

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001625-MR

RICHARD W. WEBB, SR., AND
CAROLE WEBB

APPELLANTS/
CROSS-APPELLEES

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN POTTER, JUDGE
ACTION NO. 97-CI-06425

AUTO CUSTOMIZING-SOUTH, INC.

APPELLEE/
CROSS-APPELLANT

AND: NO. 1998-CA-001686-MR

AUTO CUSTOMIZING-SOUTH, INC.

CROSS-APPELLANT/
APPELLEE

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN POTTER, JUDGE
ACTION NO. 97-CI-06425

RICHARD W. WEBB, SR., AND
CAROLE WEBB

CROSS-APPELLEES/
APPELLANTS

OPINION AND ORDER

AFFIRMING

** ** * * * ** **

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE: Richard Webb, Sr., and Carole Webb (Webb)

appeal from an order of the Jefferson Circuit Court entered March
27, 1998, which granted summary judgment in favor of Auto

Customizing-South, Inc. (ACSI). ACSI cross-appeals from an order of the same court entered June 8, 1998, which denied its motion for attorney fees. We affirm.

On September 7, 1994, Webb and ACSI entered into a lease agreement whereby ACSI leased a piece of commercial real estate owned by Webb. The terms of the lease agreement which are relevant to this appeal are as follows:

Section Twenty
Attorney Fees

In the event of any litigation between the parties, the prevailing party shall be entitled to recover from [sic] the other party all reasonable attorney fees, costs, and expenses of the prevailing party incurred in connection with such litigation, except as may be limited by applicable law.

...

Section Thirty-One
Option to Purchase

Lessee has the option to purchase the Demised Premise [sic] during the term or any extension thereof under the following terms and conditions. In order to exercise this option, Lessee must give the Lessor written notice of the exercise of such option on the manner provided in Section 27 not less than 120 days prior to the expiration of the then term. If the option to purchase is exercised, the Lessor and Lessee shall immediately attempt to agree upon the then fair market value of the Demised Premises. If the parties are not able to agree upon the fair market value of the Demised Premises, they shall attempt to agree on an independent qualified appraiser, who shall be employed by them to determine the fair market value, the expense incurred for such appraisal to be shared equally by Lessor and Lessee. If Lessor and Lessee are unable to agree upon the selection of an independent qualified appraiser within 15 days after the notice of exercise of the option is given, Lessor and

Lessee shall each select their own qualified appraiser which appraisers shall select a third qualified appraiser, and in such event the fair market value of the Demised Premises shall be the amount which shall be agreed upon and certified in writing by two or more of such three appraisers. The cost of Lessor's appraiser shall be borne by Lessor and the cost of Lessee's appraiser shall be borne by Lessee. The cost of the third appraiser shall be paid in equal shares by Lessor and Lessee.

The closing of the option purchase and sale for all cash shall take place on the earlier of sixty (60) days from the date of the determination of the purchase price or the last business day before the termination of the term in which the option to purchase is exercised, unless otherwise agreed by the parties in writing.

On April 18, 1997, ACSI, through its attorney, gave due and timely written notice of its intent to exercise the option to purchase. Along with the letter, ASCI enclosed a copy of an appraisal performed by Ronnie Galloway (Galloway) of Galloway Appraisal which indicated a fair market value for the property of \$105,000. ACSI offered to purchase the property for \$105,000. The letter further provided:

Under the terms of the lease, the lessor is under an obligation to immediately attempt to agree upon the fair market value of the property and if the foregoing amount is not agreeable to you or if no other value can be agreed upon with [sic] fifteen (15) days from this notice of exercise of the option, then you must select your own qualified appraiser within the fifteen days and the two appraisers shall select a third qualified appraiser to determine the fair market value, with the cost of the third appraiser to be paid equally by the lessor and lessee.

You therefore have fifteen days from date hereof to either agree upon a fair market value for the property or employ your own

appraiser and notify us of same so that Mr. Galloway and your appraiser may agree upon a third appraiser under the terms of the lease.

Webb responded to ACSI through his attorney on May 2, 1997. Webb expressed his opinion that ACSI's offer was unrealistic when compared to two other contracts on the property which were currently in existence. Webb also indicated that the Galloway appraisal was "6 months old and does not contain realistic comps nor all available current information." Webb offered to "sit down" with ACSI to attempt to agree on a purchase price or, upon failure of that option, to mutually agree on an appraiser.

It appears that some time after his letter of May 2, 1997, Webb apparently contacted Galloway in regard to his earlier appraisal. In a letter dated May 8, 1997, Galloway informed Webb that he was revising his earlier appraisal to show a fair market value of \$195,000 after re-inspecting the property and re-evaluating other available data. It also appears that during this time Webb and ACSI were unable to agree upon a fair market value for the property.

Upon receiving Galloway's revised appraisal and due to the lack of agreement as to fair market value, Webb wrote to ACSI on May 8, 1997, regarding the selection of a mutually agreeable appraiser. The letter stated:

[W]e have decided that we will allow your choice of Ronnie Galloway, MAI's opinion [sic] determine the market value of the subject property. He will of course use current information rather than the dated appraisal which you have previously proposed. Please be advised that we contacted Mr.

Galloway regarding the property in question, and he sent us the enclosed letter stating that the current value of that property is \$195,000.

When ACSI failed to respond to Webb's letter, Webb mailed the following letter on June 23, 1997:

As you are aware, we have not heard from you nor your client since my letter to you regarding our acceptance of your choice of appraisers, and the issuance of his updated appraisal. The current appraised value of the above property is \$195,000. This was confirmed to you by mail on May 8, 1997.

According to the terms of the lease, [ACSI] has 60 days from the determination of the purchase price in which to close for all cash. Therefore, I will expect a communication from you no later than July 7, 1997, to arrange a mutually convenient time to close within the original 60 day period.

ACSI responded to Webb's letter on June 25, 1997. ACSI indicated that it had never agreed to purchase the property for any amount greater than its original offer of \$105,000. ACSI further stated:

According to the applicable terms of the lease, the parties are to attempt to agree upon the fair market value of the property. There has been no agreement. Apparently your client believes the property is worth \$195,000.00 and my client believes it is worth \$105,000.00. We cannot agree upon Mr. Galloway as an independent appraiser due to the discrepancy in the two appraisal figures over a very short period of time.

We are open to the selection of an independent qualified appraiser under the terms of the lease and we are open to suggestions in this regard. The fact that my client based his purchase offer on an appraisal from [Galloway] does not constitute his selection of an "independent appraiser" under the terms of the lease. Of course my client remains willing to purchase the property for \$105,000.00, but otherwise we

will attempt to agree with you on the selection of an independent appraiser other than [Galloway].

It appears that negotiations between ACSI and Webb came to an end at this point.

On November 6, 1997, Webb filed an action in the trial court seeking an order directing ACSI to "specifically perform and purchase the property at the appraised value of \$195,000 pursuant to the terms of the Lease Agreement." Alternatively, Webb asked the trial court to find ACSI had forfeited not only its right to exercise the purchase option, but also its right of tenancy under the lease due to an alleged breach and subsequent failure to cure. In its answer, ACSI argued that Webb was the party in breach of Section 31 of the lease, and asked that (1) Webb's claim be dismissed; and (2) that both parties be ordered to comply with the terms of Section 31 as regarding the selection of the three independent appraisers. Both parties sought an award of attorney fees under Section 20 of the lease.

Each party filed a motion for summary judgment, and it appears that the trial court held oral arguments on the parties' motions. On March 27, 1998, the trial court entered summary judgment in favor of ACSI granting it the relief sought. The trial court further found that as a prevailing party, ACSI was entitled to an award of attorney fees under the terms of the lease and directed it to file an application with the court regarding its requested fee.

Pursuant to the trial court's order, ACSI filed its motion for fees and costs on April 2, 1998. In his affidavit,

counsel for ASCI sought a total fee of \$2,162.50 based on an hourly rate of \$125. Counsel further informed the trial court that original time records and billing statements sent to ACSI were available for inspection. Finally, ASCI's counsel stated that "[t]he hourly rate is fair and reasonable in light of undersigned counsel's experience and hourly rates paid attorneys with similar experience in the Louisville legal community." Aside from the affidavit of counsel, no further documentation was attached in support of counsel's statements.

Webb responded to ACSI's motion with a motion to set aside and amend judgment filed on April 6, 1998. Webb argued that attorney fees were not warranted because "a citizen should not be punished for asking the court to determine where in a series of steps the parties are."

In an order entered June 8, 1998, the trial court denied both ACSI's motion for attorney fees and Webb's motion to set aside and amend judgment. This appeal and cross appeal followed.

Before we address the parties' arguments, we must rule on a motion filed with this Court which was passed to the merits by a three judge motion panel. Webb filed a motion to exclude three letters dated May 29, 1998, June 8, 1998, and June 25, 1998 from the record on appeal. Although we do not have copies of the three letters, it appears that they show both parties' compliance with the trial court's entry of summary judgment. As these documents were not before the trial court at the time the order granting summary judgment was entered and therefore have no

relevance as to the question of whether the trial court's order was erroneous, Webb's motion to exclude the letters is granted. Furthermore, footnotes 4 and 6 as well as the sentence appearing on the last line of page nine and the first five lines of page ten of ACSI's brief on appeal are hereby ordered stricken as those items refer to the content of the letters in question.

Webb's Appeal

Webb contends that given the facts established by the correspondence in this case, it was improper for the trial court to enter summary judgment in favor of ACSI. Webb alleges that ACSI breach the terms of the lease by (1) failing to attempt to immediately agree upon the fair market value of the property; and (2) failing to attempt to agree upon an independent qualified appraiser once a fair market value could not be agreed upon. Webb contends that because ACSI first breached the contract, it cannot now complain if he refuses to perform or subsequently breaches the contract himself.

We agree with Webb's contention that "a party who commits the first breach of a contract is deprived of the right to complain of a subsequent breach by the other party." Williamson v. Ingram, Ky., 49 S.W.2d 1005, 1006 (1932). However, we agree with the trial court that it was Webb and not ACSI who was in breach.

Section 31 of the lease clearly provides that upon ACSI's exercise of the option to purchase, the parties are to "immediately attempt to agree upon the then fair market value" of the property. If the parties are unable to agree on a fair

market value, they are then to attempt to agree on an "independent qualified appraiser." If the parties are unable to agree on an appraiser within fifteen days after ACSI gave written notice of its intent to exercise the option to purchase, each party is then to select its own appraiser and those appraisers are to select a third appraiser with the fair market value being that which is agreed upon by two of the three appraisers.

ACSI gave written notice of its intent to exercise the purchase option on April 18, 1997, and further made an offer of \$105,000 based on Galloway's appraisal. It is clear from the language of ACSI's letter that it recommended that either Galloway be used as the agreed-upon appraiser or that Webb choose his own appraiser within fifteen days and so notify ACSI of his selection. Webb responded within the fifteen day period by his letter of May 2, 1997, in which he both declined ACSI's offer and disavowed Galloway's appraisal.

At that point, instead of selecting his own appraiser in accordance with the terms of the lease due to the parties' inability to agree on an appraiser, Webb contacted Galloway and had him revise his earlier appraisal. Upon receiving Galloway's revised appraisal showing a fair market value of \$195,000, Webb changed his mind about agreeing to the use of Galloway as the agreed-upon appraiser and then tried to force his choice on ACSI. Thus, it is clearly Webb who has breached the terms of the lease due to the fact that he failed to select his own independent appraiser after refusing to acquiesce in ACSI's initial choice of Galloway. As Webb was clearly in breach of the terms of the

lease, the trial court did not err in finding such and entering summary judgment in favor of ACSI.

ACSI'S CROSS-APPEAL

ACSI appeals from the trial court's denial of its motion for attorney fees. ACSI contends that it was clearly entitled to attorney fees under the terms of the lease and that the trial court erred in failing to enforce what the parties originally agreed to. We disagree.

Although attorney's fees are generally the sole responsibility of each individual party, contractual provisions allowing for an award of attorney fees to the successful party in the event of litigation are generally allowable and enforceable. Bernard v. Russell County Air Board, Ky. App., 747 S.W.2d 610, 612 (1987). "However, this rule does not, we believe, abolish the equitable rule that an award of counsel fees is within the discretion of the court depending on the circumstances of each particular case." Kentucky Bank v. Ag Services, Inc., Ky. App., 663 S.W.2d 754, 755 (1984). The decision as to whether an award of attorney's fees is warranted in this case is vested in the sound discretion of the trial court and will not be reversed unless it is shown that the discretion was, in fact, abused. Giacalone v. Giacalone, Ky. App., 876 S.W.2d 616, 620-621 (1994).

ACSI is correct that under Section 20 of the lease the prevailing party is entitled to an award of "reasonable" attorney fees in the event of litigation. However, in reviewing ACSI's motion for attorney fees which was filed with the trial court we note that it was not supported by any evidence which would tend

to show that either the hourly rate of \$125 or the total amount of \$2,162.50 sought by counsel for ACSI was reasonable. Apparently ACSI has now realized its mistake because in its brief on appeal it argues that remand is necessary to allow "counsel to submit an Affidavit and records necessary to establish the amount of attorney's fees . . . which it should be awarded as the prevailing party under the Lease Agreement." The time for ACSI to present such evidence was when it submitted its original motion. It is not entitled to a second chance to remedy a mistake of its own making. Given the lack of evidence, the trial court did not abuse its discretion in failing to award attorney fees in this case.

Having considered the parties' arguments on appeal, the orders of the Jefferson Circuit Court are affirmed. Furthermore, Webb's motion to exclude the letters of May 29, 1998, June 8, 1998, and June 25, 1998, from the record on appeal is granted. Footnotes four and six, as well as the sentence appearing on pages nine and ten of ACSI's brief on appeal, are ordered stricken as those items refer to the content of the above-mentioned letters.

ALL CONCUR.

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

ENTERED: February 4, 2000

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