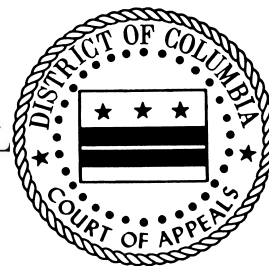


IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 23-CV-747



Clerk of the Court
Received 03/25/2024 08:51 PM

JOHN D. MUSSELLS, et al.,

Appellants,

v.

1305 RHODE ISLAND AVE NW LLC, et al.,

Appellees.

**REPLY BRIEF OF APPELLANTS JOHN D. MUSSELLS
AND PREMILA M. MUSSELLS**

ON APPEAL FROM THE SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA (CIVIL DIVISION)
2016 CA 008570 B

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ARGUMENT

I. 1305 LLC'S ARGUMENTS ARE UNAVAILING AND WITHOUT MERIT

- a. 1305 LLC cannot dispute that its claim for attorney's fees was not authorized by this Court's mandates.

Aside from the timing issues detailed in the Mussells' brief, 1305 LLC acknowledges in its Brief that the Court *twice* issued written mandates limiting the consideration of attorney's fees (as part of the further proceedings to be taken by the trial court) to only pending counterclaims which included such a claim. The Amended Order of this Court issued on December 22, 2022, is clear that it applied only to "consideration of *pending* counterclaims and requests for attorney's fees and costs." [APX 54-55] (emphasis supplied).

Likewise, on April 27, 2023, this Court issued a written opinion remanding the case to the trial court "to undertake such further proceedings consistent with this opinion as may in the trial court's discretion be appropriate, *including consideration of the Trust's counterclaim for attorney's fees and costs* against the Mussells." *Mussells I*, 292 A.3d 220. (emphasis supplied). Both mandates expressly excluded 1305 LLC from consideration of any claim for its attorney's fees since none was actually asserted in its counterclaim.

- b. 1305 LLC's argument regarding the tenants' assignment of TOPA rights is based on mere conjecture rather than the purpose and intent of TOPA itself.

1305 LLC argues that it should automatically be entitled to its attorney's fees as the assignee of the tenants' right to purchase the subject property. Again, "in examining the statutory language, it is axiomatic that 'the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them.'" Tippett v. Daly, 10 A.3d 1123, 1127 (D.C. 2010) (internal citations omitted); *see also* Davis v. United States, 397 A.2d 951, 956 (D.C. 1979). Here, the applicable statute, D.C. Code § 42-3405.03 is limited by its express language to only "[a]n aggrieved owner, tenant or tenant organization" and does allow for any other party to be entitled to recover attorneys' fees. By its plain and clear language, neither § 42-3401.02 (carefully defining the purpose of TOPA) nor § 42-3405.03 (allowing for fee-shifting despite the American Rule) encompass *assignees* of an aggrieved party where such assignees have no other standing or entitlement. Again, the entire structure of the TOPA statutes is designed to protect tenants and facilitate their access to judicial relief where needed, not outside investors in real estate opportunities who need no such protection or aid through recovery of legal expenses. TOPA is clearly not designed to benefit such

companies, nor is it designed to punish potential purchasers of real property such as the Mussells who never violated TOPA in any way.

In its Brief, at page 21, 1305 LLC argues that “[t]o conclude that an assignee of tenants’ rights could not recover attorneys’ fees and costs would run counter to the purpose of the statute and detract from tenants’ bargaining position because such a result would dissuade tenants from assigning their rights.” First, the “purpose” of TOPA, as described in more detail in the Mussells’ Brief, is entirely focused on the interests of the tenants. Second, the unsupported notion that tenants would be “dissuaded” from assigning their rights if the assignee did not recover its attorney’s fees has no basis in law or reason. 1306 LLC fails to explain why tenants would be more hesitant to assign their right to purchase because of a potential claim to be brought by the assignee well after the assignment was completed. It would not matter to the tenants whether the assignee ever recovered its fees, or any other amount. Once the tenants were paid, their involvement and interests were concluded.

“As we have noted in our discussion of the associations’ standing, TOPA is a remedial statute, and it is to be generously construed ‘toward the end of strengthening the legal rights of tenants or tenant organization to the maximum extent permitted under law.’... In particular, as the Supreme Court explained almost a century ago in a different but relevant context, ‘the courts will not permit

themselves to be blinded ... by mere forms ... but, regardless of fictions, will the substance of the transaction ... as the justice of the case may require.’’ Richman Towers Tenants' Ass'n Inc. v. Richman Towers LLC, 17 A.3d 590, 602 (D.C. 2011); *quoting* Chicago, M. & St. P. Ry. Co. v. Minneapolis Civic & Commerce Ass'n, 247 U.S. 490, 501, 38 S.Ct. 553, 62 L.Ed. 1229 (1918). Here, the justice of the case does not require that a third-party real estate investor benefit from a discretionary award of attorney’s fees to the detriment of another party who is equally seeking to enforce a contract to purchase. The statutory purpose of protecting and promoting the tenants is not furthered in any way by such fee-shifting in this case.

II. THE TRUSTEES’ BRIEF FAILS TO REFUTE THE FACT THAT THEY WERE NOT A PREVAILING PARTY IN THIS CASE UNDER THE APPLICABLE LAW.

As the facts revealed during the trial court proceeding clearly show, the Trustees’ involvement in the case was limited to waiting for a declaration from the trial court or from this Court as to which of the other two (2) parties to which they must convey the property. They were always going to, and did, receive such a declaration and gained nothing else from the lawsuit. As argued in the Mussells’ Brief, such a declaration benefitting only another party falls well short of making the Trustees a prevailing party.

The Trustees now seek to argue that they “took the side” of the 1305 LLC and thus that party’s success was their success as well. The Trustees base this position on their filing of a Motion for Summary Judgment on January 18, 2018, in which they requested that 1305 LLC’s contract to purchase be declared as superior to the Mussells’ contract. Notably, however, when the Mussells prevailed at the trial level and their contract was declared to be the valid contract, the Trustees did not appeal that decision. In fact, they then adopted an antagonistic position to 1305 LLC by seeking their attorney’s fees from that party. Moreover, regardless of the Trustee’s motivation to file a dispositive motion *on behalf of another party*, the motion was denied and can hardly represent any form of victory.

Again, “a plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.” Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). Here, the Trustees achieved no benefit and their legal relationship with the other two parties was not modified to gain a direct benefit, they merely waited until being ordered to convey the Property to one of the other two parties under the same contractual terms.

“The most recent edition of Black's [Law Dictionary] defines 'prevailing party' to mean '[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded.'...” Merriweather Post Bus. Tr. v. It's My

Amphitheater, Inc., No. 2594, at Footnote 19 (Md. App. Aug 06, 2020). The Trustees received no judgment in *their favor*, and thus were not a prevailing party and their arguments in their brief do not persuade otherwise. By their own admission, they flip-flopped in their support of the other parties and ultimately prevailed on no claims of their own.

CONCLUSION

For all the reasons stated above and in the Mussells' Brief, the Court should reverse the decision of the trial court to award attorneys' fees to 1305 LLC and the Trustees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2024, a copy of the foregoing Reply Brief of Appellants John D. Mussells and Premila M. Mussells was served electronically upon:

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D.C. Code § 42-3401.02

§ 42-3401.02. Purposes.

In enacting this chapter, the Council of the District of Columbia supports the following statutory purposes:

- (1) To discourage the displacement of tenants through conversion or sale of rental property, and to strengthen the bargaining position of tenants toward that end without unduly interfering with the rights of property owners to the due process of law;
- (2) To preserve rental housing which can be afforded by lower income tenants in the District;
- (3) To prevent lower income elderly tenants and tenants with disabilities from being involuntarily displaced when their rental housing is converted;
- (4) To provide incentives to owners, who convert their rental housing, to enable lower income non-elderly tenants and tenants without disabilities to continue living in their current units at costs they can afford;
- (5) To provide relocation housing assistance for lower income tenants who are displaced by conversions;
- (6) To encourage the formation of tenant organizations;
- (6a) To balance and, to the maximum extent possible, meet the sometimes conflicting goals of creating homeownership for lower income tenants, preserving affordable rental housing, and minimizing displacement; and
- (7) To authorize necessary actions consistent with the findings and purposes of this chapter.

D.C. Code § 42-3405.03

§ 42-3405.03. Civil cause of action.

An aggrieved owner, tenant, or tenant organization may seek enforcement of any right or provision under this chapter through a civil action in law or equity, and, upon prevailing, may seek an award of costs and reasonable attorney fees. In an equitable action, the public policy of this chapter favors the waiver of bond requirements to the extent permissible under law or court rule.

District of Columbia Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a “CV” docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
 - An individual’s social-security number
 - Taxpayer-identification number
 - Driver’s license or non-driver’s’ license identification card number
 - Birth date
 - The name of an individual known to be a minor
 - Financial account numbers, except that a party or nonparty making the filing may include the following:
 - (1) the acronym “SS#” where the individual’s social-security number would have been included;
 - (2) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
 - (3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
 - (4) the year of the individual’s birth;
 - (5) the minor’s initials; and
 - (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.



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23-CV-747

Case Number(s)

3/25/24

Date