

IN THE COURT OF APPEALS OF TENNESSEE  
EASTERN SECTION

**FILED**

March 25, 1996

Cecil Crowson, Jr.  
Appellate Court Clerk

SAFETY OPTICAL DIVISION ) C/A NO. 03A01-9509-CH-00331  
OF MID-SOUTH OPTICAL )  
LABORATORIES, INC., ) MEMPHIS CHANCERY  
)  
Plaintiff - Appellant, ) HON. EARL H. HENLEY,  
) CHANCELLOR  
v. )  
)  
NATIONAL RAILROAD PASSENGER )  
CORP., ) AFFIRMED  
) AND  
Defendant - Appellee. ) REMANDED

FRANK P. PINCHAK, WITT, GAITHER & WHITAKER, P. C., Chattanooga,  
for Plaintiff - Appellant.

HARRY R. CASH, GRANT, KONVALINKA & HARRISON, P. C.,  
Chattanooga, for Defendant - Appellee.

**O P I N I O N**

Franks. J.

In this action in debt, the Trial Judge entered judgment against defendant for \$5,368.57, but refused to award plaintiff attorney's fees, interest and costs, and plaintiff has appealed.

Plaintiff brought this action seeking \$31,528.21, together with costs, attorney's fees and pre-judgment interest. A reference was made to the master, who determined that defendant owed the amount entered in the judgment, and included in the master's report was the following findings:

Records of payments or any other documentation have

not been forthcoming from the defendant, National Railroad Passenger Corporation after repeated requests. . . . Records have been provided by the plaintiff but only dating back to December, 1990. The balance brought forward as of that date was \$40,855.23. Their records reflected payments received by check numbers and dates, but did not indicate which invoice numbers were included in these payments. Copies of invoices were furnished with purchase orders attached to most. A computer print-out was filed, showing a debit when safety glasses were furnished, and a credit when the payment was made. The balance shown is not a running balance, and I cannot determine the total amount outstanding on any given date. . . . check error entries and credit entries could not be verified.

Neither party excepted to the master's report which was confirmed by the Trial Judge. The plaintiff filed a motion for interest, costs and attorney's fees. In overruling the motion, the Trial Court said:

The Court refuses to allow attorney's fees in either direction. The record from both sides was very poor, and each were making demands upon the other that were not justified in the final accounting.

While pre-judgment interest is allowable as an element of damages, it is allowable as a matter of discretion by the Trial Judge, in accordance with the principles of equity. *Schoen v. J. C. Bradford & Co.*, 667 S.W2d 97 (Tenn. App. 1984). In this action the Court experienced considerable difficulty in arriving at the amount of the judgment, due in part to plaintiff's accounting procedures and billing practices. The Chancellor properly exercised his discretion in denying pre-judgment interest. As Professor Gibson observed:

Good conscience requires a party to do no act that will mislead another to his detriment, even though the other may have done him wrong. Hence, it has been said that nothing can call a court of chancery into activity but conscience, good faith and

reasonable diligence?<sup>1</sup>

Appended to plaintiff's offer which was accepted by defendant, was a page setting forth ?policies?. The ?policies? include the following:

Any account that is referred to an outside, independent collection agency is automatically deleted from our account list. All fees, charges, and/or commissions associated with such collection costs will be added to the account's outstanding balance, as such collection costs are not the responsibility of Safety Optical, but will be borne by the account.

Assuming without deciding that the foregoing was a part of the contract between the parties, plaintiff's actions in this case would not trigger this provision.<sup>2</sup> No collection agency was employed to collect the debt, and no evidence was offered that any claimed ?costs? were reasonable and necessary.

Plaintiff presents no basis for the courts to award attorney's fees. In the absence of a statutory provision or a contractual agreement, attorney's fees are not awarded to the prevailing party. *Goings v. Aetna Casualty & Surety Co.*, 491 S.W2d 847 (Tenn. App. 1972).<sup>3</sup>

Finally, it is argued that the Trial Court was in error in not affording an evidentiary hearing on plaintiff's motion for fees and costs. The parties had an opportunity to present any evidence they thought was relevant before the

---

<sup>1</sup>*Gibson's Suits in Chancery*, 4th Ed. §49, p. 66.

<sup>2</sup>

Collecting agencies are engaged in the business of collecting, adjusting, and remitting the proceeds of claims forwarded to them by creditors. *Tennessee Credit Clear Company v. Lindsey*, 162 Tenn. 149 (1931).

<sup>3</sup>

The contract does not provide for attorney's fees and the contract which is apparently one of adhesion, is to be strictly construed against plaintiff. See *Wright v. Commonwealth*, 351 Mass. 666, 223 N.E.2 666.

master. The Trial Court's overruling the motion was based upon the findings of the master. We find no reversible error in the Trial Court's judgment and affirm at appellant's cost.

-----  
Herschel P. Franks, J.

CONCUR:

-----  
Houston M. Goddard, P. J.

-----  
Charles D. Susano, Jr., J.