IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9579

THE TRAVELERS INSURANCE COMPANY,

Plaintiff-Appellee
Cross Appellant,

versus

ST. JUDE HOSPITAL, ETC., ET AL.,

Defendants,

and

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC., ST. JUDE MEDICAL OFFICE BUILDING LIMITED PARTNERSHIP, JOHN A. LILJEBERG, ROBERT LILJEBERG, LILJEBERG ENTERPRISES, INC. and KROWN DRUGS, INC.,

Defendants-Appellants
Cross Appellees.

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ST. JUDE HOSPITAL OF KENNER, LA., INC.,

Plaintiffs,

versus

ST. JUDE MEDICAL OFFICE BLDGS. LIMITED PARTNERSHIP,

Defendant-Appellant
Cross-Appellee,

versus

THE TRAVELERS INSURANCE COMPANY,

Defendant-Appellee
Cross-Appellant.

Appeals from the United States District Court
for the Eastern District of Louisiana

(CA 90-1983 I C/W 90-2601 I)

(April 20, 1994)

Before WIENER, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

As the instant appeal and cross appeal are in large part sequels to "Travelers I,"[1] we shall notSQin this unpublished per curiam opinion written principally for the benefit of the parties SQreiterate the facts and procedural history of the controversies before us today. It suffices that the facts set forth in detail by the magistrate judge[2] are sufficient for our purposes. (They also demonstrate, as to Defendants-Appellants John A. and Robert Liljeberg ("the Liljebergs") and St. Jude Hospital, St. Jude Medical Office Building Limited Partnership, Liljeberg Enterprises, Inc. and Krown Drugs, Inc. (collectively, "the Liljeberg entities") as egregious and unconscionable course of bad faith contractual dealings as the members of this panel can recall having encountered.)[3]

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] Travelers Ins. Co. v. Liljeberg Enters., Inc., 7 F.3d 1203 (5th Cir. 1993). This case has been referred to from time to time as Liljeberg I as well.

[2] Record Excerpts on Behalf of Travelers Insurance Co., Tab 3, at 4-12.

[3] The Liljeberg conduct to which we refer is the antithesis of that mandated in La. Civ. Code Ann. art. 1983 ("Contracts must be performed in good faith."), and has contributed to the legal

Upon careful consideration of those facts and the applicable law as reflected in the arguments of counsel, both oral and as written in briefs and supplemental submissions to this court, as well as the contents of the lengthy and tortured record of this case, we conclude that in granting the judgment, grounded in part on the jury verdict rendered at the conclusion of the trial of this cause, the district court committed no reversible error as to the principal demands of Travelers against the Liljebergs and the Liljeberg entities. For the most part, therefore, we affirm that judgment of the district court therein, both in favor of and adverse to Travelers. And we feel no compulsion to write further on that aspect of the instant case, except to observe that, given the concerns expressed by members of this panel at oral argument regarding the paucity of record citations in the brief filed on behalf of the Liljebergs, et al.SQthereby making those briefs fall woefully short of compliance with Federal Rule of Appellate Procedure 28, particularly of the requirements of FRAP 28(a)(4) and (a)(5)SQwe were sorely tempted to grant Travelers' motion to dismiss the appeal of Defendants-Appellants for failure to comply with FRAP 28(a) and (e). Even though we have refrained from granting Traveler's motion thus to dismiss, we trust that for future purposes counsel for Defendants-Appellants shall heed this caution well.

Having thus disposed of the contentions of the Liljebergs and

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effects prescribed in La. Civil Code Ann. art. 1997 ("An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.").

Liljeberg entities as appellants, we turn to the contentions of Travelers, as cross-appellant, concerning (1) entitlement to attorney's fees, (2) assessment of costs, and (3) the appropriate rate to be used in calculating pre-judgment interest. In this regard, we requested and received post-argument supplemental memoranda from the parties addressing the effect of this court's opinion in Travelers I and the "law of the case" doctrine on these cross-appeal issues; and we have carefully considered those submissions as well.

I

ATTORNEY'S FEES

In an act of candor which, in contrast to the briefing and oral argument on behalf of the Liljebergs, we find particularly refreshing, counsel for Travelers concedes that, inasmuch as Travelers I held that Travelers was not entitled to attorney's fees under the Liljeberg Enterprise, Inc. (LEI) leases, the law of the case doctrine precludes Travelers' recovery of attorney's fees here under any lease agreement memorialized in such a document. We thus need not consider the sub-issue of attorney's fees under such leases. But, as Travelers aptly demonstrates, the attorney's fees provisions of the Krown Drugs, Inc. (Krown) lease were neither considered nor ruled on in Travelers I; and that lease document contains an attorney's fees provision significantly different from the one contained in the LEI lease document. Thus the issue of attorney's fees under the Krown lease is not controlled by Travelers I under the law of the case doctrine; it remains fair

game for our review.

Section 16.7 of the Krown lease commits the lessee to pay "any reasonable amount incurred by Landlord as attorney's fees." Moreover, the Krown lease document does not contain a tripartite provision akin to the one contained in the LEI leases that we construed in Travelers I. Consequently, Travelers is clearly entitled to recover reasonable attorney's fees from Krown Drugs, Inc. as lessee, and from any other co-defendant held liable in solido with Krown Drugs under the judgment of the district court, or from any one or more of them. But, as the applicable contractual provision does not contain a specific formula or percentage for calculating attorney's fees, we are not in a position to determine the proper amount of fees thus to be awarded. Prudence thus dictates that we remand to the district court the fact question of the appropriate amount to be assessed against Krown and its solidary co-judgment debtors as reasonable attorney's fees under the Krown lease.

II

COSTS

Travelers argues on cross-appeal that the district court erred in requiring the respective parties to bear their own costs. Travelers insists that it was the prevailing party and therefore should not have to bear any costs of the district court litigation. Although we might agree if we were reviewing this issue de novo, that is not the applicable standard of review. Assessment of costs is reviewed for abuse of discretion; and we find no reversible

error under that highly restrictive standard of review.

Although Travelers did succeed on many of its claims, it did not succeed totallySQat least as to quantumSQon each and every one of them. In fact, the jury awarded Travelers significantly less dollars than it sought, and the district court rejected a number of Travelers' asserted causes of action. Thus the district court's determination that Travelers did not prevail sufficiently to be entitled to an award of costs as a matter of law under Federal Rule of Civil Procedure 54(d) cannot be said to constitute an abuse of discretion. We therefore affirm the district court's ruling on the taxing of court costs in this matter.

III

PRE-JUDGMENT INTEREST

We turn finally to the question of the proper rate to be applied in calculating pre-judgment interest, an element of recovery which the jury determined that Travelers was entitled to receive. Travelers' position on this issue is stated in its brief: "[The Liljeberg defendants are] properly liable for all damages flowing from [their] misrepresentation including all unpaid rent and interest at the contract rate . . . . The accrued interest is an integral part of the damages caused by the [defendants], and should not be segregated from the outstanding rental." Travelers argues that Cross-Appellees' contrary position is, in essence, a red herring intended to obfuscate the solidary liability of those parties by distinguishing the genesis of liability along tort and contractual lines. Our reading of the decision of the Louisiana

Supreme Court in Narcise v. Illinois Central Gulf Railroad Co.,[4] to the effect thatSQregardless of the legal nature of the liability of solidary obligors, i.e., irrespective of the fact that some may be liable in contract and others in tortSQeach solidary obligor is liable to the obligee for 100% of the indebtedness owed by each other co-obligor, convinces us that Travelers is correct. This includes the propriety under Louisiana law of treating accrued pre-judgment interest as an integral part of the damages necessary to compensate the contractually injured party.[5] These maxims of state law support the proposition that the correct way to calculate post-judgment interest is to apply the proper percentage to the entire amount of damages recovered, including in the instant case not only rent but pre-judgment interest as well. Still, we must here focus not so much on the nature of the pre-judgment interest awards or the sum upon which such interest is to be calculated, but on the appropriate rate of interest to be charged.

Paralleling the situation we analyzed above in connection with attorney's fees, we discern that in the issue of pre-judgment interest a dichotomy resulting from differences in the two different lease formsSSQLEI and KrownSQis produced for purposes of applying the law of the case doctrine. As noted, Travelers I dealt solely with the LEI leases. And, as was the case with attorney's fees, Travelers I contains a direct finding and holding on pre-

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[4] 427 So.2d 1192 (La. 1983). See Hoefly v. Government Employees Ins. Co., 418 So.2d 575, 578 (La. 1982).

[5] See e.g., Trans-Global Alloy Ltd. v. First Nat'l Bank, 583 So.2d 443, 457-58 (La. 1991).

judgment interest. Still, for law of the case purposes, such holding is applicable only to LEI lease provisions.

Despite Travelers' insistence that the LEI lease document provision calling for "the highest legal rate allowable" should be interpreted to authorize pre-judgment interest at the highest non-usurious rate available for commercial transactions in Louisiana, we cannot disregard the holding in Travelers I that the phrase "the highest legal rate allowable" incorporates by reference Louisiana's legal or judicial rate, determinable under the applicable provision of the Louisiana Civil Code.[6] Clearly, then, we are constrained by the law of the case doctrine to conclude today that pre-judgment interest on the portion of the district court's damage award to Travelers in the instant case for monies due and owing under the LEI leases should have been calculated in accordance with article 2924 of the Louisiana Civil Code.[7] In other words, we are not at liberty to consider Travelers' argument that the subject LEI lease provision means something different here than we found it to mean in Travelers I. Therefore, on remand, the district court must re-calculate the LEI portion of pre-judgment interest accordingly.

Not so, however, for calculating pre-judgment interest on monies found to be due and owing to Travelers as a result of breaches of the Krown lease (or, for that matter, any damages awarded to Travelers by the district court in this case other than under the LEI leases). Travelers I dealt solely with the LEI

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[6] LA. CIV. CODE ANN. art. 2924.

[7] Id.

leases, so that its pronouncements regarding pre-judgment interest are limitedSQfor purposes of the law of the case doctrinesQto awards arising from LEI lease obligations only. We therefore leave undisturbed the findings and holdings of the district court concerning pre-judgment interest on all portions of the judgment rendered in favor of Travelers other than the portion thereof attributable to the LEI leases. These unaffected portions include, without limitation, awards arising from or connected with the Krown lease.

IV.

CONCLUSION

The judgment of the district court holding the Liljebergs and various of the Liljeberg entities liable in solido to Travelers is affirmed in all respects, subject only to the following two exceptions: (1) To the extent that said judgment failed to award reasonable attorney's fees to Travelers, payable by some among the Defendants-Appellants/Cross-Appellees in solido, as to all matters in controversy other than the portion of the judgment resulting from liability for rent under the LEI leases, we REVERSE and REMAND for the district court to determine such reasonable attorney's fees and to modify or supplement its judgment accordingly; and (2) to the extent that some of the pre-judgment interest awarded in said judgment was calculated on the portion of the award resulting from delinquencies in the rent accruing under the LEI lease, at a rate or rates other than as specified in article 2924 of the Louisiana Civil Code, we REVERSE and REMAND for the district court to re-

calculate pre-judgment interest in accordance with said code article, but only as to the portion of the award arising from the LEI leases; and to modify or supplement its judgment accordingly. Travelers' motion to dismiss Appellants' appeal, and Travelers' alternative motion to strike Appellants' original and reply briefs, are DENIED. All costs of this appeal are taxed to Defendants-Appellants/Cross-Appellees (except St. Jude Hospital of Kenner, Louisiana, Inc.) in solido.