

June 29, 2022

CAN I RECOVER MY ATTORNEY FEES?

In recent months, the ordinary challenges of home buying have been compounded by an extremely competitive market. Home buyers wager unprecedented due diligence fees and earnest money deposits to have their offers considered, often committing to such deposits without first viewing the subject property. But what happens when a party to the purchase and sale agreement breaches, and can the buyer recover the attorney fees associated with suing for breach of contract?

The North Carolina Supreme Court recently addressed this issue in an opinion published on June 17, 2022. In *Reynolds-Douglass v. Terhark* (2022-NCSC-74), the Court considered the scope of language in a residential real estate contract providing that a “prevailing party . . . shall be entitled to recover from the non-prevailing party reasonable attorney’s fees and costs incurred in connection with the proceeding.” *Reynolds-Douglass* arose after a buyer breached the purchase contract and the seller sued to recover the earnest money deposit, as well as the due diligence fee that the buyer had failed to remit following full execution of the parties’ agreement. The seller prevailed at the trial court level, as well as on appeal. Success, however, comes at a cost. Between the trial court proceeding and the appeal, the seller incurred \$13,067 in attorneys’ fees—an amount that exceeded the actual deposits at issue. The fees were assessed against the buyer, as the non-prevailing party in the litigation.

The buyer challenged the award of attorneys’ fees, arguing that there was no authority to award the fees under N.C. Gen. Stat. § 6-21.2 (allowing for fee recovery based on an “evidence of indebtedness”). Still further, the buyer argued that even if there was authority to award attorneys’ fees, that the fees should be capped at the statutory limit of fifteen percent (15%) of the indebtedness. In a divided opinion, the North Carolina Supreme Court rejected both arguments, instead holding that residential real estate contracts fall within the parameters of N.C. Gen. Stat. § 6-21.2 and that while fees are only recoverable up to fifteen percent (15%) of the indebtedness at the trial court level, fees incurred in defending a judgment on appeal are not so capped.

Particularly given the competitiveness of the present residential real estate market, our North Carolina Supreme Court’s ruling in *Reynolds-Douglass v. Terhark* is significant. It confirms a viable option for recovering at least some attorneys’ fees in cases where the value of an ultimate judgment might otherwise be diminished by attorneys’ fees. Nonetheless, it is important to keep in mind that the fee recovery is not boundless, and instead, remains capped at fifteen percent (15%) of the outstanding indebtedness with respect to fees incurred at the trial level, notwithstanding the fact additional fees may be recoverable on appeal to defend a successful outcome in the trial court.

JAH Can Help

The **litigation attorneys** at Johnston Allison Hord are available to help with your legal needs. If you are in need of assistance or have any questions regarding whether you are able to recover attorney fees, you can contact an experienced member of the **Litigation Practice Group**.

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