. This Court granted that motion and, in accordance with the anti-SLAPP statute, awarded to Defendants the mandatory attorneys' fees incurred in making the motion. Mr. Sisto appealed to the Rhode Island Supreme Court, which affirmed this Court's grant of the motion and attorneys' fees. Subsequently, Defendants have petitioned this Court for an assessment of the attorneys' fees incurred in defending judgment on appeal.

Defendants contend that they are entitled to the attorneys' fees incurred in defending the appeal against Mr. Sisto. They assert that the Rhode Island Supreme Court's directive in Karousos v. Pardee, 992 A.2d 263 (R.I. 2010)—that appellate attorneys' fees be awarded to the prevailing party in an anti-SLAPP action—entitles them to recovery. Mr. Sisto contends that

Defendants are not eligible to receive these appellate attorneys' fees, arguing that this Court lacks jurisdiction to assess appellate fees without specific remand. He refers to alternative theories of res judicata and the mandate rule as well as citing Defendants' failure to request the fees from the Rhode Island Supreme Court as a bar to recovery.

II

Analysis

A

Res Judicata

Mr. Sisto contends that the Supreme Court has closed the case in its decision such that further proceedings would be barred by res judicata. Therefore, he asserts, the assessment of appellate attorneys' fees cannot be determined by this Court insofar as that issue has already been decided by the Rhode Island Supreme Court.

The doctrine of res judicata "'makes a prior judgment in a civil action between the same parties conclusive with regard to any issues that were litigated in the prior action, or, that could have been presented and litigated therein.'" Ritter v. Mantissa Inv. Corp., 864 A.2d 601, 605 (R.I. 2005) (quoting ElGabri v. Lekas, 681 A.2d 271, 275 (R.I. 1996)). It is applicable when determining "the scope of the issues to be precluded in the second action . . . [by preventing] the relitigation of 'all or any part of the transaction, or series of connected transactions, out of which the first action arose.'" Id. (quoting Manego v. Orleans Bd. of Trade, 773 F.2d 1, 5 (1st Cir. 1985)) (emphasis added).

Here, the case is not closed—the Rhode Island Supreme Court has not issued a final judgment but has instead remanded part of the case to this Court. Sisto, 68 A.3d at 617 ("The papers may be remanded to the Superior Court."). Furthermore, res judicata is inapplicable here

because the instant motion for the assessment of fees is merely a continuation of the singular ongoing action. Cf. In re Sherman, 565 A.2d 870, 872 (R.I. 1989) (holding that res judicata serves as an "absolute bar to a second cause of action") (internal citations omitted) (emphasis added). This is not a matter of Defendants filing a new suit with the same recycled claims; they are only requesting attorneys' fees after defending judgment. This issue of an appellate fee award has not been decided. Rather, such an assessment of fees comports with the Rhode Island Supreme Court's affirmation of this Court's ruling on the anti-SLAPP issue. Sisto, 68 A.3d at 617 (upholding award of attorneys' fees for defending SLAPP suit at trial court level).

B

Mandate Rule

Additionally, Mr. Sisto argues that the mandate rule bars assessment of appellate attorneys' fees. He maintains that the Rhode Island Supreme Court's directive provided no authority for this Court to assess such fees.

The mandate rule "provides that a lower court on remand must implement both the letter and spirit of the [appellate court's] mandate, and may not disregard the explicit directives of that court." RICO Corp. v. Town of Exeter, 836 A.2d 212, 218 (R.I. 2003) (internal citations omitted) (emphasis in original). This Court "'cannot vary [a mandate of the Rhode Island Supreme Court], or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.'" Ferrell v. Wall, 971 A.2d 615, 624 (R.I. 2009) (quoting Pleasant Mgmt., LLC v. Carrasco, 960 A.2d 216, 223 (R.I. 2008)).

Here, there has been no explicit directive by the Rhode Island Supreme Court as to the assessment of appellate attorneys' fees. Rather, the Court simply "affirm[ed] the judgment of the

Superior Court . . . with respect to the anti-SLAPP issue." Sisto, 68 A.3d at 617. In a similar situation involving such silence, the United States Supreme Court held in Perkins v. Standard Oil Co. of Cal., 399 U.S. 222, 223 (1970) that

> "[t]he Court of Appeals was . . . in error in interpreting our mandate as precluding the award of such [attorneys'] fees for [appellate] services performed in connection with the litigation of this Court. Our failure to make explicit mention in the mandate of attorney's fees simply left the matter open for consideration by the District Court[.]"

In Karousos, the Court held that the "anti-SLAPP statute entitles [a prevailing party] to reasonable attorneys' fees for the defense of the judgment." 992 A.2d at 273; see also Global Waste Recycling, Inc. v. Mallette, 762 A.2d 1208, 1214 (R.I. 2000) ("award[ing] an appropriate fee to [prevailing party's] counsel for his appellate representation" in anti-SLAPP case). The Rhode Island Supreme Court's silence on the award of appellate attorneys' fees here does not constitute denial. See Souza v. Southworth, 564 F.2d 609, 614 (1st Cir. 1977) ("Having evaluated the appellate work of the attorneys, the [trial] court properly may assign a price tag to it."); Astro-Med, Inc. v. Plant, No. CA 06-553 ML, 2010 WL 537101, at *2 (D.R.I. 2010) (holding that "the fact that the Court of Appeals did not award [appellate] attorneys' fees . . . does not preclude this Court from doing so"). As such, the mandate rule does not bar this Court's assessment of appellate attorneys' fees.

C

Failure to Request Attorneys' Fees at Appellate Level

Mr. Sisto further contends that Defendants' failure to request the attorneys' fees incurred in defending the judgment prevents this Court from assessing such fees now. He distinguishes the case at hand from Karousos on the grounds that, in that case, the prevailing party specifically "ask[ed] th[e] [Rhode Island Supreme] Court for attorneys' fees and costs in connection with

th[e] appeal." Karousos, 992 A.2d at 273. He claims that in the absence of such a request, this Court is without jurisdiction to award fees.

The Rhode Island Supreme Court has emphasized that "'the right to petition governmental bodies for the redress of grievances is among the most precious of the liberties safeguarded by the Bill of Rights.'" Hometown Props., Inc. v. Fleming, 680 A.2d 56, 62 (R.I. 1996) (quoting Cove Rd. Dev. v. W. Cranston Indus. Park Assocs., 674 A.2d 1234, 1236 (R.I. 1996)). "By enacting the anti-SLAPP statute, the General Assembly intended to secure the vital role of open discourse on matters of public importance, and [this Court] shall construe the statute in the manner most consistent with that intention." Id. In order to give full effect to legislative intent, this Court remains mindful of the General Assembly's findings:

> "The legislature finds and declares that full participation by persons and organizations and robust discussion of issues of public concern before the legislative, judicial, and administrative bodies and in other public fora are essential to the democratic process, that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances; that such litigation is disfavored and should be resolved quickly with minimum cost to citizens who have participated in matters of public concern." Sec. 9-33-1.

Rhode Island has typically followed "staunch adherence to the 'American rule[,]' [which] requires each litigant to pay its own attorney's fees absent statutory authority or contractual liability." Moore v. Ballard, 914 A.2d 487, 489 (R.I. 2007). However, in the anti-SLAPP statute, the General Assembly has carved out a statutory exception to this general rule—explicitly stating that "the court shall award the prevailing costs and reasonable attorney's fees, including those incurred for the motion and any related discovery matters." Sec. 9-33-2(d) (emphasis added). As such, "an award of costs and reasonable attorneys' fees [i]s mandatory." Alves v. Hometown Newspapers, Inc., 857 A.2d 743, 757 (R.I. 2004); see also City of

Providence v. Estate of Tarro, 973 A.2d 597, 605 (R.I. 2009) (holding "that the use of the word 'shall' denotes 'something mandatory'") (internal citations omitted). The Court has also held that the assessment of fees under the anti-SLAPP statute includes "reasonable attorneys' fees for the defense of the judgment" on appeal. Karousos, 992 A.2d at 273. The discretion to determine a reasonable amount for attorneys' fees is vested in the Superior Court. Id.

There is no state procedural or common law rule stating that a prevailing party must explicitly request appellate attorneys' fees from the Rhode Island Supreme Court. In the absence of any rule to this effect, this Court often turns to federal precedent as persuasive authority. There is a split among the circuits with respect to whether a district court may award appellate attorneys' fees in the absence of a request to the circuit court. Compare Little Rock Sch. Dist. v. State of Ark., 127 F.3d 693, 697 (8th Cir. 1997) (holding that "despite [its] local rule [requiring the circuit court to decide appellate fees either on its own motion or at the request of the prevailing party], the district courts retain jurisdiction to decide attorney's fees issues that [the circuit] ha[s] not . . . undertaken to decide[]") with Hoyt v. Robson Cos., 11 F.3d 983, 985 (10th Cir. 1993) (holding that "in order for [the circuit] to properly exercise [its] discretion, an application for appeal-related attorneys' fees must first be made to" the circuit court).

Nevertheless, this Court is persuaded that—in the absence of any rule requiring a prevailing party to solicit appellate attorneys' fees solely from the Rhode Island Supreme Court—the divination of such a prerequisite would run counter to the spirit of the General Assembly's mandate in the anti-SLAPP statute to award attorneys' fees. See Sisto, 68 A.3d at 611 (holding that the Court's "ultimate goal is to give effect to that purpose which our Legislature intended in crafting the statutory language") (internal citations omitted). As discussed earlier, the award of attorneys' fees in this context is mandatory, Alves, 857 A.2d at

757, and extends to fees incurred defending a judgment. Karousos, 992 A.2d at 273. The General Assembly has specifically carved out this fee-shifting provision as an exception to the American Rule in an effort to "secure the vital role of open discourse on matters of public importance[.]" Hometown Props., 680 A.2d at 62. The Rhode Island Supreme Court has repeatedly held that the Superior Court is one of general equitable jurisdiction and, as such, this Court "has the right and duty in the first instance to pass on its own jurisdiction." Poirier v. Quinn, 83 R.I. 98, 101, 113 A.2d 642, 644 (1955). Thus, this Court "rel[ies] upon [its] inherent powers in equity to look to the substance rather than the form of the right asserted." Rymanowski v. Rymanowski, 105 R.I. 89, 100, 249 A.2d 407, 413 (1969).

It would be "mere procedural contortion" to "allow services necessary to [uphold the judgment] go uncompensated" where there has been no directive requiring a request for appellate fees be made at the appellate level. Little Rock, 127 F.3d at 697. Such a jurisdictional prerequisite would be "at best, a pointless exercise; at worst, a hidden trap to ensnare the unwary and deny them what [the General Assembly] has said they should receive." Flitton v. Primary Residential Mortg., Inc., 614 F.3d 1173, 1184 (10th Cir. 2010) (McKay, J. concurring in part and dissenting in part). In the absence of a rule to the contrary and finding an award of fees effectuates the legislature's intent to encourage the exercise of free speech through anti-SLAPP litigation, this Court finds that it may properly award appellate attorneys' fees.

III

Conclusion

Rhode Island's anti-SLAPP law requires that this Court award reasonable attorneys' fees to a prevailing party, including those fees incurred in defending a favorable judgment. There is no state procedural or common law rule requiring that a request for such fees be made to the

appellate court. As such, this Court will consider the reasonableness of the fees requested upon further hearing before this Court. Counsel for Defendants shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Bennie Sisto v. America Condominium Association, Inc., et al.**
CASE NO:	**NC-2008-0119**
COURT:	**Newport County Superior Court**
DATE DECISION FILED:	**November 20, 2014**
JUSTICE/MAGISTRATE:	**Clifton, J.**
ATTORNEYS:	
For Plaintiff:	**Robert D. Wieck, Esq.**
For Defendant:	**Robert C. Shindell, Esq.**