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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001631-MR

RODGER W. LOFTON — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, SPECIAL JUDGE
ACTION NO. 07-CI-01120

FAIRMONT SPECIALTY INSURANCE MANAGERS, INC., D/B/A FAIRMONT SPECIALTY GROUP AND D/B/A FAIRMONT SPECIALTY P & C; DENISE MAXEY; AND DELBERT K. PRUITT — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND THOMPSON, JUDGES.

TAYLOR, CHIEF JUDGE: Rodger W. Lofton brings this appeal from an August 3, 2009, order of the McCracken Circuit Court setting forth Findings of Fact and Conclusions of Law awarding Lofton $3,628 for expenses incurred in his legal

representation of Denise Maxey on a personal injury claim but denying Lofton's claim for attorney's fees. We affirm.

Lofton is an attorney licensed to practice law in this Commonwealth and was retained by Maxey to represent her in a personal injury action arising from injuries she suffered in a pedestrian/motor vehicle accident in July 2004. Lofton and Maxey executed a written contract for legal services. The contract contained a contingency fee agreement and specifically provided, in relevant part, as follows:

> RODGER W. LOFTON is to perform all of the services as attorney in making of said settlement and prosecution of said suit, or to have same done, and is to receive as attorney, a sum equal to 33 1/3% of whatever sum may be finally recovered, which shall be payment in full for all of his services. Provided however, in the event recovery is effected by an appeal by either party, then said fee shall be 40% of any sum recovered.
>
> CLIENT [Maxey] agrees to pay any court costs incurred and any out-of-office expenses, such as the costs of hospital records and doctors' reports and depositions, long distance telephone calls, travel and investigative expenses, court reporters' fees, etc.
>
> It is agreed that no settlement will be made without the consent of CLIENT [Maxey], and that this agreement is binding on the heirs or assigns of CLIENT [Maxey].

Lofton subsequently filed an action in Ballard Circuit Court styled Mary Denise Maxey v. New Commonwealth Natural Gas Co. and Robert Walters (Action No. 05-CI-00085). Following mediation, Maxey was offered $25,000 to settle her claims by New Commonwealth's insurance carrier, Fairmont Specialty Insurance Managers, Inc., (Fairmont). Despite Lofton's advice to the contrary,

Maxey refused the settlement offer. Consequently, Lofton "concluded that he could not represent [Maxey] to her satisfaction" and filed a motion for leave to withdraw as her attorney. The circuit court granted the motion.

Following Lofton's withdrawal as counsel, Lofton filed an Attorney's Lien.[1] Maxey subsequently retained substitute counsel, Delbert K. Pruitt. After a second mediation, Fairmont again offered Maxey $25,000 to settle her claims; Maxey accepted the settlement offer. Lofton attempted to obtain attorney's fees from Pruitt. Pruitt, however, sent Lofton a check for reimbursement of his expenses only in the amount of $3,628.02. Lofton did not cash the check.

Instead, in October 2007, Lofton filed a complaint against Fairmont in the McCracken Circuit Court seeking payment of attorney's fees and expenses related to his legal representation of Maxey. Fairmont filed a third-party complaint against Maxey and Pruitt for indemnification. Following a hearing, the circuit court concluded that Lofton breached his contract with Maxey and was not entitled to recover attorney's fees. The court did award Lofton his expenses ($3,628) associated with his legal representation of Maxey. This appeal follows.

Lofton contends that the circuit court erred by failing to award him attorney's fees in connection with his legal representation of Maxey. For the reasons hereinafter expounded, we disagree.

[1] On May 5, 2006, Rodger W. Lofton filed an Attorney's Lien pursuant to Kentucky Revised Statutes (KRS) 376.460 in the Ballard Circuit Clerk's Office. Lofton attached thereto an affidavit setting out the hours of work (40.40) performed by Lofton, a list of expenses totaling $3,628.02, and a copy of the contract between Lofton and Denise Maxey.

After denying Lofton's motion for summary judgment, the circuit court subsequently tried all issues raised in this action without a jury; thus, our review proceeds under Kentucky Rules of Civil Procedure 52.01. Thereunder, the circuit court's findings of fact will not be disturbed unless clearly erroneous. *Monin v. Monin*, 156 S.W.3d 309 (Ky. App. 2004). Nonetheless, our review of the circuit court's conclusions of law proceeds *de novo*.

In its Findings of Fact and Conclusions of Law, the circuit court specifically determined:

> Rodger Lofton breached his contract with Denise Maxey when he voluntarily terminated his representation of her. As a result, he is not entitled to recover anything under quantum meruit.

The circuit court concluded that Lofton "breached" his contract with Maxey by voluntarily terminating his legal representation of her and essentially walking away from the case. However, the contract between Lofton and Maxey, drafted by Lofton, does not address or provide for Lofton to terminate the contract and still collect a fee. Because Lofton breached the contract by voluntarily withdrawing from the case, the circuit court concluded that he could not recover attorney's fees under the doctrine of q*uantum meruit* or under his contingency fee agreement with Maxey.

We think it beyond cavil that Lofton may not recover attorney's fees under the contingency fee agreement after voluntarily withdrawing from the case. In his brief, Lofton does not even argue that he is entitled to a contingency fee

under the agreement but only argues entitlement to a fee under the doctrine of *quantum meruit*. Lofton effectively concedes that he has no claim for fees under the contract with Maxey. Thus, the troublesome question presented is whether Lofton may recover attorney's fees per *quantum meruit* from Fairmont. Upon review of the complaint, the only basis for Lofton's claim against Fairmont looks to the attorney fee lien claim, which was served on Fairmont after Lofton withdrew from the case. The attorney fee lien claim is based primarily upon the contingent fee agreement Lofton entered into with Maxey. Since Lofton has not sued Maxey in this action, and the sole basis argued for his claim in this appeal is based on *quantum meruit*, we have considerable reservation that any claim could be maintained against Fairmont.[2] Fairmont's only relationship to this claim arises from being the insurance company for the tortfeasor in the Ballard Circuit Court action and certainly is not in privity with Maxey or Lofton as concerns the contingency fee agreement. The only nexus between Lofton and Fairmont is the attorney fee lien claim, which as noted, is premised upon the contract between Lofton and Maxey.

Notwithstanding, to answer the *quantum meruit* question, both parties advance arguments concerning applicability and proper interpretation of the Supreme Court case of *Baker v. Shapero*, 203 S.W.3d 697 (Ky. 2006).

[2] This Court is puzzled why Fairmont Specialty Insurance Managers, Inc. did not file a Kentucky Rules of Civil Procedure (CR) 22 interpleader action upon Maxey settling with the tortfeasor, given that Fairmont had been served with an attorney fee lien claim by Lofton pursuant to KRS 376.460.

Accordingly, our analysis shall initially focus upon *Baker*, its direct predecessors, and eventually upon the proper rule of law dispositive of our case.

Historically, an attorney discharged without cause could recover compensation for services rendered in accordance with a previously executed contingency fee agreement with the client. *LaBach v. Hampton*, 585 S.W.2d 434 (Ky. App. 1979) *overruled by Baker v. Shapero*, 203 S.W.3d 697 (Ky. 2006). In 2006, the Supreme Court reversed course when it rendered the case of *Baker v. Shapero*, 203 S.W.3d 697. Therein, the Supreme Court held that an attorney discharged without cause under a contingency fee agreement could only recover compensation for services rendered under the doctrine of *quantum meruit*. However, in our case, Lofton was not discharged by Maxey; rather, Lofton voluntarily withdrew from representing Maxey. This distinguishing fact is pivotal and renders *Baker* simply inapposite.

The prevailing view is that an attorney who voluntarily withdraws from representing a client under a contingency fee agreement is entitled to remuneration for services rendered under the doctrine of *quantum meruit* if the withdrawal was with just cause.[3] 7A C.J.S. *Attorney & Client* § 360 (2004); George L. Blum, J.D., *Circumstances Under Which Attorney Retains Right to Compensation Notwithstanding Voluntary Withdrawal From* Case, 53 A.L.R.5th 287 (1997). Conversely, if the withdrawal was without just cause, the attorney is

[3] The prevailing view also comports with the Supreme Court's recent pronouncement in *Baker v. Shapero*, 203 S.W.3d 697 (Ky. 2006), which held that an attorney may recover attorney's fees under *quantum meruit* if discharged without cause by the client.

not entitled to fee compensation under *quantum meruit* or otherwise. *Id.* Thus, resolution of this appeal turns upon whether Lofton's voluntary withdrawal was with or without just cause.

It is clear from the record that the catalyst for Lofton's withdrawal was a profound disagreement between Lofton and Maxey concerning the reasonableness of the settlement offer versus the potential value of the case. And, Lofton testified that this settlement offer was at least $5,000 less than what he had valued the case. As noted, the contract between Lofton and Maxey did not address this scenario. While a client's failure to follow an attorney's advice concerning acceptance of a settlement offer may constitute just cause under some circumstances, it is our opinion that Lofton's voluntary withdrawal does not constitute just cause under the facts *sub judice*. 7A C.J.S. *Attorney & Client* § 268 (2004).

The contract executed by Lofton and Maxey provides that "no settlement will be made without the consent of the CLIENT." In light thereof, Lofton was contractually bound to accept Maxey's decision as to any possible settlement offer. It is simply incongruous for Lofton to agree to such contractual provision and then to withdraw when Maxey exercised her right under the contract. Lofton could easily have included language reserving his right to withdraw if the client refused to accept a reasonable offer. Hence, considering the particular facts

herein, we conclude that Lofton's withdrawal was without just cause and that he was not entitled to any fee compensation.[4]

In sum, we are of the opinion that the circuit court's findings are not clearly erroneous nor did the court commit reversible error in denying Lofton's claim for attorney's fees. Lofton argues that the circuit court failed to make a finding of fact regarding Lofton's *quantum meruit* claim. It is well-established that a judgment will not be reversed because of the circuit court's failure to make a finding of fact on an essential issue unless the failure is brought to the circuit court's attention by a written request for such finding or by a motion pursuant to CR 52.02. CR 52.04.[5] If the failure to make adequate findings of fact is not brought to the circuit court's attention as required by CR 52.02 or CR 52.04, the issue is waived. *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982). In this case, Lofton did not make a request pursuant to CR 52.02 or CR 52.04 for more definite findings of fact on the *quantum meruit* issue. Thus, even if he had presented a valid argument to support this theory of recovery against Fairmont, he waived the same.

For the foregoing reasons, the order of the McCracken Circuit Court is affirmed.

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[4] Our holding should not be misconstrued as concluding Lofton's expenses were not recoverable. In fact, the circuit court awarded Lofton $3,628 for expenses incurred during his representation of Maxey. This award of expenses has not been challenged on appeal.

[5] This is distinguished from a case where a court fails to make any findings of fact pursuant to CR 52.01, which is reversible error. *Brown v. Shelton*, 156 S.W.3d 319 (Ky. App. 2004). Here, the circuit court made sufficient findings of fact to trigger CR 52.04.

COMBS, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS AND FILES SEPARATE OPINION:

THOMPSON, JUDGE, CONCURRING: I concur with the majority opinion because the burden of proof was upon appellant to prove that the termination of the contract was with good cause. However, I disagree with the majority's statement that "we have considerable reservation that any claim could be maintained against Fairmont. Fairmont's only relationship to this claim arises from being the insurance company for the tortfeasor in the McCracken Circuit Court action." In dicta, the majority suggests that the lack of privity precludes Lofton from recovering attorney's fees against Fairmont. Even a cursory review of the applicable law disproves the majority's position.

KRS 376.460 provides:

> If the action is prosecuted to a recovery of money or property, the attorney shall have a lien upon the judgment recovered, legal costs excepted, for his fee. If the records show the name of the attorney, the defendant shall be deemed to have notice of the lien.

When a case is resolved by settlement between a plaintiff and defendant without the knowledge of the plaintiff's attorney, an attorney's lien is not dissolved. To the contrary, if not satisfied from the settlement proceeds, defendant is not absolved from liability for the attorney's fees. The rule was explained in *Jellico Coal Mining Co v. Pope*, 292 Ky. 171, 166 S.W.2d 287, 289 (1942):

> It is said in 7 C.J.S., Attorney and Client, § 231, p. 1181, that a settlement made without the consent of an attorney will not be permitted to affect the existing lien of such an attorney, and that the defendant who settles with the plaintiff, without his attorney's knowledge, does so at his own risk as to the attorney's lien, especially, where a cause of action actually existed between the parties to the cause and there was notice of the attorney's lien.

As was noted long ago in *Jellico Coal*, the rule recited is one recognized by this Commonwealth and embedded in American jurisprudence.

Fairmont could have avoided this litigation by the simple act of depositing the funds into the court under a constructive trust for distribution. Fairmont was timely notified of the filing of the lien and I believe they had an absolute duty not to distribute funds and ignore the lien. However, because the fee has not been allowed and because the advanced costs have been repaid, this issue is moot.

BRIEFS AND ORAL ARUGMENT FOR APPELLANT:

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Paducah, Kentucky

BRIEF FOR APPELLEE FAIRMONT SPECIALTY INSURANCE MANAGERS, INC.:

Charles D. Walter
S. Scott Marcum
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ORAL ARGUMENT FOR APPELLEE FAIRMONT SPECIALTY INSURANCE MANAGERS, INC.:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE DENISE MAXEY:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE DELBERT K. PRUITT:

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