

IN THE COURT OF APPEALS OF IOWA

No. 2-1034 / 12-0822
Filed January 9, 2013

ROBERT B. DECK,
Plaintiff-Appellant,

vs.

MARK BETKA,
Defendant-Appellee.

Appeal from the Iowa District Court for Woodbury County, Patrick M. Carr,
Judge.

Robert Deck appeals the district court's ruling granting summary judgment
in favor of Mark Betka. **AFFIRMED.**

Robert B. Deck, Sioux City, appellant pro se.

Zachary S. Hindman of Bikakis, Mayne, Arneson, Hindman & Hisey, Sioux
City, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

MULLINS, J.

Robert Deck appeals the district court's ruling granting summary judgment to Mark Betka in an action by Deck to recover the legal fees Deck provided to Betka's daughter, Tracy Renz. Deck asserts on appeal the district court abused its discretion in denying his motion to compel discovery and to extend the time to resist the summary judgment motion. He also claims the district court erred in granting summary judgment as there was a factual dispute regarding the existence of an oral agreement, which would support a claim for promissory estoppel. For the reasons stated herein, we affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

Deck agreed to provide legal services to Betka's daughter in relation to a dissolution proceeding she was involved in. Deck did not draft a retention letter, but received a retainer check in the amount of \$2500 drawn on Betka's business account. When Renz did not pay the fees incurred and later discharged the debt in bankruptcy, Deck sued Betka for the amount of fees outstanding.

Betka filed an answer denying he was responsible for the debt and filed a motion for summary judgment. In his resistance to that motion, Deck asserted in his affidavit that Renz promised that her father would pay the legal fees. He also stated, "Betka confirmed my agreement with his daughter when he paid the retainer on September 2, 2009. He also, through his words and actions, became a party of the contract." Deck asserted he was induced to represent Renz because of Betka's "payment of the retainer fee and the assurances of future

payments.” Both Renz and Betka asserted in their affidavits there was no agreement for Betka to pay the attorney fees incurred by Renz.

After Betka filed a motion for summary judgment, Deck sought discovery of Betka’s personal and business accounts. Betka alleged he tendered the \$2500 retainer check because he was holding money for Renz, and he considered the money to belong to Renz. Deck sought discovery of both Betka’s personal and business accounts to confirm or dispel this claim. When Betka objected to the discovery, Deck brought a motion to compel along with a motion to extend the time to respond to the summary judgment motion. The court denied the motions finding that Deck failed to file an affidavit “setting forth the facts he expects to find that would create a material, contested fact issue sufficient to avoid summary judgment.” The court concluded even if the bank account records showed Betka was dishonest in his claim that he was holding money for Renz, “that dishonesty would not create a contested issue in material fact on the existence of a promise for [Betka] to pay his daughter’s legal bills to [Deck]. In short, the Court cannot imagine any evidence which might be discovered from the bank account records which would avoid summary judgment.” The court did grant Deck an additional week to respond to Betka’s summary judgment motion.

After the filings were fully submitted, the court concluded summary judgment was appropriate. It found Deck was barred by the principle of issue preclusion from asserting Renz made any promise that Betka would pay her legal

fees.¹ In addition, the court concluded the statute of frauds prevented any evidence of a contract, and Deck failed to establish there was ever a clear and definite oral agreement between himself and Betka so as to satisfy a claim for promissory estoppel. It concluded, based on the factual record, that there was no evidence Deck and Betka ever communicated by any means; thus, making it impossible for the two parties to have reached an agreement.

II. ANALYSIS.

Deck has now appealed that ruling, claiming the district court abused its discretion in denying his motion to compel on the basis of a technicality—failure to have an affidavit stating the reasons he cannot present the facts essential to justify the opposition. See Iowa R. Civ. P. 1.981(6). Based on our review of the record we find the court did not deny Deck’s motion to compel based solely on the technicality that he failed to submit an affidavit. The court denied the motion to compel because Deck failed to explain what facts might be found in the account information that could have avoided summary judgment. The district court found there would be no issue of material fact with respect to the existence of an agreement between Deck and Betka even assuming the records showed Betka was not holding money for his daughter. “[O]nly disputes over facts that

¹ Renz filed for bankruptcy, and Deck contested the discharge of the legal fees owed to him, asserting Renz lied to him about her father’s guarantee in order to induce him to provide her with legal services with no intent on making any payments after the initial retainer. The bankruptcy court found as a fact that, “[Renz] did not make a representation to Mr. Deck that her father would make the payments if she was unable to do so. Perhaps Mr. Deck misunderstood the situation because of the initial retainer check that he received was from her father.” The bankruptcy court found in favor of Renz and discharged the debt. Betka filed a certified copy of the bankruptcy order with his motion for summary judgment.

might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996).

As Deck was precluded by the bankruptcy court’s decision from asserting an agreement with Renz and there was no written contract, the only facts that could affect the outcome of the summary judgment motion needed to show an oral agreement between Deck and Betka. Betka’s bank accounts would have had no information that could have generated a fact question on this issue. We therefore find no abuse of discretion in the trial court’s decision to deny Deck’s motions to compel. See *Keefe v. Bernard*, 774 N.W.2d 663, 667 (Iowa 2009) (“Our review of a ruling by the district court on a motion to compel discovery is for abuse of discretion.”).

Deck also claims the district court erred in granting summary judgment as there was a factual dispute regarding an oral agreement between Deck and Betka. First, Deck appears to claim the retainer check signed by Betka satisfies the writing requirement of the statute of frauds found in Iowa Code § 622.32(2) (2011). Deck cites no authority for this proposition, and we find none. See *Gallagher, Langlas & Gallagher v. Burco*, 587 N.W.2d 615, 617, 619 (Iowa Ct. App. 1998) (finding the statute of frauds barred evidence of an alleged agreement between an attorney and the father of the attorney’s client despite the fact that a check for fees was written by the father); see also Iowa R. App. P. 6.903(2)(g)(3) (“Failure to cite authority in support of an issue may be deemed a waiver of that issue.”).

Next, Deck asserts the district court was incorrect in concluding the factual record indicated the two parties never communicated. Deck claims both his affidavit and Betka's affidavit establish that Betka wrote the check and "personally" delivered it to Deck. Betka's affidavit states, in part, "On September 2, 2009, I wrote a check to Mr. Deck, in the amount of \$2,500, which amount was to serve as a retainer for Mr. Deck's services to Ms. [Renz]." Nowhere in this affidavit does it say Betka personally handed the check to Deck or that the parties had any sort of discussion on the date in question. Deck's affidavit starts by asserting he had a meeting with Renz wherein she promised her father would pay the legal fees starting with a retainer check. Deck then states, "That Mr. Betka confirmed my agreement with his daughter when he paid the retainer on September 2, 2009. He also, through his words and actions, became a party to the contract."

The district court found there was no evidence of a clear and definite oral agreement between Deck and Betka, and we agree. As noted above, Deck was precluded by the bankruptcy ruling from asserting Renz made any promise that Betka would pay her legal fees. The bankruptcy court found as a matter of fact that "[Renz] did not make a representation to Mr. Deck that her father would make the payments if she was unable to do so." Deck does not challenge on appeal the district court's application of issue preclusion. Deck's affidavit does not seek to establish that Betka and Deck had an independent oral agreement for the payment of the fees Renz incurred. Rather the affidavit seeks to establish that Renz and Deck had an agreement, and Betka became a party to this

agreement when he paid the retainer. As Deck is precluded from establishing an agreement with Renz, the allegation that Betka “confirmed” this agreement or became a party to this agreement is meaningless. As Deck failed to offer any evidence to establish a disputed fact regarding the existence of an agreement between himself and Betka, we affirm the ruling of the district court.

AFFIRMED.