

RENDERED: JUNE 16, 2017; 10:00 A.M.  
 NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000444-MR

SANDRA C. BROOKS  
and ADMIRAL JOSEPH JACKSON

CROSS-APPELLANTS

CROSS-APPEAL FROM FAYETTE CIRCUIT COURT  
v. HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 11-CI-04630

ALICIA CHANEL SULLIVAN  
and JOSEPH LEE SULLIVAN

CROSS-APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, COMBS AND D. LAMBERT, JUDGES.

COMBS, JUDGE: This case arises from landlord - tenant law and has an unusual procedural history. Prior to this appeal, Alicia Chanel Sullivan and Joseph Lee Sullivan appealed a judgment of the Fayette Circuit Court that had been entered in favor of Sandra C. Brooks and Admiral Joseph Jackson, their landlords. Brooks

and Jackson cross-appealed. The Sullivans' appeal was dismissed. The remaining cross-appeal is now before us. After our review, we affirm.

Admiral Joseph Jackson is Brooks's uncle; Joseph Lee Sullivan is Brooks's nephew. Alicia Sullivan is Joseph Sullivan's wife. Brooks and Jackson own a residence at 1058 Redwood Drive in Lexington. The Sullivans moved into the residence in May 2006.

On August 15, 2011, Brooks and Jackson filed a forcible detainer action in Fayette District Court. The Sullivans appeared and contended that the agreement into which they had entered with Brooks and Jackson in May 2006 was a land contract rather than a lease of the residence. Upon that basis, the district court dismissed the eviction action filed by Brooks and Jackson.

On September 9, 2011, Brooks and Jackson filed a foreclosure action against the Sullivans in Fayette Circuit Court. However, Brooks and Jackson argued that the parties' relationship was governed by a residential lease agreement that could not be validly construed as a land contract. Brooks and Jackson alleged that regardless of the nature of the agreement, the Sullivans had failed to meet their monthly obligation for August and September 2011. In their complaint, Brooks and Jackson sought to recover possession of the property, past-due rent, late fees, costs, and attorney fees.

The Sullivans answered the complaint and filed a crossclaim alleging that they held an equitable interest in the property. Brooks and Jackson replied and denied that the Sullivans retained **any** interest in the property. By order entered

September 26, 2011, the circuit court granted Brooks and Jackson possession of the residence.

A year later, the Fayette Circuit Court conducted a bench trial. On January 10, 2013, the trial court's findings of fact, conclusions of law, and judgment were entered. These were based upon the proposed findings of fact and conclusions of law propounded by Brooks and Jackson.

In its judgment, the trial court concluded that the parties had entered into a lease agreement and not a land contract. It found that the Sullivans had complied with the terms of the lease agreement through July 2011; that their rent payments were late in April, May, June, and July 2011; that the Sullivans had maintained possession of the leased premises until November 2011; that their water use at the property between August 16 and August 19 was excessive and inconsistent with prior water use; that the premises were damaged by water; and that the costs of repair to the home totaled \$39,578.87. In reliance on their submission, the trial court concluded that Brooks and Jackson were entitled to recover \$39,578.87 from the Sullivans.

The court denied the Sullivans' subsequent motion for a Judgement Notwithstanding the Verdict (JNOV) and their motion to alter, amend, or vacate. The Sullivans appealed.

Brooks and Jackson filed a cross-appeal challenging the trial court's failure to award them further damages representing unpaid rent and late charges in the amount of \$5,332.10 and to award them attorney fees based upon the Sullivans'

bad faith destruction of the property. By order of this court, the cross-appeal was abated. Ultimately, the Sullivans' appeal was dismissed, and the cross-appeal was returned to our active docket in February 2016. That cross-appeal is now before us.

The Sullivans have not filed a cross-appellee brief. CR<sup>1</sup> 76.12(8)(c) provides a range of penalties for a party's failure to do so. We may

- (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

CR 76.12 (8)(c). In our discretion, we elect to accept the statement of the facts and issues as presented by Brooks and Jackson in their brief.

In their cross-appeal, Brooks and Jackson argue first that the trial court erred by failing to make findings of fact and conclusions of law concerning unpaid rent for the months of April 2011 through February 2012 and the accrued late charges. They contend that the matter must be remanded on this basis. We disagree.

In their trial memorandum, Brooks and Jackson contended that they were entitled to a judgment against the Sullivans in the amount of \$38,928.87, plus punitive damages in an unstated amount. In their proposed findings of fact and conclusions of law, Brooks and Jackson again claimed that they were entitled to recover \$38,928.87 plus an additional \$650.00 (an amount reflected in an inadvertently omitted invoice) for a total of \$39,578.87 for repairs to the property;

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<sup>1</sup> Kentucky Rule of Civil Procedure.

a sum reflecting punitive damages (again in an unstated amount); and \$550 representing late fees. Again, the trial court awarded Brooks and Jackson \$39,578.87.

We have reviewed the evidence presented at trial. It does not support a finding that the Sullivans were obligated -- yet failed -- to pay rent from April 2011 through February 2012. Nor does the evidence indicate unequivocally that a fee of \$50.00 would apply to any late rental payments. More importantly, our civil rules provide that a final judgment shall not be reversed or remanded based upon the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure has been brought to the attention of the trial court by a written request for a finding on that issue or by a motion filed pursuant to CR 52.02.; CR 52.04. The failure of Brooks and Jackson to request specific findings concerning their contention that the Sullivans were obligated -- yet failed -- to pay rent from April 2011 through February 2012 constitutes a waiver of the issue on appeal. This result is especially required where the court's judgment conformed to the findings of fact and conclusions of law proposed by Brooks and Jackson themselves. Consequently, the trial court's judgment is not subject to reversal or an order remanding upon this basis.

Next, Brooks and Jackson argue that the trial court erred by failing to award them attorney's fees as a sanction against the Sullivans for their intentional and willful destruction of the rental property. Again, we disagree.

Attorney fees are generally not recoverable without a specific contractual provision or a fee-shifting statute. *Golden Foods, Inc. v. Louisville & Jefferson County Metro. Sewer Dist.*, 240 S.W.3d 679 (Ky. App. 2007). Nevertheless, in *Lake Village Water Ass'n, Inc. v. Sorrell*, 815 S.W.2d 418 (Ky. App. 1991), we noted that our courts have an inherent authority to award attorney fees in equity as a sanction for bad faith conduct. However, a court's decision to award attorney fees as a sanction for bad faith conduct is always discretionary. Even upon a finding of bad faith, the trial court may elect *not* to make an equitable award of attorney fees. The trial court did not abuse its broad discretion in this case by deciding not to award attorney fees.

We affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven F. Vicroy  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Robin C. Thorogood  
Lexington, Kentucky