

STATE OF MICHIGAN 51ST CIRCUIT COURT JUDICIAL CIRCUIT OCEANA COUNTY	PARTY NOTIFICATION	CASE NO. 2021 0000014799-CH
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100 STATE STREET, SUITE M-10,
HART, MI 49420

(231)873-3977

Judge: ROBERT D. SPRINGSTEAD

Date: THURSDAY MAY 23, 2024

TO:

MATTHEW D. LEVINE 37085 GRAND RIVER AVE STE 200 FARMINGTON, MI 48335-2830
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Plaintiff/Petitioner APACHE HILLS PROPERTY OWNERS' ASSOC
--

v

Defendant/Respondent SEARS NICHOLS COTTAGES LLC,,

ENTERED WITH THE COURT ON MAY 23, 2024 PLEASE FIND:
OPINION AND ORDER FOR ATTORNEY FEES

This notice has also been sent to:

KEVIN MICHAEL HIRZEL
CHRISTOPHER L. KELLY

A 70369 ATTORNEY FOR APACHE HILLS PROPERTY OWNERS' ASSOC
A 37959 ATTORNEY FOR SEARS NICHOLS COTTAGES LLC,,

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MATTHEW D. LEVINE
CHRISTOPHER L. KELLY

A 62160 ATTORNEY FOR APACHE HILLS PROPERTY OWNERS' ASSOC
A 37959 ATTORNEY FOR SEARS NICHOLS COTTAGES LLC,,

STATE OF MICHIGAN

51ST CIRCUIT COURT FOR THE COUNTY OF OCEANA

APACHE HILLS PROPERTY
OWNERS' ASSOCIATION, INC.,

Plaintiff,

Case No. 21-14799-CH

-v-

Hon. Robert D. Springstead

SEARS NICHOLS COTTAGES, INC.,

Defendants.

KAYLEIGH B. LONG (P82774)
MICHAEL D. MCCULLOCH (P36163)
Attorneys for Plaintiff

CHRISTOPHER L. KELLY (P37959)
MATTHEW D. MILLS (P79516)
Attorneys for Defendants

OPINION AND ORDER FOR ATTORNEY FEES

Procedural History

On February 17, 2022, this Court entered an opinion and order granting Sears Nichols Cottages' (SNC) motion for summary disposition pursuant to MCR 2.116(C)(10) and denying Apache Hills Property Owners' Association, Inc's (Apache Hills) motion for summary disposition. On March 8, 2022, Apache Hills filed a claim of appeal. On December 22, 2022, the Michigan Court of Appeals entered an opinion and order reversing this Court and remanded the case for entry of summary disposition on behalf of Apache Hills. The Court of Appeals held that "the restrictive covenants, when read as a whole, require that leasing or renting comply with the single-family private residence and business restrictions and defendant's short-term rentals violate those provisions."

On February 2, 2023, SNC filed an application for leave to appeal in the Michigan Supreme Court. The application for leave to appeal was denied on June 27, 2023. On July 18, 2023, SNC filed a motion for reconsideration in the Michigan Supreme Court. The motion was denied on October 3, 2023.

On November 15, 2023, Apache Hills filed a motion for summary disposition and for costs and attorney fees with this Court. The order for summary disposition and attorney fees was entered January 5, 2024.

FILED

MAY 23 2024

Law and Analysis

Apache Hills seeks attorney fees of \$66,168.50 and \$4,819.36 in costs. The hourly rate requested for lead counsel Ms. Long and Mr. McCulloch is \$238.88 and SNC agrees the rate is reasonable. The hourly rates requested for the other five attorneys ranged from \$152.08-\$295 and SNC does not challenge that those rates are also reasonable.

"Michigan follows the 'American rule' with respect to the payment of attorney fees and costs." *Haliw v Sterling Heights*, 471 Mich 700, 706; 691 NW2d 753 (2005). "Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award." *Id.* at 707. Courts will also enforce parties' agreement that provides the payment of attorney fees. *Pransky v Falcon Group, Inc.*, 311 Mich App 164, 194; 874 NW2d 367 (2015), lv den 499 Mich 908 (2016). Unless a contract or statute expressly provides otherwise, an award is for reasonable attorney fees, not actual fees. See *Smith v Khouri*, 481 Mich 519, 528 n12, 751 NW2d 472 (2008). Thus, when a contract requires a party to pay attorney fees without specifying whether the party must pay actual or reasonable fees, only reasonable fees should be awarded. *Papo v Aglo Rests of San Jose, Inc.*, 149 Mich App 285, 299, 386 NW2d 177 (1986). The burden of proof regarding reasonableness rests on the party claiming compensation. *Smith*, 481 Mich at 528–529.

The Michigan Supreme Court's decision in *Smith*, later refined in *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274, 884 NW2d 257 (2016), articulates the standard for determining a fee's reasonableness through a specific multifactor approach. *Powers v Brown*, 328 Mich App 617, 939 NW2d 733 (2019).

In evaluating the reasonableness of a fee, the trial court should first consider "the fee customarily charged in the locality for similar legal services." *Smith*, 481 Mich at 530. Trial courts "should use reliable surveys or other credible evidence of the legal market." *Id.* at 530–531. Courts often use the data provided in the Economics of Law Practice Surveys published by the State Bar of Michigan for this purpose. Then, the fee customarily charged in the locality "should be multiplied by the reasonable number of hours expended in the case." *Id.* at 531. The resulting number serves as a starting point for the reasonable fee analysis. *Id.* The court should then apply the remaining factors outlined in *Pirgu* (and originally set forth in *Wood v DAIE*, 413 Mich 573, 321 NW2d 653 (1982), and MRPC 1.5(a)), to determine whether that number should be adjusted up or down. *Powers*. The *Pirgu* factors are:

1. the experience, reputation, and ability of the lawyer or lawyers performing the services,
2. the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
3. the amount in question and the results obtained,
4. the expenses incurred,
5. the nature and length of the professional relationship with the client,

6. the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,
7. the time limitations imposed by the client or by the circumstances, and
8. whether the fee is fixed or contingent.

499 Mich at 281–282.

Conclusion

Applying the factors in *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 281-82 (2016) and the 2023 State Bar of Michigan Economic of the Law Practice Survey, I find the hourly rates to be reasonable. SNC does not challenge whether the hours spent by Apache Hills were reasonable, and after reviewing the monthly billings I find that the time spent by Apache Hills was reasonable.

The only issue on which the parties disagree is whether the covenants provide for attorney fees after this Court's January 5, 2024 order. SNC argues that the covenants do not mandate payment of costs and attorney fees post-judgement. SNC does not provide any authority for that position. Rather, they argue that once the judgement was entered Apache Hills was the prevailing party, and no further attorney fees are allowable under the covenants. The attorney fees billed to and paid by Apache Hills from January 5, 2024, to January 25, 2024, is \$1,837.50. The costs for the same time period are the \$20.00 motion fee and \$33.60 for postage.

Paragraph 32(F) of the covenants provides:

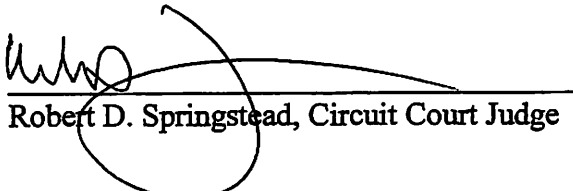
If it is necessary for the Corporation or any lot owner to file suit to enforce any covenant or to collect monies due to the Corporation, the Court shall award the prevailing party its/his/her reasonable attorney fees and expenses of litigation.

SNC position is that the covenant only provides the winning party the costs and attorney fees up to the point the party prevailed. I do not read the covenant to limit attorneys' fees up to the point the party prevailed. The covenant awards the prevailing party the expenses of litigation and attorney fees to collect monies owed to the prevailing party. Once the January 5, 2024 order was entered SNC owed Apache Hills "monies" because the order granted attorney fees in an amount to be determined. The attorney fees and costs incurred to determine the amount of costs and attorney fees are reasonable, and Apache Hills is awarded those attorney fees and costs.

IT IS SO ORDERED:

Attorney fees of \$66,168.50 and costs of \$4,819.36 are awarded to Apache Hills.

Dated: 5-23-24


Robert D. Springstead, Circuit Court Judge

CIRCUIT COURT
OCEANA COUNTY BUILDING
100 S. STATE STREET, STE. M10
HART, MI 49420-1188

GRAND RAPIDS MI 493
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