COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3109-FT **Cir. Ct. No. 01-CV-202**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

BETTENDORF TRANSFER, INC.,

PLAINTIFF-APPELLANT,

V.

MADISON FREIGHT SYSTEMS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County: EDWARD F. VLACK, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Bettendorf Transfer, Inc., appeals the circuit court's determination of its attorney fees.[1] Bettendorf argues the court erred by not

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

awarding Bettendorf its (1) actual attorney fees; (2) non-taxable costs and disbursements; and (3) attorney fees for the time it spent litigating the attorney fee dispute. We conclude the trial court did not err when it awarded less than actual attorney fees and therefore affirm the order.

BACKGROUND

¶2 Bettendorf leased a warehouse and truck terminal in River Falls to Madison Freight Systems, Inc. In December 2000, Madison notified Bettendorf that it did not plan on renewing the lease upon its upcoming expiration. Bettendorf claimed Madison was responsible for $34,373.30 in damages to the leased property. After a bench trial, the court determined that Madison was responsible for $16,600 in damages and, after deducting the $1,000 security deposit, awarded Bettendorf $15,600.

¶3 Bettendorf then requested $10,570.08 in attorney fees pursuant to ¶13 of the lease, which read:

> Should any litigation commence between the parties of this Lease concerning the premises, this Lease or the rights and duties in relation thereto, the party, Tenant or Landlord, prevailing in such litigation, shall be entitled, in addition to such other relief as may be granted, to a reasonable sum and for his attorneys' fees in such litigation which shall be determined by the Court or in a separate action brought for that purpose.

¶4 Madison opposed the request, arguing Bettendorf was not the prevailing party because it did not recover all of its requested damages. The court disagreed, but rejected Bettendorf's claim it was entitled to its actual fees and only awarded $4,250. In concluding Bettendorf was not entitled to its actual fees, the court concluded the lease provision contained an error and should read, "a reasonable sum *as* and for his attorney fees." (Emphasis added.) In addition, the

court also pointed to the lease's language providing that the court was responsible for determining the fees and relied on its common law authority to determine the reasonableness of the fees. The court then reduced the award noting Bettendorf requested more than $34,000 in damages while Madison admitted it was responsible for $3,200. Comparing these two sums to Bettendorf's actual recovery, the court found, "the pecuniary benefit derived was less than the Plaintiff's final position but did exceed the Defendant's final position."[2] In addition, the court noted that several of Bettendorf's requested charges were disbursements and would have to be included in a bill of costs rather than attorney fees. Finally, the court rejected Bettendorf's fee request for time spent on litigating the attorney fee issue, ruling it should not be included in the award. Bettendorf appeals.

DISCUSSION

¶5 Bettendorf first argues that because it was the prevailing party, under the lease it is entitled to its actual attorney fees. Madison has abandoned its argument that Bettendorf was not the prevailing party, but instead contends that Bettendorf is entitled only to reasonable attorney fees. In Wisconsin, attorney fees are not recoverable unless authorized by statute or contract. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 426, 456 N.W.2d 653 (Ct. App. 1990). An attorney fees award is committed to the trial court's discretion. ***Stan's Lumber v. Fleming***, 196 Wis. 2d 554, 572, 538 N.W.2d 849 (Ct. App. 1995). A trial court properly exercises its discretion when it applies the appropriate legal standard to the facts of

[2] Although the parties engaged in settlement negotiations, the court noted the submissions evidencing the negotiations were not clear as to what the parties' final positions were. Therefore, it based its conclusion on the parties' positions before the court.

record and, using a logical reasoning process, draws a conclusion that a reasonable judge could reach. ***Id.***

¶6 Here, Bettendorf's claim for attorney fees is based on the lease. The determination of parties' rights under a commercial lease is a question of law we review independently of the trial court. ***Bence v. Spinato***, 196 Wis. 2d 398, 408, 538 N.W.2d 614 (Ct. App. 1995). Bettendorf argues the trial court incorrectly interpreted the contract to allow the court to determine what was a reasonable award of attorney fees. Instead, it claims the court was obligated to award Bettendorf's actual fees based on the contract's language that the prevailing party "shall be entitled, in addition to such other relief as may be granted, to a reasonable sum and for his attorney's fees." Bettendorf contends this language entitles it, as the prevailing party, to (1) its requested relief; (2) a reasonable sum; and (3) its actual attorney fees.

¶7 We reject Bettendorf's interpretation. The trial court concluded the fee provision likely contained a typographical error and should have contained the word "as." While this is likely the case, the court's second rationale is more persuasive. The fee provision gives the court the authority to determine the prevailing party's attorney fees. This makes little sense if the prevailing party is entitled to its actual, rather than reasonable fees. In determining what a contract means and whether it is ambiguous we must give meaning to all of its provisions. ***Koenings v. Joseph Schlitz Brewing Co.***, 126 Wis. 2d 349, 366, 377 N.W.2d 593 (1985). Further, we note the lease does not specifically award actual attorney fees. Finally, we share the trial court's concern over Bettendorf's claim it is entitled to a "reasonable sum." The trial court questioned this phrase's meaning and the record reveals Bettendorf never requested a "reasonable sum." Based on

these considerations, we determine that Bettendorf is entitled only to its reasonable attorney fees under the lease.

¶8 Next, Bettendorf argues the trial court erred when it reduced its attorney fees based "solely on the fact that the sum the court awarded as damages fell between that asked for by the plaintiff and that conceded by the defendant." The pecuniary benefit derived from the litigation is a factor relevant to the court's determination of the reasonableness of attorney fees. ***Pierce v. Norwick***, 202 Wis. 2d 587, 597, 550 N.W.2d 451 (Ct. App. 1996); *see also* SCR 20:1.5. Bettendorf contends the trial court misapplied the pecuniary benefit factor, however, because the appropriate consideration is whether the fees are reasonable in light of the amount of money recovered.[3] Here, Bettendorf claims the court erroneously considered the relationship between the fees and the amount requested as relief.

¶9 We reject Bettendorf's claim. In the final analysis, there is no difference between the trial court's and Bettendorf's characterization of the pecuniary benefit. In both instances, the prevailing party's recovery is at issue. That the court characterized it as less than what Bettendorf sought to recover is irrelevant given that, ultimately, the court would still have to examine the actual recovery and its relationship to the attorney fees. The court determined that Bettendorf had only proved some of its damages and reduced its attorney fees accordingly. This was not an erroneous exercise of discretion.

[3] Bettendorf admits the court correctly listed the various factors for determining the reasonableness of attorney fees. In its decision, the court determined the submitted hourly rate was reasonable. The court also noted that many of the smaller damage claims were not difficult to prove because Madison had admitted them, although the larger claims were more complex and required proof. Bettendorf does not challenge these findings.

¶10 Bettendorf argues that, "a losing party is not entitled to a reduction in attorneys' fees for time spent by opposing counsel on unsuccessful claims, if the winning party was substantially successful and the claims were made in good faith." *See* ***Wright v. Mercy Hosp.***, 206 Wis. 2d 449, 471, 557 N.W.2d 846 (Ct. App. 1996). This rule, while undoubtedly true, is inapplicable here. The court did not determine the losing party was entitled to a reduction in attorney fees. Instead, it concluded that a reduced amount of fees was reasonable under the circumstances. While the court effectively granted Madison a reduction in fees, it did not do so because Madison was entitled to it. Rather, the court reduced the fees to reflect what it determined Bettendorf's attorneys had reasonably earned.

¶11 Bettendorf also argues the court's ruling essentially invalidates the parties' attorney fee agreement. The purpose of the agreement, according to Bettendorf, was to equalize the inequality of bargaining power between the parties and allow the litigation of claims that would otherwise be cost prohibitive. We disagree. The cases Bettendorf relies on, however, all involve statutes authorizing attorney fees. *See* ***Wright***, 206 Wis. 2d at 467-68 (fees authorized under WIS. STAT. § 51.61(7)(a) for patient's rights claims under Mental Health Act); ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis. 2d 534, 549-50, 472 N.W.2d 790 (Ct. App. 1991) (fees authorized pursuant to WIS. STAT. § 100.18(11)(b)2 to be levied against persons found to engage in fraudulent misrepresentations); ***Tuf Racing Prods. v. American Suzuki Motor Corp.***, 223 F.3d 585, 592 (7th Cir. 2000) (fees authorized by Illinois Fair Dealership Act). The claim for attorney fees in this case arises from a contract. Unlike the statutes, nothing in this contract reflects an intent to punish a party for egregious behavior or any inequality in bargaining power between the parties and an intent to remedy it through an attorney fees provision.

Instead, the contract entitles the prevailing party in a legal dispute to reasonable attorney fees and that is what the court awarded here.

¶12 Bettendorf next argues that the court erred by not awarding it its non-taxable costs and disbursements, such as photocopying and mileage, as part of the attorney fees award. The court denied Bettendorf's request, saying it should have been submitted as part of Bettendorf's bill of costs. It appears, however, that the trial court misunderstood Bettendorf's request. The costs submitted as part of the fee request were not explicitly taxable under WIS. STAT. ch. 814 and, therefore, Bettendorf claims, requesting them as part of the statutory costs request would have been pointless.

¶13 Instead, Bettendorf argues, the court should have granted these costs as part of the fee award because they fall within the lease's definition of attorney fees. Bettendorf contends the fee agreement is ambiguous; that is, it has two reasonable interpretations. *See* ***Borchardt,*** 156 Wis. 2d at 427. One of these, Bettendorf claims, is a technical, legal definition meaning the amount paid to compensate an attorney for the time worked, and the other is a lay definition meaning "the amount of time my attorney is billing me."

¶14 We reject Bettendorf's contentions. We agree the trial court would have been unable to award Bettendorf's non-taxable costs as part of its costs determination. *See* ***Kleinke v. Farmers Co-op. Supply & Shipping***, 202 Wis. 2d 138, 149, 549 N.W.2d 714 (1996) (omnibus fee provision of WIS. STAT. § 814.036 does not allow court to grant costs not explicitly authorized by statute). Nonetheless, we are not persuaded by Bettendorf's ambiguity argument. In support of its claim, Bettendorf contends it makes no sense to permit reimbursement for an attorney's time spent traveling to a deposition, but not to

permit recovery for his or her mileage expenses. Although this argument has a certain attraction, we reject it because these costs and disbursements are nonetheless distinct from attorney fees and the lease only grants the prevailing party its attorney fees, not its costs and disbursements.

¶15 Finally, Bettendorf contends the trial court should have awarded it attorney fees incurred in the attorney fee litigation as a matter of law.[4] The court rejected this argument by saying it did not "believe an award of attorney's fees should include consideration of work done on the issue of attorney's fees." Bettendorf argues the lease does not distinguish between attorney fees awarded for litigation on the merits and those incurred due to the fee dispute, and claims the lease provides for the recovery of all attorney fees incurred in the litigation.

¶16 We are not persuaded. As noted, the lease contemplates an award to the prevailing party "for his attorney's fees in such litigation which shall be determined by the court or in a separate action brought for that purpose." The only litigation contemplated in this paragraph of the lease is that "concerning the premises, the Lease, or the rights and duties in relation thereto." Nothing in the contract authorizes a fee award for the time spent litigating the fee dispute. Further, as Madison points out, the lease contemplates the fees being awarded in a proceeding separate from the underlying dispute. This suggests the parties intended any fee dispute be a separate issue from the underlying litigation.

¶17 Further, although Wisconsin courts have not addressed this particular issue, we reject Bettendorf's invitation to apply a Kansas case awarding

[4] These fees amounted to $1,155 at the time the fee petition was filed.

fees for the time spent litigating a fee dispute. *See* ***Moore v. St. Paul Fire Mercury Ins. Co.***, 3 P.3d 81, 85-86 (Kan. 2000). The court's award was made pursuant to a fee-shifting statute for insurance disputes, the primary purpose of which was "to benefit the insured." ***Id.*** at 86. As noted, we see nothing in the lease to favor one party over the other, only to award fees to the prevailing party in any litigation. We therefore reject Bettendorf's claim that it was entitled to these fees as a matter of law.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.