NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION I

No. CA08-471

RICK BROWN d/b/a BROWN & SONS, APPELLANT V. BEN FRANK, APPELLEE	**Opinion Delivered** 22 OCTOBER 2008 APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [NO. CV 2004-789-3] THE HONORABLE GRISHAM PHILLIPS, JUDGE AFFIRMED

D.P. MARSHALL JR., Judge

Ben Frank hired Brown & Sons to build a pond on Frank's land. The contract was an invoice that Brown wrote up. It contained a provision reciting that, if Brown did not complete the pond within a year of the start date, then "a penalty of $24,000 will be assessed." This amount was one-half of the maximum construction cost. Brown did not complete the pond within a year. Brown and Frank negotiated a ten-month extension to complete the work, with Frank reserving the right "to claim the penalty in the said same amount of $24,000" if Brown failed to finish the pond by the end of the extension. The pond was still unfinished at the end of the extension. Frank then hired another contractor to finish it and sued Brown for breach of contract.

After a bench trial, the circuit court issued a letter opinion and found Brown in

breach. The court awarded $24,000.00 in liquidated damages, rejected Brown's argument that this was actually a penalty provision, asked Frank's lawyer to prepare a precedent, and reserved a ruling on attorney's fees. About six months later, Frank moved for fees. The court then entered a judgment reflecting the damage award and awarding Frank almost $12,000.00 in fees. Brown appeals, challenging the damage and fee awards.

Mootness. There is a preliminary point. We reject Frank's renewed argument, made first in a motion to dismiss, that this appeal is moot. Our en banc court denied that motion on an eight to three vote. We are mindful of that earlier ruling. We again conclude that Brown's satisfaction of the judgment, which occurred when he complied with a property-settlement agreement contained in his divorce decree, was sufficiently involuntary to bring the issue within the holdings of *Lineberry v. Riley Farms Property Owners Association*, 95 Ark. App. 286, 289, 236 S.W.3d 534, 537 (2006) and *Reynolds Health Care Services, Inc. v. HMNH, Inc.*, 364 Ark. 168, 182–83, 217 S.W.3d 797, 808–09 (2005).

Damages. We see no clear error in the circuit court's enforcement of the $24,000.00 clause. *Alley v. Rodgers*, 269 Ark. 262, 264, 599 S.W.2d 739, 741 (1980) (standard of review). "[W]e must place ourselves in the position of the contracting parties and view the subject-matter of their contract prospectively, and not retrospectively." *Alley*, 269 Ark. at 264, 599 S.W.2d at 741 (quotation omitted). This

damages clause was enforceable if (1) Frank and Brown anticipated that damages would result from Brown's failure to perform, (2) the amount of anticipated damages was difficult to determine, and (3) the amount in the damages provision was reasonably proportional to the forecasted damages. *Johnson v. Jones*, 33 Ark. App. 149, 152, 807 S.W.2d 39, 41 (1991). If the agreed amount bore no reasonable relationship to the forecasted damages, then the amount was a penalty, which the law will not enforce. *Ibid*. Brown and Frank referred several times in the contract documents to this damages provision as a "penalty." But their label is not dispositive. *Johnson*, 33 Ark. App. at 152, 807 S.W.2d at 41–42. Instead the law looks to the parties' intent when they made their contract. *Ibid*. And their label was one piece of evidence about their intent. *Ibid*.

The circuit court did not clearly err. First, as the court found, the parties anticipated that damages would result from non-performance of the contract. When Brown drafted the contract, he included the damages provision that he now complains about. The parties also included the provision in the ten-month extension, which Frank apparently drafted and Brown signed. Second, as the record shows, at the time that the parties made their contract, the amount of anticipated damages was difficult to estimate. The circuit court found that Frank had the pond built at his home for personal use, and Brown does not challenge this finding. It would have been hard to estimate the exact amount of damage that Frank would sustain by losing the use and

enjoyment of the pond. Finally, as the circuit court concluded, the stipulated sum bore a reasonable relationship to the forecasted damages. $24,000.00 was the exact amount that Frank paid Brown up front on the day they made their contract. It was also exactly half of the agreed maximum total cost of the pond. We affirm the circuit court's decision that the parties intended the $24,000.00 provision as an enforceable liquidated-damages clause, not a penalty. We need not and do not address Brown's alternative contention that the court miscalculated the actual damages in its alternative ruling.

Fees. Brown also argues that the circuit court erred in awarding attorney's fees because Frank's fee motion—filed six months after the court issued its letter opinion—was untimely under Arkansas Rule of Civil Procedure 54. Brown is mistaken. The letter opinion was not a judgment. It reserved the issue of fees and directed Frank to prepare a precedent. Rule of Civil Procedure 58 permits this. The precedent, once signed and entered by the circuit court, was the final judgment in the case. Ark. R. Civ. P. 58. Frank's pre-judgment fee motion was timely.

Affirmed.

ROBBINS and VAUGHT, JJ., agree.