COURT OF APPEALS DECISION DATED AND FILED

July 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2016AP1354

Cir. Ct. Nos. 2015SC3186
2015SC4267
2016SC30

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

RIVERSTONE CREEK CONDOMINIUM OWNERS ASSOCIATION, INC.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

GEORGIA HALL AND HARRY HALL,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from judgments of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 SEIDL, J.[1] Georgia and Harry Hall, pro se, appeal summary judgments granted in favor of Riverstone Creek Condominium Owners Association, Inc., (the Association) in its actions against the Halls to collect unpaid condominium assessments. The Halls raise several challenges to the Association's levy of the assessments against them. Primarily, they argue Lee Investments, LLC (Lee), which is the owner of three-fourths of the units in the Association, was not entitled to vote in the affairs of the Association. Additionally, they contend three of the elected condominium board members were ineligible to serve on the board. For both reasons, the Halls contend the board's vote at a condominium meeting authorizing the assessments was invalid. We reject the Halls' arguments and affirm the judgments in favor of the Association.

¶2 The Association cross-appeals the amount of attorney fees and costs the circuit court awarded in its favor. It contends the court erroneously exercised its discretion by awarding only $1000—which is less than its actual fees and costs—without explanation. We agree with the Association, reverse the $1000 award, and remand to the circuit court with directions to reconsider the attorney fee award, including attorney fees and costs associated with this appeal.

BACKGROUND

¶3 The Association, consisting of the owners of twenty-four condominium units, was formed in November 2006. Only six of the units have constructed buildings upon them (built-units). The Halls own one built-unit, and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Lee owns eighteen upon which no buildings have been erected (unbuilt-units). Kevin Eismann is one of the owners/members of Lee and an attorney at Epiphany Law, LLC. Eismann called a special meeting of unit owners to discuss matters of the Association, which was held on March 25, 2015. Prior to the meeting, the Association had never collected any assessments against the unit owners because the built-unit owners paid for their own individual unit expenses.

¶4 Eismann and two other non-attorney Epiphany Law personnel attended the meeting in person. Of the six built-unit owners, two attended the meeting in person, two appeared by telephone,[2] and two, including the Halls, did not attend. At the meeting, the unit owners unanimously elected a five-member board of directors, consisting of Eismann, the two Epiphany Law personnel, and two of the built-unit owners. The five directors then unanimously voted to adopt restated bylaws that levied monthly assessments against the unit owners to pay for common expenses, plus a monthly special assessment to establish a reserve account for the Association. Both the condominium declaration, section 8.01, and the restated bylaws, sections 12.3 and 12.4, authorized the Association and the board of directors to issue general and special assessments on a monthly basis.

¶5 The Association billed the Halls for several monthly and special assessments levied from April to August of 2015. The Halls refused to pay several assessments. The Halls did pay some assessments with checks that

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[2] The Halls briefly challenge the right of a unit owner to vote by telephone. However, the Halls do not develop an argument or cite legal authority to support that contention, so we shall not consider it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

contained a notation “under protest.” The Association declined to accept the “under protest” checks out of concern of incurring liability. The Association brought three small claims actions against the Halls to collect the unpaid or paid “under protest” assessments, totaling $845, and it moved for summary judgment. The Halls filed cross-motions for summary judgment. The small claims cases were consolidated into one action.[3]

¶6 At the hearing on the motions, the Association argued that as an owner of unbuilt-units, Lee was entitled to vote on Association matters because the condominium declaration defined a “unit” as including unbuilt-units. Alternatively, the Association argued that, even if Lee’s representatives were not entitled to vote, a quorum of built-unit owners voted at the meeting, so the assessment vote was still valid. The Halls argued the voting rights provisions in the declaration did not include unbuilt-units such as those Lee owned, a quorum of built-unit owners was not present at the meeting, and Eismann and the two Epiphany Law personnel could not serve on the board of directors because they personally did not own any units.

¶7 The circuit court concluded the assessments against the Halls were proper and granted summary judgment to the Association. The circuit court then turned to the Association’s motion to award its attorney fees and costs under the terms of the condominium declaration allowing such an award in an action to

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[3] The Halls appear to assert that the Association’s small claims actions were invalid because they tendered the “under protest” checks as payment for at least some of the assessments refused by the Association. However, again the Halls do not develop an argument or cite legal authority to support that contention, so we shall not consider it further. *See* ***Pettit***, 171 Wis. 2d at 646-47.

recover unpaid assessments. In its affidavit in support of its motion for summary judgment, the Association attached its attorney's billing statement of $3641.98 regarding collection of the assessments against the Halls. After reviewing the portions of the condominium declaration authorizing attorney fees, the court concluded "[g]iven that the condo declaration does indicate attorney's fees, $1,000 total I think is reasonable" and awarded that amount without further explanation.

¶8 The circuit court entered written orders granting the Association's motions for summary judgment, denying the Halls' motions for summary judgment, and awarding the Association $845 for the unpaid assessments without interest, statutory costs of $291.50, and $1000 in attorney fees. The Halls appeal the denial of their summary judgment motions, while the Association cross-appeals the amount of attorney fees awarded.

DISCUSSION

I. The Halls' appeal

¶9 "We review the grant or denial of summary judgment de novo, and we apply the same standard as does the trial court." ***Mach v. Allison***, 2003 WI App 11, ¶14, 259 Wis. 2d 686, 656 N.W.2d 766 (2002). Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2). Generally, "[w]hen both parties move by cross-motions for summary judgment, it is the equivalent of a stipulation of facts permitting the trial court to decide the case on the legal issues." ***Millen v. Thomas***, 201 Wis. 2d 675, 682-83, 550 N.W.2d 134 (Ct. App. 1996). Here the parties' cross-motions amount to a stipulation of facts.

¶10 The Halls first argue the vote on the assessment provision in the restated bylaws was void because Lee owned units of vacant land without buildings, and they were improperly granted eighteen votes at the special meeting. Because the Halls argue Lee did not own units entitled to vote, we are required to interpret the voting provisions of the Riverstone Creek Declaration of the Association (the declaration). That is a question of law we review independent of the circuit court's conclusions. *See* ***Solowicz v. Forward Geneva Nat'l, LLC***, 2010 WI 20, ¶¶13, 34, 323 Wis. 2d 556, 780 N.W.2d 111.

¶11 In ***Northernaire Resort & Spa, LLC v. Northernaire Condominium Association, Inc.***, 2013 WI App 116, ¶17, 351 Wis. 2d 156, 839 N.W.2d 117, this court observed:

> The Condominium Ownership Act largely defers to the declaration to determine voting rights in an association. WISCONSIN STAT. § 703.15(4)(d)1. provides, "At meetings of the association every unit owner is entitled to cast the number of votes appurtenant to his or her unit, as established in the declaration under [WIS. STAT. §] 703.09(1)(f)." Section 703.09(1)(f), in turn, requires a condominium declaration to specify "the number of votes at meetings of the association of unit owners appurtenant to each unit."

(Brackets in original.)

¶12 Here, in compliance with WIS. STAT. §§ 703.15(4)(d)1. and 703.09(1)(f), section 6.02 of the declaration provides that "[e]ach Unit Owner shall have one vote for each Unit owned." Section 1.25 of the declaration defines a "Unit Owner" as the "record owner of a Unit." Section 2.08 of the declaration further provides a voting formula that "ownership interest and voting rights formula shall be 4.2% (1/24) interest for *each* Unit." (Emphasis added.) Nowhere

in sections 6.02 or 2.08 of the declaration, or under the statutes, is voting limited to only built-unit owners.

¶13 A question still remains as to how the declaration defines a "unit." Section 1.23 of the declaration defines a "Unit" as "[a] part of a Condominium as set forth in this Declaration intended *for any type of independent use* consistent with this Declaration, the By-Laws of the Association and any other Rules and Regulations of the Association as more fully defined in Wisconsin Statute Section 703.02(15)." (Emphasis added.) Section 1.23 of the declaration incorporates the statutory definition. WISCONSIN STAT. § 703.02(15) defines a "Unit" more fully as "a part of a condominium intended for *any type of independent use*, including one or more cubicles of air at one or more levels of space or one or more rooms or enclosed spaces located on one or more floors, or parts thereof, in a building." (Emphasis added.) We have interpreted the definition of "Unit" under § 703.02(15) to include condominium property upon which there has been no construction. *See* ***Aluminum Indus. Corp. v. Camelot Trails Condo. Corp.***, 194 Wis. 2d 574, 582-83, 535 N.W.2d 74 (Ct. App. 1995). The record establishes that Lee is the owner of eighteen units and, whether or not it owned built-units, it was entitled to eighteen of the twenty-four unit owner votes pursuant to the declaration.

¶14 Nonetheless, the Halls insist that Lee does not own "Units" as defined under Article II, section 2.04 of the declaration. Article II is titled "Description of Development," and it sets forth the development plans for the Units subject to the Declaration. Section 2.04, entitled "Identification," provides

that "[a] Unit is that part of a Building[4] intended for individual lodging purposes, comprised of one or more cubicles of air at one or more levels of space," and further describes the upper, lower and perimeter boundaries of a structure. The Halls also cite section 2.05 of the declaration, which states that "[e]ach Unit shall expressly include the Garage which serves such Unit and is appurtenant thereto[,]" and they observe Lee's units do not include any garages. The Halls further assert that section 2.04 is similar to the definition of a "unit" under the declaration in ***Northernaire***, where a "unit" was defined as "any portion of a structure situated upon the [property subject to the declaration] designed and intended for use and occupancy as a residence by a single family …." *See* ***Northernaire***, 351 Wis. 2d 156, ¶5 (brackets in original).

¶15 We reject the Halls' argument. First, the sections of the declaration the Halls cite do not define a "unit" but, rather, defines what parts of a building are included in a built-unit. Second, the Halls ignore the "Unit" definition in section 1.23. Finally, the Halls' reliance upon the ***Northernaire*** case to support their argument that Lee does not own units entitled to vote is misplaced. Here, the declaration does not define a unit in terms of "any portion of a structure" on the property as did the declaration in the ***Northernaire*** case. *See* ***id.***, ¶5.

¶16 The Halls also assert that Eismann and the two Epiphany Law personnel were improperly elected to the Association's board of directors because they were not unit owners themselves. The Halls argue those individuals could

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[4] "Building" is defined under section 1.05 of the declaration as "[a]ny structure as herein defined having a roof supported by columns or walls used or intended for the shelter or protection of persons or property of any kind."

not be elected as directors under section 3.2 of the original bylaws, which provides "All Board members shall be Unit Owners." We disagree with the Halls concerning Eismann's eligibility to serve as a director. As a unit owner, Lee was entitled to be a director under section 3.2, but as an LLC, it could only vote its units or serve as a director through its members. *See* WIS. STAT. § 183.0301 (agency powers of LLC members). It is undisputed Eismann was a member of Lee, so he was eligible to both vote Lee's units and eligible for election to the board as Lee's representative. Meanwhile, the two built-unit owners were eligible to become directors because they were unit owners. Therefore, those three persons, Eismann and the two built-unit owners, were duly elected as directors pursuant to the declaration.

¶17 However, we agree with the Halls regarding the eligibility of the two Epiphany Law personnel to serve as directors. First, the record fails to show the Epiphany Law personnel were unit owners. In the circuit court, the Halls specifically referred to Eismann and the two Epiphany Law personnel as "three agents of Lee Investments." However, the record does not show whether, or in what regard, the two Epiphany Law personnel may actually be agents of Lee. Regardless of whether they were agents of Lee, there is no indication in the record that the two Epiphany Law personnel were members of Lee. Therefore we assume, without deciding, the two Epiphany Law personnel were ineligible for election to the board.

¶18 Our analysis does not end there. We must determine the validity of the board's assessment vote without considering the vote of the two Epiphany personnel. Under the original bylaws, the Association may conduct official

business if a “quorum” is present. Section 2.2 of the original bylaws provided “a quorum for Member’s meetings shall consist of fifty percent of the votes entitled to be cast.” Of the total twenty-four votes, Lee was present at the meeting through Eismann, who held eighteen votes, as were four built-unit owners, who held four votes. Therefore, over fifty percent of the twenty-four total votes were present at the meeting, constituting a quorum to properly elect the board of directors. Under section 3.9 of the original bylaws, “a majority of Directors shall constitute a quorum for the transaction of business.” Since all three duly elected directors were present at the meeting, a quorum of directors was present, and they unanimously voted to adopt the assessments. We therefore conclude the assessment vote was valid.

¶19 Because we reject the Halls’ arguments that the Association improperly levied the assessments, we affirm the circuit court’s grant of summary judgment in favor of the Association.[5]

II. The Association’s cross-appeal

¶20 The Association cross-appeals the amount of $1000 attorney fees awarded by the circuit court. It argues the court erroneously exercised its

[5] On appeal, the Halls raise several new claims not made in circuit court. The Halls argue costs must be assessed against the Association “for maintaining a frivolous action.” They claim the Association’s actions to collect the assessments were “unconscionable” and “in violation of the Wisconsin Consumer Act … and the Fair Debt Collection Practices Act.” The Halls also allege Lee’s correspondences to the other unit owners “included defamatory comments concerning Ms. Hall.” We shall not consider those claims because they were not presented to the circuit court and are raised for the first time on appeal. *See* ***Dalka v. American Family Mut. Ins. Co.***, 2011 WI App 90, ¶5, 334 Wis. 2d 686, 799 N.W.2d 923. In addition, those claims are either unsupported by legal authority or undeveloped. *See* ***Pettit***, 171 Wis. 2d at 646-47.

discretion because it never explained why the court ignored the Association affidavit regarding its fees and only awarded $1000. It claims there is no basis in the record which supports an award less than the fees stated in the affidavit.

¶21 When a circuit court's award of attorney fees is challenged on appeal, we review for an erroneous exercise of discretion. ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58. We defer to the circuit court because it is far more likely to be familiar with local billing norms and at a better vantage point to witness the quality of counsel's service. ***Id.*** A court properly exercises its discretion when it employs a logical rationale based on correct legal principles and the facts of record. ***Id.***

¶22 "The American Rule provides that parties to litigation typically are responsible for their own attorney fees" unless statutory or contractual provisions expressly allow otherwise. ***Estate of Kriefall v. Sizzler USA Franchise, Inc.***, 2012 WI 70, ¶72, 342 Wis. 2d 29, 816 N.W.2d 853. The condominium declaration is a contract between the unit owners and the Association which is formed when an owner acquires a unit. *See* ***Solowicz***, 323 Wis. 2d 556, ¶40. Section 8.09 of the declaration here provides that the Association may "bring an action against the Unit Owner personally obligated" to pay an overdue assessment. That section further states "[i]n the event a personal judgment … is obtained, such judgment … shall include interest on the Assessment and any other sum owing to the Association, together with reasonable attorneys' fees to be fixed by the court and all costs of the action." Additionally, section 13.02 of the declaration, regarding remedies for breach of the declaration, provides "[t]he Association or the petitioning Unit Owner(s)… shall have the right to recover court costs and

reasonable attorney fees in any successful action brought against another Unit Owner to enforce or recover damages for a violation of this declaration." Therefore, the declaration serves as an exception to the American Rule.

¶23 The declaration only allows recovery of "reasonable" attorney fees. Under the "lodestar" method for determining the reasonableness of attorney fees, the starting point is measured by the attorney hours spent on the litigation multiplied by the attorney's hourly billing rate. ***Kolupar***, 275 Wis. 2d 1, ¶¶25, 30. As previously noted, in its affidavits in support of summary judgment the Association averred it incurred attorney fees and costs in the amount of $3641.98 based upon the number of hours spent in collecting the assessments multiplied by the attorney's hourly rate. The Association attached a billing statement from its attorney for that amount.

¶24 In addition to using the lodestar method, the court may consider the following factors in awarding reasonable attorney fees:

> (1) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, 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;
>
> (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.

Id., ¶25.

¶25 The fact that the circuit court declined to award the documented amount of attorney fees does not necessarily mean the award is inadequate under the "lodestar" method. *See* ***id.***, ¶¶22, 23. However, we agree with the Association that the circuit court did not properly exercise its discretion. The court failed to explain what particular factors supported its decision, and our independent review of the record does not indicate how the court determined only $1000 was a reasonable amount. We therefore reverse the amount of the attorney fees and costs award and remand to the circuit court to reconsider a reasonable amount that should be awarded using the lodestar method and considering other applicable factors, if any.

¶26 The Association also argues that, under the declaration, it is entitled to attorney fees and costs incurred in defending this appeal. As already noted, sections 8.09 and 13.02 of the declaration contractually allows for attorney fees as an exception to the American Rule.[6] "Contracts must be construed as they are written." ***Hunziger Const. Co. v. Granite Res. Corp.***, 196 Wis. 2d 327, 339, 538 N.W.2d 804 (Ct. App. 1995). "As is the general rule, we will not construe an obligation to pay attorneys' fees contrary to the American Rule unless the contract provision clearly and unambiguously so provides." ***Id.*** at 340. Sections 8.09 and

[6] The Association has not filed a motion for costs and attorney fees resulting from a frivolous appeal pursuant to WIS. STAT. RULE 809.25(3).

13.02 provide that attorney fees and costs are available when the Association obtains a judgment through an "action," or brings "any successful action," to collect delinquent assessments or fees. That broad language does not limit such an award to only action in the circuit court. This appeal is part of a successful action by the Association to collect delinquent assessments. We interpret the declaration language "any successful action," to clearly and unambiguously allow recovery of reasonable attorney fees and costs in this appeal. On remand, we also direct the circuit court to determine the Association's reasonable attorney fees and costs incurred in defending this appeal and the cross-appeal and award the Association such fees and costs.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.