2012 IL App (2d) 120091-U
No. 2-12-0091
Order filed September 18, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE CITY OF HARVARD, Plaintiff-Appellant, v. THE ELVIS J. HENSON TRUST, Successor in Interest to Elvis J. Henson and Carolyn F. Henson, Defendant-Appellee.	)	Appeal from the Circuit Court of McHenry County. No. 09-MR-324 Honorable Michael T. Caldwell, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion in denying plaintiff attorney fees: plaintiff did not "prevail," as relief to plaintiff was conditioned on the grant of substantial benefits to defendant, and the court's judgment was more a declaration than an enforcement of rights.

¶ 1 Plaintiff, the City of Harvard (the City), sued defendant, the Elvis J. Henson Trust, successor in interest to Elvis J. Henson and Carolyn F. Henson, to enforce an agreement that had been entered into between the parties. At the conclusion of the litigation, the trial court denied the City's petition for attorney fees. The City timely appealed. The issue on appeal is whether the trial court abused

its discretion in denying the City's petition for attorney fees, based on its conclusion that the City was not the prevailing party in the underlying litigation for purposes of the contractual attorney fee-shifting provision at issue. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 This appeal stems from an agreement (the Agreement) executed in 1992 between the City and Elvis J. Henson and Carolyn F. Henson (the Hensons), owners of certain property located in Harvard (the Property). When the Agreement was executed, certain City ordinances provided that it was unlawful to construct or maintain a private well on City property and required all property owners to connect their property, at their own expense, to City water services, unless a variance was approved. The Hensons operated a banquet facility on the Property, which was not connected to City water service, and requested a variance. The parties entered into the Agreement, which provided that the "Hensons shall do all that is necessary and pay all costs incurred to connect the banquet facility, located on the Property, to the City's public water system" once the City's water main was extended to a certain point near the Property. The Agreement contained the following provision concerning attorney fees:

> "In the event the City is required to incur legal expenses to enforce the terms of this Agreement against Hensons or their successors and assigns, Hensons or their successors or assigns shall be responsible to reimburse the City for all reasonable attorneys fees incurred relative to such enforcement action."

¶ 4 In April 2009, the City notified Elvis Henson that, pursuant to the Agreement, he was now required to connect the Property to the City's water main, which had been extended to the point indicated in the Agreement, and that he was further required to (1) secure permits from the Illinois

Environmental Protection Agency, (2) obtain permission from the McHenry County Division of Transportation, allowing the City to construct in the county right of way, or grant the City an exclusive easement, out of the right of way, and (3) obtain permits from the City.

¶ 5 In September 2009, the City filed a three-count complaint against defendant. (The Hensons conveyed their interest in the Property to defendant in March 2000.) In count I, seeking declaratory judgment, the City requested the following relief:

> "A. To adjudge and declare that the Agreement imposed the following requirements and obligations on the Defendant:
>
> (i) to the [*sic*] pay the connection fees pursuant to the City's current Code;
>
> (ii) to install the water extension to connect to the City's water system;
>
> (iii) to grant an [*sic*] utility easement to the City for purposes of allowing access to the water main for repair and/or maintenance;
>
> (iv) to secure a permit for the City to complete installation and connection of the water main as envisioned in the Agreement."

¶ 6 In count II, seeking specific performance, the City maintained that "[b]y virtue of the obligations to install the water lines and connect to the City's water system, Defendant is also obligated to grant the utility easement in favor of the City for the purpose of maintenance and/or repair." The City further maintained that the Agreement required defendant "to do all that [was] necessary and pay all costs associated with the connection of the Facility to the City's water system which includes payment of connection fees." The City requested that the court order defendant:

> "A. To pay the City the appropriate connection fees pursuant to current Code and ordinance requirements;

B. To install the water extension and connect to the City's water system;

C. To grant the City a utility easement for purposes of water main maintenance and/or repair; and

D. Award the City any such and further relief as the Court deems necessary."

¶ 7 In count III, the City sought attorney fees as provided for under the Agreement.

¶ 8 A bench trial took place on February 22 and 23, 2011. Relevant testimony established the following. David Nelson, City Administrator, testified that the "[A]greement kicked in" in 2008 or 2009 when Wal-Mart built a store next to the Property and extended the City water main to the edge of the Property. Nelson testified that defendant installed the water main on the Property, as required under the Agreement. According to Nelson, the only remaining issues were the actual connection of the water main, the granting of an easement from defendant to the City, and the payment of "tap-on" fees, water meter fees, and attorney fees for enforcement of the Agreement. Nelson testified that the "tap-on" and water meter fees had increased since the date of the Agreement. The current "tap-on" fee was $3,885.77, and the current water meter fee was $753.44.

¶ 9 Elvis Henson testified that he received the City's demand to connect to the City water supply in 2009. Henson stated that he "lived up to [his] portion of the [A]greement" and installed a 12-inch water main on his property. He stated: "It's all set up, ready to go. All they got to do is put a meter on it. And that's been the discussion. And it's been ready ever since prior to them filing suit." Henson further stated that he did not believe that the Agreement required him to pay the connection and water meter fees or to grant the City an easement. According to Henson: "[The City told me] that the [A]greement implied that I should give them an easement. I said it doesn't imply anything. And as far as easements go, they have a value." He further stated: "I feel that this easement is worth

something. And if it wasn't, they could sue anybody in town and say, look, I want that. I am just going to sue for it. That's basically what they have done. We put this in. We abided by the contract. All we lack is putting a meter on that. And we have done everything that's in that contract that I was supposed to do." At this point, the City orally moved to withdraw its claim for an easement.

¶ 10 Prior to resting, the City again indicated that it was withdrawing its claim for the easement, but asked for a declaration with respect to the tap-on fees, water meter fees, and connection by defendant. Thereafter, the City rested, and defendant moved for a directed finding. The trial court denied the motion. Defendant presented its witnesses. Sheila Henson, Elvis Henson's daughter, testified that she was the executive director of The Brown Bear Day Care and Learning Center (the Center), which served over 200 children and which was located on the Property. The Center used water from the private well and the water was tested three times per year; the water had never failed a test. According to Sheila, her father tested the water from the new water line and the tests showed the presence of bacteria. When the City flushed the line, it flooded the Center's parking lot, playground, and garden area.

¶ 11 Jack Kemp, owner of Illini Televising and Testing, Cleaning Services, testified that he tested the water line on the Property. According to Kemp, it took 12 to 15 hours of "flushing" to get the residual chlorine needed for disinfection. He testified that the problem was that there was "[n]ot enough use on a line that large to keep the residual chlorine content" that was necessary to kill bacteria. In his opinion, the City never adequately flushed the pipe to get the residual chlorine, which was why the initial testing failed. He stated that the question was whether the buildings on the Property would use enough water to keep a safe level of residual chlorine in the system.

¶ 12 Defendant rested and the City called Robert Scott Trotter in rebuttal. Trotter testified that he was president and senior engineer of Trotter and Associates, a consulting engineering firm. He testified that, with respect to the water line on the Property, unless there was no use on the line, he would not have any concern over water quality. According to Trotter, once the line was connected, there would no longer be any concern.

¶ 13 At the conclusion of the bench trial, the trial court orally ruled that the City had the right to force defendant to connect the Property to the City water line and to charge the current fees. With respect to the easement, the court stated:

> "[T]he [C]ity has to get an easement. There's a city water line being installed in somebody's property. It's there by virtue of the fact that the homeowner constructed the line on his property. It's an extension to the existing city water line. It no longer really belongs to Mr. Henson, yet it's in his property. And should anything happen to it, the city has no right to go onto his property to maintain it or repair it or expand it. So you've got to get an easement."

The court ruled that the City was obligated to condemn or negotiate an easement with defendant to allow the City access to the Property for purposes of maintenance and repair. The court further ruled that the City was entitled to attorney fees under the Agreement and granted the City 14 days to file its petition.

¶ 14 On March 9, 2011, the City filed a petition seeking $18,600 in attorney fees and $101 in costs. At the hearing on September 6, 2011, the City argued that, as the prevailing party, it was entitled to fees under the Agreement. Defendant argued that he began installing the water line before the City filed suit and that the controversy arose when defendant refused to grant the City an

easement. According to defendant, because the court agreed with its position that the City was not entitled to an easement under the Agreement, the City was not the prevailing party. The court agreed with defendant and denied the petition, stating: "The fact of the matter is that large at [*sic*] of time and this petition for fees were spent on this easement issue. I can't separate them out. It's not my job to separate them, it's yours. So for that reason, the motion for fees and the application for fees will be denied."

¶ 15 On September 13, 2011, the trial court issued its written decision. The court made the following findings. First, that defendant, as of the filing date of the complaint, had installed the water main and service main as required under the Agreement. Second, that the Agreement did not require defendant to grant the City an easement. Third, that absent specific language in the Agreement regarding the payment of tap-on fees, the parties intended that defendant must pay the fees that are in effect at the time of tap-on. And, fourth, that the oversized water main installed by defendant entitled defendant to the rights of recapture provided in the Agreement. Based on these findings, the court ordered as follows:

> "A. The City has the right to force and compel Defendant *** to connect to the City's water system and [defendant] is ordered to connect forthwith on the City's completion of the requirements as set forth in Paragraphs B and E of this Order. ***
>
> B. That prior to any water supply being utilized by Defendant, the City shall adequately flush the main (in the manner as described in paragraph C) and provide Defendant with water tests showing tests results indicating bacteria chlorine are within permissible limits for a new water main.

C. That all flushing, now and in the future, for the water main made a subject of this litigation shall be [completed in such a way] to prevent flooding on Plaintiff's [*sic*] property.

D. The City is obligated to negotiate a recapture agreement ***.

E. Insofar as the Agreement does not contain a requirement that a permanent, irrevocable utility easement be granted, the City shall negotiate or ultimately condemn such utility easement to be able to access the water main for purposes of maintenance and repair."

¶ 16 On October 5, 2011, the City filed a motion to reconsider the order denying its petition for attorney fees. It submitted a revised list of attorney fees and costs, excluding those associated with the easement issue. The total revised amount of attorney fees and costs was $16,275.

¶ 17 On January 3, 2011, following argument, the trial court denied the motion to reconsider, stating as follows:

"All right. Well, the motion to reconsider will be denied. The reasons are, number one, my ruling on fees was a discretionary issue. And counsel, you haven't really told me where I made a mistake of either the law or fact. Since it's a discretionary issue, the underlying situation is still the same. The City was requiring a connection to a water main, which still hasn't happened because the City still doesn't have an easement.

It's the primary issue of anything. The relief granted is out of order. There was the underlying question of whether or not the Hensons would be required to do so. They have done everything that was required of them to be done except connect and the outstanding issue is the easement.

The only reason there was an invitation to file a petition for fees in the first place is because of the contractual provision, number one; and number two, I have never known a municipality to take a pass on the issue when it's there.

Under the circumstances, I don't—this is simply a re-hearing of the initial motion for fees, which I denied, with an attempt to make it a changed motion by attempting to separate out the easement issue from the—from the rest of the fees claimed. But in point of fact, as [counsel] points out, the easement and the obligation to connect are intrinsically related to one another. I don't feel this is an appropriate situation in regard the City as being the prevailing party when the Hensons have been right all along about the need for an easement, even though the City was right about the requirement to connect."

¶ 18 The City timely appealed. On appeal, the City argues that the court erred in denying its petition for attorney fees.

¶ 19 II. ANALYSIS

¶ 20 We first address the standard of review. The City agrees that, when ruling on an attorney fee petition, a trial court has broad discretionary powers and that the court's ruling will not be reversed unless it has abused its discretion. *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 983-84 (1987). Nevertheless, the City points out that the *de novo* standard of review has been applied to the interpretation of contractual fee-shifting provisions (see *Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC*, 403 Ill. App. 3d 234, 254-55 (2010)) and to the interpretation of statutory fee-shifting provisions (see *City of Elgin v. All Nations Worship Center*, 373 Ill. App. 3d 167, 169 (2007)). While the City concedes that the issue before us (whether the City prevailed in the underlying lawsuit such that it is entitled to attorney fees) does not fit squarely into

either of the above categories, it nevertheless invites this court to apply a *de novo* standard of review. We decline the invitation. This court has previously found that an abuse of discretion standard should be applied in determining whether a litigant is a prevailing party for purposes of a contractual fee-shifting provision. *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶29; *Powers v. Rockford Stop-N-Go, Inc.*, 326 Ill. App. 3d 511, 515 (2001); *Med+Plus Neck & Back Pain Center, S.C. v. Noffsinger*, 311 Ill. App. 3d 853, 861 (2000). The Seventh Circuit, in applying Illinois law, has also applied the abuse of discretion standard in determining whether a litigant was a prevailing party for purposes of a fee-shifting provision in a lease. *Raffel v. Medallion Kitchens of Minnesota, Inc.*, 139 F.3d 1142, 1147 (1998). We will not depart from this precedent. Thus, the question for this court is whether the trial court abused its discretion in denying the City's fee petition based on its conclusion that the City was not a prevailing party. "A trial court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court." *Patton v. Lee*, 406 Ill. App. 3d 195, 199 (2010).

¶21 Turning to the merits, as a general rule, an unsuccessful party in a lawsuit is not responsible for the payment of the other party's attorney fees. *Myers v. Popp Enterprises, Inc.*, 216 Ill. App. 3d 830, 838 (1991). However, there exists an exception to this rule where the parties enter into an agreement that provides for the award of attorney fees. *Myers*, 216 Ill. App. 3d at 838. "[C]ontract provisions regarding attorney fees should be strictly construed and enforced at the discretion of the trial court." *Powers*, 326 Ill. App. 3d at 515. The contractual fee-shifting provision at issue here provided:

> "In the event the City is required to incur legal expenses to enforce the terms of this Agreement against Hensons or their successors and assigns, Hensons or their successors or

assigns shall be responsible to reimburse the City for all reasonable attorneys fees incurred relative to such enforcement action."

Although the City notes that the plain language of the provision does not expressly require that the City be the "prevailing party" to recover attorney fees, the City concedes on appeal that such a finding is necessary. Indeed, this court, when construing a similar attorney fee provision, specifically noted that "attorney fees may only be awarded to a prevailing party." *Powers*, 326 Ill. App. 3d at 516. Thus, the question here is whether the trial court abused its discretion in finding that the City was not the prevailing party.

¶ 22 A prevailing party, for purposes of awarding attorney fees, is one that is successful on a significant issue and achieves some benefit in bringing suit. *Peleton, Inc. v. McGivern's, Inc.*, 375 Ill. App. 3d 222, 227 (2007); *J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership*, 325 Ill. App. 3d 276, 280 (2001). "A party that receives judgment in his favor is usually considered the prevailing party." *J.B. Esker*, 325 Ill. App. 3d at 281. A party does not have to succeed on all its claims to be deemed the prevailing party. *Id.*

¶ 23 According to the City, it was the prevailing party because it "was successful on the sole significant issue, namely, whether the Defendant should be compelled to shut off their private well and connect to the City's water system" and because it "achieved a benefit in bringing suit by enforcing its rights under the Agreement and requiring the Defendant to tap on to the water system and pay the 'current fees' for tap-on." However, while the court did find that defendant must pay the fees currently in effect and connect to the City water main, this finding was expressly conditioned on the City's compliance with certain other provisions of the order. Specifically, the City was ordered to "adequately flush the main (in the manner as described in paragraph C) and provide

Defendant with water tests showing tests results indicating bacteria chlorine are within permissible limits for a new water main," and, more importantly, it was required to "negotiate or ultimately condemn such utility easement to be able to access the water main for purposes of maintenance and repair." The order further obligated the City "to negotiate a recapture agreement" and to conduct flushing of the water main in a certain prescribed manner. Given the conditional nature of the order, we fail to see how the City was "successful on the sole significant issue." It is the conditional nature of the order that distinguishes this case from those relied on by the City. For instance, the City cites *Tomlinson v. Dartmoor Construction Corp.*, 268 Ill. App. 3d 677 (1994), and *J.B. Esker*, for the proposition that it need not prevail on all its claims to be considered the prevailing party and entitled to all reasonable fees. However, here, unlike in *Tomlinson* and *J.B. Esker*, the City did not prevail.

¶ 24 Furthermore, where the court declares, but does not enforce, a party's rights under an agreement, an award of attorney fees under a fee-shifting provision like the one at issue here is not proper. See *Powers*, 326 Ill. App. 3d at 515-18; *Arrington v. Walter E. Heller International Corp.*, 30 Ill. App. 3d 631, 642 (1975). Here, the Court's order was more a declaration of rights than an enforcement of the contractual provisions. Although the City's complaint was couched in terms of both specific performance and declaratory judgment, the relief sought for each claim was essentially the same. The City sought to have the Court impose the following obligations on defendant: installation of the water extension, payment of the connection fees at the current rate, and granting of an easement. There was no real dispute that defendant was subject to the Agreement. A review of the trial transcript establishes that it was the easement with which defendant took primary issue. Indeed, at the time of trial, defendant had already complied with all aspects of the Agreement, except for the actual connection. Nelson agreed that defendant had installed the water main on the Property

as required under the Agreement and that the only remaining issues were the payment of the fees, the actual connection, and the granting of the easement. Henson testified that he had done everything that was required under the Agreement and that his position was that the Agreement did not require him to grant an easement. The court's final order provided that "[t]he City has the right to force and compel Defendant *** to connect to the City's water system *** on the City's completion of the requirements as set forth [in the order]." The court also declared that the fees to be paid were the current fees. Thus, the court effectively declared the City's rights under the Agreement. Indeed, defendant was not required to do anything that it had not already agreed to do. See *Powers*, 326 Ill. App. 3d at 517.

¶ 25 III. CONCLUSION

¶ 26 Accordingly, based on the foregoing, we find that the trial court did not abuse its discretion in denying the City's petition for fees. Thus, we affirm the judgment of the circuit court of McHenry County.

¶ 27 Affirmed.