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IN THE
COURT OF APPEALS OF INDIANA

RUDOLFO G. RODRIGUEZ, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 76A03-0905-CV-202
	)	
RAINBOW SEARCHERS, INC.,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE STEUBEN SUPERIOR COURT
The Honorable William C. Fee, Judge
The Honorable Randy L. Coffey, Magistrate
Cause No. 76D01-0704-SC-439

September 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Rudolfo Rodriguez, Jr. appeals the trial court's denial of his request for attorney's fees from Appellee-Plaintiff Rainbow Searchers, Inc., following remand by this court for a determination on the matter. We affirm.

FACTS AND PROCEDURAL HISTORY

The underlying facts in the parties' original appeal assist in our consideration of the instant appeal:

> On December 6, 2006, Rodriguez sold real property located at 235 North 600 East, Angola in Steuben County (the "Property") to Richard Williams. Lakeview Title, LLC ("Lakeview") provided the closing settlement statement and obtained title insurance services for the transaction. These services included the preparation of the commitment to issue a title insurance policy. The title insurance commitment was "a legal contract . . . issued to show the basis on which" the title insurance policy was issued and subject to the commitment's stated exceptions unless such exceptions were "taken care of" to the title insurance company's satisfaction. (Ex. 1). The exceptions included taxes due in 2005 and payable in 2006. The title commitment further required "[p]ayment of all taxes, charges, and assessments levied and/or assessed against the" Property, "which are due and payable." (Ex. 1).
>
> In order to prepare the title insurance commitment, Lakeview's closing agent, Jodi Getz, retained Rainbow to search for liens or encumbrances on the Property. Rainbow, in turn, hired Roberta Deem, an independent abstractor, to conduct the title search. Utilizing only a website of the Steuben County Treasurer's Office, Deem searched for taxes due and owing on the Property. She did not find any indication that there had been a tax sale of the Property and apparently conveyed the results of her search to Rainbow.
>
> Subsequently, Getz prepared the title insurance commitment, effective November 6, 2006, and held the closing on December 6, 2006. The title insurance commitment showed that taxes due in 2005 and payable in 2006 had been paid in the total amount of $647.64. The closing settlement statement—prepared by Lakeview and signed by Rodriguez—showed that taxes in the amount of $647.64 were assessed in 2005 and paid in 2006.
>
> Before it would issue a policy of title insurance, the title insurance company required Rodriguez to sign an owner's affidavit, in which he averred that there were no tax liens affecting the Property. He further averred that there were no unpaid property taxes assessed against the Property, "other than those to be paid at settlement[.]" (Ex. 3). He also averred in a vendor closing

affidavit that the Property was "free and clear of all taxes, liens, encumbrances, assessments, charges or leases of whatsoever, kind or nature, except those shown in the Title Commitment[.]" (Ex. 4). Upon closing, Rodriguez conveyed the Property to Williams by warranty deed. Rodriguez received $75,957.17 from the sale.

After the closing, Getz took the mortgage and warranty deed to the Steuben County Auditor's Office to be recorded. She was notified that taxes on the Property had become delinquent. As a result, the Property had been included in a tax sale on September 29, 2006, and sold for $2,467.12. The Steuben County Auditor's Office had mailed a notice of tax sale to Rodriguez at the Property's address on August 2, 2006.

Since the title insurance commitment requires "that the taxes are paid" before a title insurance policy would be issued, Lakeview redeemed the Property by paying $3,685.79, which included past due taxes, penalties and interest. (Tr. 22). Lakeview chose to redeem the Property as soon as possible to avoid the accrual of additional interest.

Subsequently, Deem wrote a check to Rainbow for "the amount of the tax sale" rather than submitting a claim to her insurance company. (Tr. 44). On January 3, 2007, Rainbow issued a check in the amount of $3,685.79 to Lakeview.

On April 17, 2007, Rainbow filed a notice of claim against Rodriguez in the Steuben Superior Court, Small Claims Division. The trial court held a bench trial on April 8, 2008. Deem testified that she "wrote a check to Rainbow . . . for . . . the amount of the tax sale," namely "$3,685.79[.]" (Tr. 44, 45). Rainbow's president testified that Rainbow was seeking monies from Rodriguez "to settle up . . . with [Deem.]" (Tr. 54).

On May 19, 2008, the trial court found as follows:

> 2. [Rodriguez] sold real property to another. [Rainbow] completed a title search in regard to [the] sale of the real estate. [Rodriguez] failed to inform the buyer of taxes that were due on the property. Because of that failure, [Rainbow] paid the unpaid taxes that [Rodriguez] failed to pay. [Rainbow] now seeks reimbursement of that tax payment.
>
> 3. [Rodriguez] owed taxes in the amount of $3,685.79. He was unjustly enriched by [Rainbow]'s payment of those taxes on his behalf. He should repay [Rainbow], and should also pay interest of eight per cent (8%) from December 18, 2006 ($418.46 through May 19, 2008).

(App. 4). The trial court entered judgment against Rodriguez in the amount of $4,104.25, plus court costs of $88.00.

Rodriguez v. Rainbow Searchers, Inc., No. 76A03-0807-CV-336 (Ind. Ct. App. Feb. 13,

2009), slip op. at 2-5.

Upon direct appeal, this court reversed the trial court's judgment on the grounds that Rainbow lacked standing and remanded to the trial court for a determination of whether attorney's fees were appropriate. *Id.*, slip op. at 7-8. The remand order did not require the trial court to hold a hearing on the matter.

On March 16, 2009, the trial court denied Rodriguez's request for attorney's fees before this court's opinion on remand was certified on March 26, 2009. On April 2, 2009, the trial court issued a second order denying Rodriguez attorney's fees. On April 9, 2009, Rodriguez filed a Verified Motion in Aid of Appellate Jurisdiction seeking clarification regarding (1) whether the trial court improperly denied attorney's fees due to lack of jurisdiction and (2) whether this court ordered the trial court to hold a hearing on attorney's fees. In response to Rodriguez's motion, on April 28, 2009, this court issued an order deeming the March 16 order void but the April 2 order operative and clarifying that it had not ordered the trial court to hold a hearing on attorney's fees. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Rodriguez challenges the trial court's denial of attorney's fees. Indiana Code section 34-52-1-1(b) (2006) provides as follows:

> In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:
>
> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
>
> (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
>
> (3) litigated the action in bad faith.

In denying Rodriguez's request for fees, the trial court stated as follows:

> The decision of the Court of Appeals decided that the Plaintiff's claim lacked a legal foundation. However, the Magistrate does not find, by a preponderance of the evidence that the Plaintiff had the specific intent to harass, or that no basis factually existed to pursue the claim. The Court therefore exercises its discretion to deny the collection of attorney fees from the Plaintiff.

Appellant's App. pp. 6-7.

An award or denial of attorney's fees under Indiana Code section 34-52-1-1 is reviewed through a multi-step process. *Stoller v. Totton*, 833 N.E.2d 53, 55 (Ind. Ct. App. 2005) (citing *Grubnich v. Renner*, 746 N.E.2d 111, 119 (Ind. Ct. App. 2001)), *trans. denied*. First, we review the trial court's findings of fact under the clearly erroneous standard, and second we review de novo the trial court's legal conclusions. *Id.* Finally, we review the trial court's decision to award attorney's fees and the amount thereof under an abuse of discretion standard. *Id.*

A claim is "frivolous" (a) if it is made primarily to harass or maliciously injure another, (b) if counsel is unable to make a good faith and rational argument on the merits of the action, or (c) if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law. *See Emergency Physicians of Indpls. v. Pettit*, 714 N.E.2d 1111, 1115 (Ind. Ct. App. 1999), *trans. granted, adopted and incorporated in relevant part, and vacated on other grounds*, 718 N.E.2d 753, 757 (Ind. 1999). A claim is "unreasonable" if, based upon the totality of the circumstances, including the law and facts known at the time, no reasonable attorney would consider the claim justified or worthy of litigation. *See id.* A claim is "groundless" if no facts exist which

support the claim relied upon and presented by the losing party. *See id.* We review a trial court's determination regarding the frivolous, unreasonable, or groundless nature of a claim de novo. *See id.*

Ultimately, however, a trial court has discretion to award, or not award, attorney's fees under section 34-52-1-1(b). *Wolfe v. Eagle Ridge Holding Co.*, 869 N.E.2d 521, 529 (Ind. Ct. App. 2007). It is axiomatic that the use of the permissive word "may" in a statute indicates a trial court is not required to act, but may do so within its discretion. *Id.* In the instant case, even if the trial court should have concluded that Rainbow's claim was frivolous, unreasonable, or groundless, it still would not have been required to award attorney's fees to Rodriguez. *See id.*

In challenging the trial court's judgment, Rodriguez points to this court's determination that Rainbow lacked standing to bring its claim, which in Rodriguez's view demonstrates the frivolous nature of the claim and justifies attorney's fees. Rainbow was ultimately unsuccessful, but the trial court specifically found that the pursuit of such claim was not without factual basis or for harassment purposes. Rodriguez allegedly owed taxes on real property which Rainbow's independent abstractor Deem paid for. While Deem paid for the tax delinquency rather than Rainbow, we cannot say that the trial court abused its discretion in denying Rodriguez attorney's fees in defending against Rainbow's action, especially in light of the court's findings regarding the non-frivolous nature of Rainbow's claim. Although the trial court did not hold a hearing on the matter, this court clarified in its order that such a hearing was not ordered, and section 34-52-1-1 includes no such

requirement. We find no abuse of discretion. *See Thompson v. Thompson*, 696 N.E.2d 80, 84 (Ind. Ct. App. 1998) (finding no abuse of trial court's discretion in its summary denial of petition for attorney's fees).

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.