

NOTICE  
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2012 IL App (4th) 100705-U

Filed 8/16/12

NO. 4-10-0705

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ROCHESTER BUCKHART ACTION GROUP,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
ROBERT YOUNG,	)	No. 07MR208
Defendant-Appellant.	)	
	)	Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

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PRESIDING JUSTICE TURNER delivered the judgment of the court.  
Justices Pope and Knecht concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Where defendant presented sufficient evidence to recover damages for demobilization costs and engineering fees, the trial court's order denying those costs was against the manifest weight of the evidence.
- ¶ 2 Where defendant was entitled to damages for being wrongfully enjoined, we find he presented sufficient evidence to recover his attorney fees.
- ¶ 3 In May 2007, plaintiff, Rochester Buckhart Action Group, filed a motion for preliminary injunction against defendant, Robert Young, to enjoin him from constructing or operating a hog farm on his property pending the outcome of litigation. In May 2007, the trial court granted the preliminary injunction. In August 2007, the court denied defendant's motion to vacate. On appeal, this court reversed, finding the trial court erred in declining to vacate the preliminary injunction, and remanded for further proceedings. In October 2008, defendant filed a motion for costs and damages. In November 2008, plaintiff filed a motion to strike and deny

defendant's motion, which the trial court granted. This court again reversed, finding defendant was entitled to damages, and remanded with directions. In September 2010, the trial court denied all of defendant's requested costs and damages except for \$500.

¶ 4 On appeal, defendant argues the trial court erred in denying his costs and damages. We affirm in part, reverse in part, and remand with directions.

¶ 5 I. BACKGROUND

¶ 6 Plaintiff is an Illinois general not-for-profit corporation organized to critically examine and oppose activities that adversely influence the use and value of property and the quality of health and the environment in the Rochester and Buckhart areas of Sangamon and Christian Counties. At the outset of this litigation, defendant owned property in Sangamon County and operated a dairy farm, consisting of approximately 40 dairy cows at any given time. Defendant had previously had a hog-confinement building on the property for as many as 2,300 animals, but it was demolished in 2004.

¶ 7 In April 2007, plaintiff filed a three-count complaint against defendant for declaratory judgment (count I), nuisance (count II), and public nuisance (count III). Plaintiff alleged defendant notified the Illinois Department of Agriculture in February 2006 of his intent to construct a hog-finishing operation to house 3,750 hogs at his property. In his notice of intent to construct, defendant stated the proposed facility was an expansion of an existing facility and would not be classified as a "new facility."

¶ 8 Plaintiff claimed the proposed hog operation would produce "massive volumes of feces, urine, blood[,] and other waste," cause "extremely unpleasant odors," and "attract insects and disease vectors." Plaintiff alleged persons residing and businesses operating near the facility

would be subject to odors and airborne contaminants that present a high probability of injuring their health and welfare and a diminution of property values.

¶ 9 In May 2007, plaintiff filed a motion for preliminary injunction on count I of the complaint citing the Livestock Management Facilities Act (Act) (510 ILCS 77/1 to 999 (West 2006)). Plaintiff stated the Act provided minimum setbacks, stiffer design requirements, and an opportunity for public notice, comment, and hearing when a "new facility" is contemplated.

¶ 10 In May 2007, the trial court granted the motion for preliminary injunction. The court found plaintiff had shown "there is a fair question that [p]laintiff will succeed on the merits in claiming [d]efendant is constructing a 'new' livestock management facility as defined in the Act." Further, plaintiff would suffer irreparable harm if an injunction did not issue and no adequate remedy at law or in equity existed. The court enjoined defendant from continuing to construct a hog-confinement building on his property pending further order. The court also required plaintiff to post a \$60,000 bond.

¶ 11 In June 2007, defendant answered the complaint, raising as an affirmative defense that he was not constructing a "new" livestock-management facility but expanding an existing facility. In July 2007, defendant filed a motion to vacate the preliminary injunction. In August 2007, the trial court denied defendant's motion.

¶ 12 On interlocutory appeal, this court reversed (with one justice dissenting), finding the trial court erred in declining to vacate the preliminary injunction, and remanded for further proceedings. *Rochester Buckhart Action Group v. Young*, 379 Ill. App. 3d 1030, 1036, 887 N.E.2d 49, 54-55 (2008) (*Rochester I*). The supreme court denied plaintiff's petition for leave to appeal. *Rochester Buckhart Action Group v. Young*, 229 Ill. 2d 658, 897 N.E.2d 263 (2008).

¶ 13 In October 2008, defendant filed a verified motion for award of costs and damages pursuant to section 11-103 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/11-103 (West 2008)) as a result of the "wrongfully entered injunction." Defendant alleged he had suffered substantial costs and damages as a result of his project having been shut down since the issuance of the preliminary injunction and sought to recover \$294,159.01. He also asked the trial court to award him the proceeds of plaintiff's \$60,000 surety bond as a setoff or credit against the judgment.

¶ 14 In November 2008, the trial court entered an order vacating and dissolving the preliminary injunction pursuant to this court's mandate. Thereafter, plaintiff filed a motion to strike and deny defendant's motion for costs and damages. Plaintiff claimed there had been no adjudication that the preliminary injunction was wrongful and thus defendant was not entitled to relief.

¶ 15 In January 2009, the trial court granted plaintiff's motion to strike. The court found the preliminary injunction was not wrongfully granted and defendant was barred from obtaining a judgment for recovery of costs and damages under the Procedure Code.

¶ 16 On appeal, we found the trial court erred in determining the preliminary injunction had not been wrongfully granted for purposes of section 11-103 of the Procedure Code.

*Rochester Buckhart Action Group v. Young*, 394 Ill. App. 3d 773, 776, 914 N.E.2d 1251, 1254 (2009) (*Rochester II*). In finding defendant was entitled to damages for being wrongfully enjoined, we remanded the cause with directions that the trial court allow him the opportunity to prove any damages he incurred as a result of the preliminary injunction. *Rochester II*, 394 Ill. App. 3d at 780-81, 914 N.E.2d at 1258.

¶ 17 In March 2010, defendant filed an amended verified motion for award of costs and damages totaling \$297,692.61. Therein, defendant sought numerous costs, including (1) a one-time building contractor demobilization cost of \$3,875, incurred when construction was halted by the preliminary injunction; (2) a net increase of \$42,310 in building costs due to construction delay; (3) \$7,306.09 in increased costs of seed and fertilizer for the 2008 crop due to his ineligibility for his normal discount from FS because the preliminary injunction impaired his credit; (4) a \$500 renewal fee for the Illinois Environmental Protection Agency (EPA) annual permit, which would not have been required had the construction project been completed in June 2007; (5) a \$2,905.75 insurance premium for the building under construction; (6) \$13,169.38 in remobilization costs for Michel Concrete to return to the construction project and make the necessary preparations to recommence the pouring of concrete and complete the work; (7) \$15,130.79 in interest charges on the construction loan from Wells Fargo Bank; and (8) a \$2,083.10 engineering fee incurred with the firm of Frank & West. Defendant also sought lost income in the amount of \$190,825 and attorney fees totaling \$19,587.50. Defendant attached various exhibits to his motion.

¶ 18 In May 2010, plaintiff filed a response to the amended motion, admitting liability for the \$500 Illinois EPA renewal fee but denying liability for the remainder of defendant's claimed costs and damages.

¶ 19 In May 2010, the trial court conducted a hearing on the amended motion. Tim Steinkamp, a business development manager for Cargill Pork, testified to the workings of the contract entered into between Cargill and defendant for the stocking of pigs at defendant's farm. Defendant began receiving animals at his farm in March 2009.

¶ 20 Jake Nims, an agricultural engineer for Frank & West Environmental Engineers, Inc., testified to the firm's development of the project and oversight of the construction.

¶ 21 Defendant testified to his history of his farming operations and the damages he claimed to have incurred. He testified to the demobilization costs (\$3,875), increased building costs (\$42,310), increased cost of seed and fertilizer (\$7,306.09), insurance coverage (\$2,950.75), remobilization costs (\$13,169.38), interest charges (\$15,130.79), lost income (\$150,269.20), attorney fees (\$19,587.50), and the engineering fee (\$2,083.10). Defendant testified to numerous exhibits in relation to his claimed damages.

¶ 22 Defendant's counsel supplied an affidavit listing his fees as \$19,587.50 for legal services performed in resisting the preliminary injunction. Counsel also moved to admit 17 exhibits, and the trial court admitted all except exhibit Nos. 2, 3, 7, and 9.

¶ 23 In September 2010, the trial court entered its written order. The court denied defendant's claims for damages with the exception of an award for \$500. This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 Defendant argues the trial court erred in denying all of his requested costs and damages except for a single line item of \$500.

¶ 26 Our supreme court has noted "damages will only be imposed where there is adjudication that the preliminary injunction or temporary restraining order was in fact wrongfully issued." *Buzz Barton & Associates, Inc. v. Giannone*, 108 Ill. 2d 373, 384, 483 N.E.2d 1271, 1276 (1985); *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.*, 94 Ill. 2d 535, 543, 447 N.E.2d 288, 292 (1983) (damage award requires a prior adjudication that the preliminary injunction was wrongfully entered); *Meyer v. Marshall*, 62 Ill. 2d 435, 439, 343 N.E.2d 479, 482

(1976) (damages are recoverable "only if the preliminary injunction has been dissolved before the case is disposed of on the merits, and thus adjudicated to have been wrongfully issued").

¶ 27 In the case *sub judice*, this court found the preliminary injunction had been wrongfully issued. *Rochester II*, 394 Ill. App. 3d at 778, 914 N.E.2d at 1256. As a result, we found defendant was entitled to damages under the Procedure Code. *Rochester II*, 394 Ill. App. 3d at 778, 914 N.E.2d at 1256. Defendant filed his motion for costs and damages pursuant to section 11-110 of the Procedure Code.

¶ 28 Section 11-110 provides as follows:

"In all cases where a temporary restraining order or a preliminary injunction is dissolved by the circuit court or by the reviewing court, the circuit court, after the dissolution of the temporary restraining order or preliminary injunction, and before finally disposing of the action shall, upon the party claiming damages by reason of such temporary restraining order or preliminary injunction, filing a petition under oath setting forth the nature and amount of damages suffered, determine and enter judgment in favor of the party who was injured by such temporary restraining order or preliminary injunction for the damages which the party suffered as a result thereof, which judgment may be enforced as other judgments for the payment of money. However, a failure so to assess damages as hereinabove set out shall not operate as a bar to an action upon the injunction bond." 735 ILCS 5/11-110 (West

2008).

¶ 29 Section 11-110 "is intended to provide relief against the wrongful issuance of a temporary injunction and to provide a mode of assessing damages for the wrongful issuance of a temporary injunction which is dissolved before final judgment." *L & R Insurance Agency, Inc. v. McPhail*, 92 Ill. App. 2d 107, 114, 235 N.E.2d 153, 157 (1968) (citing the former version of the statute). Damages recoverable "are limited to damages actually suffered during the life or pendency of the injunction." *Bank of Lyons v. Schultz*, 78 Ill. 2d 235, 242, 399 N.E.2d 1286, 1289 (1980); see also *In re Marriage of Bashwiner*, 155 Ill. App. 3d 531, 537, 508 N.E.2d 419, 423 (1987) (stating the successful litigant "is entitled to damages suffered from the time [he or] she was improperly enjoined"). "Damages recoverable for wrongful suing out of a writ of injunction must be such as naturally and proximately result therefrom, and remote speculative damages cannot be taken into consideration." *Kolin v. Leitch*, 351 Ill. App. 66, 73, 113 N.E.2d 806, 809 (1953).

"Compensation for losses sustained by a defendant which are the actual, natural and proximate result of the wrong committed by the restraining order while it is alive and operating is the proper measure of damages in a case of this character. Any actual damage, suffered by reason of the wrongful suing out of the injunction is a proper subject of inquiry, but claimed damages which are so uncertain as to be incapable of ascertainment cannot be recovered." *Leonard v. Pearce*, 271 Ill. App. 428, 447, 1933 WL 2620, at \*\*9 (1933).

¶ 30 "The issue of damages is a question of fact and, accordingly, a trial court's finding of damages will not be disturbed on appeal unless it is against the manifest weight of the evidence." *Doornbos Heating & Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.*, 403 Ill. App. 3d 468, 485, 932 N.E.2d 1073, 1089 (2010). "A damage award is against the manifest weight of the evidence if the trial court ignores the evidence or the measure of damages is erroneous as a matter of law." *Amalgamated Bank of Chicago v. Kalmus & Associates, Inc.*, 318 Ill. App. 3d 648, 658, 741 N.E.2d 1078, 1085 (2000).

¶ 31 A. Costs and Damages

¶ 32 In his amended motion for costs and damages, defendant sought numerous costs, including (1) a one-time building contractor demobilization cost of \$3,875 incurred when construction was halted by the preliminary injunction; (2) a net increase of \$42,310 in building costs due to construction delay; (3) \$7,306.09 in increased costs of seed and fertilizer for the 2008 crop due to his ineligibility for his normal discount from FS because the preliminary injunction impaired his credit; (4) a \$500 renewal fee for the Illinois EPA annual construction permit, which would not have been required had the construction project been completed in June 2007; (5) a \$2,905.75 insurance premium for the building under construction; (6) \$13,169.38 in remobilization costs for Michel Concrete to return to the construction project and make the necessary preparations to recommence the pouring of concrete and complete the work; (7) \$15,130.79 in interest charges on the construction loan from Wells Fargo Bank; and (8) a \$2,083.10 engineering fee incurred with the firm of Frank & West.

¶ 33 On appeal, both parties point out the trial court awarded the \$500 renewal fee for the Illinois EPA construction permit. Therefore, we need not address it.

¶ 34 Nims testified Frank & West entered into a contract with defendant to perform agricultural engineering services in February 2006. Nims testified to exhibit No. 11, an invoice in the amount of \$2,083.10 for an inspection of the site after the injunction was lifted in November 2008. Nims stated the inspection was necessary to verify the integrity of the structure was intact and suitable for further use considering it sat exposed to the elements for a long period of time. Defendant testified he paid the engineering fee. He also stated demobilization work was done on the property. He was billed \$3,875 and he paid it.

¶ 35 The uncontradicted testimony indicates defendant was billed for demobilization work as a result of the injunction and engineering fees associated with the site once the injunction had been lifted and before work could be restarted. It is indeed logical that, when an injunction is issued, work will grind to a halt and construction crews will have to remove concrete forms and associated paraphernalia for use on other jobsites. Likewise, given the length of the injunction here, inspection of the property would be necessary to determine what work needed to be done when the work commenced anew. After reviewing the record and the arguments on appeal, we find defendant is entitled to recover \$3,875 for demobilization costs and \$2,083.10 for the engineering costs. We therefore reverse that portion of the trial court's order and remand for an award of \$5,958.10.

¶ 36 As to the remaining costs, we find defendant failed to show the trial court's order was against the manifest weight of the evidence. The claims for lost income and other costs were uncertain, speculative, or not sufficiently supported to show defendant's entitlement to them. Moreover, we find defendant did not show he was entitled to prejudgment interest.

¶ 37 B. Attorney Fees

¶ 38 Defendant argues the trial court erred in failing to award him attorney fees. Plaintiff disagrees, arguing section 11-110 of the Procedure Code does not expressly authorize an award of attorney fees and, even if it did, the court did not abuse its discretion in not awarding fees. We agree with defendant.

¶ 39 "Illinois follows the 'American rule,' which prohibits prevailing parties from recovering their attorney fees from the losing party, absent express statutory or contractual provisions." *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 64, 962 N.E.2d 418, 435. "However, a court may shift the fees if a statute authorizes the court to order the losing party to pay the prevailing party's fees." *Label Printers v. Pflug*, 246 Ill. App. 3d 435, 438, 616 N.E.2d 706, 708 (1993).

¶ 40 Section 11-110 of the Procedure Code does not specifically authorize the payment of attorney fees.

"Rather, it allows the party aggrieved by the wrongful entry of a preliminary injunction to receive the damages he suffered as a result of the entry of the preliminary injunction. Several Illinois cases have affirmed the awarding of attorney fees as such damages, and plaintiff does not contest the general principle that the fees necessary to obtain a dissolution of a preliminary injunction may be included in the damages resulting from the issuance of the injunction." *Label Printers*, 246 Ill. App. 3d at 438, 616 N.E.2d at 708.

See also *Meyer*, 62 Ill. 2d at 439, 343 N.E.2d at 482 (attorney fees and other damages may be

recovered under the Procedure Code but "only if the preliminary injunction has been dissolved before the case is disposed of on the merits, and thus adjudicated to have been wrongfully issued"); *Babcock v. Chicago Rys. Co.*, 325 Ill. 16, 36, 155 N.E. 773, 781 (1927) (attorney fees incurred in action to dissolve injunction can be recovered as damages); *Scherzer v. Keller*, 321 Ill. 324, 334, 151 N.E. 915, 919 (1926) (attorney fees incurred in procuring the dissolution of an injunction can be recovered as damages); *Boltz v. Estate of Bryant*, 175 Ill. App. 3d 1056, 1068, 530 N.E.2d 985, 992 (1988) (finding the recovery of damages under section 11-110 includes attorney fees); *American Warehousing Services, Inc. v. Weitzman*, 169 Ill. App. 3d 708, 712, 533 N.E.2d 366, 368 (1988) ("attorney fees reasonably incurred in obtaining dissolution of a temporary restraining order are recoverable damages under section 11-110"); *Emerson Electric Co. v. Sherman*, 150 Ill. App. 3d 832, 835-36, 502 N.E.2d 414, 416-17 (1986) (attorney fees and other damages may be recovered); *Bank of Lyons v. Schultz*, 22 Ill. App. 3d 410, 418, 318 N.E.2d 52, 58 (1974) ("where counsel fees are necessarily incurred in procuring the dissolution of an injunction, they may be allowed as damages"); *Compton v. Paul K. Harding Realty Co.*, 6 Ill. App. 3d 488, 497, 285 N.E.2d 574, 580 (1972); *Kolin*, 351 Ill. App. at 70-71, 113 N.E.2d at 808 ("[t]he rule seems well settled that a defendant may recover as damages, on dissolution of an injunction, the solicitor's fees which he has paid or become obligated to pay for services rendered in obtaining the dissolution of the injunction but not for those rendered in the general defense of the suit").

¶ 41 "However, the provision in section 11-110 must be strictly construed." *Label Printers*, 246 Ill. App. 3d at 438, 616 N.E.2d at 708. "Only those fees arising from actions seeking reversal or dissolution of the preliminary injunction are recoverable." *Label Printers*,

246 Ill. App. 3d at 438, 616 N.E.2d at 708.

¶ 42 In this case, defendant's counsel presented an affidavit and his billing records. The injunction was entered on May 21, 2007, and it was dissolved on November 6, 2008. The affidavit and billing records indicate defendant's counsel performed legal services in the amount of \$19,587.50 between May 8, 2007, and April 30, 2008.

¶ 43 In *Rochester II*, 394 Ill. App. 3d at 778, 914 N.E.2d at 1256, we found defendant was entitled to damages under the Procedure Code. Those damages can include attorney fees, and fees incurred on appeal can be taken into consideration. See *Fry v. Radzinski*, 219 Ill. 526, 541, 76 N.E. 694, 700 (1906) (stating services of counsel on appeal may be considered in assessing the amount of damages). Counsel's affidavit and billing records clearly show the services performed, the time spent, the hourly rate, and the fees incurred in the action to reverse or dissolve the preliminary injunction. See *Shoreline Towers Condominium Ass'n v. Gassman*, 404 Ill. App. 3d 1013, 1026, 936 N.E.2d 1198, 1210 (2010) (stating a petition for attorney fees must include records showing the services performed, the time expended, and the hourly rate charged). As the fees are certain and capable of ascertainment, defendant has shown he is entitled to recovery on this issue.

¶ 44 We note defendant seeks attorney fees from the start of this case on May 8, 2007. However, the preliminary injunction was not entered until May 21, 2007. Accordingly, defendant is not entitled to recover \$1,100 worth of claimed fees prior to the injunction being entered. Also, in his reply brief, defendant's counsel points out an error in the July 26, 2007, billing entry and asks that \$100 be deducted from his claimed fees. We find the deduction appropriate.

¶ 45 As the cases show, the trial court erred in finding the American rule barred an

award of attorney fees as damages. Moreover, the court abused its discretion in not awarding fees based on counsel's affidavit and billing records. See *Grate v. Grzetich*, 373 Ill. App. 3d 228, 231, 867 N.E.2d 577, 579 (2007) (noting the decision to award attorney fees is reviewed for an abuse of discretion). The billing entries were sufficiently specific enough that a determination of the time expended on the matter could be made. Accordingly, defendant is entitled to an award of \$18,387.50 in attorney fees.

¶ 46

### III. CONCLUSION

¶ 47 For the reasons stated, we affirm in part, reverse in part, and remand for the entry of an order awarding defendant \$24,345.60.

¶ 48 Affirmed in part and reversed in part; cause remanded with directions.