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IN THE
COURT OF APPEALS OF INDIANA

CLOVERLEAF HEALTHCARE SERVICES, INC., CLOVERLEAF HEALTHCARE OF BOONVILLE, INC., WANDA PROCK, THEODORE E. BRUZAS, CHARLINE BRUZAS, GEORGE A. SMITH, TRELA C. SMITH, SHARON K. SMITH, WILLIAM T. REES, HELEN L. REES, PAUL S. HULSE, MIHOKA HULSE, TIMMY J. SHROUT, KIMBERLY SHROUT, RUTH ADE and SHERWOOD HEALTHCARE CORP.,	)	
Appellants-Defendants,	)	CONSOLIDATED APPEAL
vs.	)	No. 32A01-0610-CV-464
BOONVILLE CONVALESCENT CENTER, INC.	)	
Appellee-Plaintiff,	)	
CLOVERLEAF HEALTHCARE OF BOONVILLE, INC.,	)	
Appellant/Third-Party Plaintiff,	)	

vs.	)
	)
BRUCE H. WHITEHEAD[1],	)
	)
Third-Party Defendant.	)

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Robert W. Freese, Judge
Cause No. 32D01-0204-CC-38

November 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Cloverleaf Healthcare Services, Inc., its shareholders, and their spouses, appeal the trial court's determination of the extent of their liability to their landlord, Boonville Convalescent Center, Inc. Boonville cross-appeals. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Boonville owns a nursing home facility. In 1986, it leased the facility to Cloverleaf for twenty years. Cloverleaf's shareholders and their spouses (collectively, "Tenants") personally guaranteed the lease. The lease required the Tenants to pay real estate taxes, make repairs, and return the facility in the same condition, except for ordinary wear and tear. The lease also required the Tenants to pay Boonville's attorney fees for any litigation concerning the lease.

[1] Bruce Whitehead has not filed an appearance or brief in this appeal. Accordingly, we present the caption as it appeared in the trial Court.

The Tenants sublet the facility to a business that ultimately went bankrupt. The facility was abandoned in the winter of 2000 and left in a state of disrepair. When the Tenants refused to resume operation of the facility, Boonville's CEO, Charles Ludwyck, began operating the facility as Southwind Healthcare, Inc.

On August 22, 2000, Boonville initiated this action against the Tenants. In 2002, the trial court granted summary judgment for the Tenants.[2] We reversed the trial court, finding the Tenants liable, and remanded for a trial on damages. *Boonville Convalescent Center, Inc. v. Cloverleaf Healthcare Servs., Inc.*, 790 N.E.2d 549 (Ind. Ct. App. 2003) (hereinafter "*Boonville I*"), *trans. denied* 812 N.E.2d 801 (Ind. 2004).

After a seven-day bench trial on damages in November 2004, the trial court awarded Boonville $823,853.62 for maintenance and repairs; $173,472.00 in real estate taxes; $640,000.00 for attorney fees; and $159,867.03 in rent and interest (hereinafter "Judgment 1").[3] The tenants tendered the full amount of the award, but insisted on a total release of judgment. Boonville refused the tender and appealed.

We vacated the judgment and remanded again with instructions to the trial court on several issues, including calculation of the rent due under the contract, the date of the termination of the lease, and the award of maintenance and repair costs. *Boonville Convalescent Center, Inc. v. Cloverleaf Healthcare Servs., Inc.*, 834 N.E.2d 1116 (Ind. Ct. App. 2005) (hereinafter "*Boonville II*"), *trans. denied* 855 N.E.2d 1002 (Ind. 2006).

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[2] The Tenants also filed a third-party complaint against Bruce Whitehead, who was a guarantor on the sublease and is not involved in this appeal.

[3] Although this is the second judgment rendered by the trial court in this case, to avoid confusion we follow the shorthand adopted by the parties in their briefs.

We also held Boonville would be entitled to an additional hearing to determine the remaining rent due between November 2004 and the end of the lease. *Id*. at 1127.

On remand, the trial court ordered the parties to submit proposed findings of fact and conclusions of law based on the evidence admitted at the 2004 trial.[4] In August 2006, the trial court entered judgment of $5,903,559.62 (hereinafter "Judgment 2").[5] This sum included the same award for repairs and attorney fees as Judgment 1. By then, the lease had terminated, so Boonville requested a hearing on the remaining rent due. Boonville was awarded an additional $906,286.00 (hereinafter "Judgment 3"). In this consolidated appeal, the Tenants are appealing Judgments 2 and 3, and Boonville is appealing Judgment 3.

DISCUSSION AND DECISION

1. The Tenants' Appeal of Judgments 2 and 3

Pursuant to Ind. Trial Rule 52(A), the trial court entered findings of fact and conclusions of law; therefore, we may not set aside the findings or judgment unless clearly erroneous. *See Oil Supply Co., Inc. v. Hires Parts Serv., Inc.*, 726 N.E.2d 246, 248 (Ind. 2000) ("Challengers thus labor under a heavy burden, but one which may be overcome by showing that the trial court's findings are clearly erroneous.").

> In applying this rule, we employ a two-tiered standard of review. First, we consider whether the evidence supports the findings, construing the findings liberally in support of the judgment. Next, we determine whether

[4] The parties agree we did not remand for a new trial in *Boonville II*.

[5] The Tenants filed a motion to correct error within thirty days of Judgment 2, which the trial court denied on September 26, 2006. The Tenants filed their notice of appeal within thirty days of the denial; thus, this appeal is timely.

> the findings support the judgment. A judgment is clearly erroneous when it is unsupported by the findings of fact and conclusions thereon. In applying this standard, we will neither reweigh the evidence nor judge the credibility of the witnesses. Rather, we consider the evidence that supports the judgment and the reasonable inferences to be drawn therefrom. We must affirm the judgment of the trial court unless the evidence points incontrovertibly to an opposite conclusion.

Kesler v. Marshall, 792 N.E.2d 893, 895-96 (Ind. Ct. App. 2003), *trans. denied* 812 N.E.2d 794 (Ind. 2004).

a. Effect of Tender of Judgment 1

The Tenants argue the trial court erred in calculating the rent due to Boonville because it did not give them credit for the $1,809,797.62 they tendered after Judgment 1 was rendered. They argue that the late fees due under the lease should have been calculated as if the tender of judgment were a payment of rent, and therefore both Judgment 2 and Judgment 3 are erroneous.

Although the Tenants tendered the amount of the judgment, they opposed "the release of the judgment amount in the absence of the filing of a *total satisfaction of judgment*" by Boonville. (Appellee's App. at 12) (emphasis added). Because Boonville intended to appeal the amount of the judgment, it could not execute the satisfaction of judgment. The trial court ordered the clerk to hold the funds until further order. (Appellants' App. at 32.) Because Boonville never had access to the funds, the trial court's decision not to treat the tender as a rent payment was not clearly erroneous.

b. Method of Rent Calculation

The Tenants assert the trial court erred in Judgments 2 and 3 by using the method of rent calculation advanced by Boonville. They argue:

> The first step in calculating rent due under the Lease pursuant to paragraph 3(B) is to determine the "base intermediate care rate." Unfortunately, by the year 2000, the phrase "base intermediate care rate" was outdated and did not refer to any specific data set. . . . Thus, Boonville's expert, Clark, and [the Tenants'] expert, Hartung, were left with their interpretations of what, from 2000 through 2006, best approximated the letter and spirit of the Lease and its usage of the term "base intermediate care rate."

(Appellants' Br. at 9) (citations omitted).

The phrase "base intermediate care rate" does not appear anywhere in paragraph 3(B). *See Boonville II*, 834 N.E.2d at 1122-23. Instead, it appears in paragraph 2(D), which we previously held governs the term of the lease and not calculation of rent. *Id*. at 1124. Under paragraph 3(B), rent is calculated using "average daily routine patient revenue." *Id*. at 1122-23.

Apparently acknowledging this, the Tenants renew the same argument in their reply brief, substituting "average daily routine patient revenue" for "base intermediate care rate." (Appellants' Reply Br. at 3.) Nevertheless the Tenants do not explain their contention that the language of paragraph 3(B) is outdated.

In this case, "average daily routine patient revenue" has been defined as revenue from three sources: Medicaid, Medicare, and private pay. (Boonville's 2005 App., vol. II at 302.) The Tenants' expert based his rent calculations solely on Medicaid receipts. (*Id*. at 371-72.) Therefore, the decision of the trial court not to adopt the Tenants' methodology was not clearly erroneous.

c. Substantiation of Repair Costs

Finally, the Tenants argue the trial court did not substantiate Boonville's repair costs as we instructed. *See* 834 N.E.2d at 1129. The Tenants assert the reinstatement of

the award of $823,853.62 was *per se* erroneous because we previously found that amount included some expenditures for remodeling rather than repair. The Tenants mischaracterize our holding in *Boonville II*. We did not hold that the amount awarded included renovation expenses. Rather we ordered the trial court to verify the expenses were for repairs rather than renovations. *Id*.

On remand from *Boonville II*, the trial court made the following findings:

> 39. By March of 2000, the nursing home had holes in the ceiling, holes in the flooring, and holes in the foundation. Water damage and mold permeated the building. Air conditioning units and showers leaked water into the crawl space. Neglected drainage systems directed surface and rain water into the crawl space. Neglected roof leaks, downspouts, and patio drains directed rainwater into the dining room, damaging its floor, joists, ceilings, and walls.
> 40. The deteriorated condition of the home resulted from lack of ongoing maintenance and failure to make regular and necessary repairs.
> * * * * *
> 42. Repairs are still necessary to make the entire 108-bed facility usable.
> 43. Costs for maintenance and repairs of the Facility are the [Tenants'] responsibility. However, [the Tenants] are not responsible for the costs associate[d] with renovation of the Facility.
> * * * * *
> 45. Between November 2000 and November 2004, $154,036.60 in expenses was incurred for Independent Contractor expenses *to make repairs that should have been made by [the Tenants]*.
> 46. Between November 2000 and November 2004, $70,206.88 in expenses was incurred *for building repair supplies to make repairs that should have been made by [the Tenants]*.
> 47. Between November 2000 and November 2004, $263,688.14 in expenses was incurred for employee expenses *that should have been made by [the Tenants]*.
> 48. A good faith estimate *for additional repairs* necessary to place the premises in a like condition was obtained, this estimate totaled $335,922.00.
> 49. The total amount the [Tenants] are responsible for with regards to *maintenance and repairs* is $823,853.62 (Totals from paragraph[s] 45, 46, 47, and 48)

(Appellants' App. at 54-55) (citations omitted and emphases added). The trial court made specific findings about the types of repairs the Tenants should have made, and it found the amounts Boonville submitted were spent on repairs the Tenants should have made. Ludwyck testified these expenses were for repairs and not renovations.[6] His testimony is supported by photographic and video evidence of the damage to the facility.

The Tenants bear the burden of demonstrating the trial court's findings are clearly erroneous, and they have not identified a single improper expense. Instead, they direct us to testimony from their engineering expert, John Donan:

> Q. Now did you attempt to categorize the contractor invoices and how did they break down?
>
> A. Yes, I went through each of the contractor invoices and categorized them into four different categories uh, the first category that I categorized was – were improvements uh, to the structure over and above the original construction and I itemized that at [$22,500] of new improvements. The second category was ordinary wear and tear. Uh, I itemized those uh, at [$95,000,] the third category was ordinary maintenance uh, I categorized that at [$27,400], then there was a fourth category for services uh, that was [$5,000] and then there was one item that I couldn't categorize at all and it was – I don't – I'm not sure what it was for but it was like [$940].

(*Id*. at 163-64.) Therefore, the Tenants argue Boonville may be awarded only the amount of the contractor invoices minus $22,500 of "new improvements" identified by Donan.

Donan's figure apparently does not account for damage to the roof, as he testified he "saw no sign of any roof leak at all." (*Id*. at 166.) However, the trial court found there

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[6] The Tenants claim Ludwyck admitted he was not seeking an award for maintenance and repairs. We rejected this argument in *Boonville II*, 834 N.E.2d at 1127-28. The record reflects Ludwyck understood the repairs would offset the rent owed to Boonville by Southwind, and he therefore did not seek a *separate* award for repairs. The trial court instead deducted Southwind's rent from the rent owed by the Tenants and made a separate award for repairs.

was damage to the roof. Furthermore, these figures take into account only expenses for repairs made by independent contractors and not those Boonville made. The Tenants invite us to substitute Donan's testimony for the findings of the trial court, which we decline to do. *See Kesler*, 792 N.E.2d at 895. The award for maintenance and repairs is not clearly erroneous.

2. Boonville's Cross-Appeal of Judgment 3

In *Boonville II*, we found the lease agreement did not have an acceleration clause. *Boonville II*, 834 N.E.2d at 1126. Therefore, at the trial on damages, Boonville could seek only the rent already due. *Id*. Boonville could request an additional hearing at the expiration of the lease to collect the remainder of the rent. *Id*. at 1127.

By the time the trial court issued its order on remand from *Boonville II*, the lease had expired. Boonville filed a "Motion for Hearing on Remaining Damages," and then moved for summary judgment on "Lease-End Damages." (Appellants' App. at 44-45.) In its motion for summary judgment, Boonville sought an award for "permanent damage" to the premises, as well as the rent, real estate taxes, and attorney fees that accumulated after the November 2004 trial on damages. The trial court awarded an additional $906,286.00 in rent based on the undisputed evidence submitted by Boonville, but declined, as a matter of law, to award the other damages sought by Boonville.

In reviewing a motion for summary judgment,[7] we apply the same standard as the

[7] The Tenants responded to the summary judgment motion with a motion to strike, and therefore designated no evidence. (Cross-Appellees' Br. at 15-16 n.2.) The Tenants believed Boonville's motion was "procedurally defective" because Boonville was seeking damages that should have been proven at the trial. *Id*. The Tenants argue, therefore, that the resulting order was merely "supplemental" to the

trial court. *Wright v. Am. States Ins. Co.*, 765 N.E.2d 690, 692 (Ind. Ct. App. 2002). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). "Any doubt as to a fact, or an inference to be drawn, is resolved in favor of the non-moving party." *Sanchez v. Hamara*, 534 N.E.2d 756, 757 (Ind. Ct. App. 1989). The moving party bears the burden of proving there is no genuine issue of material fact; however, once this burden is sustained, the opponent may not rest on the pleadings, but must set forth specific facts showing there is a genuine issue for trial. T.R. 56(E); *Oelling v. Rao*, 593 N.E.2d 189, 190 (Ind. 1992). We affirm summary judgment if there is any legal basis supported by the designated evidence. *Bernstein v. Glavin*, 725 N.E.2d 455, 458-59 (Ind. Ct. App. 2000), *trans. denied* 741 N.E.2d 1248 (Ind. 2000). The appellant bears the burden of persuading us the grant of summary judgment was erroneous. *Bank One Trust No. 386 v. Zem, Inc.*, 809 N.E.2d 873, 878 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 975 (Ind. 2004).

The Tenants argue *Boonville II* permitted Boonville to request a hearing only for the remaining rent. In *Boonville II*, we recognized that because the lease did not contain an acceleration clause, Boonville did not have a mature claim for rent for the entire lease period at the time of the November 2004 trial. *Boonville II*, 834 N.E.2d at 1126.

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previous order. *Id.* They urge us to apply the T.R. 52(A) standard of review rather than the summary judgment standard of review.

However, the Tenants have not demonstrated their motion to strike was granted or that the trial court did rule on the summary judgment motion. The trial court calculated the additional rent due based on the undisputed evidence designated by Boonville and concluded as a matter of law that Boonville was not entitled to the other damages it requested. Therefore, we use the summary judgment standard of review.

Therefore, we held Boonville was entitled to a hearing at the expiration of the lease to determine the amount of additional rent due. *Id*. at 1127. Nothing in *Boonville II* precluded Boonville from pursuing other claims that were not mature at the time of the November 2004 trial. Therefore, we hold that whether Boonville was entitled to additional damages turns on whether the claims accrued before or after the 2004 trial.

a. Permanent Damages to the Premises

Boonville argues it was entitled to present additional evidence of damage to its facility because the Tenants were not obligated to return the premises in the same condition until the termination of the lease. We find this argument without merit. Although the Tenants were required to return the premises in the same condition at the end of the lease, this provision of the lease was breached in 2000 and was actionable at that time.

Boonville argues the extent of the damage could not be determined in November 2004, but offers no evidence in support of that contention. By the time of the 2004 trial, Boonville had been operating the facility for several years. Boonville presented evidence of estimates for future repairs and received an award for those expenses. Boonville's argument those repairs were later deemed unnecessary because portions of the building were beyond repair is essentially an acknowledgement that it miscalculated its damages in 2004. Therefore, the trial court correctly determined as a matter of law that Boonville's claim for damages to the facility had already accrued and was fully tried in 2004.

b. Real Estate Taxes

The real estate taxes, however, continued to accrue as taxes were assessed on the property. The lease states:

> The Lessee shall, in addition to the rent herein reserved, pay all taxes, general or special, all public rates, dues and special assessments of every kind *which shall become due and payable or which are to be assessed against or levied upon* said real estate and improvements and personal property thereon during the term of this lease. . . . Notwithstanding the foregoing, in the event any tax, assessment or other charge payable by Lessee, as aforesaid may be paid in installments, Lessee *shall be privileged to pay for such tax, assessment, or other charge accordingly*.

(Appellants' App. at 79) (emphasis added). The plain language of the lease indicates the Tenants were to pay taxes as they became due and the Tenants were in fact entitled to pay in installments when permitted by law. Just as nothing in the lease entitled Boonville to demand advance payments of rent, *Boonville II*, 834 N.E.2d at 1126, Boonville was also not entitled to demand advance payments of real estate taxes. Therefore, Boonville is entitled to the remaining real estate taxes as a matter of law, and we remand for a determination of the amount owed.

c. Attorney Fees

We also conclude Boonville is entitled to attorney fees for work subsequent to the 2004 trial. Boonville could not have proved during that trial what additional work would be required of its attorneys, especially in light of our subsequent ruling Boonville was entitled to an additional hearing.

Boonville only explicitly argues for an award of attorney fees for work done after the November 2004 trial. However, it asks us to make an award of $1,860,000 based on

its contingent fee for the entire case. To the extent Boonville argues this award is insufficient, we decline to substitute Boonville's contingent fee agreement for the judgment of the trial court. We remand for a determination of reasonable attorney fees incurred after the trial.

d. Exclusion of final month's rent

Finally, Boonville claims the trial court omitted the final month's rent from its calculations. The Tenants do not contest this issue. Therefore, Boonville is entitled to another month's rent with applicable late fees and interest.

CONCLUSION

Judgment 2 is affirmed in all respects. Judgment 3 is reversed in part and remanded for determination of real estate taxes and attorney fees owing since the November 2004 trial, as well as the final month's rent.

Affirmed in part, reversed in part, and remanded.

DARDEN, J., and CRONE, J., concur.