

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-97

FU HING MAIN RESTAURANT, INC.

vs.

NEIL TAGERMAN, trustee.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial in the Superior Court, an amended judgment issued ordering, as relevant here, the plaintiff, Fu Hing Main Restaurant, Inc. (tenant), to pay the defendant trustee, Neil Tagerman (trustee), over \$80,000 in attorney's fees and costs. The plaintiff appeals.<sup>2</sup> We affirm.

Background. Based on the limited record presented,<sup>3</sup> we discern the following facts. The tenant and the trustee

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<sup>1</sup> Of the 200 Main Street Trust.

<sup>2</sup> Although the tenant filed a general notice of appeal as to the amended judgment, the argument in the tenant's brief solely addresses so much of the amended judgment that awards attorney's fees and costs. See Mass. R. A. P. 16 (a) (9), as appearing in 481 Mass. 1628 (2019).

<sup>3</sup> The tenant has not provided us with the jury verdict forms, any of the trial transcripts, the transcript of the trustee's posttrial motion for assessment of attorney's fees and costs (posttrial motion), or its attorney's affidavit or memorandum of law attached to its opposition to the posttrial motion. See Arch Med. Assocs., Inc. v. Bartlett Health Enters., Inc., 32 Mass. App. Ct. 404, 406 (1992) (burden on appellant to furnish

executed a commercial lease (lease) whereby the tenant leased space in a building (premises) from the trustee to operate a restaurant. Paragraph nineteen of the lease provided that the tenant was liable to the trustee for "any expenditures," including "reasonable attorney's fees in [the trustee's] instituting, prosecuting or defending any action or proceeding," if the tenant "default[ed], after reasonable notice thereof, in the observance or performance of any [lease] conditions or covenants."

According to the trustee, the tenant failed to maintain the sewer lines and grease trap despite the trustee's repeated demands to do so. Sewer backups and damage to the building, including areas leased by other tenants, resulted. The trustee met with the tenant's agent and informed him of "the need for immediate remediation and repair [of the tenant's] sewer and drain line and grease trap." The tenant hired a contractor; the premises' sewer and drain lines were cut out and the grease trap was removed, leaving an open pit of overflowing accumulated sewage and food waste in the premises' kitchen floor. A city sanitary inspection of the premises revealed "an open excavated

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record that supports appellant's claims on appeal). The supplemental appendix filed by the trustee contained additional documents, but none of those noted supra.

sewage trench" and other sanitary violations, which resulted in the restaurant being closed until all violations were remedied.

The trustee, pursuant to paragraph nineteen of the lease, then sent the tenant a notice of default stating that the tenant had failed to comply with various provisions of the lease and that the trustee would "exercise all of [his] rights and remedies pursuant to the [l]ease . . . , which shall include claims for all of [his] costs . . . and attorney's fees," if the tenant did not timely correct the listed defaults. The tenant responded by filing the instant action for breach of contract and negligence. The trustee counterclaimed, asserting breach of contract and negligence claims against the tenant.

Following a jury trial, verdicts entered in favor of the trustee on the tenant's complaint, in favor of the tenant on the trustee's breach of contract counterclaim, and in favor of the trustee on his negligence counterclaim.<sup>4</sup> The trustee filed a posttrial motion for assessment of attorney's fees of \$80,342.37 and costs of \$589.12 (posttrial motion), to which he attached a supporting affidavit and time and expense records, all pursuant to paragraphs nineteen and thirty-four of the lease.<sup>5</sup> "After

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<sup>4</sup> The jury awarded the trustee \$10,000 in damages with a twenty percent reduction.

<sup>5</sup> Paragraph thirty-four provided that the tenant "shall indemnify the [trustee] for any and all of the [trustee's] costs and expenses, including reasonable attorney's fees, incurred in enforcing any of the terms and provisions of this [l]ease."

hearing and consideration of submissions of the parties," the trial judge, in a margin notation, allowed the motion.

Thereafter, an amended judgment entered.

Discussion. "Attorney's fees 'as between opposing parties in litigation' are only allowed in 'limited instances,' including 'pursuant to a valid contractual provision.'" Sea Breeze Estates, LLC v. Jarema, 94 Mass. App. Ct. 210, 218 (2018), quoting Bournewood Hosp., Inc. v. Massachusetts Comm'n Against Discrimination, 371 Mass. 303, 311-312 (1976). A judge's award of attorney's fees and costs is reviewed for abuse of discretion. See WHTR Real Estate Ltd. Partnership v. Venture Distrib., Inc., 63 Mass. App. Ct. 229, 235 (2005). Such an award will be reversed only if it is clearly erroneous. See id. A party claiming attorney's fees must show that the amount sought is reasonable, even where the claim is contract based. See Citizens Bank of Mass. v. Travers, 69 Mass. App. Ct. 174, 176-177 (2007). See also Linthicum v. Archambault, 379 Mass. 381, 388-389 (1979) (listing factors judge should consider in awarding attorney's fees).

The tenant argues that the trial judge committed "both an abuse of discretion and an error of law" in allowing the trustee's posttrial motion. The tenant, however, has failed to provide us with all of the submissions that the trial judge

considered in making her decision,<sup>6</sup> see Mass. R. A. P. 18, as appearing in 481 Mass. 1637 (2019), or with a transcript of the posttrial motion hearing. See Mass. R. A. P. 8 (b) (1) (A), as appearing in 481 Mass. 1611 (2019). Nonetheless, we exercise our discretion to review the tenant's arguments on the merits as the record before us permits. See Hasouris v. Sorour, 92 Mass. App. Ct. 607, 610 n.4 (2018), citing Worcester County Christian Communications, Inc. v. Board of Appeals of Spencer, 22 Mass. App. Ct. 83, 87 n.4 (1986).

1. Attorney's fees. The tenant argues that none of the events that trigger the lease's provisions regarding attorney's fees have occurred. We disagree. Pursuant to paragraph nineteen, the tenant agreed to reimburse the trustee for "any expenditures," including "reasonable attorney's fees," incurred by the trustee in "defending any action or proceeding" if the tenant "default[ed], after reasonable notice thereof, in the observance or performance of any [lease] conditions or covenants." Here, the trustee was defending a lawsuit that the tenant initiated in response to a notice of default. As a result, the tenant is liable to the trustee for those "expenditures" the trustee incurred in defending the tenant's

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<sup>6</sup> Specifically, the tenant has not provided us with its counsel's affidavit or memorandum of law attached to its opposition to the posttrial motion.

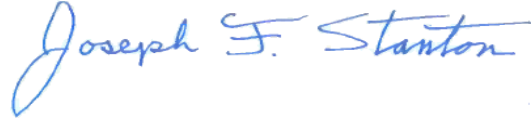
unsuccessful action. See, e.g., Sea Breeze Estates, LLC, 94 Mass. App. Ct. at 218-220.

2. Amount of award. The tenant also claims that the trial judge abused her discretion as to the amount of the award. See WHTR Real Estate Ltd. Partnership, 63 Mass. App. Ct. at 235. Given the insufficiency of the record before us, "we must assume the [attorney's fee and costs] award is adequately supported by the evidence, particularly in view of the trial judge's firsthand knowledge of the services performed." Foley v. Foley, 27 Mass. App. Ct. 221, 225 (1989). See Union v. Bloomberg, 88 Mass. App. Ct. 671, 679 (2015), quoting City Rentals, LLC v. BBC Co., 79 Mass. App. Ct. 559, 566-567 (2011) ("The judge making the firsthand observation of the quality and necessary quantity of the parties' preparation and performance is uniquely situated to assess the reasonable value of those services"). Here, the

trial judge did not abuse her discretion as to the amount of the award.<sup>7</sup>

Amended judgment affirmed.

By the Court (Green, C.J.,  
Blake & Kinder, JJ.<sup>8</sup>),



Clerk

Entered: January 13, 2020.

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<sup>7</sup> The trustee's request for appellate attorney's fees is allowed as those fees are also covered by paragraph nineteen of the lease. Within fourteen days of the date of this decision the trustee may file an application for attorney's fees in accordance with Fabre v. Walton, 441 Mass. 9, 10-11 (2004); the tenant shall have fourteen days within which to respond.

<sup>8</sup> The panelists are listed in order of seniority.