

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000968-MR

LJM 12, LLC, AND
DOUGLAS RANK

APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 08-CI-00032

H.C. TRUITT COMPANY,
D/B/A TRUITT ROOFING COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, VANMETER AND WINE, JUDGES.

ACREE, JUDGE: The appellants, LJM 12 LLC and Douglas Rank (referred to collectively as LJM), seek reversal of the Kenton Circuit Court's decision to award the appellee, H.C. Truitt Company d/b/a Truitt Roofing Company, contractual prejudgment interest on a monthly basis and attorney's fees. However, the circuit

court did not err in determining that the contract's terms required contractual prejudgment interest to be applied on a monthly basis and the court properly awarded attorney's fees. Therefore, we affirm.

This claim arises from a contract by which Truitt agreed to perform \$23,995.00 worth of improvements to a building owned by LJM. The contract contemplated that additional work—not specifically set forth in the contract—would be performed, as needed, at a time and materials rate of \$65.00 per man hour. Additional work was in fact performed and it is undisputed that all of the work performed by Truitt was authorized by LJM.

Despite full performance by Truitt, LJM failed to render full payment for the services. As a result, Truitt asserted a mechanic's and materialman's lien. The lien was properly recorded in the records of the Kenton County Clerk in Covington, Kentucky. The circuit court determined that the lien was valid and created a security interest in the subject property.

The circuit court further determined that LJM was liable to Truitt for \$52,929.09. Included in that sum is the amount outstanding under the original contract, \$4,315.45, the value of additional work performed, \$18,175.51, prejudgment contractual interest of \$9,302.29, and attorney's fees in the amount of \$21,135.84. The principal damage award of \$22,490.96 is not in dispute.

There are only two questions on appeal. First, is the contract term regarding prejudgment interest ambiguous? Second, is the contract provision for attorney's

fees valid? The contract provisions at issue are set forth below as they appear in the contract.

PAYMENT: 30% upon job set-up with progressive monthly billing and balance upon completion. 2% interest on all accounts after 30 days.

If it should be necessary to pursue legal action to secure payment, all such resulting legal expenses shall be paid by the customer herein.

“The interpretation and construction of a contract is a matter of law for the courts to decide and is subject to *de novo* review.” *New Life Cleaners v. Tuttle*, 292 S.W.3d 318, 321 (Ky. App. 2009).

Contractual Prejudgment Interest

LJM contends that the contract term calling for 2% interest is ambiguous because the contract does not indicate whether the interest is to be applied monthly, yearly, or by period. An ambiguity exists in the contract “if a reasonable person would find it susceptible to different or inconsistent, yet reasonable, interpretations.” *Id.* at 322 (quoting *Cantrell Supply, Inc. v. Liberty Mutual Ins. Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002)). If no ambiguity exists, “a written instrument will be enforced strictly according to its terms.” *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 106 (2003).

The circuit court determined that the contract provision to require 2% interest applied on a monthly basis. While the sentence setting forth the 2 % term does not dictate how the interest is to be applied, the preceding sentence indicates that billing will occur on a monthly basis. That sentence makes it clear to us that

in the event a monthly bill becomes 30 days overdue, 2% interest is applied and added to the bill as a charge for servicing the balance of the customer's indebtedness to Truitt.

Considering the entirety of the provision regarding payment, it is logical to conclude that 2% interest will be applied in accordance with the method of billing, which in this case is monthly. Thus, this court must ask if a reasonable person could conclude otherwise. In other words, could a reasonable person conclude that, despite calling for monthly billing, the contract term regarding interest does not require 2% interest per month? We do not think so. In light of the monthly billing scheme, construing the interest rate as applicable to any other period would introduce an ambiguity, and we are "not permitted to create an ambiguity where none exists[.]" *New Life Cleaners*, 292 S.W.3d at 322 (quoting *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 836 (Ky. App. 2000)).

Even assuming the term is ambiguous, the circuit court's determination that the contract requires prejudgment interest at 2% per month was reasonable. "If an ambiguity exists, 'the court will gather, if possible, the intentions of the parties from the contract as a whole, and in doing so will consider the subject matter of the contract, the situation of the parties and the conditions under which the contract was written,' by evaluating extrinsic evidence as to the parties' intentions." *Frear*, 103 S.W.3d at 106 (quoting *Teague v. Reid*, 340 S.W.2d 235 (1960)).

As discussed above, the contract provisions controlling payment clearly call for *monthly* billing. Todd Truitt, president of Truitt, testified that the company calculates interest on a monthly basis. LJM did not offer testimony as to its intent regarding interest, but it did offer testimony that it was aware of the 2% provision. It is also important to note that this contract was one of two bids submitted to LJM for consideration. Thus, LJM was in a position to choose the contract it preferred and the agreement was entered into at arm's length.

In light of the contract as a whole, the court reasonably concluded that the parties intended interest to be applied at 2% per month. There is no indication that either party intended any other period be the measure of the interest rate. LJM claims that provisions of the Kentucky Revised Statutes (KRS) imply a different result, but those provisions¹ have no relevance to the facts of this case.

The contract calls for monthly payments with additional interest on balances carried by Truitt for more than a month of 2%. Damages for LJM's breach include that 2% charge for each month Truitt carried LJM's balance. It was proper for the circuit court to award such contract damages.

Attorney's Fees

LJM contends that the attorney's fee provision of the contract is unenforceable because it only allows for fees to be collected by Truitt. LJM avers that this unilateral attorney's fees provision is contrary to public policy and should

¹ LJM cited the 19% annual percentage rate cap for interest on contracts of less than \$15,000 contained in KRS 360.010 and the interest rate calculation for manufactured home financing contained in KRS 360.150.

not be enforced. However, KRS 411.195 states that “[a]ny provision in a writing which create[s] a debt, or create[s] a lien on real property, requiring the debtor, obligor, lienor or mortgagor to pay reasonable attorney’s fees incurred by the creditor, obligee or lienholder in the event of default, shall be enforceable”

Truitt fully performed the contract LJM agreed to, thereby creating a debt owed by LJM to Truitt. Further, a lien was entered upon the land securing Truitt’s interest. Thus, pursuant to KRS 411.195, the provision allowing Truitt to recover reasonable attorney’s fees to collect the debt is enforceable.

LJM further argues that, even if the attorney’s fee provision is enforceable, it only applies to fees incurred in pursuit of the original contract debt. However, it is clear that the parties contemplated that additional work might be performed and the cost of the additional work was set forth in the original agreement. Thus, the additional work was integrated into the additional agreement. It is illogical to conclude the attorney’s fee provision would not apply to the recovery of a debt created by Truitt’s performance, under the contract, of additional work.²

For the foregoing reasons, the circuit court’s award of damages, interest and attorney fees and costs is affirmed.

ALL CONCUR.

² We also note that LJM failed to pay part of the original contract price. This argument is inapplicable to that debt and, because the costs of recovering that debt are inextricably related to the costs of recovering the debt owed for the additional work, this argument has no practical viability.

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