

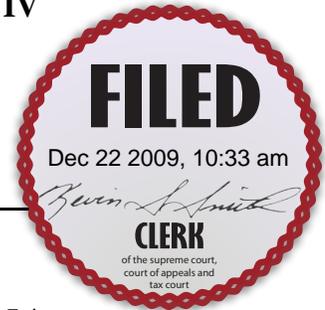
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM R. DOBSLAW,
Appellant-Defendant,

vs.

BURKHART ADVERTISING, INC.,
Appellee-Plaintiff.

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No. 71A03-0904-CV-172

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Michael G. Gotsch, Judge
Cause No. 71C01-0803-PL-48

December 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

William R. Dobslaw appeals the trial court's judgment in favor of Burkhart Advertising, Inc. ("Burkhart") on Dobslaw's complaint for a declaratory judgment, raising the following restated issues:

- I. Whether the trial court erred in concluding that a steel advertising structure erected by Burkhart on real estate which it leased from Dobslaw was not a permanent fixture and was not abandoned by Burkhart; and
- II. Whether the trial court erred in concluding that Dobslaw waived his right to assert strict compliance with the lease.

We affirm.

FACTS AND PROCEDURAL HISTORY

Dobslaw is the owner of real property located at 130 East Ireland Road, South Bend, St. Joseph County, Indiana. On April 27, 2000, Burkhart and Dobslaw entered into a lease agreement, for Burkhart to maintain a steel advertising structure on Dobslaw's real property. The lease was for a five-year term and renewed automatically for additional three-month terms unless one party gave written notice to the other as provided in the lease. A disagreement between the parties arose, and Dobslaw notified Burkhart on July 5, 2007 that the lease would be terminated in thirty days because of a reconciliation error. Burkhart issued a corrected reconciliation statement and a check to Dobslaw on July 13, 2007, and Dobslaw negotiated the check. Thereafter, Burkhart proposed certain changes in the lease which Dobslaw was to consider and respond. Dobslaw did not respond, but rather notified Burkhart on September 11, 2007 that he considered the lease terminated as of August 5, 2007 and the steel advertising structure abandoned because Burkhart did not remove it within thirty days of such date. Dobslaw

then filed a complaint for declaratory judgment. Following a bench trial, the trial court issued its judgment and entered the following relevant findings of fact:

4) The replacement lease (hereinafter "Lease") was based on Burkhart's standard form lease and incorporated changes proposed by Dobslaw including the express provision for a definite period of thirty days for the removal of the signage structure following termination of the [L]ease, removing language allowing for the removal of the sign[age] structure by the Lessee "at any time up to a reasonable time after termination." The Lease also provided that "Lessee's advertising structure, materials and equipment placed upon said premises shall always remain Lessee's personal property and may be removed by Lessee following the termination of the Lease herein."

.....

6) The Lease term was from May 5, 2000 to May 4, 2005. Thereafter, the Lease would automatically extend for three-month periods unless terminated by written notice at least thirty days prior to the commencement of a new three-month period.

7) The lease continued after the initial lease term for several successive periods, until at least August 4, 2007.

8) On July 2, 2007, Dobslaw issued a notice of termination of the Lease by certified mail. The notice was received on July 5, 2007.

9) Dobslaw indicated that his reason for seeking to terminate the [L]ease was a reconciliation error.

10) Terry O'Brien from Burkhart spoke with Dobslaw on July 9, 2007, about the accounting reconciliation error. Burkhart issued a corrected accounting reconciliation to Dobslaw on July 13, 2007, which included a check. Dobslaw negotiated the check.

11) Also on July 13, 2007, O'Brien spoke to Dobslaw and proposed to change the Lease to a fixed amount. Dobslaw was to consider the proposal and get back to O'Brien.

12) O'Brien again called Dobslaw on July 19 and July 25, 2007, to discuss the proposed change, but Dobslaw was not available so O'Brien left messages for Dobslaw. Dobslaw did not return O'Brien's July 19 or July

25 calls.

13) On September 11, 2007, Dobslaw sent Burkhart a letter indicating that he considered the Lease terminated as of August 5, 2007 and notified Burkhart that its window of time for removal of the sign had passed, that he considered the property abandoned, that Burkhart was not to alter, change or remove the structure, and that Burkhart was not to trespass on Dobslaw's property.

14) At no time between July 2 and September 11, 2007, did Dobslaw inform anyone at Burkhart that they had thirty days to remove the Advertising Structure.

....

16) O'Brien called Dobslaw again on September 13, 2007 and arranged for a meeting on September 18, 2007.

17) At the September 18, 2007 meeting O'Brien and Dobslaw discussed lease terms and O'Brien advised Dobslaw that Burkhart had not abandoned the Advertising Structure.

....

22) At the December 13, 2007 meeting, Dobslaw rejected the new terms proposed by Burkhart. O'Brien responded by telling Dobslaw that due to the onset of winter, Burkhart would remove the Advertising Structure in the spring. Dobslaw raised no objection.

Appellant's App. at 6-8. Further facts will be set forth where necessary.

DISCUSSION AND DECISION

When the trial court enters findings of fact and conclusions of law pursuant to Indiana Trial Rule 52, we apply a two-tiered standard of review considering whether the evidence supports the findings and whether the findings support the judgment. *Vill. Commons, LLC v. Marion County Prosecutor's Office*, 882 N.E.2d 210, 214 (Ind. Ct. App. 2008) (citing *Todd Heller, Inc. v. Ind. Dep't of Transp.*, 819 N.E.2d 140, 146 (Ind.

Ct. App. 2004)).

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 nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment.

Id. (citations omitted).

“We define the clearly erroneous standard based on whether the party is appealing a negative or an adverse judgment.” *Garling v. Ind. Dep’t of Natural Res.*, 766 N.E.2d 409, 411 (Ind. Ct. App. 2002) (citing *Blair Labs., Inc. v. Clobes*, 599 N.E.2d 233, 235 (Ind. Ct. App. 1992), *trans. denied*). “A negative judgment is one entered against a party who bears the burden of proof, while an adverse judgment is one entered against a party defending on a given question.” *Id.* In the instant case, the trial court entered findings against Dobslaw, the party with the burden of proof; thus, Dobslaw is appealing a negative judgment.

I. Permanent Fixture

We begin by addressing Dobslaw's contention that the structure was a permanent fixture.

To determine whether personal property have become so identified with the real property as to become a fixture, Indiana has adopted a three-part test. The item of personal property must meet the following requisites: (1) Actual or constructive annexation to the realty, (2) adaptation to the use or purpose of that part of realty with which it is connected, and (3) the intention of the annexing party to make the item a permanent part of the freehold. The third element of the test focusing upon the intent of the party is the “chief test” that controls whether an item becomes a fixture or remains personal property.

Milestone Contractors, L.P. v. Ind. Bell Tel. Co., 739 N.E.2d 174, 177 (Ind. Ct. App. 2000) (citations omitted).

Here, the structure did not become a permanent fixture. The lease between the parties provided that, “Lessee’s advertising structure, materials and equipment placed upon said premises shall always remain Lessee’s personal property and may be removed by Lessee following the termination of the Lease herein.” The lease is a clear statement of the parties’ intentions that the steel structure was not to become a fixture, and the trial court did not err in concluding that it remained the personal property of Burkhart.

Similarly, the evidence supports the trial court’s finding that Burkhart did not abandon the steel structure. Burkhart did not act in a way that suggested that they relinquished the property or intended to do so at any point during the term of the lease or the extensions afterwards. It has long been recognized that when an owner leaves behind personal property with the specific intent to terminate ownership, or when an owner ceases all efforts to seek and reclaim lost property, the law considers that property abandoned. *Smyth v. Carter*, 845 N.E.2d 219, 222 (Ind. Ct. App. 2006). Here, there is no evidence to indicate either the intent or the ceasing of efforts to reclaim on the part of Burkhart. Indeed, the trial court found that Burkhart specifically informed Dobslaw that it was not abandoning the structure on multiple occasions and that it notified Dobslaw that it would remove the structure in the spring due to weather conditions. The evidence supports such findings.

II. Strict Compliance with Lease

Dobslaw contends that the trial court erred when it concluded that he waived his

right to assert strict compliance with the lease.

“Waiver is where one in possession of any right, whether conferred by law, or by contract, and with full knowledge of material facts, does or forbears the doing of something inconsistent with the existence of the right, or of his intention to rely upon it; thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards.”

Snyder v. Int’l Harvester Credit Corp., 147 Ind. App. 364, 369, 261 N.E.2d 71, 74 (1970) (quoting *Kenefick v. Shumaker*, 64 Ind. App. 552, 559-60, 116 N.E. 319, 320-22 (1917)).

Dobslaw contends that because Burkhart did not remove the structure within the thirty-day period outlined in the lease, the property became his. Here, after Dobslaw sent his notice of termination of the lease, he and Burkhart continued to keep in contact and met on several occasions to discuss the lease and compensation. He accepted Burkhart’s check for the reconciliation payment and continued to discuss lease terms. When such discussions broke down, and Burkhart notified Dobslaw on December 13, 2007 that it would remove the structure in the spring due to weather conditions, Dobslaw made no objection. The evidence supports the trial court’s finding that Dobslaw waived strict compliance with the lease and, specifically, that Dobslaw waived the lease term requiring removal of the structure within thirty days.

Dobslaw finally contends that he is entitled to compensation for the hold-over period during which Burkhart continued to use the structure. However, the trial court agreed with Dobslaw and ordered such payment. Accordingly, Dobslaw demonstrates no error.¹ Affirmed.

NAJAM, J., and BAILEY, J., concur.

¹ We commend the trial court for the clarity of its entry, which greatly facilitated appellate review.