

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17 CVS 14515

DAVID FINKEL; HD FUNDING,
INC.; and HORIZON FUNDING,
LLC,

Plaintiffs,

v.

PALM PARK, INC.; NATHAN
BYELICK; MARGARET BYELICK;
OAK CREST PROPERTY
MANAGEMENT, INC.; and THE
OAKS AT NORTHGATE, LLC,

Defendants.

**ORDER ON MOTION FOR COSTS,
MOTION TO DEEM JUDGMENT
SATISFIED, AND MOTION TO
TRANSFER VENUE/DESIGNATE
EXEMPTIONS**

1. THIS MATTER comes before the Court on Plaintiffs' Motion for Costs (ECF No. 218), Defendants' Motion to Deem Judgment Satisfied (ECF No. 210), and Defendants' Motion to Transfer Division or in the Alternative Designate Exemptions (ECF No. 212).

FACTUAL AND PROCEDURAL BACKGROUND

2. In this action, David Finkel and his affiliated entities HD Funding, Inc. and Horizon Funding, LLC (collectively, "Plaintiffs") asserted several claims for relief in Superior Court, Wake County, against Palm Park, Inc., Nathan Byelick, Margaret Byelick, Oak Crest Property Management, Inc., and The Oaks at Northgate, LLC (collectively, "Defendants"). (ECF No. 31.) The dispute primarily arose out of the management of The Oaks at Northgate, LLC ("TONG"). (ECF No. 31, at p. 3.)

3. This matter came before the Court for trial on 13 January 2020 on claims for constructive fraud and judicial dissolution of TONG. (ECF No. 158, at p.

1.) On 22 January 2020, a jury found that Defendants Nathan and Margaret Byelick were liable to Plaintiffs in the amount of \$41,784.25. (ECF No. 158, at p. 2.)

4. On 11 February 2020, the Court entered a Final Judgment, ordering Defendants Nathan and Margaret Byelick to pay \$41,784.25 to Plaintiff Horizon Funding, LLC (“Horizon Funding”) “with interest at the legal rate from and after January 22, 2020, until [the] judgment is satisfied.” (ECF No. 149, at p. 3.) The Court also concluded that TONG should be dissolved. (ECF No. 149, at p. 3.)

5. On 19 February 2020, counsel for Defendants sent Plaintiffs’ counsel a check in the amount of \$42,059.00, constituting the amount of the Final Judgment plus accrued interest. (ECF No. 210.1.) Defendants’ counsel also included a cover letter that stated the following:

I have enclosed a check in satisfaction of the judgment entered in favor of Horizon Funding LLC in the above action. The check is in the amount of \$42,059.00, for a judgment of \$41,784.25 and \$274.75 in interest (a per diem of \$9.16 for 30 days from January 22, 2020 to February 20, 2020).

(ECF No. 210.1.)

6. Despite receiving the check and letter from Defendants’ counsel on 20 February 2020, Plaintiffs’ counsel did not deposit the check and made no efforts to notify the Wake County Clerk’s Office that payment had been received. (ECF No. 210.2.)

7. On that same date, Plaintiffs filed a Motion to Amend the Judgment and For Expedited Relief. (ECF No. 150.) In the Motion, Plaintiffs requested, among other things, “[a]n order fixing the date upon which interest begins to run as either

the date on which the complaint was filed as applicable in tort cases or the date of breach as applicable in breach of contract actions.” (ECF No. 150, at p. 2.)

8. On 9 March 2020, Defendants’ counsel sent counsel for Plaintiff a letter stating as follows:

As you know, payment in full of the Court’s February 11, 2020 judgment was sent to you via Federal Express on February 19, 2020, and you received it on February 20, 2020. I have attached a copy of the check made payable to your firm’s trust account and the FedEx receipt for the shipment. As of today, the check has still not cleared my trust account.

This letter serves as a written demand under N.C. Gen. Stat. § 1-239(c) that you transmit a notice of satisfaction of judgment to the Wake County Clerk of Superior Court within 30 days of the date of this letter, or we will seek attorneys fees or other costs associated with such failure.

(ECF No. 210.2.)

9. The Court entered an Amended Final Judgment on 27 April 2020. With regard to the date on which interest began to accrue, the Court determined that “Nathan and Margaret Byelick shall pay to Horizon Funding damages in the amount of \$41,784.25, with interest at the legal rate from and after January 1, 2008[.]” (ECF No. 158, at p. 3.)

10. On 14 and 15 September 2020, the Court held an evidentiary hearing regarding the valuation of TONG based on the election of Oak Crest Property Management to purchase Horizon Funding’s interest in the company as an alternative to judicial dissolution. (ECF No. 185, at p. 3.) On 18 November 2020, the Court issued an order valuing Horizon Funding’s ownership interest in the amount of \$1,650,000.00. (ECF No 185, at p. 38.) The parties do not dispute that Defendants

paid Plaintiff Horizon Funding the \$1,650,000.00 sum pursuant to the Court's order, although the date of the payment does not appear to be contained in the record.

11. On 3 November 2020, Defendants' counsel sent a check in the amount of \$40,340.64 to the Wake County Clerk of Superior Court for the purpose of paying the additional interest ordered in the Court's 27 April 2020 Amended Final Judgment. (ECF No. 216, at p. 3.) However, the Clerk's Office was initially unable to credit the payment toward the judgment because—for reasons that remain unclear to the Court—the judgment had never been docketed.

12. The three pending motions currently before the Court were all filed approximately eleven months later.

13. First, on 13 October 2021, Plaintiffs filed a Motion for Costs pursuant to N.C.G.S. § 7A-305. (ECF Nos. 207, 218.) In this motion, Plaintiffs seek an award of costs incurred by them in connection with this litigation in the form of expenses for deposition transcripts, mediation fees, and expert witness fees. (ECF No. 219, at p. 3.)

14. Second, on 3 November 2021, Defendants filed a Motion to Deem Judgment Satisfied in which they request that the Court direct the Clerk to mark the Amended Final Judgment as satisfied and impose sanctions against Plaintiffs pursuant to N.C.G.S. § 1-239(c). (ECF No. 210.)

15. Finally, on that same date, Defendants also filed a Motion to Transfer Division or in the Alternative Designate Exemptions in connection with Plaintiffs' ability to execute on the Amended Final Judgment in this case. (ECF No. 212.) In this motion, Defendants requested that any determination as to the validity of

Defendants' claimed exemptions be made by this Court rather than by the Wake County Clerk of Superior Court. (ECF No. 212, at p. 3.)

16. All three motions came before the Court for a hearing on 14 January 2022. The motions are now ripe for resolution.

ANALYSIS

A. Motion for Costs

17. The Court will first address Plaintiffs' Motion for Costs. As noted above, Plaintiffs' motion seeks an award of costs in connection with various expenses they have incurred in connection with this litigation.

18. In addition to contending that certain specific portions of the costs Plaintiffs seek are not recoverable, Defendants also make the threshold argument that the Motion for Costs is untimely, as it was brought more than seventeen months after the Court's entry of its Amended Final Judgment.

19. Defendants concede that there is no statutory deadline by which a prevailing party may seek the recovery of costs. Defendants assert, however, that a Motion for Costs must be made within a "reasonable time" and that this did not occur in the present case.¹

¹ Defendants note for comparative purposes that the Local Rules of all three of North Carolina's federal districts set out deadlines—none of which exceed thirty days—by which a motion for costs must be filed. *See* E.D.N.C. Local Civil Rule 54.1 ("All applications for costs must be made 14 days after the entry of judgment."); M.D.N.C. LR 54.1(a)(1)(i) ("A prevailing party may request the clerk to tax allowable costs in a civil action as a part of a judgment or decree by filing a bill of costs . . . within 30 days" after the "time allowed for appeal of a final judgment or decree[.]"); W.D.N.C. LCvR 54.1(a) ("A prevailing party may request the Clerk of Court to tax allowable costs . . . in a civil action as a part of a judgment or decree by filing a bill of costs . . . within thirty (30) days after[] . . . [t]he expiration of time allowed for appeal of a final judgment or decree.").

20. In response, Plaintiffs point to the fact that no express deadline currently exists under North Carolina law for the filing of a motion to tax costs. Plaintiffs assert that “[i]f North Carolina desired to adopt public policy [sic] setting a deadline for seeking costs, North Carolina could easily do so by local rule of court, common law rule or statute.” (ECF No. 221, at p. 3.)

21. The Court finds instructive the reasonableness requirement that has been adopted by courts in this State in connection with the filing of a motion seeking sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. In *Renner v. Hawk*, 125 N.C. App. 483 (1997), our Court of Appeals noted that the North Carolina Rules of Civil Procedure do not set out a deadline for filing Rule 11 motions and declined to judicially create such a deadline. *Id.* at 491. The Court of Appeals then stated, however, that “[w]e agree . . . a party should make a Rule 11 motion within a reasonable time after he discovers an alleged impropriety.” *Id.* (cleaned up).

22. In applying this rule, the Court of Appeals has subsequently held on at least two occasions that a Rule 11 motion was untimely. *See, e.g., Griffin v. Sweet*, 136 N.C. App. 762, 767–68 (2000) (“[W]e conclude that by waiting over thirteen months after our Supreme Court denied defendants’ petition for discretionary review, plaintiff failed to file his motion for Rule 11 sanctions within a reasonable time of detecting the alleged impropriety.”); *Rice v. Danas, Inc.*, 132 N.C. App. 736, 741 (1999) (holding that motion for sanctions under Rule 11 was untimely where moving party waited over six months after judgment was rendered).

23. Defendants argue that a similar reasonableness standard should apply to motions seeking costs. The Court agrees. Although many differences exist between

a motion for sanctions under Rule 11 and a motion for costs pursuant to N.C.G.S. § 7A-305, a requirement that both types of motions be promptly filed is consistent with the goal of efficiency in the administration of justice and provides much-needed finality to litigation. Absent such a reasonableness requirement in this context, a prevailing party could literally wait years after the entry of judgment before seeking an award of costs—effectively resurrecting cases that have long stood dormant. Such a result would run counter to a court’s interest in ensuring the prompt and efficient resolution of litigation. These goals are reflected in the North Carolina Business Court Rules. *See e.g.* BCR 1.1. (“These rules should be construed and enforced . . . to permit the orderly, just, and prompt consideration and determination of all matters; and to promote the efficient administration of justice.”)

24. Having determined that such a reasonableness requirement exists, the Court must now determine whether it was satisfied in the present action. As referenced above, Plaintiffs’ Motion for Costs was not filed until over seventeen months following the Court’s entry of the 27 April 2020 Amended Final Judgment and almost a year after the Court filed its Order and Opinion on Valuation. Despite this significant passage of time, Plaintiffs’ briefs in support of their motion make no attempt at all to explain the reason for the delay much less offer a compelling ground.

25. The Court finds that this delay was not reasonable under the circumstances of this case. A motion for costs could—and should—have been brought much earlier. Therefore, because the motion was not brought within a reasonable time period, the Court concludes that the Motion for Costs should be DENIED.

B. Motion to Deem Judgment Satisfied

26. Defendants move the Court for an order declaring the Court's 27 April 2020 Amended Final Judgment to be fully satisfied. In support of this motion, Defendants contend that they have paid all amounts ordered by the Court (along with all applicable interest) and that the Clerk of Court should therefore be directed to mark the judgment as satisfied. Defendants further request that monetary sanctions be imposed against Plaintiffs pursuant to N.C.G.S. § 1-239(c) for failing to take steps to credit the \$42,059.00 payment sent to Plaintiffs' counsel on 19 February 2020 toward the Final Judgment in effect at that time. Section 1-239 states, in pertinent part, as follows:

(a) Payment of money judgment to clerk's office.

- (1) The party against whom a judgment for the payment of money is rendered by any court of record may pay the whole, or any part thereof, in cash or by check, to the clerk of the court in which the same was rendered, although no execution has issued on such judgment.
- (2) The clerk shall give the party a receipt showing the date and amount of the payment and identifying the judgment, and shall note receipt of the payment on the judgment docket of the court. . . .
- (3) When a payment to the clerk is made in cash or when a check is finally paid by the drawee bank, the clerk shall give the notice provided for in subsection (b). When the full amount of a judgment has been so paid, the clerk shall include the words "JUDGMENT PAID IN FULL" in the notice.
- (4) When a judgment has been paid in part, but not in full, the clerk shall furnish a certificate of partial payment to the clerk of superior court of

any county to which a transcript of a judgment has been sent, but only upon the request of that clerk or of the party who made the partial payment.

- (5) When a judgment has been paid in full, and the party in whose favor the judgment was rendered has collected all payments made to the clerk, or when ten days have passed since notice of payment in full was sent pursuant to subsection (b) and the party has neither collected all payments made to the clerk nor notified the clerk that the party disputes payment of the full amount of the judgment, then the clerk shall immediately:
 - a. Mark "PAID AND SATISFIED IN FULL" on the judgment docket, and
 - b. Forward a certificate of payment in full to the clerk of superior court in each county to which a transcript of the judgment has been sent.
- (6) If the party in whose favor a judgment has been rendered notifies the clerk that the party disputes payment in full of the judgment, the clerk shall proceed as provided in G.S. 1-242.

...

(b) Upon receipt of any payment of money upon a judgment, the clerk of superior court shall within seven days after the receipt of such payment give notice thereof to the attorney of record for the party in whose favor the judgment was rendered, or if there is no attorney of record to the party. Any other official of any court who receives payment of money upon a judgment shall give notice in the same manner; provided, further, that no such moneys shall be paid by the clerk of the superior court until at least seven days after written notice by mail or in person has been given to the attorney of record in whose favor the judgment was rendered; provided further, that the attorney of record may waive said notice, and said moneys shall be paid by the clerk of superior court, by signing the judgment docket.

(c) Upon receipt by the judgment creditor of any payment of money upon a judgment, the judgment creditor shall within 60 days after receipt of the payment give satisfactory notice thereof to the clerk of the superior court in which the judgment was rendered, which notice shall specify the date and amount of the payment received. If the creditor provides to the clerk a single notice of multiple payments from the debtor, the notice shall specify the date of each individual payment and the amount received on each date. The clerk shall thereafter promptly enter any such payment on the judgment docket of the court, crediting each payment against the judgment as of the date received by the creditor. The clerk shall immediately forward a certificate thereof to the clerk of the superior court of each county to whom a transcript of the judgment has been sent, and the clerk of each superior court shall thereafter promptly enter the same on the judgment docket of the court and file the original with the judgment roll in the action. If the judgment creditor fails to file the notice required by this subsection within 30 days following written demand by the debtor, he may be required to pay a civil penalty of one hundred dollars (\$100.00) in addition to attorneys' fees and any loss caused to the debtor by such failure. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. . . .

N.C.G.S. § 1-239 (2021).

27. In order to analyze the parties' competing arguments regarding Defendants' motion, it is necessary to understand the timeline of key events relevant to the motion.

28. On 19 February 2020, Defendant sent to Plaintiffs' counsel by overnight delivery a check in the amount of \$42,059.00, which represented the \$41,784.25 amount of the Court's original Final Judgment dated 11 February 2020 plus \$274.75 in interest per the terms of the Final Judgment. Plaintiffs' counsel received the check on 20 February 2020. Plaintiffs' counsel, however, never deposited this check, apparently based on his concern that by doing so an accord and satisfaction would

potentially exist.² At the 14 January 2022 hearing on the pending motions, Plaintiffs’ counsel explained that this concern stemmed from his fear that taking steps to have the Final Judgment marked satisfied as a result of the \$42,059.00 payment could preclude Plaintiffs’ ability to collect additional sums ordered by the Court at a future date—including any additional interest due on the judgment, any award of costs, and the funds ordered by the Court to be paid as a result of the purchase of Horizon Funding’s interest in TONG.

29. On the same date that Defendants’ counsel sent the check, Plaintiffs’ counsel filed a motion asking, *inter alia*, that the Final Judgment be amended to award additional prejudgment interest “fixing the date upon which interest begins to run as either the date on which the complaint was filed as applicable in tort cases or the date of breach as applicable in breach of contract actions.” (ECF No. 150, at p. 2.)

30. On 9 March 2020, Defendants’ counsel sent a letter to Plaintiffs’ counsel demanding that he notify the Clerk’s Office that the judgment had been satisfied and threatening sanctions under § 1-239(c) for failure to do so. (ECF No. 210.2.)

31. On 27 April 2020, the Court did, in fact, issue an Amended Final Judgment that awarded “interest at the legal rate from and after January 1, 2008.” (ECF No. 158, at p. 3.)

² “An accord and satisfaction is compounded of the two elements enumerated in the term. An ‘accord’ is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considers himself, entitled to; and a ‘satisfaction’ is the execution, or performance, of such an agreement.” *In re Foreclosure of a Lien by Five Oaks Rec. Ass’n*, 219 N.C. App. 320, 326 (2012) (cleaned up).

32. On 3 November 2020, Defendants attempted to pay into the Clerk of Court the sum of \$40,340.64, which represented the amount of additional interest awarded by the Court in its Amended Final Judgment. Although the record is silent on this issue, the parties have jointly represented to the Court that the Clerk was initially unable to credit the judgment for this amount because the judgment had never been docketed. The parties have further represented to the Court that it was not until around the time that the present motions were filed before the judgment was finally docketed.

33. In their Motion to Deem Judgment Satisfied, Defendants contend that they have paid all of the sums ordered by the Court, partially by payment to Plaintiffs' counsel and the remaining portion by payment to the Clerk of Court. Defendants further argue that they are entitled to an award of attorneys' fees pursuant to N.C.G.S. § 1-239(c) in light of Plaintiffs' refusal to credit Defendants' initial \$42,059.00 payment toward the 11 February 2020 Final Judgment and failure to direct the Clerk to mark the judgment satisfied as demanded in the 9 March 2020 letter from Defendants' counsel.

34. At the 14 January 2022 hearing, Plaintiffs' counsel did not argue that Defendants have miscalculated any amounts due in making the above-referenced payments. He maintained, however, that he was legally justified in not taking steps to have the judgment marked satisfied due to his concerns about the ability of Defendants to assert the doctrine of accord and satisfaction and thereby foreclose Plaintiffs' ability to receive any additional monetary amounts in the case. Because the check tendered by Defendants' counsel on 19 February 2020 has long since

become void due to the inaction of Plaintiffs' counsel, Plaintiffs seek an order directing Defendants to make a new payment of \$42,059.00—the payment of which, they contend, will finally result in the judgment being satisfied.

35. Although it is unclear why neither the 11 February 2020 Final Judgment nor the 27 April 2020 Amended Final Judgment were originally docketed by the Clerk of Court, it is equally puzzling why neither Plaintiffs' counsel nor Defendants' counsel notified the Clerk in a timely fashion of this oversight.

36. At the end of the day, the fact remains that as a result of the sequence of events described above, Plaintiffs are still owed the sum of \$42,059.00. It is hereby ORDERED that Defendants pay that amount to the Wake County Clerk of Superior Court within twenty (20) days of the date of this Order. Upon receipt, the Clerk is DIRECTED to mark the 27 April 2020 Amended Final Judgment in this case as satisfied. The parties are ORDERED to take all necessary steps to ensure that this directive is followed.

37. The Court declines Defendants' request for the imposition of the monetary sanctions authorized under N.C.G.S. § 1-239(c), which—as noted above—states in relevant part as follows:

If the judgment creditor fails to file the notice required by this subsection within 30 days following written demand by the debtor, he may be required to pay a civil penalty of one hundred dollars (\$100.00) in addition to attorneys' fees and any loss caused to the debtor by such failure. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

N.C.G.S. § 1-239(c).

38. At the time counsel for Defendants submitted the check on 19 February 2020, he was attempting to satisfy a judgment that had not yet been docketed. Similarly, at the time of defense counsel's 9 March 2020 letter demanding that Plaintiffs' counsel mark the Final Judgment as satisfied, the Final Judgment still remained undocketed. Based on the language of the statute, it is not clear whether the General Assembly intended for the sanctions authorized by § 1-239(c) to apply in a situation where, as here, a judgment creditor makes a payment on a judgment that has not yet been docketed.

39. In any event, the Court reads § 1-239(c) as *permitting*, but not *requiring*, the imposition of sanctions. "Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory." *In re Hardy*, 294 N.C. 90, 97 (1978) (cleaned up). Therefore, even if Plaintiffs did, in fact, violate § 1-239(c) by failing to notify the Clerk of Court upon receipt of the check sent on 19 February 2020 by Defendants' counsel, the Court concludes, in its discretion, that on these unique facts no sanctions should be imposed.

C. Motion to Transfer Division or in the Alternative Designate Exemptions

40. Finally, the Court has thoroughly reviewed Defendants' Motion to Transfer Division or in the Alternative Designate Exemptions. The Court, in its discretion, concludes that this motion should be DENIED.

THEREFORE, IT IS ORDERED that:

1. Plaintiffs' Motion for Costs is DENIED.
2. With regard to Defendants' Motion to Deem Judgment Satisfied, Defendants shall tender a payment to the Wake County Clerk of Superior Court in the

amount of \$42,059.00 within twenty (20) days of the date of this Order. Once such payment has been tendered, the Clerk is DIRECTED to mark the Amended Final Judgment in this action as “Paid and Satisfied in Full”.

3. Defendants’ Motion to Transfer Division or in the Alternative Designate Exemptions is DENIED.

SO ORDERED, this the 22nd day of February, 2022.

/s/ Mark A. Davis

Mark A. Davis
Special Superior Court Judge for
Complex Business Cases