



**June 24, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

**Case Summary**

Plaintiff-Appellant Robertson Developers, LLC d/b/a White River Plaza (“Robertson Developers”) appeals a judgment in favor of Defendants-Appellees Jerry Hodges, Walter Skinner, George Sheridan, Jr., John Bultman, and Richard Grimes (collectively, “Guarantors”) upon a claim for payment of a lease. Robertson Developers also challenges an order for the payment of attorney’s fees. We affirm, and remand for a determination of reasonable appellate attorney’s fees.

**Issues**

Robertson Developers presents two issues for review:

- I. Whether the judgment in favor of the Guarantors, based upon the trial court’s conclusion that the Guarantors were released by a material alteration, without their consent, to the underlying lease, is contrary to law; and
- II. Whether the trial court erred in awarding attorney’s fees to three of the Guarantors.

**Facts and Procedural History**

In 2002, the Guarantors and other former Marines living in Delaware County, Indiana procured a charter from the Marine Corps League, a national veteran’s organization, for a local detachment to be known as the Eagle Globe and Anchor Detachment (“the League”). On February 18, 2003, the League executed a three-year lease for premises at a strip mall in

White River Plaza in Muncie, owned by Robertson Developers, in which to operate a bar. The lease consisted of twelve pages, a form lease procured by Robertson Developer owner/manager David Robertson (“Robertson”). Robertson and Steven Surface, Commandant of the League, signed the lease.

Robertson also provided a thirteenth page, including language that he had drafted: “The following members of the Marine Corps League, in order to induce the Lessor to enter into this Lease, do hereby guarantee the performance of such by Lessee and do volunteer to be personally and severally liable for its obligations as agreed to above.” (Pl. Ex. 2, pg. 13.) At a League meeting, Surface passed around the guaranty page. Six members signed, including Hodges, Grimes, and Bultman. Bultman retained a copy of the lease, and sometime thereafter obtained signatures from Skinner and Sheridan.<sup>1</sup> Ultimately, the guaranty page bore signatures from Ronald Alexander, Vincent Hughes, Jerry Hodges, Walter Skinner, George Sheridan, Jr., John Bultman, William Said, and Richard Grimes.

The bar was not a profitable undertaking, and the League soon experienced difficulty in meeting its obligations. The League failed to make the June 1, 2003 lease payment and was unable to fully pay for remodeling costs. Robertson and Vincent Hughes, the Adjutant for the League, met to discuss the League’s financial predicament. Robertson agreed to assist the League by providing some cash, re-structuring the rent payments, and paying two League creditors.

On June 23, 2003, Robertson and Surface executed a document prepared by Robertson

---

<sup>1</sup> The trial court found that there were at least two originals of the guaranty page.

and entitled “Addendum to Lease.” (Pl. Ex. 3.) Therein, Surface and Robertson agreed that the League would receive “credit” for the June and July 2003 rent and telephone bills and \$550 in cash. (Pl. Ex. 3.) Robertson Developers would pay, on the League’s behalf, \$1,639.63 to Gillespie & Son for cooler and plumbing repairs, and would “reimburse for cost of replacing bench seats, tables, and chairs from Rob Coombs.” (Pl. Ex. 3.) In turn, the League’s rental installments would be increased to \$1,765.47 for the remainder of 2003, “plus Fifty Dollar increase each succeeding year.” (Pl. Ex. 3.) After execution of the Addendum, the League continued to occupy the leased premises throughout the original three-year lease period and some additional months, making only sporadic payments to Robertson Developers.

On August 11, 2006, Robertson Developers filed a complaint against the League, Steven Surface, Ronald Alexander, Vincent Hughes,<sup>2</sup> Jerry Hodges, Walter Skinner, George Sheridan, Jr., John Bultman, William Said, and Richard Grimes. Sheridan, Hodges, and Skinner filed a counterclaim asserting that Robertson Developers had filed a groundless complaint permeated by bad faith. They sought attorney’s fees pursuant to Indiana Code Section 34-52-1-1. Grimes and Bultman filed a counterclaim alleging abuse of process.

On September 2, 2009, a bench trial was conducted, at which Hodges, Skinner, Sheridan, Bultman, and Robertson appeared. During the hearing testimony, some of the Guarantors asserted that they were tricked into signing the guaranty page, while some acknowledged signing without trickery but denied knowledge of the document’s intended

---

<sup>2</sup> Surface, Alexander, and Hughes were dismissed as defendants.

purpose. One guarantor acknowledged signing with knowledge that the document was intended to impose personal liability for the lease upon the Guarantors. Nonetheless, the trial court concluded that none of the Guarantors had challenged the execution of the guaranty in their responsive pleadings, and thus the validity of the execution of the guaranty would be presumed.

Ultimately, however, the trial court concluded that the Guarantors were not liable under the guaranty because there was a material alteration, without the Guarantors' consent, of underlying obligations:

[T]he addendum entered [into] on June 23, 2003, was a material alteration to the lease and guaranty entered into between the parties on February 28, [sic] 2003, and the named defendants were relieved and discharged of any further obligation to the plaintiff.

(App. 54.) On September 28, 2009, the trial court issued a judgment finding against Robertson Developers on its complaint but dismissing the counterclaim for abuse of process.

As to the counterclaim for statutory attorney's fees, \$14,760 was awarded on behalf of Hodges, Sheridan, and Skinner. This appeal ensued.

## **Discussion and Decision**

### **I. Guaranty of Lease**

Robertson filed suit against the Guarantors for payment upon the lease and thus had the burden of proving his claim. In challenging the trial court's judgment upon the guaranty of the lease, Robertson appeals from a negative judgment.<sup>3</sup> A party appealing a negative

---

<sup>3</sup> As to the counterclaim for attorney's fees, the Guarantors bore the burden of proof and Robertson appeals from an adverse judgment as opposed to a negative judgment.

judgment must establish that the evidence is without conflict and leads to but one conclusion, which the trial court did not reach. Truck City of Gary, Inc. v. Schneider Nat'l Leasing, 814 N.E.2d 273, 277 (Ind. Ct. App. 2004). The appellant may attack the trial court's judgment only as contrary to law. Id. On appeal, we affirm the judgment unless all evidence leads to the conclusion that the trial court's findings are clearly erroneous and against the logic and effect of the facts. Id. We neither reweigh the evidence nor judge the credibility of the witnesses, but will consider only the evidence most favorable to the judgment together with all reasonable inferences that may be drawn therefrom. Id.

Robertson Developers does not challenge any particular factual finding of the trial court (including the findings that the lease was altered by the addendum and that the Guarantors lacked knowledge of the addendum and did not consent to it). Moreover, Robertson Developers concedes that a material alteration would operate to discharge the Guarantors, citing Cunningham v. MidState Bank, 544 N.E.2d 530 (Ind. Ct. App. 1989), trans. denied. The crux of Robertson Developers' argument is that alterations to the underlying obligation did not constitute a "material" alteration such that the Guarantors were discharged. "The questions of materiality and what the parties contemplated at the time the guaranty was executed are questions of fact that must be analyzed on a case by case basis." S-Mart, Inc. v. Sweetwater Coffee Co., Ltd., 744 N.E.2d 580, 587 (Ind. Ct. App. 2001), trans. denied.

A guaranty, which is a promise to answer for the debt, default, or miscarriage of another person, is collateral to the debt itself and represents a conditional promise whereby

the guarantor promises to pay only if the principal debtor fails to pay. Id. at 585. “A guarantor is a favorite in the law and is not bound beyond the strict terms of the engagement. Moreover, a guaranty of a particular debt does not extend to other indebtedness not within the manifest intention of the parties.” Goeke v. Merchants Nat’l Bank & Trust Co. of Indianapolis, 467 N.E.2d 760, 765 (Ind. Ct. App. 1984), trans. denied (internal citation omitted). Accordingly, when parties cause a material alteration of an underlying obligation, absent the consent of the guarantor, the guarantor is discharged from further liability whether the change is to his or her injury or benefit. S-Mart, Inc. 744 N.E.2d at 586.

“A material alteration which will effect a discharge of the guarantor must be a change which alters the legal identity of the principal’s contract, substantially increases the risk of loss to the guarantor, or places the guarantor in a different position.” Yin v. Society Nat’l Bank Indiana, 665 N.E.2d 58, 64 (Ind. Ct. App. 1996), trans. denied. The change must be binding. Id. A material alteration of a lease occurs where an agreement is made between the lessor and lessee changing the terms of the lease, or the time for the payment or rent, or in some cases the amount of the rent payable. S-Mart, Inc., 744 N.E.2d at 586 (citing 49 Am. Jur. 2D Landlord and Tenant § 822 (1995)).

Here, the Guarantors had no knowledge of the addendum, and had not previously signed a continuing guaranty in contemplation of changes. As to the substance of the lease alteration, the trial court found that it created increases in the monthly rent, and these higher amounts formed the basis upon which penalties and interest were calculated. Additionally, the court observed that the relationship between the parties had changed from solely landlord

and tenant to a combination of creditor/debtor and landlord/tenant. The evidence supports the findings. The addendum was a material alteration outside the contemplation of the Guarantors at the time they executed the guaranty. The trial court did not err in determining that the addendum discharged the Guarantors from personal liability for the debts of the League arising from the breach of the lease between the League and Robertson Developers.

## II. Attorney's Fees

Robertson Developers next challenges the award of attorney's fees to three of the Guarantors. They had alleged that (1) Robertson pursued a claim against them after having been advised in writing by their attorney that they had been released from any obligations on the guaranty when the lease was materially altered, (2) Robertson should have accepted that legal opinion, in light of long-standing, well-established law, and (3) his persistence constituted bad faith. As further evidence of bad faith, they point to evidence that Robertson's collection agent made veiled threats to one of the Guarantors.

The trial court found that there were "no facts to support [the] claims for liability of Defendants Sheridan, Skinner and Hodges pursuant to the terms of the guaranty." (App. 53.) The trial court also found that "Robertson's criminal enforcement tactics through his agent precipitated Robertson's bad faith litigation against Defendants Sheridan, Hodges and Skinner." (App. 53.) Based upon these findings, the trial court concluded that the claims against the three guarantors were "oppressive, groundless and in bad faith." (App. 55.)

Robertson Developers argues that it was entitled to its day in court to argue that the addendum was merely an accommodation that did not significantly alter the total sums due

under the lease. Robertson Developers also denies the existence of any bad faith, pointing to evidence of leniency and congeniality during the performance of the lease. Finally, Robertson Developers points to the absence of evidence that Robertson authorized his collection agent to make any threat against any of the Guarantors.

Indiana adheres to the “American Rule” with respect to the payment of attorney fees, which requires each party to pay his or her own attorney fees absent an agreement between the parties, statutory authority, or rule to the contrary. Breining v. Harkness, 872 N.E.2d 155, 161 (Ind. Ct. App. 2007), trans. denied. Indiana Code Section 34-52-1-1(b) provides for the payment of attorney fees when a litigant has pursued a claim or defense that is frivolous, unreasonable or groundless.

Appellate review of the award of statutory attorney’s fees proceeds in three steps. Smyth v. Hester, 901 N.E.2d 25, 33 (Ind. Ct. App. 2009), trans. denied. First, we review the trial court’s findings of fact under a clearly erroneous standard, reversing only if we are left with a definite and firm conviction that a mistake has been made. Id. Second, we review de novo the trial court’s legal conclusions. Id. Third, we review the trial court’s decision to award fees and the amount thereof under an abuse of discretion standard. Id.

A claim or defense is “groundless” if no facts exist which support the legal claim presented by the losing party. Breining, 872 N.E.2d at 161 (citing Kahn v. Cundiff, 533 N.E.2d 164, 167 (Ind. Ct. App. 1989), summarily aff’d, 543 N.E.2d 627 (Ind. 1989)). A trial court is not required to find an improper motive to support an award of attorney fees; rather, an award may be based solely upon the lack of a good faith and rational argument in support

of the claim. Id. Accordingly, the award at issue here is not dependent upon the Guarantors having established that Robertson acted with ill will, as expressed by oblique threats from his collector. Indeed, there is no evidence of record that Robertson authorized or had knowledge of such communications. Instead, we look to whether a good faith and rational argument supported Robertson Developers' claims against Sheridan, Skinner, and Hodges.

On June 13, 2006, the attorney for the three men issued a letter addressed to Robertson and White River Plaza, Inc., providing in pertinent part as follows:

[W]hen you entered into an Addendum to Lease on June 23, 2003, the alleged guarantors were released and discharged from any further obligation. There is overwhelming Indiana legal precedent going back at least 150 years that clearly holds that "any change in the principal's (Marine Corps League's) contract to which the guarantor does not consent, will discharge the guarantor from liability."

(Ex. pg 232.) Robertson Developers did not dispute the relevant law. Moreover, it conceded that the lease was altered and did not assert that Sheridan, Skinner, or Hodges consented to the alteration.

The argument that the alteration was not "material" because the dollar amount of the League's obligation was increased by only a few hundred dollars ignores the fact that the change to the lease was not limited to a change in the amount due. The sum of \$550 was loaned to the League; other sums were paid to creditors on the League's behalf. The amount of the lease payments changed and interest and penalties were calculable on the higher installments. Some of the due dates changed as an accommodation; some late fees were forgiven. Ultimately, Robertson Developers was both the lessor and a lender after the addendum was executed. The trial court properly found that Robertson Developers' claims

against Sheridan, Skinner, and Hodges were not supported by a good faith and rational argument.

As to the amount of attorney's fees awarded, Robertson Developers claims that there is an absence of evidence that the men incurred or paid attorney's fees of \$14,760. However, at the hearing, the parties stipulated that evidence of attorney's fees incurred by both Robertson Developers and the Guarantors would be submitted by affidavit. Robertson Developers has not shown that \$14,760 is an unreasonable amount incurred in the defense of the claims against Sheridan, Skinner, and Hodges. Robertson Developers has not demonstrated an abuse of discretion in the trial court's decision to award attorney's fees or the amount thereof.

Additionally, Guarantors have requested appellate attorney's fees pursuant to Indiana Appellate Rule 66(E). "[A] discretionary award of damages has been recognized as proper when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." Orr v. Turco Mfg. Co., 512 N.E.2d 151, 152 (Ind. 1987). In considering a request for appellate attorney's fees, we exercise extreme restraint because of the potential chilling effect upon the exercise of the right to appeal. Plaza Group Properties, LLC v. Spencer County Plan Comm'n, 911 N.E.2d 1264, 1274 (Ind. Ct. App. 2009), trans. denied. However, in the circumstances presented here, we find that the request for appellate attorney's fees should be granted and we remand for a determination of the amount of those fees.

Affirmed and remanded.

MAY, J., and BARNES, J., concur.