THIRD DIVISION
September 13, 2017

Nos. 1-16-1772 & 1-16-1883

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CREATIVE VISTAS, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff, Counter-Defendant and Appellant,	)	Cook County.
	)	
v.	)	12 CH 25116
	)	
KOLIN 46, LLC,	)	
	)	
Defendant, Counter-Plaintiff and Appellee,	)	The Honorable
	)	Kathleen Kennedy,
(Antoniou Mickshea Builders, Inc., et al.,	)	Judge Presiding.
Intervenors-Appellants.)		

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment holding that appellant violated a settlement agreement and abandoned property was neither legally erroneous nor against the manifest weight of the evidence. An evidentiary hearing for attorney fees was not required. Intervenors's petition was untimely. Affirmed.

¶ 2 In 2010, Kolin 46, LLC, leased its commercial warehouse space to Creative Vistas, Inc., a now dissolved construction company. Creative then failed to pay rent, and in 2012, was

evicted under a judgment for an order of possession. Creative nonetheless left its vehicles, equipment, machinery, and other personal property in the warehouse, allegedly refusing to remove it despite repeated requests to do so and precluding Kolin from leasing the premises. This appeal arises out of a dispute over that personal property. We affirm.

¶ 3 BACKGROUND

¶ 4 Following eviction, Creative sued Kolin for breach of contract, wrongful eviction, and conversion. Kolin countersued Creative for a declaratory judgment and breach of the lease agreement. The parties entered into a settlement agreement on January 12, 2015, with both agreeing to dismiss their lawsuits (Creative, with prejudice; Kolin, without prejudice) and a stipulation that Creative fully collect its personal property from the warehouse by specified dates. The trial court maintained jurisdiction to enforce the settlement agreement.

¶ 5 Under that agreement, Creative had to remove its property from the exterior parking area by February 11, 2015, and from the interior area by March 6, 2015, leaving the warehouse space in broom-swept condition:

> "Creative shall begin the process of moving out *no later* than January 16, 2015, and actively continue the process so that it is completed by the dues [*sic*] dates above. Time is of the essence for all deadlines set in this paragraph. Kolin shall provide full access to the Premises immediately upon execution of this Agreement and Kolin represents and warrants that it has not removed any of said personal property from the Premises." (Emphasis added).

Under paragraph 4 and in the event of breach, Creative agreed its only defense would be that it timely satisfied the property removal provisions, and Kolin would be entitled to $74,000, which consisted of holdover rent between June 2012 and March 2015. Kolin also would be entitled to

costs to remove the property and clean the warehouse, in addition to all attorney fees and costs incurred in the lawsuit through the date of the judgment.

¶ 6 Ultimately, the property was not moved, and on February 13, 2015, Kolin sought to reinstate its counterclaim and entry of judgment against Creative for defaulting on its obligations under the agreement. Creative responded that Kolin had precluded access for proper removal of the property, and on March 4, an evidentiary hearing was held as to that matter with both parties presenting evidence. Details of the evidence are set forth further below. That same day, the court granted Kolin's motion, and judgment was entered against Creative pursuant to the settlement agreement. The matter was continued until May for final judgment on attorney fees and costs.

¶ 7 In apparent defiance of the court's March 4 determination, on the very next day, Creative showed up at the warehouse with movers and moving trucks, seeking to collect its property, only to find that the locks had been changed. Creative then filed an emergency motion to "enjoin" Kolin from "further interfering with removal of property," which the court denied on March 9 following a hearing. The court found that under paragraph 4 of the settlement agreement, Creative's breach meant that Kolin was entitled to dispose of the remaining property and recover the costs for disposal. In essence, after its breach, the property was no longer Creative's to reclaim.

¶ 8 Creative thereafter filed three different petitions for federal bankruptcy, which stayed the present case for another year, but those petitions were ultimately dismissed and the stay lifted in February 2016 following a request by counsel for Kolin. The trial court then entered its final judgment on June 7, 2016, awarding Kolin attorney fees and costs and formally finding Creative

had abandoned the property, pursuant to Kolin's motion. Prior to final judgment in the matter, several companies sought to intervene, but the trial court denied their petition.

¶ 9 ANALYSIS

¶ 10 On appeal, challenges the court's interpretation of, and judgment upon, the settlement agreement. A settlement agreement is in the nature of a contract, and is therefore governed by principles of contract law. *City of Chicago Heights v. Crotty*, 287 Ill. App. 3d 883, 885 (1997). As such, we read the settlement agreement as a whole, with the primary objective of giving effect to the parties' intent based on the plain and ordinary meaning of its language. *Id*.

¶ 11 The trial court ruled that Creative had failed to abide by the agreement finding that Kolin provided full access to the property no later than January 19, but Creative took no action to remove the property between then and the initial due date of February 11. The court ruled that Creative therefore abandoned its property. Abandonment is generally defined as an intentional relinquishment of a known right. *Michael v. First Chicago Corp.*, 139 Ill. App. 3d 374, 382 (1985); *Paset v. Old Orchard Bank & Trust Co.*, 62 Ill. App. 3d 534, 537 (1978). To prove abandonment, a party must show both an intent to abandon and acts carrying that intent into effect. *People ex. rel. Illinois Historic Preservation Agency v. Zych*, 186 Ill. 2d 267, 279 (1999). Abandonment can be express or implied and often must be proved by circumstantial evidence of intent, as direct evidence is rare. *Id.* at 280; *People v. Johnson*, 2013 IL App (4th) 120162, ¶ 28. Generally abandonment is not presumed, and the party seeking to declare an abandonment must prove by convincing and unequivocal evidence that the abandoning party intended to relinquish ownership. *Zych*, 186 Ill. 2d at 279; *Michael*, 139 Ill. App. 3d at 382. A finding of abandonment is usually considered a factual determination, which this court will not disturb unless it is against the manifest weight of the evidence. *Zych*, 186 Ill. 2d at 278. As such, where there are different

ways to view the evidence, or alternative inferences to be drawn from it, we accept the view of the trier of fact as long as it is reasonable. *Id*.

¶ 12 In this case, Kolin's property manager, Vince Jadryev, testified that the outdoor parking lot (where the Creative's outside property was located) was accessible to all tenants during business hours, Monday through Friday, from 5 a.m. until 6 p.m. Creative did not contradict this testimony. Although Creative claimed at the hearing that it needed an access code for the outside lot, Vadryev testified the access code was only necessary during non-business hours on the weekend. As to the inside of the warehouse, Creative did not obtain those keys until January 19. At that point, Creative did not ask for any codes or door openers that they later claimed precluded them from removing their property.

¶ 13 There is no evidence showing that Creative began removing its property from either the outside or inside lot by January 16, as required. This is a clear a breach of the agreement. Evidence showed that as of February 11, the due date to remove property from the outside lot, Creative had not done so even though it had the ability to do so. Although Creative apparently showed up on March 5 to remove property *after* the court's judgment finding that it had breached the agreement, that was too little too late.[1] This was especially the case given the time-is-of-the-essence language in the settlement agreement. After having failed to abide by the settlement agreement's specified dates for property removal following prolonged litigation, we cannot say the trial court's determination that Creative abandoned the property was against the manifest

[1] Creative essentially argues that Kolin failed to show it had a right to lock Creative out of the property on March 5, the day before the March 6 due date in the settlement agreement. The March 4 judgment held that Creative had breached the settlement agreement, and the settlement agreement makes clear that in such an event, Creative was no longer entitled to the property. Creative has not established that either the court's March 4 judgment (notwithstanding that it was interlocutory) or the settlement agreement gave Creative the right to collect its property. We note that Creative's reference to Supreme Court Rule 304(a) (eff. Mar. 8, 2016) in this context is a red herring, since 304(a) concerns only matters of appealability. See *Application of DuPage County Collector*, 152 Ill. 2d 545, 549 (1992) (Rule 304, in both title and substance, directly addresses the appealability of certain judgments).

weight of the evidence. Creative's actions showed it implicitly intended to relinquish the property. Although there was some contradictory testimony at the hearing, the trial court credited Kolin's testimony over that of Creative. We will not reweigh its determination. See *Zych*, 186 Ill. 2d at 278.

¶ 14 Creative next challenges the imposition of attorney fees and costs. Here, after carefully reviewing the affidavits and billing records of Kolin's attorneys, filed in support of the request for attorney fees, the court awarded Kolin about $118,000, consisting of the $74,000 agreed settlement amount and some $44,000 in court-approved attorney fees, even though Kolin had requested some $88,000 in attorney fees and $36,000 in costs. The trial court found the time records were accurate and the fees reasonable, then stated that given its familiarity with the case, an evidentiary hearing was unnecessary. The court also ruled Kolin could dispose of the property "in anyway it deems fit," but if it sold any property, those proceeds would act as a credit against the final judgment owed to Kolin.[2]

¶ 15 Creative contends it was entitled to an evidentiary hearing on the attorney fees. However, courts frequently award attorney fees without holding evidentiary hearings, and the circuit court's acceptance of unrebutted affidavits of counsel as to fees, in the absence of an evidentiary hearing, is within its discretion. *Raintree Health Care Center v. Illinois Human Rights Commission*, 173 Ill. 2d 469, 494-95 (1996) (also noting, it is within the discretion of the trier of fact to determine the reasonableness of the attorney fees requested); *Hess v. Lloyd*, 2012 IL App (5th) 090059, ¶ 26; *Heritage Pullman Bank & Trust Co. v. Carr*, 283 Ill. App. 3d 472, 481-82 (1996). A hearing isn't needed when the requirements can be satisfied by looking at the pleadings, trial evidence, or other matters appearing in the record, and also when the

[2] The parties do not dispute that Kolin has since disposed of the property. This guts Creative's argument that Kolin received a windfall because it would be able to potentially keep or lease the property.

complaining party has the opportunity to present evidence. *Kellett v. Roberts*, 276 Ill. App. 3d 164, 175 (1995).

¶ 16 In the trial court, Creative only raised general objections as to the fees, for example, asserting they were block-billed and duplicative. Creative, however, failed to cite sufficient details or any explanation to rebut the evidence submitted in support of the fees. See *Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887, ¶ 113 (fee petition warrants evidentiary hearing only when response of party to be charged with paying award raises issues of fact that cannot be resolved without further evidence); *cf. Bank of America National Trust and Savings Association v. Schulson*, 305 Ill. App. 3d 941, 952 (1999) (evidentiary hearing granted where defendants presented detailed objections to the fee petition). During oral arguments, Kolin stated that to the extent there was any double billing, it was willing to forgo those charges based on the court's assessment of the documents. Creative has failed to set forth adequate reasons for holding an evidentiary hearing, especially where the court awarded Kolin only half of what it requested in attorney fees, and provided Creative ample opportunity to present contrary evidence on fees. Also, it is undisputed that Kolin already paid its attorneys some $88,000 in legal fees, which serves as *prima facie* evidence of the reasonableness of the fees. See *American Service Insurance Co. v. China Ocean Shipping Co.*, 402 Ill. App. 3d 513, 529-30 (2010). Creative has not persuaded us that it has any evidence to present at an evidentiary hearing that would change the present result.

¶ 17 We also reject the assertion that Kolin's attorneys were prohibited from obtaining payment for their efforts on the bankruptcy motions. Apart from failing to cite any legal authority for its contention, resulting in waiver (see S. Ct. R. 341(h)(7) (eff. eff. Jan. 1, 2016)), Creative has not contradicted evidence showing the bankruptcy petitions were frivolous and

meant to further delay final judgment on the personal property in this case, and as such, an outgrowth of work in the underlying lawsuit.

¶ 18 In a separate appeal, now consolidated with Creative's, several companies claiming to be the rightful owners of the property have challenged the trial court's June 3, 2016, judgment denying their petition to intervene, which they filed on March 10, 2016. The court denied their motion to intervene as untimely, while also noting its serious concerns that the intervenors are "one, not at all independent third parties distinct from Creative Vistas. And, two, part of a dilatory scheme by Creative Vistas."

¶ 19 The intervenors now claim this was an erroneous ruling. However, they fail to adequately support their argument with pertinent legal authority or cohesive argument, thus waiving their claim. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *Marzouki v. Nagar-Marzouki*, 2014 IL App 1st 132841, ¶ 12. Waiver aside, we disagree, as the application to intervene must be made in a timely manner, and the trial court's judgment on timeliness will not be reversed on appeal absent an abuse of discretion. *Freesen, Inc. v. County of McLean*, 277 Ill. App. 3d 68, 72 (1995). Factors for determining timeliness include the time an intervenor became aware of the litigation, the amount of time that elapsed between initiation of the action and filing of the petition, and the reason for failing to seek intervention at an earlier date. *Id*.

¶ 20 Here, the trial court did not abuse its discretion in concluding the intervenors were untimely. On appeal, the intervenors concede they "knew of this litigation from the outset." As evidence of this, seven of the 10 companies listed Creative's president as their corporate agent, and another company is named after Creative's property manager. *Campen v. Executive House Hotel, Inc.*, 105 Ill. App. 3d 576, 585-86 (1982) (knowledge which a corporate agent receives while acting within the scope of his or her agency is imputed to the corporation). Counsel for the

intervenors also admitted at the hearing that Creative's president was familiar with the claims of the intervenors, and Creative's president verified the complaint the intervenors would file in the event they could enter the litigation.

¶ 21 Even assuming the intervenors had protectable interests in the property not already represented by Creative[3], they could have sought to intervene years earlier, when Creative was evicted and the property was left in the warehouse. At that point, they were on notice that their property interests were in jeopardy. Instead, they filed the petition four years later, just after the bankruptcy stay had been lifted and only days after Kolin had moved for final judgment in the case. This was in spite of the fact that the court had already declared Kolin was entitled to the property a year earlier in March 2015. See *Ramsey Emergency Services v. Illinois Commerce Commission*, 367 Ill. App. 3d 351, 365 (2006) (parties may not normally seek intervention after the rights of the existing parties have been determined). Intervenors' actions were not only untimely, but also demonstrated their intent to delay final judgment in this case. Intervenors' contention on appeal that they "had no grounds to intervene" until March 2016 is completely disingenuous and appears to be aimed at further wasting judicial time and resources. We need not consider their additional contentions on appeal.

¶ 22 CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.

[3] Creative itself claimed title in the property in its amended complaint.