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Attorneys for appellant Wells Fargo Bank, N.A.

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA-21-0609

WELLS FARGO BANK, N.A.,

appellant,

v.

ZINVEST, LLC,

appellee.

**WELLS FARGO BANK, N.A.'S
SUPPLEMENTAL NOTICE OF
APPEAL**

NOTICE IS HEREBY GIVEN that Wells Fargo Bank, N.A., the appellant named above and who is the plaintiff in the cause of action filed in the Fourth Judicial District, Missoula County, as Case DV-20-796, appeals to the Supreme

Court of the State of Montana from the written judgment or order on Zinvest, LLC's motion for allowance of attorneys' fees entered in the district court on the 10th day of May, 2022.

1. I certify this appeal is NOT subject to the mediation process required by M. R. App. R. 7.

2. I certify this appeal is NOT an appeal from an order certified as final under M. R. Civ. P. 54(b).

3. I further certify I have complied with the provisions of M. R. App. P. 8(3).

4. Included with this notice is:

- a. a copy of the order from which I am appealing, and
- b. the filing fee of \$100.

Dated: May 10, 2022

Respectfully submitted,

AKERMAN LLP

By: 

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*Attorneys for appellant
Wells Fargo Bank, N.A.*

CERTIFICATE OF SERVICE

I certify that I have filed this **WELLS FARGO BANK, N.A.'S SUPPLEMENTAL NOTICE OF APPEAL** with the Clerk of the Montana Supreme Court; and that I have mailed copies to the Clerk of the District Court, each attorney of record, each court reporter from whom a transcript has been ordered, on May 10, 2022 as follows:

Clerk of District Court
200 West Broadway
Missoula, Montana 59802
VIA CERTIFIED MAIL RECEIPT
NO. 7011 2970 0003 6809 3378

Jennifer Wells, court reporter
200 West Broadway
Missoula, Montana 59802
VIA CERTIFIED MAIL RECEIPT
NO. 7011 2970 0003 6809 3361

W. Scott Green
PATTEN PETERMAN BEKKEDAHL & GREEN PLLC
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Billings, Montana 59103
Attorneys for Defendant Zinvest, LLC
VIA CERTIFIED MAIL RECEIPT
NO. 7011 2970 0003 6809 3354
AND VIA EMAIL sgreen@ppbglaw.com



Chandler P. Thompson

EXHIBIT A

1 John W. Larson, District Judge
2 Fourth Judicial District, Dept. 3
3 Missoula County Courthouse
4 200 West Broadway
5 Missoula, MT 59802
6 (406) 258-4773

7 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

8 WELLS FARGO BANK, N.A.,

Dept. 3
Cause No. DV-20-796

9 Plaintiff,

10 vs.

11 ZINVEST, LLC,

12 Defendant.

13 **ORDER REGARDING WELLS FARGO’S NOTICE THAT ZINVEST, LLC’S
14 MOTION FOR ALLOWANCE OF ATTORNEYS’ FEES IS DEEMED DENIED;
15 ORDER GRANTING ZINVEST’S MOTION FOR ALLOWANCE OF ATTORNEYS’
16 FEES; AND ORDER REGARDING WELLS FARGO’S OBJECTION TO
17 ZINVEST’S SUPPLEMENTAL BRIEFING AND SUPPORTING AFFIDAVIT**

18 Before the Court are Defendant Zinvest, LLC’s Motion for Allowance of
19 Attorneys’ Fees; Defendant Zinvest, LLC’s Supplemental Brief in Support for
20 Allowance of Attorneys’ Fees; Wells Fargo Objection to Zinvest’s
21 Supplemental Briefing and Supporting Affidavit; and Wells Fargo’s Notice
22 that Zinvest LLC’s Motion for Allowance of Attorney’s Fees is Deemed
23 Denied.

24 **Background**

25 The Court finds the relevant facts to these motions as the following.
26 Plaintiff Wells Fargo Bank, N.A. (“Wells Fargo”) held a deed of trust against

1 the parcels of land assigned tax parcels 2281204 and 2281300 by the
2 Missoula County Treasurer. Wells Fargo's deed of trust was recorded with
3 the Missoula County Clerk on June 15, 2004, which identifies Wells Fargo
4 as the lender and the lender's address as "P.O. Box 10304, Des Moines,
5 Iowa 50306-0304." Wells Fargo states it inadvertently failed to pay the
6 property taxes as outlined in the Deed of Trust.
7

8 The taxes assessed against each parcel for the tax year 2014 were
9 unpaid (\$145.92 for parcel 2281204 and \$153.98 for parcel 2281300). On
10 July 15, 2015, Missoula County Treasurer conducted a tax lien sale for
11 Parcels 2281204 and 2281300. On March 8, 2016, Missoula County
12 purchased the tax liens for the parcels, and issued Tax Lien Certificates to
13 itself. On March 15, 2016, the Missoula County Treasurer, executed a
14 county treasurer's certificate of tax sale of both parcels 2281204-2281300
15 and assigned the tax lien certificates to Defendant Zinvest, LLC ("Zinvest").
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19 On June 1, 2008, Stewart Title provided Zinvest with two Litigation
20 Guarantees for Tax Parcels 2281204 and 2281300. On June 15, 2018,
21 Zinvest mailed notices to Wells Fargo, Robert Loveman, and Stewart Title.
22 On June 15 and June 22, 2018, notices of pending tax liens were published
23 in the Missoulian. On July 11, 2018, Zinvest executed its "proof of notice"
24 attesting it mailed a "notice of issuance of tax deed" to the "owners, current
25
26

1 occupant and parties as required by 15-18-212, MCA” via certified mail,
2 return receipt requested.

3 Zinvest produced copies of returned envelopes, showing a post-mark
4 of June 15, 2018, and address to “3601 Minnesota Drive, Suite 200,
5 Bloomington, Minnesota 55435” and returned to Zinvest marked “return to
6 sender—not deliverable as addressed—unable to forward.” Wells Fargo
7 contends it did not receive any notice of the tax lien sale.
8

9 On August 13, 2018, the Missoula County Treasurer, executed tax
10 deeds conveying parcels 2281204 and 2281300 to Zinvest. Zinvest paid
11 \$158.65 for parcel 2281204 and \$167.33 for parcel 2281300.
12

13 On July 17, 2020, Wells Fargo filed its Complaint pursuant to the
14 Uniform Declaratory Judgments Act, § 27-8-101 *et seq.*, MCA, alleging
15 Zinvest failed to give proper notice under Mont. Code Ann. § 15-18-212.
16

17 On November 17, 2021, the Court granted Zinvest’s Motion for
18 Summary Judgment and Denied Wells Fargo Bank, NA’s Cross-Motion for
19 Summary Judgment.
20

21 On November 22, 2021, Defendant Zinvest filed its Bill of Costs and a
22 Motion for Allowance of Attorneys’ Fees and request for hearing, asserting
23 Zinvest has incurred attorneys’ fees to defend the suit. Zinvest specifically
24 seeks attorneys’ fees in the amount of \$11,214.00.
25
26

1 On December 2, 2021, Wells Fargo filed a Notice of Appeal, and on
2 February 16, 2022, the Montana Supreme Court noted that the record on
3 appeal is not yet complete, as the District Court must still rule on the motion
4 for attorney fees filed by Zinvest and allowed Wells Fargo additional time to
5 file the opening brief on appeal.
6

7 On January 5, 2022, counsel failed to appear at a hearing, the parties
8 notified the Court that they did not receive notice of the hearing, and the
9 Court continued the hearing to January 26, 2022 at 10:30 a.m.
10

11 On January 26, 2022, during hearing, the Court acknowledged that
12 counsel were not provided notice of a previous hearing, and the Court
13 directed the reasonableness of attorney fees be briefed with Mr. Green's
14 Brief due on February 4, 2022, Mr. Thompson's Response due on February
15 18, 2022, and a final reply due on February 25, 2022. The Court set a
16 hearing on attorney fees on Wednesday, March 2, 2022 at 11:00 a.m.
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19 On February 2, 2022, Zinvest filed a Supplemental Brief in Support for
20 Allowance of Fees; on February 18, 2022, Wells Fargo filed a Response to
21 Zinvest's Supplemental Brief; and on March 7, 2022, Zinvest filed a Reply to
22 Wells Fargo Response to Zinvest's Supplemental Brief in Support for an
23 Award of Attorneys' Fees.
24

25 During the March 2, 2022, hearing Mr. Green, representing Zinvest,
26

1 advised he wanted to file a Reply, and the Court directed the Reply be filed
2 in ten (10), days. Mr. Thompson, representing Wells Fargo, also advised
3 they are not challenging the amount of fees and will not need an expert to
4 challenge accuracy. Instead, Mr. Thompson stated that there is an issue as
5 to if the requested fees qualify under the statute.
6

7 On March 10, 2022, Wells Fargo filed an Objection to Zinvest's
8 Supplemental Briefing and Supporting Briefing.

9 On March 31, 2022, Wells Fargo filed a Notice Zinvest LLC's Motion
10 for Allowance of Attorneys' Fees is Deemed Denied.
11

12 On April 5, 2022, Zinvest cross-appealed to the Montana Supreme
13 Court from the final order deemed denied in such action. The District Court
14 deems the matters regarding attorneys' fees ready for ruling.
15

16 Discussion

17 I. Wells Fargo Notice that Zinvest, LLC's Motion for Allowance of 18 Attorneys' Fees is Deemed Denied

19 Wells Fargo asserts that a request for attorneys' fees that is filed after
20 judgment is considered to be a motion to alter or amend a judgment under
21 Rule 59, M.R.Civ.P. Zinvest responds that if the Court does not rule on a
22 motion within the time period set forth in Rule 59 or Rule 60, the District
23 Court is not divested of jurisdiction to make such a ruling.
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1 The Court disagrees with Wells Fargo assertion that the Motion for
2 Attorneys' Fees is "deemed denial" as it pertains to a motion to alter or
3 amend timeline. The Court is not deprived jurisdiction on a motion for
4 attorney fees under Rule 58. Under Rule 58(e), M.R.Civ.P., "[t]he district
5 court is not deprived of jurisdiction to enter its order on a timely motion for
6 attorney fees, costs, or sanctions by the premature filing of a notice of
7 appeal." Accordingly, the Court finds that timelines under Rule 59 for
8 motions to alter or amend are not applicable to the Court's ability to still rule
9 on the pending Motion for Attorney Fees, particularly when the Montana
10 Supreme Court noted in its February 16, 2022, Order, that "...the record is
11 not yet complete" until ruling on the outstanding motion for attorneys' fees.

12 **II. Zinvest's Motion for Allowance of Attorneys' Fees and**
13 **Supplemental Brief in Support of Allowance of Attorney's Fees**

14 Zinvest asserts it has incurred attorneys' fees to defend the suit and
15 seeks costs in the amount of \$290.49 and attorneys' fees in the amount of
16 \$11,214.00. In support, Zinvest contends that "[a]ttorney fees, as
17 supplemental relief, may be ordered when a court, in its discretion,
18 determines such relief is necessary or proper, including in a declaratory
19 judgment action; the threshold question is whether the equities support a
20 grant of attorney fees, and such relief is rarely awarded." *Whitefish*

1 *Congregation of Jehovah's Witnesses, Inc. v. Caltabiano*, 449 P.3d 812, 397
2 Mont. 284 (2019).

3 Wells Fargo does not contest Zinvest's claim to costs, but asserts
4 Zinvest is not entitled to any attorneys' fees. Wells Fargo contends there is
5 no contract between Wells Fargo and Zinvest and the only claim brought in
6 this case was Wells Fargo's request for declaratory relief. Wells Fargo
7 asserts that "[t]he threshold consideration in determining whether an award
8 of attorney fees is necessary or proper under § 27-8-313, MCA, is whether
9 equitable considerations support the award." *Davis v. Jefferson Cty.*
10 *Election Off.*, 2018 MT 32, ¶ 13, 390 Mont. 280, 412 P.3d 1048. Wells
11 Fargo next contend that "[i]f the equities support an award, [the court must]
12 then apply a three-party 'tangible parameters test' adopted [] in *Trustees of*
13 *Indiana University v. Buxbaum*, 2003 MT 97, ¶¶ 43-45, 315 Mont. 210, 69
14 P.3 663, to determine whether an award of attorney fees is necessary or
15 proper under § 27-8-313, MCA." *Id.* The parameters identify "situations in
16 which 1) [the defendant] possess what the plaintiffs sought in the declaratory
17 relief action; 2) it is necessary to seek a declaration showing the plaintiffs
18 are entitled to the relief sought, and 3) the declaratory relief sought was
19 necessary in order to change the status quo." *City of Helena v. Svee*, 2014
20 MT 311, ¶ 22, 377 Mont. 158, 339 P.3d 32. Wells Fargo asserts that Zinvest
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1 presents no evidence or argument “equitable considerations” support an
2 award of attorneys’ fees in this case. Wells Fargo contends that “[e]quity
3 generally does not support an award of attorney fees under the UDJA [] if
4 similarly situated parties genuinely dispute their rights.” *Hughes*, 2011 MT
5 189, ¶ 16 (citing *United Nat’l Ins.*, 2009 MT 269, ¶ 39; *Mungas*, 2009 MT
6 426, ¶ 46). Wells Fargo asserts that Zinvest does not argue or present any
7 evidence that it is not a sophisticated party with respect to purchasing tax
8 lien certificates and acquiring tax deeds in Montana. Wells Fargo also
9 asserts that the “tangible parameters test” is not met in this case because
10 Wells Fargo filed the declaratory action, not Zinvest.
11
12

13 In supplemental brief, Zinvest argues equitable considerations support
14 an award of attorneys’ fees because Wells Fargo is a large bank and Zinvest
15 is a small family-owned business.
16

17 As an initial matter, Wells Fargo does not contest Zinvest’s claim of
18 \$290.49 in costs, nor does it argue the attorneys’ fees sought are
19 unreasonable if, in fact, Zinvest is entitled to attorneys’ fees.
20

21 The Uniform Declaratory Judgment Act provides the following:
22

23 Further relief based on a declaratory judgment or decree may be
24 granted whenever necessary or proper. The application therefor shall
25 be by petition to a court having jurisdiction to grant the relief. If the
26 application be deemed sufficient, the court shall, on reasonable notice,
require any adverse party whose rights have been adjudicated by a

1 declaratory judgment or decree to show cause why further relief
2 should not be granted forthwith.

3 § 27-8-313, MCA. Wells Fargo has not provided any cause as to why the
4 requested attorneys' fees should not be granted. The Montana Supreme
5 Court has recognized that a Court may award attorney's fees and costs
6 under § 27-8-313, MCA, when a party asserts the Uniform Declaratory
7 Judgment Act as a remedy, when "equitable consideration supports such an
8 award" and the relief is "necessary or proper." *Hughes v. Ahlgren*, 2011 MT
9 189, ¶ 13, 361 Mont. 319, 258 P.3d 439. The Court has determined that
10 "equitable considerations support an award" given the Court's Order
11 Granting Zinvest Motion for Summary Judgment and Denying Wells Fargo
12 Cross-Motion for Summary Judgment. As Wells Fargo does not dispute the
13 costs or the reasonableness of fees, Zinvest's request for fees in the amount
14 of \$11,214.00 and costs in the amount of \$290.49 is allowed, as "necessary
15 and proper."
16 and proper."

17 IT IS FURTHER ORDERED that Zinvest, LLC's Motion for Allowance
18 of Attorneys' Fees is GRANTED.
19 of Attorneys' Fees is GRANTED.

20 **III. Wells Fargo Objection to Zinvest's Supplemental Briefing and**
21 **Supporting Affidavit**

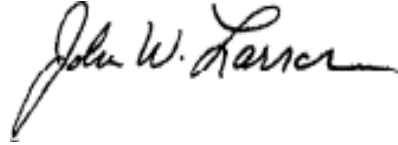
22 On March 3, 2022, Wells Fargo filed an objection to Zinvest February
23 2, 2022, Supplemental brief, March 7, 2022, Reply brief and supporting
24 2, 2022, Supplemental brief, March 7, 2022, Reply brief and supporting
25 2, 2022, Supplemental brief, March 7, 2022, Reply brief and supporting
26 2, 2022, Supplemental brief, March 7, 2022, Reply brief and supporting

1 affidavit, and seeks for the Court to deny Zinvest's request for attorneys'
2 fees. Wells Fargo asserts that Zinvest filed a reply to Wells Fargo's
3 objection to Zinvest's Motion for Allowance of Attorneys' Fees on December
4 14, 2021, a Supplemental brief on February 2, 2022, and a Reply to Wells
5 Fargo's response to Zinvest's Supplemental brief on March 7, 2022. Wells
6 Fargo asserts that in Zinvest's February 2, 2022, Supplemental Brief,
7 Zinvest compares the size of Wells Fargo to the size of a small, family
8 limited liability company. Wells Fargo contends that Zinvest argues that
9 Wells Fargo and Zinvest are not similarly situated. Wells Fargo argues that
10 Zinvest should have presented these grounds long ago and Wells Fargo
11 objects to Zinvest's attempt to argue and present evidence of the purported
12 disparity of the parties as a ground supporting attorneys' fees because these
13 were not grounds specified within M.R.Civ.P.'s 14 day deadline.
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17 The Court has reviewed all briefs submitted on the attorneys' fee issue
18 and both parties were afforded an opportunity to place arguments on the
19 record through supplemental briefing and/or objection briefing. All
20 arguments were reviewed by the Court, and any assertions made in
21 supplemental briefing that Wells Fargo's now objects do not serve as the
22 primary basis for the Court's award of fees and costs. Accordingly,
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1 IT IS FURTHER ORDERED that Wells Fargo's Objection to Zinvest's
2 Supplemental Briefing is overruled as moot.

3 Dated this 10th day of May, 2022.

4 

5
6
7 JOHN W. LARSON, DISTRICT JUDGE

8
9 Copies of the foregoing were sent to:

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12 Salt Lake City, UT 84101
13 chandler.thompson@akerman.com

14 Taylor T. Haywood--AKERMAN LLP
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18 Attorneys for Plaintiff

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21 P.O. Box 1239
22 Billings, MT 59103
23 sgreen@ppbglaw.com

24 Attorneys for Defendant
25
26

CERTIFICATE OF SERVICE

I, Chandler Poole Thompson, hereby certify that I have served true and accurate copies of the foregoing Notice - Other to the following on 05-10-2022:

Taylor Tyson Haywood (Attorney)
1900 Sixteenth Street
Suite 950
Denver CO 80202
Representing: Wells Fargo Bank, N.A.
Service Method: eService

W. Scott Green (Attorney)
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2817 2nd Ave. N. Suite 300
P.O. Box 1239
Billings MT 59103-1239
Representing: Zinvest, LLC
Service Method: eService

Electronically Signed By: Chandler Poole Thompson
Dated: 05-10-2022