

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-001053-MR

ATRIUM AT STONYBROOK, LLC,  
F/K/A ATRIUM AT STONYBROOK, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MITCHELL PERRY, JUDGE  
ACTION NO. 11-CI-005045

ATRIUM AT STONYBROOK, 1B, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, DIXON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Atrium at Stonybrook, LLC, f/k/a Atrium at Stonybrook, Inc. (hereinafter referred to as “Developer”) appeals from the May 15, 2012, order of the Jefferson Circuit Court which granted summary judgment in favor of Atrium at Stonybrook 1B, Inc., successor to the Council of Co-Owners (hereinafter

referred to as “Atrium 1B”), in the amount of \$33,221.77 plus attorney fees and costs. For the following reasons, we affirm.

This case is one for debt collection. Atrium 1B is the condominium association for the development known as Atrium at Stonybrook, which Developer built. On August 1, 2011, Atrium 1B filed a complaint against Developer to collect unpaid monthly condominium association fees on Units 102 and 202, which Developer owns. Specifically, Atrium 1B sought to recover \$12,235.71, as of February 23, 2010, on Unit 102 for assessments, late fees and collection costs, plus monthly assessments and late fees continuing to accrue; \$18,190.83, as of June 22, 2010, on Unit 202 for assessments, late fees and collection costs, plus monthly assessments and late fees continuing to accrue; \$2,795.23 for Developer’s share of insurance and clubhouse expenses, plus maintenance fees and late fees continuing to accrue; and interest and reasonable attorney fees and costs incurred in this action.

On September 28, 2011, outside the twenty-day time period for timely filing an answer, *see* CR<sup>1</sup> 12.01, Developer filed an answer generally denying the allegations. On November 14, 2011, Atrium 1B filed a motion for summary judgment, attaching to its motion a copy of the account ledger for Atrium 1B, as attested to by the notarized affidavit of its property manager; a copy of the Jefferson County PVA for Units 102 and 202; and a copy of the governing documents of Atrium 1B, which included the Master Deed and lease agreement.

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<sup>1</sup> Kentucky Rules of Civil Procedure.

On November 22, 2011, Developer filed a motion opposing summary judgment, disputing the sums reflected in the account ledger and stating a desire to depose the property manager to determine how the sums were calculated. In addition, Developer asked the court to consolidate this action with an action Developer had pending against Atrium 1B in Jefferson Circuit Court, Division Thirteen, to recoup unpaid fees for the maintenance of common areas at Atrium at Stonybrook, including the clubhouse and pool. *Atrium at Stonybrook, LLC v. Atrium at Stonybrook 1B, Inc.*, No. 10-CI-07127.

On March 20, 2012, the circuit court held a hearing, during which the parties acknowledged that Developer's pending action involved the same parties, but different issues, and that Developer was represented by another attorney in that action. The parties agreed that the issues in Developer's pending case were convoluted and the case had been going on for a few years, with several different attorneys. The circuit court found that the issue at bar was straightforward and while offset might be an issue if the prior action determines Atrium 1B owes Developer money, the present issue is separate and distinct and capable of immediate resolution. The court held that it lacked authority to consolidate this case with another case pending in another division, absent agreement by the parties.

With respect to Atrium 1B's motion for summary judgment, the court found that Developer had not contested any issues of fact regarding the liquidated amount of debt Atrium 1B seeks to recover. Upon Developer's request, the court

granted Developer leave of court to file an affidavit in support of its opposition to summary judgment, and to consult with counsel in the other action concerning the possibility of consolidation. Developer was given until April 27, 2012, a little over a month from the date of the hearing, to file an affidavit. The court stated that upon receiving Developer's affidavit, it would take Atrium 1B's motion for summary judgment under advisement.

Developer failed to file an affidavit or present any evidence showing the existence of an issue of fact. On May 7, 2012, Atrium 1B submitted the case for final adjudication. On May 15, 2012, the court entered an order granting summary judgment in favor of Atrium 1B. Developer now appeals, claiming error in the court's decision not to consolidate, its decision to grant Atrium 1B summary judgment, and its award of attorney fees and legal costs.<sup>2</sup>

First, with respect to consolidation of actions, the procedural decision to consolidate lies within the circuit court's discretion under CR 42.01, which permits consolidation of actions having common questions of law and fact. *Young v. Vista Homes, Inc.*, 243 S.W.3d 352, 359 (Ky. App. 2007). In the instant case, Developer has failed to show that the circuit court's finding that this action involves issues and facts distinct and separate from Developer's pending action, and its decision not to consolidate, was an abuse of the court's discretion. Rather, our review of

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<sup>2</sup> We note that counsel for Developer on appeal did not represent Developer before the circuit court. A month after summary judgment was entered in favor of Atrium 1B, then-counsel for Developer filed a notice to withdraw as counsel at the request of Developer. Thereafter, Developer's current counsel filed a notice of appearance and notice of appeal.

the hearing discloses the court carefully considered Developer's request for consolidation and properly denied it.

Next, Developer claims the court's grant of summary judgment was erroneous. Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment as a matter of law. CR 56.03. Under this standard,

The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present evidence establishing a triable issue of material fact. That is to say, **[t]he party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial.** The trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.

*Henninger v. Brewster*, 357 S.W.3d 920, 924-25 (Ky. App. 2012) (emphasis added) (internal quotations and citations omitted). In other words, summary judgment may be granted when "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted).

Atrium 1B, by virtue of the documents submitted in support of its motion for summary judgment, including the affidavit of its property manager attesting to the

validity of the amounts owed, established the apparent nonexistence of a genuine issue with regard to the debt owed by Developer. As the opposing party, Developer was required to submit evidence to defeat Atrium 1B's motion. In its motion opposing summary judgment, Developer stated a desire to depose the property manager but no deposition was thereafter scheduled or taken. Four months passed before the circuit court held a hearing. At the hearing, the court emphasized that no action had been taken by Developer to show the existence of a disputed fact. Developer requested and received leave of court to file an affidavit in support, but it never did.

When the moving party has presented evidence showing that despite the allegations of the pleadings there is no genuine issue of material fact, *it becomes incumbent upon the adverse party to counter that evidentiary showing by some form of evidentiary material reflecting that there is a genuine issue pertaining to a material fact.* *Neal v. Welker*, 426 S.W.2d 476, 478 (Ky. 1968) (emphasis added). That is to say, if the moving party, by virtue of an “uncontroverted affidavit[ ] which clearly discloses the fact show[s] that a genuine issue does not exist, the opposing party has an obligation ... by counter-affidavit, or otherwise, to show that evidence is available justifying a trial of the issue involved.” *Continental Cas. Co. v. Belknap Hardware & Mfg. Co.*, 281 S.W.2d 914, 916 (Ky.1955); *see also de Jong v. Leitchfield Deposit Bank*, 254 S.W.3d 817, 825 (Ky.App.2007) (explaining summary judgment was proper because, once the appellee “met its *prima facie* burden of demonstrating the absence of any genuine issue of material fact” the burden shifted to the appellants to “produce any affirmative evidence, by deposition testimony, affidavits, documents, or otherwise” to counter the appellee’s evidence).

*Henninger*, 357 S.W.3d at 929.

While this case was disposed of rather expeditiously, Developer had ample time to depose the property manager to discover the basis for the fees allegedly owed, and to present any evidentiary material contradicting or refuting Atrium 1B's affidavit and the documents Atrium 1B submitted in support of its motion for summary judgment. Leave of court was not required in this case for Developer to depose the property manager. *See* CR 30.01. Developer's stated desire to depose the property manager is not sufficient to sustain the burden imposed on it by the affidavit and documents submitted on behalf of Atrium 1B. To that end, Developer's argument fails "because [c]onclusory allegations based on suspicion and conjecture are not sufficient to create an issue of fact to defeat summary judgment." *Id.* (quotations and citation omitted). *See also Neal*, 426 S.W.2d at 479-80 (the appellant's "hope or bare belief ... that something will 'turn up' cannot be made basis for showing that a genuine issue as to a material fact exists[)"). Here, the circuit court did not err by finding that Developer had not presented any evidence to defeat Atrium 1B's properly supported motion for summary judgment and by granting summary judgment accordingly.<sup>3</sup>

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<sup>3</sup> We find Developer's citation to *Hunt v. Lawson*, 2008 WL 4691052 (Ky. Oct. 23, 2008), to be disingenuous. Developer cites *Hunt* in support of its argument that affidavits are not required to defeat a properly supported motion for summary judgment. However, *Hunt* expressly holds otherwise. *Hunt* held that "'affirmative evidence' (including but not limited to statements under oath, such as affidavits and deposition testimony) must be brought forth to defeat a properly supported summary judgment motion. Unsworn allegations in pleadings will not serve as 'affirmative evidence' sufficient to defeat an otherwise properly supported summary judgment motion." *Id.* at \*6 (internal footnotes omitted). Specifically, *Hunt* held that in a malicious prosecution action, the *pro se* plaintiff offered sufficient affirmative evidence, through sworn statements of material fact in his notarized response to the defendant's motion for summary judgment, to defeat the otherwise properly supported motion for summary judgment. *Id.* at \*1. Though the plaintiff did not file documents formally labeled as affidavits, his *pro se* motion containing his allegations of material fact, which was notarized as having been made under oath

Lastly, Developer challenges the circuit court's decision to award Atrium 1B attorney fees and legal costs, to be established by affidavit of counsel. We review a circuit court's decision to award attorney fees and costs for an abuse of discretion. *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004); *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004) (quotations and citations omitted).

Here, the Master Deed for Atrium at Stonybrook provides for reasonable attorney fees and costs incurred as a result of legal proceedings initiated by the condominium association to address an owner's breach of the provisions of the Master Deed. The relevant provision of the Master Deed in this case sets forth that unpaid common expenses and maintenance expenses, which owners are required to pay, constitute a lien on the unit which may be enforceable by legal action. Atrium 1B brought this lawsuit against Developer to recover unpaid fees for Units 102 and 202, obtained summary judgment against Developer, and thus was entitled under the terms of the Master Deed to an award of reasonable attorney fees and costs. Furthermore, KRS<sup>4</sup> 411.195 permits the recovery of attorney fees and costs when a written agreement provides for it and CR 54.04(1) states that "[c]osts shall be allowed as of course to the prevailing party unless the court otherwise directs[.]"

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and subscribed before a notary public, was sufficient to establish an issue of fact for trial. *Id.* at \*6.

<sup>4</sup> Kentucky Revised Statutes.



Accordingly, the circuit court had both a contractual and statutory basis for awarding attorney fees and costs and its decision to do so was not an abuse of its discretion.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Myrle L. Davis  
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BRIEF FOR APPELLEE:

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