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2013 IL App (3d) 120329-U

Order filed March 11, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

CHARLES M. ROCK)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellant,)	Peoria County, Illinois,
Cross-Appellee,)	
)	
v.)	Appeal No. 3-12-0329
)	Circuit No. 11-CH-286
DOVER POINTE HOMEOWNERS)	
ASSOCIATION, INC.,)	
)	Honorable
Defendant-Appellee,)	Michael E. Brandt,
Cross-Appellant.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The trial court erred in awarding provisional directors fees as costs under section 5-109 of the Code of Civil Procedure (735 ILCS 5/5-109 (West 2010)).
(2) The trial court properly denied defendant's petition for damages as untimely.
- ¶ 2 After plaintiff, Charles M. Rock, voluntarily dismissed his injunction action, defendant, Dover Pointe Homeowners Association (Association) filed a motion for costs and

a petition for damages. The trial court awarded the Association \$3,351 in court costs and fees paid for provisional directors appointed by the court and denied the Association's request for damages. Rock appeals, arguing that the Association is not entitled to recover the costs of hiring provisional directors, and the Association cross-appeals, claiming that its petition for damages should have been granted. We reverse the court's award of costs and modify the order accordingly. We also affirm the court's order denying the petition for damages.

¶ 3 The Association has an eight-member board of directors, who serve two-year terms and are elected biannually. Rock is an attorney and the registered agent of record for the Association, and he served as a director on the board. In 2011, Rock and three other board members had expiring terms and decided not to run for reelection. On April 26, 2011, the Association conducted a meeting in which the board adopted general procedures for the upcoming election to be held for the four board seats with more detailed procedures to be circulated, discussed and approved. It was also agreed that notice of a May 10, 2011, "meet the candidates" event would be circulated promptly. The record indicates that these additional activities either took place without a quorum or did not occur. The format for the ballot was discussed and approved, and a mailing list was generated.

¶ 4 Shortly after the April 26th meeting, ballots were sent to all the homeowners in the Association with instructions to return them by May 31, 2011. Upon receiving his ballot, Rock sent an email to the other board members expressing several concerns he had with the form that was mailed and informed them that he would be filing a motion in circuit court to enjoin the election.

¶ 5 Within days, Rock filed a motion for temporary restraining order against the Association. The motion sought to enjoin election procedures that Rock claimed had not been discussed or approved by a majority of the board. Those procedures included (1) a denial of members of the Association of the opportunity to vote for a write-in candidate, (2) a denial of the right of members of the Association to cast a ballot at the annual meeting, and (3) a ballot in a form not approved by the board. On May 31, 2011, the trial court entered a temporary restraining order delaying the election. On June 3, 2011, the order was converted to a preliminary injunction, and a hearing was scheduled for June 9.

¶ 6 On June 8, 2011, the Association, represented by attorney Phillip O'Donnell, filed a motion to dismiss. The Association also filed a motion to dissolve the restraining order. In response, Rock filed a motion to strike O'Donnell's appearance. At oral arguments, Rock argued that O'Donnell was not legally able to represent the Association because less than a majority of the eight-member board voted to retain him as counsel. Rock suggested that the court appoint two provisional directors pursuant to section 105/112.55 of the Business Organizations Nonprofit Corporations Act (Business Organizations Act) (805 ILCS 105/112.55(a), (b) (West 2010)).

¶ 7 The trial court found that five board members were needed for a quorum to conduct business and that any action by the Association to hire O'Donnell using only four members was null and void. The court's order stated:

"As it appears that Defendant is deadlocked in that Plaintiff is a board member who indicates he will abstain from voting, the court appoints two provisional directors. Said Provisional directors shall be treated as regular board members per Defendant's

by-laws until further order of the Court. The Provisional Directors shall bill the Defendant an hourly rate not to exceed \$200.00."

¶ 8 At a board meeting on July 22, 2011, the board, including the two provisional directors, voted to retain O'Donnell as counsel. The substantive motions that had been previously filed by the Association were then noticed for hearing. Attached to the notice was an affidavit of a board member confirming that the Association, by majority vote, had elected to retain O'Donnell.

¶ 9 Prior to the next hearing, the provisional directors filed a motion requesting that they be discharged from the board because the issue that needed a majority vote, retaining counsel, had been resolved.

¶ 10 On September 14, 2011, the trial court entered a stipulated order discharging the provisional directors. Specifically, the order stated, "Mr. Nemenoff and Mr. Fuller shall promptly submit their invoices for their services to the Board as provisional directors, and said Invoices shall be promptly paid by Defendant." On that same date, the trial court entered an order dismissing the case with prejudice pursuant to Rock's voluntary dismissal motion. The court's order also dissolved and vacated the May 31, 2011, temporary restraining order.

¶ 11 Three weeks later, the Association filed a motion to tax costs under section 5-109 of the code of Civil Procedure (Code) (735 ILCS 5/5-109 (West 2010)), seeking the fees paid to the provisional directors in the amount of \$3,210 and court costs and fees of \$141. The Association also filed a petition to assess damages, requesting attorney fees, pursuant to section 11-110 of the Code (735 ILCS 5/11-110 (West 2010)). The trial court granted the

motion for costs and denied the petition for damages as untimely.

¶ 12

I

¶ 13

On appeal, Rock argues that the trial court erred in awarding the provisional directors' fees as costs under section 5-109.

¶ 14

A prevailing party may receive costs only where a statute or supreme court rule so provides. Sections 5-108 of the Code states that judgment "shall be entered" in favor of the prevailing plaintiff to recover costs against the defendant. 735 ILCS 5/5-108 (West 2010). A similar provision mandates the award of costs to a prevailing defendant in civil cases where the action is voluntarily dismissed by the plaintiff. 735 ILCS 5/5-109 (West 2010). These statutes, however, are in derogation of the common law and must be narrowly construed; only those costs specifically designated by statute may be taxed as costs. *Vicencio v. Lincoln-Way Builders, Inc.*, 204 Ill. 2d 295 (2003).

¶ 15

Neither section 5-108 nor section 5-109 states what "costs" properly includes. Defining the term "costs" has been left for the courts to determine. In *Galowich v. Beech Aircraft Corp.*, 92 Ill. 2d 157 (1982), our supreme court stated that the term "costs" has acquired "a fixed and technical meaning in the law." The *Galowich* court defined costs as "allowances in the nature of incidental damages awarded by law to reimburse the prevailing party to some extent at least, for the expenses necessarily incurred in the assertion of his rights in court." *Galowich*, 92 Ill. 2d at 165-66.

¶ 16

That definition further evolved in *Vicencio v. Lincoln-Way Builders, Inc.*, 204 Ill. 2d 295 (2003). In *Vicencio*, the supreme court explained that the definition in *Galowich* is merely descriptive and does not create an exact correlation between those costs that must be

taxed under section 5-108 and 5-109 and those that may be taxed under another statute or rule. *Vicencio*, 204 Ill. 2d at 301-02. For example, a corporation "necessarily incurs" attorney fees every time it is involved in litigation because a corporation may only appear in court through counsel. However, those litigation fees have never been recoverable under sections 5-108 or 5-109. *Id.*

¶ 17 We note that "costs," as discussed in *Vicencio*, is a term of art with a specific statutory meaning. The legal definition of the term distinguishes between court costs: the "charges of fees taxed by the court such as filing fees, jury fees, courthouse fees, and reporter fees," and litigation costs: the "expenses of litigation, prosecution, or other legal transaction." Black's Law Dictionary 350 (7th ed. 1999). Commonly understood court costs are recoverable under section 5-109, but litigation costs are not recoverable unless otherwise authorized by another statute or supreme court rule. *Vicencio*, 204 Ill. 2d at 302.

¶ 18 Here, the provisional directors' fees do not fall squarely within the commonly understood meaning of "court costs" which are recoverable under section 5-109. They are not similar to filing costs or court reporter fees. The directors' fees are more similar to expert witness fees (*Vicencio*, 204 Ill. 2d at 302) or healthcare professionals' reports (*Moller v. Lipov*, 368 Ill. App. 3d 333 (2006)) that are required to keep litigation moving. They may or may not be incurred at trial. Here, the provisional directors' fees were required to allow the Association to continue to conduct business as a quorum board. They were incurred to facilitate the litigation process. Such fees are more appropriately characterized as litigation fees.

¶ 19 Moreover, the statute that allows for the appointment of provisional directors by the

circuit court does not authorize the taxing of directors' fees as costs. Section 112.55(e) of the Business Organizations Act states that reimbursements to the provisional directors "shall be paid by the corporation." 805 ILCS 105/112.55(e) (West 2010). Since we are charged with the task of construing section 5-109 narrowly, we refuse to expand the definition of taxable costs to include fees incurred for provisional directors appointed under section 112.55(e). Such fees are not costs that can be awarded to the Association under section 5-109.

¶ 20

II

¶ 21

On cross-appeal, the Association argues that the trial court erred in denying its petition to assess damages under section 11-110 of the Code as untimely.

¶ 22

Section 11-110 of the Code provides:

"In all cases where a temporary restraining order or a preliminary injunction is dissolved by the circuit court or by the reviewing court, the circuit court, after the dissolution of the temporary restraining order or preliminary injunction, *and before finally disposing of the action* shall, upon the party claiming damages by reason of such temporary restraining order or preliminary injunction, *** determine and enter judgment in favor of the party who was injured by such temporary restraining order or preliminary injunction for the damages which the party suffered as a result thereof." (Emphasis added.) (735 ILCS 5/11-110 (West 2010)).

¶ 23

Here, the Association did not ask the court to delay the dismissal so that it could file a petition for damages, nor did it request to have its motion to dismiss heard before the hearing on Rock's motion to voluntarily dismiss the case. The Association did not seek damages until three weeks after the case was dismissed. Since it did not request damages

before the action was finally disposed of, the Association's petition was untimely and properly dismissed by the trial court.

¶ 24 The Association argues that a defendant's petition seeking a recovery of damages under section 11-110 need not be filed before the court's order is entered dissolving a preliminary injunction or temporary restraining order. Citing *Marion Metal & Roofing Co. v. Wood*, 243 Ill. App. 3d 890 (1993), it claims that the right to recover damages accrues immediately upon dissolution of the injunction and that the restrained party may file a petition for damages any time before or after dissolution.

¶ 25 The facts in *Marion* are distinguishable. In that case, the defendant filed a counterclaim for damages under section 11-110 before the temporary restraining order was dissolved. The court held that because of the counterclaim, the plaintiff's motion for dissolution and voluntary dismissal was not a final disposition of the cause of action. In this case, a counterclaim had not been filed prior to Rock's motion for dissolution and voluntary dismissal. When the court ruled on Rock's motion, there was no pending claim by either party. Thus, the order dismissing the case with prejudice was the final disposition of the action. The Association's subsequent request for damages could not revive the case.

¶ 26 The language in section 11-110 clearly provides that the restrained party may petition the court for damages at any time after dissolution of the temporary restraining order but before the action is finally dismissed. The Association's petition was filed after the final dismissal of the case. Therefore, the trial court properly denied its petition for damages as untimely.

¶ 27

CONCLUSION

¶ 28 The circuit court's award of costs in the amount of \$3,351 is reversed. Pursuant to Supreme Court Rule 366(a)(5) (Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994)), we modify the court's order to reflect an award of \$141 for court costs and filing fees; the Association is not entitled to recover the fees paid to the provisional directors appointed by the court. The judgment of the circuit court denying defendant's petition to assess damages is affirmed.

¶ 29 Affirmed in part and reversed in part; order modified.