2012 IL App (1st) 110614-U

FIFTH DIVISION
March 30, 2012

No. 1-11-0614

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE CELOTEX CORPORATION, Plaintiff-Appellant, v. DISCOUNT ROOFING MATERIALS, LLC, an Illinois Limited Liability Company, DARIUSZ "DEREK" DYBKA and VIOLETTA DYBKA a/k/a VIOLETTA JASKULA, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County No. 02 L 008761 Honorable Daniel J. Pierce, Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices J. Gordon and McBride concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion by reducing a litigant's attorney fee award in a multi-suit collection case spanning ten years. The trial court's application of a 5% interest rate was correct where the parties had agreed to the "maximum rate allowed by law," a term that the trial court found ambiguous.

¶ 2 Celotex Corporation ("Celotex") appeals from the trial court's award of attorney fees in its collection case against defendants, Discount Roofing Materials ("Discount"), Dariusz Dybka, and Violetta Dybka ("the Dybkas"). Celotex raises the following arguments on appeal: (1) the trial court

abused its discretion by awarding only $105,000.00 out of the $330,388.25 requested by Celotex, when such fees were reasonable under the circumstances, and (2) the trial court's award of interest at the rate of 5% rather than 9% is "contrary to Illinois law." For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 In 2000, Celotex and Discount entered into a credit agreement for the sale of roofing materials to Discount. The credit agreement was personally guaranteed by the Dybkas for up to $100,000.00 each. In the credit agreement, Discount agreed "that accounts not paid when due are subject to reasonable attorney's fees, collection costs and interest at the maximum rate allowed by law." As guarantors for Discount, the Dybkas also agreed to pay "interest and reasonable attorney's fees" on debt owed by Discount to Celotex.

¶ 5 Prior to the instant dispute, Celotex had entered into an asset purchase agreement with CertainTeed Corporation ("CertainTeed"). Under this agreement, Celotex retained its accounts receivable, and CertainTeed assumed Celotex's liabilities.

¶ 6 In 2000, Discount filed a products liability claim against Celotex in the circuit court of Cook County to recover for some allegedly defective roofing materials that Celotex had sold to Discount ("the 2000 case"). The 2000 case was defended by CertainTeed in Celotex's name, pursuant to the asset purchase agreement.

¶ 7 In 2001, Celotex filed a claim against Discount and the Dybkas (collectively "defendants") in the United States District Court for the Northern District of Illinois for unpaid invoices for roofing materials Celotex had sold to Discount ("the 2001 case"). Defendants moved to dismiss, arguing that

the same set of transactions was at issue in the 2000 case and the 2001 case and that the 2001 case should have been brought as a counter-claim to the 2000 case. Celotex opposed the motion, alleging that the cases involved different parties in interest and different issues. Celotex also argued that the 2001 case was a collection action that could be disposed of quickly by summary judgment, whereas the 2000 case was a products liability action that could require lengthy discovery and possibly a trial. The district court granted defendants' motion to dismiss and denied Celotex's motion to reconsider.

¶ 8 In 2002, Celotex filed its claim against defendants in the circuit court of Cook County to recover for the unpaid invoices ("the 2002 case"). This is the case at issue in the instant appeal. Defendants moved to consolidate the 2000 and 2002 cases. The motion was opposed by Celotex, who raised objections similar to those it had raised in opposing the dismissal of the 2001 case: that the cases involved different parties in interest, that one case could be disposed of quickly and the other would require lengthy litigation, and that the cases involved different underlying facts. The circuit court granted the motion to consolidate for discovery purposes only. Discovery in the consolidated cases involved several depositions, the exchange of documents, and several pre-trial settlement conferences.

¶ 9 In 2004, Celotex moved for summary judgment against defendants in the 2002 case. The trial judge granted partial summary judgment to Celotex in the 2002 case for $121,126.58, the sum due under the credit agreement. However, the court did not enter final judgment because the 2000 and 2002 cases arose from the same contract, and Discount could seek "to recover damages for any defects it can prove existed at the time it received the shingles at issue." Defendants did not pay Celotex the judgment amount at that time.

¶ 10 After the order granting partial summary judgment to Celotex in the 2002 case, discovery for the 2000 case continued. Twenty-nine depositions were taken, including roofing contractors, Celotex employees, CertainTeed personnel, and defendants' experts. As defendants' set-off claim could have impacted Celotex's award in the 2002 case, Celotex remained a party and continued to participate in hearings and discovery proceedings.

¶ 11 In 2009, Discount and CertainTeed agreed to settle the 2000 case. Pursuant to that settlement, Discount released all defect claims related to any roofing shingles it purchased from Celotex. The 2002 case was not dismissed at that time. After the settlement and dismissal of the 2000 case, Celotex moved for an entry of judgment against Discount and renewed its summary judgment motion against the Dybkas. Discount moved to reconsider the 2005 order granting partial summary judgment. The trial judge granted the motion to reconsider and denied Celotex's motions as moot, making no ruling on Celotex's request for the award of interest and costs.

¶ 12 In 2010, the parties participated in several pre-trial conferences, eventually entering into a settlement agreement in the 2002 case in which Discount agreed to pay Celotex the sum owed under the credit agreement: $121,126.58. Discount also agreed to pay "reasonable attorney's fees," costs, and interest at the "maximum rate allowed by law."

¶ 13 Celotex then filed a Petition for Attorney Fees, seeking $453,164.13 ($330,388.23 in fees, $12,127.00 in costs, and $110,648.88 in interest on "accounts not paid when due," calculated at 9% per annum). The petition contained exhibits to illustrate the 10-year history of litigation between the parties. Celotex argued that its fees at all stages of litigation were reasonable, its attorneys were skilled, the litigation was complex, and Celotex paid its fees throughout the case. Celotex also

argued that the fee award is not limited by the amount at issue in the case.

¶ 14 At a hearing on the Petition for Attorney Fees, the trial judge told the attorneys for each party that he would apply a 5% interest rate, rather than Celotex's requested 9% rate. The trial judge also stated that he would not award attorney fees to the full extent requested by Celotex. The trial judge then made statements about the attorney fees related to the case:

> "It's ten years of litigation involving a liquidated sum of money that just let the legal fees skyrocket to astronomical levels. And I'm really not critical of you * * * with respect to advocating on behalf of your clients.
>
> * * *
>
> "And I'll guarant[ee], you get ten years of litigation on a collection case, that you are just asking for skyrocketing fees.

¶ 15 The trial judge's written order awarded $178,765.70 ($105,000.00 in fees, $12,127.00 in costs, and $61,638.70 in interest, calculated at 5% per annum). As to the interest rate applied to the fee award, the trial court noted that the "maximum rate" of interest allowed under Illinois law could mean several different interest rates, including 5% under Section 2 of the Interest Act or 9% or more under Section 4 of the Interest Act. 815 ILCS 205/2 & 4. The court found that "[l]eaving the 'lawful interest rate' unspecified, at the very least, created a contractual ambiguity that should be construed against Celotex."

¶ 16 The order listed the fees requested by Celotex and the periods of litigation associated with each set of fees. Specifically, the judge wrote that the representation of Celotex by two firms in the consolidated cases (one for the 2002 case and one for CertainTeed, which defended the 2000 case

in Celotex's name) "probably could have been more efficiently handled by one firm."

¶ 17 The court noted that the parties had failed to define "reasonable attorney fees" and "[t]hus, it is left to the court to fashion an award that, in its view, is reasonable." The order also stated that "there is no likelihood Defendants contemplated 'reasonable attorney fees' [in the fee shifting provision] could amount to 300% of the value of the purchased product." The court further wrote,

> "the Court, in its experience, does not believe a reasonably prudent businessperson would expend triple the value of the claim to pursue a recovery when less expensive alternatives were available. This result is not a finding that the attorney's hourly rates were unreasonable * * *. Both parties should bear the consequences of not resolving this lawsuit (and the others) in a prompt and efficient manner given the issues involved and the damages alleged.
>
> "The Court * * * under the facts and background of this lawsuit and based upon a review of the claimed fees and further based upon the Court's thirty-six years of private law practice, the fees generated in the federal court, in opposition to the consolidation of cases in this Court, are not reasonable in a fee-shifting context. Further, adjustments must be made in the fees generated after the grant of partial summary judgment and those generated during settlement negotiations, filing the renewed summary judgment motion, and in the preparation of the fee petition."

The court found that the amount of "reasonable attorney fees" due to Celotex was $105,000.00. This appeal followed.

¶ 18 ANALYSIS

¶ 19 I. *Whether the Fee Award Was an Abuse of Discretion*

¶ 20 Celotex contends that the trial court should have awarded attorney fees for the full amount submitted to the trial court. Celotex asserts that the trial court "ignored all established guidelines for evaluating the reasonableness of the fees." Defendants contend that the trial court was within its discretion to deny the full amount requested by Celotex.

¶ 21 "Provisions in contracts for awards of attorney fees are an exception to the general rule that the unsuccessful party is not responsible for payment of such fees." *Abdul-Karim v. First Federal Savings & Loan Ass'n of Champaign*, 101 Ill. 2d 400, 411-12 (1984). "Contractual provisions for an award of attorney fees must be strictly construed, and the court must determine the intention of the parties regarding the payment of fees." *J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership*, 325 Ill. App. 3d 276, 283 (2001) (citing *Mirar Development, Inc. v. Kroner*, 308 Ill. App. 3d 483, 488 (1999)). Given that the parties' original credit agreement provided for "reasonable" attorney fees, the crux of this case concerns what attorney fees were reasonable.

¶ 22 We review an award of attorney fees under an abuse of discretion standard. *Wildman, Harrold, Allen and Dixon v. Gaylord*, 317 Ill. App. 3d 590, 595 (2000) (citing *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 984 (1987); *In re Estate of Healy*, 137 Ill. App. 3d 406, 411 (1985); *Lurie v. Canadian Javelin Ltd.*, 93 Ill. 2d 231, 239 (1982); *Leader v. Cullerton*, 62 Ill .2d 483, 488 (1976)). "A court abuses its discretion when no reasonable person would take its view." *City of McHenry v. Suvada*, 2011 IL App (2d) 100534 (2011) (citing *Anest v. Audino*, 332 Ill. App. 3d 468, 479 (2002)).

¶ 23 "The test for determining the reasonableness of attorney fees incurred in a matter must be

whether a reasonable attorney, based on the totality of the facts and circumstances known and available to him, should have performed the legal services at the time the services were performed in order to discharge his ethical obligations under the Illinois Code of Professional Responsibility." *Harris Trust and Sav. Bank v. American Nat. Bank and Trust Co. of Chicago*, 230 Ill. App. 3d 591, 598-99 (1992). This court has also noted specific factors that a trial court may look to when determining the reasonableness of a party's requested fee award:

> "(1) the skill and standing of the attorney, (2) the nature of the case, (3) the novelty of the issues involved, (4) the significance of the case, (5) the degree of responsibility required, (6) the customary charges for comparable services, (7) the benefit to the client, and (8) the reasonable connection between the fees sought and the amount involved in the litigation." *J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership*, 325 Ill. App. 3d 276, 283 (2001) (citing *Mercado v. Calumet Federal Sav. & Loan Ass'n*, 196 Ill. App. 3d 483, 493 (1990)).

"The party seeking fees has the burden of presenting the court with sufficient evidence from which it can determine the reasonableness of the fees." *Id.* (citing *Mercado*, 196 Ill. App. 3d at 493).

¶ 24 Celotex notes that the last *Mercado* factor - connection between the fees sought and the amount at issue - is not decisive, as this court has found that "attorney fees may be reasonable even if the fees are disproportionate to the monetary amount of an award." *J.B. Esker*, 325 Ill. App. 3d at 283. In *J.B. Esker*, the appellate court reversed and remanded a fee award that had been reduced by a trial court, which had not ruled "that any of the attorney fees were excessive, redundant, or otherwise unnecessary or unreasonable." *Id.* However, in this case, unlike *J.B. Esker*, the trial court

did determine that a party's requested fees were excessive, redundant, and unreasonable. For instance, the trial court wrote that the consolidated cases "probably could have been more efficiently handled by one firm." The trial court also provided a detailed breakdown of the fees in this case according to each phase of litigation: Celotex spent over $92,000 in legal fees after the entry of partial summary judgment, over $43,000 during settlement discussions, $53,000 for a renewed summary judgment motion, and $50,000 to prepare its fee petition. The trial court specifically noted that "adjustments must be made" based on the unreasonableness of the above fees, as well as the overall size of the fee award in proportion to the amount at issue. Celotex had the burden of showing that its fees were reasonable. *J.B. Esker*, 325 Ill. App. 3d at 283 (citing *Mercado,* 196 Ill. App. 3d at 493). The trial court simply did not find that the majority of Celotex's fees were reasonable.

¶ 25 We agree with the trial court that this was a simple collection matter, whose factual complexity likely did not warrant two teams of attorneys effectively representing Celotex's interests, nor did it warrant the continued accumulation of fees during discovery in the 2000 case. The underlying cases dealt with the sale of shingles, defendants' non-payment for the shingles, and defendants' potential set-off claim based on defective shingles. Celotex did not show that the factual or legal issues in these cases were complex. Although Celotex's counsel continued to appear at depositions during discovery in the 2000 case, it did not show that its continued involvement after the entry of partial summary judgment in the 2002 case was necessary or reasonable. In fact, CertainTeed's counsel appeared at each deposition, continuing to oppose defendants' set-off claim.

¶ 26 Based on the facts in this case, we cannot say that no reasonable person would take the trial court's view on the reasonableness of the fees at issue in this case. See *City of McHenry*, 2011 IL

App (2d) 100534 (citing *Anest*, 332 Ill. App. 3d at 479). As a result, we do not find that the trial court abused its discretion in assessing and reducing the fee award in this case.

¶ 27 II. *Whether the Trial Court Applied the Correct Interest Rate to the Fee Award*

¶ 28 Celotex also argues that the trial court erred by applying the 5% interest rate in Section 2 of the Interest Act. Celotex contends that the credit agreement, which allowed interest "at the maximum rate allowed by law," is unambiguous and reflects the parties' intent. Defendants support the trial court's ruling that "[l]eaving the 'lawful interest rate' unspecified, at the very least, created a contractual ambiguity that should be construed against Celotex."

¶ 29 Contractual interpretation is a question of law that is reviewed *de novo*. *Salce v. Saracco*, 409 Ill. App. 3d 977, 981 (2011) (citing *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007). The "cardinal rule" of contract interpretation is "to give effect to the parties' intent, which is to be discerned from the contract language." *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007) (citing *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004)). "A contract is ambiguous when the language used is reasonably susceptible to more than one meaning [citation], and the language is not rendered ambiguous simply because the parties do not agree upon its meaning [citation]." *In re Marriage of Arkin*, 108 Ill. App. 3d 103, 108 (1982).

¶ 30 Section 2 of the Interest Act provides a default interest rate of 5% "[i]n the absence of an agreement between the creditor and debtor governing interest charges." 815 ILCS 205/2. Section 4 of the Interest Act provides:

> "in all written contracts it shall be lawful for the parties to stipulate or agree that 9% per annum, or any less sum of interest, shall be taken and paid upon every $100 of

> money loaned or in any manner due and owing from any person to any other person or corporation in this state, and after that rate for a greater or less sum, or for a longer or shorter time, except as herein provided." 815 ILCS 205/4.

Under Section 4, "[i]t is lawful to charge, contract for, and receive *any rate or amount of interest*" for certain transactions, including some loans and credit transactions. 815 ILCS 205/4 (emphasis added).

¶ 31 The credit agreement allows Celotex to collect "interest at the maximum rate allowed by law." Celotex concedes that "there is no limitation on the rate of interest that may be charged in a sales transaction between merchants," although it notes that it asked only 9% rather than a much higher possible interest rate allowable under Section 4. Arguing that the "maximum rate" term is unambiguous, Celotex cites a Texas case where the term "maximum rate allowed by law" was found to be unambiguous in a contract for the construction of an industrial building. See *All Seasons Window and Door v. Red Dot Corp.*, 181 S.W.3d 490 (Tex. App. Ct. 2005). However, in *All Seasons*, the court applied the rate ceiling under Texas law at that time: 18%. *All Seasons*, 181 S.W.3d at 499. In this case, the Interest Act presents no rate ceiling whatsoever for certain transactions listed by statute, and Celotex admits that this credit agreement was a transaction for which a rate above 9% could be applied.

¶ 32 In our view, the contract is ambiguous. Although the credit agreement allowed Celotex to collect "interest at the maximum rate allowed by law," the trial court noted that the "maximum rate" under Section 4 of the Interest Act could mean 9% *or more*, with no rate ceiling specified. An open-ended rate would mean that Celotex could choose virtually any interest rate to apply to its award.

As "[a] contract is ambiguous when the language used is reasonably susceptible to more than one meaning," *Schwartz v. Schwartz*, 69 Ill. App. 2d 128, 134 (1966) (citing *Whiting Stoker Co. v. Chicago Stoker Corp.*, 171 F.2d 248, 250 (7th Cir.)), the term "maximum rate allowed by law" is ambiguous because it is subject to limitless meanings under Section 4 of the Interest Act. Defendants could have had no reasonable expectation as to the interest rate Celotex would seek in this case, assuming Celotex prevailed.

¶ 33 We now turn to the question of whether the 5% rate applied by the circuit court was correct. As we have found that the term "maximum rate allowed by law" was ambiguous and could mean any number of interest rates under Illinois law, we find that Celotex failed to specify a definite interest rate. Under Section 2 of the Interest Act, creditors may charge a 5% interest rate "[i]n the absence of an agreement between the creditor and debtor governing interest charges." 815 ILCS 205/2. As the parties had no valid agreement concerning the interest rate to apply to late payments, we hold that the trial court was correct in applying the default rate of 5% to Celotex's award.

¶ 34 CONCLUSION

¶ 35 In view of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.