

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001041-MR

C & W EQUIPMENT COMPANY, INC.

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 94-CI-00853

WATER WORKS SUPPLIES, INC.;
GARDNER L. TURNER and
KEVIN W. WEAVER

APPELLEES

AND

NO. 1998-CA-001088-MR

WATER WORKS SUPPLIES, INC.
GARDNER L. TURNER and
KEVIN W. WEAVER

CROSS-APPELLANTS

v. CROSS-APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 94-CI-00853

C & W EQUIPMENT COMPANY, INC.

CROSS-APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: EMBERTON, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal and a cross-appeal from a judgment in an action by a materialman against a subcontractor to collect the outstanding balance on an account for materials, finance charges, and attorney fees. Appellant argues that it was error to award attorney fees, while cross-appellants argue that the court erred in its award on the principal balance on the account, in not awarding the full amount of attorney fees, and in not awarding finance charges. In reviewing the record and the applicable law, we cannot say the trial court's findings were clearly erroneous or that it abused its discretion. Thus, we affirm on appeal and on cross-appeal.

In 1987, appellant/cross-appellee, C & W Equipment Company, Inc. ("C & W"), a subcontractor in the construction and excavation business, submitted a credit application with appellee/cross-appellant, Water Works Supplies, Inc. ("Water Works"), a supplier of materials for the installation of water and sewer lines. Thereafter, C & W began purchasing materials from Water Works for various construction projects. On December 1, 1994, Water Works filed a complaint against C & W to collect on the balance owed on the account for a construction project on a Wal-Mart store in Georgetown, Kentucky, which totaled \$20,455.71. Additionally, Water Works sought payment of finance charges on the account and attorney fees and court costs pursuant to the credit agreement. In C & W's answer, it admitted it was indebted to Water Works in the amount of \$20,455.71 for materials, but denied any balance was owed on the Georgetown Wal-Mart project and denied that it was liable for finance charges,

attorney fees, or court costs. On May 1, 1995, C & W filed a CR 68 offer of judgment, offering Water Works the amount of \$23,000.43, which C & W claimed was the total amount on all accounts which it owed Water Works at the time. Water Works did not accept the offer because it did not provide for its claims for service charges, attorney fees, or court costs. On July 6, 1995, the court granted Water Works's motion for summary judgment as to the principal amount of \$20,455.71 due on the Georgetown Wal-Mart project, but determining that a factual controversy existed as to the service charges. On January 19, 1996, Water Works filed an amended complaint seeking payment of an additional \$3,066.22 for materials ordered by C & W for three other projects. In its answer to the amended complaint, C & W denied that it owed anything on these projects.

On July 17, 1996, Water Works moved for a trial date, and the court scheduled a pretrial conference. At the pretrial conference, the court set the matter for trial by jury on May 13, 1997 as requested by C & W. In the pre-trial order, the court ordered that exhibits of any kind to be presented at trial and itemizations for all damage claims be made available to the other side 60 days before trial. Because Water Works failed to comply with the order by furnishing exhibits and itemizations as to its claim for attorney fees 60 days before trial, C & W moved *in limine* to prevent this evidence from being admitted at trial. In lieu of granting the motion, the court continued the trial until November 24, 1997. The trial was again continued to January 28, 1998 due to no fault of either party.

On January 26, 1998, C & W waived its right to a jury trial, and the case was tried by the court on January 28 and 29, 1998. At trial, Water Works sought to prove its claim for attorney fees through the testimony of its accounting manager and the introduction of bills from Water Works's counsel. C & W objected to this proof on grounds that Water Works had not provided C & W with this evidence prior to trial as required by the pretrial order. The court did not rule on this motion.

On February 24, 1998, the court entered its findings of fact and conclusions of law. The court found that in addition to the principal amount of \$20,455.71 that it had already awarded in the summary judgment, Water Works was entitled to judgment in the amount of \$2,136.77 on its amended complaint for the balance owed on the three other projects. As to the finance charges, the court found that in looking at the course of dealing between the parties, no finance charges were owed. With regard to the claim for attorney fees, the court found that, in light of the delays caused by Water Works's failure to comply with the pretrial order and the likelihood that Water Works would not prevail on all of its claims, the claim of \$27,135.50 in attorney fees and costs was wholly unreasonable. The court did award \$7,030 in attorney fees and costs for the collection efforts related to the Georgetown Wal-Mart project and \$5,000 for attorney fees and costs expended thereafter, for a total of \$12,030. From this judgment, C & W appeals the attorney fees award. Water Works appeals the attorney fees award, the ruling regarding the finance

charges, and the amount the court found was owed on the amended complaint.

We shall first address C & W's argument that the award of attorney fees was in error. KRS 411.195 provides for the enforcement of a written agreement to pay attorney fees. It is undisputed that the credit agreement signed by C & W contained language providing for the payment of reasonable attorney fees in the event the services of an attorney are necessary to collect on the account. It has been held that even though attorney fees may be provided for in a contract, "any award of an attorney fee is subject to a determination of reasonableness by the trial court." Capitol Cadillac Olds, Inc. v. Roberts, Ky., 813 S.W.2d 287, 293 (1991). The reasonableness of attorney fees is to be determined by the trial court within its sound discretion. Dingus v. FADA Service Co. Inc., Ky. App., 856 S.W.2d 45 (1993).

C & W maintains that the award of attorney fees was in error because C & W admitted owing the principal balance and, thus, the only issue besides attorney fees which was litigated was the finance charge issue on which C & W prevailed. However, the parties were litigating more than the finance charges. In addition, there was a dispute over attorney fees incurred up to that point and the balance owed on the three other projects via the amended complaint, which C & W denied owing and for which the court awarded Water Works \$2,136.77. Further, the court took into account Water Works's failure to recover on the finance charge issue when it found the majority of the claimed fees to be unreasonable.

C & W also argues that the initial settlement offer of \$23,000.43, which was rejected by Water Works and which was greater than the amount Water Works was ultimately awarded for the materials obtained, should preclude Water Works from receiving attorney fees. However, this amount did not include any amount for attorney fees up to that point. C & W did not admit owing the principal balance until after suit had been filed. Thus, attorney fees for up to that point would certainly have been in order. We would point out that the only reason the suit was filed in the first place was because C & W would not pay the account. Had C & W timely paid the balance owed, none of the litigation would have occurred and there would be no dispute regarding attorney fees or finance charges.

C & W also maintains that the award of attorney fees was in error because Water Works failed to comply with the pretrial order requiring Water Works to submit itemized proof of its attorney fees before trial. At trial, when C & W objected to the evidence regarding attorney fees because of failure to comply with the pretrial order, the court offered to keep the record open for 30 days to allow C & W to put on additional proof challenging the attorney fees. Also, C & W had the opportunity to cross-examine Water Works's witness who testified regarding the attorney fees. Most importantly, Water Works's failure to comply with the order was one of the main reasons the court awarded Water Works only 44% of its attorney fees. Thus, in our view, C & W was not prejudiced by the violation of the pretrial order. See Sharp v. Sharp, Ky., 516 S.W.2d 875 (1974).

The trial court is in the best position to consider all the relevant factors in determining whether the party has presented sufficient proof of the reasonableness of its attorney fees. Capitol Cadillac Olds, Inc. v. Roberts, 813 S.W.2d at 293. In reviewing the record, we see that Water Works offered into evidence the billing statements of its counsel, which contained a detailed itemization of the services performed and the time spent performing these services. Water Works also offered the testimony of its accounting manager who testified that Water Works had actually paid \$13,180.52 in attorney fees up to that point, which was greater than the amount of attorney fees awarded. See Harper v. Citizens State Bank, Ky. App., 652 S.W.2d 871 (1983). The court considered the result obtained and the conduct of Water Works during the pendency of the case in awarding 44% of the requested attorney fees. In sum, we cannot say the trial court abused its discretion in awarding the amount of attorney fees it did.

C & W's final argument is that under the agreement, the reasonableness of attorney fees is dictated by Indiana law. The agreement states that attorney fees are recoverable "provided that same are legally allowed by the laws of the State of Indiana or the state where the subject collateral is situated." (Emphasis added). The evidence established that the subject collateral was situated in Kentucky. Thus, this argument is without merit.

We now move on to Water Works's cross-appeal. We shall first address Water Works's argument that the trial court abused

its discretion in not awarding it the full amount of attorney fees. As stated earlier, the determination of the reasonableness of attorney fees is within the sound discretion of the trial court. Dingus, 856 S.W.2d at 45. Water Works did not prevail on the finance charge issue (which we affirm below), which comprised a great deal of the litigation in this case. Further, contrary to Water Works's position, Water Works did violate the pretrial order. Water Works's argument that it was not required to present proof as to attorney fees prior to trial because the matter was originally set for a jury trial is not well taken. The order was clear that any claim for damages required itemized proof thereof to be provided to the other party sixty days before trial. Thus, even though a jury would not have heard the issue of attorney fees, Water Works should nevertheless have submitted proof of its attorney fees up to that point since it sought attorney fees from the onset of the case. Finally, at least one of the trial continuances was attributable to Water Works's noncompliance with the pretrial order. Given the above factors, we cannot say the trial court abused its discretion in only awarding Water Works 44% of its attorney fees.

Water Works's next argument is that the court erred in not awarding it the full amount of the balance of C & W's account for the purchase of materials. In particular, Water Works claims that the trial court should have awarded it \$1,453.95 on the Rogersville job. The court found that C & W purchased \$1,453.95 in materials for that job. However, during arbitration between the general contractor and C & W, Water Works represented that C

& W only owed \$524.50 on the job. Thus, the court awarded Water Works \$524.50 for the Rogersville job because it found that C & W had detrimentally relied on this account statement during the arbitration proceedings. The findings of the trial court acting as fact finder will not be reversed unless they are clearly erroneous. CR 52.01; Daniel v. Kerby, Ky., 420 S.W.2d 393 (1967). Upon reviewing the record, we cannot say the trial court was clearly erroneous in finding the amount owed on the job in question was the amount represented by Water Works in an earlier legal proceeding. The amount represented by Water Works in the arbitration proceeding was substantial evidence of the amount owed. Black Motor Co. v. Greene, Ky., 385 S.W.2d 954 (1964).

Water Works's remaining argument is that the trial court erred in not awarding it the finance charges on the past due balances. It is undisputed that C & W agreed to pay finance charges of 2% a month on any outstanding balances. There was evidence that Water Works used two separate accounting/billing procedures. One is a computerized billing statement sent to the purchaser on a monthly basis. The other is a handwritten billing statement which contains only finance charges on overdue accounts. Water Works asserted that it sent out the handwritten finance charge statements every month, but did not collect finance charges from all customers. However, Water Works claimed that it did not agree to waive finance charges as to C & W's overdue account. It was undisputed that the computerized monthly statement sent to C & W consistently reflected a zero balance for

finance charges. Further, C & W denied ever receiving any handwritten finance charge billings on the account. There was also evidence that the finance charge statements were not sent out every month and were sent only sporadically. The credit manager for Water Works testified that no finance charge statement had been prepared for C & W's account before April of 1993 and that only one finance charge statement indicated that it had been sent to C & W. The testimony of certain Water Works's employees indicated that finance charges were assessed on all customers, but were not collected or enforced unless they were seriously past due. One Water Works salesman testified that another Water Works salesman told him that Water Works assessed finance charges but did not collect them because of the nature of the construction business. A letter dated May 5, 1994 is contained in the record from C & W informing Water Works that it had filed suit against the general contractor. The letter further states, "It is understood that Water Works has not and will not charge service charges during this period of litigation and collection."

The trial court found that through the course of dealing between the parties, the agreement to pay finance charges was modified:

A review of the course of dealing between the parties in this case is demonstrative of a pattern of modification made by [Water Works] in pursuit of customer satisfaction so that the customer will continue and increase purchases from [Water Works]. Customer loyalty is valid consideration.

Under KRS 355.2-209 of the Uniform Commercial Code, an agreement modifying a contract for the sale of goods needs no consideration to be binding. The course of dealing between the parties is relevant to show a modification of a contract for the sale of goods. KRS 355.2-208. Evidence of modification of a written contract must be clear and convincing, although it need not be uncontroverted. Wehr Constructors, Inc. v. Steel Fabricators, Inc., Ky. App., 769 S.W.2d 51 (1988). We believe from the course of dealing between the parties, there was clear and convincing evidence that the written credit agreement was modified such that C & W was not required to pay finance charges.

For the reasons stated above, the judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
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BRIEF FOR APPELLEES/CROSS-
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