

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Judge

Appellate Case No.: 2018-002070

RECEIVED

Aug 13 2021

SC Court of Appeals

Wells Fargo Bank, N.A.Respondent
v.

D. Bruce Wolff.....Appellant.

Memorandum of Authorities in Opposition to Motion for Costs

Respondent, Wells Fargo Bank, N.A., pursuant to Rule 240(c)(2), SCACR, submits the following Memorandum of Authorities in opposition to Appellant’s Motion for Costs.

FACTS

In 1999, Appellant, D. Bruce Wolff, obtained a Business Line of Credit with Wachovia Bank and received a \$78,000 advance. On November 29, 2010, Wells Fargo acquired Wachovia Bank’s assets and Wolff authorized the conversion of the account to a Wells Fargo Business Line of Credit and, in doing so, certified that he accepted the terms and conditions Wells Fargo’s Business Line Customer Agreement. Wolff ceased making payments on his account after October 30, 2015 and, by letter dated March 17, 2017, Wells Fargo informed him it was declaring the entire balance of principal due and payable. On June 22, 2017, Wells Fargo filed suit seeking judgment of \$70,473.34. Wolff filed a pro se answer on July 24, 2017, admitting that he had authorized the conversion of the Wells Fargo Business Line of Credit account but disputing Wells Fargo’s right to increase the interest rate on the account.

On February 14, 2018, Wells Fargo moved for summary judgment. The motion was heard on August 6, 2018 and by Order filed August 14, 2018, the Circuit Court granted summary judgment to Wells Fargo and awarded judgment to Wells Fargo in the amount of \$70,473.34. Appellant filed his Notice of Appeal on November 20, 2018.

By decision filed June 23, 2021, the South Carolina Court of Appeals affirmed the grant of summary judgment on the issue of liability, finding no genuine issue of material fact regarding Wolff's failure to pay the debt. The Court of Appeals found a genuine issue of material fact existing regarding the amount of Wolff's debt to Wells Fargo and remanded the case to the Circuit Court for further proceedings regarding the judgment amount.

On August 5, 2021, Appellant moved for an Order awarding the costs along with an itemized statement of account. Appellant sought an Order awarding the costs of printing and/or copying the Final Brief, the Final Reply Brief and the Record on Appeal, the filing fee and attorney's fees in the amount of \$2500.

On August 9, 2021, Respondent Wells Fargo filed a Motion for Hearing to Ascertain Damages in the Circuit Court as instructed in the June 23, 2021 decision of the Court of Appeals.

Respondent opposes the motion for costs.

LAW

Rule 222 SCACR states as follows: "[w]hen an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court." see *Hoefler Family Ltd. P'ship v. County of Charleston*, 306 S. C. 403 602 S. E. 2d 47 (2004) cited in Appellate Practice in South Carolina 3rd edition. Part IV, Chapter 14 at 394 (S.C. Bar 2016).

ARGUMENT

Appellant asserts in the Motion for Costs that, "Appellant sought for the judgment below to be reversed and succeeded in significant part, as a money judgment previously entered against him has been reversed". Appellant's argument, however, ignores that the Court of Appeals affirmed the grant of summary judgment as to liability and remanded the case only for a hearing on damages. In such hearing, an award of damages will be entered against Appellant with the only remaining issue to be resolved being how much the damages award will be. As such, therefore, Appellant has not succeeded in significant part and has not achieved a beneficial result, but only delayed the ultimate entry of a monetary judgment.

At the hearing on damages, Respondent intends to clarify the confusion expressed in the decision of the Court of Appeals regarding the increase in monthly payments between the period ending September 4, 2013 to the period ending January 5, 2016. Appellant intends to introduce evidence that the change in the payment was not a function of an increase in the interest rate, but specifically related to a minimum payment increase strategy that Wells Fargo implemented for accounts that were closed to future transactions, such as Appellant's.

Additionally, the Record on Appeal reflects that the outstanding balance on Appellant's account prior to the increase in monthly payments noted by the Court of Appeals was \$74,068.01. Record on Appeal, page 142. That amount appears to be undisputed. As such, a judgment in at least this amount is certain to be entered at the hearing on damages. Appellant has not, therefore, obtain a beneficial result in the appeal that would justify an award of costs and attorney's fees.

More importantly, Appellant is not entitled to an award of attorney's fees as the original agreement between the parties, the Wachovia Business Bank Line Note And Agreement provides for attorney's fees to Respondent only: "the Borrower shall pay to the Lender on demand all expenses including reasonable attorney's fees and expenses of legal counsel incurred by the lender in any way arising from or relating to the enforcement or attempted enforcement of the agreement, and any related guarantee, collateral document or other document and the collection or attempted collection, whether by litigation or otherwise of the agreement." Record on Appeal page 110. The subsequent business line customer agreements with Wells Fargo also provided for attorney's fees to the bank only. See, Record on Appeal, page 118; Record on Appeal, page 126.

In regards to Appellant's request for attorney fees, South Carolina has established a six factor test to determine whether attorney's fees are reasonable: 1) the nature, extent, and difficulty of the case; 2) the time necessarily devoted to the case; 3) the professional standing of counsel; 4) the contingency of compensation; 5) the beneficial results obtained; and 6) the customary legal fees for similar services. *Jackson v. Speed*, 326 S. C. 289, 486 S. E. 2d 750 (1997). Arguably, factor number 5, "the beneficial results obtained" should be the lodestar in determining whether attorney's fees are awarded. In the present case, no final, lasting beneficial result was achieved, only a temporary delay in the entry of a damages award. As such, an award of attorney's fees to Appellant would not be reasonable or warranted.

CONCLUSION

Appellant did not prevail in the appeal. In both his Brief and Reply Brief Appellant requests that the Court of Appeals "reverse the grant of summary judgment." That did not happen. The grant of summary judgment as to liability was affirmed. The matter was remanded solely for determination of damages. This result does not warrant the awarding of costs and attorney's fees.

Respectfully submitted,

s/Theodore von Keller
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