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MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR 13 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | | |
|--------------------------------------|---|----------------------------|
| LEVERAGED LAND COMPANY, |) | 2 CA-CV 2011-0160 |
| L.L.C., an Arizona limited liability |) | DEPARTMENT A |
| company; NORMAN MONTGOMERY |) | |
| and CHERYL MONTGOMERY, husband |) | <u>MEMORANDUM DECISION</u> |
| and wife, |) | Not for Publication |
| |) | Rule 28, Rules of Civil |
| Plaintiffs/Appellants, |) | Appellate Procedure |
| |) | |
| v. |) | |
| |) | |
| MICHAEL W. HODGES and DAVID H. |) | |
| CAIN, |) | |
| |) | |
| Defendants/Appellees. |) | |

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. C200500270

Honorable Robert Carter Olson, Judge

AFFIRMED

Fidelity National Law Group

By Patrick J. Davis and Kimberly A. Lane

Phoenix
Attorneys for Plaintiffs/Appellants

Barry Becker, P.C.

By Barry Becker

Phoenix
Attorney for Defendants/Appellees

H O W A R D, Chief Judge.

¶1 Appellants Leveraged Land Company, L.L.C., and Norman and Cheryl Montgomery (collectively “LLC”) appeal from the trial court’s grant of attorney fees and costs in their favor and against appellees Michael Hodges and David Cain (collectively “Hodges”). In this fourth appeal arising from a tax lien foreclosure and redemption, LLC contends the court abused its discretion by awarding an arbitrarily low amount of attorney fees. Because we cannot conclude the court erred, we affirm.

Factual and Procedural Background

¶2 The relevant factual and procedural background is undisputed. In May 2005, LLC served Hodges by publication in a tax lien redemption foreclosure. A default judgment was entered in LLC’s favor in June 2005. *Leveraged Land Co. v. Hodges (Hodges I)*, No. 2 CA-CV 2006-0210, ¶ 2 (memorandum decision filed Aug. 8, 2007). In November 2005, Hodges filed motions to set aside the default judgment and for a new trial, which the trial court denied. *Id.* ¶ 3. Hodges appealed and we affirmed the denial of his motion to set aside the default judgment but reversed the denial of his motion for a new trial. *Id.* ¶¶ 9, 19. Hodges subsequently redeemed and the trial court granted Hodges partial summary judgment. *Leveraged Land Co. v. Hodges (Hodges II)*, No. 2 CA-CV 2009-0057, ¶¶ 4, 7 (memorandum decision filed Sept. 24, 2009). LLC appealed and we affirmed. *Id.* ¶ 1.

¶3 Concurrent with *Hodges II*, LLC filed a motion under A.R.S. § 42-18206, requesting \$153,182 in attorney fees and \$1,610.70 in costs. The trial court awarded LLC attorney fees in the amount of \$1,500. LLC appealed and we reversed, holding that LLC was entitled to reasonable attorney fees incurred in contesting the redemption.

Leveraged Land Co. v. Hodges (Hodges III), 224 Ariz. 442, ¶¶ 25, 29-30, 232 P.3d 756, 763-65 (App. 2010). The Arizona Supreme Court vacated that decision and held § 42-18206 only permits reasonable costs and attorney fees incurred before the lien was redeemed and a certificate of redemption issued. *Leveraged Land Co. v. Hodges (Hodges IV)*, 226 Ariz. 382, ¶¶ 13-14, 249 P.3d 341, 345 (2011). It remanded the case to the trial court to determine how much of LLC’s costs and attorney fees were reasonable. *Id.* ¶¶ 13-14. On remand, the trial court awarded LLC attorney fees of \$2,880 and costs of \$191. This appeal followed.

Discussion

¶4 LLC argues the trial court abused its discretion by awarding \$2,880 in attorney fees out of a requested \$106,972.50, contending the award was arbitrary and without reasonable basis. We review the reasonableness of a court’s award of attorney fees under § 42-18206 for an abuse of discretion. *See Hodges IV*, 226 Ariz. 382, ¶ 13, 249 P.3d at 345. When we review a decision to which we must show deference, “we will not second-guess or substitute our judgment for that of the trial court.” *Hilgeman v. Am. Mortg. Sec., Inc.*, 196 Ariz. 215, ¶ 7, 994 P.2d 1030, 1033 (App. 2000), *quoting Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 188, 836 P.2d 398, 401 (App. 1992). Instead, we will determine whether the court’s exercise of discretion was “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Tilley v. Delci*, 220 Ariz. 233, ¶ 16, 204 P.3d 1082, 1087 (App. 2009).

¶5 Section 42-18206 permits the purchaser of a tax lien to recover costs incurred, “including reasonable attorney fees to be determined by the court” when a

person who has been served by publication redeems property pursuant to A.R.S. § 12-1191. In determining that § 42-18206 permits the purchaser recover fees incurred before a lien is redeemed, our supreme court held that although the legislature intended to “minimize the risks” of purchasing tax liens, it did not intend to “subsidize unlimited litigation to contest redemption.” *Hodges IV*, 226 Ariz. 382, ¶¶ 10, 13, 249 P.3d at 344-45. The court stated, “[W]e leave it to the sound discretion of the trial court to determine how much of the plaintiff’s costs and fees were reasonable.” *Id.* ¶ 13.

¶6 After briefing and oral argument, the trial court found Hodges tendered redemption in November 2005 and provided the controlling authority for the relief, whereas LLC “eventually lost every material argument.” It concluded that LLC had incurred \$2,880 in attorney fees and \$191 in costs “as a result of the redemption” and that the remaining fees and costs incurred were unreasonable.

¶7 On appeal, LLC has not provided transcripts from any hearings following our supreme court’s remand of the case to the trial court, including the August 11, 2011 oral argument on the application for costs and attorney fees. The appellant has the burden of ensuring all transcripts have been included in the record on appeal. *See Blair v. Burgener*, 226 Ariz. 213, ¶ 9, 245 P.3d 898, 902 (App. 2010). When no transcript is provided, we assume the record supports the trial court’s conclusions. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶8 Additionally, the available record supports the trial court’s finding that Hodges’s first filing in this case indicated his willingness to pay the taxes owed and relied on *Southwest Metals Co. v. Snedaker*, 59 Ariz. 374, 129 P.2d 314 (1942). Both

Hodges I and *Hodges II* were decided in Hodges’s favor based on *Southwest Metals*. *Hodges I*, No. 2 CA-CV 2006-0210, ¶¶ 16-19; *Hodges II*, No. 2 CA-CV 2009-0057, ¶¶ 13-14. In *Hodges IV* our supreme court held that LLC was not entitled to recover attorney fees incurred after the certificate of redemption issued. 226 Ariz. 382, ¶ 1, 249 P.3d at 343. Thus, the record supports the trial court’s findings which can be verified. And without the transcript from the hearing, we cannot conclude that the court’s determination is an abuse of discretion. Instead, we will presume the record supports the court’s conclusion that LLC is entitled to reasonable attorney fees of \$2,880 and costs of \$191. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767.

¶9 LLC further contends Hodges “did not dispute, or present evidence contesting, the reasonableness” but instead “mere[ly] challenge[d]” whether any fees should be awarded and made vague objections as to certain fees. However, because we lack the transcript from the oral argument on awarding fees, we presume the trial court correctly considered any arguments presented. *See id.*

¶10 LLC also argues it “is entitled to all of [its] fees” because none of its arguments were found to be frivolous. It relies on a Minnesota case where the court awarded attorney fees when a claim was “not frivolous, unreasonable, without foundation, or in bad faith” pursuant to a relevant statute. *Doctor’s Med. Clinic v. City of Jackson*, 581 N.W.2d 30, 31 (Minn. 1998). However, § 42-18206 does not award non-frivolous attorney fees, but rather reasonable attorney fees as determined by the trial court. The Minnesota case is inapposite.

Conclusion

¶11 For the foregoing reasons, we affirm the trial court’s judgment.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge