

When Can An Association Recover It's Attorney's Fees?

Rian W. Jones , Esq. and Carrie M. Timko, Esq.

When contemplating whether or not to file a lawsuit, one of the questions for a homeowners association to consider is “can we recover our attorney’s fees?” Like almost any question raised in the legal realm, the answer is “it depends.” Civil Code § 1354(c) provides that “[i]n an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney’s fees and costs.” This raises two additional questions: what is an “action to enforce the governing documents,” and who is the “prevailing party?”

It would seem that an enforcement action would be fairly self-explanatory – the association wants to bring a homeowner into compliance with the governing documents and it sues to gain his/her compliance. While this would clearly be considered an enforcement action, consider a case where a homeowner sues the Association to make a determination of the parties’ rights and duties under the governing documents. Assume that a homeowners association fines a homeowner for failing to paint his house. The homeowner claims that he was wrongly fined because he believes he is not required to paint his house under the language of the CC&Rs. The homeowner brings a lawsuit for declaratory relief asking the court to make a determination as to whether the association was entitled to fine him. Although not as clear cut, this type of action is also considered an enforcement action for which the prevailing party would be entitled to attorney’s fees and costs.¹

What is a “prevailing party?” Whether a party has prevailed for the purposes of awarding attorney’s fees and costs under Civil Code § 1354 is based on a practical approach.² Under the practical approach, the court will determine the prevailing party by analyzing what party realized its litigation objectives.³ For example, a plaintiff will be considered a prevailing party when the lawsuit was a catalyst motivating the defendant to do what was asked for in the complaint.⁴ If the association filed a complaint against a homeowner to have the court order him to trim his trees after he had refused to do so for months, and after the complaint was filed, the homeowner ran out and trimmed his trees, then the association can argue that the lawsuit was the reason the trees were trimmed. As a result, under the practical approach, the association can argue that it prevailed because it obtained the relief it was seeking in its complaint.

So now the trees have been trimmed, and the court declares the association the prevailing party and awards it all of its attorney’s fees and costs. Can the association expect to receive a check from the homeowner by the end of the month? Don’t count

¹ See *Farber v. Bay View Terrace Homeowners Association* (2006) 141 Cal.App.4th 1007.

² See *Heather Farms Homeowners Association, Inc. v. Robinson* (1994) 21 Cal.App.4th 1568.

³ See *Castro v. Superior Court*, (2004) 116 Cal. App. 4th 1010, 1020.

⁴ See *Elster v. Friedman*, (1985) 211 Cal.App.3d 1439, 1443-1444.

on it. Rarely are losing parties to litigation so obliging in making sure the winning party gets paid. Chances are that the losing homeowner is still trying to pay his own attorney. Rather, the association will have to begin the process of collecting the judgment.

The big question in recovering attorney's fees is whether the losing homeowner has the money or assets to actually pay. One consideration would be how much equity the homeowner has in real property. This includes the property located within the association, as well as any other properties owned by the homeowner. Once a judgment is entered in favor of the association, an abstract of judgment can be recorded in each county where the homeowner owns property. The judgment attaches to the homeowner, and shows up as a cloud on his title when selling or refinancing his property. If the property is sold or a senior lien is foreclosed, any liens/judgments recorded before the association's abstract will be paid from the proceeds before the association's judgment is paid. Whatever funds remain, if any, will be paid to the association to satisfy the judgment. This may or may not provide for full recovery of the judgment.

The association can also levy the homeowner's bank account for payment, if the association knows his banking information (usually from payment of past assessments.) This will rarely result in the full pay-off of a judgment, since judgment-debtors will often move their account to an undisclosed bank to prevent the association from obtaining payment. Collecting payment on a judgment can take a very long time. Even if the association is awarded all of its fees and costs in a lawsuit, there is the chance that the association may never recover the full amount of the judgment, if any at all.

The association must also consider that the homeowner could be declared the prevailing party in litigation, and the association will have to pay for its own attorney's fees and costs as well as the homeowner's attorney's fees and costs. The association has no control over the rates and hours of opposing counsel, and this cost could be significant. The association may even have to specially assess its members to cover its own attorney's fees during litigation, or the homeowner's attorney's fees after judgment or settlement.

The entitlement to attorney's fees under Civil Code § 1354 is a good tool to recover the costs associated with obtaining a homeowner's compliance with the governing documents, but it is a two edged sword. In the event that the association is declared not to be the prevailing party, it stands to lose not only the fees it has paid to its attorneys, but also may be ordered to pay the attorney's fees of the other side. Even the association is awarded all of its fees and costs, this does not mean that it will be paid quickly, or paid at all.

Sometimes lawsuits are absolutely necessary, especially to fulfill the fiduciary obligations of the association, but it is important to consider all of the association's enforcement options before initiating litigation. Epsten Grinell & Howell has experienced litigators who are able to meet with the association's Board of Directors in Executive Session to discuss the pros and cons of any litigation and assist in the decision making process.