

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Plymouth Park Tax Services, LLC

Court of Appeals No. L-08-1296

Appellant

Trial Court No. CI0200802261

v.

Arnold J. Flores, et al.

DECISION AND JUDGMENT

Appellees

Decided: June 30, 2009

* * * * *

Dean Kanellis, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas denying attorney fees in a property foreclosure action. Because we conclude that the trial court erred in denying appellant's request for attorney fees, we reverse.

{¶ 2} Appellant, Plymouth Park Tax Services, LLC, filed a complaint in foreclosure on real estate owned by appellee, Arnold J. Flores and, Jane Doe, his

unknown spouse. Appellees failed to answer or defend the suit. Consequently, the trial court granted appellant's motion for default judgment against appellees. Appellant then filed a motion for attorney fees in the amount of \$1,600 pursuant to R.C. 5721.39(A)(5), supported by a fee expert witness's affidavit averring that the requested sum was "not excessive" and was "fair and reasonable under the circumstances." Again, appellees did not respond.

{¶ 3} On May 30, 2008, despite no opposition, the trial court denied the motion for attorney fees. On July 28, 2008, appellant filed a motion for reconsideration of and hearing on the interlocutory order denying attorney fees. On August 5, 2008, the trial court denied the motion for reconsideration. On August 14, 2008, the trial court entered its final Judgment Entry and Foreclosure Decree, but did not award attorney fees as requested by appellant.

{¶ 4} Appellant now appeals from the judgment vacating the award of attorney fees, arguing the following four assignments of error:

{¶ 5} "1. The trial court committed reversible error when it denied Plaintiff-Appellant's Motion for Attorney Fees, which was filed under Ohio Revised Code §5721.39.

{¶ 6} "2. The trial court committed reversible error when it denied Plaintiff's Motion for Reconsideration of the Motion for Attorney Fees.

{¶ 7} "3. The trial court committed reversible error when it entered final judgment in favor of Plymouth Park that did not include a finding for Plymouth Park's attorney fees.

{¶ 8} We will address appellant's first and third assignments of error together. Appellant argues that the trial court erred in denying its request for attorney fees, pursuant to R.C. 5721.39. We agree.

{¶ 9} R.C. 5721.39 provides, in pertinent part:

{¶ 10} "(A) In its judgment of foreclosure rendered in actions filed pursuant to section 5721.37 of the Revised Code, the court or board of revision *shall enter a finding* that includes all of the following with respect to the certificate parcel:

{¶ 11} "* * *

{¶ 12} "(5) Fees and costs incurred in the foreclosure proceeding instituted against the parcel, including, *without limitation*, the fees and costs of the prosecuting attorney represented by the fee paid under division (B)(3) of section 5721.37 of the Revised Code, plus interest as provided in division (D)(2)(d) of this section, or *the fees and costs of the private attorney representing the certificate holder*, and charges paid or incurred in procuring title searches and abstracting services relative to the subject premises."

(Emphasis added.)

{¶ 13} "In statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary

usage." *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, paragraph one of the syllabus. The language of R.C. 5721.39 clearly indicates that attorney fees are mandatory and are to be awarded, "without limitation."

{¶ 14} In this case, pursuant to the mandatory language of R.C. 5721.39, appellant was entitled to attorney fees. Therefore, the trial court erred in denying appellant's motion for those fees.

{¶ 15} Accordingly, appellant's first and third assignments of error is well-taken.

{¶ 16} Appellant's second assignment of error is moot.

{¶ 17} Pursuant to App.R. 12(B), as a matter of law, we modify the trial court's judgment¹ as follows: insert the following as the second paragraph on page three of the judgment entry:

{¶ 18} "*The Court finds that, pursuant to R.C. 5721.39, Plaintiff is entitled to be reimbursed for private attorney fees in the reasonable sum of \$1,600.00.*"

{¶ 19} At the bottom of the page, the following language is also added:

{¶ 20} "(A) The fees and costs incurred in this proceeding, including \$445.00 for title reports *and \$1,600.00 for attorney's fees, payable to Plaintiff*, which are hereby taxed as costs; * * *"

¹Modifications are shown in italics.

{¶ 21} The judgment entry of the Lucas County Court of Common Pleas is reversed, and modified as to the award of attorney fees as provided in this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT MODIFIED, IN PART,
AND REVERSED, INPART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J .

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.