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IN THE
COURT OF APPEALS OF INDIANA

BOONVILLE CONVALESCENT CENTER, INC.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 32A01-0905-CV-225
	)	
CLOVERLEAF HEALTHCARE SERVICES, INC., CLOVERLEAF HEALTHCARE OF BOONVILLE, INC., WANDA PROCK, THEODORE E. BRUZAS, CHARLINE BRUZAS, GEORGE A. SMITH, TRELA C. SMITH, JAMES L. SMITH, SHARON K. SMITH, WILLIAM T. REES, HELEN L. REES, PAUL S. HULSE, MIHOKA HULSE, TIMMY J. SHROUT, KIMBERLY SHROUT, RUTH ADE, and SHERWOOD HEALTHCARE CORP.,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Robert W. Freese, Judge
Cause No. 32D01-0204-CC-38

December 16, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Plaintiff Boonville Convalescent Center, Inc. appeals the trial court's determination on summary judgment of the balance of the real estate taxes, interest and attorney fees owed by the Appellees-Defendants Cloverleaf Healthcare Services, Inc., its shareholders and their spouses (collectively, Tenants) based on a lease agreement. We affirm in part, reverse in part and remand.

Issues

Boonville raises four issues on appeal, which we consolidate and restate as:

I. Whether the trial court erred in its conclusion that the Tenants were not subject to interest for the remaining months of unpaid rent which were later released;

II. Whether the trial court erred in calculating the amount owed by Tenants for unpaid real estate taxes and the penalties assessed by Warrick County; and

III. Whether the trial court erred in calculating the reasonable attorney fees incurred by Boonville after the 2004 trial.

Facts and Procedural History

This is the fourth time this case has come to the Court of Appeals. The relevant underlying facts were recited in the prior appeal, as follows:

> Boonville owns a nursing home facility. In 1986, it leased the facility to Cloverleaf for twenty years. Cloverleaf's shareholders and their spouses [] personally guaranteed the lease. The lease required the Tenants to pay real estate taxes, make repairs, and return the facility in the same condition, except

for ordinary wear and tear. The lease also required the Tenants to pay Boonville's attorney fees for any litigation concerning the lease.

The Tenants sublet the facility to a business that ultimately went bankrupt. The facility was abandoned in the winter of 2000 and left in a state of disrepair. When the Tenants refused to resume operation of the facility, Boonville's CEO, Charles Ludwyck, began operating the facility as Southwind Healthcare, Inc.

On August 22, 2000, Boonville initiated this action against the Tenants. In 2002, the trial court granted summary judgment for the Tenants. We reversed the trial court, finding the Tenants liable, and remanded for a trial on damages. Boonville Convalescent Center, Inc. v. Cloverleaf Healthcare Servs., Inc., 790 N.E.2d 549 (Ind. Ct. App. 2003) (hereinafter "Boonville I"), trans. denied 812 N.E.2d 801 (Ind. 2004).

After a seven-day bench trial on damages in November 2004, the trial court awarded Boonville $823,853.62 for maintenance and repairs; $173,472.00 in real estate taxes; $640,000.00 for attorney fees; and $159,867.03 in rent and interest (hereinafter "Judgment 1"). The tenants tendered the full amount of the award, but insisted on a total release of judgment. Boonville refused the tender and appealed.

We vacated the judgment and remanded again with instructions to the trial court on several issues, including calculation of the rent due under the contract, the date of the termination of the lease, and the award of maintenance and repair costs. Boonville Convalescent Center, Inc. v. Cloverleaf Healthcare Servs., Inc., 834 N.E.2d 1116 (Ind. Ct. App. 2005) (hereinafter "Boonville II"), trans. denied 855 N.E.2d 1002 (Ind. 2006). We also held Boonville would be entitled to an additional hearing to determine the remaining rent due between November 2004 and the end of the lease. Id. at 1127.

On remand, the trial court ordered the parties to submit proposed findings of fact and conclusions of law based on the evidence admitted at the 2004 trial. In August 2006, the trial court entered judgment of $5,903,559.62 (hereinafter "Judgment 2"). This sum included the same award for repairs and attorney fees as Judgment 1. By then, the lease had terminated, so Boonville requested a hearing on the remaining rent due. Boonville was awarded an additional $906,286.00 (hereinafter "Judgment 3"). In this consolidated appeal, the Tenants are appealing Judgments 2 and 3, and Boonville is appealing Judgment 3.

Cloverleaf Healthcare Servs., Inc. v. Boonville Convalescent Center, Inc., No. 32A01-0610-CV-464, slip op. at 1 (Ind. Ct. App. Nov. 30, 2007) (footnotes omitted) (hereinafter "Boonville III"), trans. denied, 891 N.E.2d 52 (Ind. 2008). In Boonville III, we affirmed Judgment 2 in all respects. However as to Judgment 3, we reversed in part and remanded for the determination of real estate taxes and attorney fees owing since the November 2004 trial and the inclusion of the final month's rent that was excluded from the calculation of damages. Id. at 7. As the twenty-year lease was executed on February 28, 1986, it terminated on February 28, 2006. Boonville II, 834 N.E.2d at 1127.

On January 12, 2007, the Tenants deposited $908,868.29 with the court clerk. On August 19, 2008, Boonville filed a Motion to Release Funds, contending that the Tenants owed at least the amount currently held by the clerk but that the Tenants refused to consent to an unconditional release of the funds. The trial court granted the motion.

On October 7, 2008, Boonville filed a motion for summary judgment as to the remaining issues that were remanded after Boonville III. The Tenants filed a cross-motion for summary judgment and a motion to strike, which was denied. After the hearing on the summary judgment motions, the trial court entered its Findings of Fact, Conclusions of Law and Judgment Order on March 19, 2009. The trial court awarded Boonville $77,216.02 in real estate taxes, $71,931.65 for the last month of rent plus interest, and $256,280.00 in attorney fees (hereinafter "Judgment 4"). This appeal ensued.

Discussion and Decision

Standard of Review

We review a summary judgment order *de novo*. Tri-Etch, Inc. v. Cincinnati Ins. Co., 909 N.E.2d 997, 1001 (Ind. 2009). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). In making this determination, we consider only those portions of the pleadings, depositions, and other matters specifically designated to the trial court by the parties for the purposes of the motion. Ind. Trial Rule 56(C), (H). We accept as true those facts alleged by the non-moving party, which are supported by affidavit or other evidence. Id. While the rationale of the trial court is helpful in reviewing the grant of summary judgment, such order may be sustained on any theory or basis supported by the designated materials. Warren v. IOOF Cemetery, 901 N.E.2d 615, 618 (Ind. Ct. App. 2009), trans. denied.

We note that when dealing with issues involving the calculation of damages, interest and fees, it is critical that counsel include in the briefs the calculations used to arrive at the contended amount. Furthermore, the figures used in the calculations should be supported by direct citations to the evidence in the record. This detail significantly aids review of such awards. See Ind. App. Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22.").

I. Rent

Boonville does not contest the amount of the final month's rent and interest accrued on that amount as ordered by Judgment 4. Rather, it argues that the trial court failed to calculate the interest owed on the rent due under Judgment 3 after its entry date of December 29, 2006, up until the date the money was withdrawn from the clerk's account on August 20, 2008.

Judgment 3 awarded Boonville $906,286 in rent and interest and ordered that interest at a post-judgment rate would accrue starting on the date of the judgment, December 29, 2006. On January 12, 2007, the Tenants tendered a check to the clerk of the court in the amount of $908,868.29. The amount of Judgment 3 was challenged by both parties on appeal in Boonville III and the calculation method was affirmed. However, the case was remanded in part for the trial court to enter the amount for the final month of rent. On August 19, 2008, Boonville filed a Motion to Release Funds being held by the Clerk of Hendricks County arguing that the Tenants owed at least the amount deposited, $908,868.29. Boonville noted that it had attempted to obtain the Tenants agreement for the unconditional release of the funds but was unsuccessful. The language of the motion indicated that Boonville wished to withdraw the deposited funds without waiving its rights to contest the remaining amounts owed by the Tenants. The next day the trial court granted the motion.

In its motion for summary judgment as to the amounts to be calculated on remand from Boonville III, Boonville argued, despite the release of the $908,868.29, the Tenants still owed the remainder of the post-judgment interest that had accrued on the rent judgment from

Judgment 3 until the release of the money. However, the order of the trial court concludes that the interest on the rent payments is not within the scope of the remand order and that Judgment 3 has been fully satisfied. Thus, it denied Boonville's request for additional interest.

At the heart of this issue is the determination of when post-judgment interest ceased accruing. Boonville points to Boonville III to support its contention that post-judgment interest continued to accrue until the trial court granted its motion to release the funds. However, the facts regarding the tender of judgment in Boonville III and those here are distinguishable. Indiana Trial Rule 67(B) governs the payment and satisfaction of judgments. It provides in relevant part:

> Unless otherwise directed by the court, payment of money owing under and following judgment may be made to . . . the clerk of the court. If paid to the clerk, the clerk shall notify the person entitled thereto or his attorney and shall pay such sum to him upon receiving a statement of satisfaction required herein. . . . A party or person receiving payment or satisfaction of a judgment shall furnish to the sheriff, clerk, party or person making payment a signed statement of total or partial satisfaction . . . . Such statement or any other entry by the clerk showing an assignment, payment or satisfaction of the judgment when certified by the clerk shall be received as evidence thereof . . . .

Ind. Trial Rule 67(B). Once the money is tendered to the clerk, the party entitled to the money can receive the money judgment upon signing a statement of partial or total satisfaction of judgment. Thus, the decision to receive the money once tendered is usually in the hands of the money judgment recipient. Unless otherwise provided by statute, interest on money judgments shall accrue from the date of the verdict or finding of the court until

satisfaction at the contract rate that shall not exceed an annual rate of eight percent.[1] Ind. Code § 24-4.6-1-101. As satisfaction of the judgment can be obtained once the money judgment recipient has the opportunity to collect the funds from the clerk, accrual of post-judgment interest ceases because any delay in receipt of the money can no longer be attributed to the money judgment defendant. See Williamson v. Rutana, 736 N.E.2d 1247, 1250 (Ind. Ct. App. 2000) ("[I]nterest accrued on the amount of the principal owed to Donna at the statutory rate of 8% annually from the date the deferred payments were due until the date that Richard tendered his check to the court clerk.").

The facts of Boonville III evidenced an exception to this general rule. After tendering the amount for Judgment 1 to the court clerk, the Tenants opposed the release of the money unless Boonville filed a statement of total satisfaction of the judgment. Boonville III, No. 32A01-0610-CV-464, slip op. at 2. As Boonville intended to appeal the judgment and did not want to waive its right to do so, it could not execute such a statement. Therefore, the trial court ordered the clerk to hold the tendered funds until further order. This prevented Boonville from accessing the funds due to the actions of the Tenants, and therefore post-judgment interest continued to accrue until the trial court ordered the release of the funds. Id.

This is not the case regarding the tender of funds for Judgment 3. There is no

[1] "Except as otherwise provided by statute, interest on judgments for money whenever rendered shall be from the date of the return of the verdict or finding of the court until satisfaction at:

(1) the rate agreed upon in the original contract sued upon, which shall not exceed an annual rate of eight percent (8%) even though a higher rate of interest may properly have been charged according to the contract prior to judgment; or

(2) an annual rate of eight percent (8%) if there was no contract by the parties."

Ind. Code § 24-4.6-1-101.

evidence in the record that the Tenants opposed the release of the funds for Judgment 3 without a statement of total satisfaction. Thus, Boonville could have filed a motion for the release of funds and filed a statement of partial satisfaction of the judgment after the money was tendered. Because the timing of the receipt of the Judgment 3 funds was in the hands of Boonville, post-judgment interest ceased accruing on the date the money was tendered to the clerk of the court. Therefore, no additional interest is due.

II. Real Estate Taxes

Boonville argues that the trial court incorrectly calculated the real estate taxes by failing to include the proper interest and penalties that were levied by the county. The argument is truly two arguments. First, Boonville claims that the trial court erred in failing to award additional penalties that accrued based on the real estate taxes awarded in Judgment 1, which was not paid until August of 2006. The original tax amounts accrued prior to the November 2004 trial, and the amount awarded was not challenged on appeal. See Boonville II, 834 N.E.2d at 1119. The alleged penalties for which Boonville seeks to be reimbursed were assessed after November 2004. However from the designated record and the calculations propounded, it is not readily determinable[2] as to the penalties that were charged for the amounts from Judgment 1 due to the failure to pay those amounts from November 2004 until August of 2006. Therefore, there is a question of material fact, and we remand for further proceedings to determine this amount.

[2] The records submitted by Boonville from the Warrick County Treasurer's Office fail to provide the detail as to the date the penalties were assessed and on which amounts they are based. The original tax statements offered by the Tenants are almost illegible as reproduced in the Appellees' Appendix. However, it is clear that there is some amount of penalty assessed, but again, the detail as to the amounts on which it is based is indecipherable.

Second, Boonville contends that the trial court incorrectly calculated the amount of real estate taxes, penalties and interest that came due after the November 2004 trial. As noted in Boonville III, the lease required the Tenants to pay real estate taxes on the property as they came due. No. 32A01-0610-CV-464, slip op. at 6. The trial court took the three real estate tax bills that had due dates between November 1, 2004 and February 28, 2006, assessed a ten percent penalty for each year each bill was outstanding and then added the interest from the date that Boonville paid the bills.

Boonville claims that this calculation fails to incorporate all of the penalties assessed by the Warrick Country Treasurer and refers to the document from the Warrick County Treasurer's Office that it submitted as an exhibit. Boonville suggests that the proper calculation is to take the sum of the taxes and penalties listed in its exhibit, $320,381.74, prorate it to March 2006, $297,608.52, and subtract the prior judgment for taxes owed prior to November 2004, $173,472. According to its calculation, this would result in a total of $124,136.52.[3] However, rather than beginning its calculation with the foundation of the damages, the real estate tax bills, Boonville starts with their total bill to date. This method does not establish that the Tenants are responsible for the entire sum. Thus, there is not a question of fact but rather one of calculation.

The three tax bills that came due during November 2004 and the end of the lease, March 2006, are November 10, 2004, for $16,919.40, May 10, 2005, for $16,828.89, and

[3] $297,608.52 – $173,472 = $124,136.52

November 10, 2005, for $16,828.89.[4] Undisputed by the Tenants, the portion of the contract addressing real estate taxes requires "[t]axes . . . for the year of the termination shall be prorated between the parties based upon the last available tax statement." Appellant's Appendix at 181. The trial court's calculation failed to include the last tax statement that needed to be prorated to the end of the lease as well as the late penalty for that amount. Neither party disputes the amounts of each tax bill or the method of calculating the ten percent penalty for late payment. The last tax bill dated May 10, 2006, totaled $16,972.84 and represents $2828.81 for each month.[5] As the lease continued to the end of February 2006, the Tenants were responsible for four more months of real estate taxes; $11,315.24.

$16,919.40	+	$5075.82 (10% penalty for 3 years)	= $21,995.22
$16,828.89	+	$3365.78 (10% penalty for 2 years)	= $20,194.67
$16,828.89	+	$1682.90 (10% penalty for 1 year)	= $18,511.79
$11,315.24	+	$1131.52 (10% penalty for 1 year)	= $12,446.76
			$73,148.44

Based on the new underlying amount owed, the daily rate of interest at 15%, as required by the terms of the lease, is $30.06.[6] Boonville paid the outstanding taxes on May 5, 2007, entitling it to $30.06 per day in interest from that date until the date of Judgment 4, March 19, 2009, after which the rate of post-judgment interest applies. Thus, we direct the trial court to enter the amount owed on the taxes as of March 19, 2009, to be $93,709.48.[7]

[4] The spreadsheet created by the trial court lists the November tax bill in the amount of $16,828.98 as opposed to $16,828.89.

[5] $16,972.84 ÷ 6 = $2828.81 (rounded up a penny for the partial remainder)

[6] $73,148.44 × .15 = $10,972.27 $10,972.27 ÷ 365 = $30.06

[7] $30.06 × 684 (days elapsed between May 5, 2007 and March 19, 2009) = $20,561.04
$20,561.04 + $73,148.44 = $93,709.48.

III. Attorney Fees

Finally, Boonville contends that the trial court erred in calculating the award of attorney fees. We review the award of attorney fees for an abuse of discretion. Gerstbauer v. Styers, 898 N.E.2d 369, 378 (Ind. Ct. App. 2008). "The trial court has broad discretion in assessing attorneys' fees, and we will reverse only if the award is clearly against the logic and effect of the facts and the circumstances before the court." Id.

The dispute about the attorney fees award is only as to the amount. In Boonville III, this court ordered the trial court to calculate the "attorney fees owing since the November 2004 trial." Boonville III, No. 32A01-0610-CV-464, slip op. at 7. As it has done in past proceedings, Boonville continues to argue that it should be awarded attorney fees in the amount of its contingent fee contract with its attorneys. Boonville II noted that the fee arrangement between Boonville and its counsel was not a standard contingent fee,[8] where the fee was deducted from the recovery. Boonville II, 834 N.E.2d at 1127. Rather, the fee was added to the judgment, providing the debtor with a pecuniary interest in the determination of the fee. Because a contingent fee that is added to the debtor's judgment may be unreasonable, without other objective evidence of reasonableness, a contingent fee cannot be added to a judgment against a third party. Id.

The determination of the reasonableness of attorney fees requires the consideration of

[8] "In the instant case, although Boonville initially engaged counsel on an hourly basis, it soon became obvious that the complexity of the case imposed a financial burden on Boonville and, to continue pursuing its claim, required a contingent fee agreement. Thus, our review shows that Boonville first executed an agreement to pay counsel's out-of-pocket expenses and twenty percent of any amount recovered. Subsequently, Boonville agreed to pay counsel his expenses, twenty percent of any amount recovered up to five million dollars, and fifty percent of any amounts recovered thereafter." Boonville II, 834 N.E.2d 1116, 1127 (Ind. Ct. App. 2005).

all relevant circumstances. Bruno v. Wells Fargo Bank, N.A., 850 N.E.2d 940, 950 (Ind. Ct. App. 2006). In determining whether the fees are reasonable, the court may consider factors such as the hourly rate, the result achieved and the difficulty of the issues.[9] Franklin College v. Turner, 844 N.E.2d 99, 105 (Ind. Ct. App. 2006). "The trial judge is considered to be an expert on the question and may judicially know what constitutes a reasonable attorney's fee." Rand v. City of Gary, 834 N.E.2d 721, 723 (Ind. Ct. App. 2005). While there are several factors a court may consider in making such a determination, "the hours worked and the rate charged are a common starting point for determining the reasonableness of a fee." Fortner v. Farm Valley-Applewood Apartments, 898 N.E.2d 393, 400 (Ind. Ct. App. 2008).

As objective designated evidentiary material to support the reasonableness of the contingency fee, Boonville submitted the time records of their attorneys supported by affidavits as well as an affidavit of a local attorney expressing her opinion as to the reasonableness of the fee. After reviewing these records and taking into consideration the factors enumerated in Rule 1.5(a) of the Indiana Rules of Professional Conduct that relates to the reasonableness of attorney fees, the trial court calculated the reasonable fee as follows:

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[9] Pursuant to Indiana Rule of Professional Conduct 1.5(a):

> The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

Attorney Fees Owing Since November 2004	
Gibbs 90.2 hrs @ $150/hr	$ 13,530.00
Leeuw & Mead 1845 hrs @ $350/hr	$365,750.00
Total fees	$379,280.00

Appellant's Appendix at 114. The order then subtracts $53,000 and $70,000 for unrelated billings and billings for unsuccessful motions.[10] However, it is apparent that there is a miscalculation as to the multiplication of the 1845 hours at the rate of $350 per hour. This should result in a total of $645,750. Using this correct number in the trial court's calculation, the resulting attorney fees award is $536,280.[11] After making this mathematical correction, the trial court's award of attorney fees is not clearly against the logic and effect of the facts and the circumstances before the court. However, we remand and direct the trial court to correct its order to reflect this correction.

Conclusion

In sum, the Tenants do not owe any additional interest as to the rent payment tendered to the court clerk on January 12, 2007. As to the real estate taxes, the undisputed evidence as to the amounts due after November of 2004 failed to include the final tax bill, prorated to the end of the lease, and the corresponding late fee. The evidence regarding the late fees for the failure on the part of the Tenants to pay the real estate taxes from Judgment I until 2006 does not permit the determination of the correct amount assessed against Boonville. Finally, while the trial court reviewed the attorney time records and additional affidavits and considered the factors to determine a reasonable attorney fee, there is an obvious miscalculation utilizing the

[10] Boonville does not challenge the calculation of these subtracted amounts. Rather, it contends that these amounts were not considerations in the negotiation of the amount of the contingent fee.

[11] $13,530 + $645,750 = $659,280 – ($53,000 + $70,000) = $536,280

number of hours and hourly rate determined by the trial court. Therefore on remand, we direct the trial court to determine the amount of late fees pertaining to the delay in paying the real estate taxes from the date of Judgment I, enter judgment on the real estate taxes and late fees for the remaining portion of the lease as $93,709.48, and correct the order as to attorney fees to reflect the correct total of $536,280.

Affirmed in part, reversed in part and remanded.

VAIDIK, J., and BRADFORD, J., concur.