COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Nos. 00-2089
00-2796

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

NO. 00-2089

IN THE MATTER OF THE ATTORNEYS FEES IN DAVID PAUSTENBACH, ET AL. V. JOHN VISHNEVSKY:

JOHN VISHNEVSKY, JULIE BENOIT, STEPHEN P. KOTECKI, THOMAS RIELLY, MARGARET VISHNEVSKY, JOAN JENSTEAD, NATIONAL DEVELOPMENT AND INVESTMENT, INC., NATIONAL FINANCIAL SERVICES, INC., SEVENTY-EIGHT IV INVESTMENTS, INC., SEVENTY-NINE I INVESTMENTS, INC., SEVENTY-NINE III INVESTMENTS, INC., SEVENTY-NINE II INVESTMENTS, INC., EIGHTY-ONE I INVESTMENTS, INC., ALHAMBRA APARTMENTS, LLC, THE WILLOWS APARTMENTS, LLC, NAKOMA HEIGHTS APARTMENTS, LLC, SUNRISE HEIGHTS APARTMENTS, LLC, HOLIDAY GARDENS APARTMENTS, LLC, EC CORP., NATIONAL REAL ESTATE MANAGEMENT, INC., EQUI CORP., THE JOHN VISHNEVSKY COMPANY, HOLIDAY REALTY OFFICE BUILDING, LLC, WOLF & COMPANY AND DOES 1-50,

APPELLANTS,

V.

DEMPSEY, MAGNUSEN, WILLIAMSON & LAMPE, LLP, HAWKINS & PARNELL, LLP, ROBERT R. ELARBEE AND VINCENT T. GRESHAM,

RESPONDENTS.

NO. 00-2796

DAVID PAUSTENBACH, WILLIAM SAHM, RICHARD HANKO, BOB NELSON, DARWIN CONE, KAREN JENSEN, BERNARD DUKE, M.D., DEXTER HAMILTON, JULIUS LAMBERT, AND GLEN EHNERT,

PLAINTIFFS-RESPONDENTS,

V.

JOHN VISHNEVSKY, JULIE BENOIT, STEPHEN P. KOTECKI, THOMAS RIELLY, MARGARET VISHNEVSKY, JOAN JENSTEAD, NATIONAL DEVELOPMENT AND INVESTMENT, INC., NATIONAL FINANCIAL SERVICES, INC., SEVENTY-EIGHT IV INVESTMENTS, INC., SEVENTY-NINE I INVESTMENTS, INC., SEVENTY-NINE III INVESTMENTS, INC., SEVENTY-NINE II INVESTMENTS, INC., EIGHTY-ONE I INVESTMENTS, INC., ALHAMBRA APARTMENTS, LLC, THE WILLOWS APARTMENTS, LLC, NAKOMA HEIGHTS APARTMENTS, LLC, SUNRISE HEIGHTS APARTMENTS, LLC, HOLIDAY GARDENS APARTMENTS, LLC, EC CORP., NATIONAL REAL ESTATE MANAGEMENT, INC., EQUI CORP., THE JOHN VISHNEVSKY COMPANY, HOLIDAY REALTY OFFICE BUILDING, LLC, WOLF & COMPANY AND DOES 1-50,

DEFENDANTS-APPELLANTS,

NATIONAL REAL ESTATE INVESTMENTS 78-II LIMITED PARTNERSHIP, NATIONAL REAL ESTATE INVESTMENTS 78-IV LIMITED PARTNERSHIP, NATIONAL REAL ESTATE INVESTMENTS 79-I LIMITED PARTNERSHIP, NATIONAL REAL ESTATE INVESTMENTS 79-II LIMITED PARTNERSHIP, NATIONAL REAL ESTATE INVESTMENTS 79-III LIMITED PARTNERSHIP, NATIONAL REAL ESTATE INVESTMENTS 81-I LIMITED PARTNERSHIP, NATIONAL REAL ESTATE INVESTMENTS 82-I LIMITED PARTNERSHIP, NATIONAL REAL ESTATE INVESTMENTS 16 LIMITED PARTNERSHIP, NATIONAL REAL ESTATE INVESTMENTS 17 LIMITED PARTNERSHIP, NATIONAL

SELECT PLACEMENT IV LIMITED PARTNERSHIP, NATIONAL SELECT PLACEMENT XIV LIMITED PARTNERSHIP, NATIONAL SELECT PLACEMENT XVII LIMITED PARTNERSHIP, NATIONAL SELECT PLACEMENT XX LIMITED PARTNERSHIP, AND NATIONAL SELECT PLACEMENT XVII MORTGAGE PARTNERS LIMITED PARTNERSHIP,

NOMINAL-DEFENDANTS.

APPEALS from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Judgment affirmed; order reversed.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Fourteen real estate partnerships and their six individual general partners (hereafter referred to as Vishnevsky) appeal from a judgment declaring how attorney fees will be determined in this class action and from an order imposing a $437,000 sanction for delay in implementing the settlement agreement. We conclude that the circuit court properly exercised its discretion in selecting the percentage of a common fund method for computing attorney fees and affirm the judgment. The order imposing the sanction is reversed because under its terms, the settlement agreement was not yet operative during the period for which the sanction was imposed.

¶2 David Paustenbach and others commenced this class action representing over 3,000 limited partners in the real estate partnerships. The partnerships were formed for the purpose of developing and marketing multi-family residential complexes. Property management and other professional

services were provided to the partnerships by entities related to the general partners. The action sought the appointment of a receiver, dissolution of the partnerships, liquidation of the assets, and recovery of profits diverted by mismanagement and the charging of excessive fees and expenses. Ultimately, the parties reached a settlement that required the liquidation of the real estate holdings by a court-appointed "Partnership Representative," and binding arbitration of other claims.

¶3 At a hearing held April 27, 2000, the circuit court addressed the application for an award of attorney fees to class counsel. Attorney fees were ordered in the amount equal to thirty-three percent of the liquidation proceeds less the value the properties had on the "secondary market" before the lawsuit. The court's oral ruling was reduced to writing in the judgment entered June 20, 2000, from which Vishnevsky appeals.

¶4 At the outset, we reject Vishnevsky's suggestion that our standard of review is de novo because the issue involves attorney fees and documentary evidence.[1] In ***Retired Teachers Ass'n v. Employe Trust Funds Bd.***, 207 Wis. 2d 1, 38, 558 N.W.2d 83 (1997), the supreme court recognized the circuit court's discretionary authority over attorney fees in a class action. The court held: "In calculating reasonable attorney fees, the circuit court shall have discretion to base its award on either a percentage of the fund recovered or the lodestar method of a reasonable hourly rate multiplied by a reasonable number of hours." ***Id.*** Our review is limited to whether the circuit court erroneously exercised its discretion.

[1] We also reject Paustenbach's argument that Vishnevsky waived any objection to the method of determining attorney fees. Vishnevsky filed a timely objection before the hearing and argued against class counsel's proposed method at the hearing.

¶5 To award fees under the common fund approach, three factors should be present: "those benefiting from the litigation should be small in number and easily identifiable;" "the benefits should be traceable with some accuracy;" and the attorney fees should "be capable of being 'shifted with some exactitude to those benefiting.'" ***Id.*** at 37 (quoted source omitted). The court must also take into consideration:

> the time and labor required, the novelty and difficulty of the question presented by the case, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorneys due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, any time limitation imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation and ability of the attorney, the "undesirability" of the case, the nature and length of the professional relationship with the client, and awards in similar cases.

Id. at 39 (quoted source omitted).

¶6 Vishnevsky does not specifically argue that the circuit court failed to consider these factors. Rather, he argues that the circuit court failed to act as a fiduciary for the class by adopting a method of calculation that results in a windfall to class counsel.[2] We reject the notion that the circuit court held any fiduciary responsibility beyond the duty to properly exercise its discretion and determine a reasonable fee.

¶7 The record here belies Vishnevsky's claim that the circuit court's decision was "based on nothing." The court found that the settlement bestowed

[2] Based on a potential selling price of $80 to $90 million and class counsel's estimated $13.6 million pre-existing secondary market value, Vishnevsky suggests that attorney fees are likely to be $8.5 million, resulting in a compensation rate of $2,800 per hour. This estimation does not account for hours devoted by class counsel after the hearing and in monitoring the sale process.

substantial economic benefit on class members by permitting recovery of equity interests in the partnerships that may have been lost through mismanagement and Vishnevsky's continual refusal to liquidate the partnerships. It noted that without the settlement, the class claims would result in lengthy and complex litigation, taking years to resolve. Moreover, the court found that if the lodestar method for determining attorney fees was utilized, it would be a "judicial nightmare" to apportion class counsel's time between fourteen different partnerships.[3] The court believed that the lodestar method of determining attorney fees would create protracted litigation. The court observed that class counsel would continue to monitor the sale process over the next several years and would not be separately compensated for that work. The reduction of the gross sale proceeds by the pre-existing secondary market value before applying the attorney fees percentage was determined to be a conservative approach tailored to the benefits obtained by class counsel. While Vishnevsky challenges the proof of the secondary market value, the circuit court found the expert valuation credible, particularly in the absence of any countervailing evidence from Vishnevsky.[4] In light of Vishnevsky's history of engaging in protracted litigation to avoid liquidation, the court found the case to be very undesirable and its acceptance on a contingency basis reasonable. It further noted that class counsel was restricted in the ability to take on other cases

[3] Based on this finding, we reject Vishnevsky's argument that the lodestar approach offers certainty and accountability whereas the common fund approach does not.

[4] We do not view the circuit court's treatment of the secondary market value as improperly shifting the burden of proof of value to Vishnevsky. Vishnevsky was given the opportunity to present the court with evidence that Paustenbach underestimated the secondary market value. Moreover, the circuit court has taken under advisement the secondary market value until the sale of all properties is completed.

while this litigation was pending. The circuit court's decision reflects consideration of the appropriate factors and was a proper exercise of discretion.

¶8 Vishnevsky argues that the common fund approach is not appropriate because the fund out of which the payment of attorney fees is made is not "new" money, but is merely money to which the class members are entitled as a return on their investment. Vishnevsky's attempt to redefine what constitutes a common fund fails. The source of the fund must not be independent of the original entitlement. "Wisconsin law recognizes that parties to an action that either creates or *preserves a fund* because of their efforts are entitled to reimbursement of their attorneys fees from the *fund protected* or created." ***Milwaukee Police Ass'n v. City of Milwaukee***, 222 Wis. 2d 259, 269, 588 N.W.2d 636 (Ct. App. 1998) (emphasis added).

¶9 Finally, Vishnevsky challenges the circuit court's selection of the percentage of a common fund approach as creating an excessive windfall in favor of class counsel. Even if we considered the award potentially excessive, the circuit court properly exercised its discretion and we may not substitute our judgment. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991).

¶10 The circuit court's judgment provided that the Partnership Representative would assume responsibilities for the sale of the partnership properties upon the "effective date" of the settlement stipulation. Paustenbach sought to implement the settlement agreement immediately after the circuit court's oral ruling approving the settlement at the conclusion of the April 27, 2000 hearing. Vishnevsky did not agree to the assumption of duties by the Partnership Representative. On July 13, 2000, Paustenbach filed a motion to compel

enforcement of the settlement agreement and for sanctions because the Partnership Representative had not been allowed to assume his duties and no effort had been made to start the arbitration process. The circuit court expressed its view that it expected the Partnership Representative to begin work on April 28, 2000 and that any position taken to the contrary was indefensible. It held that "there is no justification in the law to say that this settlement agreement should not have been given its full force and effect in both the spirit and … letter of the agreement on April 28." To sanction the bad faith conduct, the court imposed a penalty of $420,000 against Vishnevsky, the equivalent of $5,000 per day for the eighty-four day delay in putting the Partnership Representative to work.[5] Also, a $10,000 per day prospective sanction if the Partnership Representative was not at work "as soon as possible," and $17,000 in attorney fees related to the motion for sanctions were ordered. Vishnevsky sought reconsideration of the sanction on the ground that the settlement agreement did not become effective until the expiration of appeal rights and that appeal rights were not triggered until entry of the judgment on June 20, 2000.[6] The circuit court denied the motion for reconsideration and Vishnevsky appeals the sanction order.

¶11 We do not find it necessary, as Vishnevsky urges, to characterize the sanction order as either a finding of civil or criminal contempt or a violation of a court or stipulated order. Circuit courts are charged with authority to monitor their cases to insure the orderly administration of justice. To that end, WIS. STAT.

[5] The court ruled on July 21, 2000.

[6] Vishnevsky's position was that the effective date of the settlement was no earlier than August 4, 2000.

§ 805.03 (1999-2000),[7] grants the circuit court discretion to make such orders that are just to promote the administration of justice. ***Anderson v. Circuit Court for Milwaukee County***, 219 Wis. 2d 1, 9, 578 N.W.2d 633 (1998). This necessarily includes the determination of appropriate sanctions for a party's bad faith in failing to comply with a settlement agreement. Our standard of review is whether the circuit court erroneously exercised its discretion. ***Id.*** "A discretionary decision will not be disturbed if a circuit court has examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.***

¶12 We conclude that the circuit court's sanction was based on an erroneous view of the effective date of the settlement stipulation. By its terms, the effective date of the stipulation was conditioned on the following events: "(a) The Court has entered the Preliminary Approval Order, as required, above; (b) the Court has entered the Judgment; and (c) the Judgment has become Final." The stipulation defined the term "final" as: "(i) The date of final affirmance on an appeal from the Judgment, the expiration of the time for a petition for a writ of certiorari to review the Judgment and, if certiorari be granted, the date of final affirmance of the Judgment following review pursuant to that grant; or (ii) the date of final dismissal of an appeal from the judgment or the final dismissal of any proceeding on certiorari to review the Judgment; or (iii) if no appeal is filed, the expiration date of the time for filing or noticing of any appeal from the Court's Judgment approving the Stipulation, i.e., thirty (30) days after entry of the Judgment or such longer time as allowed by extension."

[7] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶13 The stipulation utilized terms of art with respect to the finality of judgments and the existence or expiration of appeal rights. An oral ruling must be reduced to writing for appellate jurisdiction to exist. ***Ramsthal Adver. Agency v. Energy Miser, Inc.***, 90 Wis. 2d 74, 75, 279 N.W.2d 491 (Ct. App. 1979). Consequently, the earliest possible effective date of the stipulation was forty-five or ninety days after entry of the judgment on June 20, 2000, if no appeal was filed.[8] Paustenbach's request for enforcement at the hearing on July 21, 2000, predated the earliest possible effective date of the settlement. There was no basis to sanction Vishnevsky for the failure to act when there was not yet an obligation to do so.

¶14 We recognize that the circuit court believed that the Partnership Representative would go to work the very next day after entry of the oral ruling approving the settlement. However, that belief, even if fostered by the parties' in-court benevolence toward one another on that day, cannot change the written word in the settlement stipulation as adopted by the court's judgment. The sanction was the result of an erroneous exercise of discretion and we reverse the order imposing it.

By the Court.—Judgment affirmed; order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[8] The time for appeal is forty-five days if a timely written notice of entry of judgment is given and ninety days in the absence of notice of entry. WIS. STAT. § 808.04(1).