STATE OF MICHIGAN

COURT OF APPEALS

BRIAN BISHOP,

Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,

v

WESTCHESTER PLACE ASSOCIATION,

Defendant/Counter-Plaintiff-Appellant/Cross-Appellee,

and

DANA SUGGITT, JOYCE ZIEGLER, MICHAELINE SENKOWSKI. and JOAN WEHNER,

Defendants.

UNPUBLISHED
July 15, 2014

No. 313239
Macomb Circuit Court
LC No. 2010-004013-CH

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

This appeal involves competing lawsuits between a condominium owner—Brian Bishop—and his condominium owners' association—Westchester Place Association (WPA)—over approximately $2,600 in repairs to the attic over Bishop's condo (a common element owned by the WPA) made by Bishop without permission. The parties resolved their disagreement regarding liability for the repair costs. After a bench trial, the circuit court entered a judgment awarding the WPA $10,801.26 in costs and reasonable attorney fees based on statutory and WPA bylaw provisions. The WPA appeals, complaining that the attorney fee award represented only one-fifth of the amount requested, and Bishop cross-appeals, contending that no amount of costs and attorney fees were recoverable. We affirm.

I. BACKGROUND

Bishop purchased his condo in the Westchester Place development in the summer of 2009. He immediately notified the WPA that ice dams on the attached condo's roof had caused leaks into the attic and water damage in the condo's foyer. The roof and attic space are common

elements that the WPA must repair pursuant to the association's Bylaws. The parties initially cooperated and Bishop secured three repair estimates at the WPA's request. The WPA was dissatisfied with these estimates and attempted to obtain additional quotes. In the meantime, winter storms caused further damage to the roof and additional leaking through the attic and into Bishop's condo. Bishop wearied of the delay, engaged a contractor, and paid for the repairs himself. He then filed suit for declaratory judgment, essentially seeking a ruling that the WPA was responsible for the repair costs. The WPA filed a counter suit to force Bishop's compliance with the WPA bylaws and for costs and attorney fees.

II. BISHOP'S OBJECTIONS TO ANY AWARD OF ATTORNEY FEES

A. CASE EVALUATION

During the proceedings, the parties participated in case evaluation. On appeal, Bishop contends that the parties settled both his claims and the WPA's counterclaims, rendering moot the WPA's claim for attorney fees. According to a post-case evaluation order in the record, however, the only issue resolved was the WPA's duty to reimburse Bishop for the repair costs, an issue raised in Bishop's complaint. Bishop also agreed to dismiss with prejudice all other claims raised in his complaint. There is no record indication that the WPA agreed to dismiss its counter suit. Because Bishop subsequently allowed the trial to proceed on the WPA's counterclaim, without objecting to the continuance of the proceedings, he waived appellate review of his argument that the case evaluation concluded the proceedings with respect to the WPA's counterclaim. *Farm Credit Servs of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 682; 591 NW2d 438 (1998) (noting that a party waives appellate review of an issue "to which the aggrieved party contributed by plan or negligence"). Given this waiver, we need not consider Bishop's challenges to the propriety of the court entering an order only partially resolving the issues placed before the case evaluator.

B. WHETHER THE WPA OBTAINED AFFIRMATIVE RELIEF AT TRIAL

Bishop also claims that the WPA did not prevail on any claim in its countercomplaint and therefore was not entitled to any costs and attorney fees at trial. This argument involves underlying issues of statutory interpretation and the interpretation of the condominium bylaws. Specifically, MCL 559.206(a) creates a cause of action against a condo owner who fails to comply with the terms of the condominium documents. MCL 559.206(b) entitles a condominium association to costs and reasonable attorney fees in a lawsuit over a condo owner's default if the association is "successful" and if the award is permitted under the condominium documents. Article XX, § 1 of the bylaws in this case similarly permits the WPA to pursue an action against a noncompliant condo owner and to pursue "prelitigation costs and attorney fees incurred in obtaining their compliance with the Condominium Documents." "[I]f successful," the WPA is also entitled to recoup the costs and fees associated with trial.

We review de novo questions of statutory interpretation. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013). In *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002), our Supreme Court restated the following principles governing statutory interpretation:

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. [Quotation marks and citation omitted.]

The construction of a master deed or condominium bylaws constitutes a matter of contractual interpretation. *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 656-658; 651 NW2d 458 (2002). We review de novo "[t]he construction and interpretation of an unambiguous contract." *Id*. at 658. A court must construe contractual language by "giving its terms their ordinary and plain meaning if such would be apparent to a reader of the instrument." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367; 817 NW2d 504 (2012) (quotation marks and citation omitted). "[U]nambiguous contracts are not open to judicial construction and must be *enforced as written*." *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005) (emphasis in original).

MCL 559.206(a) and Article XX, § 1(a), of the condominium bylaws plainly authorize an association to pursue litigation to remedy an owner's lack of compliance with relevant condominium documents. And MCL 559.206(b) and Article XX, § 1(b), clearly and unambiguously reflect that when an association successfully pursues a lawsuit alleging an owner's default, it shall recover costs and reasonable attorney fees. Article XX, § 1(b), additionally mandates that the WPA recover "the prelitigation costs and attorney fees incurred in obtaining . . . [an owner's] compliance with the Condominium Documents."

Bishop mistakenly contends that the WPA obtained no relief independent of the costs and attorney fees and thus did not qualify as a successful party. In a posttrial opinion and order, the circuit court found that the WPA had prevailed on its allegations that Bishop violated the condominium bylaws when he arranged for repairs to his attic without the WPA's permission and did not accommodate its requests to access his unit to secure an independent repair estimate. Because the record establishes that the WPA prevailed on some of its allegations of Bishop's default, the language of MCL 559.206(b) and Article XX, § 1(b), entitled the WPA to an award of costs and reasonable attorney fees.[1]

II. PARTIES' CHALLENGES TO THE CIRCUIT COURT'S AWARD OF ATTORNEY FEES

[1] The circuit court's conclusions regarding the WPA's bylaw violation claims made it a prevailing party according to the only binding authority cited by Bishop. *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 482-483; 442 NW2d 705 (1989) (defining a prevailing party entitled to attorney fees under MCL 37.2802 as a litigant who "receive[d] at least some relief on the merits of his or her claim").

Bishop and the WPA each contest the circuit court's award of $10,500 in attorney fees to the WPA, arguing that the court offered insufficient analysis in support of this award. We review for an abuse of discretion a circuit court's "decision whether to award attorney fees and the determination of the reasonableness of the fees." *In re Clarence W Temple & Florence A Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). An abuse of discretion exists when the court's decision falls outside "the range of reasonable and principled outcomes." *Id*. We review for clear error the factual findings underlying an award of attorney fees. *Id*. Clear error exists when some evidence supports a factual finding, but "the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Brown v Home-Owners Ins Co*, 298 Mich App 678, 690; 828 NW2d 400 (2012). We review de novo any underlying legal questions. *Id*.

"[T]he burden of proving the reasonableness of the requested fees rests with the party requesting them." *Smith v Khouri*, 481 Mich 519, 528-529; 751 NW2d 472 (2008). A circuit court should consider all relevant circumstances in crafting an award. *Id*. at 529. In *Smith*, the Michigan Supreme Court summarized the principles applicable to the calculation of a reasonable attorney fee:

> [A] trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services . . . . In determining this number the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case . . . . The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. . . . Thereafter, the court should consider the remaining . . . factors [set forth in MRPC 1.5(a) and *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982),] to determine whether an up or down adjustment is appropriate. . . . [*Smith*, 481 Mich at 530-531.]

The factors contained in MRPC 1.5(a) include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (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;
>
> (4) the amount involved and the results obtained;
>
> (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.

Although a court need not "consider every factor in detail, the . . . court should endeavor to briefly discuss the above factors in order to aid appellate review." *Souden v Souden*, 303 Mich App 406, 416; 844 NW2d 151 (2013).

Edward Lee, the WPA's attorney, testified that his firm had served as the WPA's general counsel since 2009. This representation ordinarily encompassed "standard bylaw [enforcement], collection and other standard advisory things." Lee described the case against Bishop as involving bylaw enforcement, although "not [a] run-of-the-mill" enforcement action. Lee confirmed that he had practiced as an attorney since 1990, had tried between 35 and 40 civil actions, and billed a $255 hourly rate for his work on this case.[2] Two other attorneys had also worked on the case: Robert Meisner, who had practiced in excess of 40 years and billed $275 an hour, and Kevin Hirzel, who had practiced for five years and billed $230 an hour.

Lee recalled that through June 2010, when he first learned that Bishop had hired a contractor to repair the attic, the WPA had incurred $3,600 in attorney fees. Lee conceded that the WPA had deemed unnecessary an inspection of Bishop's contracted attic repairs, and he could identify no manner in which Bishop's unit had been damaged. Lee identified a July 23, 2010 letter in which he advised Bishop's counsel that the WPA "would ultimately approve of the attic access door," and declined an opportunity to inspect the repairs in the attic over Bishop's condo because they felt "satisfied [with] the explanation that was provided to our repair contractor." Lee testified that the WPA only filed a lawsuit against Bishop in response to Bishop's initiation of legal action. Lee concurred that the counterclaim involved no "novel or difficult factual [or] legal issues," "did not preclude [him from] working on other files," and the WPA did not obtain injunctive relief or specific monetary damages arising from Bishop's unauthorized repair.

Lee identified at trial a list of the billing records attributable to the case. Between February 25, 2010, and the May 2012 trial date, the costs and attorney fees billed on the case totaled $59,201.27. Lee reported that he had either deleted from or highlighted on the billing statements any of the WPA's minimal "expenses . . . related to defending [Bishop's] claim," which the parties had previously settled. Lee confirmed that the firm had expended 225 hours on the case. In Lee's calculation based on adding the number of hours and multiplying them by the applicable hourly rates, he submitted that the WPA should recover approximately $55,000. Lee acknowledged that the WPA had not tried assessing the costs and attorney fees against Bishop's unit, as contemplated in the bylaws.

On cross-examination, however, Lee conceded to a laundry list of erroneous, improper, or unrelated charges on the billing statement placed before the court. Lee agreed that the billing statements (1) contained duplicate entries for identical work performed on March 31, 2010; (2) should not have included an April 2010 entry relating to a letter that Lee had drafted to Bishop

[2] In response to questioning by the circuit court, Bishop's counsel denied that he was disputing $255 as a reasonable hourly rate for Lee.

regarding a complaint unrelated to the WPA's lawsuit; (3) did not identify the precise time that Lee had spent drafting a May 11, 2010 letter to Bishop, which addressed both the WPA's desire to access his unit and an unrelated matter; (4) contained a July 6, 2010 entry reflecting that Meisner had billed time for reviewing a letter that Bishop's attorney sent Lee; (5) contained a July 8, 2010 entry for time Lee had spent reviewing a letter from the WPA concerning the repairs to the attic of Bishop's neighbors; (6) did not separate the precise time Lee had spent on July 23, 2010 between authoring correspondence to Bishop's attorney and drafting a proposed indemnification provision in a contract completely unrelated to the repairs on Bishop's condo; (7) did not identify the time Lee had worked on the applicable indemnification agreement on July 26, 2010; (8) contained a September 2, 2010 entry for time Lee had spent reviewing correspondence from Bishop and the WPA regarding a matter unrelated to the WPA's lawsuit; (9) contained an entry for October 15, 2010, that did not specifically identify how much time Lee had spent reviewing a WPA correspondence regarding Bishop's mailing to other condominium residents regarding a matter unrelated to the WPA's lawsuit; (10) contained a November 5, 2010 entry for Lee's review of WPA correspondence concerning its contractor's "findings . . . during [an] investigation and repair" of Bishop's neighbor's attic[3]; (11) contained a November 16, 2010 entry reflecting Lee's efforts to "review correspondence from [the WPA] regarding [the] status of repairs regarding ice dam issues"; (12) contained an entry dated November 18, 2010, that did not separately identify the time Lee had spent reviewing court documents relating to the complaint and the countercomplaint; (13) contained a November 30, 2010 entry pertaining to both the complaint and the counterclaims that Lee agreed should have "be[en] split in half"; (14) erroneously contained a December 6, 2010 entry relating to the potential settlement of Bishop's complaint; (15) contained entries for court-related activity on December 8, 2010, December 9, 2010, December 20, 2010, December 21, 2010,[4] January 5, 2011, January 17, 2011,[5] January 20, 2011, January 21, 2011, January 24, 2011, January 26, 2011, January 31, 2011, February 7, 2011, February 10, 2011, February 11, 2011, and February 15, 2011, all dates on which Bishop's complaint remained pending; (16) erroneously contained a January 3, 2011 entry for time Lee had spent reviewing a document relevant to Bishop's complaint; and (17) erroneously contained a January 26, 2011 entry for time Lee had spent on an issue unrelated to the counterclaim.

The circuit court's opinion and order concluded as follows with respect to reasonable attorney fees:

> The [WPA] seeks total attorney fees in excess of $55,000 to recover initial compliance costs of about $4,000. While the [WPA] was justified in vindicating

[3] Lee conceded that the ice damming issues preexisting the litigation would have necessitated the repairs to the attic of Bishop's neighbor.

[4] Lee acknowledged that the time entry for December 21, 2010, should have been divided in half to reflect the time he spent responding to Bishop's complaint.

[5] Lee confirmed that the January 17, 2011 entry had not specifically identified the time he had spent answering a WPA inquiry about a matter unrelated to its counterclaim.

> its rights to enforce compliance with the Bylaws, [the WPA's] decision to do so by filing a lawsuit and incurring such expenses was not reasonable.
>
> The [WPA] also had the ability to assess its enforcement costs—including attorney fees directly against Bishop under Article VI, § 20 of the Bylaws. And, had Bishop declined to pay those fees, the [WPA] could have collected those fees under Article II of the Bylaws. To this end, the [WPA] had the option of filing a lien for any unpaid assessed fees and foreclosing that lien. Bylaws, Article II, § 5. In light of the amount in controversy and resolved issues, the [WPA's] decision to not first pursue this alternative avenue of relief was unreasonable.
>
> Moreover, the claimed attorney fees contain charges for issues resolved by the acceptance of case evaluation, a duplicate listing, matters unrelated to Bishop's attic repairs, issues unrelated to collections, excessive intraoffice conferencing and correspondence, abandoned claims, excessive time allowances for tasks and non-billable hours. There are also references to "OLD" and "BAW" although the record does not establish who these people are or whether they meet the requirements of MCR 2.626 for legal assistants.
>
> After careful review of the entire record and in light of the result achieved, the [WPA] is only entitled to recover $10,500 in attorney fees for all of its compliance efforts.

The parties correctly observe that the circuit court did not identify a specific number of attorney hours comprising the $10,500 award to the WPA. However, the evidentiary record of the fees sought and the court's other findings reflect the court's awareness of the factors relevant to an attorney fee award and support the award in this case. See *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999) (explaining that a trial court did "not err in awarding fees without having held an evidentiary hearing because the parties created a sufficient record to review the issue, and the court fully explained the reasons for its decision").

The WPA submitted detailed testimony by Lee and a lengthy list of claimed attorney fees. Lee's testimony established his more than 20 years of experience as an attorney, and the parties agreed that he charged a reasonable hourly rate of $255. MRPC 1.5(a)(3) and (7). Lee concurred that the counterclaim involved no difficult or novel factual or legal issue and did not prevent him from working on other cases. MRPC 1.5(a)(1) and (2). With respect to MRPC 1.5(a)(4), the record reflected that the WPA did not obtain injunctive relief and suffered no damages arising from Bishop's unauthorized repair, apart from approximately $4,000 in prelitigation costs and attorney fees. Regarding the factor in MRPC 1.5(a)(8), Lee's testimony demonstrated that the WPA was incurring fixed, hourly attorney fees.[6]

[6] The factor in MRPC 1.5(a)(5) did not apply in this case. Concerning the factor in MRPC 1.5(a)(6), Lee's testimony revealed that the WPA had a preexisting relationship of an unspecified duration with Lee's firm as the association's general counsel.

In light of Bishop's counsel's lengthy cross-examination of Lee concerning duplicate and inappropriate billing entries contained on the list of attorney fees that he introduced at trial, we cannot characterize as clearly erroneous the circuit court's findings that the billing statement improperly encompassed "issues resolved by the acceptance of case evaluation, a duplicate listing, matters unrelated to Bishop's attic repairs, issues unrelated to collections, excessive intraoffice conferencing and correspondence, abandoned claims, excessive time allowances for tasks and non-billable hours." Because the parties did not dispute during trial that the WPA had incurred only approximately $4,000 in collection expenses as of June 2010, which was near the time the WPA approved Bishop's installation of the attic access door and the repairs in his attic, the circuit court did not clearly err in deeming unreasonable the WPA's request to recover "total attorney fees in excess of $55,000 to recover initial compliance costs of about $4,000." The record reflects that the circuit court calculated its ultimate award of $10,500 in reasonable attorney fees on the basis of (1) the undisputed $4,000 figure in pretrial expenses, and (2) its finding, also amply supported by the record, that Bishop had "unnecessarily complicated matters when he filed this lawsuit" in September 2010, which prompted the WPA to file its counterclaim in October 2010. We conclude that the circuit court acted within its discretion in awarding the WPA $10,500 in reasonable attorney fees, especially given the limited nature of the WPA's success in the litigation. *Head*, 234 Mich App at 114 (observing that a court may adjust a request for attorney fees "in light of the results of the proceedings").

Finally, we reject the WPA's assertion that the business judgment rule precluded the circuit court from revisiting the reasonableness of its decision to file suit against Bishop. The WPA correctly observes that Michigan courts are generally reluctant to "move in on the affairs of a corporate body," and will do so "only upon a clear showing of actual or impending wrong." *Reed v Burton*, 344 Mich 126, 130; 73 NW2d 333 (1955). "So long as the directors of a corporation control its affairs within the limits of the law, matters of business judgment and discretion are not subject to judicial review." *Id*. at 131 (quotation marks and citations omitted). The circuit court did find that the WPA's decision to seek enforcement of the condominium bylaws "and incur[] such expenses was not reasonable," especially in light of other nonlitigation avenues of relief contemplated in the bylaws. But we conclude that the circuit court's remarks properly related to the unreasonable number of hours incurred in the $55,000 request for attorney fee reimbursement. As caselaw governing awards of attorney fees makes clear, the reasonableness of requested fees constitutes the overriding consideration for a court calculating an award, and the number of requested hours is a central consideration in ascertaining reasonableness.

We affirm.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher