[Cite as *Lamar Advantage GP Co., L.L.C. v. Patel*, 2012-Ohio-3319.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

LAMAR ADVANTAGE GP CO.,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-10-105
	:	O P I N I O N
- vs -	:	7/23/2012
SACHIN PATEL, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 10CV76430

Jason D. Tonne, 150 East Fourth Street, Cincinnati, Ohio 45202, for plaintiff-appellee

Sanjay K. Bhatt, 2935 Kenny Road, Suite 225, Columbus, Ohio 43221, for defendant-appellant, Sachin Patel and defendant, Motel 6

HENDRICKSON, P.J.

{¶ 1} Defendant-appellant, Sachin Patel, appeals a decision of the Warren County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, Lamar Advantage GP Company, L.L.C. ("Lamar Co.").

{¶ 2} On November 17, 2008, Patel and Lamar Co. entered into an advertising contract, in which Patel agreed to lease a billboard from Lamar Co. to advertise a Motel 6 located in Mason, Ohio. Patel agreed to pay a total of 38 rent installments, due every four

weeks, from January 5, 2009, through December 4, 2011. According to the contract, each installment cost $1,107.69 during "Year 1," which ran from January 5 until December 6, 2009. The payments escalated in years two and three.

{¶ 3} On January 7, 2009, Patel tendered a check for $4,147.69, which covered $3,040 in production costs and $1,107.69 in rent. On March 23, 2009, Patel discovered damage to the billboard. On April 2, 2009, Patel notified Lamar Co. of the damage, and according to Patel, Lamar Co. refused to repair the sign until Patel paid rent for February and March.

{¶ 4} After Patel refused to pay, Lamar Co. filed suit in the Hamilton County Municipal Court, seeking $4,430.76 in back rent. However, Lamar Co. voluntarily dismissed the Hamilton County action on February 9, 2010. On February 12, 2010, Lamar Co. invoked the contract's acceleration clause and filed suit in the Warren County Court of Common Pleas for the entire amount due under the contract. Lamar Co. claimed that Patel failed to pay beyond the first month's rent, and that he owed $18,963.63 in damages, plus court costs, litigation expenses, attorney fees, and interest at 18% per annum.

{¶ 5} The parties filed cross motions for summary judgment. Lamar Co. argued that it had established the elements of a breach of contract claim, and that Patel was personally liable for the amount due, where he signed the contract in his individual capacity. Conversely, Patel argued that he signed the agreement as an agent for the motel owner, Shine Hospitality, L.L.C., which used the operating name "Motel 6."

{¶ 6} On May 20, 2011, the trial court granted summary judgment in favor of Lamar Co. First, the court found that Patel was personally liable under the contract. The court explained that Shine Hospitality, L.L.C. was not listed in the contract, and Patel did not indicate that he was signing as Shine's agent. Further, the court found that "Motel 6" was not a corporate entity, but rather an unregistered trade name that Patel used to operate the

business. Next, the court awarded Lamar Co. the outstanding contract balance of $18,963.63. The court also awarded $8,380.25 in attorney fees, $450.57 in litigation expenses, court costs, and interest at 4% per annum from February 2, 2009, the date of the breach, until paid in full.

{¶ 7} Patel timely appeals, raising two assignments of error for review.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT IN GRANTING PLAINTIFF-APPELLEE'S MOTION FOR SUMMARY JUDGMENT[.]

{¶ 10} In his first assignment of error, Patel argues that the trial court erred in granting summary judgment to Lamar Co. on its breach of contract claim.

{¶ 11} This court's review of a trial court's ruling on a summary judgment motion is de novo, which means that we review the judgment independently and without deference to the trial court's determination. *Easterling v. Arnold*, 12th Dist. No. CA2011-06-108, 2012-Ohio-429, ¶ 8. We utilize the same standard in our review as the trial court uses in its evaluation of the motion. *Id.*

{¶ 12} Summary judgment is appropriate when there are no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *Williams v. McFarland Properties, L.L.C.*, 177 Ohio App.3d 490, 2008-Ohio-3594, ¶ 7 (12th Dist.). To prevail on a motion for summary judgment, the moving party must be able to point to evidentiary materials that show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The nonmoving party must then present evidence that some issue of material fact remains to be resolved; it may not rest on the mere allegations or

denials in its pleadings. *Id*. All evidence submitted in connection with a motion for summary judgment must be construed most strongly in favor of the party against whom the motion is made. *Easterling* at ¶ 9; *Morris v. First Natl. Bank & Trust Co. of Ravenna*, 21 Ohio St.2d 25, 28 (1970).

{¶ 13} Here, Patel first argues that summary judgment for Lamar Co. was improper, where the evidence showed that he was not personally liable under the contract.

{¶ 14} The pertinent sections of the contract are as follows.

{¶ 15} At the top of page one, the name "Motel 6" is typed in two spaces, labeled "Customer Name" and "Advertiser." Below that, the name "Sachin Patel" is typed in a space marked "Contact Person." Further down is the address for the Motel 6.

{¶ 16} Page two of the agreement (the "signature page") begins: "The undersigned representative or agent of Advertiser hereby warrants to the Lamar Companies that he/she is the _____ of the Advertiser and is authorized to execute this contract on behalf of Advertiser." The fill-in line is blank. Below that is a preprinted signature line labeled "CUSTOMER/ADVERTISER," which is also blank. Underneath, the last signature line bears the language, "CUSTOMER/ADVERTISER SIGNED BY," wherein Patel signed his name as "Sachin Patel," and nothing more.

{¶ 17} Patel claims that he is not personally liable under the contract, because he signed as an agent for the "customer/advertiser," which was "unambiguously identified throughout the contract as Motel 6." Patel further claims that the name "Motel 6" implicated Shine Hospitality, L.L.C., where Shine used the motel's name to do business.

{¶ 18} "A corporation, being an artificial person, can act only through agents." *James G. Smith & Assoc., Inc. v. Everett*, 1 Ohio App.3d 118, 120 (10th Dist.1981). When a person conducts business on behalf of a corporation, he is acting as an agent for the corporation. *Id.* However, the agent may still incur personal liability for the debts of the corporation,

unless the agent "so conduct[s] himself in dealing on behalf of the corporation with third persons that those persons are aware that he is an agent of the corporation and it is the corporation (principal) with which they are dealing, not the agent individually." *Id. See also Gallagher v. Equity Land Title Agency, Inc*., 12th Dist. No. CA97-11-011, 1998 WL 404494, * 1 (July 20, 1998) ("[t]o avoid personal liability, an agent must disclose to the party with whom he is dealing both the agency relationship and the identity of the principal").

{¶ 19} Similarly, "if a corporate officer executes an agreement in a way that indicates personal liability, then that officer is personally liable regardless of his intention." *Spicer v. James*, 21 Ohio App.3d 222, 223 (2nd Dist.1985). Whether an officer or agent is personally liable under the contract depends upon "the form of the promise and the form of the signature." *Id.* "The typical format to avoid individual liability is 'company name, individual's signature, individual's position.'" *The Big H, Inc. v. Watson*, 1st Dist. No. C-050424, 2006-Ohio-4031, ¶ 7. Stated somewhat differently,

> The signature itself represents a clear indication that the signator is acting as an agent if[:] (1) the name of the principal is disclosed, (2) the signature is preceded by words of agency such as 'by' or 'per' or 'on behalf of,' and (3) the signature is followed by the title which represents the capacity in which the signator is executing the document, e.g., 'Pres.' or 'V.P.' or 'Agent.'

Hursh Builders Supply Co., Inc. v. Clendenin, 5th Dist. No. 2002CA00166, 2002-Ohio-4671, ¶ 21.

{¶ 20} Upon review, we find that Patel fell far short of these guidelines in completing the contract. First, neither Motel 6 nor Shine Hospitality, L.L.C. precedes Patel's sole signature, even though they are the purported principals in the action. Instead, the space directly above Patel's signature, labeled "CUSTOMER/ADVERTISER" was left completely blank. Additionally, and perhaps more importantly, after entering his signature, Patel failed to note any official capacity or position in which he was signing the contract.

{¶ 21} This court has previously held that "where an agent signs a negotiable instrument by affixing thereto his own signature, without adding the name of the principal for whom he acts, the agent so signing is himself personally bound on such instrument * * *." *W. Shell Commercial, Inc. v. NWS, L.L.C.*, 12th Dist. No CA2006-06-154, 2007-Ohio-460, ¶ 6, quoting *Aungst v. Creque*, 72 Ohio St. 551, 553 (1905).

{¶ 22} Under these circumstances, we find that Patel incurred personal liability under the contract. While page one of the agreement references the "Motel 6," the remainder of the contract, and especially Patel's signature, does not convince us that Patel intended to act as a corporate agent for Motel 6, Shine Hospitality, L.L.C., or any other alleged corporate entity. *See Everett*, 1 Ohio App.3d at 120-121.

{¶ 23} Accordingly, we reject Patel's argument as to personal liability.

{¶ 24} Patel next argues that summary judgment in favor of Lamar Co. was improper, where the trial court erroneously found that Patel materially breached the contract.

{¶ 25} To set forth a claim for breach of contract, a plaintiff must prove the following elements: (1) the existence of a contract, (2) that the plaintiff fulfilled its contractual obligations, (3) that the defendant failed to fulfill its contractual obligations, and (4) that the plaintiff incurred damages as a result. *S&G Invests., L.L.C. v. United Cos., L.L.C.*, 12th Dist. No. CA2010-03-017, 2010-Ohio-3691, ¶ 12.

{¶ 26} "A breach of a portion of a contract does not discharge the obligations of the parties to the contract unless the breach is material." *Bd. of Commrs. of Clermont Cty., Ohio v. Batavia*, 12th Dist. No. CA2000-06-039, 2001 WL 185464, * 3 (Feb. 26, 2001). "A 'material breach of contract' is a failure to do something that is so fundamental to a contract that the failure to perform defeats the essential purpose of the contract or makes it impossible for the other party to perform." *Marion Family YMCA v. Hensel*, 178 Ohio App.3d 140, 2008-Ohio-4413, ¶ 7 (3rd Dist.). To determine whether a breach of a contract is

material, a court is to consider the following five factors:

> the extent to which the injured party will be deprived of the expected benefit, the extent to which the injured party can be adequately compensated for the lost benefit, the extent to which the breaching party will suffer a forfeiture, the likelihood that the breaching party will cure its breach under the circumstances, and the extent to which the breaching party has acted with good faith and dealt fairly with the injured party.

Batavia at * 3, citing *Software Clearing House, Inc. v. Intrak, Inc.*, 66 Ohio App.3d 163, 170-171 (1st Dist.1990).

{¶ 27} Here, Patel argues that he did not materially breach the contract, where he was only late by one rent payment prior to being excused from his obligation to pay on March 23, 2009, when he discovered the damage to the billboard. Patel presents two factual scenarios as to how this is possible.

{¶ 28} First, Patel claims that soon after signing the contract in November 2008, the parties agreed that Motel 6 would share monthly rent costs equally with a Clarion hotel. Thus, according to Patel, the $1,107.69 payment on January 7, 2009, covered his half of the rent for both January and February, so that by March 23, 2009, he only owed one rent installment.

{¶ 29} Alternatively, Patel asserts that even if he was solely responsible for the rent, Lamar Co.'s monthly invoices indicated that January's rent was not due until February 4, 2009, February's rent was not due until March 4, and rent for March was not due until April 1. Thus, according to Patel, only February's rent was late as of March 23, 2009, at which time Patel was excused from paying until Lamar Co. fixed the billboard.

{¶ 30} In either case, Patel claims that his failure to make one rent payment does not constitute a material breach of contract.

{¶ 31} Upon review, we find that neither of these arguments creates a genuine issue of material fact as to whether Patel materially breached the contract.

{¶ 32} First, we note that there is no mention of another hotel or a division of costs in the contract. *See Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720. Moreover, in applying the factors listed above, we find that reasonable minds could only conclude that Patel materially breached the contract.

{¶ 33} First, the most "fundamental" terms of the contract were for Lamar Co. to provide a billboard to Patel, and for Patel to pay Lamar Co. for the use of the billboard. *See Batavia*, 2001 WL 185464 at * 3. Contrary to this agreement, however, Patel admittedly failed to pay at least one month's rent while enjoying the benefit of the billboard.

{¶ 34} Secondly, we see no evidence that Patel would suffer forfeiture if we were to excuse Lamar Co. from future performance under the contract. After January 7, 2009, Patel never contributed any additional money toward rent. Thus, Patel would not suffer a hardship in which he would forfeit money for advertising services not rendered. *See England, M.D. v. O'Flynn, M.D.*, 2nd Dist. No. 18952, 2002 WL 27314 (Jan. 11, 2002).

{¶ 35} We also note Patel's lack of good faith and fair dealing in this matter. Patel argues that he was not required to pay after March 23, 2009, when he discovered that the billboard was damaged. However, Patel waited for nearly two weeks until April 2, 2009, before notifying Lamar Co. of the damage. Under these circumstances, we cannot say that Patel's behavior was entirely consistent with good faith and fair dealing.

{¶ 36} Additionally, there is no chance that Patel, as the defaulting party, will cure his breach, since the parties did not extend the agreement beyond the contract's expiration date.

{¶ 37} In light of the above analysis, we hold that the trial court did not err in finding that Patel materially breached the contract. Having reviewed Patel's arguments, we find that the court did not err in awarding summary judgment to Lamar Co. on its breach of contract claim, and for finding Patel personally liable under the agreement.

{¶ 38} Patel's first assignment of error is overruled.

{¶ 39} Assignment of Error No. 2:

{¶ 40} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT IN ITS AWARD OF ATTORNEY FEES, COSTS AND INTEREST TO PLAINTIFF-APPELLEE.

{¶ 41} Patel challenges the trial court's award of attorney fees, court costs, litigation expenses, and prejudgment interest.

{¶ 42} First, Patel claims that the trial court erroneously granted Lamar Co.'s request for attorney fees, where Lamar Co. failed to prove the reasonableness of those fees.

{¶ 43} We review an award of attorney fees for an abuse of discretion. *See Bittner v. Tri-County Toyota, Inc*., 58 Ohio St.3d 143, 146 (1991). "Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere." *Id*. More than mere error of judgment, an abuse of discretion requires that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 44} Pursuant to the "American Rule," each party in a lawsuit must generally bear its own attorney fees. *Sorin v. Bd. of Edn. of Warrensville Hts. School Dist.*, 46 Ohio St.2d 177, 179 (1976); *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, ¶ 7. However, a court may award attorney fees where the parties have contractually agreed to shift fees. *See Southeast Land Dev., Ltd. v. Primrose Mgt., L.L.C.*, 193 Ohio App.3d 465, 2011-Ohio-2341, ¶ 15 (3rd Dist.); *Reagans v. MountainHigh Coachworks, Inc.*, 117 Ohio St.3d 22, 2008-Ohio-271, ¶ 36. Fee-shifting contractual provisions are generally enforceable "so long as the fees awarded are fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case." *Primrose* at ¶ 15, quoting *Wilborn* at ¶ 8.

{¶ 45} Although a contractual provision may entitle a prevailing party to attorney fees,

the prevailing party still has the burden of proving the reasonableness of the fees. *See Stonehenge Land Co. v. Beazer Homes Invests., L.L.C.*, 177 Ohio App.3d 7, 2008-Ohio-148, ¶ 45 (10th Dist.); *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984), fn. 11.

{¶ 46} When calculating attorney fees, a trial court is guided by a two-step determination. The court should first calculate the "lodestar" amount by multiplying the number of hours reasonably expended by a reasonable hourly rate and, second, decide whether to adjust that amount based on the factors listed in Prof.Cond.R. 1.5(a). *Bittner*, 58 Ohio St.3d at syllabus (applying the predecessor to Prof.Cond.R. 1.5[a]). Those factors include the time and labor required; the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; the amount involved and the results obtained; the experience, reputation, and ability of the lawyer or lawyers performing the services; and whether the fee is fixed or contingent. Prof.Cond.R. 1.5(a).

{¶ 47} Here, in the event of a breach, the contract provided that: "Advertiser shall pay Lamar all costs and expenses of exercising its rights under this contract, including reasonable attorney's fees of not less than 25% of the amount due, or $250.00, whichever is greater, and all reasonable collection agency fees."

{¶ 48} During the hearing on attorney fees, Jason Tonne, lead counsel for Lamar Co., testified that he was a partner at his law firm with approximately eight years of experience. He stated that he charged $195 per hour, which was actually a lower rate typically charged by senior associates at his firm. In addition to his testimony, Tonne presented itemized billing statements, which specified the work that he performed, the amount of time he spent on each activity, and the total number of hours expended. The billing statements also listed the work done by other attorneys on the case, who only charged between $125 and $150 per hour.

{¶ 49} Tonne explained that attorney fees of $11,103.22 were reasonable, given the

novelty of the claims, the numerous motions filed, and the additional work incurred because Patel continually "fought" Lamar Co. throughout the proceedings. Tonne also stated that when it was feasible, he used paralegals to prepare documents in an effort to reduce costs.

{¶ 50} During cross-examination, Patel's attorney challenged the computation of the attorney fees and questioned Tonne as to specific charges in the billing statements. Counsel also asked Tonne whether particular charges related to the prior Hamilton County case, as opposed to the case in Warren County. Tonne explained that the work could not be separated, due to the intertwined nature of the claims.

{¶ 51} After the hearing, the trial court reduced the fee award from $11,103.22 to $8,380.25. In its decision, the court explained that it lacked the authority to award attorney fees accrued during the Hamilton County action, which lasted from May 2009 through February 9, 2010. Thus, the court only awarded attorney fees for work performed after February 12, 2010, when Tonne filed suit in Warren County. Thereafter, the court specifically stated that it had considered the guidelines in Prof.Cond.R. 1.5(a), including the results obtained and the complexity of the issues involved. The court also considered the additional time and labor required to maintain the litigation, where Patel "chose to contest summary judgment without any real basis for doing so." The court also refused to award an unnecessary $225 charge for a paralegal to deliver a motion to the court, where "the US mail would have charged less than $2.00 for the same service * * *."

{¶ 52} Upon review, we find that the trial court did not abuse its discretion in awarding attorney fees. The Supreme Court of Ohio has held that a trial court "can easily determine, either in a hearing or by reviewing affidavits, the reasonableness of fees to be awarded. The trial court, having final authority to assess costs, is in the best position to make such an award." *Klein v. Moutz*, 118 Ohio St.3d 256, 2008-Ohio-2329, ¶ 14.

{¶ 53} Here, not only did the trial court hold a hearing on attorney fees, it also

reviewed Tonne's affidavit and examined detailed billing statements for each attorney's services. In addition, the court gave Patel's attorney ample opportunity to cross-examine Tonne as to the reasonableness of the fees. *See Stockdale v. Baba*, 153 Ohio App.3d 712, 2003-Ohio-4366, ¶ 138 (10th Dist.).

{¶ 54} Thus, we reject Patel's argument as it relates to the reasonableness of the attorney fees awarded.

{¶ 55} Next, Patel challenges the trial court's award of prejudgment interest at a rate of 4% on Lamar Co.'s court costs, attorney fees, and litigation expenses.

{¶ 56} The right to recover interest is governed by R.C. 1343.03, and this court has held that section (A) is the interest provision related to contract claims. *Textiles, Inc. v. Design Wise, Inc.*, 12th Dist. Nos. CA2009-08-015, CA2009-08-018, 2010-Ohio-1524, ¶ 49. According to R.C. 1343.03(A), "when money becomes due and payable upon any * * * instrument of writing, * * * and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of * * * a contract * * * the creditor is entitled to interest * * *." Once a plaintiff receives judgment on a contract claim, the trial court has no discretion but to award prejudgment interest under R.C. 1343.03(A). *Id.* at ¶ 49.

{¶ 57} While the statute's language is mandatory, "this does not mean that a trial court is divested of all discretion in a R.C. 1343.03(A) claim." *Id.* at ¶ 50. Instead, this discretion is confined to a determination of when interest begins to run, i.e., when the claim becomes "due and payable." *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 115 (1995). As previously discussed, an abuse of discretion requires that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore*, 5 Ohio St.3d at 219.

{¶ 58} Here, Patel challenges the trial court's award of prejudgment interest on Lamar Co.'s court costs, attorney fees, and litigation expenses from February 2, 2009 (the date of the breach) until paid in full. Patel argues that these charges did not begin to accrue until the

action was filed on February 12, 2010, and that they were not due and payable until the final judgment.[1]

{¶ 59} Upon review, we find that the trial court abused its discretion in awarding prejudgment interest on attorney fees, costs, and expenses from February 2, 2009. In its decision, the trial court specifically found that its jurisdiction was limited to an award of fees and costs associated with the Warren County action, which began on February 12, 2010. Yet, the court found that interest began to accrue on these amounts, or, more appropriately, that these amounts became due and payable, on February 2, 2009, roughly a year before the Warren County case began. While there is little doubt that counsel prepared for this case prior to February 12, 2010, we still find error in the court's determination, where counsel for Lamar Co. testified that the bulk of the costs incurred, at least through November 2009, were "directly related" to the Hamilton County action, rather than the case at bar. *See Royal Elec.*, 73 Ohio St.3d at syllabus.

{¶ 60} Thus, we overrule in part and sustain in part Patel's second assignment of error.

{¶ 61} Judgment affirmed in part, reversed in part, and remanded for the sole purpose of establishing a new due and payable date for attorney fees, court costs, and litigation expenses, and to order statutory prejudgment interest accordingly.

PIPER and HUTZEL, JJ., concur.

1. We note that in his reply brief, Patel appears to argue for the first time that it was error to award prejudgment interest from February 2, 2009 on the $18,963.63 in back rent due under the contract. We find that Patel's new sub-argument is raised improperly by way of the reply brief. The reply brief is merely an opportunity to reply to the brief of the appellee, and is not to be used by an appellant to raise new assignments of error or issues for review. *See* App.R. 16(C); *State v. Mackey*, 12th Dist. No. CA99-06-065, 2000 WL 190033 (Feb. 14, 2000), fn. 2.