[Cite as *Columbus Truck & Equip. Co., Inc. v. L.O.G. Transp., Inc.*, 2013-Ohio-2738.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Columbus Truck & Equipment Company, Inc.,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	No. 12AP-223 (M.C. No. 2010 CVF 029566)
v.	:	(REGULAR CALENDAR)
L.O.G. Transportation, Inc. et al.,	:	
Defendants-Appellants/ Cross-Appellees.	:	

D E C I S I O N

Rendered on June 27, 2013

Strip, Hoppers, Leithart, McGrath & Terlecky Co., L.P.A., *Paul W. Leithart*, and *Nicholas W. Reeves*, for appellee.

Novak, Robenalt & Pavlik, L.L.P., and *Thomas C. Pavlik*, for appellants.

APPEAL from the Franklin County Municipal Court.

BROWN, J.

{¶ 1} This is an appeal by defendants-appellants, L.O.G. Transportation, Inc. ("LOG Transportation"), Eagle Freight, and Kelly L. Hoban, from a judgment of the Franklin County Municipal Court awarding attorney fees to plaintiff-appellee, Columbus Truck & Equipment Company, Inc.

{¶ 2} In 2007, appellants LOG Transportation and Eagle Freight entered into a "short term lease agreement" with appellee, whereby appellee agreed to lease to

appellants a commercial truck at a rate of $1,150 per month, plus ten cents per mile. LOG Transportation and Eagle Freight leased the truck for three months, totaling 4,505 miles on the vehicle.

{¶ 3} On July 27, 2010, appellee filed a complaint against appellants, alleging causes of action for breach of contract, personal liability, and fraud. The parties subsequently stipulated to an agreed judgment whereby appellee was granted judgment against LOG Transportation and Eagle Freight in the amount of $3,419.49. Unresolved, however, was the issue of whether appellee was entitled to recover attorney fees.

{¶ 4} The matter was referred to a magistrate, who issued a decision on August 3, 2011, finding that appellee was entitled to an award of reasonable attorney fees. On August 18, 2011, appellants filed objections to the magistrate's decision. On September 21, 2011, the trial court filed an entry finding the objections untimely and upholding the decision of the magistrate. Appellants filed a notice of appeal from the trial court's entry, but this court dismissed the appeal as premature. On February 23, 2012, the trial court conducted a hearing to determine the amount of attorney fees. By entry filed February 28, 2012, the trial court awarded attorney fees to appellee in the amount of $9,511.

{¶ 5} On appeal, appellants set forth the following two assignments of error for this court's review:

> [I.] The Trial Court erred by holding, in the face of the clear statutory language found in Ohio Revised Code § 1319.02 to the contrary, that attorney fees can be awarded in a commercial contract of indebtedness when the contract at issue is less than one hundred thousand dollars ($100,000.00).
>
> [II.] The Trial Court erred in awarding to the Plaintiff the sum of $9,511.00 as attorney fees in the original matter herein as not being reasonable and was an abuse of discretion.

{¶ 6} Appellee has filed a cross-appeal, asserting the following assignment of error:

> The Trial Court erred in failing to award Cross-Appellant attorney fees it incurred at the February 23, 2012 hearing to determine the amount and reasonableness of fees.

{¶ 7} At the outset, as determined by the trial court, we note that appellants' objections to the magistrate's decision were untimely. Pursuant to Civ.R. 53(D)(3)(b)(i), a party is required to file written objections to a magistrate's decision "within fourteen days of the filing of the decision." Appellants acknowledge that their objections were filed one day after the 14-day deadline, but argue that they should be deemed timely because they inadvertently mailed the objections to the Franklin County Common Pleas Court rather than the Franklin County Municipal Court. A court, however, is not required to address untimely objections. *See Tomety v. Dynamic Auto Serv.*, 10th Dist. No. 09AP-982, 2010-Ohio-3699, ¶ 13.

{¶ 8} We nevertheless consider appellants' contention that the lease agreement at issue is a commercial "contract of indebtedness" as defined by R.C. 1319.02, and that attorney fees are not permissible under the statute because the contract did not exceed $100,000. Appellants argue that the magistrate erred in holding that the short term lease agreement was a "true lease," and not a contract of indebtedness.

{¶ 9} At issue is the interpretation of the "Short Term Lease Agreement" (hereafter "STLA") between the parties. Paragraph one of the STLA states in part: "This * * * Agreement * * * covers the short term rental (not more than 30 days) of a vehicle by the actual owner of the vehicle. * * * Customer does not acquire any title or ownership rights to the vehicle." Paragraph 19 of the STLA states in part: "Customer will pay Lessor all costs, including attorney fees, in connection with the collection amounts payable by Customer to Lessor hereunder or the enforcement of any provisions of [the STLA]."

{¶ 10} Appellants argue that R.C. 1319.02,[1] which governs the enforcement of a commitment to pay attorneys' fees in commercial contracts of indebtedness, is applicable to the lease agreement. R.C. 1319.02 states in part as follows:

> (A) As used in this section:
>
> (1) "Contract of indebtedness" means a note, bond, mortgage, conditional sale contract, retail installment contract, lease, security agreement, or other written evidence of indebtedness, other than indebtedness incurred for purposes that are primarily personal, family, or household.

[1] R.C. 1319.02 was formerly designated under R.C. 1301.21.

> (2) "Commitment to pay attorneys' fees" means an obligation to pay attorneys' fees that arises in connection with the enforcement of a contract of indebtedness.
>
> (3) "Maturity of the debt" includes maturity upon default or otherwise.
>
> (B) If a contract of indebtedness includes a commitment to pay attorneys' fees, and if the contract is enforced through judicial proceedings or otherwise after maturity of the debt, a person that has the right to recover attorneys' fees under the commitment, at the option of that person, may recover attorneys' fees in accordance with the commitment, to the extent that the commitment is enforceable under divisions (C) and (D) of this section.
>
> (C) A commitment to pay attorneys' fees is enforceable under this section only if the total amount owed on the contract of indebtedness at the time the contract was entered into exceeds one hundred thousand dollars.
>
> (D) A commitment to pay attorneys' fees is enforceable only to the extent that it obligates payment of a reasonable amount.

{¶ 11} Thus, the statute allows for an award of attorneys' fees where: (1) the parties have entered into a "contract of indebtedness," (2) the contract of indebtedness includes a commitment to pay attorneys' fees, (3) the contract is enforced through judicial proceedings or otherwise after maturity of the debt, (4) the total amount owed on the contract at the time such contract was entered into exceeds $100,000, and (5) the obligation constitutes a reasonable amount. *Saad v. GE HFS Holdings, Inc.*, 366 Fed. Appx. 593, 606 (6th Cir.2010).

{¶ 12} Appellants argued before the magistrate that the contract at issue is a "lease," as contemplated by R.C. 1319.02, and that the statute bars recovery of attorney fees for the enforcement of a contract of indebtedness for less than $100,000. Appellee, on the other hand, argued that R.C. 1319.02 was intended to cover contracts relating to financing arrangements and not, by contrast, simple rental agreements such as the one at issue in this case.

{¶ 13} In considering appellants' argument, the magistrate found that the rules of statutory construction "mitigate against casual interpretation of the word 'lease' in this statute as a general term to cover all transactions with this name." The magistrate noted that "all of the transactions listed within the definition of 'contract of indebtedness' are transactions in which an obligation for a specified amount of debt is created at the beginning of the contractual relationship," and thus "[t]he leases contemplated by R.C. 1301.21 are those that operate as financing arrangements, not 'true' leases." The magistrate concluded that, under the transaction entered by the parties in the instant case, in which LOG Transportation and Eagle Freight merely paid appellee for the use of its vehicle, "the action does not attempt enforcement of a contract of indebtedness, and R.C. 1301.21 is inapplicable."

{¶ 14} Under Ohio law, a court examines a transaction "not for what it purports to be, but for what, in essence, it is." *State ex rel. Kitchen v. Christman*, 31 Ohio St.2d 64, 67 (1972). Similar to the magistrate, we do not construe the language of the statute to mean that any agreement, though titled a "lease," constitutes a "contract of indebtedness." A review of cases in which attorney fees have been awarded under R.C. 1319.02 (and former R.C. 1301.21) supports the magistrate's observation that the types of transactions listed involve obligations relating to a specified amount of debt created at the time the debt instrument is executed, i.e., traditional financing arrangements between a creditor-debtor. *See, e.g., Croghan Colonial Bank v. Lepley Farm Lines, Inc.*, 6th Dist. No. H-10-013, 2011-Ohio-3493, ¶ 66 (attorney fees authorized under R.C. 1301.21 in action by bank to recover loans made under promissory notes); *Fahey Banking Co. v. Rees Ents., Inc.*, 3d Dist. No. 9-09-40, 2010-Ohio-4172 (awarding attorney fees under R.C. 1301.21 in action on promissory note); *New Concept Hous., Inc. v. United Dept. Stores Co.*, 1st Dist. No. C-080504, 2009-Ohio-2259, ¶ 34 (attorney fees under R.C. 1301.21 permitted on promissory note containing attorney fee provision from buyer to seller of apartment complex); *Fifth Third Bank v. Mufleh*, 6th Dist. No. L-04-1188, 2005-Ohio-2351 (mortgagee entitled to recover attorney fees based upon provisions in promissory note and guaranty).

{¶ 15} The STLA executed by the parties in the instant case lacks the attributes of the above instruments. The STLA contains no terms obligating payment of a specified

principal sum (or other typical indicia of indebtedness). Further, while the statute at issue contemplates enforcement on a contract of indebtedness after "maturity of the debt," the STLA provides no maturity date, nor can liability for payment under the STLA (based upon weekly usage plus mileage) be characterized as an action to enforce payment of a matured debt. The Supreme Court of Ohio has held that the lease of tangible personal property for a stipulated rental, in which the lessor does not transfer title, and continues to own the property, "is not an 'evidence of indebtedness' " similar to obligations such as bonds, certificates of indebtedness, debentures, and notes. *Columbus & S. Ohio Elec. Co. v. Peck*, 161 Ohio St. 73 (1954). In the instant case, the terms of the STLA are open-ended, providing for rental payments on a weekly/monthly basis plus mileage, and the option by the lessee to surrender the property to the lessor and terminate the agreement at any time. While such terms outline the mutual obligations of the parties for the rental of a truck, we agree with the magistrate that the STLA does not constitute a "contract of indebtedness" as contemplated by R.C. 1319.02.

{¶ 16} Accordingly, even accepting that appellants had filed timely objections to the magistrate's decision, we would find no error with the court's determination that appellee was entitled to an award of attorney fees under the terms of the STLA. Appellants' first assignment of error is without merit and is overruled.

{¶ 17} Appellants' second assignment of error and appellee's assignment of error on cross-appeal are interrelated and will be considered together. Under the second assignment of error, appellants contend that the trial court erred in finding that an award of $9,511 for attorney fees constitutes a reasonable amount. Under the cross-assignment of error, appellee asserts that the trial court erred in failing to award an additional four hours of attorney fees for time spent preparing for the hearing on attorney fees.

{¶ 18} With respect to attorney fee awards, "Ohio adheres to the so-called 'American rule,' which requires that each party involved in litigation pay his or her own attorney fees in most circumstances." *McConnell v. Hunt Sports Enters.*, 132 Ohio App.3d 657, 699 (10th Dist.1999). There are, however, exceptions to this rule, including "when contractual provisions between parties shift the costs of defending, * * * and where statutory provisions specifically provide that a prevailing party may recover attorney fees." *Id*.

{¶ 19} Under Ohio law, " '[a] trial court's determination of reasonable attorney's fees must generally begin with a calculation of "the number of hours reasonably expended on the case times an hourly fee[,]" ' also termed the 'lodestar figure.' " *Nordquist v. Schwartz*, 7th Dist. No. 11 CO 21, 2012-Ohio-4571, ¶ 22, quoting *Unick v. Pro-Cision, Inc.*, 7th Dist. No. 09MA171, 2011-Ohio-1342, ¶ 27, quoting *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 145 (1991). The party requesting attorney fees "bears the burden of proving evidence of any hours worked that would be properly billed to the client, proving the attorney's hourly rate, and demonstrating that the rate is reasonable." *Id.* After the requesting party has "adequately proven an appropriate number of hours worked and the attorney's reasonable hourly fee, the trial court may modify the baseline calculation by considering the factors listed in former DR 2-106(B), now found in Prof. Cond. R. 1.5." *Id.* at ¶ 23.

{¶ 20} Prof.Cond.R. 1.5 lists the following eight factors to consider in determining the reasonableness of attorney fees: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to properly perform the legal service, (2) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the attorney, (3) the fee "customarily charged in the locality for similar legal services," (4) the amount involved, and the results obtained, (5) time limitations imposed by the client or the circumstances, (6) the nature and length of the professional relationship with the client, (7) the experience, reputation and ability of the lawyer, and (8) whether the fee is fixed or contingent.

{¶ 21} A trial court's award of attorney fees is reviewed for abuse of discretion. *Nordquist* at ¶ 24. An appellate court will not interfere with a trial court's award " '[u]nless the amount of fees determined is so high or so low as to shock the conscience.' " *Lamar Advantage Gp Co. v. Patel*, 12th Dist. No. CA2011-10-105, 2012-Ohio-3319, ¶ 43, quoting *Bittner* at 146.

{¶ 22} Appellants note that appellee's attorney charged $260 per hour to handle this matter, a rate appellants maintain is unreasonable based upon the size of the claim and difficulty involved. Citing the fact that this matter was brought in municipal court, appellants argue that the time and labor required in this case was minimal; further,

appellants point to their expert's testimony that reasonable attorney fees for a similar case would be approximately $1,000.

{¶ 23} During the hearing on attorney fees, each side presented testimony regarding the amount and reasonableness of the attorney fees. Attorney Joseph B. Jerome, who testified on behalf of appellants, opined that the amount of attorney fees was unreasonable, based in large part on his view that only one entity (Eagle Freight) should have been named as a defendant in this action as opposed to the three parties that were named (Eagle Freight, LOG Transportation, and Kelly Hoban). Jerome testified that he had a "problem with trying to figure out by looking at $9,000 of bills how much time and effort was spent on trying to go after parties that should never have been named in the first place." (Tr. 49.) Jerome opined that he typically accepts cases "on a contingency fee of one-third," and thus opined that a reasonable amount would be "maybe" $1,000. (Tr. 53.)

{¶ 24} Counsel for appellee, Paul W. Leithart, testified that he was retained by appellee to collect a past due balance on the STLA. Leithart stated that he received no response to his initial collection letter, and he testified as to various email correspondence he exchanged with counsel for appellants regarding settlement attempts. Leithart also testified as to the legal issues in the case, including his attempt to ascertain the proper defendants. Leithart determined Eagle Freight was listed as both a corporation as well as "a DBA for L.O.G. Transportation, Incorporated." (Tr. 25.) Further, the certificate of liability insurance listed "L.O.G. Transportation, Incorporated, dba Eagle Freight." (Tr. 27.) Leithart also discovered that LOG Transportation had lost its corporate charter, and it led him "to believe that there was a possibility that the company my client was dealing with was no longer a corporation and that Kelly Hoban would, therefore, be personally liable." (Tr. 27.) According to Leithart, he has been involved in collection cases for his client for 23 years, and "this was one of the most difficult to get a handle on" because his client was "given the run-around before I got involved, and I believe I was given the run-around after I got involved." (Tr. 38.) Leithart testified "[t]here was never an acknowledgement [by appellants] that L.O.G. Transportation might have any liability until the very end." (Tr. 38.)

{¶ 25} Appellee also introduced evidence that he had offered to settle the case early in the litigation, but that appellants never offered a judgment for the amount sought until the day of trial. Appellee's Exhibit C includes an email from counsel for appellee to counsel for appellants, dated November 18, 2010, representing that his client would accept an agreed judgment against appellants for the balance due "plus $1500.00 in attorney fees plus costs." In another email dated December 27, 2010, counsel for appellee indicated his client would be willing to accept an agreed judgment entry against appellants for the balance due, as well as $1,500 in attorney fees, and that "[t]hey may be willing to discount this for immediate payment." In an email dated January 24, 2011, counsel for appellee indicated that attorney fees had increased.

{¶ 26} At the close of the hearing, the trial court cited the testimony presented, noting that the case "could have been settled and resolved" much earlier at much less expense. (Tr. 66.) The court also noted the competing testimony as to the issue of "whether there's a judgment against one, two or three people or two or three * * * entities and an individual." (Tr. 67.) The court ruled that it would not award costs, but that "[t]he Court is going to find that Plaintiff is entitled to recover as reasonable attorney fees in this case from the corporate defendants the sum of $9,511." (Tr. 68.)

{¶ 27} Here, the record indicates that the trial court heard conflicting testimony as to what amount constituted a reasonable attorney fee award. Leithart offered, as Exhibit A, statements from his law firm with respect to services rendered, and he testified that his hourly rate is $260 per hour. The statements begin in June 2010 and continue through August 31, 2011, listing the services rendered, the hourly rate, and the time spent on the various services. Appellee submitted a client ledger report indicating a total of $9,511 in fees. The evidence also included Leithart's affidavit, in which he opined that his hourly rate and fees were reasonable. We note that appellants' own expert witness, Jerome, did not find the hourly rate to be unreasonable, noting that the $260 rate was "within reason." (Tr. 50.) Jerome also acknowledged that, "[c]ertainly, some of the issues that are raised are not in question." (Tr. 51.) As noted, Jerome's primary contention was that counsel for appellee spent an inordinate amount of time determining whether LOG Transportation and Kelly Hoban should have been parties to the action.

{¶ 28} In awarding appellee the entire amount on the billing statements, the court obviously found credible the testimony of appellee's counsel regarding the time spent attempting to ascertain the proper defendants and the efforts to settle the case early in the litigation at much less expense. A review of the billing statements reflects that a significant amount of the time listed involved litigating the question of whether appellee was entitled to attorney fees under the contract. Upon review, we conclude that the hearing testimony and evidence were sufficient to support the trial court's award for the sum set forth in the ledger report, and thus we find that the trial court did not abuse its discretion in its award of attorneys' fees.

{¶ 29} In its cross-appeal, appellee argues that the trial court erred in failing to award attorney fees incurred in attending the February 23, 2012 hearing on the issue of attorney fees. Appellee contends that the court should have awarded an additional four hours of time spent preparing for the hearing. During the hearing, Leithart testified that he "estimated" there would be an additional four hours time related to the hearing on fees. (Tr. 10.)

{¶ 30} Appellee suggests that the trial court inadvertently failed to rule on its request for fees for these additional hours. We note, however, at the time the trial court announced from the bench that it was awarding fees in the amount of $9,511, counsel for appellee did not raise the issue of whether an additional amount should have been included for time spent preparing for and attending the hearing. We decline to presume, from the silent record, that the court failed to consider this issue, especially when counsel could have brought the matter to the court's attention. Rather, in light of comments by the trial court in ruling on the issue of attorney fees, the court could have reasonably concluded that an additional award was not warranted in light of the sum already requested and granted.

{¶ 31} Accordingly, appellants' second assignment of error and appellee's assignment of error on cross-appeal are without merit and are overruled.

{¶ 32} Based upon the foregoing, appellants' first and second assignments of error are overruled, appellee's assignment of error on cross-appeal is overruled, and the judgment of the Franklin County Municipal Court is hereby affirmed.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.

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