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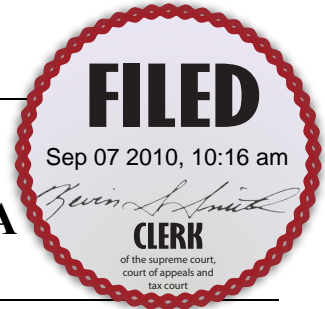
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**IN THE
COURT OF APPEALS OF INDIANA**



JAMES D. SCHREGARDUS,
Appellant-Defendant,

VS.

OH RETAIL, LL, LLC.,

Appellee-Plaintiff.

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No. 49A05-1002-PL-156

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn L. Moberly, Judge
Cause No. 49D05-0905-PL-024577

September 7, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

James Schregardus (“Schregardus”) appeals from the Marion Superior Court’s order granting summary judgment in favor of OH Retail, LL, LLC (“Landlord”) and argues that the trial court erred when it granted summary judgment in favor of Landlord. Landlord cross-appeals and raises two issues, which we restate as:

- I. Whether this appeal must be dismissed for lack of subject matter jurisdiction; and
- II. Whether damages pursuant to Indiana Appellate Rule 66(E) are warranted.

Concluding that this court does not have subject matter jurisdiction due to Schregardus’s failure to timely file his notice of appeal, we dismiss. Additionally, we decline to award damages under Appellate Rule 66(E).

Facts and Procedural History

On April 7, 2005, Landlord entered into a five-year commercial lease agreement with Futon Factory Red, Inc. (“Tenant”). In connection with the lease, Schregardus executed a personal guaranty of Tenant’s financial obligations under the lease. Pursuant to the guaranty, Schregardus waived his right to notice of any defaults on the part of Tenant. Landlord and Tenant subsequently entered into a lease modification agreement. Neither party disputes that the guaranty survived the modification of the lease, and the parties agree that Ohio law governs the lease and guaranty.

Tenant thereafter defaulted on its rental obligations. On July 3, 2008, Landlord brought suit against Tenant and Schregardus in Allen Superior Court. Venue was subsequently transferred to Marion Superior Court, where Landlord obtained a judgment

against Tenant. Landlord then moved for summary judgment against Schregardus, arguing that Schregardus was liable under the terms of the guaranty. Schregardus filed a response and cross-motion for summary judgment.

At the December 8, 2009 summary judgment hearing, Schregardus argued that he was entitled to notice of Tenant's breach and that Landlord's failure to give notice either created an issue of material fact for trial or required judgment in his favor. Specifically, Schregardus argued that Landlord's failure to give notice constituted a breach of Landlord's duty to mitigate damages because, had Schregardus received such notice, he could have cured the default and exercised an early termination option he claimed was included in the lease modification agreement. In response, Landlord argued that under the terms of the guaranty, Schregardus waived his right to notice of Tenant's default, and presented the court with a 2006 decision of the Ohio Court of Appeals which held that a guarantor's contractual agreement to waive notice of default was enforceable.¹ Landlord also stated that the lease modification agreement designated with its motion for summary judgment contained no early termination option. In an affidavit designated with his cross-motion for summary judgment, Schregardus had sworn that Landlord's designated lease modification agreement was true and accurate.

¹ The Ohio case cited by Landlord at the summary judgment hearing and again on appeal is Parkway Business Plaza Ltd. Partnership v. Custom Zone, Inc., No. 87434, 2006 WL 2846440 (Ohio Ct. App. Oct. 5, 2006). Despite the fact that Schregardus himself cites two unpublished decisions of the Ohio Court of Appeals in his Appellant's brief, Appellant's Br. at 11, 12, he argues in a motion to strike that Parkway may not be cited as legal authority pursuant to Indiana Appellate Rule 65(D) because it is unpublished. Although Ohio Supreme Court Rule for the Reporting of Opinions 4 permits all Ohio appellate opinions, whether published or unpublished, to be cited as legal authority, Schregardus argues that Indiana Appellate Rule 65(D) is a procedural rule to which Indiana courts must adhere even when the law of another jurisdiction governs the substance of the case. However, Rule 65(D) clearly only applies to unpublished decisions of the Indiana Court of Appeals. See Ind. App. R. 65.

After reviewing the designated lease modification agreement, Schregardus's counsel discovered that it did not in fact contain an early termination option. He then told the trial court that he believed that the parties had a written agreement providing an early termination option based on gross sales and requested leave of court to supplement the record. After reminding Schregardus's counsel that trial courts have no discretion to permit untimely evidence designations without the consent of opposing counsel, the trial court gave Schregardus's counsel one day to find the allegedly missing contract provision and provide it to Landlord's counsel, who would then decide whether to consent to supplementation of the record.

On December 10, 2009, Schregardus filed a supplement to his response to Landlord's motion for summary judgment and his cross-motion for summary judgment.² The supplement included another version of the lease modification agreement, which contained an early termination option. This version was signed by Schregardus on March 2, 2007, but unsigned by Landlord. Appellant's App. p. 190. The supplement alleged that genuine issues of material fact existed as to which version of the lease modification was operative and whether Schregardus had been a victim of "switch-document fraud." Appellant's App. p. 181. On December 11, 2009, the trial court issued an order granting Landlord's motion for summary judgment and entering final judgment in its favor.

On January 11, 2010, Schregardus's counsel mistakenly filed a notice of appeal in the Allen Superior Court. After receiving a telephone call from the Allen Superior Court

² On the record before us, it is unclear whether Landlord's counsel consented to supplementation of the record. We decline to address this issue because it is irrelevant to our determination of the outcome of this case.

on February 8, 2010, Schregardus's counsel realized that he had filed the notice of appeal in the wrong trial court. On February 9, 2010, nearly sixty days after the trial court entered final judgment, Schregardus's counsel filed an amended notice of appeal in the Marion Superior Court. On May 20, 2010, Landlord filed a motion to dismiss Schregardus's appeal for failure to timely file a notice of appeal. The motions panel of this court denied Landlord's motion on June 18, 2010. This appeal ensued. Additional facts will be provided as necessary.

I. Subject Matter Jurisdiction

On appeal, Landlord asks this court to revisit the issue of whether Schregardus's notice of appeal was untimely, thus warranting a dismissal for lack of subject matter jurisdiction.³ Although our motions panel has already ruled on this issue, we may reconsider that ruling. Miller v. Hague Ins. Agency, Inc., 871 N.E.2d 406, 407 (Ind. Ct. App. 2007). While we are reluctant to overrule orders of the motions panel, this court has inherent authority to reconsider any decision while an appeal remains *in fieri*. Id.; Wurster Const. Co. v. Essex Ins. Co., 918 N.E.2d 666, 671 n. 6 (Ind. Ct. App. 2009).

Indiana Appellate Rule 9(A)(1) provides that “[a] party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment.” The timely filing of a notice of appeal is a jurisdictional

³ Landlord also argues that dismissal is appropriate because Schregardus failed to timely file his Appellant's brief. The notice of completion of transcript was issued on April 15, 2010, making the deadline to file the Appellant's brief May 17, 2010. The Appellant's brief was not filed until May 21, 2010. What Landlord fails to note, however, is that the Appellant's brief was timely received by the clerk's office on May 17, 2010, but not filed due to a defect. On May 19, 2010, the clerk's office mailed a notice of defect to Schregardus's counsel, giving him ten days from the date of the notice to cure the defect. Because Schregardus cured the defect on May 21, 2010, within the time allotted by the notice of defect, we deem the Appellant's brief to be timely filed.

prerequisite, and failure to conform to the applicable time limits results in forfeiture of an appeal. App. R. 9(A)(5); State v. Hunter, 904 N.E.2d 371, 373 (Ind. Ct. App. 2009).

The Marion Superior Court entered final judgment on December 11, 2009. Schregardus's counsel mistakenly filed the notice of appeal in the Allen Superior Court on January 11, 2010. On February 9, 2010, after realizing his mistake, Schregardus's counsel filed an amended notice of appeal in the Marion Superior Court.

By the time Schregardus's notice of appeal was properly filed in the Marion Superior Court, nearly sixty days had elapsed since the entry of final judgment. Nevertheless, Schregardus argues that his original filing of a notice of appeal in the Allen Superior Court within thirty days of final judgment renders this appeal timely.

We disagree. Appellate Rule 9 requires that a notice of appeal be filed with “*the* trial court clerk,” not merely with any trial court clerk, within thirty days of the entry of final judgment. (emphasis added). Therefore, the initial filing of the notice of appeal in the Allen Superior Court did not comply with Appellate Rule 9, and the later filing in the Marion Superior Court was untimely. Accordingly, we must dismiss for lack of subject matter jurisdiction.⁴

⁴ Because we dismiss this appeal, we need not reach the merits of Schregardus's argument contesting summary judgment. Nevertheless, we note that Landlord was entitled to summary judgment in its favor. In Parkway Business Plaza Ltd. Partnership v. Custom Zone, Inc., a landlord in a commercial lease sought to hold a personal guarantor liable for the tenant's obligations. No. 87434, 2006 WL 2846440, ¶¶ 1-2 (Ohio Ct. App. Oct. 5, 2006). In response to the landlord's motion for summary judgment, the guarantor raised several defenses, including failure to mitigate damages. Id. ¶ 31. The Ohio Court of Appeals rejected these defenses, holding that the guarantor's waiver of the right to notice in the guaranty agreement was enforceable. Id. ¶ 34. Likewise, because Schregardus waived his right to notice of Tenant's default, he cannot now claim that Landlord's failure to give such notice amounted to a breach of its duty to mitigate damages. Nor does the dispute as to which version of the lease modification agreement is controlling raise an issue of material fact because, regardless of whether Schregardus could have exercised an early termination option, he was not entitled to notice. Accordingly, the trial court's order granting summary judgment in favor of Landlord was proper.

II. Rule 66(E) Damages

Landlord also argues that an award of damages against Schregardus under Indiana Appellate Rule 66(E) is appropriate. Rule 66(E) provides, in pertinent part, “[t]he Court may assess damages if an appeal . . . is frivolous or in bad faith. Damages shall be in the Court’s discretion and may include attorneys’ fees.” Although Rule 66(E) provides us with discretionary authority to award damages on appeal, we must use extreme restraint when exercising this power in light of the potential chilling effect on the exercise of the right to appeal. In re Estate of Carnes, 866 N.E.2d 260, 267 (Ind. Ct. App. 2007). Our discretion to award attorney’s fees under Rule 66(E) is limited to “instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.” Thacker v. Wentzel, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003). A strong showing is required to support an award of appellate damages, and we impose such sanctions not to punish mere lack of merit, but something more egregious. Manous v. Manousogianakis, 824 N.E.2d 756, 768 (Ind. Ct. App. 2005).

Indiana appellate courts have categorized claims for appellate attorney fees into two categories: “procedural” and “substantive” bad faith claims. Id. Here, Landlord argues both procedural and substantive bad faith.

To prevail on a procedural bad faith claim, a party must show that the appellant has flagrantly disregarded the form and content requirements of the rules of procedure, omitted or misstated relevant facts, and filed briefs written in a manner calculated to require the maximum expenditure of time by the opposing party and reviewing court. Id.:

Kozlowski v. Lake County Plan Com'n, 927 N.E.2d 404, 412 (Ind. Ct. App. 2010). Appellant's conduct need not be "deliberate or by design" to support a procedural bad faith claim. Thacker, 797 N.E.2d at 347 (quoting Boczar v. Meridian St. Found., 749 N.E.2d 87, 95 (Ind. Ct. App. 2001)). Landlord argues that Schregardus is guilty of procedural bad faith because he filed both his notice of appeal and Appellant's brief late. However, as noted in footnote 1, *supra*, the Appellant's brief was timely filed. Landlord does not argue that Schregardus omitted or misstated relevant facts, and there is no evidence to suggest that Schregardus's failure to timely file his notice of appeal was motivated by dilatory intent. Therefore, Schregardus's conduct was not so egregious as to warrant an award of damages for procedural bad faith.

To prevail on a substantive bad faith claim, a party must show that the appellant's contentions are "utterly devoid of all plausibility." Potter v. Houston, 847 N.E.2d 241, 249 (Ind. Ct. App. 2006) (quoting Thacker, 797 N.E.2d at 346). Landlord argues that Schregardus is guilty of substantive bad faith because he failed to address relevant case law in his Appellant's brief. Although Schregardus's Appellant's brief omits reference to important cases discussed during the summary judgment hearing, we cannot conclude that his arguments are so utterly lacking in plausibility as to warrant damages for substantive bad faith. Therefore, Landlord's claim for damages under Appellate Rule 66(E) must fail.

Conclusion

Concluding that this court does not have subject matter jurisdiction due to Schregardus's failure to timely file his notice of appeal, we dismiss. Additionally, we decline to award damages under Appellate Rule 66(E).

Dismissed.

BAKER, C.J., and NAJAM, J., concur.