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**IN THE
COURT OF APPEALS OF INDIANA**

STANLEY F. COLLESANO, Individually)
and as Trustee of the Enrolled Customer Trust,)
)
Appellant-Defendant,)
)
vs.)
)
PFSI FINANCIAL SOLUTIONS, INC., An)
Indiana Corporation and PREFERRED)
FINANCIAL SOLUTIONS, INC., ex rel. 2300)
SETTLORS OF THE ENROLLED CUSTOMERS)
TRUST,)
)
Appellee-Plaintiff.)

No. 49A05-0611-CV-649

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth H. Johnson, Judge
Cause No. 49D02-0511-PL-045697

DECEMBER 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Stanley F. Collesano, individually, and as Trustee of the Enrolled Customer Trust, (Collesano), appeals the trial court's grant of summary judgment in favor of Plaintiffs-Appellees Preferred Financial Solutions, Inc., an Indiana Corporation, and Preferred Financial Solutions, Inc., *ex rel.* 2300 Settlers of the Enrolled Customer Trust, (PFS).

We affirm.

ISSUES

Collesano raises the following consolidated and restated issues:

1. Whether the trial court erred in dismissing his counterclaim with prejudice;
2. Whether the trial court erred in granting PFS's summary judgment motion because PFS had no standing;
3. Whether the trial court erred in concluding that PFS was entitled to a disgorgement of attorney fees paid to Collesano;
4. Whether the trial court's award of attorney fees was reasonable; and
5. Whether the trial court erred in ordering Collesano to pay post-judgment interest accruing from its June 14, 2006 order granting PFS's summary judgment motion.

FACTS AND PROCEDURAL HISTORY

In 2000, Preferred Financial Solutions, Inc., established a debt settlement program that assists participants in reducing their unsecured credit card debt. After enrolling in

the settlement program, the participants became parties to the Enrolled Customer Trust (the Trust). Pursuant to the terms of the Trust, the participants, also known as settlors, made payments to the Trust rather than to their creditors. When a settlor accumulated the requisite balance in the Trust, a trust representative contacted the settlor's creditor and attempted to negotiate a reduction in the settlor's account. Preferred Financial held a limited power of attorney for the settlors.

In 2003, attorney Collesano entered into a revocable agreement with the settlors wherein he agreed to act as trustee for the Trust. Pursuant to the terms of this agreement, Collesano was paid a minimum of \$6,250.00 per month. During his time as trustee, Collesano received \$195,772.37 in legal fees.

This trust agreement between Collesano and the settlors provided in relevant part as follows:

The purpose of this Enrolled Customer Revocable Trust Agreement is to hold, safeguard, protect, distribute, collect, and invest monies provided to the trust by the settlors, to ensure the proper transfer of funds to the beneficiaries in compliance with all applicable state and federal laws.

* * * * *

The Trustee(s) is/are only allowed to invest funds from the Trust in financial instruments backed by the full faith and credit of the United States of America.

The Trustee may negotiate and settle accounts with Beneficiaries of this Trust, on behalf of Settlor(s), only upon the default of any such specialists, debt negotiators or other agents retained by the Trustee to perform such services. The Trustee is expressly prohibited from exercising this power absent compelling evidence of intentional and continuing default in this respect.

* * * * *

The Trustee may be immediately removed in mid-term only for cause upon written notice to the Trustee, by the Settlor(s) or Trust advisor. Cause shall include but not be limited to: gross malfeasance, gross nonfeasance, intentional tortious acts, criminal acts, and failure to adhere to the 'Prudent Trustee' rule.

In the event the Trustee is removed by the Settlor(s) or the Trust Advisor without adequate cause, the Trustee shall be paid by the Trust as liquidated damages, in a lump sum payment, the amount of \$75,000.00. This liquidated damages payment shall be paid in addition to any outstanding fees or costs to the Trustee.

Appellant's App. at 125-131.

In April 2003, Collesano transferred \$150,000.00 from the Trust's account to a Chicago Title Company account at Bank One. Collesano used \$125,000.00 of this money to pay his client Teresa Gilmore's home mortgage before the bank foreclosed on it. Gilmore was not a member of the Trust. Collesano placed the other \$25,000.00 in his firm's IOLTA account for expenses.

Four months later, in August 2003, Collesano prepared and executed an addendum document that substantially modified the original Trust Agreement. For example, the Restatement and Amendment to the Trust Agreement: 1) removed the requirement that the Trustee invest the Trust's funds in instruments backed by the full faith and credit of the United States of America; 2) removed the definition of what constitutes "cause" justifying the Trustee's removal; 3) extended the Trustee's term from one to seven years; 4) increased the liquidated damages to which the Trustee is entitled at removal from \$75,000.00 to \$250,000.00; and 5) removed the requirement that the Trustee is only entitled to liquidated damages if he is removed without adequate cause. Rather, pursuant

to the amended agreement, Collesano was entitled to the \$250,000.00 if he left his position for any reason, including a voluntary resignation. Collesano signed the amended agreement and typed “AS PER CONTRACT” on the settlors’ signature line.

In June 2005, PFS notified Collesano that he was being terminated as Trustee pursuant to the Trust Agreement because he had: 1) failed to report his activities and the financial condition of the trust; 2) removed funds from the trust without authorization; and 3) failed to provide an accounting. PFS also asked Collesano to provide a full accounting of all funds withdrawn from the Trust’s account, including the money transferred to pay Gilmore’s mortgage. Collesano refused to comply with this request.

Therefore, in November 2005, PFS filed a five-count complaint against Collesano alleging: 1) breach of fiduciary duty; 2) breach of contract; 3) conversion; 4) violation of the Indiana Crime Victim’s Act; and 5) negligence. Collesano responded with a two-count counterclaim against PFS. PFS filed a motion for summary judgment on all counts of its complaint, as well as a motion to dismiss Collesano’s counterclaim pursuant to Indiana Trial Rule 12(B)(6). The trial court granted PFS’s motion to dismiss with prejudice and granted PFS’s summary judgment motion. Specifically, the court’s June 14, 2006, order concluded as follows:

3. Plaintiffs are entitled to judgment as a matter of law based upon the following:
 - a. Article III(A)(1) of the trust agreement limited Collesano’s authority and power as trustee to investing the Trust’s and the Settlers’ funds in instruments backed by the full faith and credit of the United States of America.

- b. Ms. Gilmore's mortgage and promissory note are not instruments backed by the full faith and credit of the United States of America.
- c. By transferring \$150,000.00 from the Trust's account in order to facilitate the saving of Ms. Gilmore's house from foreclosure, Collesano violated his fiduciary duty to Plaintiffs.
- d. By transferring \$150,000.00 from the Trust's account in order to facilitate the saving of Ms. Gilmore's house from foreclosure, Collesano breached his duties under the terms of the trust agreement.
- e. By transferring \$150,000.00 from the Trust's account in order to facilitate the saving of Ms. Gilmore's house from foreclosure, Collesano converted the Trust's money.
- f. Based upon his conversion of the Trust's money, Collesano is liable for treble damages, attorneys fees, and costs of suit pursuant to the Indiana Crime Victims Act I.C. 34-24-3-1.
- g. Based upon Collesano's wrongdoings, Plaintiffs are entitled to a disgorgement of legal fees paid to Collesano in the amount of \$195,772.37.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that summary judgment is hereby entered in favor of Plaintiffs, Preferred Financial Solutions, Inc. and Preferred Financial Solutions, Inc., *ex rel.* 2300 Settlers of the Enrolled Customer Trust and against Defendant Stanley F. Collesano, individually, and as Trustee of the Enrolled Customer Trust, as to all Counts of Plaintiffs' Complaint, and damages in the amount of \$370,772.37 are hereby awarded to Plaintiffs Plaintiffs are DIRECTED to submit to the Court a statement of their attorneys' fees and court costs expended in litigating this matter and also submit a calculation as to the amount of interest and treble damages to which they claim they are entitled. . . .

Appellant's Appendix at 5-6.

On July 13, 2006, after reviewing the Plaintiffs' statements and calculations, the trial court included in the judgment \$11,497.50 in attorney fees; \$130.00 in court costs; \$525,000.00 in treble damages pursuant to I.C. 34-24-3-1(2); \$33,657.00 in prejudgment interest pursuant to I.C. 34-51-4-1; and post judgment interest at the rate of eight percent per annum beginning on June 14, 2006, the date of the court's prior order. As of July 13,

2006, the post judgment interest totaled \$2,686.44, and thereafter, Collesano would owe an additional \$167.90 per day in interest until the judgment was satisfied. Collesano appeals.

DISCUSSION AND DECISION

I. Motion to Dismiss

Collesano first argues that the trial court erred in dismissing with prejudice his counterclaim. T.R. 12 provides in relevant part that “[w]hen a motion to dismiss is sustained for failure to state a claim under subdivision (B)(6) of this rule the pleading may be amended once as of right.” T.R. 12(B). Accordingly, Collesano is correct that a T.R. 12(B)(6) dismissal is without prejudice because the complaining party remains able to file an amended counterclaim within the parameters of the rule. *See Baker v. Town of Middlebury*, 753 N.E.2d 67, 73 (Ind. Ct. App. 2001), *trans. denied*. The trial court therefore erred in dismissing Collesano’s counterclaim with prejudice.

However, Collesano has not shown on appeal how he would have amended his counterclaim to avoid a T.R. 12(B)(6) dismissal. Just as an offer of proof allows this court to determine the admissibility of evidence and the potential for prejudice if it is excluded, we likewise need specific information as to how Collesano would have amended his counterclaim to make a rational assessment of whether he was prejudiced by the trial court’s ruling. *See id.* As Collesano has not demonstrated prejudice, we conclude that the trial court’s error was harmless. *See id.*

II. Standing

Collesano next argues that the trial court erred in granting summary judgment in favor of PFS because PFS did not have standing.¹ Collesano has waived appellate review of this issue because he failed to raise the issue at the summary judgment hearing. *See Pitman v. Pitman*, 717 N.E.2d 627, 633 (Ind. Ct. App. 1999) (stating that a party cannot make an argument to the appellate court unless the party made that argument to the trial court).

Waiver notwithstanding, we find no error. The issue of standing focuses on whether the complaining party is the proper one to invoke the court's power. *Alexander v. PSB Lending Corporation*, 800 N.E.2d 984, 989 (Ind. Ct. App. 2003), *trans. denied*. The standing requirement assures that litigation will be actively and vigorously contested, as plaintiffs must demonstrate a personal stake in the litigation's outcome in addition to showing that they have sustained, or are in immediate danger of sustaining, a direct injury as a result of the defendant's conduct. *Id.*

Here, PFS established the Debt Settlement Program, the Trust is a part of this program, and PFS holds a limited power of attorney for the settlors of the Trust. Further, PFS terminated Collesano's position as trustee, an action that Collesano has not challenged. Under these circumstances, we find no error in the trial court's grant of summary judgment in favor of PFS.²

¹ To the extent that Collesano argues that PFS had the burden to prove that it had standing, Collesano is mistaken. Standing is an affirmative defense for which Collesano had the burden of proof. *See Freedom Express, Inc. v. Merchandise Warehouse Co.*, 647 N.E.2d 648, 651 (Ind. Ct. App. 1995).

² Collesano also argues that the trial court erred in granting PFS's summary judgment motion because PFS could not properly bring an "ex rel." action on behalf of the trust settlors. This issue is

III. Disgorgement of Attorney Fees

Collesano further argues that the trial court erred in concluding that PFS was entitled to a disgorgement of legal fees paid to Collesano. Specifically, he claims that “[e]xactly why the trial court ordered disgorgement of legal fees remains a mystery.” Appellant’s Brief at 19.

Disgorging an agent of all compensation received during a period in which the agent breached a fiduciary duty to the principal is an equitable remedy consistent with Indiana precedent that a claim for a breach of a fiduciary duty is an equitable claim. *Wenzel v. Hopper & Galliher, P.C.*, 830 N.E.2d 996, 1001 (Ind. Ct. App. 2005). Here, the trial court concluded that Collesano breached his fiduciary duty to the settlors when he transferred \$150,000.00 from the Trust’s account in order to save his client’s home from foreclosure. Collesano does not challenge this conclusion. Because Collesano breached his fiduciary duty to the settlors, the trial court did not err in ordering him to disgorge the legal fees paid by the settlors. *See also Four Winds, LLC v. Smith & DeBonis, LLC*, 854 N.E.2d 70,76, n.6 (Ind. Ct. app. 2006), *trans. denied*, (explaining that attorney who breaches a duty may be disgorged of fees already received).

waived because Collesano raised it for the first time in his motion to correct errors. *See Grayson v. Union Federal Savings and Loan Association of Crawfordsville*, 851 N.E.2d 1017, 1022 (Ind. Ct. App. 2006), *trans. denied*, (stating that issue raised for the first time in a motion to correct errors is waived).

Additionally, Collesano argues that the trial court erred in ordering him to pay statutory treble damages. Specifically, his sole contention is that because PFS lacked standing, “it had no right to any damages, costs and fees under I.C. 34-24-3-1.” Appellant’s Brief at 21. Because we have just determined that PFS had standing, this argument fails as well.

IV. Reasonableness of Attorney Fees

Collesano also argues that the trial court's award of \$11,497.50 in attorney fees to PFS was not reasonable. What constitutes reasonable attorney fees is a matter largely within the trial court's discretion. *Franklin College v. Turner*, 844 N.E.2d 99, 105 (Ind. Ct. App. 2006). In determining whether a fee is reasonable, the trial court may consider such factors as the hourly rate that is charged, the result achieved, and the difficulty of the issues that are involved in the litigation. *Id.*

Here, PFS submitted an affidavit from one of its attorneys, which explained that four attorneys and one law clerk worked on the case, including two partners who billed at \$260.00 per hour, a seven-year associate who billed at \$180.00 per hour, a first-year attorney who billed at \$105.00 per hour, and the law clerk who also billed at \$105.00 per hour. PFS also submitted four pages of time entries in support of its request. The entries showed that the four attorneys and one law clerk worked a total of 62.9 hours on the case.

Collesano does not challenge the attorneys' hourly rates or the amount of time the attorneys spent on each project. Rather, his sole contention is that the PFS's "conclusory affidavit stating that [the attorney fees] are reasonable . . . does not suffice to establish the reasonableness of the fees." Appellant's Brief at 23. However, as this court pointed out in *Daimler Chrysler Corporation v. Franklin*, 814 N.E.2d 281, 287 (Ind. Ct. App. 2004), the reasonableness of attorney fees is a matter about which the judge, being a lawyer, may take judicial notice. Based upon the facts and circumstances of this case, the court's award of attorney fees to PFS was reasonable, and we find no abuse of the trial court's discretion. *See id.*

V. Post-Judgment Interest

Lastly, Collesano argues that the trial court erred in ordering him to pay post-judgment interest accruing from the court's June 14, 2006 judgment granting PFS's summary judgment motion. According to Collesano, the June 14 judgment is not a final judgment triggering the accrual of post-judgment interest.

Post-judgment interest arises as a matter of statutory law. *Tincher v. Davidson*, 784 N.E.2d 551, 553 (Ind. Ct. App. 2003). Specifically, Indiana Code Section 24-4.6-1-101 requires post-judgment interest from the date of a verdict in a jury trial or a "finding of the court" in a bench trial. Here, the trial court made a finding and awarded PFS \$370,772.37 in damages in its June 14 judgment. By the plain language of the statute, PFS was entitled to post-judgment interest from the date of this order. *See Tincher*, 784 N.E.2d at 554. We find no error.

Affirmed.

RILEY, J., and ROBB, J., concur.