

No. 1-15-2305

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LEASECORP HOLDING, LTD. and)	Appeal from the
SPACELOGIK, LLC,)	Circuit Court of
)	Cook County.
Plaintiffs-Appellants,)	
)	
v.)	
)	
DLA PIPER LLP (US),)	13 L 4982
)	
Defendant)	
)	
)	Honorable
(DASPIN & AUMENT LLP,)	Patrick J. Sherlock,
Petitioner-Appellee).)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err by enforcing the original contingency fee arrangement pursuant to the terms contained in the parties' modified engagement letter agreement; and (2) The trial court did not err by awarding petitioner costs incurred during the underlying dispute between the defendant and the plaintiffs.

¶ 2 The plaintiffs Leasecorp Holding, Ltd. and SpaceLogik, LLC (collectively Leasecorp), appeal an order granting petitioner Daspin & Aument LLP's (Daspin) petition to adjudicate attorney's lien and fee petition.

¶ 3 **BACKGROUND**

¶ 4 On April 17, 2013, Daspin entered into a contingency fee agreement (fee agreement) where Daspin agreed to represent Leasecorp in connection with its claims against defendant DLA Piper LLP (DLA). The agreement provided that the fees would be set based on the particular stage of the litigation and that costs would be separate and apart from fees. With regard to the payment of costs and fees, the agreement's relevant terms are as follows:

"Fees. Our representation of [Leasecorp] shall be on an hourly or contingency fee basis depending on the following:

First, we will prepare and file a complaint against [DLA] and then seek to have a settlement meeting with [DLA's] principals. If the case settles on terms acceptable to [Leasecorp] following this initial settlement effort, and before discovery or any motion practice begins, [Daspin] shall be entitled to receive as fees the total number of hours expended by attorneys Robert S. Grabemann and Timothy M. Schaum at a rate of \$400.00/hour. (If other attorneys or paralegals expend any time on the matter, they will be billed at their regular hourly rates which are less than \$400.00/hour). Such hourly fees for this phase shall not exceed a maximum of \$30,000.00. We anticipate that the cost for this phase, which will include the court filing fee, will be approximately \$500.00.

Second, if the case proceeds beyond the filing of the complaint to the motion and/or discovery stage (which includes the issuance of document request, interrogatories, deposition notices and the like) but settles or is otherwise resolved prior to trial, [Daspin] shall be entitled to receive as fees thirty three percent (33%) of any net recovery to [Leasecorp] up to \$900,000.00 and fifty percent (50%) of any net recovery above that amount.

Third, if the case proceeds to trial (which shall be considered the start of jury selection) then [Daspin] shall be entitled to receive as fees forty percent (40%) of any net recovery to [Leasecorp] up to \$900,000.00 and fifty percent (50%) of any net recovery above that amount.

Reimbursable Costs. Costs are separate and apart from fees. They include such non-overhead items such as outside photocopying charges, messenger and

delivery service, computerized research, travel (including airfare, lodging, meals, ground transportation to and from airports), court costs, court reporters, expert witnesses, mediators, consultants and filing fees. [Leasecorp] shall be responsible for such costs and expenses irrespective of the outcome of the litigation. We will bill [Leasecorp] for such costs and expenses on a monthly basis. Before incurring any costs and expenses, we will discuss them with you first and obtain your approval to go forward [sic] such cost or expense."

¶ 5 On May 13, 2013 Daspin filed Leasecorp's complaint against DLA. On January 14, 2014, the trial court denied DLA's motion to dismiss the first amended complaint as to all claims except for plaintiffs' breach of fiduciary duty claim. On January 20, 2014, via email, Leasecorp and Daspin agreed to revise their original fee arrangement to incorporate a contingent fixed fee clause. The revision is contained in the following email exchange between plaintiff's president, Michael Walker, and Daspin & Aument LLP attorney Robert Grabemann:

Mr. Grabemann: "We have agreed to revise our fee agreement as follows: We will issue written discovery (document requests and interrogatories) and prepare an amended complaint regarding the breach of fiduciary duty claim. If the case should settle prior to our receiving the discovery responses, [Daspin] will be entitled to a flat fee of \$100,000. If the case does not settle prior to our receipt of discovery responses (i.e., [DLA's] production of documents and interrogatory responses) then our prior contingency fee arrangement will kick in.

Please let me know if this accurately reflects your understanding of our revised agreement. Thanks, Rob"

Mr. Walker: "Yep***that sounds good. Thanks for doing that. I had forgot but I knew it needed to get done. Thanks, Mike."

¶ 6 Thereafter, Daspin filed Leasecorp's second amended complaint, however the case did not settle. On March 12, 2014, DLA filed a third motion to dismiss directed at Leasecorp's breach of fiduciary duty claim. On July 15, 2014, the trial court denied DLA's motion to dismiss.

¶ 7 On January 31, 2014, eleven days after Leasecorp and Daspin revised their fee agreement, Leasecorp issued their first request for production of documents. On July 5, 2014,

DLA produced 12,000 pages of documents pursuant to the request. Two days later, DLA indicated that the production was not complete. On November 5, 2014, DLA produced five additional pages of documents which it labeled "confidential." DLA served its answers to Leasecorp's first set of interrogatories on October 8, 2014. On February 25, 2015, Leasecorp sent DLA a letter pointing out what Leasecorp contended were additional documents that had yet to be produced.

¶ 8 On March 24, 2015, Leasecorp and DLA agreed to a settlement whereby DLA would pay Leasecorp a confidential sum in exchange for DLA dismissing its counterclaim for \$104,000 in unpaid legal fees against Leasecorp. That same day, Leasecorp received notice of Daspin's attorney's lien on the proceeds of Leasecorp's settlement for the amount of \$181,500.00 plus unpaid costs of \$2,582.78. On March 27, 2015, Leasecorp notified Daspin that its lien sought an amount that exceeded what they had agreed to. Daspin had applied the fee agreement's contingency fee provision rather than capping its attorneys' fees at \$100,000. In a series of email exchanges, Daspin and Leasecorp disputed the meaning of the term "the discovery responses" within their revised fee agreement. Leasecorp claimed that the term meant "all of the responses" and that the contingency fee provision had not been triggered because DLA had not tendered all of the documents requested. Daspin argued that the contingency fee provision was triggered when DLA responded to the first set of interrogatories and began tendering documents.

¶ 9 On April 2, 2015, Leasecorp and DLA executed a written settlement agreement. DLA tendered \$550,000.00 in settlement proceeds to Daspin in the form of a check made payable jointly to Daspin and Leasecorp. Daspin kept \$100,000, which represented the undisputed amount owed to them, and released \$333,333.33 to Leasecorp.

¶ 10 Ultimately, Daspin filed a petition to adjudicate attorney's lien and fee petition because the parties could not resolve the fee dispute.¹ On July 21, 2015, the trial court ruled in favor of Daspin and held that the term "the discovery responses" did not mean "all of the responses." The trial court determined that DLA's incomplete production of documents was sufficient to trigger the contingency fee provision and that Leasecorp had waived its right to pre-approve costs. The trial court awarded Daspin 33% of the net recovery of the settlement and \$2,582.78 in unreimbursed costs.

¶ 11 ANALYSIS

¶ 12 On appeal Leasecorp raises the following issues: (1) the trial court misinterpreted the term "the discovery responses" in the parties' fee agreement; and (2) the trial court erred when it granted Daspin a judgment for \$2,582.78 in unreimbursed costs and determined that Leasecorp waived its right to pre-approve costs. For the reasons that follow, we affirm the judgment of the trial court.

¶ 13 I. Fee Agreement

¶ 14 A. Standard of Review

¶ 15 The construction of a fee agreement is a matter of law. *Guerrant v. Roth*, 334 Ill. App. 3d 259, 263 (2002). Therefore, we construe the contract unrestrained by the trial court's judgment, and the standard of review is *de novo*. *Id.*

¶ 16 B. Discussion

¶ 17 Leasecorp contends that the trial court erred in its interpretation of the parties' fee agreement. Specifically, Leasecorp argues that the fee agreement's contingency fee provision was never triggered because the term "the discovery responses" meant one hundred percent of DLA's discovery responses, and Daspin never received all of DLA's discovery responses.

¹ The record does not indicate the date that the petition to adjudicate attorney's lien and fee petition was filed.

¶ 18 When construing a contract, our principal objective is to determine and give effect to the intention of the parties at the time they entered into the contract. *Fleet Business Credit, LLC v. Enterasys Networks, Inc.*, 352 Ill. App. 3d 456, 469 (2004). To determine the parties' intent, a court will first look to the language of the contract itself. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). The parties' intent is not determined by viewing a clause or provision in isolation, or in looking at detached portions of the contract. *Id.* A contract must be construed as a whole, viewing each provision in light of the other provisions. *Id.* Further, where the words in the contract are clear and unambiguous, they must be given their plain, ordinary and popular meaning. *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004). When a dispute exists between the parties as to the meaning of a contract provision, the threshold issue is whether the contract is ambiguous. *Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC*, 403 Ill. App. 3d 234, 247 (2010). Whether the contract is ambiguous is a matter of law, and an ambiguity is not created simply because the parties do not agree upon an interpretation. *Id.* Contractual language is ambiguous when it is susceptible to more than one meaning or is obscure in meaning through indefiniteness of expression. *Id.*

¶ 19 Here, the parties do not dispute that DLA answered all of Leasecorp's first set of interrogatories. The sole issue is whether DLA's partial production of documents constituted receiving "the discovery responses" sufficient to trigger the contingency fee provision in the parties' fee agreement. The parties' revision states that "If the case should settle prior to [Daspin] receiving the discovery responses, [Daspin] [would] be entitled to a flat fee of \$100,000." Leasecorp insists that the "receiving the discovery responses" language is synonymous to "completed document production." In the sentence immediately preceding the clause at issue, the parties defined written discovery to include document requests and interrogatories. Nothing in

the agreement provides any indication as to how much document production must be completed in order to trigger the fee agreement's contingency fee provision. Rather, the plain language provides that the only prerequisite to shifting to the contingency fee structure is that Daspin must receive the discovery responses (i.e. responses to document requests and interrogatories) prior to the case settling.

¶ 20 Accordingly we reject Leasecorp's argument and conclude that the trial court did not err in its interpretation of the fee agreement or in its judgment awarding Daspin 33% of Leasecorp's net recovery.

¶ 21 **II. Waiver**

¶ 22 **A. Standard of Review**

¶ 23 Generally when a trial court enters a judgment, we will not disturb the trial court's judgment unless that judgment is against the manifest weight of the evidence. *Schulenburg v. Signatrol, Inc.*, 37 Ill. 2d 352, 356 (1967). However, when the evidence before the trial court consists solely of documentary evidence, as in this case, a reviewing court will make an independent decision on the facts. See *In re Estate of Hook*, 207 Ill. App. 3d 1015, 1028 (1991); see also *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 285 (2007).

¶ 24 **B. Discussion**

¶ 25 Leasecorp contends that it did not waive its right under the fee agreement to pre-approve costs, and therefore, the trial court's judgment holding otherwise was erroneous. We disagree.

¶ 26 Waiver is the voluntary and intentional relinquishment of a known and existing right and may be either express or implied. *Lake County Grading Co. of Libertyville v. Advance Mechanical Contractors, Inc.*, 275 Ill. App. 3d 452, 462 (1995). A party to a contract may waive,

by express agreement or by its course of conduct, its legal right to strict performance of the terms of a contract. *Id. at* 463.

¶ 27 The record demonstrates that Leasecorp waived strict compliance with the terms of their agreement regarding costs and expenses. During the approximate two year span of the lawsuit, Leasecorp contends that they only approved spending \$579.80 for a copy of Mr. Walker's deposition transcript. In Leasecorp's response to Daspin's petition, Leasecorp stated, "[a]t no time did Mr. Walker give specific approval for any costs incurred, other than a verbal authorization to obtain a copy of the transcript of his deposition***" Moreover, Leasecorp stated in its brief that, "nothing otherwise in the [r]ecord on [a]ppeal indicates that any costs of any nature were ever paid by Mr. Walker."

¶ 28 The trial court noted that one category of costs specifically enumerated in the parties' agreement were filing fees. Leasecorp denies paying the filing fees and denies authorizing them to be paid. However, a prerequisite to commencing the suit against DLA was paying the filing fees. Thus, the filing fees were paid without Leasecorp's prior authorization or objection. By failing to object to or authorize these costs when they were incurred on Leasecorp's behalf, Leasecorp waived their right to dispute future costs on the basis that they were incurred without their pre-approval. See *id.*

¶ 29 Accordingly we conclude that the trial court did not err in awarding Daspin \$2,582.78 in unreimbursed litigation costs and holding that Leasecorp waived strict compliance with the terms of the fee agreement.

¶ 30 Accordingly, the judgment of the trial court is affirmed.

¶ 31 Affirmed