

DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO.: 3D23-1396
L.T. CASE NO.: 2020-002305-CA-01

THE IVY CONDOMINIUM ASSOCIATION,
INC., a Florida Not for Profit Corporation,

Appellant,

v.

NORTH INVESTMENT GROUP, LLC,
a Florida Limited Liability Company,
et al.,

Appellees.

**APPELLANT'S RESPONSE TO APPELLEES' MOTION FOR
APPELLEES' ATTORNEYS' FEES**

Appellant, THE IVY CONDOMINIUM ASSOCIATION, INC. (the "Ivy"), by and through its undersigned counsel, and pursuant to the Florida Rules of Appellate Procedure, files this Response to Appellees' Motion for Appellees' Attorneys' Fees:

1. Appellees, NORTH INVESTMENT GROUP, LLC and CWV REALTY GROUP, LLC (collectively, "Appellees"), filed suit against the Ivy and the RIVER FRONT MASTER ASSOCIATION, INC. (the "Master Association"), for breach of contract, injunctive relief, violation of

Chapter 718, and tortious interference with a contractual relationship, asserting that an agent or employee of the Master Association removed certain retail signs and displays in violation of the Ivy's and the Master Association's respective Declarations and section 718.303, Florida Statutes. (A. 619-58).¹

2. After extensive litigation and four attempts to plead a cause of action, Appellees filed a Motion for Leave to Amend the Complaint to Seek Punitive Damages and eventually a Restated Motion for Leave to Amend the Complaint to Seek Punitive Damages. (A. 680-95, 1143-64).

3. After a hearing on Appellees' Restated Motion, the trial court entered an Order granting Appellees' Restated Motion to Amend the Complaint to Add a Claim for Punitive Damages, which forms the basis of this appeal. (A. 2130).

4. On January 18, 2024, Appellees filed their Motion for Appellees' Attorneys' Fees.

¹ Citations to the Appendix to the Ivy's Initial Brief will be referenced as "A." followed by any appropriate PDF reader page number.

5. In their Motion, Appellees assert they are entitled to appellate attorneys' fees pursuant to sections 718.303(1) and 59.46, Florida Statutes, sections 9.1 and 9.2 of the Master Declaration, and section 18.2 of the Ivy Declaration.

6. Section 718.303, Florida Statutes, provides in pertinent part, that "The **prevailing party** in any such action [under section 718.303, Florida statutes] . . . is entitled to recover reasonable attorney fees." § 718.303(1), Fla. Stat. (emphasis added).

7. The relevant portions of the Master Association Declaration provide that "Failure to comply with any such rules or regulations shall be grounds for immediate action. . . . The **offending party** shall be responsible for all costs of enforcement, including attorneys' fees actually incurred and courts costs, through and including the appellate level." (A. 361) (emphasis added).

8. Section 18.2 of the Ivy Declaration similarly provides:

18.2. Negligence and Compliance. . . . In any proceeding arising because of an alleged failure of a Unit Owner, a tenant or the Association to comply with the requirements of the Act, this Declaration, the exhibits annexed hereto, or the rules and regulations adopted pursuant to said documents, as the same may be amended from time to time, the **prevailing party** shall be

entitled to recover the costs of the proceeding and such reasonable attorneys' fees (including appellate attorneys' fees).

(A. 59) (emphasis added).

9. Here, Appellees are not yet the prevailing party below, nor have they prevailed on appeal as the merits have yet to be determined.

10. Where the ultimate outcome of the underlying litigation remains unresolved, an award of attorneys' fees to the prevailing party must be conditioned on the party ultimately prevailing in the underlying litigation. *See General Accident Ins. Co. v. Packal*, 512 So. 2d 344, 346 (Fla. 4th DCA 1987); *Foley v. Fleet*, 652 So. 2d 962, 963 (Fla. 4th DCA 1995) (explaining that prevailing party attorneys' fees must be conditioned on the movant ultimately prevailing in the underlying litigation).

11. Accordingly, even if Appellees successfully obtain an affirmance of the Order granting Appellees' Restated Motion to Amend the Complaint to Add a Claim for Punitive Damages, the case will be remanded for further proceedings and Appellees will not yet be the "prevailing party" in the litigation. Therefore, any award of

appellate attorneys' fees must be conditioned upon Appellees ultimately prevailing in the underlying litigation.

12. Based on the foregoing, the Ivy respectfully submits that this Court should deny Appellees any award of appellate attorneys' fees unless and until they successfully obtain an affirmance of the Order granting Appellees' Restated Motion to Amend the Complaint to Add a Claim for Punitive Damages, and further condition any such award upon Appellees ultimately prevailing in the underlying litigation.

WHEREFORE, the Appellant, THE IVY CONDOMINIUM ASSOCIATION, INC., respectfully requests that this Honorable Court (1) enter an order denying Appellees' Motion for Appellees' Attorneys' Fees as they are not yet the prevailing party on appeal; (2) in the event this Court awards appellate attorneys' fees, condition any such award upon Appellees ultimately prevailing in the underlying litigation; and (3) grant any such other and further relief this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 2nd day of February, 2024, a true and correct copy of the foregoing was filed with the Clerk of the Third District Court of Appeal, by using the Florida Courts e-Filing Portal, which will send an automatic e-service e-mail to the following parties registered with the e-Filing Portal system: all parties listed on the attached Service List.

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