

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

RON W. VIG, d/b/a VIG'S PRODUCE,)	
)	Docket No. 28719
Plaintiff-Respondent-Cross Appellant,)	
)	
v.)	
)	
KATHY CARTER, d/b/a CARTER'S)	
HEALTH FOOD, and EMMETT CARTER,)	
)	
Defendants-Appellants-Cross)	
Respondents.)	
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KATHY CARTER and EMMETT)	
CARTER, d/b/a CARTER'S HEALTH,)	2004 Unpublished Opinion No. 655
)	
Plaintiffs-Appellants-Cross)	
Respondents,)	Filed: October 19, 2004
)	
v.)	Frederick C. Lyon, Clerk
)	
RON W. VIG, d/b/a VIG'S PRODUCE,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Respondent-Cross)	BE CITED AS AUTHORITY
Appellant.)	
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Appeal from the District Court of the Second Judicial District, State of Idaho, Nez Perce County. Hon. John R. Stegner, District Judge.

Order of the district court denying attorney fees, reversed and case remanded.

Charles Alan Brown, Lewiston, for appellant.

Ron W. Vig, Lewiston, pro se respondent.

GUTIERREZ, Judge

Kathy and Emmett Carter appeal the decision of the district court that did not designate them as the prevailing party in the action below and denied them an award for attorney fees and costs. Ron W. Vig has filed a cross-appeal on the same basis. We reverse and remand for determination of attorney fees and costs.

I.
FACTUAL AND PROCEDURAL SUMMARY

In 1998, Vig filed a small claims action against Kathy Carter to recover costs associated with her breach of an alleged oral lease to rent retail space from Vig. Kathy planned to use the space to operate a health food store. In preparation for opening, Vig, Kathy and her husband, Emmett, each expended materials and labor to make alterations necessary for the health food store's operation. In response to Vig's action, the Carters filed suit in magistrate court to recover damages incurred in making such improvements. Vig amended his small claims complaint and the case was then removed to the district court and consolidated with the Carters' lawsuit.

The Carters' complaint was subsequently dismissed with prejudice upon the Carters' own motion, but the Carters preserved their claim for damages as an offset against Vig's complaint for damages. Vig filed a memorandum of costs and sought attorney fees from the Carters relating to their dismissed complaint; the district court, however, postponed a decision until the outcome of Vig's action was determined.

Prior to trial, Vig moved to amend his complaint to add Emmett Carter as a defendant, which was granted. On the day set for trial, the district court granted the Carters' motion to exclude evidence of a five-year oral lease on the basis of the statute of frauds and as a result, also granted their motion to dismiss Vig's complaint. Both parties filed memoranda of costs and requests for attorney fees. Vig also filed a motion to alter or amend the memorandum decision or for a new trial. In granting Vig's motion, the district court allowed Vig to amend his complaint to add a claim of *quantum meruit* or quasi-contract for the improvements made by Vig to his property in anticipation of the lease. The parties filed cross-motions for summary judgment, which were denied by the district court. At the trial on Vig's claim of quasi-contract, the district court determined that Vig did not prove the requisite elements. As Vig did not meet his burden and did not recover against the Carters, the district court determined the Carters' claim to an offset was rendered moot. The district court thereafter entered a judgment in favor of the Carters. Vig filed a motion to alter or amend the judgment, which was denied.

The Carters then filed an additional memorandum of costs and attorney fees for costs incurred in defending against Vig's quasi-contract action. The district court addressed both Carters' and Vig's request for attorney fees pursuant to I.C. §§ 12-120 and 12-121. The district

court denied attorney fees, ruling that neither party prevailed for purposes of awarding attorney fees. The parties appeal.

II.

STANDARD OF REVIEW

This Court reviews a decision regarding whether to award attorney fees for an abuse of discretion, and the burden is on the person asserting error to show an abuse of discretion. *Merrill v. Gibson*, 139 Idaho 840, 843, 87 P.3d 949, 952 (2004); *Anderson v. Ethington*, 103 Idaho 658, 660, 651 P.2d 923, 925 (1982). The determination of who is a prevailing party, for the purpose of receiving an award of attorney fees, is also committed to the sound discretion of the trial court. *Israel v. Leachman*, 139 Idaho 24, 27, 72 P.3d 864, 867 (2003); *Caldwell v. Idaho Youth Ranch, Inc.*, 132 Idaho 120, 127, 968 P.2d 215, 222 (1998); *Decker v. Homeguard Systems*, 105 Idaho 158, 161, 666 P.2d 1169, 1172 (Ct. App. 1983). To determine whether the trial court abused its discretion, this Court considers: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991); *Sanders v. Lankford*, 134 Idaho 322, 325, 1 P.3d 823, 826 (Ct. App. 2000).

III.

ANALYSIS

On appeal, the parties argue that each was the prevailing party and thus entitled to an award of attorney fees. As such, the Carters contend that the district court abused its discretion by not awarding them attorney fees under I.C. § 12-120(3) while Vig contends the district court abused its discretion by not awarding him attorney fees under I.C. § 12-121. Under either statute a finding that there be a prevailing party is required in order for the district court to award attorney fees.

Idaho Code § 12-120(3) requires an award of attorney fees to the prevailing party in an action arising out of “any commercial transaction.” A contract between the parties is not required under I.C. § 12-120(3); rather, the statute requires that there be a commercial transaction that is integral to the claim and that it be the basis upon which recovery is sought. *Erickson v. Flynn*, 138 Idaho 430, 436, 64 P.3d 959, 965 (Ct. App. 2002). Attorney fees are to

be awarded where the cause of action is for breach of a commercial contract. *Id.* When a quasi-contract claim is presented as an alternative to a breach of contract claim as a fallback position in the event that the contract claim fails, and when the quasi-contract claim is based upon the same facts and circumstances as the breach of contract claim, and the alleged transaction is commercial in nature, the prevailing party is entitled to recover attorney fees under I.C. § 12-120(3). *Erickson*, at 437-38, 64 P.3d at 966-67. In this case, Vig's original claim was based on a breach of an alleged commercial lease which the district court dismissed. The district court subsequently allowed Vig to pursue a quasi-contract claim based upon the same facts and circumstances as his failed breach of contract claim. As the alleged transaction involved in the breach of contract claim was commercial in nature, it follows that the quasi-contract claim is also commercial in nature. Any prevailing party in this case is therefore entitled to attorney fees associated with the litigation of all claims.

The trial court should consider three principal factors in determining which party, *if any*, prevailed: (1) the final judgment or result in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. I.R.C.P. 54(d)(1)(B); *Sanders*, 134 Idaho at 325, 1 P.3d at 826. The trial court may determine that a party prevailed or prevailed in part, and then apportion costs between and among the parties in a fair and equitable manner. I.R.C.P. 54(d)(1)(B).

Here, the district court recognized the issue as of whether to designate either party the prevailing party as one of discretion. The district court determined that each party "prevailed in part and failed to prevail in part" and determined that an award of attorney fees and costs to either party was not appropriate. The facts of this case do not support the district court's ruling.

In 1998, Vig filed his small claims complaint alleging breach of a two-year lease and requesting payment of rent due and for miscellaneous improvements that had been made to the proposed rental premises totaling \$2,999.99. This commenced an action that was not fully resolved for nearly four years. In response to Vig's complaint, the Carters filed a separate action against Vig to recover for their labor and expenses incurred in making improvements to the same premises. Subsequently, Vig amended his complaint, alleging breach of a five-year lease and requesting approximately \$57,000 in damages for lost rent and improvements. The Carters then moved to have their complaint dismissed, but reserved their claim of damages as an offset

against Vig's amended complaint. The Carters' affirmative defense for an offset was subsequently rendered moot however. In essence, the Carters' claim was hardly litigated.

The majority of the litigation activity focused on Vig's claims. Up until the dismissal of the Carters' complaint, the Carters submitted and Vig responded to written discovery requests, and Vig submitted to a deposition. Following the dismissal of the Carters' claim, the litigation and discovery continued to focus on Vig's breach of contract claim and there were numerous motions and additional depositions and written discovery requests. Vig's action appeared to have been resolved when the Carters' motion to exclude evidence of an oral lease and motion to dismiss were granted. Vig, however, was allowed to proceed on the new theory of quasi-contract that eventually went to trial. The Carters prevailed on this claim as well, for Vig failed to prove the requisite elements.

Considering the factors for determining which party prevailed for the purposes of attorney fees, it is clear that the Carters were the prevailing party. The Carters sought and were granted dismissal of Vig's breach of contract claim and prevailed after a trial on the merits of Vig's quasi-contract claim. Vig's claim was the only claim presented to and resolved by the court. Additionally, Vig's claim of damages initially began at \$2,999.99 and later was enlarged to over \$57,000. The successful defense of all claims by the Carters was significant when compared with their claim for an offset, which was never resolved once it became moot.

We conclude that on the facts presented here, the district court's determination that the Carters were not the prevailing party was inconsistent with the applicable legal standards and therefore exceeded the bounds of the district court's discretion. Consequently, we vacate the district court's order and remand the case for further consideration of the Carters' request for costs and attorney fees in light of our holding that the Carters were the prevailing party.

Both parties have also requested attorney fees on appeal. The mandatory attorney fee provisions of I.C. § 12-120 govern on appeal as well as in the trial court. *Sanders*, 134 Idaho at 327, 1 P.3d at 828. This Court has held that the statute does not apply to an appeal that challenges only the *amount* of an award below, but that it does apply if the appeal is concerned with the *entitlement* to an award below. *Id.* We deem the issue presented here to be one of entitlement, and the Carters have prevailed on appeal. Accordingly, the Carters are awarded reasonable attorney fees to be determined pursuant to I.A.R. 41.

IV.

CONCLUSION

The district court's order denying attorney fees to both parties is reversed. The case is remanded to the district court for determination of the amount of attorney fees and costs to be awarded to the Carters as the prevailing party in the action. Costs and attorney fees on appeal are awarded to the Carters.

Chief Judge LANSING and Judge PERRY **CONCUR.**