

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-313

MAY TERM, 2019

Roy H. A. Watson III * v. The Village at	}	APPEALED FROM:
Northshore I Association, Inc.	}	
	}	Superior Court, Chittenden Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 835-8-13 Cncv
		Trial Judge: Robert A. Mello

In the above-entitled cause, the Clerk will enter:

Plaintiff condominium unit owner appeals the superior court’s partial award of attorney’s fees to defendant condominium association. We affirm.

This is the third time that this case has come before this Court. We briefly summarize the underlying facts. The litigation began in August 2013, when plaintiff, who at the time was not represented by counsel, filed a declaratory judgment action against defendant. The superior court dismissed the complaint without prejudice based on its conclusion that plaintiff had failed to exhaust contractual remedies set forth in defendant’s governing documents. A three-justice panel reversed the dismissal and remanded the matter for further proceedings. See Watson v. Village at Northshore I Association, Inc., No. 2013-451, 2014 WL 3714662 (Vt. May 9, 2014) (unpub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo13-451.pdf>. [<https://perma.cc/X5J9-UTD8>]. On remand, plaintiff, with the assistance of counsel, filed an amended thirty-page complaint seeking declaratory relief with respect to thirteen distinct issues. Plaintiff voluntarily withdrew four of the issues. The superior court granted defendant’s motion to dismiss those issues with prejudice and ruled in defendant’s favor on the remaining issues. Defendant appealed all thirteen issues to this Court. In an amended opinion, this Court entered judgment for Watson on one issue and partial judgment for him on three other issues, while affirming the superior court’s decision in all other respects. Watson v. Village at Northshore I Association, Inc., 2018 VT 8, ¶ 88 (“Watson II”).

On remand, the parties filed cross-motions for attorney’s fees and costs pursuant to 27A V.S.A. § 4-117(a) of the Vermont Common Interest Ownership Act (VCIOA). In a July 25, 2018 decision, following a non-evidentiary hearing, the superior court denied plaintiff’s motion and granted defendant’s motion with respect to three of the issues in the case. In denying plaintiff’s motion, the court reasoned that plaintiff lost on most of his claims, achieved only partial success on the claims on which he prevailed, ultimately achieved little tangible benefit from his lawsuit, and failed to show any bad faith or misconduct on defendant’s part. As for defendant’s motion, the court determined that defendant did not substantially prevail in the litigation, despite successfully defending against most of the issues raised by plaintiff, because it lost on the two central issues in the case. Accordingly, the court denied a large portion of defendant’s request for

attorney's fees. However, the court awarded defendant fees with respect to three of plaintiff's claims based on its conclusion that one of those claims was pursued in bad faith and the other two were borderline frivolous. The court found unavailing plaintiff's argument that defendant's attorney's fees had not been properly approved in advance by its board of directors, stating that if defendant reasonably incurred such fees, it was entitled to reimbursement. The court gave defendant two weeks to file documents supporting the amount of reasonable fees associated with those three issues, and another two weeks for plaintiff to respond. In an August 31, 2018 decision, following the parties' submissions, the court awarded defendant \$41,356 in attorney's fees and \$184 in costs, which amounted to less than one-fourth of what defendant was seeking.

On appeal, plaintiff raises several claims of error. He first contends that a provision in defendant's amended and restated Declaration of Condominium, rather than 27A V.S.A. § 4-117(a) of the VCIOA, controls the award of attorney's fees in this case. Plaintiff asserts that defendant is not entitled to attorney's fees under § 10-06 of the Declaration, which provides that in a proceeding arising from an alleged failure to comply with the VCIOA or an association's governing documents, "the prevailing party shall be entitled to recover the costs of the proceeding and such reasonable attorney's fees as may be awarded by the court." In plaintiff's view, this provision permits the award of attorney's fees and costs only to a prevailing party. Relying on the superior court's pronouncement that neither party substantially prevailed in the litigation, plaintiff argues that defendant cannot obtain attorney's fees under § 10.06 of the Declaration.

We conclude that defendant has waived review of this argument on appeal. In its July 25, 2018 decision, the superior court noted that both parties sought attorney's fees pursuant to § 4-117(a) of the VCIOA. Indeed, plaintiff argued that § 4-117(a) controlled rather than § 10.06 of the Declaration. Plaintiff cannot contend before the superior court that 27A V.S.A. § 4-117(a) controls and then argue to this Court on appeal that it does not control. See R&G Properties, Inc., 2008 VT 113, ¶ 48, 184 Vt. 494 ("This Court will not consider matters raised for the first time on appeal."); State v. Longe, 170 Vt. 35, 39 n.* (1999) ("The invited error doctrine, which applies in both civil and criminal cases, is a branch of the doctrine of waiver by which courts prevent a party from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside." (citation and quotation omitted)).

Plaintiff points out that he argued § 10-06 controlled in his response to defendant's submission of documents supporting its request for reasonable fees associated with the three issues identified in the superior court July 25 decision. But the court had already determined in that decision, based on the parties' arguments and their reliance on § 4-117(a), who was entitled to attorney's fees under what provision and on what issues. At that point, the only issue left for the court to decide was the amount of fees to award defendant for its work on the three identified issues. As the superior court pointed out, plaintiff's argument was in the nature of a motion to reconsider; yet, his argument not only adopted a position he had not taken earlier but it was inconsistent with his earlier position. See Vt. Ag. of Nat. Res. v. Parkway Cleaners, 2019 VT 21, ¶ 45 (stating that defendant could not preserve issue in motion to reconsider that raised new theory). Notwithstanding the fact that the superior court briefly responded to the argument, plaintiff failed to preserve for appellate review his belated contention that § 1006 is the governing law, in contradiction to what he had previously argued, after the superior court had already ruled on who was entitled to attorney's fees.¹ See In re Programmatic Changes to Standard-Offer Program, 2017 VT 77, ¶ 12, 205 Vt. 358 (stating that "post-judgment motions may sufficiently

¹ Our determination that plaintiff waived this argument moots his argument that the superior court erred by stating in its August 31, 2018 decision that nothing in § 10-06 precluded the court from awarding fees and costs for other reasons.

preserve issues if the asserted error did not rise prior to judgment” (quotation omitted)); In re Entergy Nuclear Vt. Yankee, LLC, 2007 VT 103, ¶ 13, 182 Vt. 340 (rejecting appellant’s argument that it sufficiently preserved claim in post-judgment motion); Hoffer v. Ancel, 2004 VT 38, ¶ 19, 176 Vt. 630 (mem.) (stating that plaintiff’s argument in reply brief in support of motion to amend “was made too late to preserve it”).

We also conclude that plaintiff waived his companion argument that even assuming 27A V.S.A. § 4-117(a) applies, that provision limits attorney’s fees and costs only to prevailing parties. Section 4-117(a) states simply that “[t]he court may award reasonable attorney’s fees and costs,” but the official comment to that section states that the section “permits court costs and attorney’s fees to be awarded in the discretion of the court to any party that prevails in an action.” Plaintiff did not argue before the superior court that the section precluded an award of attorney’s fees to partially prevailing litigants; indeed, he relied on § 4-117(a) and its official comment in arguing that he was entitled to attorney’s fees because he had prevailed on four of the thirteen issues he raised in his lawsuit.

Next, plaintiff argues that the superior court violated Vermont Rule of Civil Procedure 11 by awarding defendant attorney’s fees based on its reasoning that three of plaintiff’s claims were either borderline frivolous or made in bad faith. According to plaintiff, Rule 11, and Rule 11 alone, governs the award of attorney’s fees with respect to alleged frivolous or bad-faith contentions made in submissions to the court. He contends that the court’s failure to abide by the provisions in Rule 11 deprived him of the rule’s safe-harbor provision that would have allowed him to correct any alleged Rule 11 violations. We find no merit to this argument. Rule 11 provides for sanctions when signed submissions to the trial court are presented for an improper purpose, are not warranted by existing law, or have no evidentiary support. See V.R.C.P. 11(b). In this case, there was no motion seeking Rule 11 sanctions. The fact that the court awarded defendant attorney’s fees with respect to several issues that the court concluded were borderline frivolous or lacking good faith did not compel the application of Rule 11.² Rule 11 did not preclude the superior court from imposing attorney’s fees pursuant to § 4-117(a), which explicitly gives the court discretion to award reasonable attorney’s fees and costs. The court did so here and explained its reasoning. We find no error.

Plaintiff, however, challenges the court’s reasoning in granting fees and argues that the amount of fees imposed by the court were unreasonable. “The determination of the reasonableness of an [attorney’s fee] award. . . is reviewed for an abuse of discretion.” Post & Beam Equities Group, LLC v. Sunne Village Dev. Prop. Owners Ass’n, 2015 VT 60, ¶ 47. The exercise of the court’s wide discretion in arriving at the reasonable value of legal services “will not be disturbed on appeal in the absence of strong evidence of excessiveness or inadequacy of the determined attorney’s fees.” Young v. N. Terminals, Inc., 132 Vt. 125, 130 (1974); see Watson II, 2018 VT 8, ¶ 87 (“Our review for an abuse of discretion is highly deferential.”). Here, the superior court explained in detail the borderline frivolity or lack of good faith regarding the three issues for which the court awarded defendant attorney’s fees. Plaintiff fails to undercut on appeal the court’s findings and conclusions regarding those issues. That is also true with respect to the court’s findings that defendant’s attorney spent 143 hours on two of those issues, totaling \$34,789, and 28 hours on the third issue, totaling another \$6547. The court determined that these fees, representing

² Indeed, in concluding that plaintiff acted in bad faith and made borderline frivolous claims, the superior court relied on the record as it developed in the case. With respect to two of the claims for which defendant was granted attorney’s fees, the court relied upon evidence and findings from the merits hearing on those claims. Attorney’s fees were awarded on the third claim as the result of plaintiff’s unsupported appeal to this Court.

less than one-quarter of what defendant was seeking in defense of plaintiff's lawsuit, were reasonable. The court rejected plaintiff's arguments that defendant's computation of the fees inadequately separated out the issues and intentionally altered its billing information. We discern no basis on appeal to disturb the superior court's discretionary assessment of attorney's fees or costs.

Finally, plaintiff argues that the superior court erred by refusing to consider his post-judgment assertion that defendant's board failed to properly approve expenditures of legal fees in defending against his lawsuit. Plaintiff spends a considerable amount of time presenting the merits of his argument that the fees were not properly approved, but he fails to explain why the board's actions were relevant with respect to the superior court's determination as to what amount, if any, of attorney's fees actually incurred in defending against plaintiff's lawsuit should be awarded to defendant. The record supports the superior court's determination that the fees awarded to defendant were reasonably incurred to defend against plaintiff's borderline frivolous or bad faith claims. The question of whether Declaration rules were followed in approving those fees is a separate matter that does not undermine the court's award of partial fees to defendant based on that determination.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice