

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

DIANE WERT,

Plaintiff,

Case No. 2014-4866-CH

vs.

RIVER BEND CONDOMINIUM
ASSOCIATION,

Defendant.

_____ /

OPINION AND ORDER

Plaintiff has filed a motion for sanctions pursuant to MCL 559.215(1), MCL 450.2487(5), MCL 600.2591 and MCR 2.625(A)(2), and for taxable costs pursuant to MCR 2.625(A)(1). Defendant has filed a response and requests that the motion be denied.

I. Factual and Procedural History

Plaintiff is a resident within the River Bend Condominium subdivision ("Subdivision"). Defendant is the condominium association that governs the Subdivision. On September 5, 2014, Plaintiff sent Defendants' board of directors a request for some of Defendant's books and records. Specifically, Plaintiff's letter provides:

I respectfully request further information in keeping with Article XIV of the River Bend Bylaws, and MCL 559.157 of the Michigan Condominium Act for the [2009-2014] fiscal years, sent via the U.S. Postal Service.

(See Plaintiff's Exhibit A.)

On September 24, 2014, Defendant sent Plaintiff a response in which it denied

Plaintiff's request based on its counsel's opinion that the requested documents were privileged. (See Plaintiff's Exhibit B.)

On September 30, 2014, Plaintiff's counsel sent the Subdivision's management company, Metropolitan Property Management a copy of Plaintiff's September 5, 2014 letter, as well as a copy of Defendant's response, and re-requested the documents pursuant to the Michigan Condominium Act and the Subdivision's bylaws. (See Plaintiff's Exhibit C.)

On October 7, 2014, Defendant's counsel sent Plaintiff's counsel a letter responding to the September 30, 2014 letter. (See Plaintiff's Exhibit D.) In the letter, Defendant's counsel denied Plaintiff's request based on its concern that allowing Plaintiff to inspect the requested documents would potentially expose Defendant to claims for violation of the Federal Fair Debt Collection Practices Act or civil claims that it is invading the other residents' privacy rights. (Id.) In addition, Defendant offered to produce the requested records with certain information redacted. (Id.)

On October 10, 2014, Plaintiff's counsel sent Defendant's counsel a response to the October 7, 2014 letter. (See Plaintiff's Exhibit E.) In the response, Plaintiff's counsel reiterated Plaintiff's demand pursuant to the Michigan Condominium Act and the bylaws. (Id.) Further, Plaintiff's counsel requested any authority substantiating Defendant's concern that complying with the request would expose Defendant to potential liability. (Id.)

On October 27, 2014, Defendant's counsel sent Plaintiff's counsel a response to the October 10, 2014 letter. (See Plaintiff's Exhibit F.) In the response, Defendant's counsel again denied Plaintiff's request. (Id.) In addition, Defendant's counsel cited to

authority that he believed could form the basis for claims against Defendant in the event it complied with Plaintiff's request. (*Id.*)

On December 22, 2014, Plaintiff filed her complaint in this matter seeking an order from this Court requiring Defendant to produce specific books and records. On January 20, 2015, Defendant filed a motion for protective order. On February 10, 2015, Plaintiff filed a motion for permanent injunction allowing her to exercise her rights to review the books and records at issue.

On February 23, 2015, the Court, after hearing oral arguments on both pending motions and issued an Order granting Plaintiff's motion for a permanent injunction and denying Defendant's motion for a protective order.

On April 6, 2015, Plaintiff filed her instant motion for sanctions and taxable costs. Defendant has filed a response and requests that the motion be denied.

On May 6, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

A court's decision to award sanctions, costs and fees involves questions of law that are subject to de novo review on appeal. *Elia v Hazen*, 242 Mich App 374, 376-377, 379-380; 619 NW2d 1 (2000). A prevailing party cannot recover such expenses absent statutory authority. *Id.* at 380. However, upon finding that sanctions are authorized, a trial court has discretion to determine the appropriate amount for an award. *Id.* at 377.

III. Arguments and Analysis

In her motion, Plaintiff requests attorney fees pursuant to MCL 450.2487(5), MCL 559.215(1), MCL 600.2591 and MCR 2.625(A)(2).

A. Michigan Nonprofit Corporation Act, MCL 450.2487

The first basis Plaintiff has advanced in support of her request for attorney fees is the Michigan Nonprofit Corporation Act ("MNCA") MCL 450.2487(5). MCL 450.2487 provides in pertinent parts:

(1) If requested in writing by a shareholder or member, a corporation shall mail to the shareholder or member its balance sheet as at the end of the preceding fiscal year; its statement of income for that fiscal year; and, if prepared by the corporation, its statement of source and application of funds for that fiscal year.

(2) Any shareholder or member of record of a corporation that is organized on a stock or membership basis, in person or by attorney or other agent, may during regular business hours inspect for any proper purpose the corporation's stock ledger, a list of its shareholders or members, and its other books and records, if the shareholder or member gives the corporation written demand describing with reasonable particularity the purpose of the inspection and the records the shareholder or member desires to inspect, and the records sought are directly connected with the purpose. As used in this subsection, "proper purpose" means a purpose that is reasonably related to a person's interest as a shareholder or member. A shareholder or member must deliver a demand under this subsection to the corporation at its registered office in this state or at its principal place of business. If an attorney or other agent is the person seeking to inspect the records, the demand must include a power of attorney or other writing that authorizes the attorney or other agent to act on behalf of the shareholder or member.

(5) If the court orders inspection of the records demanded under subsection (3) or (4), it shall also order the corporation to pay the shareholder's, member's, or director's costs, including reasonable attorney fees, incurred to obtain the order unless the corporation proves that it failed to permit the inspection in good faith because it had a reasonable basis to doubt the right of the shareholder, member, or director to inspect the records demanded.

In this case, Plaintiff sent Defendant three requests to inspect the books and records at issue in this matter. However, not once did Plaintiff cite to the MNCA as a basis for her request; rather, Plaintiff repeatedly stated that she was making her request

pursuant to the Michigan Condominium Act ("MCA") and the Subdivision's bylaws. Consequently, the Court is convinced that Plaintiff did not make a request in writing pursuant to the MNCA as required by MCL 450.2487. As a result, Plaintiff is not entitled to recover attorney fees under the MNCA.

In addition, Section 2487 was amended in January 2015, a month after Plaintiff's complaint in this matter was filed. Subsection (5) of Section 2487 was added at the time of the amendment. Prior to the amendment, Section 2487 did not grant attorney fees in the event the court orders the books and records to be produced.

The Michigan Supreme Court has held that a statute operates prospectively only unless the Legislature indicates that the amendment is intended to be applied retroactively. *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012). The 2015 amendment of Section 2487 does not indicate that it is to be applied retroactively, and because the complaint in this matter was filed before the effective date of the amendment, the Court must refer to the pre-amendment version. See *Wayne Cnty Employees Retirement Sys v Wayne Charter Cnty*, 497 Mich 36; 859 NW2d 678 (2014)(Holding that because the complaint was filed before the effective date of the amendment to the statute at issue the pre-amendment version applies.) Accordingly, because the previous version of Section 2487 did not authorize the Court to grant attorney fees, Plaintiff's request for attorney fees pursuant to MCL 450.2487 must be denied.

B. Michigan Condominium Act

Next, Plaintiff requests costs pursuant to Section 559.215(1) of the MCA. MCL 559.215(1) provides:

- (1) A person or association of co-owners adversely affected by a violation of or failure to comply with this act, rules promulgated under this act, or any provision of an agreement or a master deed may bring an action for relief in a court of competent jurisdiction. The court may award costs to the prevailing party.

However, MCL 559.207 limits a court's ability to award costs and attorney fees in an action to enforce the terms of condominium documents. Specifically, MCL 559.207 provides:

A co-owner may maintain an action against the association of co-owners and its officers and directors to compel these persons to enforce the terms and provisions of the condominium documents. In such a proceeding, the association of co-owners or the co-owner, if successful, shall recover the costs of the proceeding and reasonable attorney fees, as determined by the court, to the extent that the condominium documents expressly so provide. A co-owner may maintain an action against any other co-owner for injunctive relief or for damages or any combination thereof for noncompliance with the terms and provisions of the condominium documents or this act.

In this case, the Subdivision's bylaws do not provide for an award of attorney fees or costs in the type of situation presented in this matter. (See Subdivision's bylaws, Exhibit A to Defendant's Motion for a Protective Order.) Consequently, Plaintiff's request for attorney fees and costs under the MCA must be denied.

C. Attorney Fees under the Revised Judicature Act of 1961

Plaintiff also requests attorney fees under MCL 600.2591, which provides:

- (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

- (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

(3) As used in this section:

(a) "Frivolous" means that at least 1 of the following conditions is met:

(i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.

(b) "Prevailing party" means a party who wins on the entire record.

In this case, Plaintiff contends that Defendant's legal position is devoid of legal merit. In its response, Defendant contends that its defense in this case, although ultimately unsuccessful, was not devoid of arguable legal merit.

Defendant's defense in this case was that granting Plaintiff the access she requested would violate the Fair Debt Collection Practices Act ("FDCPA") and open it up to potential invasion of privacy claims.

15 USC 1692(b) of the FDCPA prohibits a debt collector from communicating with any third party "in connection with the collection of any debt." Defendant contends that it was a debt collector with respect to outstanding dues and assessments, and that giving Plaintiff access to documents related to those debts would violate the FDCPA. While the Court ultimately found that Defendant's concerns were without merit because Plaintiff, as a co-owner, was also bound by the FDCPA from disclosing the information she obtained, the Court is convinced that Defendant's defense was not devoid of arguable legal merit. As a result, Defendant's defense was not frivolous. Accordingly, Plaintiff's request for attorney fees and costs under MCL 600.2591 must be denied.

D. Costs under MCR 2.625

MCR 2.625(A)(1) provides that “[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.”

In this matter, it appears undisputed that Plaintiff is the prevailing party. Moreover, Defendant does not contest any of the costs Plaintiff seeks. In her motion, Plaintiff requests to recover the following costs: Complaint filing fee- \$150.00, motion for preliminary injunction filing fee: \$20.00, and \$20.00 for proceedings before trial.

Although the decision whether to tax costs is discretionary, any costs that the court awards must be authorized by statute and only costs statutorily authorized may be recovered. *Rickwalt v Richfield Lakes Corp.*, 246 Mich App 450, 465, 633 NW2d 418 (2001); *Beach v State Farm Mutual Auto Ins Co*, 216 Mich App.612, 621, 550 NW2d 580 (1996). With respect to the motion fees and proceedings before trial, MCL 600.2441(1)(a)(motion fees) and MCL 600.2441(2)(a)(proceedings before trial) allow the Court to grant such costs. Moreover, the complaint filing fee is taxable as a cost pursuant to MCL 600.2529(2). Consequently, all of the costs are authorized by statute, and the Court is satisfied that Plaintiff should be allowed to recover such costs in this matter.

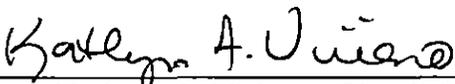
IV. Conclusion

For the reasons set forth above, Plaintiff’s motion for sanctions and costs is GRANTED, IN PART, and DENIED, IN PART. Plaintiff’s request for attorney fees is DENIED. Plaintiff’s request for costs of \$190.00 is GRANTED. Pursuant to MCR

2.602(A)(3), this Opinion and Order resolves the last remaining issue and CLOSES this case.

IT IS SO ORDERED.

Date: **JUN 08 2015**



Hon. Kathryn A. Viviano, Circuit Court Judge

cc: Benjamin Aloia – Attorney for Plaintiff
Trisha Benson – Attorney for Defendant