



Clerk of the Court
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No. 23-CV-747

**DISTRICT OF COLUMBIA
COURT OF APPEALS**

JOHN D. MUSSELLS, ET AL.,
Appellant,

v.

1305 RHODE ISLAND AVE NW LLC, ET AL.,
Appellees.

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

BRIEF FOR APPELLEES

**THE MICHAEL JOHN FURMAN LIVING TRUST, MICHAEL JUDE GRIPPO, AND
LAURIE ANN FURMAN**

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**CERTIFICATE REQUIRED BY RULE 28 (a)(2) OF THE RULES
OF THE DISTRICT OF COLUMBIA COURT OF APPEALS**

The undersigned counsel of record for The Michael John Furman Living Trust, Michael Jude Grippo, and Laurie Ann Furman (collectively “the Trust”) certifies that the following listed parties appeared, or their interests were represented below:

At trial and on appeal The Michael John Furman Living Trust, Michael Jude Grippo, and Laurie Ann Furman are represented by Carol S. Blumenthal, Esq., and Kathryn Erklauer, Esq.

At trial and on appeal John D. Mussells and Premila Mussells are represented by Kenneth C. Crickman, Esq.

At trial and on appeal, 1305 Rhode Island Ave NW LLC, is represented by Robert C. Gill, II, Esq. and Kyra A. Smerkanich, Esq.

These representations are made in order that judges of this court, *inter alia*, may evaluate possible disqualification or recusal.

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APPEAL TAKEN FROM FINAL ORDER

This appeal was taken from a final order or judgment that disposed of all parties' claims.

STATEMENT OF THE FACTS

The Trust is owner of the property located at 1305 Rhode Island Ave. N.W., Washington D.C. ("the property"). The property is a four-unit apartment building for purposes of D.C. Code § 42-3404.01 *et seq.* ("TOPA").

The Mussells were the third-party contract purchaser of the property under a contract ratified July 29, 2016 ("the Mussells contract"). At the time of ratification of the Mussells contract, there were eight tenants in the building. On or about August 16, 2016, the Trust caused an Offer of Sale and Tenant Opportunity to Purchase With a Third Party Contract, pursuant to D.C. Code § 42-3404.03, to be served on the eight tenants who occupied three of the units at the property.

On or about November 8, 2016, the eight tenants at the property "acting individually and collectively" assigned their TOPA rights to Defendant 1305 Rhode Island Ave. NW, LLC ("1305 LLC"), as contemplated by D.C. Code § 42-3404.06. On November 30, 2016, the Trustees entered into a sales contract with 1305 ("the 1305 contract") which purported to exercise the TOPA rights assigned to it by the tenants.

On December 22, 2016, Mr. and Mrs. Mussells filed their amended complaint against the Trustees and 1305 Rhode Island Ave. NW, LLC (“1305 LLC”) alleging that the Mussells’ contract right to purchase the property located at 1305 Rhode Island Avenue, NW, Washington, D.C. (“the Property”) was superior to 1305 LLC’s purported right to purchase the Property. The Mussells’ claim was in direct conflict with the Trustees’ contract to convey the Property to 1305 LLC, which purported to act pursuant to rights established by TOPA.

In light of the foregoing, the Trustees filed counter and cross claims seeking a declaratory judgment of the parties’ respective rights, as contemplated by D.C. Code § 42-3405.03. Included in the request for relief, the Trustees requested attorney fees and costs. On January 19, 2018, the Trustees filed a motion for summary judgment arguing that, based on the undisputed material facts, the Trustees were entitled to a judgment declaring that 1305 LLC has a superior right to purchase the property and that Trustees may convey the property to 1305 LLC. The motion was denied and the matter set down for trial.

After a trial, in the Judgment Order dated March 19, 2019, the court ordered that the contract to the Mussells was valid and enforceable. On April 17, 2019, 1305 LLC noted an appeal of the March 19, 2019 judgment.

On December 22, 2022, the D.C. Court of Appeals issued an Amended Order, which reversed the trial court’s decisions and remanded the case with the

specific and explicit instruction to “enter judgment in favor of appellant and an order granting specific performance of the sales contract for the property between appellant [1305 LLC] and the Trust” and for “further proceedings consistent with this order, including consideration of pending counterclaims and requests for attorney’s fees and costs.” On December 27, 2022, the D.C. Court of Appeals issued a mandate. That mandate was recalled on April 12, 2023. A new mandate was issued on May 8, 2023.

On February 10, 2023, the Trustees filed a Motion for Declaratory Judgment And Award of Attorney Fees. The Mussells filed an opposition to the Trustees’ motion on June 3, 2023. On July 11, 2023, the court entered a declaratory judgment against the Mussells and in favor of Trustees. On August 8, 2023, the Court entered an attorney fee award in favor of the Trustees and against the Mussells.

The Mussells have filed an appeal of the order awarding the Trustees’ their attorney fees.

STANDARD OF REVIEW

The Mussells seek reversal the trial court’s grant of the Trustees’ motion for attorney fees. The Court of Appeals “scope of review of an award of attorneys’ fees is a limited one because disposition of such motions is firmly committed to the informed discretion of the trial court.” *Campbell-Crane & Assocs. v. Stamenkovic*,

44 A.3d 924, 947 (D.C. 2012) (cleaned up). The Court of Appeals should only set aside the trial court's decision where there is "a very strong showing of abuse of discretion," *Watkins v. District of Columbia*, 944 A.2d 1077 (D.C. 2008).

SUMMARY OF THE ARGUMENT

The Trust is entitled to its attorney fees pursuant to D.C. Code § 42-3405.03 and its motion for fees was timely under D.C. Super. Ct. Civ. R. 54. Therefore, there is no basis for reversal.

ARGUMENT

a. The Trustees' Motion Was Timely

The Mussells argue that the Trustees' Motion for Attorney Fees was filed untimely under Rule 54(d)(2)(B)(i) which states in relevant part, "Unless a statute or a court order provides otherwise, the motion [for attorney fees] must: (i) be filed no later than 14 days after the entry of judgment."

In their brief, the Mussells argue that the Trustees' motion was filed out of time because the Court of Appeals Order reversing the decision of the trial court was issued on December 22, 2022, and the motion filed on February 10, 2023.

This argument is completely erroneous; it is based on the faulty premise that the Court of Appeals order of reversal order initiates the 14-day period to file a motion for fees. This court's order of December 22, 2022, however, was not an "entry of judgment," the starting point for beginning the 14-day countdown.

Rather, the order reversed the lower court and remanded the case to the Superior Court “to enter judgment in favor of appellants....” As reflected on the docket of the Superior Court, at Apx. 20, entry of the declaratory judgment against the Mussells and in favor of Trustees was not made until July 11, 2023.¹ Moreover, by consent of the parties and oral ruling by the trial court, the Trustees were ordered to file their fee request by February 17, 2023.²

Thus, the filing of the Trustees’ motion on February 10, 2023, was timely both under Rule 54 and under court order, as allowed by Rule 54.

b. Trust Was An Aggrieved Owner and A Prevailing Party - Not Mere Passive Stakeholder

The Trustees filed their counterclaim seeking declaratory relief pursuant to D.C. Code § 42-3405.03, which provides that “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 the first appeal, the Court of

¹ Following the remand, on July 11, 2023, the trial court granted the Trustees’ motion for a declaratory judgment and “the Trustees are entitled to a declaratory judgment that the Trust has the right and obligation to convey the property to 1305 LLC and that John D. Mussells and Premila M. Mussells have no right to purchase the Property.” Supp. App’x 98 – Supp. App’x 99.

² At a hearing held on January 17, 2023, that Court set a briefing schedule giving the Trustees until February 17, 2023 to file. Apx. 18. The docket notes specifically that “The parties agree to the schedule.” Id. The Trustees file their brief on February 10, 2023. Id.

Appeals determined that the property must be conveyed to 1305 LLC and remanded the case for entry of judgment and other proceedings consistent with the court's decision.

As set forth in the Trustee's motion for declaratory judgment and attorney fees, Apx. 63-69, the Trust is an aggrieved owner. It has been aggrieved by the Mussells' maintenance of their claim of a superior right to purchase the property, which was contrary to 1305 LLC's TOPA rights. Among other things, the Trust has been aggrieved by having to carry the costs of this property, including real estate taxes, insurance and upkeep, for over six years and suffering the loss of appreciation in value. Accordingly, the Trust is an aggrieved party entitled its costs and reasonable attorney's fees. See D.C. Code § 42-3405.03.

The Mussell argue that the Trustees were basically "passive stakeholders" and as such cannot be deemed to have achieved a successful outcome. That characterization, however, is descriptively and legally inaccurate.

On January 19, 2018, the Trustees filed a Motion for Summary Judgment to validating the 1305 Rhode Island Ave. NW LLC ("LLC") contract as a proper exercise of TOPA rights.³ While that motion was denied, the subsequent history of the case ratifies the position taken by the Trustees and represents a success by the

³ Earlier, on May 5, 2017, the Trustees filed a Response to the LLC's Motion of Judgment on the Pleadings which advances the same position.

Trustees on the central issue in the litigation. Because the Trustees have obtained the declaratory relief they requested, they are the prevailing party in their claim against John D. Mussells and Premila M. Mussells and entitled to their costs and reasonable attorney's fees. *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) does not support the Mussells' suggestion that the Trustees' entitlement to a declaration of rights precludes them from being a prevailing party. In order to be a prevailing party, the Trustees needed not only to succeed on a significant issue, but to obtain "actual relief on the merits... [relief which] materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Nat. Motion by Sandra, Inc. v. D.C. Comm'n on Hum. Rts.*, 726 A.2d 194, 198 n.9 (D.C. 1999). The ruling in this case does just that: it validates that the Trustees were correct in signing the LLC's contract as a superseding contract to that of the Mussells and terminated the Mussells' contract rights. Thus, the Trustees were allowed to sell the property free of any claim by the Mussells for breach of their contract, or for specific performance under their contract. The ruling alters the Mussells' behavior by forestalling their further claims to the property.

Accordingly, the Trustees were not mere "passive" stakeholders, as they are styled by the Mussells. Rather, they were aggrieved parties who needed to clear the cloud on title created by the Mussells and to defeat the impediment the

Mussells created, which prevented the Trustees' ability to convey the property to LLC, as required by TOPA. The Trustees were successful on these claims.

c. The Trial Court Did Not Abuse Its Discretion

In response to the Trustees' Motion for attorney fees filed on February 10, 2023, the Mussells filed an Opposition brief on June 3, 2023. Because the Court did not hear further from the parties at the hearing on August 7, 2023, the Mussells conclude that the court gave "no real consideration" to their arguments. The Mussells cite no authority for their suggestion that the trial court was required to have extensive oral argument, or to make detailed findings of fact in support of its ruling on attorney fees.

It is well established that because "[t]he essential goal in shifting fees is to do rough justice, not to achieve auditing perfection," and "the determination of fees should not result in a second major litigation." *Fox v. Vice*, 563 U.S. 826, 838 (2011) (cleaned up). "A review for 'reasonableness' is not *carte blanche* for micromanaging the practice of lawyers the court . . . has no reason to believe are padding their hours." *Tenants of 710 Jefferson St. v. D.C. Rental Hous. Comm'n*, 123 A.3d 170, 191 (D.C. 2015). "[T]rial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time" to determine the reasonableness of the award sought. *Fox*)

The order of August 8, 2023 granting attorney fees to the Trustees states that it is based on the Trustees' motion, and the hearing, but also on the "entire record herein." On appeal, the Mussells do not argue against the amount of the award, rather relying on the speculation that the trial court did not give due consideration to its Opposition.

The Trustees submit that based on the record, there is no reason to believe that the trial court did not give the Opposition below a full review, defeating any argument of abuse of discretion. Moreover, the lack of specificity in the grounds for the court's ruling, if error, was harmless, given that the record below and on appeal supports that an attorney fee award was proper, and the amount uncontested.

CONCLUSION

For the foregoing reasons, Appellee The Michael John Furman Living Trust, Michael Jude Grippo, and Laurie Ann Furman respectfully request that the court should affirm the Superior Court's award of attorneys' fees and costs in favor of the Trust in all respects and remand this case to the Superior Court for consideration of a supplemental petition for attorneys' fees and costs incurred in conjunction with the instant appellate proceedings.

Dated: March 8, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2024 the foregoing was e-served on all
counsel for record.

/s/ Kathryn Erklauer

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.

/s/ Kathryn Erklauer

Signature

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23-CV-747

Case Number(s)

3/8/24

Date