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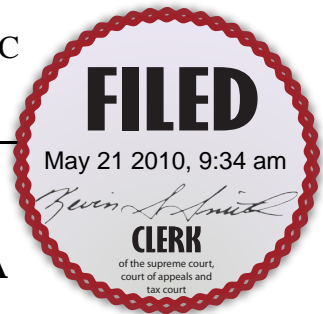
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**IN THE
COURT OF APPEALS OF INDIANA**



JADCORE, INC.,

Appellant-Plaintiff,

VS.

No. 84A01-0909-CV-475

C & C ELEVATORS f/k/a CAVINDER
ELEVATORS, INC.¹ and OTIS ELEVATOR
COMPANY,

Appellees-Defendants.

APPEAL FROM THE VIGO SUPERIOR COURT

The Honorable Michael Rader, Judge

Cause No. 84D05-0506-PL-4893

May 21, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

¹ C & C Elevators f/k/a Cavinder Elevators, Inc. is not pursuing an appeal of the trial court's order and has not filed a brief. Pursuant to Indiana Appellate Rule 17 (A), however, a party of record in the trial court is a party on appeal.

Jadcore, Inc. (“Jadcore”), appeals from the trial court’s order denying its motion to reconsider filed after the trial court granted summary judgment in favor of Otis Elevator Company (“Otis”) and awarded damages and legal fees to Otis on its counterclaim against Jadcore. The following issues are presented in this appeal:

- I. Whether the trial court erred by granting Otis’s motion for summary judgment and awarding damages to Otis on its counterclaim; and
- II. Whether the trial court abused its discretion in its award of legal fees to Otis.

We affirm.

FACTS AND PROCEDURAL HISTORY

Jadcore entered into a contract with Cavinder Elevators, Inc. (“Cavinder”) for the modernization and upgrade of industrial elevators at its facility. Cavinder was later sold to Otis. Otis, pursuant to a maintenance contract with Jadcore, conducted routine maintenance and inspection of the elevators. In 2005, during an inspection, Otis discovered problems with the elevators that had been upgraded. In May 2005, the Indiana Department of Fire and Building Services ordered Jadcore’s converted elevators closed until code violations had been corrected.

On June 1, 2005, Jadcore filed a complaint alleging breach of contract, breach of an implied warranty of fitness, and breach of express warranty against Cavinder and Otis, and also alleged a breach of the maintenance contract against Otis. On January 10, 2006, Otis filed a counterclaim against Jadcore alleging a breach of the maintenance contract by

stopping payments without cause. Jadcore filed its answer and affirmative defenses to the counterclaim.

On September 18, 2006, Otis filed a motion for summary judgment against Jadcore as to all counts of Jadcore's complaint. The trial court held a hearing and ultimately granted Otis's motion for summary judgment.² Otis then filed a motion for summary judgment against Jadcore as to all counts of Otis's counterclaim against Jadcore. After a hearing, the trial court granted Otis's motion for summary judgment on Otis's counterclaim and awarded damages and legal fees to Otis. Jadcore's motion to reconsider that decision was denied. Jadcore now appeals.

DISCUSSION AND DECISION

Standard of Review

Our standard of review for summary judgment is the same as that used in the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Bd. of Sch. Comm'rs of City of Indianapolis v. Pettigrew*, 851 N.E.2d 326, 330 (Ind. Ct. App. 2006). All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party. *Pettigrew*, 851 N.E.2d at 330. Review of a summary judgment motion is limited to those materials designated to the trial court. *Id.*

² In passing, Jadcore requests that this court review the trial court's order on Otis's motion for summary judgment on Jadcore's complaint alleging Otis's breach of the maintenance agreement. However, Jadcore's claim that the trial court ignored material issues of fact is not supported by argument. As a consequence, this argument is waived. *Hollowell v. State*, 707 N.E.2d 1014, 1025 (Ind. Ct. App. 1999) (failure to present cogent argument constitutes waiver of issue for appellate review).

I. Damages Award

We use a limited standard of review in cases challenging a trial court's award of damages. *Whitaker v. Brunner*, 814 N.E.2d 288, 296 (Ind. Ct. App. 2004). Recognizing that the trial court is in a better position than we are to observe the witnesses, we will not judge witness credibility or otherwise reweigh the evidence. *Id.* We will consider only that evidence favorable to the trial court's award. *Id.* However, "[t]he damage award cannot be based on speculation, conjecture, or surmise, and must be supported by probative evidence." *Id.* The trial court's award of damages will be reversed only if it is not within the scope of the evidence. *Id.*

Although both parties refer to the damages award as one for liquidated damages, and the trial court's order makes reference to the damages award as liquidated damages, the trial court awarded actual damages. The maintenance contract between Jadcore and Otis contains the following relevant payment provisions:

You agree to pay a late charge from the date such sums become due of one and one-half percent (1.5%) per month, or the highest legally permitted rate, whichever is less, on any balance past due for more than thirty (30) days, together with all costs (including but not limited to, attorneys' fees) incurred by us to collect overdue amounts.

Failure to pay any sum due by you within sixty days will be a material breach. We may at our option declare all sums due or to become due for the unexpired term immediately due and payable as liquidated damages, and until the same are paid be discharged from further obligations under the contract.

Appellant's App. at 70. Therefore, liquidated damages were defined by the parties as the contract amounts due for the duration of the contract.³ That is not what Otis sought in its counterclaim and is not what the trial court awarded regardless of the wording of the order.

The maintenance contract commenced on December 1, 2003 for a five-year term expiring on December 1, 2008. Jadcore agreed to pay \$1,200.00 per month to Otis for the performance of its services with an annual price adjustment of 5%. Jadcore stopped making payments on the maintenance contract in June of 2005, and Otis stopped performance in October of 2005. Otis designated in support of its motion for summary judgment the affidavit of David Lawrence, an Otis employee, who calculated Otis's lost profits due to Jadcore's breach of the maintenance contract. The lost profits were calculated as forty percent of the contract amounts due, which were adjusted for each year to reflect the annual price adjustment of 5%. The trial court found that as of April of 2009, Otis sustained lost profits in the amount of \$24,863.82, and the interest on those lost profits of \$22,518.31, for a total award of damages of \$47,382.12. The maintenance contract provided for interest in the amount of one and one-half percent (1.5%) per month or the highest legally permitted rate, whichever is less." *Id.* Our review of the designated evidence leads us to the conclusion that

³ Because the damages awarded were actual damages and not liquidated damages, we do not address Jadcore's argument that Otis failed to mitigate liquidated damages. There is no duty to mitigate liquidated damages. Liquidated damages is a term applicable to a specific sum of money determined by the parties to a contract as the amount of damages recoverable by a party upon the breach of the contract by the other party whether it falls short of or exceeds actual damages. *Merrillville Conservancy Dist. v. Atlas Excavating*, 764 N.E.2d 718, 724 (Ind. Ct. App. 2002). There is a duty to mitigate actual damages, but Jadcore did not raise the failure to do so as an affirmative defense or in response to Otis's motion for summary judgment. *See Foster v. Owens*, 844 N.E.2d 216, 221 (Ind. Ct. App. 2006) (mitigation of damages is an affirmative defense that may reduce amount of damages after liability is found).

the trial court did not abuse its discretion in the award of damages to Otis on its counterclaim against Jadcore or in granting summary judgment to Otis. The award is supported by evidence designated to the trial court.

II. Attorney Fees

Jadcore argues that the trial court erred in its award of attorney fees to Otis. Jadcore does not argue that the rate, hours, or total is improper. Instead, Jadcore claims that the trial court could not have individually reviewed each entry and that Otis is only entitled to attorney fees incurred in the collection of the past due amount.

Attorney fees awarded under a contract must be reasonable. *Seibert v. Mock*, 510 N.E.2d 1373, 1378 (Ind. Ct. App. 1987). However, trial courts are afforded discretion in determining a reasonable fee. *Dempsey v. Carter*, 797 N.E.2d 268, 275 (Ind. Ct. App. 2003), *trans. denied*. On appeal, Jadcore bears the burden of establishing that the trial court abused its discretion. *Seibert*, 510 N.E.2d at 1378. We will find the trial court's award in error if it is "clearly against the logic and effect of the facts and circumstances" *Dempsey*, 797 N.E.2d at 275.

In the present case, Jadcore filed a complaint against Cavinder and Otis. Otis filed a counterclaim against Jadcore, and filed a complaint against Cavinder alleging breach of its assets purchase agreement with Otis. On December 21, 2008, Cavinder paid to Otis \$130,000.00 in settlement of Otis's complaint and counterclaim against Cavinder. Otis applied the \$130,000.00 payment against its claim of \$174,987.80 in attorney fees and sought the difference, *i.e.*, \$44,987.80, from Jadcore in Otis's motion for summary judgment. The

trial court granted Otis's motion for summary judgment and awarded Otis \$44,987.80 in legal fees.

We find that Jadcore has failed to meet its burden of establishing that the trial court abused its discretion in the award of attorney fees. Before the trial court, Jadcore claimed that the attorney fees were related to defense of the case-in-chief and not for the collection of the past due amounts. Otis produced evidence of its total legal fees and reduction of that amount by Otis's settlement with Cavinder and sought only the difference from Jadcore. Jadcore did not rebut Otis's evidence. Based upon the record before us, we conclude the trial court's award is supported by the designated evidence.

Jadcore also argues on appeal that the trial court could not have had the time to review each billing entry prior to entering judgment, yet failed to present evidence to refute those fees to the trial court, or to establish that the trial court did not review the billing individually.

The record before us leads to the conclusion that the trial court's award is not clearly against the logic and effect of the facts and circumstances in this case. Jadcore has failed to establish that the trial court abused its discretion.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.