

[Cite as *EAC Properties, L.L.C. v. Brightwell*, 2012-Ohio-5385.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

EAC Properties, LLC, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 12AP-347
 : (C.P.C. No. 08CVH-12-17284)
 Robert R. Brightwell, D.O., : (ACCELERATED CALENDAR)
 :
 Defendant-Appellee. :

D E C I S I O N

Rendered on November 20, 2012

Murray Murphy Moul & Basil LLP, Brian K. Murphy, and Robert H. Miller, for appellant.

Innis & Barker Co., L.P.A., and Larry D. Barker, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Plaintiff-appellant, EAC Properties, LLC ("EAC"), appeals the judgment of the Franklin County Court of Common Pleas, which granted the motion of defendant-appellee, Robert R. Brightwell, D.O. ("Brightwell"), for attorney fees and costs. For reasons we explain below, we reverse and remand this matter for clarification and consideration of EAC's arguments in opposition.

I. BACKGROUND

{¶ 2} This matter arises from a dispute over rent and utility payments due on property owned by EAC and leased by Brightwell. EAC filed a complaint against Brightwell in December 2008, alleging breach of the lease agreement. A magistrate of

the trial court held a bench trial. Important for our purposes here, during the trial, counsel for the parties addressed the issue of awarding attorney fees upon a finding of a prevailing party. The parties agreed that they would not submit evidence on fees at the trial, but would submit the fees by affidavit once a prevailing-party determination had been made. The magistrate said: "Great. Then we will not take any evidence on fees. I will not make a decision on fees. I will merely put who is the prevailing party. And, then, hopefully, the parties can work that out without any additional hearing." (Tr. 66.)

{¶ 3} Following the trial, in his decision, the magistrate concluded that the parties had modified the terms of the lease, and EAC's conduct waived its ability to recover the back-rental payments it sought from Brightwell. The magistrate also concluded, however, that Brightwell owed EAC \$3,703.97 for unpaid utility expenses. Because EAC held Brightwell's security deposit of \$3,147.30, the magistrate awarded EAC \$556.67 for the unpaid utilities. The magistrate's decision also stated the following:

Claim for Attorney Fees:

Both parties have asserted that the lease between the parties contained a fee shifting provision awarding attorney fees to the 'prevailing party'. The undersigned finds that both sides have prevailed in part.

{¶ 4} EAC objected to the magistrate's findings of fact and conclusions of law, including the magistrate's finding that both parties had prevailed. EAC contended that it "was awarded damages and should be deemed the prevailing party under the terms of the Lease and should be awarded attorney's fees." In response, Brightwell argued that EAC's "point is difficult to understand when clearly the Magistrate provided that [Brightwell] won on the issue of rent and that [EAC] won on the issue of utilities. Therefore, the attorney fees portion of the agreement has been nullified."

{¶ 5} The trial court overruled EAC's objections and adopted the magistrate's decision. On the issue of prevailing-party status, the court stated:

The Supplemental Objection regarding prevailing party for the purpose of attorneys' fees fails. The Plaintiff's primary claim for additional rent failed. Plaintiff waived the lease terms which entitled her to additional rent by her conduct in spite of the Lease provision which prohibited waiver. Lease

¶24. The Magistrate awarded a small sum for utilities, but deducted that from the security deposit. Dec. at 11. To bring suit and request over \$30,000 and be awarded roughly \$550 is by any definition a win [sic]. Plaintiff did not prevail, and is not entitled to attorneys fees.

{¶ 6} On appeal, this court affirmed. *See EAC Properties v. Brightwell*, 10th Dist. No. 10AP-853, 2011-Ohio-2373. EAC did not raise, and this court did not address, the issue of prevailing-party status or attorney fees. The Supreme Court of Ohio declined jurisdiction to review the decision.

{¶ 7} On October 24, 2011, Brightwell submitted to the trial court a motion for reasonable attorney fees and costs. He asked for judgment in the amount of \$8,868 pursuant to Section 36 of the Lease Agreement. That section, he argued, provided that, if one of the parties were required to enforce any provision of the lease agreement, then " 'the prevailing party shall be entitled to its reasonable attorney fees and costs in connection with such action.' "

{¶ 8} On November 23, 2011, EAC filed a memorandum in opposition to Brightwell's motion. In it, EAC contended that Brightwell was not entitled to fees and costs because he did not prevail.

{¶ 9} On March 20, 2012, the trial court issued a decision and entry granting Brightwell's motion for attorney fees and costs. In it, the trial court stated: "The Defendant's Motion is not opposed." Upon determining that the fees were reasonable, the court stated: "The Court previously found the Defendant prevailed. Trial court's August 5, 2010 Decision at page 8. The Court therefore grants Defendant's Motion and awards Defendant \$8,868.00 in attorney's fees and costs."

II. ASSIGNMENTS OF ERROR

{¶ 10} EAC filed a timely appeal and raises the following assignments of error:

[I.] The Trial Court Erred As A Matter Of Law In Awarding Attorney's Fees Based On A Previous Finding That Defendant Prevailed When The Court Had Never Made Such A Finding.

[II.] The Trial Court Erred As A Matter Of Law In Awarding Attorney's Fees To A Non-Prevailing Party Contrary To The Parties' Agreement.

[III.] The Trial Court Erred As A Matter Of Law And To The Prejudice Of Plaintiff By Failing To Consider Plaintiff's Memorandum In Opposition To Defendant's Motion For Attorney's Fees And Costs.

III. DISCUSSION OF ASSIGNMENTS OF ERROR

{¶ 11} In its assignments, EAC contends that the trial court erred by granting Brightwell's motion for attorney fees. We agree, for two reasons.

{¶ 12} First, in its decision granting Brightwell's motion, the trial court stated that it had previously found Brightwell to be the prevailing party. That statement, however, is somewhat inconsistent with its prior findings.

{¶ 13} The magistrate found that each party prevailed, in part, and declined to award fees to either party under the lease agreement. EAC objected to the magistrate's finding. In his response, Brightwell argued that the prevailing-party provision of the agreement had been nullified. The trial court overruled EAC's objection to the magistrate's finding as to the status of EAC as the prevailing party and failure to award fees to EAC. On those points, the trial court's decision appears to contain a typographical error, as it states that judgment in favor of EAC for an award of \$550 on a claim for \$30,000 is "by any definition a win." The next sentence clearly states, however, "Plaintiff did not prevail, and is not entitled to attorneys fees." At a minimum, the court's findings on these points require clarification before we may review them, and we remand the matter for that purpose.

{¶ 14} Second, we are troubled by the fact that the court's decision states that Brightwell's motion was unopposed. The court apparently missed EAC's memorandum in opposition, which was filed on November 23, 2011. Because it appears the trial court failed to consider EAC's memorandum, we decline to address EAC's contentions in the first instance. The trial court shall consider EAC's contentions on remand.

{¶ 15} Under the unique circumstances presented here, we conclude that the trial court erred by granting Brightwell's motion for attorney fees and costs, although we decline to review that motion on its merits. We sustain EAC's first and third assignments of error; EAC's second assignment of error is moot.

IV. MOTION TO DISMISS

{¶ 16} Brightwell filed a motion to dismiss EAC's appeal. In it, Brightwell contends that EAC is attempting to appeal the trial court's August 5, 2010 decision and entry, which overruled Brightwell's objections to the magistrate's decision, including the objection regarding EAC's status as the prevailing party. Because EAC did not file the appeal before us now until April 2012, Brightwell contends it is untimely. We disagree.

{¶ 17} In this appeal, EAC challenges the trial court's March 20, 2012 judgment, which granted Brightwell's motion for attorney fees and costs. EAC does not challenge the trial court's conclusion, over its objection, that both parties prevailed, in part. Rather, EAC is challenging the trial court's characterization of that prior conclusion and its failure to consider EAC's arguments in opposition to Brightwell's motion. EAC's notice of appeal was not untimely, and we deny Brightwell's motion to dismiss EAC's appeal.

V. MOTION FOR ATTORNEY FEES AND COSTS

{¶ 18} Brightwell has filed in this court a motion for judgment against EAC for reasonable attorney fees and costs. Brightwell cites no statute, rule or case law in support of his motion. In any event, having reversed the trial court's judgment in Brightwell's favor, we deny his request for fees.

VI. CONCLUSION

{¶ 19} In conclusion, we sustain EAC's first and third assignments of error and render EAC's second assignment of error moot. We reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to the trial court for consideration of EAC's memorandum in opposition to Brightwell's motion for attorney fees and costs and, if necessary, clarification of its decision. We deny Brightwell's motion to dismiss this appeal and his motion for attorney fees and costs.

*Motions denied;
judgment reversed,
cause remanded.*

BRYANT and KLATT, JJ., concur.
