FILED
MAR 31 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

151

MIDWEST BANCSHARES, INC.,

Plaintiff-Appellee,

vs

THE ANDREOLA COMPANIES, INC. and DANIEL M. ANDREOLA,

Defendants-Appellants.

Filed March 31, 1986

5-662
85-609

Appeal from the Iowa District Court for Scott County (No. 66751 and 66811) - C. H. Pelton, Judge.

Defendants appeal from judgment for plaintiff landlord in an action for breach of a lease agreement. **AFFIRMED.**

Paul J. Bieber, Davenport, for defendants-appellants.

Ralph W. Heninger of Heninger & Heninger, Davenport, for plaintiff-appellee.

Considered by Donielson, P.J., and Snell and Schlegel, JJ.

Defendants-tenants appeal from judgment for plaintiff-landlord in an action for breach of a lease agreement, asserting: (1) that the evidence was insufficient to establish the reasonableness of the attorney fees claimed by the landlord and that in its award of fees the court erroneously placed on the tenants the burden of proving the amount sought to be unreasonable; (2) that under Iowa Code section 625.24 the landlord was not entitled to an award of attorney fees when no affidavit was filed with the petition at the commencement of the action; (3) that the evidence was insufficient to support a finding that a previous settlement of the parties was only partial, rather than a complete, compromise of the claims; (4) that the evidence was insufficient to establish terms of the oral contract upon which the judgment was based; and (5) that the evidence was insufficient to establish that any agreement of the parties obliged the tenants to pay the cost of certain specific improvements.

In 1981, the parties executed a written lease agreement providing, inter alia, that the losing party was to pay the attorney fees of the other party in the event of litigation. A dispute arose and litigation commenced in 1982. On February 10, 1983, the tenants paid the landlord $31,000 following settlement negotiations, but the landlord continued to make demand for additional payment. At the commencement of trial, the tenants acknowledged owing $3,307.02 and it was stipulated that the issues remaining were "attorney's fees and improvements."

No affidavit concerning attorney fees was filed with the petition at the commencement of the action, but such an affidavit was filed with an amendment to the petition prior to tenants' answer. Evidence was introduced concerning the hourly rate of the landlord's counsel and the work performed.

At trial, the landlord testified that defendant Andreola had orally agreed to pay the cost of improvements to the extent that it exceeded $13 per square foot. Andreola testified to the contrary and further testified that the settlement of February 10, 1983, was a compromise of all claims.

The trial court, as finder of fact, found that Andreola's testimony was not credible. It further found that an oral agreement was shown and that the settlement was a compromise only of a forcible entry and detainer action. Judgment for plaintiff was entered for the tenants' share of the costs of improvements totaling $14,824.00, and attorney fees of $12,539.00 were awarded. That amount represented the amount the landlord was charged less the amount found by the court to be related to the forcible entry and detainer action that was settled.

I.

The tenants maintain the landlord failed to show the reasonableness of attorney fees under Iowa Code section 625.22 (1983) which, in essence, placed the burden of proof of this issue upon them. We disagree.

Iowa Code § 625.22 provides, in relevant part:

> When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as a part of the costs a reasonable attorney fee to be determined by the court.

The lease contained such an agreement. We also recognize that the trial court is presumed an expert on what reasonable attorney fees are and has considerable discretion in awarding such fees. See In re Condemnation of Certain Lands for Urban Renewal Project No. I, 254 Iowa 769, 771, 119 N.W.2d 187, 188 (1963)(citing Nelson v. Iowa State Highway Commission, 253 Iowa 1248, 1256, 115 N.W.2d 695, 699-700 (1962)).

The landlord submitted evidence of his attorney's hourly rate, time slips, and complexity of the matter. Such a showing satisfied the landlord's burden

of proof. It appears the tenants did not controvert this evidence and the trial court properly exercised its discretion.

II.

The tenants' next contention is that the required affidavit for attorney fees was insufficient under Iowa Code section 625.24 (1983). The affidavit was not filed with the petition, but was filed before the tenants filed an answer. Section 625.24 provides:

> The attorney's fee allowed in sections 625.22 and 625.23 shall not be taxed in any case unless it shall appear by affidavit of the attorney, filed with the petition at the commencement of the action, that there has been, and is, no agreement between such attorney and his client, express or implied, nor between him and any other person, except a practicing attorney engaged with him as an attorney in the cause, for any division or sharing of the fee to be taken, which, when taxed, shall be only in favor of a regular attorney and as compensation for services actually rendered in the action.

The landlord raises a preservation of error claim because tenant did not raise this issue in any pretrial motion or pleading nor during the trial. Because this issue was not raised below, we cannot entertain it for the first time on appeal. See generally Hansen v. McCoy & McCoy, 221 Iowa 523, 526, 266 N.W. 1, 2 (1936). Thus, we do not reach the merits of the tenants' claim on this issue.

III.

The tenants further contend that a complete settlement of the issues occurred when the landlord accepted a $31,000 payment, which constituted an accord and satisfaction, so that no attorney fees could have been awarded. The tenants misconstrue the trial court's decree.

The tenants and landlord stipulated that the forcible entry and detainer action was compromised on February 10, 1983, when the $31,000 payment was accepted. Thus, it was proper to sustain the tenants' motion to discharge judgment relating only to the forcible entry and detainer claim. Accordingly, the

trial court reduced the attorney fee award to reflect the fee it taxed associated with the forcible entry and detainer action. The trial court still had to address the issue of whether the tenants were responsible to pay for improvement costs above $13 per square foot and attorney fees associated with this issue because the tenants' stipulation only indicated that they owed $3,307 to the landlord for rent, interest, damage deposit, and operating expenses. This issue was properly addressed at the trial court.

IV.

Tenants claims the landlord did not carry its burden of proof regarding the contract terms for the costs of improvement. We cannot find merit in this position.

The tenants bear a heavy burden to overcome fact findings because such findings are viewed in the light most favorable to the judgment and sustained if supported by substantial evidence. See Iowa R. App. P. 14(f)(1); see also Pillsbury Co. v. Ward, 250 N.W.2d 35, 38 (Iowa 1977).

The trial court found no credibility in the testimony of one tenant and found that an oral contract existed which provided the landlord would pay $13 per square foot for the costs of improvements and any additional costs would be paid by the tenants.

The landlord introduced oral testimony and invoices which indicated the costs of remodeling the tenants' office space was $33,980 on July 14, 1981 and adjusted to $32,075 on October 22, 1982. A cost breakdown indicated nine categories of itemized expenses which amounted to $24.84 per square foot for a total of $32,963. We find the trial court's findings were supported by substantial evidence and the damages were properly computed.

V.

The tenants' final claim is that the submitted costs of improvements went beyond those authorized. The tenants cite to the invoice as containing expenses beyond the walls, doors, and hardware which they did not agree to pay. After reviewing the itemized cost breakdown in conjunction with the trial court's ruling, we are unable to discern any expenses of tenants which were beyond those authorized. Thus, we affirm the trial court.

AFFIRMED.