Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Jul 05 2011, 9:20 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

DANE L. TUBERGEN
Hunt Suedhoff Kalamaros LLP
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE:

KAREN T. MOSES
Baker & Daniels LLP
Fort Wayne, Indiana

IN THE
COURT OF APPEALS OF INDIANA

LARRY E. SNELL,	)	
	)	
Appellant–Cross-Appellee,	)	
	)	
vs.	)	No. 02A03-1010-CC-523
	)	
K-INDUSTRIAL, LLC,	)	
	)	
Appellee–Cross-Appellant.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Daniel G. Heath, Judge
Cause No. 02D01-0705-CC-628

July 5, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant–Cross-Appellee Larry E. Snell contends that the trial court erred to the extent that it ruled in favor of Appellee–Cross-Appellant K-Industrial, LLC, in his breach of contract suit. Snell contends that the trial court erred in ruling that K-Industrial was not obligated to distribute to him funds adequate to offset the 2005 federal tax liability he incurred due to certain income received from K-Industrial and in ordering that he pay some of K-Industrial's attorney's fees. K-Industrial cross-appeals, contending that the trial court erred in concluding that it should distribute to Snell a Michigan refund issued for overpayment of 2005 state composite taxes and in ordering that it pay some of Snell's attorney's fees. We affirm in part and reverse in part.

FACTS

In 2000, Snell purchased a ninety percent interest in K-Industrial, with Bill Sale taking a ten percent interest. K-Industrial is a "pass-through" entity that is not taxed directly. Instead, the members of K-Industrial pay personal income tax on a pro rata share of its income. When Snell was majority member of K-Industrial, he directed the company to distribute to all members an amount that would reimburse them for personal income tax liability related to their ownership of K-Industrial.

At the end of 2005, Snell, who by this time had transferred a 3.33% interest to Brad Moos, agreed to sell his remaining 86.67% interest in K-Industrial back to the company. Following the sale, Sale would have a seventy-five percent interest in K-Industrial and Moos would have a twenty-five percent interest. To that end, an "Agreement for Liquidation of Interest" ("the Agreement") was prepared and executed by Snell and K-Industrial on January

3, 2006.

The Agreement provided that K-Industrial would purchase Snell's interest for $1,733,400.00, effective December 31, 2005. In addition, the Agreement provided in relevant part as follows:

> 2.01. Both [K-Industrial] and [Snell] shall have such remedies as may be available at law or in equity in the event of any default or breach of this contract. Each party is entitled to recover its reasonable attorney fees, cost and expenses incurred by reason [of] enforcing its rights herein under, including the expenses of preparing any notice of delinquency or other legal action.
>
> ….
>
> 5.01. All Federal and State income tax liability shall be determined and distributed by March 15, 2006, for the taxable year, 2005.

Appellant's App. p. 96.

On February 27, 2006, Snell reported to K-Industrial that his K-Industrial-related federal tax liability for 2005 was $55,267.20, an estimate based on a year-end financial statement provided him by K-Industrial. On March 2, 2006, K-Industrial issued a check in Snell's name for $55,276.20.

As it happens, when an accounting firm hired by Snell before he left K-Industrial finished the company's 2005 federal tax return after March 15, 2006, the company's income, and therefore Snell's federal tax liability, was significantly higher than earlier estimated. In fact, Snell's 2005 K-Industrial-related federal tax liability turned out to be $26,567.20 higher than the total amount the company distributed to him.

On or about October 17, 2006, Snell sent a letter to K-Industrial demanding an additional $26,567.50 distribution for federal taxes and $10,845 for overpayment of

Michigan composite taxes. In the end, K-Industrial never made any further distributions to Snell related to 2005 taxes.

On May 25, 2007, Snell sued K-Industrial for breach of contract, contending that it breached the Agreement by failing to fully reimburse him for his 2005 tax liability and for his overpayment of Michigan composite taxes. At some point, K-Industrial moved for summary judgment and Snell cross-moved for partial summary judgment. On August 2, 2009, the trial court denied K-Industrial's summary judgment motion and granted Snell's partial summary judgment cross-motion, concluding that K-Industrial, as a "pass-through" entity, must pass to him the appropriate percentage of any refund issued by Michigan for overpayment of 2005 composite taxes in the same way that it passes through income.

A bench trial on the federal tax issue was held on March 8 and 9, 2010. On June 17, 2010, the trial court issued findings and conclusions, ruling that K-Industrial was not obligated to make any more distributions to Snell related to his 2005 K-Industrial-related federal tax liability and that, pursuant to the Agreement, K-Industrial was entitled to attorney's fees incurred in defending against Snell's claim. On October 22, 2010, following a hearing, the trial court awarded Snell $11,069.12 in attorney's fees incurred in pressing the Michigan composite tax refund claim and K-Industrial $106,430.38 in fees incurred in defending the federal income tax claim. Both Snell and K-Industrial appeal.

DISCUSSION AND DECISION

Standard of Review

When, as here, the trial court enters findings of fact and conclusions thereon, we apply

the following two-tiered standard of review: we determine whether the evidence supports the findings and the findings support the judgment. *Clark v. Crowe*, 778 N.E.2d 835, 839 (Ind. Ct. App. 2002). The trial court's findings of fact and conclusions thereon will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. *Id*. at 839-40. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id*. at 840. This court neither reweighs the evidence nor assesses the credibility of witnesses, but considers only the evidence most favorable to the judgment. *Id*.

I. Snell's Federal Tax Liability

Snell's argument is limited to his contention that the Agreement is unambiguous and required K-Industrial to both determine the amount of and distribute tax liability payments to members by March 15, 2006, and that it therefore breached the Agreement by failing to do so. It is well-settled that "[i]f the terms of a written contract are ambiguous, it is the responsibility of the trier-of-fact to ascertain the facts necessary to construe the contract." *Newnam Mfg., Inc. v. Transcon. Ins. Co.*, 871 N.E.2d 396, 401 (Ind. Ct. App. 2007). However, "[a] contract is ambiguous only if reasonable persons would differ as to the meaning of its terms." *Oxford Fin. Group, Ltd. v. Evans*, 795 N.E.2d 1135, 1142 (Ind. Ct. App. 2003) (citing *Beam v. Wausau Ins. Co.*, 765 N.E.2d 524, 528 (Ind. 2002)). "In interpreting an unambiguous contract, a court gives effect to the parties' intentions as expressed in the four corners of the instrument, and clear, plain, and unambiguous terms are conclusive of that intent." *Id*. (citing *Hyperbaric Oxygen Therapy Sys., Inc. v. St. Joseph*

Med. Ctr. of Ft. Wayne, Inc., 683 N.E.2d 243, 247 (Ind. Ct. App. 1997)). "Courts may not construe clear and unambiguous provisions, nor may it add provisions not agreed upon by the parties." *Id*. (citing *Hyperbaric Oxygen Therapy Sys.*, 683 N.E.2d at 247-48).

As previously mentioned, section 5.01 of the Agreement provided that "[a]ll Federal and State income tax liability shall be determined and distributed by March 15, 2006, for the taxable year, 2005." Appellant's App. p. 96. We do not believe that this section unambiguously required K-Industrial to determine the partners' tax liability, which is what it must have done for Snell's argument to carry the day. To expand on this last thought, if we conclude that the Agreement is ambiguous, we would be required to rule in K-Industrial's favor, given extrinsic evidence indicating it was understood that it was Snell's duty to determine his own tax liability. Of course, K-Industrial also wins if the Agreement unambiguously placed the onus of determination on Snell. To reiterate, the Agreement must have unambiguously placed the duty of determining Snell's tax liability on K-Industrial in order for Snell to win on this claim.

As Snell seems to appreciate, Section 5.01 does not specifically name K-Industrial as the party responsible for determination of Snell's tax liability, and such a duty cannot be fairly inferred from its language. Snell, however, argues that his lack of official authority at K-Industrial after January 3, 2006, and K-Industrial's obligations under Federal law mean that the only reasonable interpretation of section 5.01 is that K-Industrial was responsible for determining his tax liability. We agree that if Federal law required K-Industrial to determine Snell's tax liability, that obligation became part of the Agreement. *See, e.g.*, *Miller v. Geels*,

643 N.E.2d 922, 928 (Ind. Ct. App. 1994) ("Indeed, it is well settled that, unless the contract provides otherwise, all applicable law in force at the time the agreement is made impliedly forms a part of the agreement without any statement to that effect."), *trans. denied*. Snell's argument, however, erroneously conflates K-Industrial's statutory duty to report Snell's share of the company's income to him and prepare its own tax return, *see* 26 U.S.C. § 6031 (2005),[1] with a duty to determine Snell's related tax liability, which is not the same thing. Snell's tax liability *vis-à-vis* his share of K-Industrial's income could not be known unless myriad other factors were taken into account, such as his other income, deductions, credits, etc., matters about which K-Industrial was under no obligation to know. K-Industrial's only relevant statutory duty was to tell Snell how much of its income was imputed to him; it was up to *Snell* to determine how that affected his personal tax liability. Neither the language of Section 5.01 nor applicable Federal law imposed a duty upon K-Industrial to determine Snell's tax liability. As such, the trial court's judgment in favor of K-Industrial on this claim

[1] Title 26, Section 6031 of the United States Code provides, in part, as follows:

> **(a) General rule**.—Every partnership (as defined in section 761(a)) shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowable by subtitle A, and such other information, for the purpose of carrying out the provisions of subtitle A as the Secretary may by forms and regulations prescribe, and shall include in the return the names and addresses of the individuals who would be entitled to share in the taxable income if distributed and the amount of the distributive share of each individual.
> **(b) Copies to partners.**—Each partnership required to file a return under subsection (a) for any partnership taxable year shall (on or before the day on which the return for such taxable year was required to be filed) furnish to each person who is a partner or who holds an interest in such partnership as a nominee for another person at any time during such taxable year a copy of such information required to be shown on such return as may be required by regulations.

was not clearly erroneous.[2]

II. K-Industrial's Attorney's Fees

Snell contends that the trial court erroneously awarded attorney's fees to K-Industrial accrued in defending against his breach of contract claim. This argument depends entirely on a favorable ruling on the underlying breach of contract claim, and, as we have already concluded that Snell's argument in that regard is without merit, we leave the trial court's award of attorney's fees to K-Industrial in place.

III. Michigan Composite Taxes

K-Industrial contends that the trial court erroneously entered summary judgment in favor of Snell on his claim that he was entitled to a *pro rata* share of a refund issued by Michigan following an overpayment of composite tax for the year 2005. When reviewing the grant or denial of a summary judgment motion, we apply the same standard as the trial court. *Merchs. Nat'l Bank v. Simrell's Sports Bar & Grill, Inc.*, 741 N.E.2d 383, 386 (Ind. Ct. App. 2000). Summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.*; Ind. Trial Rule 56. All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. *Id.* To prevail on a motion for summary judgment, a party must demonstrate that the undisputed material facts negate at least one element of the other

[2] Because we conclude that the Agreement did not unambiguously impose a duty on K-Industrial to determine Snell's tax liability, we need not address Snell's arguments that the trial court erroneously considered extrinsic evidence and construed the contract against him or K-Industrial's argument that Snell waived any objection to the use of extrinsic evidence.

party's claim. *Id*. Once the moving party has met this burden with a prima facie showing, the burden shifts to the nonmoving party to establish that a genuine issue does in fact exist. *Id*. The party appealing the summary judgment bears the burden of persuading us that the trial court erred. *Id*.

While acknowledging that Snell was entitled to his share of overpayment of Michigan composite tax for 2005 if K-Industrial was a "pass-though" entity, K-Industrial contends that Snell failed to designate any evidence that K-Industrial was, in fact, a "pass-through" entity. Snell, however, designated, *inter alia*, the Agreement, which clearly identifies K-Industrial as "an Indiana Limited Liability Company[.]" Appellant's App. p. 94. As this court has observed, LLCs "are treated by federal and state taxing bodies in the same way as partnerships, that is, income 'passes through' the entity and is taxed to the member, an owner of an interest in the company." *Five Star Concrete, L.L.C. v. Klink, Inc.*, 693 N.E.2d 583, 586 (Ind. Ct. App. 1998).

Snell also designated a deposition of Sale that included the following exchange:

> Q. Is it your understanding – and I just want to be clear [on] this. It might seem redundant. Is it your understanding that once the numbers were calculated, each member of the LLC would pay their fair share of the taxes, and then the company would reimburse you for what you had paid in taxes through the company's profits?
>
> A. Again, the way that it was done was Larry generated the numbers based on – I believe it was – he used thirty-five percent (35%). And then it was done on a percentage basis. So if he had ninety percent (90%), he would receive 90% of that. I would receive ten percent (10%) of that. And it was typically – that was done before the taxes were due.

Cross-Appellee's App. pp. 16-17. Snell designated sufficient evidence to establish K-

Industrial's "pass-through" status, and K-Industrial points to no designated evidence disputing that status. The trial court did not err in granting Snell's motion for partial summary judgment and directing that the Allen County Clerk, who apparently has custody of the refund proceeds, issue a check to Snell in the appropriate amount.

IV. Snell's Attorney's Fees

K-Industrial contends that the trial court's award of attorney's fees to Snell accrued in pursuing his Michigan composite tax claim was an abuse of discretion. K-Industrial argues that whatever rights Snell had to the Michigan composite tax refund, they did not arise under the Agreement, and so could not be the basis of an award of attorney's fees. As previously mentioned, the Agreement provides that "[e]ach party is entitled to recover its reasonable attorney fees, cost and expenses incurred by reason [of] enforcing its rights *herein under*[.]" Appellant's App. p. 96 (emphasis added).

We agree with K-Industrial that its obligations to Snell under the law to effectuate or assist in the pass-through of the Michigan refund did not arise under the Agreement. Section 2.01 of the Agreement obligated K-Industrial to distribute to Snell funds necessary to cover his previously-determined state and federal tax liabilities related to K-Industrial income for the year 2005 by March 15, 2006. At the very least, however, there is no evidence that there was any determination by either party made before March 15, 2006, regarding the overpayment of the Michigan composite tax at issue here, which is what was required under the Agreement to trigger K-Industrial's obligation to distribute funds. While all seem to agree that Snell is entitled to his share of the Michigan composite tax refund, it is by

operation of law and not because of an obligation arising under the Agreement. We therefore reverse the trial court's award of attorney's fees to Snell.

Conclusion

We affirm the trial court's judgment in favor of K-Industrial that it did not breach the Agreement and that it is entitled to an award of attorney's fees and the trial court's grant of partial summary judgment in favor of Snell. We reverse the trial court's award of attorney's fees to Snell.

We affirm in part and reverse in part.

BAKER, J., and MAY, J., concur.