

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

In re:	*	
	*	
GORDON PROPERTIES, LLC,	*	Case No. 09-18086-RGM
	*	Chapter 11
Debtor.	*	
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GORDON PROPERTIES, LLC,	*	
	*	
Debtor,	*	
v.	*	Contested Matter
	*	(Objection to Proof of Claim No. 2-1)
FIRST OWNERS' ASSOCIATION OF FORTY-SIX HUNDRED CONDOMINIUM, INC.,	*	
	*	
	*	
Creditor.	*	

**SUPPLEMENT TO
MOTION FOR AWARD OF ATTORNEYS' FEES AS PREVAILING PARTY**

GORDON PROPERTIES, LLC ("Debtor"), by counsel, files this supplement in support of its motion for an award of attorneys' fees as the prevailing party in this contested matter:

Background

In May 2009, First Owners' Association of Forty-Six Hundred Condominium, Inc. ("FOA"), made a retroactive assessment against the Debtor related to its street-front restaurant unit (the "Restaurant Unit"). The retroactive assessment (the "Assessment"), which FOA called a corrective assessment, attempted to collect from the Debtor an alleged under-assessment for years 2003 through 2008. After making the Assessment, FOA initiated collection action by filing a condominium lien against the Debtor and by

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declaring the Debtor in default of its payment obligations, thereby rendering it ineligible to vote at FOA's upcoming annual election. The Assessment and subsequent collection action forced the Debtor to seek relief in this Court.

Following commencement of this case, FOA filed a proof of claim (the "Claim") [Claim No. 2-1], seeking \$315,673.36 in alleged under-payment of assessments for the period 2003 through 2009 relating to the Restaurant Unit. The Debtor objected to the Claim (the "Claim Objection") [Docket No. 99]. Following approximately 1 ½ years of pre-trial litigation, the Claim Objection was tried over several days in February 2012, and on August 23, 2012, this Court entered its order [Docket No. 424] and memorandum decision [Docket No. 423] sustaining the Claim Objection and disallowing the Claim in its entirety.

On September 6, 2012, the Debtor timely filed its Motion for Award of Attorneys' Fees as Prevailing Party (the "Motion") [Docket No. 430], seeking recovery of its attorneys' fees pursuant to the Virginia Condominium Act, Va. Code § 55-79.53, for successfully objecting to the Claim. This is the Debtor's supplement to the Motion detailing the legal authorities supporting its right to recover its attorneys' fees and itemizing the time entries reflecting the actual fees incurred by the Debtor in its successful objection to the Claim.

Legal Authority

Federal Rule of Civil Procedure 54(d)(2) (incorporated into the Federal Rules of Bankruptcy Procedure as Rule 7054(a)) allows for the recovery of attorneys' fees if permitted by otherwise applicable law. In this case, Va. Code § 55-79.53(A) specifically

allows for the Debtor to recover its attorneys' fees as the prevailing party in the Claim Objection.

Under Virginia law, the "prevailing party" is the "party in whose favor a judgment is rendered, regardless of the amount of damages awarded." *Sheets v. Castle*, 263 Va. 407, 413, 559 S.E.2d 616, 620 (2002).

Section 55-79.53 of the Virginia Condominium Act provides that when an action is brought by an association to recover alleged unpaid assessments, "the prevailing party shall be entitled to recover reasonable attorney fees." The award of attorneys' fees to the prevailing party is mandatory, not discretionary. *Mozley v. Prestwould Bd. Of Directors*, 264 Va. 549, 570 S.E.2d 817 (2002). However, the amount of the award remains in the sound discretion of the Court, and should be based upon consideration of "the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate." *Ulloa v. Qsp, Inc.*, 217 Va. 72, 624 S.E.2d 43 (2006) (quoting *Chawla v. BurgerBusters, Inc.*, 235 Va. 616, 499 S.E. 829 (1998)).¹

Argument

In this case, both the law firm of Odin Feldman & Pittleman PC ("OFP"), as Debtor's general counsel in this chapter 11 case, and the law firm of Mercer Trigiani PC ("MT"), as the Debtors' special counsel on condominium matters, rendered services

¹ To the extent the Court determines that it is required to apply the *Johnson* factors (i.e., *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)), as adopted in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978), the Debtor submits that the analysis contained herein with respect to the factors required by the Virginia Supreme Court are not materially different and lead to the same conclusion.

related to the Claim Objection, and the Debtor is entitled to an award of the fees incurred with respect to such services.

(a) The time and effort expended by the attorney.

Both OFP and MT have previously submitted interim fee applications in this case. The time and effort expended by OFP and MT with respect to the Claim Objection are included in those fee applications. Because these fee applications also include fees for services unrelated to the Claim Objection, OFP and MT identified and isolated the time entries specifically relating to the Claim Objection, and those entries are attached to this Supplement as exhibits. Each time entry that relates to the Claim Objection has been isolated and highlighted in yellow on the exhibits.

(i) The Claim Objection litigation.

Attached as Exhibits 1 through 10 are the time records of OFP and MT reflecting fees that are directly related to the Claim Objection litigation. The total approved fees associated with the Claim Objection litigation for OFP is \$195,370.00, and for MT is \$3,580.00, with an aggregate total of \$198,950.00.

Exhibit 1 is from OFP's second interim fee application² for the period January 2010 to September 2010 [Docket No. 105], and reflects total fees for this period in the amount of \$6,210.00.

Exhibit 2 is from OFP's third interim fee application for the period October 2010 to March 2011 [Docket No. 194], and reflects total fees for this period in the amount of \$59,419.50.

² No fees related to the Claim Objection were included in OFP's first interim fee application for the period October 2009 to December 2010 [Docket No. 59].

Exhibit 3 is from OFP's fourth interim fee application for the period March 2011 to August 2011 [Docket No. 265], and reflects total fees for this period in the amount of \$10,745.00.

Exhibit 4 is from OFP's fifth interim fee application for the period September 2011 to December 2011 [Docket No. 342], and reflects total fees for this period in the amount of \$30,840.00.

Exhibit 5 is from OFP's sixth interim fee application for the period January 2012 to February 2012 [Docket No. 366], and reflects total fees for this period in the amount of \$79,403.00.

Exhibit 6 is from OFP's seventh interim fee application for the period March 2012 to June 2012 [Docket No. 408], and reflects total fees for this period in the amount of \$4,840.00.

Exhibit 7 is from OFP's eighth interim fee application for the period July 2012 to December 2012 [Docket No. 511], and reflects total fees for this period in the amount of \$3,912.50.

Exhibit 8 is from MT's first interim fee application for the period July 2009 to May 2010 [Docket No. 87], and reflects total fees for this period in the amount of \$175.00.

Exhibit 9 is from MT's second interim fee application for the period June 2010 to November 2010 [Docket No. 127], and reflects total fees for this period in the amount of \$390.00.

Exhibit 10 is from MT's third interim fee application for the period December 2010 to November 2011 [Docket No. 344], and reflects total fees for this period in the amount of \$3,015.00.³

The Claim Objection litigation was lengthy, time consuming, complex, and of tremendous benefit to the Debtor and its estate. In addition to the significant effort undertaken to analyze the facts and law with respect to the Assessment and to draft the Claim Objection, the parties engaged in spirited litigation for 1 ½ years leading up to the trial. This litigation included extensive discovery and motions and cross-motions for summary judgment. In addition, the Debtor was required to litigate issues relating to FOA's failure to properly designate its expert witness and expert report. Also, the Court required that the parties submit extensive post-trial briefs regarding assessment methodology and objections to evidence. Finally, the Debtor was required to respond to FOA's appeal of the Court's judgment.⁴

(ii) Mediation, Settlement Negotiations, and Settlement Agreement relating to the Claim Objection.

In addition to the services provided by OFP and MT to the Debtor directly relating to the Claim Objection litigation, OFP and MT also provided services relating to mediation, settlement negotiations, and approval of a settlement agreement between the parties that related largely to the Claim Objection issues. Although the services provided in this regard involved other disputes between the parties, the Claim Objection issues encompassed a significant portion. The Debtor submits that it is entitled to

³ The pages from Exhibits 9 and 10 that were filed with the Court as part of the fee applications contain redactions. For that reason, these Exhibits also include immediately following such pages the unredacted pages from MT's time records for the purpose of confirming that the time entries relate to the Claim Objection.

⁴ That appeal ultimately was stayed by the District Court, upon motion by the Debtor, pending this Court's hearing on approval of the global settlement entered into by the parties.

recovery of fees relating to mediation and settlement relating to the Claim Objection, and that the Court should determine a percentage of the fees in this regard that are related to the Claim Objection. Considering that the Claim Objection issues encompassed a significant portion of the services provided in this regard, the Debtors submits that at least fifty percent (50%) of the fees should awarded.

Attached as Exhibits 11 through 16 are the time records of OFP and MT reflecting fees that are related to mediation, settlement negotiations, and approval of the settlement agreement entered into by the parties. A large portion of these fees were included in the fee applications of OFP and MT previously approved by the Court, but a portion of these fees have not yet been submitted for approval. The total fees associated with these services for OFP is \$162,770.00, and for MT is \$3,150.00, with an aggregate total of \$165,920.00 (or \$82,960.00 at 50%).

Exhibit 11 is from OFP's fifth interim fee application for the period September 2011 to December 2011 [Docket No. 342], and reflects total fees for this period in the amount of \$9,400.00.

Exhibit 12 is from OFP's sixth interim fee application for the period January 2012 to February 2012 [Docket No. 366], and reflects total fees for this period in the amount of \$1,120.00.

Exhibit 13 is from OFP's seventh interim fee application for the period March 2012 to June 2012 [Docket No. 408], and reflects total fees for this period in the amount of \$1,280.00.

Exhibit 14 is from OFP's eighth interim fee application for the period July 2012 to December 2012 [Docket No. 511], and reflects total fees for this period in the amount of \$38,050.00.

Exhibit 15 is from OFP's time records for the period January 2013 through August 2013 which have not yet been submitted for approval, and reflects total fees for this period in the amount of \$112,920.00.

Exhibit 16 is from MT's third interim fee application for the period December 2010 to November 2011 [Docket No. 344], and reflects total fees for this period in the amount of \$3,150.00.

(b) The nature of the services rendered.

As indicated, the services provided to the Debtor were related to the Debtor's objection to the Claim filed by FOA to recover the Assessment against the Restaurant Unit.

(c) The complexity of the services.

The services required of the Debtor with respect to the Claim Objection were highly complex. Those services required an analysis of a complicated set of condominium instruments, made even more complex by the peculiar nature of The Forty Six Hundred Condominium (the "Condominium") and its myriad of different limited common elements. Further, the services required an analysis and understanding of the Virginia Condominium Act, and, specifically, the section dealing with assessments, which is a highly specialized area of law. Moreover, the services required analysis and understanding of complex budgets and expert accounting analysis in the presentation of evidence with respect to the Claim Objection. Finally, trial preparation required a time-

consuming review, analysis, and understanding of the applicability of prior court rulings rendered by the Alexandria Circuit Court with respect to the Condominium's assessment practices and methodology.

(d) The value of the services to the client.

In the first instance, the value of the services to the client is easily quantified by elimination of a claim in an amount exceeding \$315,000. More importantly, the evidence in the case established that the Assessment had a material negative impact upon the fair market value of the Restaurant Unit, causing the Debtor to lose a contract with a proposed purchase price of \$3.2 million and placing the value of the Restaurant Unit without a resolution of the Assessment dispute into serious question. Moreover, the evidence established that allowing FOA to continue with an improper assessment methodology would cost the Debtor, and any subsequent owner of the Restaurant Unit, hundreds of thousands, if not millions, of dollars. The actual attorneys' fees incurred pale in comparison to the long-term value realized by the Debtor.

(e) The results obtained.

The Claim Objection was sustained, and the Claim was disallowed in its entirety. The result was that the Debtor prevailed entirely on its Claim Objection.

(f) Whether the fees incurred were consistent with those generally charged for similar services.

Part of the analysis conducted by the Court in granting the interim fee applications previously submitted by both OFP and MT is a finding that the rates charged are consistent with both the applicants' general fee structure and with the marketplace in general. In addition, this Court conducted a separate evidentiary hearing in Adversary Proceeding No. 11-1020 with respect to damages awarded for

FOA's stay violation at which the Court overruled FOA's objections to the Debtor's attorneys' fees on the basis, *inter alia*, that the fees were customary and reasonable. The Debtor submits that the findings made therein apply equally to this Motion (the Debtor specifically requests that the Court take judicial notice of those proceedings and rulings in this context).

(g) *Whether the services were necessary and appropriate.*

A debtor-in-possession has an obligation to object to objectionable claims. It cannot reasonably be debated that the services rendered by OFP and MT were both necessary and appropriate.

Conclusion

Applicable federal and Virginia law require the Court to award the Debtor its attorneys' fees incurred in this case with respect to the Claim Objection. The fees incurred were reasonable, customary, necessary, appropriate, and highly beneficial to the Debtor and its estate. For the foregoing reasons, the Debtor respectfully requests that the Court enter an order for recovery against FOA of attorneys' fees in the amount of \$198,950.00, plus such additional amounts as the Court determines related to mediation, settlement negotiations, and approval of the settlement agreement between the parties.

Respectfully submitted,

GORDON PROPERTIES, LLC
By counsel

/s/ Donald F. King

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Certificate of Service

I certify that this Supplement was served electronically on September 4, 2013, upon all registered users in this case pursuant to this Court's CM/ECF procedures.

/s/ Donald F. King
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