

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-255

JANUARY TERM, 2019

2751 North Miami Avenue, LLC* v.	}	APPEALED FROM:
Chad Jaques & Trevor Jaques	}	
	}	Superior Court, Chittenden Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 754-9-16 Cncv
		Trial Judge: Dennis R. Pearson

In the above-entitled cause, the Clerk will enter:

Landlord appeals from the trial court’s decision, following a bench trial, in this landlord-tenant dispute. It argues that the court erred in denying its request for attorney’s fees and by rejecting its motion to reconsider. We agree, and we therefore reverse and remand for additional proceedings.

In September 2016, landlord filed a complaint against tenants alleging that tenants breached their lease agreement, causing \$14,228.20 in damages plus costs and legal fees. Tenants filed counterclaims. Landlord noted in its complaint that, under the lease, “the prevailing party” in “any action or legal proceeding to enforce any part of this Agreement . . . shall recover reasonable attorney’s fees and court costs.” At trial, a woman who assisted in managing landlord’s properties testified that “the total legal fees as of today” were \$7978.54. Landlord also entered the legal bills into evidence.

Following a two-day trial, the court awarded landlord \$6949 in unpaid rent due under the lease, plus interest and court costs; it rejected tenants’ affirmative defenses and counterclaims. The court also denied landlord’s remaining claims, including its request for “reasonable and necessary attorney’s fees,” finding that landlord failed to meet its burden of proof. The court explained that while it was true that, under Vermont Rule of Civil Procedure 54(d)(2), litigation over attorney’s fees should be limited in scope, there must be some supporting and independent proof of both necessity and reasonableness, beyond merely presenting legal bills. The court refused to speculate or be conscripted to act essentially as landlord’s “expert” on this issue.

Landlord moved for reconsideration, arguing in relevant part that it was entitled to attorney’s fees because the lease agreement provided for payment of such fees, it presented testimony as to the amount of the legal fees, and tenants did not present any evidence or otherwise suggest that the fees were unreasonable. Landlord argued that the rule cited by the court, Rule 54(d)(2), contemplated a post-trial hearing on motions for attorney’s fees but it asserted that no such motion was required here because landlord was entitled to recover its legal fees under the terms of the lease. If the court deemed a hearing necessary as to the reasonableness of the fees,

landlord asked for a post-judgment hearing on its claim for legal fees as contemplated by Rule 54(d)(2).

The court denied landlord's motion. It explained that its denial of attorney's fees was not based on a literal application of Rule 54(d)(2), although there was caselaw stating that the rule applied to contractual fee claims. The court explained that it had found that landlord presented no evidence at trial, on the merits, that the amounts billed were in fact necessary and reasonable. This appeal followed.

Landlord argues that as the "prevailing party," it is entitled to recover its reasonable attorney's fees under the lease. It maintains that the court could have inferred the reasonableness of the fees from the fact that the property manager paid the fees in the normal course of business and that tenants did not object to the amount of the fees. Landlord also asserts that because the fee request was small, the court could have relied upon "its own experience and knowledge," Gokey v. Bessette, 154 Vt. 560, 567 (1990), without requiring the submission of evidence. Landlord contends that it would be bad policy to require expert testimony as to the reasonableness of the fees before such fees have been awarded and absent any objection to them. Landlord further argues that the court erred in denying its request for a post-judgment hearing regarding the reasonableness of its attorney's fees.

As indicated, this is a contractual claim for attorney's fees. Rule 54(d)(2)(A) provides that "[c]laims for attorneys' fees for services rendered in connection with a pending action, and related nontaxable expenses, shall be made by motion in the action unless the applicable substantive law provides for the recovery of such fees as an element of damages to be proved at trial or in an independent action. The Advisory Committee Note to the analogous federal rule, on which our rule is based, states that the rule does not "apply to fees recoverable as an element of damages, as when sought under the terms of the contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury." F.R.C.P. 54(d)(2)(A), Advisory Committee Note.

In Murphy v. Stowe Club Highlands, we recognized that notwithstanding the Advisory Committee Note referenced above, "there is a split of authority on whether attorneys' fees are an element of damages in cases where the right to attorneys' fees is created by a contract." 171 Vt. 144, 161 (2000) (citing cases). "Some courts have held that a request for attorneys' fees must be included in the complaint and the entitlement and amount proven at trial. Others have held that the request for attorneys' fees may be made by the prevailing party post-trial, and the decision on entitlement and amount is made by the court." Id. (citations omitted). "In the absence of a contractual requirement to the contrary," we adopted the approach taken by the U.S. Court of Appeals for the Second Circuit in McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1312-1313 (2d Cir. 1993), and held "that the jury must decide whether a party is entitled to attorneys' fees pursuant to a contractual provision, but the amount of fees awarded is determined post-trial by the judge." Id. at 161-62. We identified a number of policy reasons supporting this approach, including avoiding having the jury "look behind the curtain of the case" by assessing the reasonableness of fees, promoting efficiency because "the evidence need be presented only if the party seeking the award prevailed on the merits," and allowing for a full accounting of the legal services provided. Id. at 162 (quotation omitted). Notwithstanding this approach, we concluded in Murphy that the plaintiffs were "entitled to attorney's fees as a matter of law," and "[t]he fact that the jury did not make an entitlement decision in this case is no bar to their award." Id. at 163.

We reach a similar conclusion here, mindful that this was a bench trial rather than a jury trial. The parties' lease agreement provides that "[i]n any action or legal proceeding to enforce

any part of this Agreement, the prevailing party . . . shall recover reasonable attorney’s fees and court costs.” There is no dispute that landlord was the “prevailing party.” It is entitled to recover “reasonable” attorney’s fees as a matter of law. See EBWS, LLC v. Britly Corp., 2007 VT 37, ¶ 34, 181 Vt. 513 (“The trial court has discretion in crafting the amount of an award, but where fees are due by law, it is an abuse of discretion to deny all fees.”); see also Fletcher Hill, Inc. v. Crosbie, 2005 VT 1, ¶ 5, 178 Vt. 77 (“When a contract provides for attorney’s fees, Vermont courts are loath to revise the agreement struck by the parties and deny them the benefit of their bargain.”). Under our case law, landlord should have the opportunity to establish the reasonableness of its fees post-trial. See Bruntaeger v. Zeller, 147 Vt. 247, 254 (1986) (explaining that while court has discretion in determining “reasonable attorney fees,” “counsel has the burden to provide evidence of services upon which value can be determined”).

We therefore reverse the court’s denial of landlord’s request for a post-trial hearing on the reasonableness of attorney’s fees and remand for an evidentiary hearing as to the reasonableness of the fees requested.

Reversed and remanded for additional proceedings.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice