2011 IL App (1st) 101135-U

SIXTH DIVISION
September 30, 2011

No. 1–10–1135

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LAKESIDE BUILDING MAINTENANCE, Inc.; ABM INDUSTRIES INCORPORATED, INC.; ABM JANITORIAL SERVICES-MIDWEST LLC; and SKB, INC.,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellees,	)	No. 04 CH 5289
v.	)	
PITTSFIELD DEVELOPMENT, LLC,	)	Honorable Charles R. Winkler,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Justices Garcia and Lampkin concurred in the judgment.

O R D E R

¶ 1 ***Held*:** Trial court's entry of a $174,379.15 judgment in favor of plaintiff on plaintiff's breach of contract complaint is affirmed over defendant's contentions that the court erred in: granting plaintiff leave to file a fourth amended complaint to substitute parties; failing to enter judgment on defendant's counterclaim; and awarding attorney fees to plaintiff in the amount of $25,271.50.

¶ 2 Defendant Pittsfield Development, LLC, appeals from a $174,379.15 judgment for plaintiff Lakeside Building Maintenance, Inc. (Lakeside), on its breach of contract complaint.

We affirm.

¶ 3 On July 15, 2002, Lakeside entered into a contract with defendant to clean a building owned by defendant. Under the contract, Lakeside was to clean a benchmark of "255,000 net occupied square feet" of the building. Defendant in exchange agreed to pay $558,829.08 per year in equal monthly installments of $46,569.09. The contract also provided that if Lakeside cleaned more or less than the agreed benchmark of 255,000 square feet, it would add or subtract $0.0878 per "net occupied square f[oo]t actually cleaned" to or from the monthly installment.

¶ 4 In June 2003, defendant refused to pay the full monthly installment. Defendant informed Lakeside that the reason it did not pay the installment in full was because it believed Lakeside cleaned less than the agreed benchmark of 255,000 square feet. Defendant did not pay the monthly installments for October and December 2003, and January 2004. Defendant also did not pay Lakeside for the services it rendered during the first five days of February 2004. On February 6, 2004, defendant informed Lakeside that it no longer required its janitorial services.

¶ 5 Lakeside filed suit on March 25, 2004, seeking damages of $174,379.15 due under the contract. Lakeside's three-count complaint sought a declaratory judgment (count I) in the amount of $174,379.15 and alleged a breach of contract (count II) and tortious interference with contract (count III). Lakeside amended its complaint twice before trial. In its first amended complaint, Lakeside omitted count III. In its second amended complaint, Lakeside omitted count I and proceeded solely on the breach of contract claim.

¶ 6 Defendant counterclaimed, alleging it overpaid Lakeside for square footage that was not being cleaned. Defendant argued that the actual space cleaned by Lakeside was between 150,000

to 160,000 square feet and sought to recover the alleged overpayments it made to Lakeside.

¶ 7 The record shows that after entering into the contract with defendant and filing suit, Lakeside went through a series of corporate mergers. In July 2002, Lakeside transferred its assets to ABM Lakeside, Inc. After that transaction, SKB, Inc., was incorporated as a successor to Lakeside. ABM Lakeside was merged into Bonded Maintenance, Inc., on July 15, 2005. Bonded Maintenance was merged into ABM Janitorial Services, Inc. (ABM Janitorial), on January 8, 2007. On the following day, ABM Janitorial transferred some of its assets to ABM Janitorial Midwest, Inc. (ABM Midwest).

¶ 8 On September 10, 2008, defendant filed a motion for summary judgment, arguing that it was entitled to judgment as a matter of law on its counterclaim because the term "net occupied square feet" as used in the contract did not include hallways and common areas of the building. The court denied the motion after finding the term unambiguous as used in the contract.

¶ 9 Defendant then filed a motion to deem certain facts admitted. At a November 25, 2008, hearing, defendant sought for Lakeside to admit that as a result of the corporate mergers, it was no longer the proper party plaintiff in this matter. Lakeside made an oral motion to substitute plaintiffs. On the same date, the court granted leave to Lakeside to amend its complaint. The court's written order instructed Lakeside to file within seven days of the hearing documents showing it had legal standing to substitute plaintiffs.

¶ 10 On December 8, 2008, Lakeside filed its third amended complaint, adding a count in *quantum meruit* and naming SKB and ABM Lakeside as additional plaintiffs. Lakeside attached to the complaint an "asset purchase agreement," documenting its merger with ABM Lakeside.

¶ 11 Defendant filed an answer to Lakeside's third amended complaint, raising three affirmative defenses: (1) want of consideration by Lakeside because Lakeside did not provide the janitorial services in question; (2) lack of standing of ABM Lakeside because the contract contained an anti-assignment provision with respect to Lakeside; and (3) lack of capacity of ABM Lakeside because it ceased to exist after it merged with Bonded Maintenance.

¶ 12 The matter then proceeded to trial in December 2008 and concluded in February 2009. During this time, Lakeside went through another corporate merger. On January 16, 2009, ABM Midwest merged with Onesource Energy Services, LLC (Onesource). On the same date, Onesource changed its name to ABM Janitorial Services - Midwest, LLC. Plaintiff ABM Industries, Inc., is the parent company of ABM Janitorial Services - Midwest, LLC.

¶ 13 At trial, Nicholas Baker, the vice-president of ABM Midwest, testified that in July 2002, he was the president and chief operating officer of Lakeside. As president of Lakeside, Baker executed the contract in question with defendant. Baker identified the invoices sent by Lakeside to defendant for services rendered from January to December 2003. He said that Lakeside's account receivable report was prepared by ABM Midwest and showed that defendant did not pay the June 2003 monthly invoice in full and the October and December 2003 invoices at all. Baker said that Lakeside sent two invoices to defendant for services rendered from January 2004 through February 5, 2004, and that those invoices were also not paid. Baker also said that some of the invoices reflected charges for "tag" labor. He explained that "tag" labor included services provided by Lakeside outside the scope of the contract, such as washing windows and cleaning spills and carpets. Baker further testified to the series of corporate mergers that took place after

Lakeside entered into the contract with defendant. He said Lakeside informed defendant in writing of the mergers. Baker acknowledged that Lakeside no longer exists. He also acknowledged that when ABM Lakeside merged with ABM Midwest it ceased to exist.

¶ 14 Robert Danial testified that in 2002 he was defendant's representative and handled the day-to-day management of the building. Danial said he relied on the "Building Owners and Managers Association's" (BOMA) office measurement standards in determining the net usable square feet of the building. He said that under the BOMA guidelines, net usable square feet differed from net occupied square feet. Danial said that in the contract, 255,000 "net occupied square feet" meant "usable square feet actually cleaned by Lakeside." He said that usable square feet such as storage spaces, retail spaces and medical offices were not cleaned by Lakeside. Danial estimated that Lakeside cleaned between 150,000 to 160,000 usable square feet of the building and did not subtract from defendant's monthly installment the space below the 255,000 square foot benchmark it did not clean, as agreed in the contract. Danial prepared a "reconciliation statement," alleging that from July 2002 to February 2004 Lakeside over-charged defendant by about $21,000.

¶ 15 On February 20, 2009, the last day of trial, Lakeside moved to introduce into evidence documents showing its corporate reorganization to date (exhibit 22). The court admitted exhibit 22 into evidence over defendant's foundation objection.

¶ 16 At the close of evidence, Lakeside filed a motion for leave to file a fourth amended complaint to substitute new party plaintiffs in place of those identified in its third amended complaint. In support of the motion, Lakeside attached a memorandum and numerous

documents detailing the series of mergers that had occurred since the inception of the case. Lakeside also attached a fourth amended complaint to the motion, naming ABM Industries and ABM Janitorial Services - Midwest, LLC, as plaintiffs. In response, defendant moved to strike the documents supporting Lakeside's fourth amended complaint as being outside the trial record. Defendant also moved the court for rule to show cause against Lakeside for failing to provide these documents within seven days of the court's November 25, 2008, order.

¶ 17 In a written order, the court denied defendant's motions to strike documents and rule to show cause and granted Lakeside's motion for leave to file a fourth amended complaint. In doing so, the court noted that "these [documents] were attached to show the very point of the motion, that various transactions that have occurred necessitate the substitution of a party/amendment of the complaint" and that "in light of [the] numerous mergers and transactions," Lakeside's failure to file the documents within seven days of the court's November 25, 2008, order was "not the result of ill intent or deliberate action."

¶ 18 The court then entered a $174,379.15 judgment in favor of Lakeside on its breach of contract claim. The court later granted Lakeside's amended petition for attorney fees and, after a hearing, entered judgment against defendant in the amount of $25,271.50. Defendant appeals.

¶ 19 Defendant first argues that the court erred in granting leave to Lakeside to file its fourth amended complaint because the complaint substituted new party plaintiffs, ABM Industries and ABM Janitorial Services - Midwest, LLC, who were not deposed or subject to discovery. The question of whether to allow an amendment to a pleading is within the trial court's discretion, and the court's decision will not be reversed absent an abuse of that discretion. *Weidner v. Midcon*

Corp., 328 Ill. App. 3d 1056, 1059, 767 N.E.2d 815 (2002).

¶ 20 An amendment to a pleading to substitute new parties is governed by section 2-1008(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1008(a) (West 2008)), which provides:

> "Change of interest or liability. If by reason of marriage, bankruptcy, assignment, or any other event occurring after the commencement of a cause or proceeding, either before or after judgment, causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after commencement of the action, it becomes necessary or desirable that any person not already a party be before the court *** the action does not abate, but on motion an order may be entered that the proper parties be substituted or added, and that the cause or proceeding be carried on with the remaining parties and new parties, with or without change in the title of the cause."

Leave to amend should generally be granted if the amendment would further the ends of justice. *Weidner*, 328 Ill. App. 3d at 1059. In determining whether the court abused its discretion we consider: " '(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.' " *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273, 586 N.E.2d 1211 (1992). In considering these factors, the court should err on the side of allowing a resolution on the merits rather than imposing procedural hurdles to litigation. *Patsis v. Zion-Benton Township High School, No. 126*, 234 Ill. App. 3d 232, 238, 599 N.E.2d

531 (1992).

¶ 21 After considering these factors, we cannot say that the trial court abused its discretion in granting Lakeside leave to amend its complaint. First, it is clear that the proposed amendment naming the proper party plaintiffs cured the defective complaint. Second, there is no indication that defendant was prejudiced or surprised by the proposed amendment where defendant was aware that Lakeside went through a series of corporate mergers and based its affirmative defenses almost entirely on the effect of these mergers on Lakeside's ability to perform under the terms of the contract. Third, the proposed amendment was timely given that Lakeside's last merger occurred after the beginning of trial and the named parties did not exist before the merger. Finally, the record does not disclose previous opportunities on which Lakeside could have amended its complaint where, as mentioned, Lakeside's last merger did not occur until after the trial had begun. To the extent that Lakeside did have opportunities to amend its complaint the record shows Lakeside took advantage of them by filing a third amended complaint naming ABM Lakeside and SKB as additional plaintiffs. Under these circumstances, the trial court properly granted Lakeside leave to amend its complaint.

¶ 22 We find further support for this conclusion in section 2-401(b) of the Code (735 ILCS 5/2-401(b) (West 2008)), which provides:

> "Misnomer of a party is not a ground for dismissal but the name of any party may be corrected at any time, before or after judgment, on motion, upon any terms and proof that the court requires."

Here, in accordance with section 2-401(b), the court instructed Lakeside to file documents

showing it had legal standing to substitute plaintiffs. Lakeside attached an "asset purchase agreement" to its third amended complaint, documenting its merger with ABM Lakeside. Lakeside also introduced into evidence exhibit 22, showing its corporate reorganization as of the last day of trial, and attached numerous documents to its fourth amended complaint, detailing the series of mergers since the inception of the case. Although defendant objected to these documents at trial and continues to object to them in this court, we find no error in the court admitting them into evidence as required by section 2-401(b). These documents were the "proof that the court require[d]" to verify that a substitution of parties was necessary. 735 ILCS 5/2-401(b) (West 2008).

¶ 23 Defendant next contends that the court erred in: (1) entering judgment in favor of Lakeside on its breach of contract complaint; (2) failing to enter judgment on defendant's counterclaim; and (3) including the amount of "tag" labor damages in its $174, 379.15 judgment. We consider these related arguments together.

¶ 24 We review *de novo* the construction, interpretation or legal effect of a contract. *Kopley Group V., L.P. v. Sheridan Edgewater Properties, Ltd.*, 376 Ill. App. 3d 1006, 1014, 876 N.E.2d 218 (2007). "To succeed on a claim of breach of contract, a plaintiff must plead and prove the existence of a contract, the performance of its conditions by the plaintiff, a breach by the defendant, and damages as a result of the breach." *Kopley Group*, 376 Ill. App. 3d at 1014.

¶ 25 Here, there is no dispute that a contract existed between Lakeside and defendant. There is also no dispute that Lakeside performed the conditions of the contract by cleaning 255,000 net occupied square feet of defendant's building and that Lakeside was damaged by defendant's

failure to pay for the services rendered. At issue is whether defendant breached the contract by withholding payment from Lakeside for work it allegedly was not required to perform. Defendant claims that the "net occupied square feet actually cleaned" by Lakeside was between 150,000 to 160,000, not "255,000 net occupied square feet" as agreed in the contract. Defendant maintains that the term "net occupied square feet actually cleaned" refers to the office area cleaned by Lakeside and does not include hallways and common areas of the building, also cleaned by Lakeside. In setting forth this argument, defendant relies on the BOMA standards of measuring office space.

¶ 26 Where a contract is unambiguous, that language will be given its plain and ordinary meaning. *Whitt v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 658, 662, 734 N.E.2d 911 (2000). A contract is not ambiguous if we can ascertain its meaning from the general contract language. *William Blair and Co., LLC, v. FI Liquidation Corp*, 358 Ill. App. 3d 324, 334, 830 N.E.2d 760 (2005). A contract will not be deemed ambiguous simply because the parties do not agree on its meaning. *Manor Healthcare Corp. v. Soiltest, Inc.*, 192 Ill. App. 3d 934, 940, 549 N.E.2d 719 (1989).

¶ 27 We need not look outside the contract here in interpreting the term "255,000 net occupied square feet." The term is not complex nor is it ambiguous. It was the agreed-to benchmark by the parties from which defendant's monthly installments were either adjusted up or down, depending on the amount of space cleaned by Lakeside. We believe this 255,000 square foot benchmark included hallways and common areas cleaned by Lakeside. Having so found, it necessarily follows that defendant breached the contract by withholding payments to Lakeside for

services rendered under the contract. The court did not err in entering judgment in favor of Lakeside and rejecting defendant's counterclaim.

¶ 28 In reaching this conclusion, we are unpersuaded by defendant's argument that the court erred in entering judgment in favor of Lakeside because Lakeside failed to file its fourth amended complaint after being granted leave to do so. The record shows Lakeside attached its fourth amended complaint to its motion for leave to file the complaint. After the motion was granted, Lakeside was not required to independently refile the complaint.

¶ 29 We are also unpersuaded by defendant's argument that the court erred by including the amount of "tag" labor damages in its $174, 379.15 judgment. The record shows that this judgment was supported by partially paid and unpaid monthly invoices provided by Lakeside. Although "tag" labor was outside the terms of the contract, Baker testified these services included washing windows and cleaning spills and carpets which Lakeside performed during the course of business. These services were reflected in the invoices sent to defendant and are in line with what defendant hired Lakeside to do–perform janitorial services. We believe that under the circumstances these damages were reasonable. See *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 107, 854 N.E.2d 607 (2006) (The burden is on the plaintiff to establish a reasonable basis for computing damages); *Wilson v. DiCosola*, 352 Ill. App. 3d 223, 225, 815 N.E.2d 975 (2004) (When a contract is breached, the injured party is entitled to be placed in the position it would have been in had the contract been performed).

¶ 30 Defendant finally contends that the court erred in awarding attorney fees to Lakeside. Defendant does not contest that the contract provided for the payment of fees but claims that an

evidentiary hearing should have been held to show the reasonableness of the fees.

¶ 31 The determination of reasonable attorney fees rests in the sound discretion of the trial court. *Sampson v. Miglin*, 279 Ill. App. 3d 270, 281, 664 N.E.2d 281 (1996). Even where the trial court has, in its calculations, included improper fees or excluded recoverable fees, this court will not disturb the judgment unless the total of the fees awarded is so excessive as to amount to a clear abuse of discretion. *Sampson*, 279 Ill. App. 3d at 281.

¶ 32 In *Chicago Title & Trust Co., Trustee under Trust No. 89-044884 v. Chicago Title & Trust Co., Trustee under Trust No. 1092636*, 248 Ill. App. 3d 1065, 1072, 618 N.E.2d 949 (1993), this court enumerated the basic principles for assessing fees:

> "[T]he party requesting fees bears the burden of presenting sufficient evidence from which the trial court can render a decision as to their reasonableness. [Citations]
>
> A petition for fees must present the court with detailed records containing facts and computations upon which the charges are predicated and specifying the services provided, by whom they were performed, the time expended and the hourly rate charged."

In assessing the reasonableness of fees, "[t]he trial court is permitted to use its own knowledge and experience to assess the time required to complete particular activities." *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 139, 894 N.E.2d 781 (2008).

¶ 33 Here, the amended fee petition, consisting of nearly 20 pages of invoices, listed the

attorneys and their services, as well as their hours and rates. The petition also itemized the specific tasks performed and described the work involved. Although the court did not hold an evidentiary hearing to determine the reasonableness of the fees, it did hear argument from each party concerning the fees. The record shows that Lakeside's amended fee petition sought considerably less in attorney fees then its initial petition seeking $74,703. The record also shows that the court considered Lakeside's amended petition in awarding fees. In light of this record, including the itemized fee petition, the court's familiarity with the case and its issues, we believe the court was capable of determining the reasonableness of the charges, and that the amount of attorney fees was not so excessive as to amount to an abuse of discretion. See *Wildman, Harrold, Allen and Dixon v. Gaylord*, 317 Ill. App. 3d 590, 595, 740 N.E.2d 501 (2000) ("the trial judge's familiarity with the underlying litigation allows him to independently assess the necessity and reasonableness of the legal services rendered"); see also *Sampson*, 279 Ill. App. 3d at 282; *Kirkpatrick*, 385 Ill. App. 3d at 140.

¶ 34 For the reasons stated we affirm the judgment of the trial court.

¶ 35 Affirmed.