

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-107

OCTOBER TERM, 2005

Alpine Haven Property Owners Association, Inc.	}	APPEALED FROM:
	}	
	}	
v.	}	Franklin Superior Court
	}	
David Orrock, Susan White, Edward Deptula,	}	
Bertrand Emmett, Joseph Emmett, Frederick and	}	DOCKET NO. S468-97 Fc
Laura Snyder, Deborah Upshall and Esther Verhelst	}	
	}	Trial Judge: Edward J. Cashman

In the above-entitled cause, the Clerk will enter:

Defendant Edward Deptula appeals the superior court=s post-judgment order requiring him to pay approximately \$40,000 in attorney=s fees stemming from a collection action brought against him and other defendants by plaintiff Alpine Haven Property Owners Association, Inc. We affirm the court=s attorney=s fee award in all respects, except that we remand the matter for the court (1) to calculate Attorney Glenn Howland=s fees based on his actual billing rate rather than his requested lodestar rate, and (2) to deduct from Attorney Marc Heath=s bill any fees attributable solely to defendants Frederick and Laura Snyder=s independent counterclaims.

The facts of this case are set forth in our previous decision affirming the underlying October 24, 2001 judgment, which included an assessment of attorney=s fees against defendant. See Alpine Haven Property Owners Ass=n, Inc. v. Deptula, 2003 VT 51, 175 Vt. 559 (mem.). In that decision, we explained that (1) defendant had been unsuccessful in seven previous attempts to legally contest maintenance fees assessed against him, and (2) despite being warned that he could become liable for litigation expenses if he continued to refuse to pay the maintenance fees deemed reasonable in a previous superior court order, defendant continued to challenge the maintenance fee assessment, which led to the instant collection action against him and other defendants. Id. && 3, 5, 12, 16. In affirming the judgment against Deptula, we concluded that the trial court had sufficient undisputed facts before it to find that Deptula did not act in good faith in disputing the assessment bill for 1996-97, and that the bill was not subject to a bona fide dispute. @ Id. & 20. Following a July 13, 2004 hearing on attorney=s fees, the superior court required defendant to pay \$10,434 in attorney=s fees incurred by plaintiff in pursuit of the delinquent fee claim, and \$29,481 in fees incurred in defending against the counterclaims raised in the collection action. On appeal, defendant challenges several aspects of the attorney=s fee award.

Defendant first argues that the superior court erred by requiring him to pay all of the fees associated with all of the defendants in the case. The superior court stated that its imposition of attorney=s fees against defendant arose from warnings by two previous judges that he would bear the costs of any further litigation resulting from him challenging the reasonableness of the maintenance fees. The court stated that (1) this most recent litigation was very similar to previous cases in which defendant challenged the maintenance fees; (2) the principal defendants were united at the inception of this litigation, with a single counsel handling both their defense against the collection action and their counterclaims; (3) although other defendants appeared pro se or with separate counsel, the request for fees was adjusted to some extent, and, in any event, the addition of other defendants resulted in few additional attorney=s fees for plaintiff. In the court=s view, plaintiff=s attorney=s fees were not increased significantly simply because other

defendants joined defendant Deptula in challenging the reasonableness of the maintenance fees.

Judge Cashman, who reviewed the request for attorney=s fees, heard the entire case from its inception. As we stated in Young v. Northern Terminals, Inc., 132 Vt. 125, 130 (1974):

The trial court enjoys a large measure of discretion in fixing the reasonable value of legal services. The exercise of that discretion will not be disturbed on appeal in the absence of strong evidence of excessiveness or inadequacy of the determined attorney=s fees. This is especially true where the services were performed in that court. The court=s own knowledge and experience in such matters might well be made use of in reaching such determination.

(citations omitted). Here, despite the warnings against doing so, defendant elected to continue to challenge the reasonableness of maintenance fees established in a prior case. He hired counsel and raised legal arguments in common with other defendants. The record and defendant=s litigious history in this matter support the court=s conclusion that his actions drove yet another round of litigation, which caused plaintiff to incur its attorney=s fees. With one exception, which we explain below, the superior court acted well within its discretion under the circumstances in requiring defendant to pay the bulk of plaintiff=s attorney=s fees in this litigation. See L=Esperance v. Benware, 2003 VT 43, & 21, 175 Vt. 292 (AWhen determining an award of attorney=s fees, the trial court must make a determination based on the specific facts of each case and, accordingly, we grant the trial court wide discretion in making that determination.@).

Defendant argues, however, that he should not be required to pay attorney=s fees associated with the counterclaims because the counterclaims were a separate matter from the collection action, and defense against the counterclaims was not necessitated by his failure to pay his maintenance fees. We find no merit to this argument. We have applied a four-factor analysis in determining whether a party requesting an award of attorney=s fees is entitled to fees for defending a claim by the party opposing payment of those fees. Wright v. Doolin, 158 Vt. 317, 321 (1992) (reversing trial court=s refusal to award attorney=s fees incurred in defending against counterclaim). Here, the record supports the superior court=s statement that the counterclaims were an important part of defendants= challenge to the reasonableness of the maintenance fees. Cf. L=Esperance, 2003 VT 43, & 24 (trial court did not abuse its discretion in granting attorney=s fees for all claims arising out of common core of facts). Defendant has failed to demonstrate that the Wright factors militate against compensating plaintiff for fees incurred in defending against the counterclaims while attempting to obtain payment for the maintenance fees in the collection action.

Defendant further argues that, absent a motion under Vermont Rule of Civil Procedure 11 or a finding of bad faith on his part, the superior court erred in awarding fees for defense against the counterclaims. This argument is unavailing because the court, in effect, found bad faith in defendant=s continued refusal to pay the maintenance fees after having been warned of the consequences of failing to do so. His refusal to pay the fees led to the instant lawsuit, including the counterclaims. A court may impose attorney=s fees Awhere a party is unjustly forced to endure a second round of litigation.@ Agency of Natural Res. v. Lyndonville Savings Bank & Trust Co., 174 Vt. 498, 501 (2002) (mem.).

We agree with defendant, however, that, under the circumstances of this case, he should not have to pay fees claimed by Attorney Heath, who defended against the counterclaims on behalf of plaintiff=s insurer, that are attributable solely to defendants Frederick and Laura Snyder=s independent counterclaims. The Snyders had their own attorney and raised some counterclaims that were distinct from the ones raised by defendant Deptula and other defendants. Plaintiff=s principal attorney in the collection action, Attorney Howland, conceded before the superior court that fees attributable solely to defending against the Snyders= independent counterclaims should be deducted from the claim of attorney=s fees against defendant Deptula. In fact, Attorney Heath made some deductions based on that concession. Although defendant has failed to demonstrate on appeal that those deductions were incomplete, he asserts that \$6,268 of the fees set forth in Attorney Heath=s bill are attributable solely to defense of the Snyders= separate counterclaims. We remand the matter for the superior court (1) to determine which, if any, of the claimed \$6,268 in fees are attributable solely to defending against the Snyders= independent counterclaims, and (2) to remove from the attorney=s fee award any such fees. We emphasize that our remand is limited to the \$6,268 in fees allegedly attributable solely to defense of the Snyders= independent counterclaims.

Defendant also argues that the superior court erred in calculating the award of attorney=s fees for the collection action. As defendant points out, although the court expressly elected to use actual billing charges as the fair measure of attorney=s fees, the footnote in its February 4, 2005 decision indicates that it used the requested lodestar billing rate rather than the actual billing rate to calculate Attorney Howland=s fees. Plaintiff does not respond to this claim of a clerical error. Accordingly, the matter is remanded for the superior court to recalculate the fees incurred by Attorney Howland based on the actual billing charges.

Next, defendant argues that the superior court erred by finding that Attorney Howland submitted a timely revised affidavit deducting challenged items from the fees claimed. Insofar as defendant fails to seek any remedy for this alleged impropriety, we reject the claim of error.

Defendant=s last claim of error is that the superior court erred by charging him for fees incurred as a result of the court sua sponte raising issues related to the Vermont Common Interest Ownership Act, 27A " 1-101-4-120. According to defendant, because the trial court had already decided that the doctrine of issue preclusion prevented him from challenging the maintenance fees, resolution of questions concerning Title 27A did not affect him. We disagree. The record shows that Deptula was one of the defendants who filed memoranda regarding the Title 27A issues. Further, because defendant eventually would appeal the superior court=s issue preclusion ruling, he maintained an interest in issues concerning Title 27.

Finally, given that plaintiff failed to file a cross-appeal, we reject its request that we use our inherent equitable powers to grant it an additional \$28,000 in attorney=s fees.

The superior court=s February 4, 2005 decision is affirmed in all respects, except that the matter is remanded for the court to adjust the award of attorney=s fees after (1) calculating Attorney Glenn Howland=s fees based on his actual billing charges, and (2) deducting from Attorney Heath=s bill fees attributable solely to defendants Frederick and Laura Snyder=s independent counterclaims.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice