2012 IL App (1st) 102441-U

FIFTH DIVISION
March 2, 2012

No. 1-10-2441

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SUSAN DILLON and JEFFREY DILLON,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 09 CH 34874
	)	
DTG OPERATIONS, INC. d/b/a THRIFTY	)	
CAR RENTAL,	)	Honorable
	)	Daniel A. Riley,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Epstein and Justice Joseph Gordon concurred in the judgment.

O R D E R

¶ 1 ***HELD***: Because section 6-1-113(2)(b) of the Colorado Consumer Protection Act specifically provides the damages in a private civil action includes costs and attorney fees except in a class action, the trial court did not err in finding the $1,275 defendant's tendered to plaintiffs before plaintiffs moved for class certification was sufficient to moot plaintiffs' class action complaint.

¶ 2 Plaintiffs Susan and Jeffrey Dillon brought an individual and putative class action against defendant, DTG Operations, Inc. d/b/a Thrifty Car Rental (Thrifty), alleging violations of the Colorado Consumer Protection Act (CCPA) (Colo. Rev. Stat. § 6-1-101, *et. seq.* (West 2008)). Before plaintiffs filed a motion for class certification, defendant tendered a $1,275 check to plaintiffs in an attempt to settle the plaintiffs' individual claims. Plaintiffs rejected the tender and filed a motion to certify the class. Defendant filed a joint section 2-619.1 (735 ILCS 5/2-619.1 (West 2008)) motion to dismiss plaintiffs' claims. Rather than respond to defendant's motion to dismiss, plaintiffs filed an amended complaint. Defendant then filed a second joint section 2-619.1 motion to dismiss the claims. On July 23, 2010, the trial court granted defendant's second motion to dismiss pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2008)), finding plaintiffs' claims were rendered moot by defendant tendering the requested relief prior to when plaintiffs filed their motion for class certification. Because it found plaintiffs' claims were moot, the court declined to address whether plaintiffs' claims should also be dismissed under section 2-615 of the Code for failing to adequately state a claim upon which relief could be granted.

¶ 3 On appeal, plaintiffs contend the trial court erred in finding defendant's tender mooted the claims because it failed to provide for reasonable attorneys' fees. Plaintiffs also initially contended on appeal that the trial court erred in allowing defendant to "pick off" a class representative while that representative was diligently pursuing class certification. However, plaintiffs acknowledge that after they filed their initial brief on appeal, our supreme court specifically determined a named plaintiff's claims are rendered moot and the class action may be dismissed where a defendant tenders full damages to the named plaintiff *before* the plaintiff moves for class certification. See *Barber v. American Airlines, Inc*., 241 Ill. 2d 450, 458-59 (2011). In light of *Barber*, plaintiffs concede the sole issue remaining on appeal is whether the tender itself was full and complete for mootness purposes.

¶ 4 For the reasons that follow, we affirm the trial court's dismissal of plaintiffs' class action complaint as moot.

¶ 5 BACKGROUND

¶ 6 In August 2007, plaintiffs rented a car from one of defendant's Denver, Colorado offices. Plaintiffs caused minor damage to the rear bumper of the rental car, which they disclosed to defendant. Section 4 of the rental contract plaintiffs signed permitted defendant to charge plaintiffs for various costs and

losses associated with returning a damaged vehicle, including "loss of use" of the rental vehicle during repairs and "a reasonable administrative fee." The rental contract did not define loss of use; nor did the contract define what constituted a "reasonable administrative fee." Defendant sent plaintiffs a bill for damages to the rental car, which included (1) $435.19 for the estimated cost of repairs; (2) $94.99 for "loss of use," which represented a 1-day loss of use at a $94.99 daily rental rate; and (3) $50 as an administration fee. The bill for damages stated "loss of use is calculated by dividing the number of repair hours by five and rounding it to the next highest number times the daily rate. This represents the number of days this vehicle is unavailable to us while the car is under going necessary repairs."

¶ 7 Plaintiffs paid the estimated cost of repairs portion of the bill but contested payment of the loss of use and administrative fee charges.

¶ 8 Plaintiffs filed a class action complaint on September 22, 2009, alleging individual and class claims based for violations of the Colorado Consumer Protection Act (CCPA), breach of contract and declaratory relief under the Colorado Uniform Declaratory Judgment Law (CUJDL). The claims centered on plaintiffs' allegation that defendant failed to properly disclose

its practice of charging customers an arbitrary and inflated rate of loss of use. Plaintiffs also alleged defendant engaged in unfair or deceptive trade practices by arbitrarily charging a $50 administration fee, which was an amount in excess of defendant's actual costs. On top of monetary damages, plaintiffs sought injunctive relief to prevent defendant from engaging in these practices in the future. Plaintiffs also sought to collect attorneys fees and costs for brining the class action lawsuit.

¶ 9 A "notice of attorney's lien" was attached to the complaint, which provided:

> "You are hereby notified that said Claimants have entered into a contract with us to pay as compensation for services rendered in and about the prosecution of said suit, claim, demand or cause of action, a sum equal to our fees or one-third of any amount recovered by way of suit settlement, adjustment or otherwise plus expenses as approved by the Court in regards to any class."

¶ 10 On October 26, 2009, before plaintiffs were able to move for class certification under the original complaint, Thrifty sent a letter to plaintiffs waiving any and all rights to recover any loss of use fees, administrative fees or other further sums from

the plaintiffs. Thrifty agreed not to report or verify any alleged debt for such charges. Thrifty also tendered plaintiffs' counsel a check for $1275.00, which Thrifty alleged constituted "full and final payment of any and all of the [plaintiffs'] claims against Thrifty." Thrifty noted the tender was made "[without waiving or limiting the foregoing denials in any respect, and without admitting any wrongdoing, liability or anything else, but solely to avoid the cost, expense and time of further legal proceedings."

¶ 11 Plaintiffs rejected the tender on November 2, 2009. Plaintiffs then filed their motion for class certification on November 3, 2009.

¶ 12 On December 10, 2009, Thrifty filed its first section 2-619.1 motion to dismiss plaintiffs' claims. Rather than responding to the first dismissal motion, plaintiffs filed an amended complaint on February 18, 2010. On March 18, 2010, Thrifty filed its second 2-619.1 motion to dismiss. In the section 2-619(a)(9) portion of the motion to dismiss, Thrifty alleged plaintiffs' claims were moot because–-to avoid the cost and expense of litigation–-Thrifty tendered all of the relief plaintiffs requested in their original complaint. In the section 2-615 portion of the motion to dismiss, Thrifty contended all three counts of plaintiffs' amended complaint should be dismissed

because each failed to state a claim upon which relief may be granted.

¶ 13 In response, plaintiffs argued Thrifty's tender was not sufficient to moot their claims because Thrifty did not tender the entire relief requested. Specifically, plaintiffs argued that because the tender did not provide for attorneys fees for the CCPA claim or agree to injunctive relief, the tender did not moot plaintiffs' claims. Plaintiffs argued that Thrifty did not properly calculate attorneys' fees as set forth in the attorneys' lien, and that the attorneys' fees due under either the lien or the CCPA far exceeded the $1275.00 tender.

¶ 14 The trial court granted Thrifty's section 2-619.1 motion to dismiss, finding Thrifty's act of tendering to plaintiffs the requested relief prior to when plaintiffs' filed their motion for class certification mooted plaintiffs' case. With regards to whether the tender itself was sufficient, the court found:

> "To determine the appropriate amount of attorneys' fees due, the Court looks to the attorneys' lien attached to Plaintiffs' First Amended Complaint, The Attorneys' lien attached to Plaintiff's complaint is controlling as to determining attorneys' fees. It reads: 'You are hearby notified

> that said Claimants have entered into a contract with us to pay as compensation for services rendered in and about the prosecution of said suit, claim, demand or cause of action, a sum equal to our fees or one-third of an amount recovered by way of suit, settlement, adjustment or otherwise plus expenses as approved by the court in regards to any class.'
>
> The pertinent part for the issue before this court is the word 'otherwise'. Interpretation of the lien, which Plaintiffs drafted, requires calculation of Plaintiffs' attorneys' fees 'one-third of an amount recovered by way of suit, settlement, adjustment or otherwise.' In this sentence, the word 'otherwise' is a catch-all in a series of terms outlining how money may be paid at the resolution of matter. This Court finds that, given this context, 'otherwise' reasonably includes Thrifty's tender offer.
>
> Thrifty properly calculated the attorneys' fees according to the attorneys'

> lien and tendered full relief to the Dillons. By tendering the full amount of requested relief to the Dillons, the Dillons' complaint has been mooted, and Plaintiffs no longer have a stake in the litigation."

¶ 15 Because the court determined plaintiffs' individual claims had been mooted, the court found it unnecessary to address Thrifty's section 2-615 arguments. Plaintiffs appeal.

¶ 16 ANALYSIS

¶ 17 During oral argument in this case, plaintiffs conceded the sole remaining issue in this appeal is whether the tender Thrifty made to plaintiffs was sufficient to moot plaintiffs' claims. Specifically, plaintiffs contend the tender did not make them whole because Thrifty did not provide plaintiffs with reasonable attorneys' fees for successfully pursuing their deceptive trade practices claims, as required under the CCPA.

¶ 18 A section 2-619(a)(9) motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that defeat the claims. 735 ILCS 5/2-619(a)(9) (West 2008); *Valdovinos v. Tomita*, 394 Ill. App. 3d 14, 17 (2009). The question on review is whether a genuine issue of material fact precludes dismissal or whether dismissal is proper as a matter of law. *Fuller Family Holdings, LLC v. Northern*

Trust Co., 371 Ill. App. 3d 605, 613 (2007). We review a circuit court's judgment on a section 2-619 motion to dismiss *de novo*. *Valdovinos*, 394 Ill. App. 3d at 18.

¶ 19 Generally, if a defendant tenders the relief to the named plaintiff in a class action suit before the class is certified, the underlying cause of action must be dismissed as moot because an actual controversy is no longer pending. *Kostecki v. Dominick's Finer Foods, Inc. of Illinois*, 361 Ill. App. 3d 362, 376-77 (2005). A "tender" is an "unconditional offer of payment consisting of the actual production of a sum not less than the amount due on a particular obligation" and a "tender must be without conditions to which the creditor can have a valid objection or which will be prejudicial to his rights." *Brown & Kerr, Inc. v. American Stores Properties, Inc.*, 306 Ill. App. 3d 1023, 1032 (1999).

¶ 20 With regard to fees as a part of a proper tender, we note a successful litigant is not entitled to recover attorneys fees from an opponent absent a statutory provision or contractual agreement to the contrary. *Hillenbrand v. Meyer Medical Supply Group, S.C.*, 308 Ill. App. 3d 381, 389 (1999). Generally, a trial court's exercise of discretion in determining what constitutes reasonable attorneys' fees is not reversed absent an abuse of discretion; however, we apply a *de novo* standard of

review where expenses awarded by the court are challenged as a matter of law. *Baez v. Rosenberg*, 409 Ill. App. 3d 525, 534 (2011).

¶ 21 Section 6-1-113(2)(b) of the CCPA specifically provides:

> "(2) Except in a class action or a case brought for a violation of section 6-1-709, any person who, in a private civil action, is found to have engaged in or caused another to engage in any deceptive practice listed in this article shall be liable in an amount equal to the sum of:
>
> ***
>
> (b) In the case of any successful action to enforce said liability, the costs of the action together with reasonable attorneys fees as determined by the court." Colo. Rev. Stat. § 6-1-113(2)(b) (West 2008); *Holcomb v. Steven D. Smith, Inc.*, 170 P. 3d 815, 817 (2007).

¶ 22 Although plaintiffs contend the tender did not moot their class action claims here because the tender did not provide for reasonable attorneys fees for pursuing their CCPA claims, we note the statute itself makes clear it is intended to apply to all

private civil actions, "*[e]xcept in a class action*" context. (Emphasis added.) Colo. Rev. Stat. § 6-1-113(2)(b) (West 2008). Colorado courts have held that by its plain language, section 6-1-113(2) of the CCPA establishes that:

> "a defendant's liability in a private civil action for commission of deceptive trade practices and sets forth the damages available to an individual plaintiff. Contrary to [plaintiff's] assertions, it expressly excludes members of a class from benefitting from damages provided in subparagraphs 2(a) and 2(b)." *Robinson v. Lynmar Racquet Club, Inc.*, 851 P. 2d 274, 278 (1993).

¶ 23 In *Robinson*, a Colorado appellate court specifically held: "by its plain language, the damages in a private civil action includes costs and attorney fees *except in a class action*. Nor is there any other provision awarding costs and attorney fees to class action members in CCPA actions." (Emphasis added.) *Robinson*, 851 P. 2d at 280. Robinson's attorney presented evidence to the trial court that he had worked approximately 88 hours on the case. The trial court subtracted 11.5 hours for that portion of the time attributable to the class action, and

then awarded attorney fees for only 35 of the approximately 77 remaining hours. *Id*. Because the statute explicitly excluded attorney fees for class actions and because the trial court considered appropriate factors with regard to its determination of the reasonable hours spent on the case, the court held it would not disturb the trial court's fee determination on appeal. *Id*.

¶ 24 In light of the fact that section 6-1-113(2)(b) of the CCPA itself specifically provides it applies to all civil private actions "except in a class action," we find the Colorado statute reflects plaintiffs were not statutorily entitled to any award of reasonable attorney's fees or costs for time spent preparing or pursuing the class action portion of plaintiffs' CCPA claims. See Colo. Rev. Stat. § 6-1-113(2)(b) (West 2008); *Robinson*, 851 P. 2d at 278. Simply put, the plain language of the Colorado statute clearly indicates neither plaintiffs nor their attorneys were ever entitled to statutory attorneys' fees for pursuing the class action portion of plaintiffs' claims under the CCPA. See *Robinson*, 851 P. 2d at 278, 280. Consequently, we fail to see how defendant's failure to tender plaintiffs reasonable attorneys' fees for time spent pursuing the class action portion of the CCPA claims resulted in an insufficient tender here. See Colo. Rev. Stat. § 6-1-113(2)(b) (West 2008); *Robinson*, 851 P. 2d

at 278, 280.

¶ 25 To the extent section 6-1-113(2)(b) can be read to suggest plaintiffs should be entitled to an award of reasonable attorneys' fees and costs as "successful" individual CCPA claimants, we note the statute itself provides that "[i]n the case of any successful action to enforce said liability" a plaintiff is entitled to "the costs of the action together with reasonable attorneys fees as determined by the court." See Colo. Rev. Stat. § 6-1-113(2)(b) (West 2008); *Holcomb*, 170 P. 3d at 817. "If, as here, the statute pursuant to which an award of such fees is made does not provide a specific definition of reasonable, then such compensation should be determined in light of all circumstances for the time and effort reasonably expended by the prevailing party's attorney." *Robinson*, 851 P. 2d at 280.

¶ 26 Here, defendant's tendered plaintiffs $559 in court filing fees and $216 in attorneys' fees. The $216 in attorneys' fees represented one-third of the $644.99 net monetary value of the $500 statutory penalty and $144.99 refund of the loss of use and administrative fee charges tendered to plaintiffs.

¶ 27 Based on the record before us, we cannot say the trial court erred in determining the $216 in attorneys' fees defendant tendered to plaintiffs constituted reasonable attorneys' fees sufficient to moot plaintiffs' individual claims.

¶ 28 While plaintiffs repeatedly assert a tender of $216 in attorneys' fees was unreasonable in light of the hours their attorneys spent researching the claims, drafting the complaint and filing it, we again note Colorado case law and the CCPA itself make clear that neither plaintiffs nor their attorneys were entitled to an award of attorney fees and costs for time spent preparing and prosecuting plaintiffs' class action claims. See *Robinson*, 851 P. 2d at 280. Plaintiffs were only ever entitled to collect the reasonable attorney fees and costs expended in pursuing their own individual claims under the CCPA. See *Id*. Although plaintiffs suggest the actual attorneys' fees incurred in pursing plaintiffs' CCPA class action far exceeded the $1,275 tender amount, plaintiffs have made no attempt to either define what amount would have constituted a reasonable attorneys' fee award here or clarify what amount was actually expended in pursuing their own individual CCPA claims rather than the class action as a whole.

¶ 29 The attorneys' lien attached to plaintiffs' complaint provided:

> "You are hereby notified that said Claimants have entered into a contract with us to pay as compensation for services rendered in and about the prosecution of said suit, claim,

> demand or cause of action, a sum equal to our fees or one-third of an amount recovered by way of suit, settlement, adjustment or otherwise plus expenses as approved by the court in regards to any class."

¶ 30 Plaintiffs conceded at oral arguments that plaintiffs' attorneys never intended to charge them on an hourly basis for the actual work performed on the case; instead, the attorneys' lien was simply intended to ensure any fee amounts plaintiffs collected as a result of the fee-shifting provision in the CCPA actually flowed to plaintiffs' attorneys.

¶ 31 In finding defendant's tender was sufficient to moot plaintiffs' complaint, the court specifically determined defendant "properly calculated the attorneys' fees according to the attorneys' lien and tendered full relief to the Dillons." In support, the court noted the term "otherwise" acted as "a catch-all in a series of terms outlining how money may be paid at the resolution of the matter." The court found that, given the context of the case, the term " 'otherwise' reasonably includes Thrifty's tender offer." While we recognize the existence of a contingent fee contract or attorneys' lien cannot be considered as conclusive evidence of what constitutes a reasonable statutory attorney's fee, we note the existence of such a contract or lien

is "a relevant factor to be considered in determining the amount of statutory attorney's fees that should be awarded." See *Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill. App. 3d 231, 240-41 (1996).

¶ 32 We find the trial court correctly considered the actual recovery sought and obtained with regard to plaintiffs' individual CCPA claims to determine whether, under the circumstances of the case, the attorneys' fee award defendant's tendered to plaintiffs was sufficient. See *Robinson*, 851 P. 2d at 280 ("Moreover, [the trial court] considered the actual recovery sought and obtained in arriving at what, 'under the circumstances of this case, [is] a fair, reasonable attorney fee award.' ") Consequently, we find the trial court did not abuse its discretion in determining that $216–-which constituted one-third of plaintiffs' ultimate individual monetary recovery in this matter–-amounted to a tender of reasonable attorneys' fees sufficient to moot plaintiffs' individual claims under the CCPA.

¶ 33 CONCLUSION

¶ 34 We affirm the trial court's dismissal of plaintiffs' complaint as moot.

¶ 35 Affirmed.