[Cite as *Strip Delaware, LLC v. Landry's Restaurants, Inc.*, 2010-Ohio-6403.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE STRIP DELAWARE, LLC Plaintiff-ppellee/Cross-appellant -vs- LANDRY'S RESTAURANTS, INC. ET AL. Defendant-Appellant/Cross-appellee	JUDGES: Hon. Julie A. Edwards, P.J. Hon. William B. Hoffman, J. Hon. Patricia A. Delaney, J. Case No. 2010CA00092, 2010CA00121, 2010CA00146 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Common Pleas Court, Case No. 2008CV3288
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 27, 2010

APPEARANCES:

For Plaintiff-appellee/Cross-appellant	For Defendant-Appellant/Cross-appellee
RANDOLPH SNOW Black McCuskey Souers & Arbaugh 220 Market Ave. South 1000 Unizan Plaza Canton, Ohio 44702	TERRENCE L. SEEBERGER NADA G. FADDOUL Stark & Knoll Co., LPA 3475 Ridgewood Road Akron, Ohio 44333
And	
MICHAEL R. STAVNICKY Singerman, Mills, Desberg & Kauntz Co., L.P.A. 3333 Richmond Road, #370 Beachwood, Ohio 44122	

Hoffman, J.

{¶1} Defendant-Appellant/Cross-appellee Landry's Restaurants, Inc. appeals the April 23, 2010 and May 14, 2010 judgment entries of the Stark County Court of Common Pleas in favor of Plaintiff-appellee/Cross-appellant The Strip Delaware, LLC. On cross-appeal, Appellee/Cross-appellant The Strip Delaware, LLC. appeals the amount of attorney fees awarded in the trial court's April 23, 2010 Judgment Entry.

STATEMENT OF THE FACTS AND CASE

{¶2} The Strip Delaware, LLC (hereinafter "Landlord") owns a parcel of commercial real estate known as "The Strip" in Jackson Township, Stark County, Ohio. In 1997, Landry's Seafood House-Ohio, Inc., an Ohio Corporation (hereinafter "Tenant") entered into a lease agreement with Landlord to operate a "Joe's Crab Shack" restaurant. Landry's Seafood Restaurants, Inc., a Delaware Corporation, (hereinafter "Guarantor") executed a Guaranty Agreement guaranteeing the full performance of the Lease by Tenant. Tenant and Guarantor are collectively hereinafter referred to as "Landry's."

{¶3} In 2006, Guarantor sold the majority of its Joe's Crab Shack restaurants, and as a result, closed the restaurant at The Strip on November 17, 2006. Landlord then notified Tenant it was in default of the lease agreement, which required it to continuously operate at the leased premises. On December 22, 2006, Landlord repossessed the leased premises, changing the locks and posting notices on the doors. All the equipment and furnishings Tenant used to operate its restaurant remained on the premises. On December 29, 2006, Landlord terminated the lease with Tenant, and requested it remove its property.

{¶4} Tenant disputed Landlord's decision, and on February 1, 2007, Landlord filed a complaint for declaratory judgment. The trial court granted summary judgment, finding Tenant and Guarantor violated the terms of the lease agreement, the agreement was terminated as a result of the default, and Landlord was entitled to self-help repossession of the leased premises.

{¶5} Tenant and Guarantor appealed the matter to this court in *Stark Common, Ltd. v. Landry's Seafood House Ohio, Inc.*, Stark App. No.2007-CA00240. Via Judgment Entry of April 14, 2008, this court affirmed the trial court's decision.

{¶6} Thereafter, Landlord filed a complaint for money damages. Following a bench trial, the trial court, via Judgment Entry of June 9, 2008, found Tenant and Guarantor were liable as a holdover tenant from December 22, 2006 through April 14, 2008, at 150 percent of the base rent (the rate provided for in the lease), together with applicable taxes and charges. The court's June 9, 2008 Judgment Entry states,

{¶7} "The Court finds that Plaintiff is entitled to damages by way of rents, attorney fees, taxes, insurance, and shopping center expense pro-ration.***

{¶8} "Pursuant to the lease judgment of reasonable attorney fees to Plaintiff and against Defendant is granted with the amount to be determined based upon evidence to be presented under this case, Case No. 2007CV00522 and 2007CV00240. Case No. 2007CV0522 and this case are consolidated for the purpose of attorney fees due in the interest of judicial economy."

{¶9} The trial court further found Landlord had not violated its duty to mitigate damages.

{¶10} The trial court, via Judgment Entry of July 7, 2008, awarded Landlord $209,312.99, plus accrued interest in the amount of $24,744.05, plus any additional accrued interest from the date of the judgment entry. Landry's was ordered to pay all costs and Landlord's attorney fees.

{¶11} On July 18, 2008 and July 25, 2008, the trial court held hearings on the issue of attorney fees. Via Judgment Entry of September 12, 2008, the trial court awarded Landlord attorney fees in the amount of $147,632.30.

{¶12} Via Judgment Entry of March 9, 2009, this Court determined Tenant was not a holdover tenant as defined in the lease and by case law, and the trial court erred in using the holdover clause of the lease as the basis of its computation of damages. This Court affirmed the trial court's holding as to all the assignments of error pertaining to Tenant and Guarantor's liability, but remanded the matter to the trial court to recompute damages. See, *The Strip Delaware, LLC. v. Landry's Restaurants, Inc. et al.*, No. 2008 CA 00146, No. 2008 CA 00160.

{¶13} Via Judgment Entry of August 3, 2009, this Court reversed the trial court's September 12, 2008 Judgment Entry, holding Landlord was not entitled to attorney fees relative to the original declaratory judgment action against Tenant. See, *Stark Commons Ltd. v. Landry's Seafood House-Ohio, Inc., et al.*, No. 2008 CA 00206.

{¶14} Via Judgment Entry of April 23, 2010, the trial court found Landlord to be the prevailing party for the purposes of awarding attorney fees, and ordered Landry's pay attorney fees in the amount of $133,908.66, plus interest at the rate of 18% per the terms of the lease. Landlord had requested attorney fees in the amount of $140,735.41, which amount did not include fees related to the original declaratory judgment action.

The trial court reduced the fees requested by dividing the specific fees relating to the March 9, 2009 appeal to this Court in which Landry's was partially successful on the issue of holdover tenancy.

{¶15} Via Judgment Entry of May 14, 2010, the trial court, upon motion of Landlord, ordered payment on the bond relating to the attorney fees.

{¶16} Landry's now appeals, assigning as error:

{¶17} "I. THE TRIAL COURT ERRED TO THE EXTENT IT HELD APPELLANT LANDRY'S RESTAURANTS, INC. LIABLE FOR ATTORNEY FEES, WHERE NEITHER THE LEASE, TO WHICH IT IS NOT A PARTY, OR THE GUARANTY AGREEMENT, AUTHORIZE ATTORNEY FEES AGAINST THIS APPELLANT.

{¶18} "II. THE TRIAL COURT ERRED BY FAILING TO DETERMINE THAT STRIP DELAWARE WAS NOT A 'PREVAILING' PARTY WITH RESPECT TO THE APPEAL IN CASE NO. 2008-CA-00146 AND 00160, NOR IN CASE NO. 2009-CA-00206, BEFORE THIS COURT.

{¶19} "III. THE TRIAL COURT ERRED BY DETERMINING THAT STRIP DELAWARE WAS A PREVAILING PARTY WITH RESPECT TO THE ATTORNEY FEE HEARING OF JULY 18 AND 25, 2008, WHERE AS A RESULT OF THIS COURT'S DECISION IN CASE NO. 2008-CA-00206, STRIP DELAWARE WAS NOT A PREVAILING PARTY AT THAT HEARING INSOFAR AS IT SOUGHT ATTORNEY FEES FOR THE DECLARATORY JUDGMENT ACTION, AND THIS ACTION SHOULD BE REMANDED FOR A REDUCTION IN THE ATTORNEY FEES ALLOWABLE WITH RESPECT TO THAT PROCEEDING.

{¶20} "IV. THE TRIAL COURT ERRED WHERE IT DETERMINED THAT STRIP DELAWARE IS ENTITLED TO EIGHTEEN PERCENT INTEREST UPON UNPAID ATTORNEY FEES, AND BY FAILING TO HOLD THAT INTEREST BEGINS TO ACCRUE ONLY FROM THE DATE OF THE JUDGMENT ENTRY.

{¶21} "V. THE TRIAL COURT ERRED BY ORDERING THAT STRIP DELAWARE BE PAID $172,074.81 FROM APPELLANTS' BONDING COMPANY WHERE THE BOND THAT WAS ON FILE WAS POSTED TO SECURE THE DAMAGE JUDGMENT AND NOT A LATER ATTORNEY FEE AWARD, AND WHERE THE DAMAGES JUDGMENT HAD BEEN PREVIOUSLY PAID."

I, II and III.

{¶22} Landry's first three assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶23} Section 3.4 of the Lease Agreement reads,

{¶24} "Section 3.4 Additional Payments.

{¶25} "(a) Except as expressly provided to be paid by Landlord, Tenant shall pay any and all rents and sums of money or charges required to be paid by tenant under this Lease (collectively the "Rent") promptly when the same are due without demand, set off or deduction. Tenant's failure to pay any such amounts or charges when due shall carry with it the same consequences as tenant's failure to pay Rent. All such amounts or charges shall be payable to Landlord at the place where the Minimum Rent is payable."

{¶26} Section 14.10 of the Lease Agreement reads:

{¶27} "Section 14.10 Legal Expenses. In case suit shall be brought for recovery of possession of the Leased Premises for the recovery of rent or any other amount due under the provisions of this Lease, or because of the breach of any other covenant herein contained on the part of either party to be kept or performed, the losing party shall pay to the prevailing party all actual expenses incurred therefor, including reasonable attorneys' fees and court costs."

{¶28} Pursuant to the above provisions, we find the payment of attorney fees is included under the terms of the Lease collectively as "Rent" because "Rent" includes money or charges required to be paid by Tenant under Section 14.10 of the Lease.

{¶29} The Guaranty Agreement executed by Guarantor reads,

{¶30} "('Guarantor') hereby unconditionally guarantees to the Landlord, ***the full performance and observance of all the covenants, conditions and agreements therein provided to be performed and observed by the Tenant, ***

{¶31} "If, at any time, default shall be made by the Tenant in the performance or observance of any of the terms, covenants or conditions required to be performed or observed by tenant under the Lease, the Guarantor will keep, perform and observe the same in the place and stead of the Tenant. Guarantor also guarantees the payment to Landlord of any monies payable by Tenant under the provisions of the Lease, or in connection with or arising out of any provision of the Lease, in law or equity, including, without limitation, any warranty, indemnity or covenant of Tenant under this agreement and this Guaranty shall be primary and not as a guarantor, and that in any right of action which shall accrue to the Landlord under, in connection with or arising out of the within Lease, the Landlord may, at its option, proceed against any judgment against the

Tenant. The heading of this agreement and the words "Guaranty" and "guarantees" shall not be interpreted to limit the aforesaid primary obligation of Guarantor under this Lease."

{¶32} As Guarantor of the Lease Agreement, Landry's guarantees the payment of "any monies payable by Tenant under the provisions of the Lease, or in connection with or arising out of the Lease." The Lease Agreement provides, in an action to recover rent, the losing party shall pay the prevailing party expenses, including attorney fees. Further, as noted supra, the Lease defines "Rent" as "any and all sums of money required to be paid by Tenant under the terms of the Lease." The Lease requires Landry's to pay attorney fees, if it is not the prevailing party, and such fees are considered collectively as "Rent."

{¶33} The trial court's April 23, 2010 Judgment Entry states,

{¶34} "Four appeals were initiated by the defendant, three which were related to the case sub judice. However, it appears that the defendant's only level of success on appeal occurred on April 20, 2009 in Case No. 2008CA00206 where the Court of Appeals affirmed the trial court's decision as to liability in the second appeal but remanded to recalculate the damage amount. As a result, the Court finds the only fees in question to be those on the appeal issue that was reversed. This consisted of the fees on November 25 and November 26, 2008 of $1,483.50 and $559.00; December 1, 2008 to December 29, 2008 totaling $8,888.50; and January 8, 2009 through January 31, 2009 of $2,722.50. The cumulative total of fees in question is $13,653.50.

{¶35} "The Court is reducing those fees for the appeal by fifty percent due to the Defendant's partial claim of success in the appeal."

{¶36} The decision of whether to award attorney fees rests in the sound discretion of the court and will not be overturned on appeal absent an abuse of discretion." *Moore v. Moore,* 175 Ohio App.3d 1, 2008-Ohio-255, ¶ 81, 884 N.E.2d 1113.

{¶37} A prevailing party is generally the party "in whose favor the decision or verdict is rendered and judgment entered." *Hagemeyer v. Sadowski* (1993), 86 Ohio App.3d 563, 566, quoting *Yetzer v. Henderson* (June 4, 1981), 5th Dist. No. CA-1967. See, also, *Falther v. Toney,* 5th Dist. No. 05 CA 32, 2005-Ohio-5954.

{¶38} The Eleventh District Court of Appeals has elaborated on this definition:

{¶39} "The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered. * * * This may be the party prevailing in interest, and not necessarily the prevailing person. To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who had made a claim against the other, has successfully maintained it." *Lehto v. Sankey* (June 29, 2001), 11th Dist. No. 99-T-0137, at *7, as cited by the Ninth District Court of Appeals in *Moga v. Crawford* 2008-Ohio-2155, L 1961216.

{¶40} As set forth in the statement of the case above, on March 9, 2009, this Court affirmed the trial court's finding as to Landry's liability, but remanded the matter to the trial court on the limited issue of recalculation of damages, after finding Landry's was not a holdover tenant under the terms of the lease. The trial court properly

recalculated said damages. The trial court determined Landry's was a prevailing party in the March 9, 2009 appeal on this limited issue, and reduced the amount of the attorney fees specifically relating to the appeal by fifty-percent. We find the trial court acted within its discretion in equitably awarding less than the full amount of attorney fees relating to the March 9, 2009, having found both parties prevailed on an issue assigned as error in the appeal. Accordingly, we do not find the trial court abused its discretion in determining the amount of the attorney fee award.

{¶41} Landry's first, second and third assignments of error are overruled.

IV.

{¶42} Landry's fourth assignment of error argues the trial court, via Judgment Entry of March 22, 2010,[1] erred in determining Landlord is entitled to eighteen percent interest upon unpaid attorney fees, and in failing to find the interest accrues from the date of the judgment entry.

{¶43} Section 3.4 of the Lease Agreement governs "Additional Payments" and reads,

{¶44} "(b) Any payment due from Tenant to Landlord not received by Landlord on the date herein specified to be paid shall bear interest from the date such payment is due to the date of actual payment at the rate of eighteen percent (18%) per annum or the highest lawful rate of interest permitted in the State, whichever rate of interest is lower.***"

[1] On April 23, 2010, the trial court entered a nunc pro tunc entry correcting the case number under which the March 22, 2010 Judgment Entry was filed (No. 2009-CV-02483) to read No. 2007-CV-03288.

{¶45} As discussed in our analysis and disposition of Landry's first three assignments of error, attorney fees fall within the definition of "Rent" as set forth in the Lease Agreement. Therefore, the trial court did not err in applying the 18% interest rate as set forth in the agreement.

{¶46} The Lease clearly states the monies shall be paid when due. We conclude the monies relative to the attorney fees were due on the date of the trial court's original judgment entry granting attorney fees, June 9, 2008, as set forth in the statement of the facts and case, above.

{¶47} Accordingly, the fourth assignment of error is overruled.

V.

{¶48} In the fifth assignment of error, Landry's maintains the trial court erred in ordering payment of the bond on the attorney fee award.

{¶49} Landlord sought payment on the bond which had been filed in November of 2008, and the trial court ordered said payment. Throughout the pendency of these proceedings, Landry's has issued a number of bonds relative to the compensatory damages award in the amount of $300,000.00, and in the amount of $250,000.00 as to the attorney fees award.

{¶50} Upon review of the record, Landry's has not demonstrated error in the trial court's application of the bond to the payment of attorney fees, and the fifth assignment of error is overruled.

CROSS-APPEAL

{¶51} On cross-appeal, Landlord assigns as error:

{¶52} "I. THE TRIAL COURT ERRED IN FAILING TO AWARD APPELLEE ALL ATTORNEYS' FEES INCURRED."

{¶53} Landlord asserts the trial court erred in failing to award the entirety of attorney fees incurred. Specifically, Landlord maintains it was the "prevailing party" under the terms of the lease; therefore, entitled to all attorney fees incurred in the defense of Landry's appeals in this action.

{¶54} As set forth in our analysis and disposition of Landry's first three assigned errors, we find the trial court did not abuse its discretion in determining Landlord was the prevailing party as to Landry's liability, and in then determining Landry's succeeded on appeal in garnering a recalculation damages, following this Court's determination Landry's was not a holdover tenant. We previously found the trial court did not abuse its discretion in reducing the amount of the award.

{¶55} Landlord's assigned error is overruled.

By: Hoffman, J.

Edwards, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE STRIP DELAWARE, LLC	:	
Plaintiff-appellee/Cross-appellant	:	
-vs-	:	JUDGMENT ENTRY
LANDRY'S RESTAURANTS, INC. ET AL.	:	Case No. 2010CA00092
Defendant-Appellant/Cross-appellee	:	

For the reasons stated in our accompanying Opinion, the April 23, 2010 and May 14, 2010 Judgment Entries of the Stark County Court of Common Pleas are affirmed. Costs to Appellant/Cross-appellee on the direct appeal, and to Appellee/Cross-appellant on the cross-appeal.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE STRIP DELAWARE, LLC	:	
Plaintiff-appellee/Cross-appellant	:	
-vs-	:	JUDGMENT ENTRY
LANDRY'S RESTAURANTS, INC. ET AL.	:	Case No. 2010CA00121
Defendant-Appellant/Cross-appellee	:	

For the reasons stated in our accompanying Opinion, the April 23, 2010 and May 14, 2010 Judgment Entries of the Stark County Court of Common Pleas are affirmed. Costs to Appellant/Cross-appellee on the direct appeal, and to Appellee/Cross-appellant on the cross-appeal.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE STRIP DELAWARE, LLC	:	
Plaintiff-appellee/Cross-appellant	:	
-vs-	:	JUDGMENT ENTRY
LANDRY'S RESTAURANTS, INC. ET AL.	:	Case No. 2010CA00146
Defendant-Appellant/Cross-appellee	:	

For the reasons stated in our accompanying Opinion, the April 23, 2010 and May 14, 2010 Judgment Entries of the Stark County Court of Common Pleas are affirmed. Costs to Appellant/Cross-appellee on the direct appeal, and to Appellee/Cross-appellant on the cross-appeal.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY