

CONCURRING AND DISSENTING OPINION BY FOLEY, J.

I concur in the majority opinion with the exception of the discussion and conclusion vacating the award of attorneys' fees and costs to AOA, to which I respectfully dissent as follows.

The Bowers contend the circuit court reversibly erred in awarding AOA attorneys' fees for substantiating its claims against the Bowers in Civil No. 04-1-062K (04-1-062K) based on an incorrect standard of "substantiate" rather than "prevailing" party. The Bowers argue that they were the prevailing party in 04-1-062K pursuant to the Stipulation to Dismiss 04-1-0062K. The stipulation provides that AOA's 04-1-062K Complaint against the Bowers "is hereby dismissed with prejudice" and the parties "expressly reserve their claims for attorneys' fees and costs."

In the Amended Final Judgment, the circuit court entered judgment as follows:

4. [AOA] substantiated its claims against the Bowers as more fully set forth in the [FOF/COL/Order]. See [FOF/COL/Order] at ¶¶ 14-16, 21, 27-31, 35-45, 52-53, and 59-61. Accordingly, [AOA's] Motion for Attorneys' Fees and Costs is granted and the Bowers shall pay [AOA's] reasonable attorneys' fees in the amount of \$121,778.51 and costs in the amount of \$1,359.49 pursuant to the [Order re Fees/Costs] filed on July 10, 2008.

FOFs 14 and 15 of the FOF/COL/Order describe the additions or alterations the Bowers made to Units 50 and 180, and FOF 16 provides:

16. The Bowers admit that: (a) they performed alterations and additions to [Units 50 and 180]; (b) there [sic] alterations and additions involve converting common elements to limited common elements; (c) they only obtained approval of the Board of Directors concerning these alterations and improvements; and (d) they never received the requisite owner approval and consent required by [AOA's] governing documents and Hawaii law.

FOF 21 describes the lists created to evaluate "every identified unauthorized and illegal alterations [sic] and additions [sic] to the common elements at the Project, including the apartments owned by the Bowers." FOF 27 provides in relevant part that the alterations and additions the Bowers made to Unit 50 "received

not less than 79% owner approval" and the alterations and additions they made to Unit 180 "received not less than 77% owner approval." FOF 28 describes the Bowers' claims against the Schooleys in Civil No. 06-1-010K. FOFs 29 through 31 provide:

29. In their Complaint against the Schooleys, the Bowers admit that all apartment owners are subject to the Restated Declaration.

30. The Bowers concede that, pursuant to Hawaii law and [AOAO's] governing documents, any alterations that convert common elements to limited common elements, such as the alterations and improvements to their apartments, require consent from the owners at the Project.

31. On or about May 2, 2006, [AOAO] filed [AOAO's 04-1-062K Complaint] seeking, among other things, a global resolution and declaratory relief as to the identified unauthorized and illegal alterations and additions made to the common elements at the Project by the KKSRC owners over the past thirty years, including those unauthorized and illegal alterations and additions made by the Bowers and Schooleys, in accordance with the laws of the State of Hawaii, and the Restated Declaration and Amended Bylaws.

(Record references omitted.) FOFs 35 through 45 describe the Settlement Agreement's factual history and provide that the Bowers' counsel "never demanded or placed any limitations and/or restrictions concerning [AOAO's] motion pertaining to the 'grandfathering' proposal" and the Bowers agreed not to oppose or otherwise obstruct AOA's efforts to obtain judicial approval of the Grandfathering Amendment. FOFs 52 and 53 provide:

52. In furtherance of its Grandfathering Amendment, [AOAO] set forth the undisputed factual history concerning the alterations and additions by the Bowers as to Apartment Nos. 50 and 180, which were done in violation of [AOAO's] governing documents and statutory laws because there was no amendment to the Restated Declaration that was voted upon or consented to by the [AOAO] owners.

53. In direct violation of the Settlement Agreement entered into by the parties, the Stipulation to Amend, and the representations made to this Court, the Bowers filed an opposition to [AOAO's MSJ].

In COL 59, the circuit court concluded that the Bowers had "waived their legal right to challenge the validity and enforceability of the Restated Declaration and Amended Bylaws" and the court could not consider the Bowers' opposition to AOA's MSJ. COL 60 provides that AOA did not attack the Bowers in

AOAO's MSJ. COL 61 provides that "[a]n actual case or controversy exists in [sic] by virtue of [AOAO's 04-1-062K Complaint] seeking declaratory relief . . . and the Response filed by the Bowers, which denied each and every allegation asserted, including the declaratory relief sought by [AOAO]."

"Generally, under the American Rule, each party is responsible for paying for his or her own litigation expenses. An exception exists to the American Rule in which attorneys' fees may be awarded to the prevailing party where such an award is provided for by statute, stipulation, or agreement." Ranger Ins. Co. v. Hinshaw, 103 Hawai'i 26, 31, 79 P.3d 119, 124 (2003) (internal quotation marks and citations omitted). In the instant case, the circuit court awarded AOA0 attorneys' fees pursuant to HRS § 514A-94(a)(3) (Supp. 2009), which provides that "reasonable attorneys' fees, incurred by or on behalf of the association for . . . (3) Enforcing any provision of the declaration [or] bylaws, . . . against an owner . . . shall be promptly paid on demand to the association by such person or persons[.]" If the association's claims "are not substantiated," the association shall pay attorneys' fees incurred by the owner in defending against the claims. HRS § 514A-94(a). According to the plain language of HRS § 514A-94(a), there is no requirement that an association be a "prevailing party" to receive an award of attorneys' fees. Further, the parties did not stipulate that the circuit court was to award attorneys' fees to the "prevailing party."

In AOA0's 04-1-062K Complaint, AOA0 alleged that the Bowers had violated various provisions of the governing documents by making alterations and additions to Units 50 and 180 without first obtaining the proper approval. AOA0 requested, among other things, an injunction restraining and enjoining the Bowers from "continued and further breaches of the Declaration, Bylaws, and applicable law," and an award of AOA0's costs and expenses, including reasonable attorneys' fees, which it had incurred in enforcing the Declaration and By-Laws against the Bowers. In FOF

16, the circuit court found that the Bowers had not received KKSRC owners' consent to make alterations and additions to Units 50 and 180 and the Bowers had conceded that such consent was required by the governing documents. In COL 59, the circuit court concluded that the Bowers had "waived their legal right to challenge the validity and enforceability of the Restated Declaration and Amended Bylaws" and that the court could not consider Bowers' opposition to AOA's MSJ. According to the aforementioned findings, AOA substantiated its claims, as set forth in AOA's 04-1-062K Complaint.

The circuit court did not err by awarding AOA attorneys' fees for substantiating its claims in AOA's 04-1-062K Complaint, pursuant to HRS § 514A-94(a)(3).

Associate Judge