MONTGOMERY COUNTY
COMMISSION ON COMMON OWNERSHIP COMMUNITIES
100 Maryland Avenue, Room 330
Rockville, Maryland 20850

Dorothy McDonald,
Junior McDonald,
4416 Thornhurst Drive
Olney, Maryland 20832

Complainants

vs.

Case No. 64-10
April 20, 2011
(Panel: Alkon, Fonoroff, Henderson)

Briars Acres Community Association,
c/o Christopher Hitchens, Esq.
401. N. Washington St. #500
Rockville, Maryland 20850

Respondent

Order Granting Motion to Dismiss and Denying Attorney's Fees

This matter comes to the panel for a ruling on Respondent's objections to the Complainants' motion to dismiss their complaint and Respondent's request for $5425 in attorney's fees.

Dorothy and Junior McDonald (the “Complainants”), owners of a lot located at 4416 Thornhurst Drive in Olney, Maryland, are members of the Briars Acres Community Association (the “Respondent” or “Association”), a homeowners association as defined by Section 11B-101 of the Real Property Article of the Annotated Code of Maryland. The Complainants filed this dispute with the Commission on Common Ownership Communities on July 12, 2010, alleging that the Respondent acted arbitrarily and unreasonably to hold them in violation of the community's rules and to require them to remove playground equipment that they installed at the rear of their lot. It is alleged that the equipment is located in the common area of the Association.

The complaint shows that the Association first notified the Complainants of the alleged violation in November, 2009. The Complainants responded to the violation notice by claiming that they installed the equipment in 1997 with the permission of the Association. They further claimed that in 2004 they applied for, and received,

permission from the Association to modify their home, and the implication of that approval was that the Association must have inspected the lot and been on notice of the existence of the play equipment in the common area. The Association, however, persisted in its position, arguing that the existence of the play equipment in the common area put the Association at risk of personal injury claims. In June, 2010, the Association ordered the Complainants to remove the equipment and warned them that "regardless of the outcome of this situation, the BACA will hold you liable for any and all expenses, including, but not limited to, legal expenses, attorney fees, . . . and any other relief available at law or equity."

Both parties participated in a mediation session arranged by the Commission but it was unsuccessful. The Commission accepted jurisdiction of this dispute on October 6, 2010, and set it for a hearing on December 8, 2010.

Up to this time, both parties had represented themselves. On October 21, 2010, Christopher Hitchens, Esq., entered his appearance as counsel for the Association, and filed discovery requests to Complainants, which the panel approved. The Complainants did not respond to the discovery requests; rather, by letter dated November 10, 2010, the Complainants notified the panel that they had decided to withdraw their complaint and to remove the offending play equipment from the common areas. The Association objected to a dismissal without prejudice and asked for a judgment on the merits. On November 30, 2010, the Association filed a lengthy opposition to the request to withdraw and dismiss, together with a motion for attorneys fees. The Association conceded that the play equipment had been removed from the common areas, and therefore, that part of the dispute being moot, the panel decided to remove the case from the hearing calendar.

Another hearing panel has decided that once a complaint has been filed and answered, the complaining party cannot withdraw it and dismiss the case over the objection of the responding party. Only the Commission or its appointed hearing panel has the authority to do so. *Berlack v. Edson Park Condominium,* CCOC No. 11-10 (October 25, 2010). We concur, and proceed to rule on the merits of the motion and the objections.

The Association argues in effect that the Complainants acted in bad faith. It claims that:

> The Complainants employed a year-long strategy of making assertions but not substantiating those assertions, of providing partial compliance, and of using the Commission's dispute resolution process for the improper purpose of coercing the Respondent not to carry out its fiduciary duty, all without ever producing any evidence that the assertions in its complaint were justified.
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> Because no evidence was ever produced by the Complainants …it is clear that this dispute is frivolous and that the Complainants maintained

it in bad faith, through and after mediation, until when faced with the Respondent's discovery and subpoena requests, the Complainants had to acknowledge the inevitable conclusion that the Commission panel would reach following a hearing in which the Complainants could present no evidence to substantiate their claims.

Chapter 10B, Section 13(d), allows a hearing panel to award attorneys fees against a party if that party:

(1) filed or maintained a frivolous dispute, or filed or maintained a dispute in other than good faith;
(2) unreasonably refused to accept mediation of a dispute, or unreasonably withdrew from ongoing mediation; or
(3) substantially delayed or hindered the dispute resolution process without good cause.

The Commission has, in the past, awarded attorneys fees based on findings of bad faith or frivolous litigation. Respondent has cited some of those it its brief, including *Harary v. The Willoughby of Chevy Chase,* CCOC No. 373 (September 4, 1998); and *Vartan v. Oak Springs Townhouse,* CCOC No. 733 (September 21, 2005). These cases involve awards made by hearing panels *after* the panels conducted full hearings on the merits of the members' disputes.

More recently, Commission panels awarded attorneys fees based on findings of bad faith or frivolous litigation in *Livingstone v. Parkside Community Association,* CCOC No. 23-08 (October 28, 2008), and in *Soliman v.Madison Park Condominium,* CCOC No. 12-09 (February 25, 2010) (decision upheld on appeal, *Soliman v. Madison Park Condominium,* Circuit Court No.329202-V, September 10, 2010). The cases are instructive. In *Livingstone,* the homeowner challenged the right of the association to amend its rules and prohibit day-care businesses as provided by Section 11B-111.1 of the Real Property Article of the Annotated Code of Maryland. Not only did she fail to produce any facts or arguments at the hearing to show that her association violated the law when it amended its governing documents, but she had previously and unsuccessfully sought an injunction against the association in the Circuit Court on the same issue.

In *Soliman,* the panel, again after a full evidentiary hearing, awarded attorney fees because the evidence showed that before the hearing, the complainant had been offered $13,000 to settle her complaint. She rejected the offer and proceeded to the hearing. The hearing panel awarded her $3300 for her damages. The panel found that the settlement offer far exceeded the amount the complainant could reasonably have expected to win at a hearing, and concluded that her conduct in forcing a hearing after receiving the offer amounted to pursing frivolous litigation. However, the panel did not award the other party's attorneys fees for the entire cost of the case but only for those fees incurred after the complainant rejected the offer.

In *Black v. Fox Hills North Community Association,* 599 A.2d 1228, 90 Md. App.75 (1991), the Court wrote that:

> An award of costs and reasonable expenses, including attorneys fees…is "an extraordinary remedy, intended to reach only intentional conduct. It is reserved for the rare and exceptional case. The rule was intended to eliminate abuses in the judicial process and not to penalize a party and/or counsel for asserting a colorable claim….[The rule] is not, and never was intended, to be used as a weapon to force persons who have a questionable or innovative cause to abandon it because of a fear of the imposition of sanctions…No one who avails himself or herself of the right to seek redress in a Maryland court of law should be punished merely for exercising that right.
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> "Although we can sympathize with the trial judge's feeling, when dismissing the complaint…that the suit should not have been brought against the association, the Blacks' suit was not so outrageous that they should be penalized with such an extreme sanction. The redress available under [the rule] applies only when a suit is patently frivolous and devoid of any colorable claim…. The rule does not apply simply because a complaint failed to state a cause of action. Nor does it apply because a party 'misconceived the legal basis upon which he sought to prevail.'"

Black, supra, 90 Md App. at 83-84 (citations omitted).

We believe we should also take into account the fact that the Complainants proceeded *pro se*, and although *pro se* litigants must also act in good faith, their ability to evaluate the legal merits of their cause and to support it must be judged by a lesser standard than should be applied to those represented by counsel. *Sato v. Tabor,* 579 F. Supp. 1170 (N.D. Ill. 1983). *See also, Fried v. Norbeck Grove Condominium Association,* CCOC #28-08 (January 19, 2007), in which another panel of the Commission denied a motion for attorneys fees against a party who withdrew his complaint after consultation with an attorney, writing that, "[w]hile the Complainant may ultimately have been mistaken about his legal rights in the matter, he was not represented by an attorney at the time he filed the complaint, and his complaint was not, on its face, without merit."

We also must consider that the Commission's policy on its dispute resolution program has been to keep the process as simple and as inexpensive as possible for both parties. To this end, the Commission successfully sponsored legislation to amend Section 10-206 of the Business Occupations and Professions Article of the Code of Maryland so that the boards of directors of common ownership communities can represent their associations without attorneys in proceedings before the Commission. It would conflict with this longstanding policy if we were to penalize laymen representing themselves with burdensome awards of attorney's fees simply because they do not

know, or they misunderstand, the law.

In this case, unlike the other Commission cases that have been cited, there has been no evidentiary hearing and no opportunity to question the Complainants or evaluate their motives or credibility. Although Complainants did not answer the discovery requests, they also did not concede that they had no evidence to supply in response to those requests. The panel cannot say with any certainty that the Complainants' testimony of events that took place 13 years ago would be less credible than that offered by the Association's witnesses. Since the parties agree that the Complainants have removed the structures and other items in dispute, the complaint is moot and there is therefore no need for a hearing on the merits. Yet, the Respondent is now in effect asking the panel to evaluate the merits of the dispute without a hearing. The panel believes that this is inappropriate and declines to do so.

Respondent argues that the Complainants' behavior in this dispute tends to show bad faith and intentional delay. The record is not so one-sided. The Complainants cooperated in the mediation procedures, and they voluntarily removed many of the other structures and items from the common area about which the Respondent had complained. Even if they withdrew their complaint because they realized they could not prove their claims, the fact is that they did withdraw it instead of forcing a hearing on it and thereby causing more delay and expense. Such conduct tends to suggest a desire to cooperate as much, or more, as it suggests an intent to delay and obstruct.

Finally, the panel is not blind to the uncontested allegation that the offending playground equipment was installed in 1997 with no action by the Respondent against it until 2009. This is a delay of up to 12 years in the enforcement of the Respondent's rights. The panel does not take the position that mere delay in enforcement creates a waiver of the Respondent's rights. *See, South Village Homes Corp. v. Toossi,* CCOC #50-10 (March 22, 2011) (6-year delay in enforcement of parking rule does not prevent subsequent enforcement); *Halaby and Abboud v. Glenwaye Gardens Condominium,* CCOC ##679/685 (April 13, 2005) (opinion per John McCabe, panel chair) (mere delay in enforcement of a rule does not prevent the association from later enforcing the rule if the delay created no prejudice). But the panel does believe that the Complainants could reasonably, if erroneously, conclude that their use of the common areas in an open and obvious way for such an extended period of time, without any protest from their association, created a *de facto* approval for their structures, or that Association action might be barred for some other reason such as a statute of limitations. *See, e.g.,* W. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW Section 8.05(f) (ALI-ABA 2007) at 168: "Generally, courts subscribe to the 'discovery rule.' The injured party must have discovered the violation or had a reasonable opportunity to discover the violation before the statute of limitations begins to run.")

The panel concludes that there is insufficient evidence to show that the Complainants filed or maintained a frivolous dispute or acted in bad faith.

The panel GRANTS the motion to dismiss the complaint WITH PREJUDICE, and the panel DENIES the motion for attorneys fees.

Commissioners Fonoroff and Henderson concur in this decision.

Any party aggrieved by this Decision may file an appeal with the Circuit Court of Montgomery County, Maryland, within 30 days after the date of this decision, as provided by the rules of the court governing appeals from administrative agency decisions.

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Mitchell Alkon
Panel Chair

Date Issued: _____