

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STARK COMMONS, LTD., ET AL.

Plaintiffs-Appellees

-vs-

LANDRY'S SEAFOOD HOUSE - OHIO,  
INC., AND LANDRY'S RESTAURANTS,  
INC.

Defendants-Appellants

JUDGES:

Hon. Sheila G. Farmer, P.J.  
Hon. William B. Hoffman, J.  
Hon. Julie A. Edwards, J.

Case No. 2008CA00206

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common  
Pleas, Case No. 2007CV00522

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

August 3, 2009

APPEARANCES:

For Plaintiffs-Appellees

TERRENCE L. SEEBERGER  
NADA G. FADDOUL  
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For Defendants-Appellants

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*Farmer, P.J.*

{¶1} On September 30, 1997, appellant, Landry's Seafood House - Ohio, Inc., entered into a lease contract with appellee, Stark Commons, Ltd., to lease premises located in "The Strip" in Jackson Township, Ohio, for the purpose of operating a "Joe's Crab Shack" restaurant.

{¶2} In 2006, appellant's parent company, appellant, Landry's Restaurants, Inc., sold the majority of the Joe's Crab Shack restaurants. As a result, Joe's Crab Shack at The Strip closed on or around November 17, 2006.

{¶3} On November 20, 2006, Stark Enterprises, on behalf of appellee, sent notice to appellant Landry's Restaurants, Inc., stating it was in default of the lease contract for failing to continuously operate at the leased premises, and it had thirty days to cure the default.

{¶4} On or around December 22, 2006, appellee repossessed the leased premises and terminated the lease contract.

{¶5} On February 1, 2007, appellee filed a complaint for declaratory judgment, seeking a determination on the rights of the parties in light of the provisions in the lease contract and the alleged default (Case No. 2007CV00522). An amended complaint was filed to add The Strip Delaware, LLC as a party plaintiff, the current entity owning The Strip. On May 18, 2007, appellees filed a motion for summary judgment. A hearing was held on July 27, 2007. By judgment entry filed same date, the trial court granted the motion, finding appellants violated the terms of the lease contract, the contract was terminated as a result of the defaults, and appellees were entitled to self-help repossession of the leased premises.

{¶6} Appellants filed an appeal and this court affirmed the trial court's decision. See, *Stark Commons LTD. v. Landry's Seafood House-Ohio Inc.* (April 14, 2008), Stark App. No. 2007CA00240.

{¶7} On August 10, 2007, appellee The Strip Delaware had filed a complaint against appellants seeking damages for breach of the lease contract (Case No. 2007CV03288). A bench trial was held and by findings of fact, conclusions of law, and judgment entry filed June 9, 2008, the trial court found in favor of appellee as against appellants, finding appellants were liable as holdover tenants, and appellee had not violated its duty to mitigate damages. By judgment entry filed July 7, 2008, the trial court awarded appellee \$209,312.99, plus accrued interest in the amount of \$24,744.05, plus any additional accrued interest from the date of the judgment entry. Appellants were also ordered to pay all costs and appellee's attorney fees.

{¶8} Appellants filed an appeal and this court affirmed the trial court's decision as to appellants' liability, but reversed the trial court's decision as to the computation of damages. See, *The Strip Delaware, LLC v. Landry's Restaurants, Inc.*, Stark App. Nos. 2008CA000146 and 2008CA00160, 2009-Ohio-1869.

{¶9} On July 18 and 25, 2008, the trial court held hearings on the issue of attorney fees. By judgment entry filed September 12, 2008 in Case No. 2007CV00522, the trial court awarded appellees attorney fees in the amount of \$147,632.30.

{¶10} Appellants filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶11} "THE TRIAL COURT ERRED BY AWARDING ATTORNEY FEES IN CASE NO. 2007 CV 03288 BECAUSE THAT CASE IS STILL ON APPEAL AND AN ATTORNEY FEE AWARD IS NOT YET RIPE."

II

{¶12} "THE TRIAL COURT ERRED BY AWARDING APPELLEE ATTORNEY FEES RELATED TO CASE NO. 2007 CV 00522, SINCE THE ACTION WAS FOR DECLARATORY RELIEF AND RECOVERY OF ATTORNEY FEES FOR SUCH IS NOT ALLOWED UNDER THE CIRCUMSTANCES OF THIS CASE AND THE STATUTE AUTHORIZING DECLARATORY RELIEF."

III

{¶13} "THE TRIAL COURT ERRED BY AWARDING APPELLEE ATTORNEY FEES THAT ARE NOT RECOVERABLE UNDER THE LEASE."

IV

{¶14} "THE TRIAL COURT ERRED BY AWARDING APPELLEE ATTORNEY FEES RELATED TO CASE NO. 2007 CV 00522 THAT WERE UNREASONABLE."

V

{¶15} "THE TRIAL COURT ERRED BY AWARDING APPELLEE ATTORNEY FEES RELATED TO CASE NO. 2007 CV 03288 THAT WERE UNREASONABLE."

VI

{¶16} "THE TRIAL COURT ERRED BY FAILING TO SEGREGATE ATTORNEY FEES ACCORDING TO EACH OF THE TWO UNDERLYING CASES."

I

{¶17} Appellants claim the issue of attorney fees in Case No. 2007CV03288 was not ripe for determination. We agree.

{¶18} The parties have been involved in two cases, Case Nos. 2007CV00522 and 2007CV03288. Both involved the issue of attorney fees.

{¶19} Following the bench trial on appellee's breach of lease contract claim in Case No. 2007CV03288, the trial court found attorney fees were appropriate, but reserved ruling pending the appeal of the summary judgment ruling in the declaratory judgment action, Case No. 2007CV0522: "As the matter of attorney fees is pending in Case No. 2007 CV 00522, the determination thereof will be combined with any such fees due related to the action hereunder and the appeal in 2007 CV 00255 (sic), rather than in this opinion." See, Findings of Fact, Conclusions of Law, and Judgment Entry filed June 9, 2008.

{¶20} This court affirmed the trial court's decision in Case No. 2007CV0522 on April 14, 2008. See, *Stark Commons LTD. v. Landry's Seafood House-Ohio Inc.* (April 14, 2008), Stark App. No. 2007CA00240. Because appellants filed a notice of appeal in Case No. 2007CV03288 on July 8, 2008 prior to the scheduled hearing on attorney fees, no decision was made on the issue. On June 30, 2008, the trial court entered the following order in Case No. 2007CV00522:

{¶21} "This matter came before the Court for a Hearing on June 27, 2008, at 12:00 p.m. regarding the amount of attorney fees to be awarded to the Plaintiffs' as to the within matter, Case No. 2007 CV 00522, and with regard to those fees to be awarded to the Plaintiffs in Case No. 2007 CV 03288.

{¶22} "Upon agreement of counsel, the Court hereby continues the Hearing on Case No. 2007 CV 00522 to July 18, 2008, at 12:00 p.m.

{¶23} "Further, the Court hereby continues the Hearing on Case No. 2007 CV 03288 until such time that there is a ruling on the appeal."

{¶24} The transcript of the July 18, 2008 hearing indicates the issue of attorney fees was being heard on both case numbers. However, the trial court's September 12, 2008 judgment entry on attorney fees appealed herein is captioned with Case No. 2007CV00522 only, the declaratory judgment action, and filed in the docket of said case only. There is no judgment entry in Case No. 2007CV03288, the breach of lease contract action.

{¶25} Neither docket of the cases shows an official order of consolidation pursuant to Civ.R. 42(A)(1) which states, "When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all the matters in issue in the actions; it may order some or all of the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

{¶26} The trial court ordered a joint hearing on the issue of attorney fees, but never ordered a consolidation. The notice of appeal sub judice only references the judgment entry entered in Case No. 2007CV00522. It is interesting to note that the appellate briefs of both parties recite both case numbers.

{¶27} Admittedly, the history of these cases is convoluted and confusing. However, because of the lack of a consolidation entry and/or the filing of the trial court's

decision in both cases, we find the sole issue presented and ripe for review is the award of attorney fees in the declaratory judgment action only, Case No. 2007CV00522.

{¶28} Assignment of Error I is granted.

{¶29} The only remaining assignments relative to this appeal are Assignments of Error II, III, and IV.

## II

{¶30} Appellant claims the trial court erred in awarding attorney fees in the declaratory judgment action. We agree.

{¶31} The amended complaint filed February 27, 2007 requested three prayers for relief:

{¶32} "(a) Declaratory relief: finding that Defendant Tenant breached the Lease by failing and refusing to continuously operate its restaurant as required and failed to cure said default; finding the Lease terminated; terminating Defendants' interests (if any) in the Lease and Premises; declaring the parties' rights as to the personal property abandoned therein; and allowing Plaintiffs to enter into a new Lease with a third party.

{¶33} "(b) For attorney's fees, costs and disbursements of this action in accordance with the lease; and

{¶34} "(c) Such other and further relief as this Court may deem just and proper."

{¶35} Included in the above is a claim for attorney fees pursuant to the lease contract. The same request for attorney fees pursuant to the lease contract was included in Case No. 2007CA03288 filed on August 10, 2007.

{¶36} Appellants filed an amended answer, amended counterclaim, and third party complaint in Case No. 2007CV00522 on March 22, 2007. Appellants claimed

appellees wrongfully, maliciously, and unlawfully breached the lease contract, interfered with its business, trespassed, and violated its rights. In their prayer, appellants requested attorney fees.

{¶37} Appellees filed a motion for summary judgment on May 18, 2007. Appellees requested specific declaratory relief: the finding of a de facto termination of the lease and attorney fees under the guaranty of the lease, Article 14, Section 14.10. Appellees concluded their motion as follows:

{¶38} "For the aforementioned reasons, the Plaintiffs respectfully request that the Court grant summary judgment in their favor and against the Defendants finding the Lease terminated. Plaintiffs request that the Court dismiss any and all counterclaims and third party (sic) claims with prejudice. Finally, Plaintiffs request an award of all attorneys' fees and costs in enforcing its rights and bringing this action in accordance with section 14.10 of the Lease."

{¶39} By judgment entry filed July 27, 2007, the trial court granted declaratory judgment to appellees, finding the lease contract was terminated as a result of appellants' defaults. The trial court dismissed appellants' counterclaims and third-party claims, and reserved the issue of attorney fees to a later date. To the date of July 27, 2007, the issue of the legality of attorney fees in a declaratory judgment action had not been litigated.

{¶40} Appellees now claim that appellants have not perfected their claim that R.C. 2721.16(A) bars the granting of attorney fees in a declaratory judgment action. However, in appellants' August 15, 2008 brief contra appellees' request for attorney

fees, they specifically argued the application of R.C. 2721.16(A). We find no waiver of this issue.

{¶41} Appellees further argue this was also a breach of contract action and was a suit on the guaranty included in the lease contract. However, these same claims for attorney fees remain pending in Case No. 2007CV03288. Although appellees gratuitously requested fees via the guaranty in the lease contract, this was not the subject matter of the declaratory judgment action.

{¶42} Unquestionably, the declaratory judgment statute, R.C. 2721.16(A) bars attorney fees except in specific instances:

{¶43} "(A)(1) A court of record shall not award attorney's fees to any party on a claim or proceeding for declaratory relief under this chapter unless any of the following applies:

{¶44} "(a) A section of the Revised Code explicitly authorizes a court of record to award attorney's fees on a claim for declaratory relief under this chapter.

{¶45} "(b) An award of attorney's fees is authorized by section 2323.51 of the Revised Code, by the Civil Rules, or by an award of punitive or exemplary damages against the party ordered to pay attorney's fees.

{¶46} "(c) Regardless of whether a claim for declaratory relief is granted under this chapter, a court of record awards attorney's fees to a fiduciary, beneficiary, or other interested party, the attorney's fees are to be paid out of trust property, estate property, or other property that is the subject of a fiduciary relationship and that is involved in that claim or proceeding for declaratory relief, and the attorney's fees are awarded in

accordance with equitable principles that permit recovery of attorney's fees incurred for services that are beneficial to the trust or estate."

{¶47} None of these exceptions apply in this case. The current law on this issue was set forth in *Westfield Companies. v. O.K.L. Can Line*, 155 Ohio App.3d 747, 759, 2003-Ohio-7151:

{¶48} "This dispute implicated Ohio's Declaratory Judgment Act,\*\*\*because both parties asked the court to declare the rights and duties of the parties under the contract. R.C. 2721.16 specifically prohibits the award of attorney fees on a claim for declaratory relief unless another source of law explicitly provides for the award. This statute was enacted in 1999 specifically to supersede the effect of the Ohio Supreme Court's holdings in a line of cases beginning in 1995 with *Motorists Mut. Ins. Co. v. Brandenburg*.\*\*\*The legislature expressly overturned the holding in *Brandenburg* 'that the "whenever necessary or proper" and "further relief"' language in section 2721.09 of the Revised Code \* \* \* reflected the General Assembly's conferral of authority upon an Ohio trial court to award "attorney's fees based on a declaratory judgment issued by the court," ' and emphasized, 'consistent with the "American Rule," that authority to grant an award of attorney's fees in connection with an action or proceeding in which declaratory relief is sought, \* \* \* must be expressly conferred by the General Assembly upon the courts of this state and has not been so conferred prior to the effective date of this act.' "

(Footnotes omitted.)

{¶49} Based upon the clear prohibition in the statute, we find the trial court erred in awarding attorney fees to appellees for the prosecution of the declaratory judgment

action. This finding does not bar the finding of attorney fees in Case No. 2007CV03288 pursuant to the guaranty in the lease contract.

{¶50} Assignment of Error II is granted.

III, IV

{¶51} Based upon our decision in Assignment of Error II, these assignments are moot.

V, VI

{¶52} Based upon our decision in Assignment of Error I, these issues are not ripe for review.

{¶53} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby reversed.

By Farmer, P.J.

Hoffman, J. and

Edwards, J. concur.

s/ Sheila G. Farmer\_\_\_\_\_

s/ William B. Hoffman\_\_\_\_\_

s/ Julia A. Edwards\_\_\_\_\_

JUDGES

