2019 IL App (1st) 182262-U

FOURTH DIVISION
August 29, 2019

No. 1-18-2262

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SILO RIDGE HOMEOWNERS ASSOCIATION, Plaintiff-Appellee, v. JOHN T. ABERCROMBIE, ROSEMARY ABERCROMBIE, and ALL UNKNOWN OCCUPANTS, Defendants. (John T. Abercrombie and Rosemary Abercrombie, Defendants-Appellants).	)	Appeal from the Circuit Court of Cook County. No. 17 M5 005766 Honorable Kathleen Marie Burke Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendants failed to meet their burden of providing a complete record on appeal to support their claims that the circuit court erred in granting attorney fees, or in the alternative, that the amount of fees awarded was unreasonable, this court presumes that the trial court's orders had a sufficient factual basis and were in conformance with the law.

¶ 2 This appeal arises from a complaint for possession and judgment for unpaid assessments filed by plaintiff, Silo Ridge Homeowners Association (Association), against defendants, John T.

Abercrombie and Rosemary Abercrombie, and all unknown occupants. In this appeal, defendants contend that the trial court erred in granting the Association attorney fees and court costs, and, in the alternative, that the amount of attorney fees and costs awarded was unreasonable.

¶ 3 The common law record filed in this appeal shows that on August 17, 2017, the Association filed a complaint for possession of common interest unit and judgment for assessments against defendants. The complaint alleged that defendants were the legal owners of property located at 30 Country Lane in Orland Park (the premises), which was subject to the Declaration of Covenants of the Association. The Association asserted that defendants had failed to pay monthly assessments, special assessments, and other common expenses, as provided in the Declaration of Covenants, totaling $2,180.15, which was comprised of an outstanding balance from 2016 of $468.23, an annual assessment of $500, late charges of $100, attorney fees to date of $609.50, and costs to date of $502.42. The Association alleged that the Declaration of Covenants and Section 9-111 of the Illinois Code of Procedure (Code) (735 ILCS 5/9-111 (West 2016)) further provided that defendants were responsible for the Association's costs, late charges, interest and reasonable attorney fees incurred in bringing the action, and that the Association was entitled to possession of the premises. Finally, the Association contended that the above facts constituted a breach of contract.

¶ 4 On August 29, 2017, the Association filed affidavits of service from the sheriff, alleging that defendants were served by substitute service by leaving a copy of the summons and complaint at the premises—the defendants' "usual place of abode"—with Angel Abercrombie, "a family member or person residing there, 13 years or older, and informing that person of the contents of the summons." The sheriff further averred that a copy of the summons was mailed to

defendants at that location on August 25, 2017. The summons indicated that the matter was set for trial on September 7, 2017.

¶ 5 On September 7, 2017, the Association filed a petition in support of attorney fees, which provided that the Association's "Declaration provides that each unit owner must pay to the Association monthly and special assessments, and other common expenses, including all costs of collection and attorney[] fees," and that Section 9-111 of the Code of Civil Procedure (Code) also provided for reasonable attorney fees and costs. The Association alleged that during the course of the proceedings, certain attorneys "performed a variety of services in connection with the amounts owed by the unit owner to the Association." The Association attached a schedule detailing the various services rendered by those attorneys, and an itemization of the costs incurred. The attached schedule showed total attorney fees of $1303.50, and total costs of $543.61.

¶ 6 That same day, the court entered an *ex parte* order of possession in favor of the Association. The court found that the Association was entitled to possession of the premises, and that the Association was entitled to recover $700 in common expenses, $1303.50 in attorney fees, and $543.61 in costs. The judgment was stayed until November 7, 2017. No transcript of the September 7, 2017, proceedings appears in the record on appeal.

¶ 7 On February 22, 2018, defendant John T. Abercrombie filed a motion to vacate the judgment, stating, in total, "I was never served and the bill was paid to [the] Association."

¶ 8 Defendant's motion was heard on April 19, 2018, at which time the trial court entered a written order stating that it was "viewing the Motion to Vacate as Defendant's Motion to Quash" and that "Defendant's motion is hereby granted." The court further stated that defendants were

"waiv[ing] service and submit[ting] to the Court's jurisdiction." No transcript of the April 19, 2018, proceedings appears in the record on appeal.

¶ 9 The case was set for trial on August 9, 2018. On that date, the court entered a written order noting that the matter was coming to be heard for trial and that all parties were present and represented by counsel. The court found that "[n]o assessments [were] due as of August 9, 2018, and [the] only issue before [the] Court [wa]s [the Association]'s fee petition." The court granted the Association leave to file its fee petition *instanter*, set a briefing schedule, and set the fee petition for hearing on September 20, 2018. No transcript of the August 9, 2018, trial appears in the record on appeal.

¶ 10 The Association's petition for attorney fees, filed August 9, 2018, provided that the Association's "Declaration provides that each unit owner must pay to the Association monthly and special assessments, and other common expenses, including all costs of collection and attorney[] fees," and that Section 9-111 of the Code also provided for reasonable attorney fees and costs. The Association again alleged that during the course of the proceedings, certain attorneys "performed a variety of services in connection with the amounts owed by the unit owner to the Association." The Association attached another schedule detailing the various services rendered by those attorneys, and an itemization of the costs incurred. This time, the attached schedule showed total attorney fees of $4513.50, and total costs of $615.88, for a total of $5129.38.

¶ 11 Defendants filed a response to the Association's petition for attorney fees on August 30, 2018. In their response, defendants alleged that Section 9-111 of the Code provides that: "if the court finds that the expenses or fines are due to the plaintiff, the plaintiff shall be entitled to *** reasonable attorney[] fees, if any, and for the plaintiff's costs." 735 ILCS 5/9-111(a) (West

2016). Defendants maintained that the statute did "not allow for attorney[] fees for an action if there is no assessment, including interest and late charges, due," and accordingly, since the court found that "all assessments had been paid," the court could not "find that reasonable attorney fees are due to the [Association]." Defendants also argued in the alternative that the amount sought for attorney fees was unreasonable because it was more than seven times $700, the "original amount in controversy."

¶ 12 The Association filed a reply on September 11, 2018. In that reply, it contended that defendants did not pay the April 1, 2017, annual assessment until October 2017, after the Association had been forced to "issue a Notice and Demand, file a lawsuit, obtain a possession order, have it placed with the sheriff and appear for numerous court calls." The Association asserted that there was

> "no dispute that this matter was litigated for several months and if Defendant had timely paid his assessment and/or paid prior to the filing of the lawsuit then legal fees would not be at issue. However, *** it was only after the possession order was entered that the Defendant paid the assessment portion only[,] *** long after the lawsuit was initiated."

The Association further stated that defendants' failure to pay "triggered the provisions in the Illinois Condominium Property Act, the Forcible Entry and Detainer Act, and the Association's Declaration which allowed the Association to *** recover unpaid assessments along with legal fees." The Association attached a copy of its Declaration, which provided that every owner:

> "is deemed to covenant and agree to pay the Association: (1) annual assessments or charges; and (2) special assessments for capital improvements ***. The annual and special assessments, together with interest, costs and reasonable attorney[]

> fees, shall be a charge on the land and shall be a continuing lien upon the property against which each assessment is made. Each such assessment, together with interest, costs and reasonable attorney[] fees, shall also be the personal obligation of the person who was the Owner of such property at the time when the assessment fell due."

¶ 13 On September 20, 2018, the court held a hearing on the Association's petition for attorney fees. The written order following that hearing provided: "Money Judgment in the amount of $3,833.00 as attorney[] fees and $615.88 as court costs are hereby entered against [defendants]." The written order provided no factual findings or reasoning, and no transcript from the September 20, 2018, hearing appears in the record on appeal.

¶ 14 The "Agreed Bystander's Report" submitted by defendants provided that, at the hearing, the parties appeared through counsel, "[n]o witnesses were called and the Court heard the arguments of counsel." The Bystander's Report further states that:

> "both attorneys argued their positions as fully set-forth in their respective Petition, Response and Reply.
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> ***
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> The Court then took the matter under advisement and proceeded into chambers to review. After a period of time, approximately an hour, the Court came back on the bench and issued her oral ruling as memorialized in the Order of September 20, 2018."

¶ 15 Defendants filed a timely notice of appeal on October 18, 2018, and in this court defendants first contend that the trial court erred in granting the Association attorney fees and court costs. Specifically, defendants maintain that the court erred in awarding fees pursuant to

Section 9-111 of the Code, because that statute requires a specific finding that expenses or fines are due to the Association. Defendants maintain that the court found that no assessments were due as of August 9, 2018, and without a finding that defendants failed to pay any particular expense, the trial court had no discretion to enter an order for attorney fees. Defendants do not cite any authority for their argument, maintaining that this is an issue of first impression, because there "has been no factual situation that has occurred wherein a condominium association has been awarded attorney[] fees and court costs when there is no underlying finding that the homeowner failed to pay the expenses or fines due to the association."

¶ 16 In response, the Association contends that the trial court properly granted its fee petition. The Association maintains that "[i]t was not until after the entry of the Order of Possession that defendants paid the past due balance. Accordingly, at the time of trial, the Association *** sought only the recovery of the attorney[] fees the Association incurred as a result of the litigation." The Association states that it is "[w]ithin this context" that the court acknowledged that defendants did not owe assessments at that time, but nothing in the order suggests that defendants "had not previously failed to pay assessments, which ultimately led to the lawsuit." The Association also contends that it is entitled to the recovery of attorney fees—not only pursuant to Section 9-111 of the Code—but also pursuant to the Association's Declaration.

¶ 17 Whether a party may recover attorney fees and costs pursuant to a specific statutory provision is a question of law. *Forest Preserve District of Cook County v. Continental Community Bank & Trust Co.*, 2017 IL App (1st) 170680, ¶ 32, citing *Grate v. Grzetich*, 373 Ill. App. 3d 228, 231 (2007). The circuit court's resolution of such a question is therefore subject to *de novo* review. *Id*. However, the circuit court's application of such statutory language to the facts of a particular case is reviewed for an abuse of discretion. See *Peleton, Inc. v. McGivern's*

Inc., 375 Ill. App. 3d 222, 226 (2007). An abuse of discretion occurs when no reasonable person could take the view adopted by the circuit court. *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812, ¶ 21. Thus, whether the court has authority to grant attorney fees is a question of law we review *de novo*, whereas a court's decision to as to whether to award authorized fees is reviewed for an abuse of discretion. *Spencer v. Di Cola*, 2014 IL App (1st) 121585, ¶ 34.

¶ 18 Even assuming that we agree with defendants that Section 9-111 of the Code requires a finding that expenses or fines were due to the Association, in light of the incomplete record on appeal, this court cannot assume that no such factual finding was made. It is well-established that "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). "From the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant." *Id.* When the record on appeal is insufficient, "it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Id.* at 392. Any doubts arising from the incompleteness of the record must be resolved against the appellant. *Id.*

¶ 19 In this case, defendants submitted the common law record on appeal, but provided no transcripts of the proceedings, most importantly, the September 20, 2018, hearing on the Association's petition for attorney fees. Although defendants attempt to remedy the lack of a transcript by submitting an agreed bystander's report (see Ill. S. Ct. R. 323(c), (d) (eff. July 1, 2017) (noting that in lieu of a trial transcript, an appellant may file a bystander's report or an agreed statement of facts)), the report submitted in this case is insufficient for us to review defendants' claim of error. See *Faddis v. Board of Directors of 1850-56 North North Lincoln Ave. Condominium Association*, 2014 IL App (1st) 132484, ¶ 31 (finding that "the bystander's

report provided [wa]s insufficient to review the trial court's decision."). The report in this case provides little to no additional information about the hearing than can otherwise be gleaned from the common law record, stating only that the parties argued as in their respective filings and that the court ruled as set forth in its written order.

¶ 20 Moreover, our review of the record and bystander's report confirms that the question of whether defendants had failed to pay the required assessment was before the court, as the Association claimed in its petition and reply. However, the record before us, including the written order and the bystander's report, does not indicate whether the circuit court made any factual findings on this point. In light of the incomplete record, this court has no knowledge of what findings the circuit court made, or the reasoning and rationale that provided the bases for its ruling. See *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 155-56 (2005) (declining to disturb the circuit court's judgment when "nothing in the supporting record contains any factual findings or the basis for the circuit court's decision"). In the absence of a complete record, we presume that the trial court's order was in conformity with law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392. Accordingly, this court will presume that the court made a factual finding that the assessment was due, and that an award of attorney fees pursuant to section 9-111 of the Code was appropriate.

¶ 21 Furthermore, even if we were to conclude that an award of attorney fees under section 9-111 of the Code was improper, there is yet another basis that could support the circuit court's award of attorney fees. As the Association points out, nowhere in defendants' appellate brief do they acknowledge that the Association was entitled to the recovery of attorney fees based on a contract between the parties, namely, the Association's Declaration. The Association contends that, pursuant to the Declaration, unit owners have a personal obligation to pay their assessments

in a timely manner, and the Declaration also provides for "interest, costs and reasonable attorney[] fees" incurred by the Association. In defendants' reply, they provide no responsive argument on this point, limiting their argument to Section 9-111 of the Code. 735 ILCS 5/9-111 (West 2016).

¶ 22 The general rule is that an unsuccessful party * * * is not responsible for the payment of the other party's attorney fees." *Myers v. Popp Enterprises, Inc.*, 216 Ill. App. 3d 830, 838 (1991). However, attorney fees are recoverable when specifically authorized by statute or by contract. *Mirar Development, Inc. v. Kroner*, 308 Ill. App. 3d 483, 486 (1999), citing *Midwest Concrete Products Co. v. La Salle National Bank*, 94 Ill. App. 3d 394, 398 (1981). Here, the Association provided the trial court with a copy of its Declarations, which provided that defendants "agree[d] to pay the Association: (1) annual assessments or charges; and (2) special assessments for capital improvements *** together with interest, costs and reasonable attorney[] fees." Based on the limited record before us, the contract between the parties provides another basis on which the trial court could have awarded attorney fees to the Association. See *Foutch*, 99 Ill. 2d at 392.

¶ 23 Having so found, we turn to defendant's alternative argument, that the amount of attorney fees and costs awarded was unreasonable. Defendants maintain that they "do not dispute the time expended by the attorneys or the reasonableness of the hourly rate." However, defendants maintain that the "amount of time expended, especially in connection with the amount in controversy and the nature of the action," was unreasonable.

¶ 24 The standards applicable to a court's award of attorney fees, whether pursuant to a statute or under the terms of a contract, are well established. See *Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887, ¶ 102. "In determining whether the fee sought is reasonable,

courts assess a number of factors, including 'the skill and standing of the attorneys, the nature of the case, the novelty and/or difficulty of the issues and work involved, the importance of the matter, the degree of responsibility required, the usual and customary charges for comparable services, the benefit to the client [citation], and whether there is a reasonable connection between the fees and the amount involved in the litigation.' " *Id.*, quoting *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 984 (1987). " 'Whether and in what amount to award attorney fees is within the discretion of the trial court and its decision will not be disturbed on review absent an abuse of that discretion.' " *Thomas v. Weatherguard Construction Co., Inc.*, 2018 IL App (1st) 171238, ¶ 61, quoting *Med+Plus Neck*, 311 Ill. App. 3d 853, 861 (2000). An abuse of discretion occurs only when the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *In re Marriage of Heroy*, 2017 IL 120205, ¶ 24.

¶ 25 Defendants' only argument regarding the amount of attorney fees awarded is that the attorney fee award was unreasonable because it far exceeded the Association's damages for unpaid assessments. They point out that the amount of attorney fees and costs sought by the Association was "733% of the amount in controversy," based on the $700 damages awarded in the *ex parte* judgment. Defendants characterize the attorney fee order as "ridiculous" and "not within the purview of acceptable discretion."

¶ 26 Initially, we note that defendant's 733% calculation is misleading, in that they use the amount of attorney fees and costs sought by the Association in their petition for attorney fees—a total of $5129.38—but not the actual fees and costs awarded by the trial court, which apparently denied some of the Association's requested fees, awarding a reduced total amount of $4448.88. Moreover, in the Association's complaint, they originally sought more than the $700 awarded in

the *ex parte* judgment, maintaining that defendants owed an outstanding balance from 2016 of $468.23, an annual assessment of $500, and late charges of $100, for a total of $1068.23. Accordingly, the trial court actually ordered attorney fees and costs of approximately four times the total damages initially sought—not "733%" as argued by defendants.

¶ 27 Nonetheless, the fact that the amount of the fees sought exceeds a party's recovery, even by a large margin, does not, standing alone, justify rejection of the amount sought. See *Thomas*, 2018 IL App (1st) 171238, ¶ 74-75 (the disparity between the damage award of $9,226.52, and the attorney fees and costs award of $179,574.65, did not constitute an abuse of discretion); *Verbaere v. Life Investors Insurance Co. of America*, 226 Ill. App. 3d 289, 302 (1992) (approving $31,500 in fees incurred in connection with recovery of $10,000); *City of Riverside v. Rivera*, 477 U.S. 561, 574, 582 (1986) ("reject[ing] the proposition that fee awards *** should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers," and approving a $245,000 fee on a recovery of $33,350—"seven times the amount of compensatory and punitive damages awarded.").

¶ 28 In this case, we cannot find that the trial court abused its discretion in awarding attorney fees and costs in the amount at issue. As stated above, the trial court conducted a hearing on the issue of attorney fees on September 20, 2018, but no transcript of this hearing appears in the record on appeal, and the bystander's report provides no insight into the court's factual findings or rationale for its decision. Since we have no way of knowing what occurred at the hearing, we have no basis for disagreeing with the trial court's determination that the fees awarded were reasonable, or finding that the trial court abused its discretion. See *Foutch*, 99 Ill. 2d at 391-92 (1984) (an appellant has the burden of presenting a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it

will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis).

¶ 29 Based on the limited record provided in this case, we cannot say the trial court's decision to award attorney fees and costs totaling $4448.88 was an abuse of discretion. Accordingly, we affirm the trial court's attorney fee award.

¶ 30 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 31 Affirmed.