RENDERED: March 19, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000066-MR

GLYNN YOUNG LANDSCAPING AND
NURSERY CENTER — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DOUGLAS C. COMBS, JR., JUDGE
ACTION NO. 95-CI-000568

JOHN MARK BARGER and
DARLENE BARGER — APPELLEES

OPINION REVERSING AND REMANDING
** ** ** ** **

BEFORE: JOHNSON, KNOX, AND SCHRODER, JUDGES.

KNOX, JUDGE: Appellant, Glynn Young Landscaping and Nursery Center, appeals from an order of the Perry Circuit Court denying attorney fees and pre-judgment interest in this debt collection case. We reverse and remand.

Appellees, John Mark and Darlene Barger (the Bargers), own property located in Perry County, Kentucky. In August 1994, during construction of an addition to their existing home, the Bargers contacted Marty Maddux, owner of appellant, Glynn Young Landscaping and Nursery Center in Nicholasville, Kentucky.[1] They

[1]For purposes of this opinion, appellant will be referred (continued...)

informed Maddux of their desire to more fully landscape the property once the addition to their home was completed. Maddux visited the Bargers' home to assess the extent of the job and, thereafter, submitted a quote of $6,441.00. Although the Bargers had intended that Maddux landscape the property in the fall, the addition to their home was not completed in time to do so.

In January 1995, Darlene Barger apprised Maddux that she and her husband now desired more extensive landscaping than had been originally contemplated, but that she wanted to incorporate into the new landscaping any existing plants which were still viable. On March 17, 1995, Maddux submitted a second quote of $13,979.00, stating as follows:

> Glynn Young's Nursery is prepared and able to perform the work as specified below for Barger Res. Hazzard [sic]. This work consists of the following conditions and specifications (job description):
>
> Materials used: Reference Print
>
> All planting beds to have sod removed if needed, herbicided and covered with hardwood mulch after planting. Topsoil, supplied by owner, to be installed in planting areas as needed. Lava rock to be hauled away with mulch installed in existing beds. Existing materials to be moved as needed and shown.
>
> Sod to be installed as shown on drawings and as discussed. Seed areas to have seed and straw installed. Owner/ contractor to have site clean of debris and graded down to allow for planting.
>
> Total cost for front[,] sides[,] and back:
> $13,979.00.

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[1](...continued)
hereafter by way of its owner, Marty Maddux (Maddux).

The quote additionally contained Maddux's warranties, e.g. Maddux warranted his plants to be "true to name, of healthy quality, and installed with proper workmanship," which warranty was effective for a twelve-month period. However, the quote stated, "[a]ll warranties are void if payment is not received in 30 days."

The Bargers hired Maddux, who completed the job in April 1995. On April 22, 1995, Maddux forwarded the Bargers a bill for a total amount of $14,057.00.[2] By August, the Bargers had not yet paid Maddux, who proceeded to file a materialman's lien against the property pursuant to KRS 376.010. Nearly three (3) months passed, with no payment from the Bargers forthcoming. On October 24, 1995, Maddux filed a collection action against the Bargers. His complaint demanded payment of the bill, attorney fees, and interest at the rate of twenty-four percent (24%) annually, based upon the quote he had provided them which, in addition to the above-quoted excerpt, contained the following language: "Charges 30 days overdue will be assessed an interest rate of 2% per month, or 24% annually. Overdue charges are subject to collection fees and/or attorney fees which may occur in the collection process."

By March 1996, six (6) months after Maddux filed this collection action, the Bargers had neither paid the bill nor answered Maddux's complaint. As such, Maddux moved for a default judgment against them. The trial court, however, allowed the Bargers to file a late answer, in which they maintained they owed

[2]It is not clear what the additional $78.00, over and above Maddux's quote, represents.

Maddux nothing, alleging it was Maddux who had breached the parties' contract, i.e. he had not performed his duties in a workmanlike manner, had sold and installed defective products, and had uprooted and destroyed existing plant material which he had been told to leave in place. Several months later, following extensive discovery, the trial court ordered the parties to mediation, the result of which was a document entitled "Agreed Order of Partial Dismissal and Stipulation to Remaining Issues," entered of record on May 5, 1997, and signed by counsel for each party.

By way of the terms in the order, the Bargers agreed to, and did in fact, pay Maddux the amount set forth in his quote, i.e. $13,979.00. Additionally, the parties reserved for the court's decision the issues of attorney fees and prejudgment interest, agreeing to submit for the court's review memoranda of law on these issues. Finally, the parties entered into the following stipulations:

> A. The attached bid quote dated March 17, 1995 is an agreement between the parties pursuant to which Plaintiff performed work which was completed and payment was due on April 23, 1995. Said quote is attached and marked as "Exhibit A."
>
> B. Prior to commencement of work, the Defendants agreed to pay the sum of $13,979.00 and, for the purposes herein, that amount was paid on February 10, 1997. No payment has been made on the claim of interest or attorney's fees.
>
> C. On August 17, 1995 Plaintiff hired an attorney, Austin Mehr Law Offices, to collect this debt pursuant to a contract, which is attached as "Exhibit B."

D. The amount owed to Plaintiff was a liquidated sum and any disputes raised by Defendants as to the amount owed, and the amount actually paid, is irrelevant.

In his memorandum supporting his request for attorney fees, Maddux maintained he had an express agreement with the Bargers that they would pay attorney fees, in light of these facts: (1) the Bargers had stipulated in the agreed order that the quote provided by Maddux constituted an "agreement between the parties"; and, (2) this agreement clearly stated that overdue charges were subject to attorney fees. Maddux argued that where an agreement between parties contains a provision for attorney fees, the court should honor that agreement. Further, Maddux requested an award of prejudgment interest, reminding the court that such interest is allowed on liquidated sums as a matter of course. He argued that because the Bargers had stipulated by way of the agreed order that the amount they owed Maddux was a "liquidated sum," there was no question he was entitled to prejudgment interest, at the rate of two percent (2%) per month or twenty-four percent (24%) annually, as set forth in the quote.

In response to Maddux's memorandum, the Bargers argued their stipulation merely evidenced their "agreement" with Maddux whereby he promised to perform landscaping services, nothing more and nothing less. Certainly, they argued, there is nothing in either the stipulation or the record evidencing any agreement on their part to pay attorney fees. Further, they maintained, the stipulation characterizing the sum they owed Maddux as "liquidated" does not accurately reflect the agreement of the parties. The Bargers insisted they never agreed to that

stipulation, in spite of their attorney's signature thereon, entered of record on May 5, 1997. As proof, they pointed to a draft of the agreed order wherein their attorney had marked out that portion of the stipulation characterizing the sum as "liquidated" and, thereafter, on March 13, 1997, had forwarded his notations to counsel for Maddux.[3] This altered draft, they claimed, constituted proof positive they did not agree to the stipulation. As such, they argued, the sum they owed Maddux was not "liquidated," hence, not subject to prejudgment interest.

Ultimately, the trial court struck each and every stipulation the parties had entered into, finding they did not "represent the true Agreement of the parties and [they are] hereby stricken from the record." Having thus found there were no effective stipulations in place, the court addressed the issues of attorney fees and prejudgment interest substantively. Noting that Maddux's quote was not signed by either Maddux or the Bargers, and was styled a "quote," the court concluded the document constituted merely a bid, not an agreement or contract. Thus, the court held, absent an express contract for payment of attorney fees, it could not impose such fees upon the Bargers, and denied Maddux's request for attorney fees. The court further found, "[t]he only contract entered into by the parties was an oral one for the performance of landscape work by the Plaintiff."

Addressing the issue of prejudgment interest, the court found the amount owed by the Bargers was not a liquidated sum, as

[3]It appears that on this draft, counsel for the Bargers had also marked out the provision characterizing the quote as an "agreement."

evidenced by the fact they had contested the amount owed throughout the litigation. As such, the court denied Maddux's request for prejudgment interest.

On appeal, Maddux argues the trial court erred when it: (1) struck the parties' stipulated findings of fact; (2) found there was no express agreement between the parties providing for attorney fees; and, (3) found the sum owed Maddux did not constitute a liquidated sum, and refused to award prejudgment interest.

A trial court's findings of fact will be upheld if supported by substantial evidence; if not, the findings will be set aside as "clearly erroneous." Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998) (citations omitted).

1. ATTORNEY FEES

Whether there existed an agreement or a contract between the parties to this litigation constitutes a question of fact. See Audiovox Corp. v. Moody, Ky. App., 737 S.W.2d 468, 471 (1987) ("The question of the existence of a contract is a question of fact . . . ."). Certainly, litigants may enter into stipulations resolving questions of fact; in their doing so, however, the trial court is bound by those stipulations. See Humbard Constr. Co. v. City of Middlesboro, 237 Ky. 652, 36 S.W.2d 38, 40 (1931) (characterizing a question of fact as a question "about which the parties could stipulate and the court is bound by the stipulated facts.").

The Bargers maintain they effectively withdrew, or repudiated, their stipulation characterizing the quote submitted by Maddux as an agreement. In Kentucky, a litigant does, in fact, have a right to repudiate a stipulation, but only under certain circumstances: "The right to repudiate a stipulation is recognized where it is shown that it was inadvertently made, provided notice is given to the opposite party in sufficient time to prevent prejudice to him." World Fire & Marine Ins. Co. v. Tapp, 286 Ky. 650, 151 S.W.2d 428, 430 (1941) (citation omitted).

While the Bargers rely on Tapp to support the position that they effectively repudiated the stipulation, we find Tapp to be distinguishable. First, the litigant in Tapp alleged the stipulation had been entered into by his attorney without his knowledge, and under an erroneous impression of the facts. Thus, the trial court found the evidence to be "very persuasive that this agreement was made through a misunderstanding on the part of [litigant's] attorney." Id. Second, the litigant in Tapp repudiated his stipulation prior to judgment in the matter, reducing the potential for prejudice to the opposing party, whereas the Bargers attempt to repudiate their stipulations post-judgment.

The Bargers made no allegations similar to those made in Tapp. They did not point to any misunderstanding between them and their attorney; they did not allege their attorney entered into the stipulation without their knowledge; nor did they allege they minsunderstood the facts of the case as those facts had been represented by their attorney. They merely pointed to a draft of

the agreed order wherein their attorney had marked out the "liquidated sum" provision, which alteration he then forwarded to counsel for Maddux. Further, the Bargers' attorney, himself, did not allege he entered into the stipulation as it was originally drafted by counsel for Maddux, absent his changes, through either inadvertence or mistake. In short, we see no evidence the Bargers or their attorney unintentionally or mistakenly entered into the stipulation characterizing the quote as an "agreement."

We do not believe the draft on which the Bargers' attorney allegedly marked out the provision at issue sufficiently establishes inadvertence. The fact remains the attorney entered into the stipulation in May 1997, nearly two (2) months after he had submitted to counsel for Maddux his altered version. Thus, having had sufficient time within which to insist on his proposed changes or, alternatively, to deliberate the agreed order absent any changes, the Bargers' attorney entered into the stipulation.

Further, we believe the Bargers' argument they did not agree to the stipulation is somewhat disingenuous, given they asserted the contractual nature of Maddux's quote from the onset of this litigation, i.e. by way of their answer to Maddux's complaint, a portion of which we quote and emphasize as follows:

> The defendants deny that they are in default under the terms of their contract with the plaintiff and further states [sic] that the plaintiff breached the agreement by its failure to perform its duties in a workmanlike manner and by the sale and installations of defective products. The plaintiff is further in default under the terms of the contract by its uprooting and destroying other landscaping of the defendants' which the defendants specifically instructed them [sic] to leave in place.

Additionally, in their answer, the Bargers admitted that portion of Maddux's complaint alleging appellant had "contracted" with the Bargers to landscape their property. We do not believe the Bargers should have been permitted to repudiate their stipulation concerning the nature, or legal effect, of Maddux's quote when, from the onset, they did not dispute the contractual nature of that document. They may not rely on it as a "contract," on the one hand, for the purpose of enforcing it against Maddux, and dispute its legal effect as a "contract," on the other hand, for the purpose of defending the litigation.

Finally, we are mindful that a bid constitutes a contractual offer. See City of Hartford v. King, Ky., 249 S.W.2d 13, 15 (1952) (stating bids "are simply contractual offers"). In the present case, Maddux's bid set forth not only the contract price, but also additional, very specific, terms by which the parties would be bound. Once the Bargers accepted Maddux's bid, the terms therein controlled. We disagree with the trial court that the only contract entered into by the parties was an oral contract whereby Maddux agreed to perform landscaping services for the Bargers. Rather, we believe the parties agreed to operate pursuant to the terms set forth in the bid. Just as the terms of Maddux's warranty, as they are set out in the bid, could be enforced against him under appropriate circumstances, the terms of payment and collection can be enforced against the Bargers under the present circumstances. Thus, we do not believe our enforcement of the Bargers' stipulation that they agreed to

abide by the terms set out in the bid produces a result contrary to law.

The trial court's findings are not supported by the substantial evidence in the record. We find the trial court erred in striking the parties' stipulation characterizing the quote as an "agreement" and in finding the parties had not entered into a valid contract which incorporated the terms of Maddux's quote. Further, we believe the court erred in refusing to award Maddux attorney fees. We note the general rule that "in [the] absence of a statute or a contract expressly providing for attorney fees, they are not allowed." Bernard v. Russell County Air Bd., Ky. App., 747 S.W.2d 610, 612 (1987). In this case, we believe Maddux and the Bargers were parties to a contract which did, in fact, expressly provide for attorney fees.

As to the amount of fees recoverable, Maddux is limited to "reasonable" attorney fees, the determination of which is within the discretion of the trial court. See Dingus v. FADA Serv. Co., Ky. App., 856 S.W.2d 45, 50 (1993). "Reasonableness of an attorney fee must encompass the time involved, the task assigned, and the degree of difficulty of the work under the circumstances." Id. Thus, in reversing the trial court's decision and remanding the matter of attorney fees, we instruct the court to determine the reasonableness of the attorney fees requested.

> The trial judge is generally in the best position to consider all relevant factors and require proof of reasonableness from parties moving for allowance of attorney fees. In exercising its discretion, a trial court should require parties seeking attorney fees

> to demonstrate that the amount sought is not excessive and accurately reflects the reasonable value of bona fide legal expenses incurred.

Capitol Cadillac Olds, Inc. v. Roberts, Ky., 813 S.W.2d 287, 293 (1991).

2. PREJUDGMENT INTEREST

While the trial court, under the facts of this case, was bound by the stipulation of the parties characterizing the quote submitted by Maddux as an agreement between the parties, the court was not bound by the stipulation characterizing the amount owed by the Bargers as a "liquidated sum." The nature of the amount owed, whether liquidated or unliquidated, constitutes a question of law. See Fidelity & Deposit Co. of Maryland v. Jones, 256 Ky. 181, 75 S.W.2d 1057, 1060 (1934) ("Whether a stipulated sum is to be allowed as liquidated damages is a question of law."). Courts are not bound by the stipulations of parties concerning questions of law. See Humbard Constr. Co. v. City of Middlesboro, 36 S.W.2d at 40 ("That was a question of law, and the court is not bound by the stipulations of the parties as to that effect. The rights of these litigants must be determined by the law as made or unmade by the duly constituted legislative authorities, not by stipulation of litigants.") (Citation omitted).

As such, we see no harm in the trial court's having struck from the record the stipulation characterizing the amount owed Maddux by the Bargers as a "liquidated sum." However, we disagree with the trial court's conclusion that the sum owed Maddux was unliquidated. "[I]n general 'liquidated' means

'[m]ade certain or fixed by agreement of parties or by operation of law.' Common examples are a bill or note past due, an amount due on an open account, or an unpaid fixed contract price." Nucor Corp. v. General Elec. Co., Ky., 812 S.W.2d 136, 141 (1991) (citation omitted) (emphasis added). By way of the parties' agreement, the Bargers owed Maddux a definite and ascertainable sum of money. We believe that, according to Nucor, the amount owed was, in fact, a liquidated sum.

The trial court denied Maddux prejudgment interest based upon the fact that, throughout the litigation, the Bargers had denied they owed the amount demanded by Maddux. The court apparently concluded that by virtue of the Bargers having merely disputed the claim during the course of negotiations, the sum owed Maddux, definite and ascertainable in the quote itself (and thus liquidated), became unliquidated. We disagree, noting the parties settled the matter through an agreed order, at which point the amount the Bargers agreed they owed Maddux (which was precisely that amount set out in Maddux's quote) became undisputed for purposes of post-judgment issues. Nonetheless, a litigant's merely disputing a claim does not automatically render a liquidated sum of money an unliquidated sum:

> [A] claim which qualifies as a "liquidated claim" may not be rendered "unliquidated" by virtue of a good-faith denial of liability. See City of Louisville v. Henderson's Trustee, 13 S.W. 111, 113, 11 Ky.Law.Rep. 796, in which it was written:
>
> > But where, by the contract between the parties, the debt is due at a certain time, and the debtor has therefore impliedly promised to pay interest from that

> time, or has perhaps expressly so promised, upon whatever may be owing to his creditor, he cannot certainly defeat his right to it by a vain and unsuccessful dispute of the amount of the debt. Such a rule would not only be unjust, but unsustained by all modern precedent. Interest upon this claim was allowable, as a matter of law, because it was payable, by the contract between the parties, at a certain time[.]

Shanklin v. Townsend, Ky., 434 S.W.2d 655, 656 (1968).

"When the damages are 'liquidated,' prejudgment interest follows as a matter of course." Nucor Corp., 812 S.W.2d at 141. The trial court's finding that Maddux was not entitled to prejudgment interest is not supported by the substantial evidence in the record. We believe Maddux was, in fact, entitled to prejudgment interest, "'recoverable from the time for performance on the amount due . . . .'" Id. at 144. (Citation omitted). As such, we reverse the trial court's order denying prejudgment interest.

Maddux argues the Bargers owe prejudgment interest at the rate of twenty-four percent (24%) annually, as set out in the quote. However, KRS 360.010(1) states, in pertinent part:

> The legal rate of interest is eight percent (8%) per annum, but any party or parties may agree, in writing, for the payment of interest in excess of that rate as follows: (a) at a per annum rate not to exceed four percent (4%) in excess of the discount rate on ninety (90) day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the transaction is consummated or nineteen percent (19%), whichever is less, on money due or to become due upon any contract or other obligation in writing where the original principal amount

> is fifteen thousand dollars ($15,000) or less
> . . . .

Thus, in reversing the trial court, we instruct the court to determine the proper rate of interest under the circumstances.

For the foregoing reasons, we reverse the judgment of the Perry Circuit Court, and remand the matter for further orders consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward A. Baylous, II
M. Austin Mehr
Lexington, Kentucky

BRIEF FOR APPELLEE:

Frank C. Medaris, Jr.
Hazard, Kentucky