

Riverwood Athletic Club Community Association, Inc.
Informational Release
December 7, 2016

On December 2, 2016, the Honorable Gregory P. McGuire (“Judge McGuire”) entered a final order in the litigation filed by Todd Ward (“Mr. Ward”) and Terry Kallum (“Mr. Kallum”), derivatively on behalf of the Riverwood Athletic Club Community Association, Inc. (“RACCA”), against FSC I, LLC, Fred Smith Company, Fred J. Smith, Jr, and Reid M. Smith. After considering all of the relevant facts, and considering all of the applicable law, Judge McGuire “dismissed with prejudice” the action filed by Mr. Ward and Mr. Kallum. According to uslegal.com, “[a] dismissal with prejudice is a dismissal of the case on merits after adjudication” which bars the plaintiff “from bringing an action on the same claim.”

With their civil action, Mr. Ward and Mr. Kallum “contend[ed] that under the terms of a Service Agreement [between RACCA and FSC I, LLC (“FSC”)], FSC was only entitled to a single, annual payment [of approximately \$57 per home], but instead collected . . . payments [of approximately \$57 per home] on a monthly payment, resulting in a significant overpayment.” In addition, Mr. Ward and Mr. Kallum also “contend[ed] that FSC ha[d] collected fees for unimproved lots in a manner not permitted by the Service Agreement.”

With his final order, Judge McGuire found that Mr. Ward and Mr. Kallum “allege[d] that prior to filing [their] action they . . . requested that [the] RACCA investigate the possible overpayment of fees to FSC.” In response to that request, Judge McGuire determined “that the RACCA Board of Directors [agreed to] form an independent committee to investigate the issues raised” by Mr. Ward and Mr. Kallum; however, before the independent committee could complete its investigation and report, Mr. Ward and Mr. Kallum “filed their Complaint.” After Mr. Ward and Mr. Kallum filed their Complaint, the “RACCA filed a Motion to Intervene and a Motion to Stay/Motion to Appoint Committee” seeking Judge McGuire’s permission “to allow the investigation of [Mr. Ward and Mr. Kallum’s] claims to be completed.” Ultimately, Judge McGuire “entered an order approving the appointment of the Committee” so that the committee might “conclude its investigation and report the results to” Judge McGuire.

Before Mr. Ward and Mr. Kallum filed their civil action, “a discrepancy between the [RACCA] Covenants and the Service Agreement [was discovered, which showed] that RACCA had been paying fees to FSC for certain unimproved lots for which RACCA did not owe a fee. Based on this discovery, FSC reimbursed RACCA for improperly collected fees in the amount of approximately \$24,200.”

By July of this year, the independent committee submitted a report to Judge McGuire in which all committee members “determined that ‘it is not in the best interest of [RACCA] to pursue the claims proffered by [Mr. Ward and Mr. Kallum] in this case.’” Judge McGuire ultimately agreed with the independent committee, which lead to the dismissal of the claims of Mr. Ward and Mr. Kallum.

In addition to agreeing with the independent committee, Judge McGuire concluded that Mr. Ward and Mr. Kallum had failed to “rebut” the independence of the committee and that the committee was in fact appropriately independent. In support of his conclusion that the committee made a “reasonable inquiry,” Judge McGuire said:

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“With regard to the issue of whether the Service Agreement required the payment of monthly or annual fees, the [committee’s] Report and the evidence before the Court establishes that the Committee made inquiries of and requested information from the parties to the Service Agreement, FSC and RACCA. The Committee obtained and considered information by way of sworn affidavits from the signatories to the Service Agreement and the RACCA directors who approved the Service Agreement regarding the parties’ intentions in entering into, and their course of dealing under, the Service Agreement. The Committee also obtained affidavit evidence from the parties regarding their course of dealing under the immediately preceding agreement that was in effect from 2006 until 2011. All of the evidence was that the parties intended the fees to be paid monthly, and not annually, and that the fees had been paid on a monthly basis under both the Service Agreement and the predecessor agreement.

The Report and evidence before the Court also shows that the Committee considered the fees paid by members of other, local community associations for comparable amenities and services, and determined that the monthly fees being paid by RACCA were less than the fees paid by those other associations.

Based upon the information gathered by the committee, Judge McGuire confirmed that “the thoroughness of its inquiry supports the conclusion that the investigation was done in good faith.”

Ultimately, Judge McGuire concluded “that the Committee’s investigation was reasonable under the circumstances, and was conducted in good faith by disinterested individuals . . . [and] that the Committee reached a reasonable determination that it is not in the best interest of the [RACCA] to pursue the claims alleged by” Mr. Ward and Mr. Kallum. The RACCA is pleased that Judge McGuire agreed with the committee and dismissed the claims of Mr. Ward and Mr. Kallum since the prosecution of those claims and the refusal by Mr. Ward and Mr. Kallum to wait for the committee to complete its investigation has cost the RACCA approximately \$35,000 in costs and legal fees, none of which are recoverable under any insurance policy.

Because Mr. Ward and Mr. Kallum’s claims have cost the RACCA approximately \$35,000, the RACCA is investigating whether or not those costs can be recovered from Mr. Ward and Mr. Kallum.