

2012 IL App (2d) 100871-U
No. 2-10-0871
Order filed June 19, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

WILLIAM R. McMANAMAN,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 05-L-709
)	
FIRST HEALTH GROUP CORPORATION)	
and COVENTRY HEALTH CARE, INC.,)	Honorable
)	John T. Elsner
Defendants-Appellees.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Hudson concurred in the judgment.

ORDER

Held: The trial court properly found that postjudgment interest on the plaintiff's term-completion severance payment began to accrue on the date the trial court entered judgment on remand. The trial court erred in denying, in part, the plaintiff's requests for attorney fees and postjudgment interest.

¶ 1 This appeal stems from a dispute arising from the interpretation of an employment agreement. The employment agreement provided that if the plaintiff, William McManaman, was ever terminated without cause, he would be eligible for two types of severance payments and an excise tax neutralization payment. The agreement also provided that a prevailing party in litigation

was entitled to reasonable attorney fees and expert witness fees. It was undisputed that the plaintiff was terminated without cause, however, the defendants, First Health Group Corporation (First Health) and Coventry Health Care, Inc. (Coventry), insisted he was only entitled to one of the two severance payments. The plaintiff filed a complaint for breach of contract, but the trial court agreed with the defendants. The plaintiff appealed from that order and this court reversed, holding that the plaintiff was entitled to both severance payments. We remanded the matter for further proceedings consistent with our disposition. Following proceedings on remand, the plaintiff eventually received his second severance payment and the excise tax neutralization payment. In this appeal, the plaintiff argues that the trial court erred in (1) denying him his attorney fees related to recovering the excise neutralization payment; (2) finding that he was only entitled to postjudgment interest from the time of the trial court's order after remand and not from the time of this appellate court's order; and (3) failing to grant him postjudgment interest from May 5 to 28, 2010. Additionally, the plaintiff claims that he is entitled to reasonable attorney fees for this appeal. We affirm in part, reverse in part, and remand for further proceedings.

¶2 In July 2003, the plaintiff was employed as the chief financial officer (CFO) of Aurora Foods, Inc. At that time, First Health's chief executive officer (CEO), recruited the plaintiff for the CFO position at First Health. After several months of negotiating an employment agreement, the plaintiff accepted the CFO position. The employment agreement had several provisions covering the topic of termination. On May 13, 2004 (less than two months after the plaintiff had accepted employment), First Health's board of directors put the company up for sale. On October 14, 2004, Coventry announced its acquisition of First Health, which was finalized January 28, 2005. On

January 27, 2005, First Health and Coventry notified the plaintiff that he would be terminated the next day.

¶ 3 The employment agreement contained the following relevant provisions. Section 2 of the agreement provided that the plaintiff had a guaranteed, fixed four-year term of employment. Section 5 provided that the plaintiff's gross compensation was \$450,000 annually and that, for the year ending December 31, 2004, the plaintiff's "Target Bonus" would be 50% of his base salary, or \$225,000. Section 6(f) of the agreement provided that, in the event the plaintiff was terminated without cause, he was entitled to a term-completion severance payment consisting of his base salary and target bonus for each year of the remainder of his four-year term of employment. At the plaintiff's option, he could receive this payment in installments according to normal payroll practices or he could request to be paid "in an immediate lump sum discounted to present value applying a discount interest rate equal to the interest rate of [First Health's] revolving credit facility at the time of termination."

¶ 4 In addition, section 6(h) provided that, in the event the plaintiff was terminated due to a change in control of First Health, the plaintiff would receive severance of two times the sum of his base salary plus his target bonus. Section 6(h) also provided that if any payments to the plaintiff were subject to the excise tax imposed by section 4999 of the Internal Revenue Code of 1986 (the Code), then First Health would pay an "Excise Neutralization Payment." Finally, section 15(e) provided that, in the event the employee was the prevailing party under any litigation related to the agreement, First Health would reimburse the plaintiff for his reasonable attorney fees and expert witness fees.

¶ 5 Following the plaintiff's termination, litigation ensued concerning the plaintiff's severance. The plaintiff believed that, under the employment agreement's terms, he was entitled to both the term-completion severance, under section 6(f), and the change-in-control severance, in section 6(h). Coventry asked the plaintiff to sign a separation agreement and release, which provided that he would receive only the change-in-control severance. Coventry withheld the payment of termination benefits because the plaintiff refused to sign the separation agreement and release.

¶ 6 On July 18, 2005, the plaintiff filed a complaint for breach of the employment agreement against the defendants, First Health and Coventry, which sought all of the termination benefits provided in sections 6(f) and 6(h) of the agreement. On April 26, 2006, Coventry tendered the change-in-control severance benefit and on June 7, 2007, it tendered the interest due on that benefit. The defendants maintained that no other payments were due to the plaintiff. The parties filed cross-motions for summary judgment. Following arguments on the motions, the trial court found that, under the plain language of the employment agreement, the plaintiff was only entitled to the change-in-control severance. The trial court also found that the plaintiff was entitled to attorney fees and that if the parties could not agree on the amount of those fees, it would conduct a hearing. Finally, the trial court noted that the defendant was liable for the excise tax to be imposed by section 4999 and the related excise neutralization payment. Accordingly, the trial court granted the defendant's motion for summary judgment. The trial court partially granted the plaintiff's motion for summary judgment as it related to excise taxes and attorney fees. On December 13, 2007, the parties entered

¶ 7 The plaintiff appealed the trial court's order. This court reversed in part, vacated in part, and remanded the matter for additional proceedings. *McManaman v. First Health Group Corporation*,

No. 2-08-0021 (March 12, 2009) (unpublished order under Supreme Court Rule 23). We held that, considering the plain and ordinary meaning of the provisions of the employment agreement, the plaintiff was entitled to both the term-completion severance and the change-in-control severance. *Id.* at 18. We also vacated the award of attorney fees and ordered the trial court to reconsider the amount due to the plaintiff as the prevailing party in light of our disposition. *Id.* at 22. Finally, we noted that the plaintiff had included arguments on appeal related to the subsection 6(h) excise tax neutralization payment. However, because the plaintiff prevailed on the issue in the trial court, and the defendants did not cross-appeal on the issue, we declined to consider those arguments. *Id.*

¶8 Thereafter, the defendants filed a petition for leave to appeal to our supreme court, which was denied on September 30, 2009. The case was remanded to the trial court on November 16, 2009. On December 10, 2009, the plaintiff filed a motion for entry of judgment. The plaintiff argued that as a result of this court's order, it was entitled to the term-completion severance, pre-judgment and post-judgment interest on that payment, an excise neutralization payment, and attorney fees. With respect to the term-completion severance payment, the plaintiff noted that, pursuant to the employment agreement, he elected to receive that payment as a lump sum in June 2005. Based on an interest rate of 2.41%, the plaintiff alleged that the present value of the lump sum term-completion severance was \$1,877,029.91. The plaintiff further alleged that (1) the prejudgment interest on this amount, from June 30, 2005, through the date of the appellate court order, March 12, 2009, was \$355,071.49; (2) the postjudgment interest on this amount from March 13, 2009, through December 31, 2009, was \$136,071.81; and (3) he was entitled to \$1,253,078.20 as an excise neutralization payment. Finally, the plaintiff requested a hearing on the issue of attorney fees.

¶ 9 On December 21, 2009, at a status hearing, the defendants requested time to file a response to the plaintiff's motion. Defense counsel noted that the defendants were not in total agreement with the plaintiff's numbers. Specifically, the defendants did not agree as to the lump sum owed because the parties had a difference of opinion as to the discount rate that should be applied. The defendants also did not agree that they owed prejudgment interest. Defense counsel further noted:

“MR. CLARK [defense counsel]: The post judgment interest will not be in dispute once *** the Court would rule on the lump sum ***. *** [A]s to the neutralization payment, there will be some legal dispute on that, because there's tax issues involved, and that's why we'd like to brief that. The reasonable attorneys fees that I would think there will be entitlement to *** but we just haven't see the documentation on that yet.”

The trial court granted the defendants three weeks to respond and allowed 14 days for the plaintiff's reply. However, following modification to the briefing schedule, the plaintiff sought leave to file an amended motion for entry of judgment, which the trial court granted.

¶ 10 On February 23, 2010, the plaintiff filed a motion to compel. Therein, the plaintiff noted that pursuant to section 6(f)(ii) of the employment agreement, the plaintiff had the right to elect to receive payment of all sums owed to him in an immediate lump sum. Upon such an election, the amounts to be paid were to be “discounted to present value applying a discount rate equal to the interest rate of the [defendants'] revolving credit facility at the time of termination.” The plaintiff argued that despite repeated requests for the correct discount rate, the defendants had failed to provide the proper rate and documentation supporting the proper rate.

¶ 11 On March 9, 2010, the plaintiff filed his amended motion for entry of judgment. In his amended motion, the plaintiff alleged that the amount due him for the term-completion severance

payment was \$1,813,092.54. This was based on an interest rate of 4.83%. Based on this new payment amount, the plaintiff alleged that he was owed \$335,547.66 in prejudgment interest and \$218,808.10 in postjudgment interest (through April 29, 2010). The plaintiff further alleged that the excise neutralization payment should be \$1,460,710. Finally, the plaintiff alleged that his reasonable attorney fees and expenses through February 28, 2010, were \$190,227.98. The plaintiff noted that despite his demand for payment on October 6, 2009, the defendants did not pay him the amounts owed. As such, he filed his motion for entry of judgment. After that, upon the trial court's request that the parties attempt to settle the issues, the parties had further discussions, but to no avail. The plaintiff alleged that in the course of the negotiations, the defendants argued that the plaintiff would owe taxes under section 409A of the Code. As a result, he was required to retain a tax expert, who issued an opinion refuting that any taxes would be owed under section 409A.

¶ 12 On April 12, 2010, the defendants filed a response to the amended motion for entry of judgment. The defendants argued that the plaintiff was not entitled to prejudgment interest because the amount of the section 6(f) payment was not easily calculable. The defendants argued that there was uncertainty as to the discount interest rate to be applied. Even after the plaintiff accepted that the proper discount rate was 4.83%, the parties still differed as to the appropriate section 6(f) payment. The defendants further argued that, because the amount owed to the plaintiff was not easily calculable, the plaintiff was not entitled to postjudgment interest. Alternatively, the defendants argued that if postjudgment interest was owed, it would not begin to accrue until the trial court determined the exact amount of the section 6(f) payment.

¶ 13 The defendants acknowledged that they were liable for the excise neutralization payment. Nonetheless, they argued that the plaintiff's request for an excise neutralization payment was

premature because such payment was not yet due and the amount was subject to a determination by the IRS. Finally, the defendants argued that the plaintiff's request for attorney fees was excessive. Specifically, the defendants argued that they should not have to pay fees related to the excise neutralization payment because, pursuant to the employment agreement, the defendants were to determine whether any such fee was owed and, therefore, the plaintiff's calculation of that payment was premature. Accordingly, the defendants urged the trial court to deny the plaintiff's requests for prejudgment interest, postjudgment interest, any excise neutralization payment, and any excessive attorney fees. The defendants also requested that the trial court grant the plaintiff his section 6(f) payment in the amount of \$1,806,080.17.

¶ 14 On April 15, 2010, the defendants filed a motion to strike the plaintiff's request for calculation of an excise neutralization payment and reference to section 409A or, in the alternative, for leave to present expert testimony on the tax implications of the case. The defendants argued that the excise neutralization payment was subject to determination by the IRS and would not be due until the IRS determined what was owed under section 4999. With respect to the section 409A tax issue, the defendants acknowledged that during settlement negotiations they had suggested that the plaintiff keep in mind that he might owe taxes under section 409A. Nonetheless, the defendants argued that they were not required to reimburse the plaintiff for any taxes he owed under that section. Accordingly, the defendants suggested that the plaintiff's request for relief under section 409A was inappropriate and should be stricken. Alternatively, the defendants requested that they be granted leave to present their own expert testimony as to the excise neutralization payment and the section 409A issue.

¶ 15 On April 14, 2010, a hearing was held on the motion to strike. The defendants argued that the IRS would calculate the excise neutralization tax and it was not proper for the court to do so. The plaintiff argued that taxes do not work that way. Rather, he had to pay the taxes up front, and if the IRS believed a different amount was due, a reconciliation would occur later. If he underpaid, he would have to pay a penalty, fines, and interest as well. The plaintiff argued that he was entitled to the reasonable amount that he believed was due. The trial court asked the defendants why the plaintiff still had not received his section 6(f) payment. The defendants stated that they were trying to structure a settlement that was beneficial to both sides tax-wise. The trial court asked the plaintiff if he wanted to reach a settlement. The plaintiff said no. The defendants stated that they would tender the section 6(f) payment by April 29, 2010, the time set for the hearing on the amended motion for entry of judgment. Prior to that time, the defendants stated that they would send the plaintiff a proposal on the tax issues and see if the parties could reach a settlement.

¶ 16 The defendants further argued that the tax issue went beyond the remand order from the appellate court. The defendants did not believe a tax expert was necessary because the IRS would decide what was owed. Further, it did not make sense to expend money on tax experts before the parties even knew if they could reach an agreement on the excise taxes owed. The defendants stated that they would stipulate that after the April 29, 2010, order was entered as to the section 6(f) payment, they would pay any excise neutralization payment within 30 days thereafter (because quarterly payment to the IRS would be due in June). Additionally, they would agree to pay any subsequent fines, penalties and interest should their excise neutralization payment fall short. The parties agreed that this was the proper way to proceed on the excise tax issue. The trial court asked the parties to put the agreement in writing, sign it, and then return to court.

¶ 17 On April 29, 2010, the parties appeared for hearing on the motion for entry of judgment. The parties indicated that they agreed the section 6(f) payment owed to the plaintiff was \$1,806,080.17. The defendants stated that they had the check but that they had failed to take out the proper withholdings “for wages and things like that” and would need to reissue the check. The parties also indicated that they agreed as to the amount of the tax neutralization payment. The parties indicated that the only remaining issues were interest and attorney fees. The parties first addressed prejudgment interest.

¶ 18 The plaintiff argued that the employment agreement was an instrument of writing under the Interest Act (815 ILCS 205/2 (West 2010)) and, therefore, prejudgment interest was proper. The plaintiff argued that the section 6(f) payment could be easily calculated by the defendants because it was a simple formula and the defendants had all the numbers within their knowledge. The defendants argued that interest was not properly before the trial court because the appellate court had only remanded the matter as to the section 6(f) payment and attorney fees. The defendants further argued that the section 6(f) payment was not easily computed because of the difference in opinion as to the interest rate. Following argument, the trial court found that prejudgment interest was appropriate in this type of case. The parties agreed to continue the matter as to attorney fees.

¶ 19 A written order was entered that same day entering judgment in favor of the plaintiff in the following amounts: (1) \$1,806,080.17 as the section 6(f) payment; and (2) \$447,812.10 in prejudgment interest on the section 6(f) payment at the rate of 5% from May 16, 2005 through April 29, 2010. Additionally, the order indicated that the defendants would remain liable for all excise neutralization payments pursuant to section 6(f) of the employment agreement. The trial court denied the plaintiff’s request for postjudgment interest from March 12, 2009 to the date of the order

(April 29, 2010). Finally, the order indicated that the matter was continued on the issue of attorney fees.

¶ 20 On May 20, 2010, a hearing on the issue of attorney fees commenced. However, the parties first addressed the issue of the section 6(f) payment. Although the defendants had tendered a check on May 5, 2010, it did not have the proper withholdings. The plaintiff claimed that after April 29, 2010, the defendants called and said that since the plaintiff was no longer in the payroll system, they could not cut the plaintiff a new check. The plaintiff sent a letter to the defendants on May 6, 2010, indicating that the improper check caused problems due to a self-employment issue. The plaintiff claimed that the defendants did not respond to the letter. The defendants acknowledged that the check had the improper withholdings but noted that they had offered to take care of the Medicare withholdings and believed the plaintiff could take care of the rest. The defendants stated that they were not prepared to address the tax implications of the improper withholdings.

¶ 21 As to the issue of attorney fees, the defendants argued that they should not have to pay attorney fees related to the excise tax issue because that issue was not before the court and they never contested that they had to make the excise neutralization payment. The defendants noted that although the plaintiff was asking for \$240,000 in attorney fees, they should only have to pay \$67,000. In response, the plaintiff argued that the defendants made the excise taxes a contested issue and did not agree to pay the excise taxes until April 28, 2010. The plaintiff noted that the defendants had requested conference calls between tax experts for both parties.

¶ 22 Following argument, the trial court stated that section 6(h) of the employment agreement provided that the defendants would determine the amount of excise taxes owed and that it was never at issue in the proceeding. Accordingly, the trial court did not award attorney fees related to excise

taxes or the excise neutralization payment. However, the trial court noted that it would allow attorney fees related to prejudgment and postjudgment interest. A written order entered that same day indicated that the defendants had to issue the section 6(f) payment, with the proper withholdings, to the plaintiff by 5 p.m. on May 28, 2010. The trial court noted that no postjudgment interest would accrue from May 5, 2010, forward.

¶ 23 On June 15, 2010, the plaintiff filed a motion to reconsider the trial court's ruling as to attorney fees. The plaintiff reiterated that the defendants had made an issue of whether any excise taxes were due and whether it had any obligation to make an excise neutralization payment under section 6(h) of the employment agreement. The plaintiff also noted that the defendants had raised the issue of whether the plaintiff would owe taxes under section 409A of the Code and whether the parties could reach a settlement on the section 6(f) payment that would be favorable to both parties on the tax issue. The plaintiff argued that he incurred attorney fees in addressing each of these issues. The plaintiff argued that even though the defendants were liable for the excise tax payment under section 6(h) of the employment agreement, he was ultimately accountable to the IRS and, therefore, it was reasonable for him to seek legal advice on the issues. The plaintiff argued that the defendants could not use significant tax issues to delay payment and then expect the plaintiff to foot the bill for attorney fees to address those issues. The plaintiff attached an affidavit from his attorney explaining the events related to the tax issues.

¶ 24 In his affidavit, the plaintiff's attorney alleged the following sequence of events. A demand letter requesting payment of the judgment was sent to defense counsel on October 6, 2009. The defendants did not respond until there was a telephone conference on December 3, 2009. In that call, defense counsel took the position that the section 6(f) payment was not a severance payment, but a

salary continuation payment, which should be characterized as deferred compensation. In that case, they argued, no excise tax payment was due. Defense counsel also suggested that, due to the section 6(f) payment, the plaintiff would be subject to additional taxes under section 409A of the Code. As such, defense counsel suggested that if they characterize the payments in such a way that they would not owe any excise taxes and the plaintiff did not owe anything under 409A, it would be beneficial to both parties. The plaintiff's counsel further alleged that the motion for entry of judgment was filed on December 10, 2009, because, after the December 3 conference call, it was clear that the defendants did not think an excise neutralization payment would be due.

¶ 25 Further, in a telephone conversation on January 13, 2010, defense counsel again suggested that it would be mutually beneficial from a tax perspective to characterize the section 6(f) payment as something other than severance. Defense counsel suggested that the parties conduct a telephone conference call with tax attorneys for each party to discuss this possibility. A subsequent call took place on January 20, 2010. The defendants' tax counsel stated that the section 6(f) payment would result in additional tax liability to the plaintiff under section 409A and that, therefore, it would be beneficial to plaintiff to settle for an amount lower than the section 6(f) payment itself. The plaintiff requested time to review the tax issue. After review, the plaintiff's tax counsel determined that there was no valid basis for tax liability under section 409A. On January 27, 2010, plaintiff's counsel sent a letter requesting that the defendants submit a proposal on what they believed was owed as the excise neutralization payment. On February 3, 2010, defense counsel informed the plaintiff that no excise taxes were due and, therefore, no excise neutralization payment was due until the IRS imposed such excise taxes. At that point, the plaintiff hired a tax expert to address the tax issues.

It was not until April 28, 2010, that the parties agreed on the amount of the excise neutralization payment due to the plaintiff.

¶ 26 Also on June 15, 2010, the plaintiff filed a motion for rule to show cause why the defendants should not be held in contempt for failure to comply with the April 29, 2010 order. That order had directed the defendants to make the section 6(f) payment to the plaintiff in the amount of \$1,806,080.17 and to make the excise neutralization payment as provided in section 6(h) of the employment agreement. The plaintiff alleged that those payments still had not been made. The parties had agreed on April 28, 2010, that the amount of the excise neutralization payment was \$1,414,551. The plaintiff argued that the defendants were required to make that payment by withholding the proper amounts and remitting them to the state and federal tax authorities. The plaintiff acknowledged that the defendants made the section 6(f) payment on June 4, 2010. However, the plaintiff argued that the payment was invalid because it was late and because the tender did not include the excise neutralization payment. The plaintiff alleged that the applicable tax laws and regulations, 26 U.S.C.A. § 4999(c)(1), required the excise taxes to be withheld at the same time the section 6(f) payment was made to him. If the defendants did not simultaneously make the excise neutralization payment, his excise taxes would be unpaid and overdue, and therefore not “neutralized.” Finally, the plaintiff argued that he was entitled to postjudgment interest on the section 6(f) payment and the excise neutralization payment.

¶ 27 On June 22, 2010, the trial court entered an order requiring the defendants to file responses to the plaintiff’s motion to reconsider and the plaintiff’s motion for rule to show cause by July 1, 2010. On July 2, 2010, in response, the defendants argued that the excise neutralization payment was subject to determination by the IRS and was not due until then. Additionally, the defendants

argued that they did nothing more than suggest that plaintiff keep the tax implications in mind during the settlement negotiations. On July 15, 2010, the plaintiff filed a reply. The plaintiff noted that on June 22, 2010, the defendants had tendered both the section 6(f) payment and the documentation for the excise neutralization payment. The plaintiff argued that, by doing so, the defendants effectively conceded that the plaintiff was correct concerning the timing, amount and method of paying the excise neutralization payment. Accordingly, the plaintiff argued, he had prevailed on the issue and had a contractual right to recover all the fees he incurred in connection with that payment.

¶ 28 On July 22, 2010, a hearing was held on the plaintiff's motion to reconsider. Following argument, the trial court denied the plaintiff's request for attorney fees and costs related to the excise tax issue. The trial court noted that the original trial court judgment stated that the defendants were liable for the excise neutralization payment and that the appellate court mandate did not include the tax issue. The trial court further noted that, under the language of the contract, the defendants were required to determine the amount of any excise neutralization payment. The trial court found that although the plaintiff was free to try to convince the defendant of what tax to pay, the plaintiff's attorney fees were his own. The trial court also refused to grant postjudgment interest for the time period when the plaintiff refused to accept tender of the section 6(f) payment (May 5 through May 28, 2010).

¶ 29 The trial court entered a written order the same day. The trial court denied the plaintiff's motion to reconsider and found that the motion for rule to show cause was moot. The order stated that the plaintiff was entitled to (1) postjudgment interest, on the previous award of prejudgment interest, from April 30, 2010 until May 6, 2010; and (2) postjudgment interest on the section 6(f) payment from April 30 through May 4, 2010 and from May 29 through June 3, 2010. The latter had

to be paid by August 3, 2010. All other claims were denied. On August 16, 2010, the plaintiff filed a motion for entry of an award for attorney fees. On August 19, 2010, the trial court entered a written order granting the plaintiff \$163,968.03 in attorney fees and another \$300 in relation to the drafting of a motion for rule to show cause. Thereafter, the plaintiff filed a timely notice of appeal.

¶ 30 On appeal, the plaintiff first argues that the trial court abused its discretion in denying his request for attorney fees and costs on the excise tax issue because the plaintiff incurred those fees in compelling the defendants' compliance with the employment agreement. The plaintiff notes that as the prevailing party under the employment agreement he is entitled to all reasonable attorney fees and expert witness fees. The plaintiff further argues that the attorney fees and costs related to the excise tax issue were reasonable because he was entitled to an excise neutralization payment under the agreement and the defendants had raised the tax issue during settlement negotiations.

¶ 31 Under the common law, the losing party in a lawsuit does not have to pay the winning party's attorney fees. *Powers v. Rockford Stop-N-Go, Inc.*, 326 Ill. App. 3d 511, 515 (2001). However, parties to a contract may agree otherwise, and if they do, the attorney-fee provision is strictly construed. *Id.*; see also 4 W. Jaeger, *Williston on Contracts* § 602A, at 325 (3d ed.1961) ("contractual provisions violative of an established legal concept * * * are held to be of restricted application"). When a contract calls for the shifting of attorney fees, a trial court should award all reasonable fees. *Amoco Realty Co. v. Montalbano*, 133 Ill. App. 3d 327, 335 (1985).

¶ 32 The determination of reasonableness is a matter for the trial court's discretion. *Mercado v. Calumet Federal Savings & Loan Association*, 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.* In determining the reasonableness of the fees, the court may look to

various factors including the nature of the case, the novelty of the issues involved, and the reasonable connection between the fees sought and the amount involved in the litigation. *Id.* A reviewing court is not justified in disturbing an award merely because it may have made a different award. *In re Estate of Healy*, 137 Ill. App. 3d 406, 411 (1985). The reasonableness of attorney fees in a given case is to be determined like other fact questions, by the weight of the evidence. *Id.*

¶ 33 In the present case, the issue is whether the attorney fees and expert fees related to the excise tax issue were unreasonable or unnecessary. The trial court found that section 6(h) of the employment agreement provided that the defendants would determine whether any excise taxes were owed and that, therefore, excise taxes were never at issue in the proceeding. This conclusion that excise taxes were never at issue is not supported by the manifest weight of the evidence. First, excise taxes were always at issue. As early as July 18, 2005, the trial court found that, under the employment agreement, the defendants were liable for the excise neutralization payment. Furthermore, although the trial court stated that the appellate court mandate did not include the tax issue, the appellate court remanded the cause “for further proceedings consistent with [its] disposition.” Further proceedings necessarily involved the excise neutralization payment as it had to be paid under the agreement if excise taxes were owed.

¶ 34 Second, the defendants made taxes an issue. The evidence shows that on December 21, 2009, at a status hearing, defense counsel stated that “as to the neutralization payment, there will be some legal dispute on that, because there’s tax issues involved.” Although the defendants insist that they never challenged their responsibility for the excise neutralization payment, they nonetheless contested whether such a payment was in fact owed. Pursuant to the affidavit of the plaintiff’s attorney, defense counsel suggested, in a December 3, 2009, conference call, that the section 6(f)

payment was a salary continuation payment and that no excise taxes were owed. Defense counsel also suggested that the plaintiff would have tax liability under section 409A and that it would be beneficial to both parties to characterize the 6(f) payment in such a manner as to minimize taxes on both sides. The record indicates that the plaintiff thus incurred fees in analyzing the section 409A issue and determining whether it was beneficial to recharacterize the 6(f) payment.

¶ 35 Furthermore, on February 3, 2010, despite the fact that the employment agreement stated that First Health would determine if any excise taxes would be imposed, defense counsel stated to the plaintiff that no excise taxes would be due until the IRS imposed such taxes and, therefore, no excise neutralization payment was due. The record indicates that it was not until April 28, 2010, that the defendants agreed that an excise neutralization payment was due to the plaintiff. The plaintiff incurred substantial fees in recovering that payment from the defendants. Accordingly, fees to address the tax related issues were necessary under the circumstances in this case. The trial court abused its discretion in denying the plaintiff's request for such fees. Pursuant to section 15(e) of the employment agreement, we remand for the trial court to determine and award the plaintiff his reasonable attorney and expert witness fees for the excise tax-related issues.

¶ 36 The plaintiff's second contention on appeal is that the trial court erred in failing to award him postjudgment interest on the section 6(f) payment from the date of the appellate court remand order, March 12, 2009, until the date of the trial court's judgment on remand, April 29, 2010. Specifically, the plaintiff argues that because the section 6(f) payment was easily calculable, he was entitled to postjudgment interest from the date of this court's decision holding that he was entitled to the section 6(f) payment under the employment agreement.

¶ 37 The plaintiff argues that whether postjudgment interest begins to accrue from the date of this court's original remand order, or from the date of the trial court's judgment on remand, is a question of law that we review *de novo*. We acknowledge that it is not clear what the proper standard of review is when reviewing a determination of the date on which postjudgment interest begins to accrue. Compare *Kramer v. Mount Carmel Shelter Care Facility*, 322 Ill. App. 3d 389, 392 (2001) (stating that determining a specific date from which to measure the accrual of interest on a judgment that has been modified on appeal depends on the unique facts of each case), with *Decker v. St. Mary's Hospital*, 266 Ill. App. 3d 523, 525 (1994), *reversed on other grounds*, (stating that whether interest runs from the date of the first verdict or the date of the verdict on retrial is a question of law). Nonetheless, we need not determine the proper standard of review in this case because even applying the *de novo* standard we would affirm the trial court's determination.

¶ 38 In the present case, we cannot say that the trial court erred when it granted postjudgment interest from the date of its April 29, 2010 order. An award of interest on a money judgment requires that the amount of money owed is certain and that the judgment debtor enjoyed improper use of the money during the period for which interest is to be awarded. *Robinson v. Robinson*, 140 Ill. App. 3d 610, 611 (1986). Generally, where the exact amount owed is not calculated until the disposition of the case following remand, interest on the judgment runs from the date of the new decree. *Rosenbaum v. Rosenbaum*, 94 Ill. App. 3d 352, 357 (1981). In the first appeal, this court determined that the plaintiff was entitled to the section 6(f) severance payment and remanded the matter for further proceedings. This court did not make a determination as to the exact amount of the section 6(f) payment. On April 29, 2010, on remand, the trial court found that the defendants owed the plaintiff \$1,806,080.17 as the section 6(f) payment. Because the exact amount owed was

not determined until remand, the trial court properly determined that postjudgment interest did not begin to accrue until April 29, 2010.

¶ 39 The plaintiff relies on several cases in arguing that because the section 6(f) payment was easy for the defendants to calculate, postjudgment interest should have accrued from the date of this court's original judgment. In those cases, postjudgment interest, on increased judgment amounts, was found to accrue from the date of the filing of the reviewing court's orders, awarding the increased judgments. However, the reviewing courts had increased the awards by specific sums. See *Department of Transportation ex rel. Moline Consumers Co. v. American Insurance Co.*, 199 Ill. App. 3d 1068, 1069 (1990) (increasing award by \$35,653.62); *Owens v. Stokoe*, 170 Ill. App. 3d 179, 181 (1988) (award increased by \$30,000); *Toro Petroleum Corporation v. Newell*, 33 Ill. App. 3d 223, 232 (1975) (increased award by \$18,500). These cases are distinguishable from the present case because our previous mandate left the damage award undetermined.

¶ 40 The plaintiff also relies on *Phelps v. O'Malley*, 187 Ill. App. 3d 150 (1989), and *Kramer v. Mount Carmel Shelter Care Facility*, 322 Ill. App. 3d 389 (2001), for the proposition that the test for evaluating postjudgment interest is whether the amount due is readily calculable. However, those cases are also distinguishable from the present case. In both *Kramer* and *Phelps*, the damage awards were reduced on appeal. *Kramer*, 322 Ill. App. 3d at 391; *Phelps*, 187 Ill. App. 3d at 151. The *Phelps* court set a specific amount for the new judgment. *Id.* at 151. The *Kramer* court did not set out a specific number, but the reduction was a "simple recalculation." *Kramer*, 322 Ill. App. 3d at 393. In both cases, postjudgment interest was found to accrue from the date of the original trial court judgment. *Kramer*, 322 Ill. App. 3d at 393; *Phelps*, 187 Ill. App. 3d at 158. The *Kramer* court noted that because the defendants' liability was settled, and its remand was nothing more than a

recalculation, the trial court did not err in allowing postjudgment interest to accrue from the date of the original judgment. *Kramer*, 322 Ill. App. 3d at 393. The *Phelps* court noted that when a judgment debtor realizes a reduction of liability after appeal, the judgment debtor can halt the total accrual of interest by initially paying the greater amount of the original judgment. *Phelps*, 187 Ill. App. 3d at 158. In the present case, the plaintiff realized an increase in the judgment amount following remand and this court did not set forth a specific amount due. Moreover, the section 6(f) payment was more than a “simple recalculation.” Accordingly, the plaintiff’s reliance on *Kramer* and *Phelps* is unpersuasive.

¶ 41 The plaintiff’s third contention on appeal is that he is entitled to postjudgment interest on the prejudgment interest that had accrued from May 16, 2005 until this court’s order on March 12, 2009. However, as stated above, postjudgment interest did not properly begin to accrue until the trial court’s remand order on April 29, 2010. From that date, postjudgment interest accrues on both the section 6(f) payment and the prejudgment interest awarded up to that date. See *Halloran v. Dickerson*, 287 Ill. App. 3d 857, 863-64 (1997). Accordingly, the trial court did not abuse its discretion in denying the plaintiff’s request for postjudgment interest from March 12 to April 29, 2010.

¶ 42 The plaintiff’s fourth contention on appeal is that he is entitled to postjudgment interest from May 5 to 28, 2010, a period in which the defendants failed to tender the proper section 6(f) payment. On May 5, 2010, the defendants tendered a section 6(f) payment to the plaintiff. It is undisputed, however, that the tax withholdings on the payment were improper. On May 20, 2010, the trial court ordered the defendants to re-issue the check in a proper and valid manner and to do so by May 28, 2010. The trial court allowed postjudgment interest from April 29, 2010, until May 5, 2010 and

from May 29, 2010, until the proper tender was rendered on June 4, 2010. However, the trial court denied the plaintiff's request for postjudgment interest from May 5 until May 28, 2010 because during that time period the plaintiff had a check in his possession, chose not to cash it, and was therefore not deprived of the use of his money.

¶ 43 Determining when a valid tender is made is a finding of fact and will not be disturbed absent an abuse of discretion. *Poliszczuk v. Winkler*, 2011 IL App (1st) 101847, ¶ 14 (2011). "A trial court abuses its discretion where no reasonable person would take the view adopted by the trial court." *In re Marriage of Tutor*, 2011 IL App (2d) 100187, ¶ 10 (2011). Only a valid payment of a judgment can stop the accrual of interest. *Niemeyer v. Wendy's International, Inc.*, 336 Ill. App. 3d 112, 115 (2002). The action of the judgment debtor in making the tender controls, not the judgment creditor's acceptance or rejection of that tender. *Id.* A valid tender must include everything to which the creditor is entitled including, at the very least, payment of the judgment, costs, and interest accrued to the date of tender. *Id.*

¶ 44 In the present case, the trial court abused its discretion in failing to grant the plaintiff postjudgment interest between May 5 and 28, 2010, because the defendants had failed to tender a valid payment of the judgment during that time period. The defendants acknowledged that the tender was invalid because it no longer had the plaintiff in its payroll system and, therefore, the withholdings were improper. The defendants argue, nonetheless, that because the check given to the plaintiff was actually for an amount greater than what was due, the plaintiff was not deprived of the use of his money since he had not returned the improper check during the subject time frame. However, although the plaintiff had the invalid tender in his position, cashing it would have been an implicit acceptance of that tender and would have resulted in negative tax ramifications.

Moreover, as noted above, the plaintiff's acceptance or rejection of the tender is not the controlling issue; rather, it is the defendant's action that controls. *Id.* At the hearing on April 29, 2010, the defendant agreed that the check with the improper withholdings was invalid and that they would tender a new check. However, the check they sent the plaintiff on May 5 still had the improper withholdings. Accordingly, because the defendant failed to make a proper tender between May 5 and May 28, 2010, the trial court abused its discretion in finding that postjudgment interest failed to accrue between that time period. *Id.*

¶ 45 The plaintiff's final contention is that he is entitled to reasonable attorney fees on appeal under section 15(e) of the employment agreement and under the Attorney Fees Act, 705 ILCS 225/0.01 *et seq.* (West 2008). We agree. Section 15(e) provided that, in the event the plaintiff was the prevailing party under any litigation related to the agreement, the defendant would reimburse the plaintiff for his reasonable attorney fees and expert witness fees. An appeal is a continuation of the same action. *Washington v. Civil Service Commission*, 146 Ill. App. 3d 73, 76 (1986). The plaintiff is the prevailing party on appeal as he has prevailed on significant issues. See *Grossinger Motorcorp, Inc. v. American National Bank & Trust Co.*, 240 Ill. App. 3d 737, 753 (1992) ("A party can be considered a 'prevailing party' for the purposes of awarding fees when he is successful on any significant issue in the action and achieves some benefit in bringing suit [citation] * * * or by obtaining an affirmative recovery. [Citation.]"). As "the amount of attorney fees *** on appeal are more properly determined upon a petition and evidentiary hearing in the trial court [citation], we remand the cause for such petition and evidentiary hearing." *Exchange National Bank of Chicago v. Sampson*, 186 Ill. App. 3d 969, 976 (1989). However, as with any fee petition, only reasonable

fees and costs should be allowed. *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 983 (1987).

¶ 46 For the foregoing reasons, we affirm the trial court's determination that postjudgment interest on the section 6(f) payment did not begin to accrue until April 29, 2010. We reverse the trial court's determinations denying the plaintiff's requests for attorney fees on the excise tax-related issues and for postjudgment interest from May 5 until May 28, 2010. We remand for further proceedings not inconsistent with this order, including a determination of reasonable attorney and expert witness fees related to the excise tax issues and reasonable attorney fees for this appeal.

¶ 47 Affirmed in part and reversed in part; cause remanded.