



## Parkland

878 N.E.2d 544 (2007) | Cited 0 times | Indiana Court of Appeals | December 28, 2007

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

### MEMORANDUM DECISION

### NOT FOR PUBLICATION

Parkland, Inc. ("Parkland") appeals the trial court's determination of damages awarded to it in its breach of contract suit against Alanya Cunningham ("Cunningham"). Parkland appeals and argues that the trial court erred when it determined that Parkland failed to mitigate damages resulting from the breach and that Parkland is not entitled to attorney's fees.

We affirm in part, reverse in part and remand

### Facts and Procedural History

On April 1, 2000, Parkland and Cunningham entered into a lease and occupancy agreement ("Agreement") for the purpose of renting a lot for the placement of a mobile home. The Agreement provided that in exchange for the use of a lot at the mobile home community, Cunningham would pay rent in the amount of \$130 per month. Appellant App. p. 7. Furthermore, the Agreement provided that Cunningham could terminate the agreement with thirty days written or verbal notice before the date of termination. Id. Finally, the Agreement provided that in the event of litigation, Cunningham would be responsible for reasonable attorney fees. Id. Cunningham admitted that in May and June of 2004, she failed to make her rental payments on time. Tr. p. 24. In June of 2004, Cunningham notified Parkland verbally and in writing that she was moving and wished to terminate her lease. Cunningham moved out of the mobile home community and left the mobile home on the lot. Over the next two months, Cunningham sent two interested persons to inquire about buying the mobile home. Neither person bought the mobile home because of Parkland's stated requirement that any back rent must be paid before it would acquiesce to any sale.

Two years later, on June 7, 2006, Parkland filed a complaint alleging that Cunningham defaulted on the Agreement and that Parkland was entitled to back rent, attorney's fees, and possession of the leased premises. A bench trial proceeded on April 24, 2007. The trial court entered Judgment in favor of Parkland in the amount of \$260 plus costs and allowed Parkland to dispose of the mobile home



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pursuant to Indiana Code 32-33-6-1. Parkland now appeals.

### Standard of Review

Cunningham failed to file an appellate brief in this appeal.

When an appellee fails to file a brief, we may reverse the trial court's decision based on a showing of prima facie error. Prima facie error means error at first sight, on first appearance, or on the face of it.

Morequity, Inc. v. Keybank, N.A., 773 N.E.2d 308, 311-312 (Ind. Ct. App. 2002), trans. denied (citations and quotations omitted). The standard for reviewing a trial court's findings of fact and conclusions of law is:

When the trial court has entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52, we apply the following two-tiered standard of review: whether the evidence supports the findings and whether the findings support the judgment. The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. We neither reweigh the evidence

[n]or assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. We review conclusions of law de novo. Tompa v. Tompa, 867 N.E.2d 158, 163 (Ind. Ct. App. 2007) (citations omitted).

### Discussion and Decision

Parkland argues that the following findings were prima facie erroneous:

5. [Parkland] did nothing for two years to pursue satisfaction of [Cunningham]'s indebtedness for ongoing lot rent, though empowered to do so by statute, without the necessity of filing suit.
6. [Parkland] has failed to make reasonable efforts to mitigate damages and in fact thwarted efforts of [Cunningham] to minimize damages.
7. [Parkland] is not entitled to lot rent and upkeep for two years or attorney fees in this case.

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9. The only evidence before the Court concerning efforts to dispose of the mobile home was that [Cunningham] had found two prospective purchasers shortly after she vacated the trailer.



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Appellant's App. p. 10.

The ultimate issue before us is whether Parkland made reasonable efforts to mitigate its damages. While mitigation of damages is not an affirmative defense to liability, it is a defense that may reduce the damages Parkland could recover after liability is found. See *Foster v. Owens*, 844 N.E.2d 216, 221 (Ind. Ct. App. 2006) trans. denied. "The obligation of a plaintiff to mitigate damages generally refers to the expectation that a person who has been injured should act to minimize damages after an injury-producing incident." *Id.* "The amount of damages a plaintiff is entitled to recover is reduced by those damages which reasonable care would have prevented." *Id.* To bring a successful mitigation defense claim, Cunningham must prove two elements: (1) "that the plaintiff failed to exercise reasonable care to mitigate his or her post-injury damages"; and (2) "that the plaintiff's failure to exercise reasonable care caused the defendant to suffer an identifiable item of harm not attributable to the defendant's negligent conduct." *Id.*

Here the evidence supports the trial court's finding that Parkland failed to mitigate damages. Parkland completely fails to show what actions it took other than claiming to attempt to obtain the Vehicle Identification Number from Cunningham. Cunningham testified that she never received any delinquent statements regarding lot fees despite providing Parkland with her contact information. Moreover, shortly after Cunningham vacated the residence, she sent two prospective buyers to Parkland. However, the prospective buyers refused to purchase the mobile home after Parkland demanded that they pay the back rent on the lot. Thereafter, and without any mitigation, Parkland claimed damages of \$9,328.00. Had Parkland mitigated its damages Cunningham would have owed \$260.00 or two month's rent and Parkland could have allowed the sale of the mobile home to one of Cunningham's buyers and attached the sale proceeds, or at least presented evidence that mitigation through sale on reasonable terms was not possible. For all of these reasons, the trial court's finding that Parkland failed to make reasonable efforts to mitigate damages is supported by the evidence.

The trial court also found that Parkland failed to pursue its rights regarding Cunningham's indebtedness. Ralph Pardieck ("Pardieck"), the owner of Parkland, testified that they unsuccessfully attempted to contact Cunningham yet proffered no evidence of letters sent to Cunningham. Tr. p. 9. To the question, "Did you ever send any certified mail to [Cunningham]?" Pardieck's answer was "I think so." Tr. p. 19. Pardieck thought that Parkland had put a notice in a newspaper but was unsure and provided no proof that this happened. Tr. p. 16. When asked if Pardieck had a copy of the notice he claimed he posted on the door of the mobile home, he could not produce it in court. Pardieck claimed that Parkland pursued Cunningham, yet provided the court with no documentation that this occurred. While the absence of documentation is not fatal to Parkland's claim, the trial court, as fact-finder, could reasonably determine based on the evidence and testimony that Parkland did not pursue its rights.

Additionally, the trial court found that Parkland was not entitled attorney's fees. In Indiana, the parties generally pay their own attorney's fees unless provided for under statute or contract. Holliday



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v. Crooked Creek Villages Homeowners Assoc., Inc., 759 N.E.2d 1088, 1095 (Ind. Ct. App. 2001). Therefore, a contract which provides for attorney fees is enforceable, unless contrary to law or public policy. Id. "The amount recoverable for an award of attorney fees is left to the sound discretion of the trial court." Id.

Cunningham signed a contract that included a clause under which the tenant must pay the attorney fees of Parkland in the event that Parkland succeeded in its litigation. Regardless of mitigation or lack thereof on the part of Parkland, Cunningham must be held to the terms she agreed to. The contract requires Cunningham to pay Parkland's reasonable attorney fees. Appellant's App. p. 7.

Parkland's attorney testified at trial that he billed at \$175 per hour and that his total services were worth \$700. "The determination of the reasonableness of an attorney's fee requires consideration of all relevant circumstances, including the attorney's experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained." *Mason v. Mason*, 561 N.E.2d 809, 811 (Ind. Ct. App. 1990). For these reasons, we conclude that Parkland is entitled to a reasonable attorney fee.

We therefore affirm as to the content of the judgment, reverse as to the award of attorney fees, and remand with instructions to the trial court to determine and award reasonable attorney fees to Parkland for the trial, but not the appeal of this matter, as we decline to award appellate attorney fees.

NAJAM, J., and BRADFORD, J., concur.

