[Cite as *Summers & Vargas Co. v. Abboud*, 2010-Ohio-5595.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94310

SUMMERS & VARGAS CO.

PLAINTIFF-APPELLEE

vs.

ELIE ABBOUD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-603357

BEFORE: Sweeney, J.,* Stewart, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: November 18, 2010

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JAMES D. SWEENEY, J.:*

{¶ 1} Defendant Elie Abboud appeals from the order awarding attorney's fees in the amount of $34,864.19 to plaintiff Summers & Vargas, Co. in the law firm's collection action. For the reasons set forth below, we affirm.

{¶ 2} The background of this matter was set forth in *Summers & Vargas Co. v. Abboud,* Cuyahoga App. No. 90786, 2008-Ohio-5995, as follows:

{¶ 3} "On June 19, 2006, Abboud retained Summers & Vargas to represent him in the United States District Court for the Northern District of Ohio in a pending criminal case for his participation in a check kiting scheme. Abboud's original sentence was vacated and remanded for re-sentencing; Summers & Vargas was hired to represent Abboud at the re-sentencing hearing.

On September 8, 2006, the federal court re-sentenced Abboud to 121 months in prison, which was more than Abboud's original sentence of 97 months.

{¶ 4} "On October 4, 2006, Summers & Vargas filed a complaint against Abboud seeking payment in the amount of $35,407.94 for legal services it had provided to Abboud. Abboud filed an answer and counterclaim for malpractice."

{¶ 5} Abboud asserted various counterclaims. Summers & Vargas filed a motion for summary judgment both on its claims and Abboud's counterclaim. The trial court granted judgment in favor of the firm and stated that defendant owed plaintiff $35,407.94. On November 20, 2008, this court affirmed the award of summary judgment to the firm but reversed the attorney fee award and remanded for consideration of the following factors:

{¶ 6} "(1) Time and labor, novelty of issues raised, and necessary skill to pursue the course of action; (2) customary fees in the locality for similar legal services; (3) result obtained; and (4) experience, reputation and ability of counsel." Id.

{¶ 7} On July 24, 2009, the trial court held an evidentiary hearing on the issue of attorney's fees.

{¶ 8} The trial court received an expert report from attorney John P. Hildebrand. Hildebrand opined, based upon his knowledge and experience with Summers & Vargas, their backgrounds, the background of the litigation, and litigation in the Cleveland area, that the hourly fees were reasonable and reasonably incurred.

{¶ 9} Vargas testified that he typically charges $275 per hour for resentencing hearings in federal court, but charged $200 per hour in this matter. According to Vargas, the objective set by Abboud was to look for any possible mitigation, and to obtain a variance or downward departure from the potential sentence, although federal case law issued subsequent to the United States Supreme Court's decision in *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, limited the scope of a *Booker* remand hearing to a determination of whether the judge would have imposed a different sentence in the absence of mandatory guidelines. In preparation for the hearing, Abboud was eventually referred to a psychologist who opined that he suffered from bipolar illness. At this time the probation department was seeking extensive financial records about Abboud's business dealings. As of the date of the re-sentencing, however, Abboud had not fully complied with the probation department's request, and this resulted in a more harsh sentence than originally imposed.

{¶ 10} Hildebrand testified that he has known Summers for forty-two years, that they were law partners for seven years, and that their practices are very similar. Hildebrand further testified that Summers could reasonably charge between $400-450 per hour and that Vargas could reasonably charge between $200-250 per hour. With regard to the nature of the hearing on remand, Hildebrand opined that even on a limited remand hearing, an attorney may

reasonably employ a strategy outside the scope of the remand in pursuit of a lighter sentence.

{¶ 11} Summers testified to his experience and associations. He further stated that the scope of a *Booker* remand hearing was not immediately clear after the *Booker* decision was released. Further, at this time, Abboud had not filed his 2004 and 2005 income taxes, so for strategic reasons, and because the probation department was seeking records in consideration of an obstruction adjustment, Summers did not fight the judge's determination that these records were needed. Moreover, the opinion remanding Abboud's case for resentencing did not set forth limitations on what should be considered.

{¶ 12} Abboud testified that plaintiffs did not begin representing him until June 2006. He further claimed that nothing happened in the matter for the period of time surrounding the death of the original trial judge, and that plaintiffs were simply to file a sentencing memorandum. Abboud next stated that he paid expert fees to Alan Ellis between $30,000-$40,000 but never met him, and met more with Vargas than Summers. Finally, Abboud testified that he decided to replace Summers as lead counsel in the matter, and that Summers then became upset and requested an in camera hearing to inform the judge that Abboud had replaced him for a political reason. Defendant's wife, attorney Ruth Nader, next testified that they complied with the requests for financial information and that her daughter, a licensed attorney, also did research on the case.

{¶ 13} Thereafter, the trial court found that the parties entered into a written fee agreement on June 19, 2006, which outlined the hourly rates charged by Summers & Vargas, and support staff. This letter additionally stated that the firm "had already done extensive work on your matter * * * for which you will now be billed." Additionally, the trial court determined that several errors in the billing statement had improperly inflated the bill by $543.75. The trial court then concluded that it was reasonable for Attorney Summers to bill at the rate of $300 per hour for the resentencing; it was reasonable for attorney Vargas to bill at the rate of $200 for the resentencing; and it was reasonable for the support staff services to be billed at the rate of $75 per hour. The trial court additionally concluded that the billed hours were reasonably expended, and properly accounted for and itemized. Finally, the trial court concluded that the total bill for the legal work was $79,864.19, that $34,864.19 remained due and owing to the firm.

{¶ 14} Defendant now appeals and assigns three errors for our review.

{¶ 15} For his first assignment of error, defendant asserts that the trial court erred and deprived him of due process of law in determining that he was not entitled to a jury trial.

{¶ 16} In the prior appeal, defendant assigned the following errors:

{¶ 17} "I. Defendant was denied due process of law when the court granted plaintiff's motion for summary judgment which was totally unsupported."

{¶ 18} "II. Defendant was denied due process of law when the court granted plaintiff's motion for summary judgment on defendant's counterclaim which was totally unsupported." *Summers & Vargas Co. v. Abboud,* supra.

{¶ 19} This court rejected those contentions, and found that summary judgment was properly granted to defendants. Id. This decision remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410. Further, it is well-settled that a trial court's proper grant of summary judgment does not violate the constitutional guarantee of due process of law. *State Farm Mut. Auto. Ins. Co. v. Advanced Impounding & Recovery Servs.,* 165 Ohio App.3d 718, 2006-Ohio-760, 848 N.E.2d 534; *Tschantz v. Ferguson* (1994), 97 Ohio App.3d 693, 713, 647 N.E.2d 507; *Houk v. Ross* (1973), 34 Ohio St.2d 77, 296 N.E.2d 266.

{¶ 20} This assignment of error is without merit and is overruled.

{¶ 21} In his second and third assignments of error, defendant raises the related contentions that the trial court erred and deprived him of his right to due process in determining that all of the claimed fees were reasonable and proper, and in allowing fees for the period prior to the June 19, 2006 engagement letter.

{¶ 22} In *Climaco, Seminatore, Delligatti & Hollenbaugh v. Carter* (1995), 100 Ohio App.3d 313, 653 N.E.2d 1245, which was cited and applied in *Abboud v. Summers & Vargas,* the court outlined the following factors that must be considered before the trial court enters an attorney fee award:

{¶ 23} "Compensation for services rendered by an attorney is generally fixed by contract prior to employment and the formation of the fiduciary relationship between attorney and client. *Jacobs v. Holston* (1980), 70 Ohio App.2d 55, 24 O.O.3d 72, 434 N.E.2d 738. After the fiduciary relationship is established, the attorney has the burden of establishing the reasonableness and fairness of fees. Id. Where, prior to employment, the attorney and client have reached an agreement as to the hourly rate to be charged and the amount of the retaining fee, but the agreement fails to provide for the number of hours to be expended by the attorney, in an action for attorney fees the burden of proving that the time was fairly and properly used and the burden of showing the reasonableness of work hours devoted to the case rest on the attorney. Id. Furthermore, a trial court must base its determination of reasonable attorney fees upon actual value of the necessary services performed, and there must be some evidence which supports the court's determination. *In re Hinko* (1992), 84 Ohio App.3d 89, 616 N.E.2d 515. In making such a determination, the court must consider many important factors, including those set forth in *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 11 OBR 63, 463 N.E.2d 98:

{¶ 24} "'* * * (1) [T]ime and labor, novelty of issues raised, and necessary skill to pursue the course of action; (2) customary fees in the locality for similar legal services; (3) result obtained; and (4) experience, reputation and ability of counsel. See DR 2-106(B), Code of Professional Responsibility; Annotation (1974), 57 A.L.R.3d 475.' Id. at 35, 11 OBR at 68, 463 N.E.2d at 104-105."

{¶ 25} With regard to defendant's claim that the trial court erred in permitting recovery for the period preceding the date of the engagement letter, the trial court properly noted that the engagement letter clearly states that the firm "had already done extensive work on your matter * * * for which you will now be billed." Billing for services undertaken in this earlier time period was therefore clearly within the contemplation of the parties. Accordingly, the second assignment of error lacks support in the record and is without merit.

{¶ 26} With regard to defendant's contention that the fees were not reasonable, defendant maintained that they were derived from matters outside the scope of a proper *Booker* remand hearing. That is, defendant asserts, citing to *United States v. Worley* (C.A.6, 2006), 453 F.3d 706, 709, that the limited remand of this matter involved the sole issue of whether, at the time of sentencing, the district judge would have imposed a different sentence in the absence of mandatory guidelines. We note, however, that on February 17, 2006, the United States Court of Appeals for the Sixth Circuit decided and filed its opinion vacating Mr. Abboud's sentence and remanding for resentencing in light of *Booker*. See *United States v. Abboud* (C.A.6, 2006), 438 F.3d 554. We therefore cannot say that the trial court erred in rejecting the argument that the firm's legal services should have been limited in accordance with the decision in *Worley,* which was not decided and filed until July 10, 2006. Moreover, as noted by the United States Court of Appeals for the Sixth Circuit in vacating Abboud's sentence following remand:

{¶ 27} "*Worley,* the decision on which our decision today primarily relies, was issued one day before Judge Adams was assigned Defendants' resentencing, and was never submitted to the district court in the proceedings below. Judge Adams also did not have the benefit of this Court's decisions in [*United States v*.] *Keller* [(C.A.6, 2007), 498 F.3d 316] and [*United States v*.] *Sexton* [(C.A.6, 2008), 512 F.3d 326], which clarified and reinforced the rationale underlying *Worley*." *United States v. Abboud* (C.A.6, 2009), Nos. 06-4498 and 06-4499, 308 Fed.Appx. 977.

{¶ 28} Further, as this court noted in the earlier appeal:

{¶ 29} "A review of the sentencing transcript reveals that Abboud received a longer sentence due to his continued refusal to comply with an outstanding order to turn over financial documents to the prosecutor." *Summers & Vargas Co. v. Abboud,* ¶ 19.

{¶ 30} Defendant additionally contends that the firm breached its fiduciary duty when Summers requested a hearing before the sentencing judge to discuss a comment allegedly made by a third attorney hired by defendant, the sentencing would be favorable to Abboud because the attorney was instrumental in getting the sentencing judge appointed to the federal bench. This court specifically considered and rejected this contention in its previous appeal. See *Summers & Vargas v. Abboud,* supra. This court stated:

{¶ 31} "Moreover, there is no indication that this revelation had any bearing on Abboud's sentencing. A review of the sentencing transcript reveals that

Abboud received a longer sentence due to his continued refusal to comply with an outstanding order to turn over financial documents to the prosecutor." Id.

{¶ 32} Therefore, the law of the case precludes reconsideration of this claim.

{¶ 33} Defendant next asserts that the trial court erred insofar as its judgment reflects $20,000 in fees for expert Alan Ellis.

{¶ 34} In its judgment entry, however, the trial court noted the following:

{¶ 35} "Both Mr. Summers and Mr. Vargas testified, and Plaintiff's Billing Statement reflects, that Defendant agreed to pay $20,000 for the services of [accountant] Alan Ellis, that Defendant did pay $20,000 for the services of Alan Ellis to Plaintiff, and that Plaintiff, in turn, paid Ellis $20,000 for those services."

{¶ 36} The record therefore shows that the trial court considered Ellis paid when it derived its attorney fee award.

{¶ 37} Finally, with regard to the amount of the attorney fees, the record indicates that the trial court had evidence going to the time and labor, novelty of issues raised, and necessary skill to pursue the course of action and the customary fees in the locality for similar legal services. As to the result obtained, the record indicates that the sentence, though now vacated under *Worley,* was within the contemplated range, and was rendered due to Abboud's failure to file taxes for 2004 and 2005, and not due to any deficiency in representation. The record also indicates that the firm has the experience, reputation and ability commensurate with the requested fees.

{¶ 38} The third assignment of error is without merit.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES D. SWEENEY, JUDGE*

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR

*(SITTING BY ASSIGNMENT: Judge James D. Sweeney, Retired, of the Eighth District Court of Appeals)