STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

[FILED: September 5, 2019]

AMERICA CONDOMINIUM ASSOCIATION, INC., and CAPELLA SOUTH CONDOMINIUM ASSOCIATION, INC., ***Plaintiffs*,**	:	
v.	:	**C.A. No. NC-2011-234**
STEFANIA M. MARDO, as Trustee of the Constellation Trust—2011, ***Defendant*,**	:	
and	:	
HARBOR HOUSES CONDOMINIUM ASSOCIATION, INC., ***Intervenor*.**	:	

DECISION

THUNBERG, J. The within Motion for Attorneys' Fees and Costs was filed by Plaintiffs, America Condominium Association, Inc. (America), and Capella South Condominium Association, Inc. (Capella) (collectively, Plaintiffs), following our Supreme Court's Opinion and remand in *American Condominium Association, Inc., v. Mardo,* 140 A.3d 106 (R.I. 2016). Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

The Rhode Island Supreme Court succinctly described the condominium associations involved in this dispute as follows:

> '"Goat Island South Condominium [GIS] is comprised of three sub-condominium residential areas—Harbor Houses Condominium, America Condominium, and Capella South Condominium. Of the

> 154 total units, there are nineteen stand-alone townhouse residence units located in Harbor Houses Condominium, forty-six residence units in America Condominium, and eighty-nine residence units in Capella South Condominium. Each of these sub-condominiums is governed by a separate association and declaration and must also adhere to the provisions of the master declaration."' *American Condominium Association, Inc.*, 140 A.3d at 109 (quoting *Sisto v. American Condominium Association, Inc.,* 68 A.3d 603, 606 (R.I. 2013)) (*Sisto I*).

Defendant Stefania M. Mardo is the Trustee of a Trust that owns a condominium unit located in the Harbor Houses complex. On April 19, 2011, Plaintiffs filed a four-count Verified Complaint for Injunctive Relief against Ms. Mardo, as Trustee, alleging that she unlawfully had expanded the unit and thereby impermissibly had intruded onto GIS's limited common elements. The Complaint alleged: (1) a violation of Rhode Island's Condominium Act, G.L. 1956 chapter 36.1 of title 34 (the Act) (Count I); (2) breach of the Goat Island South Second Amended and Restated Declaration of Condominium Goat Island South (GIS SAR) and the Second Amended and Restated Declaration of Condominium, Harbor Houses Condominium (the HH SAR) (Count II); (3) a violation of restrictive covenants (Count III); and (4) common law trespass (Count IV). On May 9, 2011, Harbor Houses filed a Motion to Intervene to protect its interests, which motion the Court granted. As there were no allegations against Harbor Houses, it did not file an answer to the Complaint.

Following a six-day bench trial, the Court issued a written Decision on August 22, 2012, finding a violation of the Act, breach of the condominium declarations, and a continuing trespass. In view of the latter finding, the Court declared Count III—violation of restrictive covenants—to be moot. Thereafter, the Court entered Final Judgment in favor of Plaintiffs on Counts I, II, and IV, and deemed Count III to be moot. The Court denied Plaintiffs' request for a mandatory

permanent injunction requiring the removal of the trespass, enjoined the Trust from further expansion, and denied Plaintiffs' request for attorneys' fees and court costs.

The Plaintiffs timely appealed the Final Judgment to the Rhode Island Supreme Court. They raised three issues on appeal; namely, that this Court (1) erred in failing to order a mandatory permanent injunction requiring removal of the trespass; (2) erred in declaring Count III of the Complaint moot; and (3) erred in failing to award attorneys' fees and court costs pursuant to the GIS SAR. The Trust cross-appealed, contending that this Court erred in finding that the Trust had breached the GIS SAR and in finding that there existed a continuing trespass.

In its subsequent Opinion, our Supreme Court held that the GIS SAR unequivocally prohibited unit expansion without the unanimous consent of the unit owners. The Supreme Court further held that although the Trust had committed a continuing trespass, the Superior Court had acted within its discretion when it both declined to order a mandatory permanent injunction requiring removal of said trespass and declared that Count III of the Complaint was moot. The Supreme Court additionally held that because the Trust had breached § 11.1(b) of the GIS SAR, the Superior Court erred in failing to award attorneys' fees and court costs pursuant to § 11.3 of the GIS SAR. The court denied the Trust's cross-appeal, vacated the attorneys' fees portion of the Final Judgment, and remanded the matter to the Superior Court for a determination of attorneys' fees and court costs.

On January 20, 2017, the Trust filed a Motion to Amend Answer and Defenses and to Add Counterclaims. On the same day, it filed an objection to an award of attorneys' fees and court costs, and it requested the Court to only award nominal attorneys' fees and court costs to Plaintiffs. The Plaintiffs objected.

On March 31, 2017, Plaintiffs' new counsel, Thomas W. Lyons (Attorney Lyons), made a joint demand for payment of the entirety of Plaintiffs' attorney fees and court costs in the underlying matter, as well as a request for reimbursement of reasonable fees and court costs incurred in collecting said payment. (Demand Letter, Mar. 31, 2017.) Thereafter, on April 12, 2017, Plaintiffs filed a Motion for Attorneys' Fees and Costs with this Court, as well as reimbursement of their reasonable costs and attorneys' fees incurred in pursuing those fees. In response, on May 25, 2017, Harbor Houses filed a Motion to Assert Counterclaims against Plaintiffs.

On June 7, 2017, the Trust deposed the attorney who was Plaintiffs' only proposed sole expert witness (expert attorney). During the deposition, the following colloquy took place:

> "Q. You claim that there are $233,000 in attorneys' fees that are reasonably assessed – or I think reasonably and necessarily assessed against [the Trust]; correct?
>
> "COUNSEL FOR PLAINTIFFS: Objection.
>
> "Q. That was the number you said?
>
> "A. The number is right. I don't know who is responsible for paying. I haven't gotten into that, who is responsible for paying.
>
> . . . .
>
> "Q. Do you think it's relevant to figure out whether or not Harbor Houses had affirmative relief sought against it in the Trial Court in order to arrive at that $233,000 figure?
>
> "COUNSEL FOR PLAINTIFFS: Objection.
>
> "A. I don't have an opinion on that.
>
> "Q. So if Harbor Houses did not have any affirmative relief sought against it, and there were time entries relating to Harbor Houses, would it be your opinion that they would still be properly included in the $233,000 total?
>
> "COUNSEL FOR PLAINTIFFS: Objection.
>
> "A. I don't have an opinion . . . I won't give an opinion on what should be allocated, what should be excised from it, whether there are more or less." (Expert Attorney Dep. Tr. 119-121, June 7, 2017.)

The expert attorney later stated that he included "whatever is listed in the bills[,]" and that he "didn't make the allocation or separation." *Id.* at 121 and 122. Counsel for the Trust then asked the expert attorney: "You don't even know whether or not any claims have been asserted against Harbor Houses in this case?" *Id.* at 122. The expert attorney responded: "I didn't review that, no." *Id.*

On June 19, 2017, Harbor Houses objected to Plaintiffs' Motion for Attorneys' Fees, asserting that Plaintiffs never raised any affirmative claims against Harbor Houses; consequently, it averred that judgment did not, and could not, enter against Harbor Houses as to any of the counts contained in the Complaint. It additionally contended that because attorneys' fees only were available as a result of the Trust's breach of the GIS SAR, in which Harbor Houses played no part, Plaintiffs are not entitled to attorneys' fees and court costs from Harbor Houses. Accordingly, Harbor Houses requested an award of attorneys' fees from Plaintiffs for defending Plaintiffs' motion.

This Court commenced a hearing on the matter on August 22, 2017. The first order of business was for the Court to declare that the remand proceedings would strictly be limited "to a determination of what amount of attorney's fees should be awarded to the plaintiffs based on the Trust's breach of the GIS SAR[.]" (Hr'g Tr. at 13, Aug. 22, 2017) (Tr. I.) In so determining, the Court impliedly denied the Motions to Assert Counterclaims and the Motions for Attorneys' Fees filed by the Trust and Harbor Houses. On August 25, 2017, Plaintiffs filed a Motion to Withdraw Their Motion for Attorneys' Fees Against Harbor Houses.

At the hearing, Plaintiffs presented its expert attorney to testify about the reasonableness of the attorneys' fees from the law firm Barton Gilman, LLP, formerly Taylor, Duane, Barton and Gilman LLP (Barton Gilman, LLP). He testified that he has been practicing condominium law

since approximately 1973, and that he currently represents approximately sixteen condominium associations. *Id.* at 17 and 18. He further testified that he reviewed all the legal invoices that he received from Plaintiffs' attorneys, dated approximately March 2010, to December 12, 2016. *Id.* at 23-24. He stated that although he charges $295 per hour, his informal survey of other attorneys in the same field of practice revealed that the going rates varied between $300 to $365 per hour. *Id.* at 22. Thus, he concluded that [t]here was nothing unusual or unreasonable" about the rates charged by Plaintiffs' attorneys, and that in fact their rates of $130-$250 per hour "were really quite modest." *Id.* at 24.

The expert attorney testified that he omitted from consideration any invoice amounts that were unrelated to the case, such as charges for lobbying on a proposed house bill before the General Assembly, as well as charges for a tangential issue involving another unit owner. *Id.* at 27. He subtracted $24,416.55 in unrelated charges and concluded that the fair and reasonable fee in this matter amounted to $233,688.44. *Id.* at 30-31. He then testified:

> "I was impressed with three things, not only the rates, which I thought were fair, I thought [the main attorney's] rate was probably half of what the value of his work was. He was up against a team of a number of prestigious, experienced trial attorneys, and from what I could read from the invoices, he was standing his ground alone and responded well, so I was impressed with that." *Id.* at 31.

The hearing reconvened on August 29, 2017. Before Plaintiffs' expert attorney resumed his testimony, the Court accepted a proposed Order from Plaintiffs' counsel granting Plaintiffs' Motion to Withdraw their Motion for Attorneys' Fees against Harbor Houses. (Hr'g Tr. at 34, Aug. 29, 2017) (Tr. II). The Order was duly entered on the same day.

The Plaintiffs' expert attorney testified that, in calculating reasonable attorneys' fees, he considered the factors contained in Rule 1.5 of the Supreme Court Rules of Professional Conduct,

entitled "Fees."[1] *Id.* at 35. In doing so, he graded each factor on a basis of one to five, with five being the most difficult. *Id.* He testified that being familiar with condominium law, he basically is aware of its complexities and how much time would be necessary to address a particular issue. *Id.* at 37. He concluded that the total amount of compensable attorneys' fees in this case (*i.e.*, without the deductions) amounted to $258,104.95, and that his own fees up until the previous week totaled $5522. *Id.* at 39-40. However, during cross-examination, the expert attorney acknowledged that affidavits filed by the attorneys who had actually worked on the case stated that their fees amounted to $224,960, which was nearly $9000 lower than the final fee that the expert attorney calculated. *Id.* at 53-54; *see also* Affidavit of Robert C. Shindell and Affidavit of Timothy J. Groves.

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[1] Rule 1.5 of the Supreme Court Rules of Professional Conduct provides in pertinent part:

> "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
>
> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> "(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> "(3) the fee customarily charged in the locality for similar legal services;
>
> "(4) the amount involved and the results obtained;
>
> "(5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> "(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> "(8) whether the fee is fixed or contingent." Rule 1.5(a) of the Rules of Professional Conduct.

During subsequent cross-examination, the expert attorney admitted that he did not read any of the pleadings in this case, including the Complaint. (Hr'g Tr. at 73, 99, 104, Nov. 1, Dec. 4 and Dec. 7, 2017) (Tr. III.). He stated that he relied upon the findings of fact contained in this Court's August 22, 2012 Decision, as affirmed by the Supreme Court in *American Condominium Association, Inc.* 140 A.3d 106. (Tr. III at 76.)[2] In addition, he stated that he had "focused almost exclusively on the Supreme Court's directive in this particular case that remanded it to this Court." *Id.* at 92. The expert attorney also admitted that when he made his calculations, he had not been familiar with the term "lodestar," as it pertains to calculating reasonable attorneys' fees; however, he believed that he satisfied lodestar requirements when he established and analyzed fair and reasonable fees in this case. *Id.* at 86, 89; *see also id.* at 212 ("During [my] deposition, when the lodestar concept was explained, I said that is exactly what I did.").

The expert attorney further testified that he did not delete any fees or services related to the counts for trespass, statutory violation, or restrictive covenant, because he believed that all four of the counts were intermingled, and it would be "unrealistic" to specifically allocate fees on a count-by-count basis. *Id.* at 98-99; 102; *see also id.* at 133 (stating "I made no distinction between the various claims, the various counts, and the billings. I did not segregate based on a particular claim or a particular count in the complaint").[3] Counsel for the Plaintiffs stipulated that the expert

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[2] Later, the expert attorney explained:

> "Um, I didn't read the pleadings, because there was a summary of the factual situation in the Superior Court's decision, and the Supreme Court also had facts in it. Um, I've been around courts long enough to know that what goes into a complaint, in an answer, and a counterclaim, and so on, is somebody's version of a prayer for relief, or counts of causes of action. Um, I went right to the facts as set forth in the two court decisions." (Tr. III at 204.)

[3] At a subsequent hearing date, the expert attorney testified that he did not distinguish the various claims for purposes of assessing attorneys' fees because they "all arise out of the same situation,

attorney did not think it necessary to distinguish or identify which services were related to any given count. *Id.* at 103. The expert attorney admitted that he did not delete block billing or lumping entries; rather, the only fees that he eliminated were those that he considered not directly involved in the case. *Id.* at 136-37. Accordingly, he considered all of the remaining invoices to be reasonable. *Id.* at 214.

The Court has before it multiple exhibits, including affidavits from counsel for Barton Gilman, LLP; an affidavit and deposition testimony from the expert attorney; and multiple invoices submitted by the parties. After carefully considering the evidence and the testimony presented at the hearing, the Court makes the following determinations.

II

Standard of Review

Our Supreme Court has declared that

> '"When a case has been once decided by this court on appeal, and remanded to the [Superior Court], whatever was before this court, and disposed of by its decree, is considered as finally settled. The [Superior Court] is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, 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. * * * But the [Superior Court] may consider and decide any matters left open by the mandate of this court."' *Sisto v. American Condominium Association, Inc.*, 140 A.3d 124, 128 (R.I. 2016) (*Sisto II*) (quoting *Pleasant Management, LLC v. Carrasco,* 960 A.2d 216, 223 (R.I. 2008)).

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the same set of facts, the same parties involved, on both sides of the fence." (Tr. III at 205); *see also id.* at 207 (stating that in this instance, "we have one piece of property, one unit owner, two condominiums, and a, one set of facts").

What our Supreme Court discussed above is the "mandate rule." Pursuant to such rule, this Court must first determine exactly what the Supreme Court mandated in the opinion it issued in *American Condominium Association, Inc.,* 140 A.3d 106 before assessing attorneys' fees and court costs.

III

Analysis

The Trust contends that Plaintiffs are entitled only to those fees that specifically relate to the breach of the GIS SAR; namely, the unopposed $900 worth of fees. The Trust further maintains that, due to the inherent deficiencies in Plaintiffs' Motion for Attorneys' Fees, coupled with the failure of Plaintiffs to provide competent evidence to support their motion, the Court should award only those unopposed fees.

The Plaintiffs counter that the factual and legal issues of their four-count Complaint are so closely interrelated that Plaintiffs are entitled to an award of *all* of their attorneys' fees and court costs. Specifically, they seek the Court to award $225,235.23 in attorneys' fees and $3,685.15 in costs for litigating the underlying matter, as well as an additional $38,165 in attorneys' fees and $12,175.38 in costs for litigating the fee motion. The Plaintiffs also seek post-judgment interest on the entire amount.

A

Attorneys' Fees

It is settled law that Rhode Island has "'staunch[ly] adhere[d] to the 'American rule' that requires each litigant to pay its own attorney's fees absent statutory authority or contractual liability."' *Tri-Town Construction Company, Inc. v. Commerce Park Associates 12, LLC*, 139 A.3d 467, 478 (R.I. 2016) (quoting *Shine v. Moreau,* 119 A.3d 1, 8 (R.I. 2015)). Generally,

"[g]iven a proper contractual, statutory, or other legal basis to do so, the award of attorney's fees rests within the sound discretion of the trial justice." *Women's Development Corp. v. City of Central Falls*, 764 A.2d 151, 162 (R.I. 2001). In this case, the Rhode Island Supreme Court determined that Plaintiffs are entitled to fees under the GIS SAR. *See Mardo,* 140 A.3d at 117. However, even "if there is a contractual basis for awarding attorney's fees," this Court's actual award is reviewed under '"an abuse of discretion"' standard. *Tri-Town Construction Co.*, 139 A.3d at 478 (quoting *Dauray v. Mee,* 109 A.3d 832, 845 (R.I. 2015)).

The "prevailing party" in any given case carries "the burden of establishing that the amounts sought are 'reasonable.'" *In re Schiff*, 684 A.2d 1126, 1131 (R.I. 1996) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983)). In Rhode Island, "[t]he starting point or 'lodestar' for determining the reasonableness of a fee is 'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" *In re Schiff*, 684 A.2d at 1131 (quoting *Hensley,* 461 U.S. at 433). Accordingly,

> "a fee application must be accompanied by documentation that is:
>
> > "sufficient to satisfy the court, or indeed a client, that the hours expended were actual, nonduplicative and reasonable, . . . and to apprise the court of the nature of the activity and the claim on which the hours were spent.
>
> "Such documentation is particularly important where the 'prevailing' plaintiff does not succeed on all of the claims asserted. In such mixed success cases, hours spent on unsuccessful claims must be excluded from fee computations if those claims are separate and distinct from the successful claims, and the fee awarded should be limited to that which is reasonable in relation to the result achieved." *In re Schiff*, 684 A.2d at 1131 (internal citation and quotations omitted).

Furthermore, even when successful, a prevailing party is "not entitled to awards for hours that are duplicative, unproductive, excessive or unnecessary." *Id.* Thus, requests for attorneys' fees must "be accompanied by contemporaneous time records reflecting the nature of the task

performed and who performed it." *Id.* In order to be adequate, such records should allocate "time among successful claims and separate claims that were unsuccessful." *Id.* A "[f]ailure to comply with these requirements is a basis for drastically reducing or, in extreme cases, completely disallowing an award of attorneys' fees." *Id.* at 1132.

As previously stated, this Court must first determine the directive of the Supreme Court's mandate in *American Condominium Association, Inc.,* 140 A.3d 106. In its opinion, the court held "that the trial justice did not err in determining that the Trust had breached the GIS SAR . . . However, we do find error with respect to the trial justice's failure to award attorneys' fees and costs to plaintiffs *based on the terms of the GIS SAR*." *Id.* at 117 (emphasis added). The Court finds that the clear mandate from the Supreme Court is for the Court to award attorneys' fees and costs only for the breach of contract claim. This Court does not find that the Supreme Court's mandate includes attorneys' fees for the other claims because there is no statutory or contractual liability for attorneys' fees on those claims. *See Tri-Town Construction Co.*, 139 A.3d at 478 (stating that the "American Rule" requires parties to pay their "own attorneys' fees absent statutory or contractual liability").

In the instant case, there is no statutory or contractual liability to pay attorneys' fees for any of Plaintiffs' claims that were not brought pursuant to the GIS SAR.[4] Section 11.3 of the GIS SAR provides in pertinent part:

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[4] Citing to *Hensley* for support, Plaintiffs contend that all of their claims are so intertwined that they cannot be separated; however, that case readily is distinguishable. In *Hensley*, The United States Supreme Court declared that in some actions

> "the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims.

> "*Violation of any of the terms of the [GIS SAR] . . . shall be grounds for relief* which will include, but not be limited to, any actions for money damages, injunctive relief, foreclosure of the lien pursuant to the Act, or any combination thereof, each such remedy to be cumulative and not exclusive. *Any such violator shall be liable for all court costs and attorney's fees* incurred in enforcing the rights pursuant to the preceding sentence . . . ." Sec. 11.3 of the GIS SAR (emphases added).

It is well settled that

> "[t]he language employed by the parties to a contract is the best expression of their contractual intent, and when that language is clear and unambiguous, words contained therein will be given their usual and ordinary meaning and the parties will be bound by such meaning. Whether a contract's terms are ambiguous is a question of law. A contract may be deemed ambiguous only if it is reasonably and clearly susceptible of more than one interpretation." *John Rocchio Corp. v. Pare Engineering Corp.*, 201 A.3d 316, 324 (R.I. 2019) (internal citations and quotations omitted).

The term "violation" is defined as "1. An infraction or breach of the law; a transgression . . . 2. The act of breaking or dishonoring the law; the contravention of a right or duty." Black's Law Dictionary 1881 (11th ed. 2019); *see also* The American Heritage Dictionary of the English Language 1933 (5th ed. 2011) (defining violate as "[t]o disregard or act in a manner that does not conform to (a law or promise, for example"). In view of the clear and unambiguous language of § 11.3 of the GIS SAR, the Court finds that breach of the GIS SAR is the sole trigger for liability for attorneys' fees and costs.

> Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 435.

However, in so declaring, the United States Supreme Court was discussing separate civil rights claims for which attorneys' fees statutorily would have been available for all counts. In this case, even though the separate claims may have involved a common core of facts, attorneys' fees are not available for the non-contract claims under the American Rule.

Moreover, the Court observes that the GIS SAR states that any violator of the GIS SAR "shall be liable for *all* court costs and attorney's fees . . . ." Sec. 11.3 of the GIS SAR (emphasis added). Although this blanket statement suggests that the prevailing party should receive any and all court costs and attorneys' fees, regardless of reasonableness, such an interpretation would improperly impinge upon the Court's discretion to assess reasonable attorneys' fees. *See, e.g., Mardo,* 140 A.3d at 116 ("While a trial justice enjoys *considerable discretion* in determining the value of an award of attorneys' fees, such discretion is not unbridled and does not allow for a direct contravention of a mandatory award of fees contained in the GIS SAR.") (emphasis added); *see also In re Schiff*, 684 A.2d at 1131 (requiring the prevailing party to establish "that the amounts sought are 'reasonable'"). Thus, pursuant to the Supreme Court's mandate, this Court will confine its determination to an assessment of reasonable attorneys' fees solely for the breach of the contract claim.

In *Sisto II*, our Supreme Court had occasion to determine the reasonableness of attorneys' fees where the prevailing parties submitted documentation that was, purportedly, inadequate. 140 A.3d at 129-30. In that case, the plaintiff sought declaratory relief, alleging slander of title and breach of contract. *Id.* at 126. Ultimately, the Superior Court was called upon to assess attorneys' fees under the anti-SLAPP statute (Strategic Lawsuit Against Public Participation) which defendants had invoked. *Id.* In disputing the requested fees, the plaintiff contended that the defendants had submitted insufficient documentation to support their request, because their records did not specifically differentiate the hours expended on the anti-SLAPP claim from the hours expended on other issues. *Id.* at 129. The plaintiff also suggested that some of the fees may have been duplicative. *Id.* Thereafter, the hearing justice reduced the requested amount by 75% "to

more accurately reflect the time spent on the 'tangentially-related' anti-SLAPP claim and eliminate time that may have been spent on the other issues . . . ." *Id.*

On appeal, the Supreme Court observed that:

> "[w]hile an across-the-board reduction is certainly not the most precise method for calculating an award of attorneys' fees, the hearing justice was forced to make do with what he had—which were billing records that, in his words, 'd[id] not even begin to approach a diligent accounting of the hours spent on the anti-SLAPP [issue]' and from which he could not 'distinguish work performed on anti-SLAPP issues [from] time dedicated to other matters.'" *Id.* at 129-30.

The court held that the hearing justice did not abuse his discretion in reducing the requested fees by 75% in light of the inadequate records presented by the defendants and then subsequently increasing them by 5% "based on the complexity of the anti-SLAPP claim . . . ." *Id.* at 130. The court issued the following strongly-worded admonition: "we must caution that, in the future, we will require more meticulous recordkeeping by attorneys seeking an award of fees—*our tolerance today is limited to the circumstances of this case*." *Id.* (emphasis added).

Mindful of this admonition, the Court is constrained to discount any fees not solely attributable to the contract claim and to the attorneys' fees issue presently before the Court. Thus, the Court will consider only those submissions that are specifically allocated to the breach of contract claim and for the fees and costs incurred in collecting on that claim. Furthermore, any billings related to Harbor Houses will not be considered as Plaintiffs have withdrawn their motion for attorneys' fees against Harbor Houses. There is nothing in the record to suggest that Harbor Houses breached the GIS SAR.

In assessing the reasonableness of the proposed attorneys' fees, the Court finds credible the expert attorney's opinion that the rates charged by the attorneys were reasonable. He testified that the going rate in the practice of condominium law ranges from $300 to $365 per hour, and

that the $130 to $250 rates charged by the attorneys in this case "were really quite modest." (Tr. I at 24.)[5] Although the expert attorney admitted that he did not read the pleadings, he testified that he generally was aware of the complexities involved in condominium cases, and how much time would be required to litigate such a case. (Tr. II at 37.) He also stated that he had been impressed by the work conducted by the principal attorney in this case. (Tr. I at 31.)

The Court is extremely troubled by the fact that the expert attorney did not read the pleadings or the multi-count Complaint. In assessing the reasonableness of the fees, the Court must discount all block billings that lumped the discrete contract claim with the other claims and will not consider billings attributable to same. *See World Triathalon Corp. v. Dunbar*, 539 F. Supp. 2d 1270, 1284-85 (D. Haw. 2008) ("The term block billing refers to the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks. Block billing entries generally fail to specify a breakdown of the time spent on each task.") (internal citations and quotations omitted).

A thorough review of the invoices from the underlying action reveals that the following attorneys' fees incurred on the dates set forth below were directly and solely related to the contract claim:

May 5, 2011, in the amount of $39.00 (Invoice No. 27876);
May 6, 2011, in the amount of $169.00 (Invoice No. 27876);
May 11, 2011, in the amount of $208.00 (Invoice No. 27876);
May 13, 2011, in the amounts of $182.00; $208.00; and $325.00 (Invoice No. 27876);
May 23, 2011, in the amount of $156.00 (Invoice No. 27876);
May 26, 2011, in the amount of $52.00 (Invoice No. 27876);
May 29, 2011, in the amount of $78.00 (Invoice No. 27876);
June 7, 2011, in the amount of $104.00 (Invoice No. 28093);
August 1, 2011, in the amount of $200.00 (Invoice No. 28482);
August 31, 2011, in the amount of $350.00 (Invoice No. 28482);
October 10, 2011, in the amount of $500.00 (Invoice No. 28815);

[5] The Court observes that one of the attorneys charged $275 per hour and finds this rate to be reasonable.

November 01, 2011, in the amounts of $175.00 and $150.00 (Invoice No. 28993);
November 8, 2011, in the amounts of $750.00 and $500.00 (Invoice No. 28993);
November 14, 2011, in the amount of $375.00 (Invoice No. 28993);
February 27, 2014, in a total amount of $375.00 (Invoice Nos. 42703 and 42704);[6]
September 2, 2014, in a total amount of $350.00 (Invoice Nos. 47356 and 47357);
November 23, 2015, in a total amount of $55.00 (Invoice Nos. 52721 and 52722);
June 30, 2016, in a total amount of $330.00 (Invoice Nos. 55385 and 55386);
August 9, 2016, in a total amount of $187 (Invoice No. 55858);
November 4, 2016, in the amount of $11.00 (Invoice No. 57927);
November 9, 2016, in the amount of $22.00 (Invoice No. 57927); and
November 10, 2016, in the amount of $11.00 (Invoice No. 57927).

By adding up the foregoing sums, the Court determines that the Trust is liable to Plaintiffs in the underlying contract action upon which they prevailed in the amount of $5862.

Plaintiffs also seek reimbursement of reasonable attorneys' fees and court costs for the work of Attorney Lyons, who was engaged to litigate their claim for the underlying attorneys' fees following the Supreme Court remand. Specifically, they seek $38,165 in attorneys' fees and $12,175.38 in court costs for that additional litigation. In support of this claim, Plaintiffs submitted an Affidavit from Attorney Lyons with an attached invoice for "Professional Services Rendered." *See* Affidavit of Attorney Lyons with attached Exhibits.

In *New York Association for Retarded Children v. Cuomo*, the United States District Court for the Eastern District of New York recently discussed the precise issue of fees on fees:

> "[Plaintiffs] are entitled to recover 'a reasonable fee for preparing and defending a fee application' where 'underlying costs are allowed.' *Hines v. City of Albany*, 862 F.3d 215, 223 (2d Cir. 2017); *Weyant v. Okst*, 198 F.3d 311, 316 (2d Cir. 1999). Indeed, '[i]f an attorney is required to expend time litigating his [or her] fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased' and '[s]uch a result would not comport with the purpose behind most statutory fee authorizations.' *Gagne v. Maher*, 594 F.2d 336, 344 (2d Cir. 1979), *aff'd* 448 U.S. 122 (1980); *see also M.D. v. New York City Department of Education*, 17-CV-2417

[6] Barton Gilman LLP changed its billing practice by sending separate bills to Plaintiffs, rather than combined bills, as it had done previously.

> (JMF), 2018 WL 4853032, at *1 (S.D.N.Y. Oct. 5, 2018) (allowing 'fees on fees' because 'a culpable defendant should not be allowed to cause the erosion of fees awarded to the plaintiff for time spent in obtaining the favorable judgment by requiring additional time to be spent thereafter without compensation). 'To hold otherwise would permit a deep pocket losing party to dissipate the incentive provided by an award through recalcitrance.' *Hines*, 862 F.3d at 222. However, '[i]f the fee claims are exorbitant, or if the time devoted to presenting [the fee petition] is unnecessarily high, the judge may refuse further compensation or grant it sparingly.' *Cruceta v. City of New York*, No. 10-CV-5059 (FB) (JO), 2012 WL 2885113, at *7 (E.D.N.Y. Feb.7, 2012) (citing *Valley Disposal, Inc. v. Central Vermont Solid Waste Management District*, 71 F.3d 1053, 1059 (2d Cir. 1995))." *New York Association for Retarded Children*, 72 CV 356 (RJD), 72 CV 357 (RJD), 2019 WL 3288898, at *9.

The Court has thoroughly reviewed papers submitted by Attorney Lyons, and it finds reasonable his hourly billing rate of $250.[7] However, the Court finds that multiple billings are unrelated to Plaintiffs' claim for attorneys' fees against the Trust. For example, some of the charges were attributable solely to issues raised by Harbor Houses. (Aff. of Attorney Lyons at 2, 3, Ex. at 7-9 and 11.) Other charges, some of which were included in block billings, were related to the production of an affidavit from America's Vice President, Diane S. Vanden Dorpel; however, a close review of her affidavit reveals that it does not contain any information pertinent to the attorneys' fees claim. (Aff. of Attorney Lyons, Ex. at 1, 3, 4, and 5; Aff. of Diane S. Vanden Dorpel); *see also World Triathalon Corp.*, 539 F. Supp. 2d at 1285 ("Block billing entries generally fail to specify a breakdown of the time spent on each task.").

The invoice also contains billings for the affidavit of Sandra Conca; however, the Court is unable to discern its relevance, if any, so those billings likewise must be rejected. (Aff. of Attorney Lyons, Ex. at 5.) In view of the fact that the Court rejects the billings for the aforementioned

[7] Two associates, who billed at a rate of $150 per hour, assisted Attorney Lyons. However, for reasons that will be explained later, those billings will not be included in the award.

affidavits, the Court also must reject any billings for unspecified affidavits, as it is unable to determine the source of those affidavits. (Aff. of Attorney Lyons, Ex. at 3, 5, 6.) *See In re Schiff*, 684 A.2d at 1131 (requiring sufficient documentation "to apprise the court of the nature of the activity").

In addition, there exist instances where relevant charges are block billed with unrelated charges. One such example is for work conducted on May 22, 2017, where research on attorneys' fees was lumped together with a telephone call related to "discovery of fees in Brown U. case." (Aff. of Attorney Lyons, Ex. at 7.) Other charges refer to research about GIS condominium history and property values, some of which were block billed with other charges, as well as charges for research involving attorneys' fees provisions of the Condominium Act—which provisions are not relevant to the contract claim. (Aff. of Attorney Lyons, Ex. at 4, 5.)

Several billings refer to Plaintiffs' responses to defendants in the plural. For example, on July 5, 2017, Attorney Lyons referred to "defendants' objection to fee motion and reply memo" and billed for "reply memos[.]" (Aff. of Attorney Lyons, Ex. at 10.) The record reveals that on that date, Plaintiffs filed two memoranda—one replying to the Trust's objection to the Motion for Attorneys' Fees, and a lengthier one replying to a similar objection filed by Harbor Houses. In addition, multiple billings refer to Plaintiffs' requests for production from both defendants. (Aff. of Attorney Lyons, Ex. at 7-9.) As the Court is in no position to separate out how much time was spent on the Harbor Houses memorandum, or the request for production from Harbor Houses, it must reject all such block billings. *See World Triathalon Corp.*, 539 F. Supp. 2d at 1285 ("Block billing entries generally fail to specify a breakdown of the time spent on each task.").

Furthermore, during the hearing on the Motion for Attorneys' Fees, it became apparent that an affidavit submitted by Barton Gilman, LLP was missing several attachments. Attorney Lyons

attempted to rectify the situation by drafting and submitting a supplemental affidavit with the requisite attachments. The Court finds that it would be unfair to require the Trust to pay for the additional attorneys' fees incurred to rectify Plaintiffs' mistake; consequently, any such fees are not compensable. (Aff. of Attorney Lyons, Ex. at 12-16.) Moreover, the billing submitted by Associate Marcou not only concerns that mistake, but is duplicated by Associate Huffman, thus providing an additional reason to reject such billings. (Aff. of Attorney Lyons, Ex. at 15, 16.)

There are also multiple billings concerning inquiries about insurance coverage for the counterclaims asserted by both Harbor Houses and the Trust. (Aff. of Attorney Lyons, Ex. at 4, 5.) These billings cannot be solely attributed to the Trust and thus, must be rejected.

In light of the foregoing, the Court has subtracted $14,425 from the total amount charged in the invoice. This leaves a balance of $23,740 in attorney fees. However, the Court declines to find this amount to be reasonable.

As the Court previously observed, Plaintiffs' expert attorney did not appear fully informed in preparation for the hearing. He had not read any of the pleadings in the underlying case; he was unfamiliar with the lodestar method in calculating fees; and, he appeared unfamiliar with pertinent case law. In addition, although there were no affirmative claims asserted against Harbor Houses, the expert attorney did not subtract any billings solely attributable to Harbor Houses and did not make any adjustments subsequent to Plaintiffs' withdrawal of their claim for attorneys' fees against Harbor Houses. *See In re Schiff*, 684 A.2d at 1131 (requiring the prevailing party to establish "that the amounts sought are reasonable"). The Court finds that it would be unreasonable to charge the Trust for all of the time the Trust expended illustrating various discrepancies in the expert attorney's testimony and exhibits. Consequently, the Court has adjusted these attorney fees downwards by 25% or $5935 to reach reasonable attorneys' fees in the amount of $17,805.

B

Court Costs

In addition to attorneys' fees, Plaintiffs seek reimbursement of their court costs. Specifically, they seek $3,685.15 in court costs from the Trust in the underlying matter and $12,175.28 in court costs for pursuing their Motion for Attorneys' fees.

Section 11.3 of the GIS SAR provides that violators of the GIS SAR "shall be liable for *all* court costs . . . ." Sec. 11.3 of the GIS SAR (emphasis added). However, G.L. 1956 § 9-22-5 of the Rhode Island General laws provides: "In civil actions at law, the party prevailing shall recover costs, except where otherwise specially provided, or as justice may require, in the discretion of the court." Sec. 9-22-5. Clearly, a breach of contract claim, like the one in the instant matter, constitutes a civil action at law; thus, it falls under the ambit of § 9-22-5.

Super. R. Civ. P. 54 provides in pertinent part:

> "Costs (including costs on depositions as provided for in Rule 54(e)) shall be allowed as of course to the prevailing party as provided by statute and by these rules unless the court otherwise specifically directs. Costs may be taxed by the clerk upon ten (10) days' notice by the prevailing party. A copy of the bill of costs, specifying the items in detail, and a copy of any supporting affidavits shall be served with the notice." Super. R. Civ. P. 54(d).

When interpreting these provisions, our Supreme Court recently declared that:

> '"Both the statute and the court rule endow the trial justice with discretion in conducting a cost-distribution analysis. Discretion is not exercised by merely granting or denying a party's request. The term discretion, rather, denotes action taken in the light of reason as applied to all the facts and with a view to the rights of all the parties to the action while having regard for what is right and equitable under the circumstances and the law."' *Cranston Police Retirees Action Committee v. City of Cranston By & Through Strom*, 208 A.3d 557, 592 (R.I. 2019) (quoting *State v. Lead Industries Association, Inc.*, 69 A.3d 1304, 1309 (R.I. 2013)) (internal quotations and citations omitted).

A "bill of costs" is defined as "[a] certified, itemized statement of the amount of costs owed by one litigant to another, prepared so that the prevailing party may recover the costs from the losing party." Black's Law Dictionary 200 (11th ed. 2019). Similar to "requests for attorneys' fees, requests for costs and expenses must be properly documented." *Pontarelli v. Stone*, 781 F. Supp. 114, 124 (D.R.I. 1992). Accordingly, "[u]nverified expenses and costs may be rejected out of hand." *United States v. Davis*, 87 F. Supp. 2d 82, 86 (D.R.I. 2000). However, "[t]he Court does have discretion to allow unverified costs where it is clear from the nature of the cost that it was necessarily incurred." *Id.*

Accordingly,

> "The justice of any court, who shall examine and approve any bill of costs, shall strike out and disallow any sum that may be taxed or demanded for the expense of any witness, or any evidence whatsoever, that shall appear to the justice to be overcharged, frivolous, or not material to the issue of the cause; and no costs shall be allowed for any written evidence, unless the fees are noted thereon, or certified by the officer who issued or made out the written evidence." Sec. 9-22-18.

1

Court Costs in the Underlying Case

With respect to the underlying case, the attorneys from Barton, Gilman, LLP, submitted affidavits with attached invoices stating that their respective costs were $163.14 and $3703.80, for a total amount of $3866.94. (Affs. of Robert C. Shindell and Timothy J. Groves.) Neither of these affidavits itemized the costs, and the attached invoices contained few receipts.

The expert attorney calculated the costs to be $3685.15, and opined, in his affidavit, that "the expenses charged are fair and reasonable . . . ." (Aff. of Expert Attorney.) He neither itemized the costs nor discussed why he believed that they were fair and reasonable. Nevertheless, after

carefully reviewing the invoices submitted by Barton Gilman, LLP, the Court will exercise it discretion in assessing Plaintiffs' entitlement to the requested court costs.

Although Plaintiffs did not provide receipts for the costs of the initial filing fee of $160 (Invoice No. 27698) and the appellate filing fees of $600 (Invoice No. 43725), the docket reflects that they were paid to the Court; thus, clearly they are recoverable. Likewise, the $45 cost of service of process to Ms. Mardo, as Trustee, is reflected in the docket and is recoverable. (Invoice No. 28482.)

The cost of obtaining the trial transcripts in pursuing Plaintiffs' appeal amounted to $975. This cost is reflected in a May 22, 2014 letter from the Clerk of the Superior Court that was attached to invoices Nos. 44225 and 44226. Consequently, this cost is recoverable. The Plaintiffs also provided proof of payment for the cost of "Outside binding of Brief and Appendix" in the amount of $132.68. (Invoice Nos. 50850 and 50851.) This cost also is recoverable.

The Plaintiffs seek reimbursement for their photocopying expenses. A court may award the cost of making photocopies '"necessarily obtained for use in a case."' *Davis*, 87 F. Supp. 2d at 88 (quoting *Piester v. International Business Machine Corp.,* 201 F.3d 428 (1st Cir. 1998) (per curiam) (unpublished)). Such "[c]opies may be deemed necessary even if not used in the trial of the matter." *Id.* However, "in order for copies to be taxable in a case, the party seeking to tax the cost must show some evidence of necessity." *Davis,* 87 F. Supp. 2d at 88. This means that "[p]hotocopying costs for the convenience, preparation, research, or records of counsel may not be recovered." *Id.* Nevertheless, photocopies that are "attributable to discovery" are recoverable as part of court costs. *United States Equal Employment Opportunity Commission v. W&O, Inc.*, 213 F.3d 600, 623 (11th Cir. 2000).

The Plaintiffs have neither provided receipts for their photocopying expenses nor any evidence of necessity. Rather, most of these expenses simply are listed as "Photocopying," with no further explanation, and several are referred to as "Outside Copying." *See, e.g.,* Invoice No. 27876 ("Outside Copying survey #'s 16-49 through 16-56 of Goat Island ($13 each x 8 = $104)[;]" "Outside Copying of voluminous condo decl. file at the Newport City Clerk's office on 5/11/11[,] $244.50."). A reference is made to "copying + binding reply brief" in Invoice No. 53094 for $26.96; however, no receipt is provided for this expense.

Accordingly, Plaintiffs have not verified any of their photocopying expenses with proper documentation. Furthermore, apart from Invoice No. 53094 ("copying + binding reply brief"), Plaintiffs have failed to properly demonstrate which, if any, of these expenses necessarily were obtained for use in their case. *Davis*, 87 F. Supp. 2d at 88. Consequently, the Court, in the exercise of its discretion and based on the record, denies these costs.

The Plaintiffs also seek expenses related to express and/or overnight mail, and messenger and/or delivery services. "The use of, and the reimbursement for such items should be limited to emergency or special circumstances, where less expensive means of communication are not reasonably available, and it is the [Plaintiffs'] burden to demonstrate that such circumstances exist(ed)." *In re 321 S. Main St., L.P.*, 155 B.R. 41, 43 (Bankr. D.R.I. 1993), *holding modified by In re Almacs, Inc.*, 178 B.R. 598 (Bankr. D.R.I. 1995). In this case, Plaintiffs have not sustained their burden of demonstrating that special circumstances necessitated the use of such services and that less expensive means of communication, reasonably, were not available. Consequently, the request for these expenses is denied.

The Plaintiffs also seek reimbursement for travel expenses to and from the Superior Court. *See Stark v. PPM America, Inc.*, 354 F.3d 666, 674 (7th Cir. 2004) (stating attorneys' travel

expenses are compensable). However, recognizing that Plaintiffs are entitled to travel expenses, the Court nevertheless is unable to award the full amount sought by Plaintiffs. According to Invoice No. 27876, Plaintiffs' counsel traveled to and from Newport County Superior Court on March 25, 2011; April 1, 2011; and April 7, 2011. However, a review of the attorney-fee billings indicates that those trips were related to a completely separate lawsuit. Indeed, Plaintiffs did not file the instant matter until April 18, 2011—eleven days after the third trip on Invoice No. 27876 had occurred. Clearly, Plaintiffs are not entitled to these court costs.

Invoice No. 28602 contains a charge of $93.49 for "Transportation" that purportedly took place on September 29, 2011; however, a review of the attorney-fee billings indicates that there was no attorney-related work performed on that day. Thus, Plaintiffs cannot establish that the travel costs billed for that day were "reasonably expended on the litigation" and must be denied. Mary Francis Derfner & Arthur D. Wolf, *Court Awarded Attorney Fees* § 16.02[2][c] (2011).

Only two other invoices contain charges for travel expenses. Invoice Nos. 42703 and 43704 contain a combined charge for travel to and from Washington County Superior Court on January 14, 2014 in the amount of $32.81. As the record confirms that the conference did take place, the Court finds that this particular court cost is compensable. Invoice Nos. 43725 and 43726 contain a combined charge of $37.52 for travel to and from Newport County Superior Court on February 20, 2014 for a hearing on a Motion to Confirm. The record reflects that this hearing took place; consequently, the Court also finds that this court cost is compensable.[8]

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[8] The Court observes that in 2011, trips to and from Newport County Superior Court were billed at only $34.98 per trip. (Invoice No. 27876.) However, given that the February 20, 2014 trip occurred almost three years later, the fact that gasoline prices fluctuate, and that different vehicles with different gas mileage may have been used for the various trips, the Court does not question this discrepancy.

In light of the foregoing, the Court concludes that with respect to the underlying case, Plaintiffs are entitled to court costs for their filing fees in the amount of $760, the cost of trial transcripts in the amount of $975, and travel costs in the amount of $70.33, for a total amount of $1805.33. The request for photocopying expenses, express/overnight mail expenses, and messenger/delivery service expenses is denied.

2

Court Costs to Litigate Attorneys' Fees

As previously stated, Plaintiffs seek $12,175.38 in court costs to compensate them for pursuing their claim for attorneys' fees after remand. Specifically, they seek reimbursement for the cost of the expert attorney, various transcripts, and unnamed documents.

The Plaintiffs have requested $5,522.40 in costs for the expert attorney and $5,979.02 in costs for his "Statement[.]" However, our Supreme Court has declared that

> '"the payment of expert-witness fees is not normally recoverable in an award of costs made pursuant to G.L. 1956 § 9-22-5. Costs are normally considered the expenses of suing another party, including filing fees and fees to serve process. Fees to pay expert witnesses would not be included in this definition of costs.'" *South County Post & Beam, Inc. v. McMahon*, 116 A.3d 204, 215 (R.I. 2015) (quoting *Chiaradio v. Falck,* 794 A.2d 494, 496 (R.I. 2002)).

In light of this proclamation, and considering that the expert attorney's opinion had deficiencies, the Court, in the exercise of its discretion, denies Plaintiffs' request for the cost of the expert attorney.

With respect to the transcript costs and the cost of documents from WarRoom Document Solutions, Plaintiffs have not provided any documentation or bills verifying the amount charged. *See Pontarelli*, 781 F. Supp. at 124 (stating that "like requests for attorneys' fees, requests for costs and expenses must be properly documented"). Accordingly, the Court denies these costs.

IV

Conclusion

In view of the foregoing, the Court concludes that Plaintiffs are entitled to $5862 in attorneys' fees in the underlying case, and $17,805.00 in attorneys' fees for pursuing those initial fees. They also are entitled to $1805.33 in court costs for the underlying case. With respect to photocopying expenses, express/overnight mail expenses, and messenger/delivery service expenses, said costs are denied. The cost of transcripts and documents in pursuit of the claim for attorneys' fees and court costs is likewise denied. All costs related to compensation of the expert attorney's fees are denied.

Counsel shall submit an appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Cover Sheet

TITLE OF CASE:	America Condominium Association, Inc., et al. v. Stefania M. Mardo, as Trustee of the Constellation Trust - 2011
CASE NO:	NC-2011-234
COURT:	Newport County Superior Court
DATE DECISION FILED:	September 5, 2019
JUSTICE/MAGISTRATE:	Thunberg, J.
ATTORNEYS:	
For Plaintiff:	Thomas W. Lyons, III, Esq.
For Defendant:	Robert D. Wieck, Esq. Edmund A. Allcock, Esq. for Intervenor