2017 IL App (1st) 160340-U

FOURTH DIVISION
March 16, 2017

No. 1-16-0340

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CLOVERFIELD, INC.,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	2015 M1 708593
	)	
507 CORPORATION and ARTHUR ENGELLAND,	)	
	)	Honorable
Defendants-Appellants.	)	Raymond Funderbunk,
	)	Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendants failed to provide a sufficient record of the proceedings at trial, including the petition for attorney fees at issue and a transcript of the relevant hearing, this court must presume that the circuit court correctly ordered defendants to pay plaintiff's attorney fees.

¶ 2 Defendants, 507 Corporation and Arthur Engelland[1], appeal from the circuit court's order requiring them to pay the attorney fees of plaintiff, Cloverfield, Inc.

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[1] We note that in the record, this defendant's name is alternatively spelled either "Engelland" or "Enelland." For consistency, we will use the spelling "Engelland" as defendants used on their notice of appeal.

¶ 3 The common law record, which defendants have filed in support of their appeal, indicates that this action began on May 7, 2015, when plaintiff filed an eviction summons and complaint against defendants seeking possession and rent of an office space located in Chicago. Plaintiff alleged that it had rented the office space to defendants, that defendants had failed to pay the rent due, and that defendants were unlawfully withholding possession of the office space. Plaintiff requested that the court enter judgment in its favor against defendants in the amount of $7,663.77, plus subsequently accruing rent and late charges, and attorney fees.

¶ 4 In support of its complaint, plaintiff attached a copy of the lease between plaintiff and defendants, which provided, as relevant to this appeal, that:

> "If the services of an attorney are required by any party to secure the performance under this Lease or otherwise upon the breach or default of the other party to the Lease, or if any judicial remedy is necessary to enforce or interpret any provision of the Lease, the prevailing party shall be entitled to reasonable attorney's fees, costs and other expenses, in addition to any other relief to which such prevailing party may be entitled."

¶ 5 Defendants filed their appearance and jury demand on June 25, 2015, and the matter was set for trial. However, on August 28, 2015, the court entered an order indicating that defendants "jointly & severally, have agreed to pay $3,651.83 to Plaintiff on or before *** Sept 22, 2015[.]" The court continued the matter to October 5, 2015 "based on Defendants' Oral Emergency Motion to Continue Trial & Agreement to pay $3,651.83[.]" The court also continued the matter for hearing on plaintiff's "petition for attorney's fees," and set a briefing schedule on that petition.

¶ 6 At some point thereafter, plaintiff apparently filed a petition for attorney fees, however a copy of that petition does not appear in the common law record before this court. On October 5, 2015, plaintiff withdrew its petition for attorney fees "over the objection of defendants without prejudice" and was granted seven days to file an amended petition.

¶ 7 Plaintiff apparently filed an amended petition for attorney fees, but again, a copy of that petition does not appear in the record on appeal. Defendants did, however, include a copy of its objection and response to that petition. Defendants contended that plaintiff had settled the case because "the statute requires *** five (5) day notice" prior to commencing an action, and plaintiff had not complied with that notice provision. As a result, defendants contended that plaintiff was not the "prevailing party" in the action, and that an order for attorney fees was not appropriate under the lease. Defendants further objected to plaintiff's counsel's billing entries as being unreasonable and unnecessary.

¶ 8 The record indicates that plaintiff filed a reply to defendants' response, however a copy of that reply does not appear in the record on appeal.

¶ 9 On November 12, 2015, defendants filed a motion for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013). Defendants contended that in plaintiff's reply in support of its petition for attorney fees, plaintiff "did nothing but" personally attack counsel for defendants. Defendants requested that the court sanction plaintiff's counsel "for reasonable attorney's fees and punitive damages[.]"

¶ 10 On November 16, 2015, the court entered an order stating:

> "This matter coming for hearing on plaintiff's amended fee petition, defendants having filed their 'objection & response to amended fee petition' & plaintiff having filed its 'reply to objection & response to amended fee petition.' This court having proper jurisdiction

and being fully advised in the premises & having reviewed the above pleadings, IT IS HEREBY ORDERED

1) for the reasons stated in open court, this court finds that plaintiff is the prevailing party for the purposes of awarding attorney's fees;

2) This matter is continued *** for the rule on the petition for fees."

¶ 11 Two days later, on November 18, 2015, the court entered the following order:

"This matter coming to be heard for ruling on plaintiff's amended fee petition, the court having reviewed Plaintiff's amended fee petition, 'Defendants' objection and response to amended petition' and plaintiff's 'Reply to Objections & Response to Amended Fee Petition,' the court having heard argument by counsel on November 16, 2015 and having determined per court order of that date that plaintiff is the prevailing party, this court having proper jurisdiction and being fully advised in the premises, IT IS HEREBY ORDERED:

1) For the reasons stated in court, Defendants 507 Corporation and Arthur Engelland, jointly and severally pay to Plaintiff, the amount of $12,026.20 for attorney's fees, plus $389.35 for costs for a total judgment in the amount of $12,415.55."

¶ 12 On November 30, 2015, the court denied defendants' motion for sanctions.

¶ 13 On December 16, 2015, defendant Arthur Engelland filed a motion to vacate judgment under section 2-1301 of the Code of Civil Procedure (Code) (735 ILCS 2-1301 (West 2012)), contending that he did not individually sign a contract with plaintiff or make a personal guarantee of the contract between plaintiff and defendant 507 Corporation, and thus, the judgment entered against him individually should be vacated. Defendants filed a notice of appeal

the next day, which became effective when the court denied defendant Engelland's motion to vacate on January 4, 2016. See Ill. Sup. Ct. R. 303(a)(2) (eff. Jan. 1, 2015) ("When a timely postjudgment motion has been filed by any party, *** a notice of appeal filed before the entry of the order disposing of the last pending postjudgment motion *** becomes effective when the order disposing of said motion or claim is entered.")

¶ 14 In this appeal, defendants challenge the court's judgment ordering them to pay plaintiff's attorney fees. Defendants contend that the court "abused its discretion in awarding attorney's fees to Plaintiff where the parties settled the case and Plaintiff was not the prevailing party under the terms of the parties' lease agreement." Defendants do not contest the amount or reasonableness of the attorney fees.

¶ 15 Generally, a trial court has broad discretion to award attorney fees and its decision will not be disturbed on appeal absent an abuse of that discretion. *In re Estate of Callahan*, 144 Ill. 2d 32, 43-44 (1991); *Peleton, Inc. v. McGivern's, Inc.*, 375 Ill. App. 3d 222, 225 (2007). However, in cases in which a party contests the trial court's authority to award attorney fees under the terms of a lease, our standard of review is twofold. *Id*. First, to the extent that the trial court interpreted the terms of the lease, our review is *de novo. Id*. Second, where the trial court applied the terms of the contract to the facts, our review is based on an abuse of discretion standard. *Id*. at 226.

¶ 16 In this case, the parties generally agree that the lease allows a prevailing party to recover attorney fees from the non-prevailing party. However, they disagree as to whether plaintiff can be considered the "prevailing party" in the circumstances at bar. Our court has specifically concluded that such a determination is governed by an abuse of discretion standard. See *Id*. at 226.

> "Whether either party prevailed or compelled the other to obey the lease in the trial court below involves an application of the facts to this principle of law. Therefore, it remains a matter committed to the discretion of the trial court [citation], and the question before us is whether the trial court abused its discretion when it determined that plaintiff was the prevailing party." *Powers v. Rockford Stop-N-Go, Inc.*, 326 Ill. App. 3d 511, 516 (2001).

We thus review the trial court's determination for an abuse of discretion.

¶ 17 Defendants contend that plaintiff cannot be the prevailing party in these circumstances, where the parties settled their dispute. In plaintiff's response, it argues that defendants have not presented a sufficient record to support their claims of error under *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Alternatively, it contends that the trial court properly awarded attorney fees, because the relevant lease provision is not limited to litigation in which there is a judgment on the merits, and because the trial court did not abuse its discretion in finding that plaintiff was the prevailing party. Plaintiff additionally contends that it is entitled to recover its attorney fees incurred in defense of this appeal, and requests that this court enter judgment accordingly. Defendants filed a reply brief in which they maintain that plaintiff cannot be considered a prevailing party and that "the record is sufficient to support [their] claim[.]" Defendants, however, did not specifically respond to plaintiff's contention that the record is insufficient under *Foutch*, or to plaintiff's request for attorney fees.

¶ 18 As an initial matter, we agree with plaintiff that the record on appeal is inadequate. Specifically, defendants, as appellants, have failed to provide this court with a copy of the complained-of petition, namely plaintiff's petition for attorney fees. They have also failed to provide us with a copy of plaintiff's reply to that petition, or a transcript, report of proceedings,

bystander's report or an agreed statement of facts regarding the November 16, 2015, hearing on plaintiff's petition. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005) (requiring an appellant to prepare and file a transcript or bystander's report of the proceedings in the trial court).

¶ 19 Defendants, as appellants, have the burden to present a sufficiently complete record of the proceedings in the trial court to support a claim of error, and any doubts arising from the incompleteness of the record will be resolved against them. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (where appellant did not provide a transcript or bystander's report of the hearing on a motion to vacate, the reviewing court had no basis for holding that the trial court had committed an error in denying the motion); see also *In re marriage of Hofstetter*, 102 Ill. App. 3d 392, 396 (1981) ("[i]t is not the obligation of the appellate court to search the record for evidence supporting reversal of the circuit court. *** When portions of the record are lacking, it will be presumed that the trial court acted properly in entry of the challenged order and that the order is supported by the part of the record not before the reviewing court"). Without an adequate record of the claimed error, this court must presume the circuit court's order had a sufficient factual basis and conformed with the law. *Foutch*, 99 Ill. 2d at 391-92. This presumption applies "especially" when the standard of review is abuse of discretion. See, *e.g.*, *Gakuba v. Kurtz*, 2015 IL App (2d) 140252, ¶ 22.

¶ 20 In this case, the trial court entered an order stating "for the reasons stated in open court, this court finds that plaintiff is the prevailing party for the purposes of awarding attorney's fees." However, the record before us does not contain the complained-of petition, or a report of proceedings or other record of the hearing. We do not know what evidence or arguments were presented, or the trial court's reasoning in entering its judgment. See *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005). In these circumstances, we have no basis for disturbing the trial

court's judgment. *Foutch*, 99 Ill. 2d at 393. We thus conclude that defendants have not provided us with a sufficient record of the proceedings below to permit us to properly evaluate the merits of this appeal, or decide it in their favor. See *Lill Coal Co. V. Bellario*, 30 Ill. App. 3d 384, 385 (1975); *Foutch*, 99 Ill. 2d at 392.

¶ 21 Nevertheless, even if we were to consider defendants' issue on the merits, we would find no abuse of discretion by the trial court. Defendants contend that an award of attorney fees is inappropriate because plaintiff "was not the prevailing party." Defendants argue that when parties settle a case, "it is inappropriate to find that either party is the prevailing party and an award of attorney fees to either is inappropriate." They acknowledge, however, that in some cases, a party can be found to be "prevailing" after a settlement (see *Tampam, Inc. v. Prop. Tax Appeal Bd.*, 208 Ill. App. 3d 127, 132 (1991) ("A party who prevails by way of a settlement order rather than through litigation is not precluded from claiming attorney fees as the prevailing party within the meaning of section 1988 [of the Civil Rights Act]"; *Melton v. Frigidaire*, 346 Ill. App. 3d 331, 339 (2004) (plaintiff was entitled to attorney fees as a prevailing party after settlement under Section 2310(d)(2) of the Magnuson–Moss Warranty Act)), but maintain that the court could not find plaintiff to be the prevailing party where the settlement "was not converted into a court order, judgment, or consent decree."

¶ 22 In arguing that plaintiff was not the prevailing party, defendants assign specific motivations to plaintiff's choice to settle the case. They maintain that plaintiff "knew [it] would not prevail" and agreed to settle because "it never properly served Defendants with a five-(5) day notice and it was defective." Defendants make additional arguments based on a lack of "video evidence" and "defect[s]" in the notice. We note, however, that defendants' objections to service, and their corresponding speculation on plaintiff's motivation, come solely from allegations

contained in their response to plaintiff's petition for attorney fees, and are not otherwise supported by the record.

¶ 23 In general, Illinois follows the "American Rule," under which each party must bear its own attorney fees. *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 572 (2000). However, Illinois courts will award attorney fees when the parties contracted for the award of fees or when such an award is authorized by statute. *Geisler v. Everest Nat. Ins. Co.*, 2012 IL App (1st) 103834, ¶ 86. A court must strictly construe a contractual provision providing for attorney fees, which requires construing the provision " 'to mean nothing more—but also nothing less—than the letter of the text.' " *Bjork v. Draper*, 381 Ill. App. 3d 528, 544 (2008) (quoting *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 952 (2004)). Construction of an attorney fee provision in a contract is a question of law, which we review *de novo*. *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 510 (2005)

¶ 24 As previously discussed, the parties in this case agreed to the following provision in their lease to govern the shifting of attorney fees:

> "If the services of an attorney are required by any party to secure the performance under this Lease or otherwise upon the breach or default of the other party to the Lease, or if any judicial remedy is necessary to enforce or interpret any provision of the Lease, the prevailing party shall be entitled to reasonable attorney's fees, costs and other expenses, in addition to any other relief to which such prevailing party may be entitled."

¶ 25 Defendants' proposed interpretation of the above provision would allow the shifting of attorney fees only where there is a "court order, judgment, or consent decree" in favor of one party. However, the plain language of the above provision indicates that the parties intended that

the provision would be applicable in a broad variety of situations—namely, when the services of an attorney are required "to secure the performance under this Lease *or* otherwise upon the breach or default of the other party to the Lease, *or* if any judicial remedy is necessary to enforce or interpret any provision of the Lease[.]" (emphasis added). As plaintiff points out, the plain language of this provision indicates that attorney fees could be sought in the hypothetical situation where a tenant fails to pay rent, the landlord hires an attorney to write a demand letter, and the tenant responds by paying the overdue rent. Given the language of the provision, we find that the term "prevailing party" should not be construed so narrowly as to apply only in situations in which the parties have fully litigated a dispute and the trial court has entered judgment on the merits.

¶ 26 Having so found, we next turn to the question of whether the trial court properly applied the terms of the contract to the facts, which, as previously stated, is governed by an abuse of discretion standard. *Peleton, Inc.*, 375 Ill. App. 3d at 225. The record shows that plaintiff filed a complaint alleging that defendants had failed to pay rent pursuant to a lease. Nowhere in the record did defendants deny that they had failed to perform under the lease. Instead, they chose to settle with plaintiff for $3,651.83. Under these circumstances, and based on the limited record before us, we find no abuse of discretion by the trial court in concluding that plaintiff was the prevailing party and was entitled to the attorney fees that were required "to secure [defendants'] performance" under the lease.

¶ 27 Finally, we address plaintiff's request for attorney fees in defense of this appeal based on the lease provision considered above. In defendants reply brief, they do not respond or otherwise object to plaintiff's request for attorney fees in this appeal.

¶ 28 Based on our previous discussion, we find that this appeal is a "judicial remedy *** necessary to enforce or interpret any provision of the Lease," and there is no question that plaintiff is the prevailing party. Plaintiff is thus entitled to reasonable attorney fees and costs, and we remand this matter to the trial court to determine the appropriate amount of those fees and court costs incurred during these appellate court proceedings. See *Hartman Realtors v. Biffar*, 2014 IL App (5^{th}) 130543.

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.