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ATTORNEY FOR APPELLANTS:

IRVING L. FINK
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

STEVEN M. LUTZ
Church, Church, Hittle & Antrim
Fishers, Indiana

FILED
Sep 21 2011, 9:34 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

BARBARA NOONAN, ROBERT NOONAN, and EARNEST CROSS,	)	
Appellants,	)	
vs.	)	No. 49A02-1104-CC-345
SLF, LLC.,	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Michael D. Keele, Judge
Cause No. 49D07-0802-CC-7052

September 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Barbara Noonan, Robert Noonan, and Earnest Cross ("Tenants") appeal the trial court's entry of summary judgment in favor of SLF, LLC ("Landlord"). Tenants sued Landlord for damages, alleging that Landlord caused the loss of certain personal property and equipment from restaurant premises they had leased from Landlord. Landlord cross-claimed for breach of the lease agreement and default on rent payments. During discovery, Tenants failed to respond or otherwise object to requests for admissions. Accordingly, those matters, which included admissions that Tenants breached their lease agreement with Landlord, defaulted on rent payments, and were permitted to retrieve all personal property from the premises, were deemed admitted by operation of law.

In light of Tenants' admissions, the trial court determined that no genuine issue of material fact remained and entered summary judgment in favor of Landlord. On appeal, Tenants contend that genuine issues of material fact remain and, therefore, summary judgment is not appropriate. We disagree and affirm the trial court's entry of summary judgment. Upon Landlord's request and pursuant to the terms of the lease agreement, we remand to the trial court for a determination of reasonable appellate attorney's fees to be awarded to Landlord.

Facts and Procedural History

In May 2002, Landlord entered into a lease agreement with Diana Miller and Jason Miller for commercial space on Pendleton Pike in Indianapolis. The Millers ran a pizza restaurant on the premises. The lease was later assigned to Kim Fischer upon her purchase of

the pizza business. In July 2007, Tenants began operating the restaurant and the lease was assumed by Tenants pursuant to a written assignment from Fischer. The lease provided that Tenants would pay rent to Landlord on or by the first day of each month and the payments became subject to late fees if not paid within four days of the due date. Tenants failed to pay rent for several months, including October, November, and December 2007, and all subsequent months. Landlord provided written notice to Tenants that they were in default of the lease agreement.

Landlord observed that Tenants had ceased operating their pizza business and had closed to the public in December 2007. Landlord met with one of the Tenants on the premises and provided her the opportunity to remove any personal property or equipment that she wished to remove. Thereafter, Landlord obtained an appraisal of the equipment that remained on the premises by an independent appraiser. Landlord applied the appraised value of the remaining equipment to the outstanding amounts owed by Tenants and provided Tenants with an accounting for the amounts remaining and due pursuant to the lease terms. Tenants have never paid Landlord the outstanding balance.

On February 14, 2008, the former business owner, Fischer, filed a complaint against Tenants alleging that they had breached the agreement related to their purchase of Fischer's pizza business.[1] On May 12, 2008, Tenants filed a third-party complaint against Landlord for

[1] Fischer's complaint was dismissed on May 17, 2010, for failure to prosecute. *See* Ind. Trial Rule 41(E).

damages.[2] Tenants alleged that Landlord agreed to allow Tenants to close the restaurant for one month due to Barbara Noonan's involvement in an automobile accident but that, two days after making such oral agreement, Landlord changed the locks on the premises and took possession of the inventory and equipment therein. Tenants alleged that when they were subsequently permitted to retrieve personal items from the premises, several items of value were missing. Accordingly, Tenants sought damages from Landlord. Landlord responded by filing a counterclaim against Tenants for breach of the lease agreement and resulting damages for unpaid rent and late fees.

On June 12, 2009, Landlord served Tenants with written discovery requests, including requests for admissions. Tenants did not respond to any of the discovery requests. Consequently, on July 22, 2009, Landlord filed a notice indicating that the unanswered requests for admissions were deemed admitted on July 15, 2009, pursuant to Indiana Trial Rule 36(A).

On January 5, 2010, Landlord filed its motion for summary judgment and designation of evidence, requesting an entry of summary judgment on its claims against Tenants for breach of the lease agreement as well as summary judgment on Tenants' claims against Landlord. Tenants responded by designating only their third-party complaint and the affidavit of Barbara Noonan. The affidavit attempted to contradict matters already admitted by Tenants. Accordingly, the trial court struck the affidavit from the record. Concluding that

[2] Although titled "cross-complaint," Tenants' claim is properly referred to as a "third-party complaint" because Landlord was not named as a defendant in the original action. *See* Ind. Trial Rule 14.

the evidence designated by Landlord showed that there is no genuine issue as to any material fact, the trial court granted judgment as a matter of law in favor of Landlord on all claims. The trial court awarded Landlord a total judgment of $13,923.48, which included unpaid rents, accrued interest, and attorney's fees. This appeal ensued.

Discussion and Decision

Tenants appeal the trial court's entry of summary judgment in favor of Landlord. We review a trial court's summary judgment order de novo. *Kovach v. Caligor Midwest*, 913 N.E.2d 193, 196 (Ind. 2009). We apply the same standard as the trial court and will affirm the trial court's grant of summary judgment where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc.*, 949 N.E.2d 1195, 1199 (Ind. 2011). Our review of summary judgment is limited to the materials designated to the trial court. Ind. Trial Rule 56(H); *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 827 (Ind. 2011). We will accept as true the facts established by the evidence in favor of the nonmoving party while resolving all doubts against the moving party. *Id.*

Pursuant to Indiana Trial Rule 36(A), a party may serve upon any other party a written request for the admission of the truth of any matters covered under Indiana Trial Rule 26(B), which governs the scope of discovery. "The matter is admitted unless, within a period designated in the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney." Ind. Trial Rule 36(A). Matters admitted are deemed conclusively

established unless the trial court permits withdrawal or amendment of the admission. Ind. Trial Rule 36(B); *Gen. Motors Corp., Chevrolet Motor Div. v. Aetna Cas. & Sur. Co.*, 573 N.E.2d 885, 888-89 (Ind. 1991). Indeed, once the admission is obtained, the need to otherwise prove the matter is eliminated and the factfinder may not disregard it. *Corby v. Swank*, 670 N.E.2d 1322, 1325 (Ind. Ct. App. 1996). When a party fails to timely answer requests for admission and the result of such failure is the admission of all facts material to the lawsuit, nothing remains to litigate and the requesting party is entitled to summary judgment. *Bryant v. County Council of Lake County*, 720 N.E.2d 1, 6 (Ind. Ct. App. 1999), *trans. denied*.

On appeal, Tenants do not dispute that they failed to respond to Landlord's requests for admission and that those facts, including their breach of the lease agreement and default on rent payments, are deemed admitted and conclusively established. Although their argument is somewhat difficult to discern, it appears that they are attempting to evade the entry of summary judgment by arguing that additional issues of fact remain that were not covered by the admissions. Specifically, they assert that Landlord caused them to incur monetary losses due to the alleged disappearance of personal property and restaurant equipment and therefore, genuine issues of material fact remain that cannot be resolved by summary judgment.

Contrary to Tenants' assertions, Tenants admitted that they had the opportunity to remove all personal property and equipment from the premises and that all property or equipment Tenants chose not to remove was included in the appraisal obtained by Landlord

and credited to Tenants. Appellee's App. at 16-20. Moreover, the only evidence designated to the trial court in opposition to summary judgment and in support of Tenants' allegations of loss was the affidavit of Barbara Noonan, which merely contradicted facts already conclusively established. The trial court properly struck that affidavit from the record. *See Shepard by Shepard v. Porter*, 679 N.E.2d 1383, 1387 (Ind. Ct. App. 1997); *see also Patham Constr. Co. of Highland Park v. Drum-Co Eng'g Corp.*, 402 N.E.2d 1, 9 (Ind. Ct. App. 1980) (trial court has authority to strike improper provisions in affidavit regarding items previously admitted pursuant to Trial Rule 36).

In sum, all issues dispositive of this litigation have been conclusively established by operation of Trial Rule 36. At no time did Tenants object or move to withdraw their admissions. Accordingly, no genuine issues of material fact remain to be litigated and Landlord has demonstrated its entitlement to judgment as a matter of law. Therefore, the trial court properly entered summary judgment in favor of Landlord.

As noted by Landlord, the lease agreement between the parties provides that "[e]ach party shall pay the other party's reasonable legal costs and attorney's fees incurred in successfully enforcing against the other party any covenant, term or condition of this Lease." Appellee's App. at 98. The purpose of an attorney fee provision in an agreement is to make the prevailing party whole, and it will be upheld so long as it does not violate public policy. *Fischer v. Heymann*, 943 N.E.2d 896, 903 (Ind. Ct. App. 2011), *trans. denied*. We see no reason to disregard the attorney fee provision in the lease between the parties here. Although the trial court's summary judgment included an award of attorney's fees to Landlord,

Landlord is also entitled to appellate attorney's fees. *See id*. We remand to the trial court for a determination of reasonable appellate attorney's fees to be awarded to Landlord.

Affirmed and remanded.

BAILEY, J., and MATHIAS, J., concur.