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IN THE
COURT OF APPEALS OF INDIANA

WERNLE, RISTINE & AYERS, L.P.C.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 54A01-0610-CV-435
	)	
B.O.M. CORPORATION d/b/a TONERTEK and JAMIE PHILLIPS,	)	
	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE MONTGOMERY SUPERIOR COURT
The Honorable Peggy Lohorn, Judge
Cause No. 54E01-0312-CC-113

September 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Wernle, Ristine, & Ayers ("WRA") appeals the trial court's apportionment of liability between Jamie Philips and B.O.M. Corp. d/b/a Tonertek. WRA raises two issues, which we revise and restate as:

I. Whether the trial court's finding that Philips hired WRA to draft a franchise agreement was clearly erroneous; and

II. Whether the trial court's failure to award prejudgment interest to WRA was clearly erroneous.

We affirm.

The relevant facts follow. Tonertek sells remade fax and toner cartridges and services office equipment. In 1998 or 1999, Philips, as franchisee, executed a franchise agreement with Craig Morehouse, one of the owners of Tonertek, as franchisor. Julie Estell, an attorney with WRA, drafted the agreement. A little over a year later, Morehouse terminated the franchise because, he alleged, Philips had shared customer lists and other confidential information with Tonertek's competitors. In the meantime, Tonertek hired Estell to serve as counsel in unrelated matters. Estell then left WRA in February of 2000.

On December 31, 2003, WRA filed a complaint against Tonertek for unpaid bills. In late 2003 or early 2004, a bill was forwarded from Phillips's home address to Morehouse for "three thousand some odd dollars." Transcript at 74. On February 24, 2004, Morehouse received a faxed bill from WRA for $3,146.75, which included, among other things, entries for Estell's work on the franchise agreement. The bill did not allot fees to the time entries. On February 26, 2004, Morehouse requested "a breakdown of

the bill" from James E. Ayers, who had been Estell's supervising attorney at WRA. Id. at 77. Ayers responded that he "would see [Morehouse] in court." Id.

At a bench trial, Phillips testified that Morehouse had hired Estell to draft the franchise agreement and that Phillips had only reviewed the agreement and proposed changes to it. Ayers testified that, sometime in 2000, WRA both faxed and delivered a bill to Morehouse. WRA introduced into evidence copies of the cover sheet and bill it allegedly faxed to Morehouse, a "work-in-process" report, correspondence it had sent to Morehouse in 2000, and handwritten "blueslips" containing messages Morehouse had left with WRA's staff in 2004. Exhibits 5, 8-11. Sharon O'Connell, a secretary at WRA, testified that she faxed a bill to Morehouse twice in 2000 and that she had spoken to Morehouse "several times" because he was questioning the bill.[1] Id. at 101.

Morehouse, in turn, testified that, although he hired an attorney to prepare the franchise agreement, Philips refused to sign it and hired Estell to draft a second franchise agreement, which the parties signed after Morehouse amended it. Morehouse denied having received a bill from WRA until late 2003 or early 2004 and stated further that he had not received an itemized bill until the morning of the trial. Melinda Morehouse, Morehouse's wife and co-owner of Tonertek, also testified that from 1999 to 2004 they did not receive any bills or faxes from WRA.

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[1] WRA also introduced into evidence a taped telephone message from Morehouse to Philips in which Morehouse said that Phillips was not obligated to pay WRA's bill because Tonertek was going to pay it. Morehouse, however, testified that he had offered to pay the bill in full "out of pity" because

The trial court found that:

> [WRA] has proved that there are amounts due and owing to them based upon legal representation. Without Ms. Estell's testimony, however, or any further evidence, the Court cannot really find exactly who Ms. Estell contracted with as a client other than [by looking at] the records that [WRA] has produced today. And the fact that [Estell] has designated records as being for Tonertek, gives little credence to the argument based upon the testimony of both Mrs. Philips and Mr. Morehouse, that that was in fact the entity which should have been billed from the start. The Court does not believe that that in fact was the case based upon the evidence presented and although there has been a failure of memories on all sides . . . the Court believes that when Mr. Morehouse was made aware of the bill, whether that was in 2000 or in 2004, he has disputed that bill. And back in 2000, if he in fact received the fax that w[as] the subject of a great deal of questions, he in fact obviously questioned them based upon those faxes and the representation of [O'Connell].

Transcript at 111-112. The trial court granted WRA judgment against Philips for $1971.45 for work on the franchise agreement and against Tonertek for $1175.30 for work on unrelated matters, but denied prejudgment interest. WRA filed a motion to correct error, which the trial court denied.

"Sua sponte findings control only as to the issues they cover and a general judgment will control as to the issues upon which there are no findings." Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). When a trial court enters findings of fact and conclusions of law, we apply a two-tiered standard of review: first, we determine whether the evidence supports the findings, and second, whether the findings support the judgment. Freese v. Burns, 771 N.E.2d 697, 700 (Ind. Ct. App. 2002), trans. denied. In

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Phillips was filing for bankruptcy. Transcript at 82. Morehouse later retracted the offer when, on four

deference to the trial court's proximity to the issues, we disturb its judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. Id. We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. Id. at 700-01. We do not defer to conclusions of law, however, and evaluate them de novo. Id. at 701.

I.

The first issue is whether the trial court's finding that Philips hired WRA to draft the franchise agreement was clearly erroneous. In support of the assertion that Tonertek was their sole client with respect to the franchise agreement, WRA recites for our consideration the same evidence it introduced at trial. However, other evidence was presented demonstrating that Phillips hired WRA to draft the agreement. Specifically, Morehouse testified that Philips, after refusing to sign a franchise agreement prepared by Morehouse's attorney, hired Estell to draft a second agreement, which the parties signed. The trial court apparently found Tonertek's evidence more credible.[2] WRA merely asks us to reweigh the evidence, which we cannot do. See id. at 700-701. The record contains

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different occasions about town, Phillips gave him and his family "the finger." Id. at 83.

[2] WRA also argues that Morehouse's testimony was "outside his personal knowledge, based on faulty memory, and inherently unreliable" and urges us to apply the "incredible dubiosity rule" to it. Appellant's Reply Brief at 1. Although WRA presented a short argument on this issue in its Appellant's Reply Brief, it did not present argument on this issue in its Appellant's Brief. Any argument not presented in the original brief is waived and a party may not revive it by arguing the issue in the reply brief. Meyers v. Langley, 638 N.E.2d 875, 879 (Ind. Ct. App. 1994). Thus, WRA has waived our review of this issue.

evidence to support the trial court's findings, and we cannot say that the trial court's finding that Phillips hired WRA is clearly erroneous.

II.

The next issue is whether the trial court's failure to award WRA prejudgment interest was clearly erroneous. Ind. Code § 24-4.6-1-103(b) provides that prejudgment "interest at the rate of eight percent (8%) per annum shall be allowed . . . from the date an itemized bill shall have been rendered and payment demanded on an account stated . . . ." An account stated is defined as an agreement between parties that all items of account and the balance struck are correct, together with a promise, express or implied, to pay the balance. Urbanational Developers, Inc. v. Shamrock Eng'g, Inc., 372 N.E.2d 742, 750 (Ind. Ct. App. 1978). The agreement may be inferred from delivery of the statement coupled with the recipient's failure to object within a reasonable time. Id. However, once a party has denied liability, failure to object does not convert a bill into an account stated. See id. (citing Walsh v. Farm Bureau Co-op., 252 N.E.2d 609, 612 (Ind. Ct. App. 1969)). WRA appears to argue that its bill for legal services constituted an account stated. Alternatively, WRA argues that Morehouse failed to object to the bill within a reasonable time.[3]

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[3] WRA argues that:

> There was no evidence presented that Morehouse or Tonertek responded in any way or objected in a timely manner to the invoice delivered in April 2000 and faxed in August 2000. The first objections did not occur until four years later, in 2004. This is not a reasonable amount of time within which to make such objection.

Here, although Morehouse testified that he made several requests for an itemized bill, he did not receive one until the morning of the trial. Furthermore, despite conflicting testimony as to when Morehouse first received a bill from WRA, the trial court found, and the record shows, that Morehouse consistently denied liability regarding attorney fees for drafting the franchise agreement. Thus, we cannot say that the bill, regardless of when Morehouse received it, constituted "an agreement between parties that all items of account and the balance struck are correct." Id. Finally, even if Morehouse had failed to object within a reasonable time, the failure would not have converted the bill into an account stated once he had denied liability for the franchise agreement. Because WRA neither presented Morehouse with an itemized bill nor demanded payment on an account stated, we cannot say that trial court's denial of prejudgment interest was clearly erroneous. See id. at 750-751 (reversing an award of prejudgment interest where plaintiff's invoices "stated only the total amount due rather than an itemized bill of various items comprising the claim").

For the foregoing reasons, we affirm the trial court's partial judgment in favor of B.O.M. Corp. d/b/a Tonertek.

Affirmed.

MAY, J. and BAILEY, J. concur

Appellant's Brief at 13. We note that WRA also claims that "[o]n August 18, 2000, Sharon O'Connell, secretary for WRA, . . . spoke with Mr. Morehouse several times, as he was questioning the bill." Id. at

15.