

NO. 12-14-00365-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

***EDOM CORNER, LLC AND EARL
BERRY, JR.,
APPELLANT***

§ ***APPEAL FROM THE 294TH***

V.

§ ***JUDICIAL DISTRICT COURT***

***IT'S THE BERRY'S, LLC,
APPELLEE***

§ ***VAN ZANDT COUNTY, TEXAS***

MEMORANDUM OPINION

Edom Corner, LLC and Earl Berry, Jr. (collectively Edom Corner unless otherwise noted) appeal the trial court's judgment awarding attorney's fees as compensatory damages to It's the Berry's, LLC (ITB). Edom Corner raises four issues on appeal. We reverse and render judgment that ITB take nothing.

BACKGROUND

In 2004, Edom Corner, lessor, and ITB, lessee, executed a commercial lease in Edom, Texas. In 2006, the parties engaged in a dispute, which ultimately resulted in several lawsuits regarding the lease. The litigation consisted of three separate forcible entry and detainer suits, two garnishment actions, a mandamus proceeding regarding the supersedeas bond amount in the first forcible entry and detainer suit, a mandamus proceeding to disqualify counsel, and an injunction action.¹ In the prior suits, the parties either did not seek attorney's fees, sought

¹ See generally *It's The Berrys, LLC v. Edom Corner, LLC*, 271 S.W.3d 765 (Tex. App.—Amarillo 2008, no pet.) (appeal of first forcible entry and detainer action); *In re It's The Berry's, LLC*, Cause No. 12-06-00298-CV, 2006 WL 3020353 (Tex. App.—Tyler Oct. 25, 2006, orig. proceeding) (mem. op.) (mandamus proceeding regarding supersedeas bond).

attorney's fees that were ultimately denied, or were awarded attorney's fees but the award was reversed on appeal.

ITB filed the instant suit that is the subject of this appeal. In its petition, ITB asserted a breach of contract action, claiming that Edom Corner failed to pay ITB's attorney's fees in accordance with a provision in the lease that "[i]f either party retains an attorney to enforce this Lease, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs." ITB contended that it was the prevailing party in the prior litigation between the parties, and that it was entitled to recover the attorney's fees it incurred in all of the prior litigation.² Finally, ITB sought the attorney's fees it incurred in prosecuting this suit under Section 38.001 of the Texas Civil Practice and Remedies Code.

The parties filed competing motions for summary judgment. They also filed a "joint motion for determination of controlling questions of law and for interlocutory appeal," which the trial court granted, but we ultimately denied.³ After a hearing, the trial court granted ITB's motion and denied Edom Corner's motion. In its judgment, the trial court awarded ITB \$135,283.42 for attorney's fees it incurred in the prior suits, and \$40,000.00 for attorney's fees it incurred incident to prosecuting this suit under Section 38.001. This appeal followed.

SUMMARY JUDGMENT

In its fourth issue, Edom Corner contends that the trial court erred in granting ITB's motion for summary judgment and awarding it the attorney's fees it incurred in the prior litigation between them.

Standard of Review

Appellate courts review a trial court's decision to grant summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When both sides move for summary judgment on the same issue and the trial court grants one motion and denies the other, we review the summary judgment evidence presented by both sides, determine all questions

² Prior to filing suit, ITB presented its claim for attorney's fees to Edom Corner.

³ See generally *Edom Corner, LLC v. It's the Berry's, LLC*, Cause No. 12-14-00131-CV, 2014 WL 2609732 (Tex. App.—Tyler June 11, 2014) (per curiam), *reh'g granted* (Sept. 18, 2014), *on reh'g*, 2015 WL 268863 (Tex. App.—Tyler Jan. 21, 2015, no pet.) (per curiam).

presented, and render the judgment the trial court should have rendered. *SeaBright Ins. Co. v. Lopez*, 465 S.W.3d 637, 641-42 (Tex. 2015).

Generally, we review a trial court's award of attorney's fees under an abuse of discretion standard. See *Ridge Oil Co., Inc. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 163 (Tex. 2004). Here, however, the issue is whether Texas law recognizes a particular basis for the recovery of attorney's fees, which is a question of law that we review de novo. See *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012) (appellate courts review questions of law de novo); *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999) (per curiam) (availability of attorney's fees under particular statute is question of law).

Applicable Law

Texas law distinguishes between recovery of attorney's fees *as* actual damages and recovery of attorney's fees *incident to* recovery of other actual damages. See *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 173 (Tex. 2013) (noting difference between compensation owed for underlying harm and fees awarded for counsel's services) (citing *Haden v. David J. Sacks, P.C.*, 222 S.W.3d 580, 597 (Tex. App.—Houston [1st Dist.] 2007) (op. on reh'g), *rev'd in part on other grounds*, 263 S.W.3d 919 (Tex. 2008) (per curiam)).

Attorney's fees are ordinarily not recoverable as actual damages in and of themselves. See *Tana Oil & Gas Corp. v. McCall*, 104 S.W.3d 80, 81-82 (Tex. 2003) (holding that attorneys, who sought to recover damages based solely on value of time and costs incurred in defending claims, affirmatively precluded themselves from any recovery); *Worldwide Asset Purchasing, L.L.C. v. Rent-A-Ctr. E., Inc.*, 290 S.W.3d 554, 570 (Tex. App.—Dallas 2009, no pet.). However, attorney's fees may be recovered as actual damages in limited circumstances, such as for the recovery of unpaid legal bills arising from a client's contract with his lawyer, or in a legal malpractice case for the attorney's fees incurred by the plaintiff in the underlying suit. See *In re Nalle Plastics*, 406 S.W.3d 168, 174-75 (Tex. 2013) (unpaid legal bills); *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 111 (Tex. 2009) (legal malpractice cases).

When attorney's fees are recovered incident to other actual damages, Texas follows the American Rule, which prohibits attorney's fee awards unless specifically authorized by contract or statute. *MBM Fin. Corp. v. Woodlands Oper. Co.*, 292 S.W.3d 660, 663, 669 (Tex. 2009). "Suits cannot be maintained solely for the attorney's fees [when they are recovered incident to

other actual damages]; a client must gain something before attorney's fees can be awarded." *Id.* at 663. One commonly utilized statute authorizes the recovery of attorney's fees in a suit on a contract. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (West 2015). A party may not recover attorney's fees on a breach of contract claim under Chapter 38 when the party fails to recover damages. *See In re Nalle Plastics*, 406 S.W.3d at 172-73 (Tex. 2013) (citing *MBM Fin. Corp.*, 292 S.W.3d at 666); *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 201 (Tex. 2004).

Discussion

The trial court found that ITB was the prevailing party in the prior litigation, and that in accordance with the terms of the lease, it was entitled to \$135,283.42 for attorney's fees. The trial court did not expressly state in its findings whether those fees were awarded as actual damages, or separately, incidental to the prosecution of those suits.

ITB cites *In re Nalle Plastics* to support its position that the trial court was authorized to award attorney's fees as actual damages because of the lease provision authorizing the award of attorney's fees to the prevailing party in litigation to enforce the lease. *See In re Nalle Plastics*, 406 S.W.3d at 175 ("While attorney's fees incurred in prosecuting this claim are not compensatory damages, the fees comprising the breach-of-contract damages are."). However, the court went on to state that "[i]f the *underlying* suit concerns a claim for attorney's fees as an element of damages, as with [the law firm's] claim for unpaid fees here, then those fees may properly be included in a judge or jury's compensatory damages award." *Id.* It is clear that the court limited an award of attorney's fees as actual damages to those circumstances where Texas law has recognized them as such. The circumstances in this case are not within the narrow class of cases authorizing an award of attorney's fees as actual damages, such as a suit by a law firm to collect unpaid legal bills against its client under their contract. *See id.* at 174-75. In such a suit, the unpaid fees under the contract are the actual damages suffered by the law firm. *See id.* at 175.

Instead, the fees ITB incurred in the prior suits are incident to prosecuting or defending them. To the extent that the trial court awarded those fees under the terms of the lease, Texas law does not authorize a lawsuit like this one maintained solely for the attorney's fees. *See MBM Fin. Corp.*, 292 S.W.3d at 663 (noting that "suits cannot be maintained solely for the attorney's fees; a client must gain something before attorney's fees can be awarded").

We hold that, as a matter of law, ITB may not recover the attorney's fees it incurred in the prior suits as actual damages, or incident to prosecuting or defending those suits. As a result of our disposition of this issue, ITB failed to recover damages or anything of value in this lawsuit. Accordingly, it may not recover its attorney's fees incident to prosecuting this suit under Chapter 38. *See In re Nalle Plastics*, 406 S.W.3d at 172-73. Moreover, ITB cannot recover attorney's fees for this suit under the terms of the lease, because it is not the prevailing party. Therefore, the trial court should have rendered judgment that ITB take nothing on its claims against Edom Corner and Berry.

Edom Corner and the Berry's fourth issue is sustained.

DISPOSITION⁴

Having sustained Edom Corner and Berry's fourth issue, we *reverse* the judgment of the trial court and *render* judgment that ITB take nothing on its claims for attorney's fees against them.

BRIAN HOYLE
Justice

Opinion delivered March 31, 2016.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

⁴ In its first issue, Edom Corner contends that the trial court erred in concluding ITB was the prevailing party in the prior litigation. In its second issue, Edom Corner argues that the trial court erred in finding neither res judicata nor collateral estoppel barred ITB's suit. In its third issue, Edom Corner argues that Berry is not individually liable for ITB's attorney's fees as a matter of law. Because Edom Corner's fourth issue is dispositive, we need not address these issues. *See* TEX. R. APP. P. 47.1.



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MARCH 31, 2016

NO. 12-14-00365-CV

EDOM CORNER, LLC AND EARL BERRY, JR.,

Appellant

V.

IT'S THE BERRY'S, LLC,

Appellee

Appeal from the 294th District Court
of Van Zandt County, Texas (Tr.Ct.No. 09-00138)

THIS CAUSE came to be heard on the oral arguments, appellate record and the briefs filed herein, and the same being considered, it is the opinion of this court that there was error in the judgment of the court below and that the same should be reversed and judgment rendered.

It is therefore ORDERED, ADJUDGED and DECREED by this court that the judgment of the trial court be **reversed** and judgment is **rendered** that ITB take nothing on its claims for attorney's fees against them. All costs of this appeal are hereby adjudged against the Appellee, **IT'S THE BERRY'S, LLC**, for which let execution issue, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.