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OPINIONS AND ORDERS

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ORDER DENYING REVIEW, SUPREME COURT OF COLORADO (MAY 28, 2024)

COLORADO SUPREME COURT

GABRIEL N. SCHWARTZ, ESQ,

Petitioner,

v.

BEAUVALLON CONDOMINIUM ASSOCIATION INC., a Colorado Nonprofit Corporation,

Respondent.

Supreme Court Case No: 2023SC960

Certiorari to the Court of Appeals, 2022CA1474
Denver County District Court, 2020CV553

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MAY 28, 2024.

OPINION, COURT OF APPEALS OF THE STATE OF COLORADO (APRIL 11, 2024)

COLORADO COURT OF APPEALS

BEAUVALLON CONDOMINIUM ASSOCIATION INC., a Colorado Nonprofit Corporation,

Plaintiff-Appellee,

v.

GABRIEL N. SCHWARTZ, ESQ,

Defendant-Appellant.

Court of Appeals No. 22CA1474

City and County of Denver
District Court No. 20CV553
Honorable David H. Goldberg, Judge
NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Before: LIPINSKY, TOW and GROVE, Judges.

Gabriel N. Schwartz appeals numerous orders that the district court entered against him in his litigation against Beauvallon Condominium Association Inc. (HOA), his former homeowners' association. But as a motions division of this court previously ruled, this appeal is limited to the portion of the court's July 15, 2022, judgment awarding attorney fees and costs to the HOA and against Schwartz under section 38-33.3-

123(1)(c), C.R.S. 2023, of the Colorado Common Interest Ownership Act (CCIOA). We affirm.

I. Background Facts and Procedural History

This action arises from Schwartz's refusal during the COVID-19 pandemic to wear a mask in the common areas of the property (the Beauvallon) governed by the HOA. The HOA adopted a policy (the mask rule) that required all persons not exempted from the requirements of applicable state and city public health orders to wear "face coverings or masks" in specified common areas of the Beauvallon. The mask rule stated that failure to comply "may result in sanctions being imposed which may include a monetary fine or other sanction." At the time this litigation began, Schwartz resided in a condominium in the Beauvallon and operated a law office in a commercial area elsewhere in the complex.

The HOA filed suit against Schwartz in county court and sought a temporary restraining order (TRO) to bar Schwartz from entering the common areas of the Beauvallon without wearing a mask, in violation of covenants in the HOA's "Amended and Restated Condominium Declaration" (the declaration) and the mask rule.

The county court granted the HOA's motion for a TRO. Shortly thereafter, the HOA moved for issuance of a contempt citation on the grounds that Schwartz had violated the TRO. The court deferred ruling on the contempt issue.

Schwartz filed an answer to the HOA's complaint and asserted eleven counterclaims premised on, among other legal theories, breach of contract, breach of fidu-

ciary duty, housing-and disability-based discrimination, harassment, and false imprisonment. (Schwartz claimed that his alleged disability precluded him from wearing a mask.) Schwartz included in his answer a request for an award of attorney fees based on having to "incur[] defense litigation." He then transferred the case to district court.

The district court conducted an evidentiary hearing on whether the TRO should be converted to a preliminary injunction (PI). At the conclusion of the hearing, the court declined to convert the TRO to a PI. Because the TRO was no longer in effect, the court declined to find Schwartz in contempt. In addition, the court requested briefing on Schwartz's request for an award of attorney fees.

In his supplemental briefing, Schwartz argued that he was entitled to an award of attorney fees as a prevailing party under CCIOA and other authorities because the court had declined to enter a preliminary injunction against him.

On June 15, 2021, the HOA requested that the court deem its affirmative claims moot because Schwartz had moved out of his residence and law office at the Beauvallon. Schwartz opposed the motion and requested an award of his attorney fees under C.R.C.P. 41(a)(2), the declaration, and CCIOA.

The court dismissed the HOA's affirmative claims on mootness grounds. In its dismissal order, the court noted that "the question of attorney fees is not yet ripe, since there has been no final disposition on any substantive issue."

Schwartz appealed the court's order deferring his request for attorney fees and costs. A division of this

court dismissed Schwartz's appeal for lack of a final, appealable order and denied Schwartz's subsequent petition for rehearing.

Following Schwartz's unsuccessful appeal, the HOA moved to postpone consideration of the attorney fees issue until the case was resolved on the merits. The court granted the HOA's motion.

On August 29, 2021, the HOA moved for summary judgment on eight of Schwartz's eleven counterclaims. On January 19, 2022, the court granted the motion, in part, and entered summary judgment in favor of the HOA on two of Schwartz's counterclaims. The court denied summary judgment on the other six counterclaims.

The court conducted a jury trial on Schwartz's remaining nine counterclaims in March 2022. During the trial, Schwartz voluntarily dismissed three of his counterclaims. The jury found in favor of the HOA on all six of Schwartz's remaining counterclaims and expressly found, through a special interrogatory, that Schwartz did not have a disability. The HOA and Schwartz each filed post-trial motions for awards of attorney fees and costs.

On July 15, 2022, the court entered an omnibus order addressing, among other issues, the parties' requests for attorney fees and costs. The court found that the HOA was "the sole prevailing party in this case" and, therefore, "entitled to attorney fees under the CCIOA." For this reason, the court entered a judgment awarding the HOA $134,428.53 in attorney fees and costs.

II. Analysis

A. Attorney Fees and Costs

1. Standard of Review

Because the district court is in the best position to determine which party prevailed, we apply the abuse of discretion standard to the prevailing party analysis. *Anderson v. Pursell*, 244 P.3d 1188, 1193-94 (Colo. 2010). A district court commits an abuse of discretion "if its decision is 'manifestly arbitrary, unreasonable, or unfair.'" *Id.* at 1194 (quoting *Colo. Nat'l Bank of Denver v. Friedman*, 846 P.2d 159, 167 (Colo. 1993)).

2. Applicable Law

CCIOA "establish[es] a . . . uniform framework for the creation and operation of common interest communities." § 38-33.3-102(1)(a), C.R.S. 2023. Section 38-33.3-123(1)(c) mandates that, "[i]n any civil action to enforce or defend the provisions of [CCIOA] or of the declaration, bylaws, articles, or rules and regulations, the court shall award reasonable attorney fees, costs, and costs of collection to the prevailing party."

CCIOA does not define "prevailing party" but, rather, relies on the common law definition of the term. *FD Ints., LLC v. Fairways at Buffalo Run Homeowners Ass'n*, 2019 COA 148, ¶ 59, 490 P.3d 496, 507. Under Colorado law,

> [t]o be a prevailing party for the purpose of an award of attorney fees pursuant to a statute or contract, the applicant must have succeeded upon a significant issue presented by the litigation and must have achieved

> some of the benefits that he sought in the lawsuit. But a party need not prevail upon the "central" issue, only upon a significant one.

Id. (quoting *In re Marriage of Sanchez-Vigil*, 151 P.3d 621, 625 (Colo. App. 2006)).

A litigant does not prevail merely by successfully defending a motion for a preliminary injunction. Defending a preliminary injunction motion is not a "significant issue," *id.*, as a preliminary injunction ruling neither adjudicates the ultimate rights of the parties nor determines the merits of the parties' claims, *see Anderson*, 244 P.3d at 1196.

In considering whether a litigant prevailed for purposes of CCIOA's fee-shifting provision, we consider whether that party prevailed in the litigation on the whole, rather than on a claim-by-claim basis. *Far Horizons Farm, LLC v. Flying Dutchman Condo. Ass'n*, 2023 COA 99, ¶ 29, 542 P.3d 700, 706; *see also Grynberg v. Agri Tech, Inc.*, 985 P.2d 59, 64 (Colo. App. 1999), *aff'd*, 10 P.3d 1267 (Colo. 2000) ("[T]he number of claims upon which a party prevails and the amount awarded for such claims are not determinative of who is the prevailing party for the purpose of awarding costs.").

3. The Court Correctly Determined the HOA Was the Prevailing Party Under CCIOA and, Therefore, Was Entitled to an Award of Its Attorney Fees and Costs

In its omnibus order, the court stated that "[o]ther than prevailing on one (1) motion of preliminary injunctive relief within the first weeks of this lengthy

case[,] Schwartz failed to prevail on any significant issue. Schwartz's claims and protestations to the contrary are ludicrous." The court explained:

> Schwartz's appeal to the Colorado Court of Appeals was dismissed and attorney fees and costs were assessed against him, summary judgment entered in favor of the Association and against Schwartz on two of his claims for relief, two of Schwartz's claim [sic] were withdrawn during trial (again with the caveat that each party is responsible for attorney fees and costs relating to those claims), and the jury found in favor of the Association against Schwartz on all remaining claims.

For those reasons, it found that the HOA was "the sole prevailing party."

We hold that the court did not abuse its discretion by making this finding. The court's determination was not "manifestly arbitrary, unreasonable, or unfair," *Anderson*, 244 P.3d at 1194 (quoting *Colo. Nat'l Bank*, 846 P.2d at 167), as the record and the law supported it.

In his opening brief, Schwartz argues:

> It defies logic to imagine how Mr. Schwartz could be more successful on the HOA's claims against him, in that he prevailed on the preliminary injunction by not being forced to wear a mask/face covering due to his disabilities, the Court found he had no further duty to discuss the accommodation with the HOA, he prevailed on the Contempt of Court seeking jail, was able to access his home and business without wearing a mask/face covering, pre-

> vailed on the TRO and the Court asked Mr. Schwartz to file motion for attorney fees and costs.

He also asserts that "[t]he HOA's claims were dismissed against him," so "there could not have been any other Court hearing or trial that would have given Mr. Schwartz more of a win."

Schwartz's arguments fail as a matter of law. As Schwartz conceded in the motion for attorney fees he filed following the hearing on the HOA's motion for a PI, "the focus of the prevailing party analysis is not on procedural victories during the course of the litigation, but on the final disposition of the substantive issues." *Reyher v. State Farm Mut. Auto. Ins. Co.*, 2012 COA 58, ¶ 40, 280 P.3d 64, 72 (emphasis added); *see also FD Ints., LLC*, ¶ 59, 490 P.3d at 507. Moreover, the three cases Schwartz cites in his opening brief on the "prevailing party" issue either are inapposite or undercut his argument.

In *Brock v. Weidner*, the defendants successfully "preclud[ed] plaintiffs from obtaining a preliminary injunction . . . [and] then succeeded in defending against both plaintiffs' motion for partial summary judgment and plaintiffs' demand for a jury trial." 93 P.3d 576, 579 (Colo. App. 2004). The litigation culminated in the dismissal with prejudice of all claims asserted against the defendants. Under the circumstances, the division held that the defendants were the prevailing parties. *Id.*

In *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782, 784 (1989), the United States Supreme Court considered whether the plaintiffs were entitled to an award of attorney

fees under 42 U.S.C. § 1988, the fee-shifting statute applicable in federal civil rights cases. The Court held that, if a "plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind." *Tex. State Tchrs. Ass'n*, 489 U.S. at 791-92 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). "Cross[ing] the threshold" requires, at a minimum, "a resolution of the dispute which changes the legal relationship between [plaintiff] and the defendant" because "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 792 (emphasis added) (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)).

Applying this test in *Kansas Judicial Watch v. Stout*, the Tenth Circuit explained that "[a] preliminary injunction provides relief on the merits when it (a) affords relief sought in the plaintiff's complaint and (b) represents an unambiguous indication of probable success on the merits." 653 F.3d 1230, 1238 (10th Cir. 2011).

Schwartz's singular victory at the PI hearing did not "afford[] any of the relief sought," *id.*, through his eleven counterclaims. The court's denial of the HOA's motion for a PI handed Schwartz only a minor victory — it solely meant that the TRO would not be extended while the parties continued to litigate the case on the merits. That following the PI hearing Schwartz was not immediately required to "discuss the accommodation with the HOA" and "was able to access his home and business without wearing a

mask/face covering," meant only that the status quo would remain in place at that point in the litigation.

Moreover, the court's ruling on the PI motion lacked any "unambiguous indication of probable success on the merits." *Id.* Notably, the court said the opposite, telling the parties that the court's decision not to enter a PI at the time "doesn't mean that [the HOA's request for an injunction against Schwartz] can't be proven up later." Thus, Schwartz failed to obtain "at least some relief on the merits of his claim" through the PI ruling. *Tex. State Tchrs. Ass'n*, 489 U.S. at 792.

At most, Schwartz's minor wins on the HOA's PI motion and in dodging contempt charges were "procedural victories during the course of the litigation" that fell far short of any type of "final disposition of the substantive issues." *Reyher*, ¶ 40, 280 P.3d at 72. Similarly, the dismissal of the HOA's affirmative claims on mootness grounds, after Schwartz moved out of the Beauvallon, did not resolve any of the substantive claims in the case and was not a ruling on the merits. Under Schwartz's reasoning, the Vince Lombardi trophy would be handed to a team that scored a field goal in the first quarter but lost the Super Bowl by twenty-four points.

Lastly, the court's directive during the hearing on the HOA's PI motion that Schwartz file a motion explaining the grounds for his request for attorney fees did not establish that Schwartz had won any issue on the merits. Rather, the court's directive reflected the lack of clarity in Schwartz's request. As the court said, "It wasn't clear to me what it is you were requesting . . . , so that's why I'm asking for additional filings on that."

In sum, the court did not abuse its discretion by determining that the HOA was the prevailing party.

III. Disposition

The judgment is affirmed. To the extent Schwartz seeks an award of his appellate attorney fees and costs, the request is denied.

JUDGE TOW and JUDGE GROVE concur.

NOTICE CONCERNING ISSUANCE OF THE MANDATE

COURT OF APPEALS
STATE OF COLORADO
2 EAST 14TH AVENUE
DENVER, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT:

/s/ Gilbert M. Román
Chief Judge

DATED: January 6, 2022

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Additional material from this filing is available in the Clerk's Office.