

2007

Lebr Associates, LLC, a Utah limited liability company, and Centennial Pointe Property Owners Association (Registered on November 29, 2004), a Utah Nonprofit Corporation v. Myriam Onyeabor :
Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LEBR ASSOCIATES, LLC, a Utah limited liability company, and CENTENNIAL POINTE PROPERTY OWNERS ASSOCIATION (Registered on November 29, 2004), a Utah Nonprofit Corporation,

Plaintiffs/Appellees/Cross-Appellants,

vs.

MYRIAM ONYEABOR,

Defendant/Appellant/Cross-Appellee

REPLY BRIEF OF
CROSS-APPELLANTS
LEBR ASSOCIATES, LLC, and
CENTENNIAL POINTE PROPERTY
OWNERS ASSOCIATION

Appellate Case No. 20070851

District Court No. 040918762

Appeal from Order of
Third District Court
Judge Robert P. Faust

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Pursuant to Utah Rule of Appellate Procedure 24(c), cross-appellants LEBR Associates, LLC, and Centennial Pointe Property Owners Association (collectively the “Association”) hereby submit their reply brief in support of their cross-appeal.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT REDUCED THE ASSOCIATION’S FEE CLAIM BY 50%.

In its opening brief, the Association argued that the trial court erred when, without justification or proper analysis, it reduced the Association’s fee claim by 50%. Ms. Onyeabor set forth no response or analysis in regard to this argument. Based on this Court’s decision in *American Vending Services, Inc. v. Morse*, 881 P.2d 917 (Utah Ct. App. 1994), this Court should reverse the trial court’s determination.

In *Morse*,

[t]he trial court reduced the Morses’ requested attorney fees by ninety percent without providing support for its decision in the record. The trial court gave the following explanation for reducing the requested attorney fees: “Defendants’ claimed fees of \$112,435 are excessive. A reasonable fee is one-tenth of the amount claimed, i.e., \$11,243.”

Id., at 926. This Court held such a determination was erroneous, ruling that the factors set forth in *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988), must be considered, and that “an award of attorney fees must be supported by evidence in the record.” *Id.* (quoting *Bracken*, 764 P.2d at 988).

Morse is dispositive as to this issue, because the same error occurred in this case.

The trial court simply ruled, without further elaboration, that the Association's fees were "exorbitant" and therefore would be reduced by 50%. (R.2425.) This is an insufficient basis to halve an attorney fee award. Accordingly, the Association respectfully urges this Court to reverse and award full attorney fees as requested and substantiated below, or to remand for a proper analysis based on evidence in the record.

II. THE TRIAL COURT ERRED WHEN IT FAILED TO AWARD DAMAGES AS SET FORTH IN THE PARTIES' CONTRACT.

The Association argued in its opening brief that the trial court erred when it denied the Association's claim for late fees and fines imposed against Ms. Onyeabor under the express terms of their contract. Again, Ms. Onyeabor provides no response to this analysis. Instead, she simply restates arguments that relate to her direct appeal, which arguments were examined and rebutted in the Association's opening brief. Because the trial court improperly rejected damages that are expressly provided for by contract, this determination should also be reversed.

There is no question that late fees and fines were provided for by the Restated Amended CC&R's, and no question that such late fees and fines were actually imposed against Ms. Onyeabor. The sole basis for the trial court's determination was that "these penalties are not damages which have been sustained and suffered by the [Association] due to [Ms Onyeabor's] breach." (R.1976.) Respectfully, the trial court provides no basis, factual or otherwise, in the record for this conclusion. To the contrary, Utah courts enforce such covenants as written. *See Swenson v. Erickson*, 2000 UT 16, ¶ 11, 998 P.2d

807. Without setting forth a basis to depart from this standard, the trial court should have enforced the contractual remedies set forth in the parties' contract. Accordingly, the Association respectfully urges this Court to reverse this determination and remand to the trial court for a determination of late fees and fines due under the CC&R's.

CONCLUSION

The Association requests that this Court reverse the trial court in relation to its decision to reduce the Association's attorney fees, award full attorney fees as requested and substantiated below, or remand for a proper analysis based on evidence in the record. The Association also requests that this Court reverse the trial court's determination as to contract damages and remand for a determination of late fees and fines due under the CC&R's.

DATED this 29th day of June, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be mailed,
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