IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 9, 2009 Session

DONALD F. BRADFORD, ET AL. v. JAMES W. SELL, ET AL.

Appeal from the Law Court for Washington County
No. 25079 Jean A. Stanley, Judge

No. E2008-02424-COA-R3-CV - FILED SEPTEMBER 29, 2009

This is continuing litigation between property owners James W. Sell and Carolyn R. Sell ("the Landlords") and their tenants, Donald F. Bradford and Wendy L. Bradford ("the Tenants"). In ***Bradford v. Sell***, 240 S.W.3d 834 (Tenn. Ct. App. 2007) ("***Bradford I***"), we made a ruling favorable to the Landlords and "remanded with instructions for the trial court to enter judgment requiring the parties to enter into [the Landlords'] proposed substitute lease agreement as required by the clear and unambiguous language of the [parties' Recognition Non-Disturbance Agreement ("the RNDA")]. ***Id***. at 840. The primary dispute in ***Bradford I*** was whether the RNDA mandated the execution of the substitute lease proposed by the Landlords, which lease obligated the Tenants to pay insurance and taxes as additional elements of rent, as opposed to the signing of the substitute lease proposed by the Tenants, which did not obligate the Tenants to pay insurance and taxes. After we released our opinion in ***Bradford I***, the Tenants filed a motion in the Court of Appeals arguing that the Landlords received a payment out of the bankruptcy of the Landords' previous tenant, Winn-Dixie, for which, in equity, the Tenants should receive a credit. In response to the motion, we ordered that "[o]n remand the trial court is directed to consider the bankruptcy judgment and payment in favor of [the Landlords] against Winn-Dixie, and if the trial court determines that requiring [the Tenants] to pay the full amount of taxes and insurance for which they are contractually liable would result in double payment to [the Landlords], [the Tenants] shall be entitled to an offset in the amount that [the Landlords have] already received from Winn-Dixie for those expenses." We left our earlier opinion and judgment otherwise unaltered. On remand, the trial court determined that since the *total* amount paid to the Landlords from the bankruptcy did not fully compensate them for the *rent* that went unpaid by Winn-Dixie, no offset for the Tenants was equitably required. The trial court determined that the Landlords were entitled to discretionary costs in the amount of $1,754.15 for expert witness fees incurred in the trial on remand. The Tenants appeal. We affirm in part and reverse in part.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Law Court
Affirmed in Part and Reversed in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

Rick J. Bearfield, Johnson City, Tennessee, for the appellants, Donald F. Bradford and Wendy L. Bradford.

Robert L. Arrington and Frank A. Johnstone, Kingsport, Tennessee, for the appellees, James W. Sell and Carolyn R. Sell.

OPINION

I.

This case is most remarkable in that there is very little in dispute about the facts and very little disagreement about the law, yet the parties continue to litigate. It appeared at the time we filed our post-judgment order in ***Bradford I*** that the legal issues had been disposed of and that calculations based upon documents was all that would be needed to ascertain whether part or all of the payment to the Landlords in the Winn-Dixie bankruptcy should be credited against amounts owed by Tenants under the substitute lease.

A little more background will help the reader understand the history and present posture of this case. The Landlords purchased a piece of commercial property that was subject to an existing lease with Winn-Dixie. Winn-Dixie fell on hard times and vacated the space but continued to make its rental payments. The Tenants moved into the Winn-Dixie space after executing a sub-lease with Winn-Dixie. They also signed the RNDA with the Landlords, the latter document providing, in effect, that the Tenants would execute a substitute lease with the Landlords on terms defined in the RNDA and remain in the space if Winn-Dixie filed for bankruptcy protection. As previously stated, Winn-Dixie filed a Chapter 11 petition in bankruptcy, and ***Bradford I*** focused on which of the two substitute leases was consistent with the terms of the RNDA.

On remand following our opinion in ***Bradford I***, the parties executed the substitute lease proposed by the Landlords. The Tenants filed a motion for consideration of their entitlement to an offset, pursuant to our post-appellate judgment order. The motion alleged that the Landlords had received 49,808 shares of Winn-Dixie stock to satisfy their claim made in the Winn-Dixie bankruptcy. The motion demanded that 6,714.31 shares be treated as payment on the taxes and insurance component of the Landlords' claim, and that the offset be calculated at $32.40 per share, representing the highest traded value of the stock after receipt of same by the Landlords. The Landlords admitted receiving the stock but denied that the highest traded value was an appropriate figure to calculate the Tenants' offset, assuming, which the Landlords disputed, that the Tenants were entitled to an offset.

The Landlords called two expert witnesses, an accountant and a bankruptcy attorney, to support their position that, despite the payment from Winn-Dixie's bankruptcy, the Tenants were not entitled to an offset because the Landlords were not made whole by virtue of the payment. From the testimony and exhibits submitted, it appears that the important facts are not in dispute.

The Landlords' initial claim in bankruptcy was in the total amount of $6,552,767.10. A substantial portion of the claim, but not all, was based upon damages caused by Winn-Dixie's rejection of its lease with the Landlords. The Landlords' claim was disapproved by the bankruptcy court because it reflected the Landlords' *gross* damages rather than the figure derived by applying

the statutory 15% cap to that higher figure. The Landlords ultimately agreed to a pared-back claim of $1,076,687, of which $1,030,758 – as allowed by the bankruptcy court – was for damages flowing from Winn-Dixie's rejection of the remaining term of the lease with the Landlords, *i.e.*, from 2005 through 2017. The pared-back, approved "rejection" claim of $1,030,758[1] was made up of the following components:

Base Rent	$ 876,167
Property Taxes	135,896
Insurance	18,695
	$1,030,758

As can be seen, property taxes and insurance together represent 15%[2] of the total "rejection" claim of $1,030,758. In satisfaction of the "rejection" claim of $1,030,758, the Landlords received, not cash, but 44,647.23 shares of stock in the reorganized Winn-Dixie.[3]

The Tenants' Exhibit 12 at trial is a spread sheet which purports to calculate what the Tenants perceive to be the "value" of the stock received by the Landlords according to the Tenants' understanding of the plan of reorganization approved by the bankruptcy court. The exhibit also shows the "highest value" of the stock since distribution, *i.e.*, $32.40 per share. The Tenants viewed the "highest value" as relevant to their assertion that the Landlords had "converted" the stock instead of tendering it to the Tenants. The calculations of the value (1) at the time of distribution and (2) at its highest value since distribution were, respectively, $145,163.42 and $217,543.70. Representing the opposing view, the Landlords' experts testified that if a value needed to be assigned to the stock, it should be the value at the time of distribution, which was $13.90 per share.

The Landlords introduced proof that the Tenants had made a separate claim in the bankruptcy proceeding based upon Winn-Dixie's rejection of the Tenants' sublease. The Tenants' claim was based on the contingency that they might be forced to pay taxes and insurance under their substitute lease with the Landlords – a contingency that came true. The only elements of the Tenants' "rejection" claim were taxes and insurance. The initial claim was in the amount of $1,382,194.24. The Tenants received a distribution of 35,289 shares of stock in the reorganized company. Using the market value on the date[4] the stock was distributed to the Tenants, the value of the distribution to the Tenants was $533,216.79. This was the amount reported to the IRS by Winn-Dixie, and the amount used by the Tenants to calculate the amount of their capital gain when they eventually sold the stock.

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[1]The revised "rejection" claim was actually $6,871,719; but, as previously noted, it was subject to the statutory cap of 15%. When the cap is applied, the rejection claim is reduced to the $1,030,758 figure.

[2]Obviously, this 15% figure is coincidental and unrelated to the 15% statutory cap.

[3]The Landlords actually received 49,808 shares but only 44,674.23 shares represent payment of the "rejection" claim of $1,030,758. The shares were distributed at the rate of 46.26 shares per $1,000 of allowed claim.

[4]The Tenants received their stock on a different date than that of the Landlords, and the price on that date was $15.11. The Tenants sold the stock for more than the $15.11 per share price.

The trial court found as follows:

> It is undisputed that the [Landlords] have not been fully compensated for the base rent, taxes and insurance owed to them. This Court finds no basis for the plaintiffs' argument that their partial payment should be prorated.
>
> In conclusion, the [Tenants] are not entitled to an offset and the [Tenants'] motion in that regard is denied.

The final order of the trial court disposing of all issues between the parties addressed numerous pending motions including the Tenants' motion to alter or amend the denial of an offset and the Landlords' motion for discretionary costs. The trial court denied the motion to alter or amend but allowed the Landlords discretionary costs in the amount of $1,754.15. Another motion disposed of in the final order was a motion by the Tenants to "clarify" an alleged conflict between the substitute lease this court ordered the parties to sign and a term in the RNDA. The motion was based on the proposition that the renewal term in the substitute lease included taxes and insurance as an element of rent, whereas the RNDA, which was the underlying agreement that controlled, supposedly excluded taxes and insurance as elements of rent during the renewal term. The trial court denied the motion to clarify.

II.

The issues raised by the parties, as restated by us, are:

> Whether the doctrine of law of the case allowed the trial court to modify the substitute lease that this court found to be required under the RNDA and ordered the parties to sign.
>
> Whether the trial court erred in finding that taxes and insurance payable by the Tenants under the substitute lease could not amount to double payment to the Landlords because they will not be made whole for the damages incurred from Winn-Dixie's rejection of the lease.
>
> Whether the trial court erred in granting the Landlords discretionary costs for expert witness fees.
>
> Whether the taxes and insurance payable by the Tenant was a liquidated claim that required the trial court to allow pre-judgment interest on the claim.

III.

We apply different standards of review to the various aspects of the trial court's order challenged by the Tenants. The trial court's findings of fact are reviewed *de novo* with a presumption of correctness unless the preponderance of the evidence is against the trial court's findings. Tenn. R. App. P. 13(d); ***Bogan v. Bogan***, 60 S.W.3d 721, 727 (Tenn. 2001). Review of the trial court's conclusions of law is *de novo* with no presumption of correctness. ***Ganzevoort v. Russell***, 949 S.W.2d 293, 296 (Tenn. 1997). We review a trial court's rulings on discretionary costs and prejudgment interest under an abuse of discretion standard. ***Scholz v. S.B. International, Inc.***, 40 S.W.3d 78, 82, 84 (Tenn. Ct. App. 2000).

IV.

A.

Our direction on remand was clear in two respects and essentially disposed of the first two issues before they arose on remand. Our judgment in ***Bradford I*** "remanded with instructions for the trial court to enter judgment requiring the parties to enter into the [Landlords'] proposed substitute lease agreement." The parties signed the lease, but the Tenants convinced the trial court on remand to add a proviso in its order reserving ruling on "[Tenants'] request that the court clarify an alleged conflict between paragraph 23 of the substitute lease and paragraph 4 of the RNDA." The conflict alleged is that the substitute lease obligates Tenants to pay taxes and insurance through a renewal period but the language of the RNDA allows the Tenant to renew, and in fact lease the property, under an option, at the same rent as in the sublease (excluding taxes and insurance). As noted above, the Tenants filed a motion to clarify, which the trial court denied.

This issue was fully litigated in ***Bradford I***. In fact, the Tenants took the extra step of filing a petition pursuant to Tenn. R. App. P. 39 asking that we rehear and reverse ourselves. The Tenants specifically argued in their petition that the option and renewal provision found in paragraph 4 of the RNDA was "so contrary to the argument of the [Landlords] that [the Tenants are] required to pay the taxes and insurance until 2017, as to make such a finding contrary to a determination that the RNDA clearly and unambiguously requires Bradford to pay the taxes and insurance through 2017." This court reviewed and denied the petition. The complaint that commenced this continuing litigation included a count for declaratory relief requesting "a judicial determination of [the Tenants'] obligation under the RNDA."

Our ruling in ***Bradford I*** is the law of the case in the trial court and on this appeal. As we stated in ***Hawkins v. Hart***, 86 S.W.3d 522 (Tenn. Ct. App. 2001):

> The phrase "law of the case" refers to a legal doctrine which generally prohibits reconsideration of issues that have already been decided in a prior appeal of the same case. In other words, under the law of the case doctrine, an appellate court's decision on an issue of law is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal. The doctrine applies to issues that were actually before the appellate court in the first appeal and to issues that

> were necessarily decided by implication. The doctrine does not apply to dicta.
>
> . . . [I]t is a longstanding discretionary rule of judicial practice which is based on the common sense recognition that issues previously litigated and decided by a court of competent jurisdiction ordinarily need not be revisited. This rule promotes the finality and efficiency of the judicial process, avoids indefinite relitigation of the same issue, fosters consistent results in the same litigation, and assures the obedience of the lower courts to the decisions of appellate courts.
>
> Therefore, when an initial appeal results in a remand to the trial court, the decision of the appellate court establishes the law of the case which generally must be followed upon remand by the trial court, and by an appellate court if a second appeal is taken from the judgment of the trial court entered after remand.

Id. at 531-32 (brackets and omission in original) (*quoting* ***Memphis Publ. Co. v. Tennessee Petroleum Underground Storage Tank Bd.***, 975 S.W.2d 303, 306 (Tenn. 1998)).

The Tenants' rights and obligations under the sublease, the RNDA, and the substitute lease were litigated and determined in ***Bradford I***. There was no error in the trial court's refusal on remand to reopen the matter, and thus no error in its denial of the motion to clarify.

B.

For the same reason, our order on the Tenants' motion to stay the mandate is the law of this case. The particular language that should have controlled the proceedings on remand, and which will control on this appeal, is as follows:

> We are of the opinion that nothing in the [Tenants'] motion and supporting documents alters the analysis and conclusions in our opinion deciding this case. However, equity requires that the [Landlords] not be allowed to recover twice for the payment of ad valorem taxes and insurance. . . .
>
> On remand, the trial court is directed to consider the bankruptcy judgment and payment in favor of the [Landlords] against Winn-Dixie, and if the trial court determines that requiring the [Tenants] to pay the full amount of taxes and insurance for which they are contractually liable would result in double payment to the [Landlords], the [Tenants] shall be entitled to an offset in the amount that the [Landlords] have already received from Winn-Dixie for those expenses.

We did not direct the trial court to consider whether the Landlord had been or would be made whole by the Winn-Dixie proceeding in bankruptcy, but that is clearly what the trial court considered. Our order was specifically directed at preventing the Landlords from recovering funds in bankruptcy from Winn-Dixie "for the payment of ad valorem taxes and insurance" and then forcing the Tenants to pay "those expenses" in full under the substitute lease. The only inquiry should have been whether a portion of the recovery in bankruptcy was properly attributable to taxes and insurance.

The trial court was apparently swayed by the testimony of the Landlords' impressive experts that the recovery cannot be directly correlated with the claim, and that there was no double payment because, even if the Tenants perform in full through the term of the lease, the Landlords ultimately will not receive as much as they would have received in the event Winn-Dixie fully performed. As we have indicated, the inquiry that led to the latter opinion is one the trial court did not need to reach and one that does not impact our judgment. The reluctance of the experts to admit a direct correlation is understandable considering their role, but it is not entitled to much weight under the known facts. We know that the claim included taxes and insurance. We know that in calculating the claim of the Landlords based on the rejection of the lease, "Winn-Dixie used the three line items of taxes, insurance and rent, which is $6,871,719, capped that at 15% and that's how they came up with the amount of the allowed claim." We know that $1,030,758 was allowed for the rejection claim. We know that translates into 44,647.23 shares of stock recovered based on the claim for rejection of the lease. We know that had the tax and insurance line items not been included in the claim, the amount calculated and awarded would have been less. We know that the Landlords' trial Exhibit 6 reflects the handling of the claim in bankruptcy. It necessarily follows that the amount recovered by the Landlords includes a component of taxes and insurance.

We must now determine how much of the total "rejection" claim needs to be allocated to taxes and insurance. Again, this is a matter of simple mathematics. Taxes account for 13.2% of the total "rejection" claim made and allowed. Insurance accounts for 1.8% of the total "rejection" claim allowed. As previously noted, the two components together comprise 15% of the "rejection" claim allowed. Multiplication of the total number of shares of stock paid on the rejection claim, *i.e.* 44,647.23, by 15% results in a product of 6,697.08 shares paid in lieu of taxes and insurance. We hold that 6,697.08 of the shares received by the Landlords are to be allocated to payment for taxes and insurance.

The final calculation we must make is the per share value to be assigned to the "insurance and taxes" shares. Three different figures have been proposed. Tenants favor using the highest selling price of Winn-Dixie stock between the time of distribution and trial, *i.e.*, $32.40 per share. This figure is based on the theory that the Landlords should have immediately tendered the stock to the Tenants upon receipt, and, by refusing, the Landlords deprived the Tenants of the opportunity to sell the stock at the higher price. There is absolutely no merit to this argument. In fact, the argument is contrary to our order granting the Tenants' motion to the extent that "an offset in the amount" to be determined by the trial court is equitable. Notably, we knew the motion was based on compensation in stock, but did not order that the offset be in stock. Tenants' Exhibit 12 at trial also purported to assign a value based on the bankruptcy reorganization plan but Mr. Bradford did not purport to explain on direct how he arrived at this value and on cross examination was completely unable to articulate any basis for a "plan value."

The only supportable figure presented either to the trial court or this court is the value of the stock as of the date of distribution, as determined by the market. As best we can tell, it is the likely figure that a willing buyer would have paid a willing seller, with neither being under a compulsion to buy or sell, at the time the Landlords received their stock. *See* ***Franklin Capital Assoc. v. Almost Family, Inc.***, 194 S.W.3d 392, 407 (Tenn. Ct. App. 2005) (applying the standard to determine damages based on conversion of stock). This is the same method used by Winn-Dixie in calculating the amount to report as income to the Landlords on IRS form 1099. It is noteworthy that the Tenants also received a sizeable distribution of stock in bankruptcy based on their separate claim that they were damaged by Winn-Dixie's rejection of the sublease. The claim was based entirely on the contingent proposition that they might be forced in this present litigation to pay the Landlords taxes and insurance that they would not have had to pay under the sublease.[5] Winn-Dixie also valued the distribution to the Tenants on IRS form 1099 by the market price on distribution date. The Tenants used the same method to determine their gain or loss on the stock they received for rejection of the sublease when they eventually sold it. The Tenants conceded on cross-examination they could not give a reason, other than their conversion theory, for valuing the Landlords' stock by one method and the Tenants' by another.

We hold that the proper valuation method is the market price of the stock distributed to the Landlords on December 21, 2006, the date of distribution. That price was $13.90. Having previously held that 6,697.08 shares are to be allocated to taxes and insurance, it is a simple matter for us to multiply the number of shares by the price per share of $13.90. The result is $93,089.41. Tenants are thus entitled to an offset of $93,089.41 against the payment of taxes and insurance.

C.

The next issue we address is whether the trial court abused its discretion in awarding discretionary costs to the Landlords. A trial court abuses its discretion when it exercises its discretion in light of an erroneous impression of the law or facts so as to reach a result that is not consistent with logic and justice. ***Eldridge v. Eldridge***, 42. S.W.3d 82, 85 (Tenn. 2001). Tenn. R. Civ. P. 54 sets "the parameters for the trial court's exercise of discretion in awarding discretionary costs." ***Stalsworth v. Grummons***, 36 S.W.3d 832. 835 (Tenn. Ct. App. 2000). Discretionary costs are allowable only to the prevailing party. Rule 54.04; ***Massachusetts Mutual Life v. Jefferson***, 104 S.W.3d 13, 33 (Tenn. Ct. App. 2002). A party who prevails in the trial court but loses on appeal is no longer the prevailing party. ***Progressive Casualty Ins. Co. v. Chapin***, 243 S.W.3d 553, 562 (Tenn. Ct. App. 2007). While the Landlords prevailed in the trial court on the testimony of the experts and the argument that they were not made whole, the result of our holdings on appeal is that they are no longer the prevailing party. Accordingly, we reverse the award of discretionary costs.

D.

[5]The Landlords have not argued that the Tenants are somehow barred from the offset by their recoupment of the loss from Winn-Dixie. It is clear that Tenants, like the Landlords, will nonetheless be worse off than had Winn-Dixie fully performed the prime lease and sublease, even with the recovery from Winn-Dixie.

The final issue is whether the trial court erred in not awarding prejudgment interest to the Landlords for the Tenants' "failure" to timely pay the 2006 and 2007 taxes and insurance. The Landlords argue that they are entitled, by their calculations, to $16,597.52 "in interest on the late tax and insurance payments." The Tenants have not replied to the argument. The Landlords rely on ***Performance Systems, Inc. v. First American Nat'l Bank***, 554 S.W.2d 616 (Tenn. 1977), for the proposition that the taxes and insurance were easily subject to calculation, therefore interest should have been awarded.

While we have no quarrel with the holding of ***Performance Systems***, we do not think it helps the Landlords. Their entire argument is based on the premise that no offset is in order, and we have rejected that premise. Thus, the calculation the Landlords argue was easily done was, in fact, incorrectly done. We can see no wisdom in reversing a trial court for not performing an incorrect calculation. Further, the effect of our holding as to the offset is that the Landlords were paid the taxes and insurance in the amount of $93,089.41 effective December 21, 2006, well before some of the payments were due from the Tenants. The current law is that courts must bear in mind that the purpose of prejudgment interest is to fully compensate a party for loss of use of money, and then award or deny prejudgment interest based on fairness in light of the particular circumstances of the case. ***Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 927 (Tenn. 1998). In light of the circumstances of this case, and our holdings on appeal, we believe it would be unfair to award prejudgment interest to the Landlords. Accordingly, we hold there was no error in the trial court's denial of interest to the Landlords.

V.

The final order of the trial court before us on appeal is reversed in part and affirmed in part. Costs on appeal are taxed to the appellees, James W. Sell and Carolyn R. Sell. This case is remanded to the trial court, pursuant to applicable law, for entry of an order awarding the Tenants an offset against the taxes and insurance components of their rent in the amount of $93,089.41, and any further proceedings necessary, including taxing and collection of costs, not inconsistent with this opinion.

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CHARLES D. SUSANO, JR., JUDGE