**Opinion issued June 11, 2009**

**In The**
# Court of Appeals
**For The**
# First District of Texas

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**NOS. 01-08-00619-CV**

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**WILLIE MCGLOWN, JR., Appellant**

**V.**

**ASHFORD PARK HOMEOWNERS ASSOCIATION, INC., Appellee**

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**On Appeal from County Civil Court at Law No. 2**
**Harris County, Texas**
**Trial Court Cause No. 872089**

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## MEMORANDUM OPINION

Ashford Park Homeowners' Association, Inc. (the Association) sued one of its property owners, Willie McGlown, Jr., for his failure to timely pay assessments levied against him. The trial court granted the Association's motion for summary judgment, and awarded actual damages and attorney's fees. McGlown, proceeding pro se, appeals, contending that the trial court erred in granting summary judgment because contested issues remain for trial. We agree and reverse.

## Background

The Association Declaration of Covenants, Conditions, and Restrictions (declaration) of Ashford Park requires each lot owner to pay assessments imposed by the board of directors of the Association. The declaration, as well as Texas statute, allows the Association to charge a lot owner interest, late charges, costs, and reasonable attorney's fees if that owner does not timely pay an assessment. The declaration also reserves to the Association a continuing lien against the lot to secure any outstanding assessments. According to the Association's pleadings, McGlown failed to pay his homeowners' assessment, amounting to more than $2,144.75, including interest, costs, and attorney's fees.

The Association sent a request for admissions of fact to McGlown by certified and first class mail on or about October 13, 2006. The certified

mail was returned unclaimed; the first-class mail was not returned. The record reveals that, while McGlown still had legal representation, his counsel sought to undo the deemed admissions through a motion to strike, but the record does not contain any ruling on that motion.

In December 2006, the Association moved for summary judgment based on the deemed admissions, an affidavit from the Association's records custodian, and an attorney's fees affidavit executed by its own attorney. In his response, McGlown challenged the validity of the deemed admissions, provided a copy of correspondence showing that he had sent a $457.00 check to the Association representing the amount of the assessment plus late fees before receiving a demand letter for $3,646.90, and challenged the reasonableness of the attorney's fees sought.

On April 8, 2008, the trial court granted summary judgment in favor of the Association, and awarded $1,372.50 in damages and $5,000 in attorney's fees, as well as fees for defense of the judgment on appeal and pre- and post-judgment interest. On May 8, 2008, McGlown filed his "Objections to Judgment," in which he contended that the trial court erred in granting the attorney's fees award and that fact issues existed concerning whether the Association had agreed to accept the tendered payment, and requested that the judgment be reversed and that "[he] be given [his] day in

court."

## Discussion

*Standard of Review*

McGlown has asserted a general complaint that the trial court erred in granting summary judgment. *See Malooly Bros. Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life Accid. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). In a traditional motion for summary judgment, the movant has the burden to show that no genuine issue of material fact exists and that the trial court must grant a judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). We review the evidence in a light favorable to the nonmovant and indulge every reasonable inference in the nonmovant's favor. *Dorsett*, 164 S.W.3d at 661; *Knott*, 128 S.W.3d at 215; *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

Summary judgments must stand on their own merits. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). The nonmovant has no burden to respond to a traditional summary judgment motion unless the movant conclusively establishes its cause of action. *See*

*id.*; *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222–23 (Tex. 1999); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); *see also Grace v. Titanium Electrode Prods., Inc.*, 227 S.W.3d 293, 297 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

*Did the Association meet its burden of proof?*

The Association's claim against McGlown is essentially one for breach of the declaration. To prove a breach of contract cause of action, the plaintiff bears the burden to show (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. *Valero Mkt'g & Supply Co. v. Kalama Int'l*, 51 S.W.3d 345, 351 (Tex. App.—Houston [1st Dist.] 2001, no pet.). McGlown admits that he failed to timely pay the 2006 assessment owed to the Association under the declaration. We examine, then, whether the Association conclusively proved actual damages and attorney's fees as required to satisfy its summary judgment burden.

*Proof of actual damages*

As proof of actual damages, the Association provided with its summary judgment motion an affidavit from its records custodian, who, after making recitals to satisfy the evidentiary rule for business records,

declared that "[t]he account reflecting the maintenance charges and costs of collection assessed against [McGlown's] property is attached hereto as Exhibit '1.'" Exhibit 1, however, is not attached to the record custodian's affidavit, and was not included with either the original or amended motion for summary judgment. In addition, we have reviewed the requests for admission and none ask McGlown to admit the amount of actual damages sought by the Association. Aside from the reference to the omitted Exhibit 1 accounting, no evidence supports the amount of actual damages awarded in the summary judgment. Resolving all doubts against the Association, therefore, we hold that it failed to meet its summary judgment burden on damages because it did not submit competent proof of them. *See* TEX. R. CIV. P. 166a(c).

*Proof of attorney's fees*

Next, we consider whether the Association's evidence supports the attorney's fees award. As a general rule, the party seeking to recover attorney's fees carries the burden of proof. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991). Chapter 38 of the Texas Civil Practice and Remedies Code, which the Association invoked here, affords the party seeking fees the presumption that the usual and customary fees for the eligible claim are reasonable. TEX. CIV. PRAC. & REM. CODE ANN.

§§ 38.001, 38.003 (Vernon 2008). This presumption, however, is subject to rebuttal, and McGlown has challenged the reasonableness of the Association's fee demand. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.003. In reviewing the reasonableness of an attorney's fees award, the court considers:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
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> (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

*Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04). The amount of attorney's fees sought also must bear some reasonable relationship to the

amount in controversy. *USAA County Mut. Ins. Co. v. Cook*, 241 S.W.3d 93, 103 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Although proof of the number of hours and corresponding hourly rate are not necessarily required, the trial court generally relies on evidence of hours expended and the attorney's stated hourly rate to determine whether the requested fee is reasonable for the nature and extent of the services performed. *McGee v. Deere & Co.*, No. 03-04-00222-CV, 2005 WL 670505, *4 (Tex. App.—Austin Mar. 24, 2005, pet. denied) (mem. op.) (citing *Collins v. Guinn*, 102 S.W.3d 825, 836 (Tex. App.—Texarkana 2003, pet. denied)).

In this case, the Association's own attorney executed the attorney's fees affidavit in support of its summary judgment motion. Uncontroverted testimony of an interested witness will establish attorney's fees sought are reasonable and necessary as a matter of law if (1) the testimony could readily be contradicted if untrue; (2) the testimony is clear, direct, and positive; and (3) there are no circumstances tending to discredit or impeach the testimony. *Rosenblatt v. Freedom Life Ins. Co. of Am.*, 240 S.W.3d 315, 321 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990)).

The Association's attorney describes his professional experience and itemizes activities he identifies as "the services that are necessary to handle a

collection matter which is similar in nature to the above-entitled and numbered cause." The attorney avers that "the total amount of attorney's fees and expenses incurred by Ashford Park Homeowners Association, Inc. in the prosecution of this lawsuit is $7,620.00," and, after reciting the reasonableness factors, opines that such sum "is a reasonable attorney's fee and is in accordance with the attorney's fees normally and customarily charged in litigation of the type now before the Court."

This affidavit does not satisfy the Association's summary judgment burden. First, the affidavit does not identify the services actually performed on behalf of the Association in this lawsuit, itemize the hours expended, or identify the attorney's hourly rate. The absence of these objective criteria prevents the affidavit from being readily controvertible.

Second, controverting evidence before the trial court bars summary judgment on the Association's attorney's fees claim. In his response, McGlown challenged the reasonableness of the Association's fee request with evidence that (1) he tendered a $457.20 check for payment of his dues, plus late charges, before he was served with any documents from an attorney, including the Association's demand letter, (2) the Association delayed in opening the mail containing the tendered check for several days, and (3) after an additional delay, the Association returned the check and

demanded the sum of $3,646.90.

The trial court's judgment awards only $5,000.00 in fees, less than the amount sought by the Association. It reflects that the trial court was duly concerned about the issue, but the court was not authorized to make a fact finding at this stage. *See Guity v. C.C.I. Enter. Co.*, 54 S.W.3d 526, 528 (Tex. App.—Houston [1st Dist.] 2001, no pet.). (holding that, when summary judgment record contains evidence contesting reasonableness of the attorney's fees requested, trial court may not resolve issue on summary judgment); *see also Rosenblatt*, 240 S.W.3d at 321. Accordingly, we reverse the trial court's summary judgment on the attorney's fee award.

**Conclusion**

The Association failed to meet its summary judgment burden to conclusively prove the amount of actual damages and its reasonable and necessary attorney's fees. We therefore reverse the judgment and remand the cause for trial.

Jane Bland
Justice

Panel consists of Justices Keyes, Hanks, and Bland.