

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 272

September Term, 2017

A&S SMITH DEVELOPMENT CORP.

v.

SAIL AWAY, LLC, ET AL.

Eyler, Deborah S.,
Berger,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: April 28, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises out of a dispute regarding a commercial lease. Commercial landlord A&S Smith Development Corp. (“A&S”), appellant/cross-appellee, brought breach of contract claims against former tenant Sail Away, LLC and Amy Michaud (collectively, “Sail Away”), appellee/cross-appellant. Sail Away filed a counterclaim against A&S, alleging tortious interference of an economic relationship. The circuit court entered summary judgment in favor of A&S as to liability for the breach of contract claims, but referred the determination of damages to the jury. At the close of all evidence in the subsequent jury trial, the circuit court entered judgment as a matter of law in favor of A&S as to Sail Away’s counterclaim alleging tortious interference.

The jury returned a verdict awarding certain damages to A&S and declining to award other damages. Following the trial, A&S filed a motion for judgment notwithstanding the verdict and for attorney’s fees. The circuit court denied both motions. A&S and Sail Away both noted appeals.

A&S presents six issues for our consideration on appeal, which we have consolidated as two issues as follows:

1. Whether the circuit court erred in denying A&S’s motion for judgment notwithstanding the verdict on the issues of real estate taxes, late fees and interest on rent, interest on real estate taxes, interest on slip leases, and attorney’s fees incurred in prosecuting A&S’s claim for breach of the commercial lease.
2. Whether the circuit court erred in denying A&S’s motion for attorney’s fees incurred in defending the tortious interference counterclaim.

In addition to responding the A&S’s appellate issues, Sail Away presented two additional issues for our consideration in its cross-appeal. Sail Away argued that the circuit court erred by entering summary judgment in favor of A&S as to liability for the breach of contract claims and that the circuit court erred by granting A&S’s motion for judgment as to the tortious interference claim. Following oral argument, Sail Away filed a “Line” stating that, in the event this Court finds against A&S on the issues raised in its appeal, Sail Away’s cross-appeal would be withdrawn.

For the reasons explained herein, we shall affirm. We hold that the circuit court did not err by denying A&S’s motion for judgment notwithstanding the verdict and that the circuit court did not err by denying A&S’s motion for attorney’s fees incurred in defending the tortious interference counterclaim. We do not address the issues initially presented in Sail Away’s cross-appeal, which were subsequently withdrawn.

FACTS AND PROCEEDINGS

In 2010, Sail Away entered into a commercial lease agreement (the “Lease”) with Pier Seven Limited Partnership. The Lease provided that Sail Away was entitled to use certain office space at a marina in Edgewater, Maryland (the “Marina”). The Lease term was from May 1, 2010 through April 30, 2011, and included the following automatic renewal provision: “This Lease will automatically renew for successive 12 (twelve) month periods unless either the Tenant or Landlord provides notice to the other between 60 (sixty) and 90 (ninety) days prior to the scheduled expiration of the lease that they wish to not review.”

The Lease provided that Sail Away was required to pay rent and a pro rata portion of real estate taxes, and further provided for late fees and interest which accrued if rent and taxes were not paid by the date specified in the Lease. The Lease further required Sail Away to indemnify the landlord for any attorney's fees required to enforce the Lease, providing: "In the event lawyers are needed to enforce either party's rights hereunder, the prevailing party shall be entitled to reimbursement from the other party of reasonable attorney fees incurred."

In addition to the Lease for office space, Sail Away also entered into multiple boat dockage and storage agreements. One agreement, for dockage and storage of a vessel named "Makai," was for the period of July 2013 through May 2014. Another agreement was for a vessel named "Misto" and covered the period of April 2013 through March 2014.

On May 1, 2014, the Lease automatically renewed for the 2014-15 term. On May 2, 2014, Pier Seven Limited Partnership sold the marina and assigned the Lease to A&S. After the sale and assignment of the Lease, Sail Away stopped paying rent, but did not give any notice of termination of the Lease. The Lease automatically renewed again on May 1, 2015 for the 2015-16 term. Sail Away failed to pay rent for the months of June 2014 through December 2015, when A&S secured a new tenant. The total amount of rent due was \$16,906.00 and the interest and late fees set forth in the Lease totaled \$5,441.00.

During the same period, Sail Away did not pay any real estate taxes required by the Lease or the dockage and storage agreements. A&S calculated the amount of taxes required by the Lease during the May 2014 - December 2015 period totalled \$9,446.00 plus interest in the amount of \$1,735.00. A&S determined that the amount due for the

Makai agreement was \$4,876.00 plus \$500.09 in interest, and the amount due for the Misto agreement was \$4,950.00 plus \$550.16 in interest. A&S demanded that Sail Away make payments for office rent, real estate taxes, vessel storage, interest, late fees, and attorney's fees, but Sail Away declined to pay those fees.

On November 12, 2015, A&S filed a complaint in the Circuit Court for Anne Arundel County alleging two breach of contract claims, one for the Lease and a second for the dockage agreements. A&S filed an amended complaint on April 28, 2016. Sail Away filed an answer to A&S's initial and amended complaints and also filed a counterclaim alleging tortious interference with economic relations by A&S. Sail Away demanded a jury trial.

Prior to trial, both parties moved for summary judgment. The circuit court held a hearing on January 27, 2017. At the close of the hearing, the circuit court granted A&S's motion for summary judgment as to liability only. The circuit court determined that no reasonable fact-finder could find that Sail Away had not breached Lease and dockage agreements. The court left the determination of damages for a jury's determination. The circuit court also denied the motion for summary judgment as to Sail Away's tortious interference counterclaim.

A two-day trial began on March 16, 2017. At the close of evidence, the circuit court granted A&S's motion for judgment as to Sail Away's counterclaim, determining that no reasonable fact-finder could find that Sail Away had established the elements of tortious interference of an economic relationship. The issues submitted to the jury were the determination of damages for rent payments, interest and late fees on the office rent

payments, real estate taxes, attorney's fees associated with the breach of Lease/breach of dockage agreements case, dockage fees, and interest and late fees on the dockage fees. The circuit court determined that the issue relating to attorney's fees incurred by A&S while defending Sail Away's counterclaim was a legal issue to be decided by the court.

The jury awarded damages in the following amounts, indicating its verdict on a special verdict sheet:¹

1. Office Rent Payments:	\$16,906.00
2. Interest/Late Fees on Rent:	\$0.00
3. Real Estate Taxes:	\$0.00
4. Attorney's Fees associated with the breach claim	\$0.00
5. Dockage Payments:	\$9,826.00
6. Interest/Late Fees on Dockage:	\$0.00

The verdict sheet did not include a specific question as to whether A&S failed, to any extent, to mitigate damages.

A&S filed a motion for judgment notwithstanding the verdict, asking the circuit court to award damages for interest/late fees, taxes, and attorney's fees associated with prosecuting the breach of Lease/breach of dockage agreements case. A&S further sought attorney's fees for expenses incurred in defending the tortious interference counterclaim. The circuit court denied both motions.

¹ The parties agreed to the format of the verdict sheet.

Both parties noted timely appeals. Additional facts shall be discussed as necessitated by our discussion of the issues on appeal.

STANDARD OF REVIEW

The entry of summary judgment is governed by Maryland Rule 2-501, which provides: “The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.” Md. Rule 2-501(f). “The court is to consider the record in the light most favorable to the non-moving party and consider any reasonable inferences that may be drawn from the undisputed facts against the moving party.” *Mathews v. Cassidy Turley Md., Inc.*, 435 Md. 584, 598 (2013). “Because a circuit court’s decision turns on a question of law, not a dispute of fact, an appellate court is to review whether the circuit court was legally correct in awarding summary judgment without according any special deference to the circuit court’s conclusions.” *Id.* (citation omitted). “The mere existence of a scintilla of evidence in support of the plaintiff’s claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff.” *Hamilton v. Kirson*, 439 Md. 501, 523 (2014) (citations and internal quotation marks omitted). “[O]rdinarily an appellate court will review a grant of summary judgment only upon the grounds relied upon by the trial court.” *Id.* (citations and internal quotation marks omitted).

The same standard of review applies for a motion for judgment notwithstanding the verdict and a motion for judgment at the close of the evidence. *Univ. of Maryland Med.*

Sys. Corp. v. Gholston, 203 Md. App. 321, 329 (2012). For both motions, we consider “whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence.” *Id.* We review the circuit court’s denial of A&S’s claim for attorney’s fees for abuse of discretion. *Monmouth Meadows Homeowners Ass’n., Inc. v. Hamilton*, 416 Md. 325, 332 (2010).

DISCUSSION

I.

We first address A&S’s assertion that the circuit court erred by denying its motion for judgment notwithstanding the verdict on the issues associated with the real estate taxes, late fees and interest on rent, interest on real estate taxes, interest on dockage agreements, and attorney’s fees incurred in prosecuting the breach of commercial lease claim. A&S asserts that the circuit court erred as a matter of law by denying the motion for judgment notwithstanding the verdict because A&S presented uncontradicted evidence as to the amount of rent, taxes, interest, late fees, and attorney’s fees.

A&S points to the following evidence in the record in support of its assertion that it was entitled to interest and late fees for overdue office rent and dockage fees, taxes, and attorney’s fees:

- The Lease provides that “[a]ny payment of Rent not received by Landlord within five (5) days of its due date shall be subject to a five percent (5%) late fee plus interest at the rate of 16% per annum.
- The Lease provides that “[i]n the event lawyers are needed to enforce either party’s rights hereunder, the prevailing party shall be entitled to reimbursement from the other party of reasonable attorney fees incurred.”

A&S further points to the testimony of its president, Hugh Murray, as to the precise calculations of interest and late fees for office rent and dockage, as well as Mr. Murray’s testimony about the reasonableness of the \$16,962.25 incurred in legal fees for prosecuting the breach claims.

At trial and before this Court, Sail Away did not dispute the specific calculations presented by A&S, but instead argued that the provisions of the required tax payments had been waived by A&S’s predecessor. We shall discuss Sail Away’s waiver argument *infra*. Sail Away further asserts that A&S is not entitled to any damages whatsoever because it failed to mitigate damages.

We recognize that there is some level of inconsistency in the jury’s verdict, given that the jury awarded the full amount of rent and dockage fees A&S had claimed was due under the Lease, but declined to award any interest or late fees. We further acknowledge that the circuit court determined, as a matter of law, that the terms of the Lease were not waived, and yet, the jury awarded no damages for the tax payments, interest, late fees, and attorney’s fees specifically referenced in the Lease. Nonetheless, as we shall explain, the inconsistency of the jury’s verdict can be reconciled. We, therefore, shall not reverse the circuit court’s denial of A&S’s motion for judgment notwithstanding the verdict.

Under Maryland law, in civil matters, “it is only irreconcilably inconsistent verdicts that are not permitted to stand.” *Turner v. Hastings*, 432 Md. 499, 517 (2013). It is our task to “attempt to reconcile a jury’s answers because ‘[o]ur quest should be for a view of the case which would make the jury’s findings consistent.’” *Id.* (quoting *Edwards v. Gramling Eng’g Corp.*, 322 Md. 535, 548 (1991)). The Court of Appeals has, for example,

permitted a verdict to stand when a jury specifically found that a plaintiff did not suffer any injury, yet awarded her damages. *Id.* at 519. In *Turner*, a plaintiff brought a claim against another driver based upon alleged injuries suffered in a motor vehicle accident while the plaintiff was operating her taxicab. The jury found that the defendant was negligent, but determined that the plaintiff had not sustained injuries as a result of the accident. The jury awarded the plaintiff damages for past medical expenses, lost wages, and property damage. The Court explained that the jury’s verdict was “consistent with the view that the jury found that Turner had not sustained any physical injuries, yet she was still damaged through her loss of income and personal property damage.” *Id.* at 519. The Court of Appeals has also held that a jury’s finding that a defendant driver negligently caused a plaintiff’s injuries was not inconsistent with an award of zero damages. *Patras v. Syphax*, 166 Md. App. 67 75-77 (2005). The Court determined that a reasonable fact-finder could have concluded that “no monetary award was justified because [the plaintiff] was so untrustworthy as a medical historian that he had failed to meet his burden of proving the amount of money that would compensate him for his pain.” *Id.* at 76.

Sail Away offers an explanation of how the jury verdict in this case can be reconciled. Specifically, Sail Away asserts that the jury’s decision to not award damages for late fees, interest, taxes, and attorney’s fees can be characterized as a determination by the jury that A&S failed to mitigate its damages. The special verdict form, which was prepared by counsel for A&S, included specific line items for office rent payments, interest on rent, real estate taxes, attorney’s fees related to office lease, dockage, and interest on dockage. Sail Away argued to the jury that A&S had failed to use reasonable efforts to

rent the property after Sail Away vacated the property, and there was no specific question on the verdict sheet inquiring as to whether any damages should be reduced for failure to use reasonable efforts to mitigate.

We agree that it is conceivable that the jury intended to reduce the damages awarded to A&S due to a perceived failure to mitigate and did so by declining to award damages for interest, late fees, taxes, and attorney’s fees. Of course, there is no way for us to know with any certainty the precise basis for the jury’s verdict. Nonetheless, we agree with Sail Away that it is, at least, a plausible explanation. In our view, this is enough to reconcile the jury’s verdict, particularly while keeping in mind that “[o]ur quest should be for a view of the case which would make the jury’s findings consistent,” *Turner, supra*, 432 Md. at 517. Accordingly, we hold that the circuit court did not err by denying A&S’s motion for judgment notwithstanding the verdict.

II.

A&S further asserts that the circuit court erred by denying its motion for attorney’s fees associated with defending the tortious interference with an economic relationship counterclaim. In its cross-appeal, Sail Away initially asserted that the circuit court erred by granting A&S’s motion for judgment on Sail Away’s claim for tortious interference. Sail Away ultimately withdrew its cross-appeal, so our consideration of the tortious interference claim is limited to whether the circuit court erred by denying A&S’s motion for attorney’s fees. In order to explain our reasoning as to the attorney’s fees issue, however, we must to some extent consider the substance of the tortious interference claim.

A. *Tortious Interference*

“The tort of intentional interference with contract is well established in Maryland.” *Macklin v. Robert Logan Assocs.*, 334 Md. 287, 296 (1994). The tort has two different manifestations and “is committed when a third party’s intentional interference with another in his or her business or occupation induces a breach of an existing contract or, absent an existing contract, maliciously or wrongfully infringes upon an economic relationship.” *Id.* at 297. The Court of Appeals has explained that a tortious interference claim requires three parties:

Tortious interference with business relationships arises only out of **the relationships between three parties, the parties to a contract or other economic relationship (P and T) and the interferer (D)**. We have said that “the two general types of tort actions for interference with business relationships are inducing the breach of an existing contract and, more broadly, maliciously or wrongfully interfering with economic relationships in the absence of a breach of contract.” *Natural Design, Inc. v. Rouse Co.*, 302 Md. 47, 69, 485 A.2d 663, 674 (1984). The elements of the form of the tort involving prospective contracts were listed in *Natural Design*.

“(1) [I]ntentional and wilful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting.”

302 Md. at 71, 485 A.2d at 675 (quoting *Willner v. Silverman*, 109 Md. 341, 355, 71 A. 962, 964 (1909), in turn quoting from *Walker v. Cronin*, 107 Mass. 555, 562 (1871)).

K & K Mgmt., Inc. v. Lee, 316 Md. 137, 154–55 (1989) (emphasis supplied).

At trial, Sail Away asserted that A&S tortiously interfered with Sail Away’s potential business relationships in various ways. Sail Away acknowledged that a

contractual relationship existed between itself and A&S, but urged that A&S could be characterized as a third party that sought to interfere with Sail Away’s business dealings. The circuit court expressly rejected Sail Away’s attempts to characterize A&S as a third party, explaining:

I can’t get away from the fact that [the relationship] clearly arises out of the contract. It doesn’t arise out of some third party coming in and ripping the signs down, or moving the boats, or whatever. It all arose out of the contract.

We agree with the circuit court that, absent a specifically identified third-party, a claim of tortious interference must fail.

B. Attorney’s Fees for Defense of the Tortious Interference Claim

A&S asserts that the circuit court abused its discretion by denying A&S’s motion for attorney’s fees incurred while defending the tortious interference counterclaim. A&S asserts that it is entitled to attorney’s fees under the Lease because the circuit court determined that the tort claim failed because the dispute between A&S and Sail Away arose only out of the contractual relationship between the parties. Specifically, A&S points to the portion of the Lease that provides that “[i]n the event lawyers are needed to enforce either party’s rights hereunder, the prevailing party shall be entitled to reimbursement from the other party of reasonable attorney fees incurred.”

As discussed *supra*, the circuit court determined that the tortious interference claim failed due to the contractual relationship between the parties and the lack of a specifically identified third-party. It does not necessarily follow, however, that Sail Away’s tort claim was specious or entirely without merit. Furthermore, we will not reverse a circuit court’s

denial of a motion for attorney’s fees absent an abuse of discretion. *Monmouth Meadows, supra*, 416 Md. at 332.

We have consistently held that “a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. Rather, for us to conclude that the circuit court has abused its discretion, [t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *Aronson & Co. v. Fetridge*, 181 Md. App. 650, 688 (2008) (quotations omitted) (alterations in original). In our view, the circuit court acted within its broad discretion when denying A&S’s motion for fees. Accordingly, we shall leave the circuit court’s determination as to attorney’s fees undisturbed.

**JUDGMENT OF THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY AFFIRMED. COSTS
TO BE PAID BY APPELLANT.**