

STATE OF MINNESOTA

DISTRICT COURT

HENNEPIN COUNTY

FOURTH JUDICIAL DISTRICT
CASE TYPE: CIVIL OTHER

Edain Altamirano Flores; Esperanza Herrera;
Lori Nicol; Olutundun Arike Ogundipe;
Jason Beck; Patricia Goggin; Norma Juarez;
and Bruno Gorostieta, on behalf of
themselves and all others similarly situated,

Court File No. 27-CV-16-14225
Class Action
Judge Mary R. Vasaly

Plaintiffs,

v.

**ORDER EFFECTUATING
SETTLEMENT**

Spiros Zorbalas; Stephen Frenz; Equity
Residential Holdings, LLC; National
Housing Fund, LLC; The Apartment Shop,
LLC; ERT, LLC; Quarters for Creativity,
LTD.; Emerald Square Properties, Inc.;
Hennepin Quarters, Inc.; Powderhorn
Quarters, Inc.; Hiawatha Quarters, Inc.; 25
&3146 Properties, Inc.; Lahaha Holdings,
Inc.; Arts Avenue Properties, Inc.; SS
Quarters, Inc.; Berkeley Holdings, Inc.; 1801
Properties, Inc.; SZ112, Inc.; S1322, Inc.;
R110, Inc.; G121, Inc.; Alpha-Omega
Companies, Inc.; JAS Apartments, Inc.;
Jennifer Frenz; Mary Brandt; and 2020
Vision Investments, LLC,

Defendants.

This matter came before the Court on May 22, 2019, upon the motion of Plaintiffs and Class Counsel for an Order Effectuating the Settlement. In particular, Class Counsel moves the Court for entry of an Order as follows:

- Declaring that the Effective Date of the Settlement can occur notwithstanding Class Counsel's appeal of the attorney fee award;
- Declaring that the Effective Date is to occur no later than the date of the Court's order on this Motion;
- Ordering that distributions of the Settlement Fund by the Settlement Administrator can commence;
- Directing the Settlement Administrator to retain in the Settlement Fund the amount in

dispute on Class Counsel's appeal of the attorney's fees award in this action, which amount is \$1,375,000, until the dispute over the attorney fee award is finally resolved and that upon such final resolution, the retained funds (including earned interest) will be distributed either to Class Counsel or to the class, under the distribution method set forth in Exhibit B of the Settlement Agreement, as appropriate.

Plaintiffs were represented by James W. Poradek, James L. Volling, Nathaniel J. Zylstra, and Faegre Baker Daniels LLP.

None of the Defendants appeared individually or by counsel at the hearing.

Defendants, Spiros Zorbalas, SZ112, Inc.; S1322, Inc.; R110, Inc.; G121, Inc.; and Alpha-Omega Companies, Inc., represented by William F. Mohrman, and Mohrman, Kaardal & Erickson, P.A., filed a written memorandum opposing the motion.

Based upon the Affidavits filed by the parties, the arguments of counsel and all the files, records and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. The parties settled the above-captioned case pursuant to a settlement agreement signed by Defendants and their counsel on October 9 and 11, 2018 (the "Settlement Agreement"). The Court granted preliminary approval of the Settlement Agreement in an October 24, 2018, Order. The Settlement Agreement created a Settlement Fund in the amount of \$18,500,000.

2. According to the Settlement Agreement, the Settlement Fund "will be used to pay (i) the Benefit Amount to the Class Members; (ii) Class Representative Incentive Awards not to exceed \$10,000 per class representative; (iii) the Attorneys' Fee Award to Class Counsel; and (iv) Notice and Administration Costs." (Pls.' and Class Counsel's Mem. in Supp. of Mot. for Order Effectuating the Settlement, Ex. 1, Settlement Agreement, ¶ III.A.1, at 13.) Pursuant to Exhibit B to the Settlement Agreement, the Benefit Amount is calculated after the payment of the Class Representative Incentive Award, the Attorney Fee Award, and reasonably anticipated administration costs. (*Id.*, Ex. 3, Exhibit B to Settlement Agreement, ¶ II.A, at 2.)

3. The Settlement Agreement defines the "Effective Date" of the Settlement as 61 days after entry of the Final Approval Order and Judgment if no document is filed within that time seeking appeal, review, or rehearing of the judgment or taking some other action that would extend the time for seeking appeal or review of the Final Approval Order and Judgment; or [] if any such document is filed, five business days after the date upon which all appellate and other proceedings resulting from such document have been finally terminated in such a manner as to

permit the Final Approval Order and Judgment to take effect in substantially the form it was entered.

(*Id.*, Ex. 1, at 7-8).

4. Plaintiffs filed a Motion for Final Approval of the Settlement Agreement on November 29, 2018. Class Counsel also moved for an award of attorneys' fees in the amount of \$6,000,000 from the Settlement Fund.

5. After some additional litigation, on January 11, 2019, the parties entered into a Stipulation that required Defendants to pay the Settlement Administrator \$1,500,000.00, on or before January 14, 2019, and \$1,749,820.49, on or before February 1, 2019. The parties agreed that Defendants would pay an additional \$8,500,000.00, on or before February 28, 2019. The parties also agreed that within 10 days of an agreement between the parties or an order of the Court, Defendants would pay Plaintiffs' counsel's reasonable attorneys' fees (not to exceed \$100,000.00) and costs incurred as a result of Defendants' actions on or after December 26, 2018.

6. On February 11, 2019, the Court issued a final order approving the Settlement Agreement and awarding Class Counsel \$4,625,000 in attorneys' fees. Although this was a reduction of the amount of attorney's fees demanded by \$1,375,000, the terms of the Settlement Agreement provide that the "[s]ettlement is not dependent or conditioned upon" the Court's approval of Class Counsel's demand for attorney's fees. (*Id.*, ¶ VIII.E, at 23.)¹

7. The Settlement Agreement addresses the procedure for distribution of the attorney's fee award. It provides that the Settlement Administrator should pay the amount awarded "immediately following the entry of the Court's order awarding such fees and expenses." (*Id.*, ¶ VIII.C, at 22.) In addition, the Settlement Agreement expressly allows Class Counsel to appeal regarding the award of attorney's fees. (*Id.*)² Class Counsel appealed the fee award and the appeal is currently pending.

8. Now Class Counsel moves to establish the Effective Date of the Settlement and to allow the Settlement Administrator to distribute the Settlement funds to the Class as of that date,

¹ In an order filed on May 16, 2019, Class Counsel were granted an additional award of attorney's fees in the amount of \$100,000 and costs in the amount of \$5,131.03.

² The Settlement Agreement provided further that if the fee award were reduced on appeal, Class Counsel would be obligated to return the excess funds to the Settlement Fund for distribution to the class. (*Id.*, ¶ VIII.C & D, at 22-23.)

without regard to the pendency of the appeal, except the amount in dispute in Class Counsel's appeal of the attorney fees award in this action (\$1,375,000.00) until the appeal is finally resolved.

9. Defendant Zorbalas does not object to the distribution of the entire Settlement Fund due to the Class. However, he objects to allowing the Administrator to pay Class Counsel any portion of the attorney's fee award on the grounds that the Court of Appeals might reduce it further.

DISCUSSION

1. Class Counsel and Plaintiffs seek immediate distribution of most of the Settlement funds to the Class, and the undisputed portion of Class Counsel's attorney's fees to Class Counsel, despite that an appeal is pending regarding whether the amount of the attorney's fee award should be increased.

2. Minn. R. Civ. App. P. 108 provides that the appeal of an order does not stay enforcement of the order pending appeal. Enforcement of judgments and orders is considered "collateral" to the matter on appeal. *David N. Volkmann Constr., Inc. v. Isaacs*, 428 N.W.2d 875, 876-77 (Minn. Ct. App. 1988); see Minn. R. Civ. App. P. 108.01, subd. 2 (noting that the district court retains jurisdiction on appeal "as to matters independent of, supplemental to, or collateral to the order or judgment appealed from"). Furthermore, statutory attorney's fee awards have been held to be sufficiently collateral to the merits of an action such that a claim for attorney's fees may be decided by the district court even after a party has appealed from the underlying claims in the action. *Welsh v. City of Orono*, 355 N.W.2d 117, 123 (Minn. 1984) (citing *State v. Barnes*, 81 N.W.2d 864 (Minn. 1957) (stating even after an appeal is perfected, the trial court retains jurisdiction over matters collateral and supplemental to the decision on the merits). While a trial court may enforce its order pending appeal, it does lose jurisdiction to alter or modify it. *Isaacs*, at 877.

3. Here, the Court is not being asked to alter or modify the order that is the subject of the pending appeal. It is being asked to enforce the order partially, withholding only that part of the Settlement Fund that is the subject of Class Counsel's appeal. Unless the Court does so, the Settlement Administrator would be required to pay the Class an amount that would include the \$1,375,000 that Class Counsel seeks on appeal. If the Court were to require immediate payment of those fees to the Class, then Class Counsel's appeal might be rendered moot because

it would be difficult if not impossible, to recoup the attorney's fees from the amounts distributed to the Class.

4. Allowing a partial distribution of the Settlement Fund to the Class effectuates the structure contemplated by the Settlement Agreement, by enabling the Class to be immediately paid that portion of the Settlement Fund to which they are entitled regardless whether or not Class Counsel's appeal is successful. This solution will also allow the Class Representatives to be paid their Incentive Awards and allow the releases in the Settlement Agreement to become effective.

5. This Court sees no barrier to issuing the Order Class Counsel seeks. In the ordinary case, an order that is the subject of an appeal is not stayed while the appeal is pending unless the appellant files a bond or other security to assure that the opposing party's right to the amount due is secured and not jeopardized by any circumstances rendering the appellant insolvent or otherwise unable to pay the original judgment, if its appeal is ultimately unsuccessful. But the circumstances here are unique. Class Counsel is not seeking to suspend an order requiring that it pay its own funds to the Class. Instead, the funds in dispute have already been paid by Defendants and are being safely held by the Settlement Administrator. Class Counsel only asks that the Court order the Settlement Administrator to retain in the Settlement Fund the amount in dispute in Class Counsel's appeal of the attorney fee award in this action, until the dispute over the attorney's fee award is finally resolved. At that point, the retained funds (including earned interest) can be distributed either to Class Counsel or the Class, pursuant to the distribution method set forth in Exhibit B of the Settlement Agreement, as appropriate.

6. Given these facts, the Class does not risk, during the appeal, the loss of either the principal due or the interest on that principal, in the event that the appeal is unsuccessful. In that event, the Class Administrator will pay out the remaining funds in its possession that were held during the appeal to the Class. Thus, there is no reason that Class Counsel should be required to post a bond in any amount to suspend payment of these funds to the Class until the resolution of the appeal.

7. Zorbalas argues that the Court should not issue an order permitting the Settlement Administrator to make the payments due pursuant to the order, because the Court of Appeals might reduce the fee award still further, requiring that Class Counsel disgorge some percentage of the amount of fees they receive and pay them over to the Class. But this is no impediment to

enforcement of the Order. As Class Counsel points out, the Settlement Agreement requires Class Counsel to pay any reduction of the fee award to the Settlement Fund. (Pls.' Mem., Ex. 1, ¶ VIII.D, at 22-23.)

10. Plaintiffs and Class Counsel also seek an Order defining the "Effective Date" as the date of the Court's order. This Effective Date is the trigger for commencement of distribution of the Settlement Fund to the Class. (*Id.*, ¶ III.A.2, at 13-14.) Similarly, the payment of the Incentive Award to the Class Representatives is to occur five days after the Effective Date. (*Id.*, ¶ III.A.3, at 14.) Finally, all releases under the Settlement Agreement become effective as of the Effective Date. (*Id.*, ¶ IV.A, at 14.)

11. Class Counsel have appealed the Court's Attorney Fee Award Order, and, because the attorney fee award is incorporated in the Final Approval Order and Judgment, Class Counsel have appealed that Final Approval Order as well. Pursuant to the definition of "Effective Date," the appeal thus delays the Effective Date because the agreement provides that the Effective Date does not occur until five business days after the date upon which all appellate and other proceedings resulting from such document have been finally terminated in such a manner as to permit the Final Approval Order and Judgment to take effect in substantially the form it was entered.

12. Plaintiffs and Class Counsel seek a practical solution to this issue by asking the Court to enter an order making clear that, notwithstanding the appeal, the Effective Date can occur, the releases will become effective, and distributions can commence (except the amount held in connection with Class Counsel's appeal (\$1,375,000) until the appeal is resolved).

13. The alternative is that the distributions to class members and the effectiveness of the releases would be delayed to no real purpose. It is in no party's interest to delay payment to the Class of the portion of the Settlement proceeds that are uncontested.

ORDER

The Court declares that notwithstanding Class Counsel's appeal of the attorney's fee award:

- The Effective Date of the Settlement shall be no later than the date of the Court's order on this Motion;
- Distributions of the Settlement Fund by the Settlement Administrator can commence, except that the Settlement Administrator shall retain in the Settlement Fund the amount in dispute on Class Counsel's appeal of the attorney's fees award in this

action, which amount is \$1,375,000, until the dispute over the attorney fee award is finally resolved and that upon such final resolution, the retained funds (including earned interest) shall be distributed either to Class Counsel or to the Class, under the distribution method set forth in Exhibit B of the Settlement Agreement, as appropriate, consistent with any Order issued by the Court of Appeals.

Dated: June 3, 2019

Mary R. Vasaly
Judge of District Court