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IN THE
COURT OF APPEALS OF INDIANA

CHEROKEE DEVELOPMENT, INC.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A04-1106-CC-274
	)	
OHIO FARMERS INSURANCE COMPANY,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn L. Moberly, Judge
Cause No. 49D05-1007-CC-30231

December 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Plaintiff Cherokee Development, Inc. ("Cherokee") appeals the trial court's order granting summary judgment in favor of Appellee-Defendant Ohio Farmers Insurance Co. ("Ohio Farmers") and awarding sanctions against Cherokee and counsel for Cherokee in the amount of $7660. For its part, Ohio Farmers argues that the underlying lawsuit was groundless, and as such, the trial court's award of sanctions should be affirmed. Ohio Farmers also argues that Cherokee's appeal is wholly frivolous, and as such, it is entitled to appellate attorney's fees. Upon review, we affirm the judgment of the trial court relating to sanctions, but deny Ohio Farmers's request for appellate attorney's fees.

FACTS AND PROCEDURAL HISTORY

The undisputed facts establish that on August 18, 2005, S.C. Nestel entered into "an AIA A101 construction contract" (hereinafter "Construction Contract") with Horne Development, L.P. and Horne Properties-Bedford, LLC (collectively "Horne") "by and through which S.C. Nestel agreed to construct certain improvements on real estate owned by Horne located in Bedford." Appellant's App. pp. 57-58. "The improvements included an approximate 200,000 square foot supercenter to be leased or owned by Wal-Mart Real Estate Business Trust and an additional 51,200 square feet of retail space and related site work for the creation of a shopping center known as Williams Crossing" (hereinafter "the Project"). Appellant's App. p. 58.

Also on August 18, 2005, in conjunction with entering into the Construction Contract, S.C. Nestel purchased, and Ohio Farmers provided, an "AIA A312 Payment Bond No. 5670908" (hereinafter "the Payment Bond") in the sum of $15,184,700. Appellant's App. p.

66. The Payment Bond was recorded in the Lawrence County Recorder's Office as "Instrument No. 200500007484 or Book 269, Page 2418." Appellant's App. p. 67.

In furtherance of the Project, S.C. Nestel hired numerous subcontractors, including Cherokee, to perform certain aspects of the work associated with the Project. On August 26, 2005, S.C. Nestel and Cherokee entered into an "AIA A401 Standard Form Agreement" (hereinafter "the Agreement"). Appellant's App. p. 58. The Agreement "incorporated by reference" the Construction Contract, and specified that "progress billings from Cherokee must be submitted on the AIA G702 and G703 forms." Appellant's App. p. 58.

During the course of the Project, a dispute arose between S.C. Nestel and Horne regarding Horne's belief that S.C. Nestel and its subcontractors were wrongfully delaying completion of the Project, and S.C. Nestel's belief that Horne was wrongfully delaying or refusing to make full and prompt payment for labor and materials provided for the Project. As a result of this dispute, the Construction Contract between S.C. Nestel and Horne was terminated by Horne on January 15, 2007.

Meanwhile, in 2006, Cherokee notified S.C. Nestel that it believed it was entitled to additional compensation for work completed on the Project. Cherokee asserted that it had completed the services included in the Agreement, had submitted applications for payment, and that a balance of $98,300.47 of compensation for the work completed remained unpaid. Cherokee did not file a claim for payment from the Payment Bond at this time.

Representatives for S.C. Nestel and Cherokee met in October of 2008, to discuss the monies allegedly owed to Cherokee. S.C. Nestel did not dispute that it owed the funds, but

nevertheless refused to pay said funds to Cherokee. Cherokee filed suit against S.C. Nestel on April 16, 2009, seeking payment of the outstanding balance due for the work completed on the Project. This lawsuit was subsequently stayed pending arbitration.[1]

At some point in May or June of 2010, Cherokee contacted Ohio Farmers to inquire about recovering the funds owed by S.C. Nestel from the Payment Bond. On June 14, 2010, then-co-counsel for Ohio Farmers sent Cherokee's counsel a detailed email outlining the factual and legal defects in any potential claim by Cherokee against the Payment Bond. In this email, then co-counsel for Ohio Farmers specifically highlighted the language contained in Paragraph 11 of the Payment Bond, which created a one-year limitation for bringing a claim for recovery of funds from the Payment Bond. Paragraph 11 provides as follows:

> No suit or action shall be commenced by a Claimant under this Bond other than [i]n a court of competent jurisdiction in the location in which the work or part of the work is located or after the expiration of one year from the date (1) on which the Claimant gave the notice required by Subparagraph 4.1 or Clause 4.2.3, or (2) on which the last labor or service was performed by anyone or the last materials or equipment were furnished by anyone under the Construction Contract, whichever of (1) or (2) first occurs. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.[2]

Appellant's App. p. 70. The last labor or service, all of which was performed in Lawrence County, was performed and the Construction Contract was terminated on January 15, 2007. Thus, under the plain language of Paragraph 11, any claim filed against the Payment Bond

[1] Cherokee claims on appeal that it learned about certain limitations included in the Payment Bond for the first time in May of 2010, during the stay of its lawsuit against S.C. Nestel, despite the fact that the Payment Bond was previously recorded as a public record in the Lawrence County Recorder's Office.

[2] Cherokee does not claim that the provisions of Paragraph 11 are void or prohibited by law.

must have been filed in Lawrence County by January 15, 2008.

In spite of the plain language in Paragraph 11 demonstrating that any claim expired two years prior, on July 9, 2010, Cherokee filed suit against Ohio Farmers in the Marion County Superior Court seeking to recover the monies owed to it by S.C. Nestel. In support, Cherokee claimed that the Payment Bond obligates Ohio Farmers to indemnify S.C. Nestel's failure to satisfy its duties under the Agreement. On July 19, 2010, counsel for Ohio Farmers sent a letter to counsel for Cherokee informing both counsel and Cherokee of the timing and venue defects in Cherokee's complaint, requesting that Cherokee dismiss its lawsuit, and alerting Cherokee that it intended to seek sanctions under Indiana Code 34-52-1-1 and Indiana Trial Rule 11 if Cherokee further pursued its lawsuit. Cherokee refused to dismiss its lawsuit after receipt of the July 19, 2010 letter from Ohio Farmers.

On July 26, 2010, Ohio Farmers filed its Answer, Affirmative Defenses and Counterclaim in which it alleged that Cherokee's claims were barred because Cherokee failed to satisfy the time and venue limitations contained in Paragraph 11 of the Payment Bond. In its three-count Counterclaim against Cherokee, Ohio Farmers alleged that Cherokee's lawsuit was frivolous and amounted to malicious prosecution and an abuse of process because Cherokee had no reasonable expectation of prevailing in its lawsuit.

On August 16, 2010, Ohio Farmers filed a motion for summary judgment of Cherokee's claims. In support, Ohio Famers asserted that it was entitled to judgment as a matter of law because Cherokee had failed to meet the conditions established by the Payment Bond and was unable to rectify its failure. Cherokee filed its response in opposition to Ohio

Farmers's motion for summary judgment on October 8, 2010, after which Ohio Farmers filed its reply brief in support of its motion for summary judgment on October 19, 2010. On November 1, 2010, the trial court granted Ohio Farmers's motion for summary judgment. The trial court determined that Cherokee could not "accept the benefit of the contract of the Payment Bond without accepting the other terms which limit the right of action against the Bond," and, as such, Cherokee was bound by the terms of Paragraph 11 of the Payment Bond. Appellant's App. p. 138. Cherokee did not appeal the trial court's November 1, 2010 order.

On November 12, 2010, Ohio Farmers filed a motion for summary judgment of its counterclaims and requested sanctions under Indiana Code section 34-52-1-1. Cherokee filed its response in opposition to Ohio Farmers's motion for summary judgment on January 14, 2011, after which Ohio Farmers filed its reply brief in support of its motion for summary judgment on January 28, 2011. On March 2, 2011, the trial court conducted a hearing on Ohio Farmers's motion for summary judgment and request for sanctions. On March 23, 2011, the trial court granted Ohio Farmers's motion for summary judgment and set the matter for an evidentiary hearing regarding the sanctions to which Ohio Farmers was entitled under Indiana Code section 34-52-1-1.

On April 11, 2011, Ohio Farmers filed a supplemental brief and designation of evidence, including the fees incurred in defending Cherokee's lawsuit, in support of its motion for sanctions. After reviewing Ohio Farmers's supplemental brief, on May 16, 2011, the trial court amended its March 23, 2011 order to include sanctions "jointly and severally"

against Cherokee and counsel for Cherokee in the amount of $7660. Appellant's App. p. 9. This appeal follows.

DISCUSSION AND DECISION

I. Whether the Trial Court Erred in Awarding Sanctions in Favor of Ohio Farmers Pursuant to Indiana Code Section 34-52-1-1

In awarding sanctions pursuant to Indiana Code section 34-52-1-1, the trial court determined that the underlying lawsuit was baseless because Cherokee's potential claim against Ohio Farmers had expired on January 15, 2008. Cherokee contends, however, that the trial court erred in determining that it had no basis for recovery from Ohio Farmers, and, thus, in awarding Indiana Code section 34-52-1-1 fees to Ohio Farmers. Indiana Code Section 34-52-1-1(b), provides:

> In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:
> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
> (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
> (3) litigated the action in bad faith.

"A three-tiered approach to reviewing a trial court's decision under this statute has developed." *Wolfe v. Eagle Ridge Holding Co., LLC.*, 869 N.E.2d 521, 529 (Ind. Ct. App. 2007).

> First, we review the trial court's findings of fact, if any, under the clearly erroneous standard; second, we review de novo the trial court's legal conclusions; and third, we review the trial court's decision whether to award attorney's fees and any amount thereof under an abuse of discretion standard. *Emergency Physicians of Indianapolis v. Pettit*, 714 N.E.2d 1111, 1115 (Ind. Ct. App. 1999), *adopted in relevant part*, 718 N.E.2d 753, 757 (Ind. 1999). This court specifically has reviewed de novo a trial court's determination

> regarding whether a party has pursued frivolous, unreasonable, or groundless defenses or claims. *See id*.
>
> Ultimately, however, a trial court has discretion to award, or not award, attorney fees under Indiana Code Section 34-52-1-1(b). *See Nelson v. Marchand*, 691 N.E.2d 1264, 1269 (Ind. Ct. App. 1998). It is axiomatic that use of the permissive word "may" in a statute indicates a trial court is not required to act, but may do so within its discretion. *See, e.g., Wenzel v. Hopper & Galliher, P.C.*, 830 N.E.2d 996, 1003 (Ind. Ct. App. 2005).

Id.

Cherokee argues that the trial court erred in determining that the underlying lawsuit against Ohio Farmers was baseless[3] because there is no evidence to support the trial court's determination. However, the record demonstrates that Cherokee sought to recover under the Payment Bond while at the same time circumventing the one-year limitation for filing suit also contained in the Payment Bond. A party cannot selectively choose those rights he seeks to enforce under a contract or agreement and, in turn, disavow other provisions set forth in the same document. *TWH, Inc. v. Binford*, 898 N.E.2d 451, 453-55 (Ind. Ct. App. 2008)

A claim or defense is groundless if "no facts exist which support the legal claim relied on and presented by the losing party." *Kahn v. Cundiff*, 533 N.E.2d 164, 171 (Ind. Ct. App. 1989). Here, we must conclude that Cherokee's claim against Ohio Farmers, which again was filed more than two years after any such claim expired, was time-barred under Paragraph 11 of the Payment Bond. *See T&R Dragline Serv., Inc. v. CAN Ins. Co.*, 796 F.2d 133, 134-

[3] Indiana Code section 34-52-1-1(b) allows for an award of attorney's fees if the underlying claim or defense is groundless. A claim or defense is "groundless" if it lacks cause or reason for support. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1003 (14th ed. 1961). The trial court defines Cherokee's underlying lawsuit as "baseless." "Baseless" means "groundless." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 181 (14th ed. 1961). Thus, the terms may be used interchangeably.

35 (5th Cir. 1986) (providing that subcontractor's claim against a payment bond was governed by the terms of the bond and, as such the claim must have been filed within one year as required by the bond). Again, Cherokee cannot selectively choose those rights it seeks to enforce under the Payment Bond and, in turn, disavow other provisions set forth therein. As such, we conclude that Cherokee's basis for recovery from Ohio Farmers was groundless when the underlying litigation was initiated.[4]

Having concluded that Cherokee's basis for recovery in the underlying lawsuit was groundless when the underlying litigation was initiated, we must next determine whether the trial court abused its discretion in awarding sanctions in favor of Ohio Farmers. An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law. *McCullough v. Archbold Ladder Co.*, 605 N.E.2d 175, 180 (Ind. 1993). A court need not find an improper motive to award sanctions pursuant to Indiana Code section 34-52-1-1(b). *Kahn*, 533 N.E.2d at 171.

In the instant matter, pursuant to the terms of the Payment Bond, the deadline for filing a claim against the Payment Bond was January 15, 2008. Cherokee did not file the underlying lawsuit until July 9, 2010. The record establishes that counsel for Cherokee was

[4] Cherokee acknowledges that *Young v. Tri-Etch, Inc.*, 790 N.E.2d 456 (Ind. 2003), the sole case it relied on both below and on appeal, is not "directly on point." Appellant's Br. p. 12. In *Young*, the Indiana Supreme Court held that the plaintiff's claim against the defendant was not subject to the one-year limitation for bringing suit under the contract, and, thus, the plaintiff's claim was not time-barred. *Id*. at 458-59. However, the Indiana Supreme Court's holding in *Young* is easily distinguishable from the instant matter because in *Young*, unlike here, the plaintiff was not seeking to recover under any contract or agreement, but rather under a theory of wrongful death in which the plaintiff argued that the defendant had violated an assumed duty to act. *Id*. at 457. Accordingly, Cherokee's reliance on *Young* is misplaced and does not alter the baseless nature of its underlying theory of recovery.

informed, both prior to and immediately after filing the underlying lawsuit, that Cherokee's basis for recovery was groundless because Cherokee's claim was time-barred. Throughout litigation, Cherokee based its argument that its claims were not time-barred on one case which Cherokee itself acknowledged was not "directly on point." Appellant's Br. p. 12. As such, while we do not believe that counsel for Cherokee displayed an improper motive in filing the underlying lawsuit, we conclude that the trial court did not abuse its discretion in awarding sanctions pursuant to Indiana Code section 34-52-1-1(b). Counsel for Cherokee should have known that Cherokee's claim against Ohio Farmers was groundless as it was filed over two years after the time limitation prescribed in the Payment Bond had run.

II. Whether Ohio Farmers is Entitled to Appellate Attorney's Fees

On appeal, Ohio Farmers requests this court to impose appellate attorney's fees, or, alternatively, remand the case to the trial court to impose appellate attorney's fees for the appeal at bar. Appellee's Br. pp. 27-29. In support of this claim, Ohio Farmers asserts that Cherokee's appeal is frivolous because "Cherokee and its counsel have now been put on notice four (4) separate times that [its] claim is legally defective, devoid of all plausibility, and frivolous." Appellee's Br. p. 28. Ohio Farmers further asserts that it "is time for this Court to again proclaim that 'Enough is enough.'" Appellee's Br. p. 28.

Indiana Code section 31-15-10-1 provides that attorney's fees may be awarded for proceedings occurring after the entry of final judgment, including proceedings on appeal. *Thompson v. Thompson*, 811 N.E.2d 888, 929 (Ind. Ct. App. 2004). The trial court retains jurisdiction to award appellate attorney's fees even after the perfection of the appeal. *Id.*

However, "[a]ppellate sanctions are an extreme measure and 'should not be imposed to punish lack of merit unless an appellant's contentions and argument are utterly devoid of all plausibility.'" *Posey v. Lafayette Bank and Trust Co.*, 583 N.E.2d 149, 154 (Ind. Ct. App. 1991), *trans. denied*.

Upon review, we conclude that although Cherokee's appellate claims were not ultimately successful, we cannot say that its claims were utterly devoid of all plausibility. Cherokee did not challenge the trial court's determination that Ohio Farmers was entitled to judgment on the merits, but rather the imposition of fees pursuant to Indiana Code section 34-52-1-1(b) following the trial court's determination that Cherokee's underlying lawsuit was groundless. On appeal, this court conducts a thorough review employing three separate standards when reviewing an award of fees pursuant to Indiana Code section 34-52-1-1(b). Here, although we ultimately affirmed the award of fees, we did not wholly defer to the trial court but rather conducted the aforementioned independent review. Therefore, we deny Ohio Farmers's request for appellate attorney's fees.

The judgment of the trial court is affirmed and Ohio Farmers' request for appellate attorney's fees is denied.

KIRSCH, J., and BARNES, J., concur.