[Cite as *Mason Law Firm, L.P.A. v. Ross Co. Redi-Mix-Co., Inc.* , 2009-Ohio-4991.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

MASON LAW FIRM, LPA,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA5
	:	
vs.	:	**Released: September 14, 2009**
	:	
ROSS CO. REDI-MIX CO., INC.,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

James L. Mann, Mann & Preston, LLP, Chillicothe, Ohio, for Appellant.

Ronald L. Mason, Mason Law Firm Co., LPA, Dublin, Ohio, for Appellee.

McFarland, J.:

{¶1} This is an appeal from a judgment by the Pickaway County Court of Common Pleas granting summary judgment in favor of Appellee, Mason Law Firm. On appeal, Appellant, Ross Co. Redi-Mix, contends that the trial court erred in granting summary judgment in Appellee's favor. Because we conclude that genuine issues of material fact exist with regard to the legal services performed by Appellee on Appellant's behalf and the adequacy and necessity of those legal services, we reverse the trial court's grant of summary judgment in Appellee's favor and remand this matter to the trial court for further proceedings consistent with this opinion.

FACTS

{¶2} On April 1, 2003, Appellant, Ross Co. Redi-Mix, retained Appellee, Mason Law Firm, to provide legal services. Appellee provided legal services to Appellant from April 1, 2003, until Appellant terminated its services on January 10, 2005. During the course of the representation, Appellee represented Appellant for various matters, including general labor, an arbitration matter and one federal action. During the representation, Appellee billed Appellant in accordance with the fee structure set forth in a letter sent to Appellant, dated April 1, 2003. At some point during Appellee's representation of Appellant in the federal matter, Appellant became dissatisfied with the representation and on January 10, 2005, terminated Appellee's services, eventually hiring attorney James Mann to take over representation.

{¶3} Although Appellee continued to bill Appellant for services allegedly provided prior to the termination, Appellee refused to pay. On January 11, 2006, Appellant, through counsel, notified Appellee that successor counsel believed Appellee had performed unnecessary and inappropriate work in the federal matter, that Appellant would not be making any further payments on the account and that a malpractice action

against Appellee was being investigated. The record reflects that Appellee continued to bill Appellant, sending a final demand letter on March 2, 2007.

{¶4} When Appellant did not pay as demanded, Appellee filed a complaint for collection of debt on March 5, 2007. In its complaint, Appellee set forth claims for breach of contract and action on account. Attached to Appellee's complaint was a one-page copy of a Client Ledger Report, indicating fees due in the amount of $17,160.84, $12,618.28 of the amount representing fees for services and $4,542.56 representing finance charges. In response, Appellant filed an answer denying it had failed to pay fees related to the arbitration matter and stating it only failed to pay fees related to the federal matter, which it claimed were negligently and improperly performed by Appellee. Appellant further set forth a counter claim alleging malpractice by Appellant. Appellee subsequently filed a motion to dismiss the counter claim for malpractice, which was granted by the trial court on the basis that it was time-barred.

{¶5} On January 23, 2008, Appellee filed a motion for summary judgment as to both claims set forth in its complaint. In support of its motion, Appellee included an affidavit by Ronald L. Mason, stating that Appellant had refused to pay for all legal bills after the termination, including bills for the arbitration case. Mr. Mason further stated that the

total amount due at that point was $19,071.21. After several extensions were granted by the court, Appellant filed its memorandum in opposition to Appellee's motion for summary judgment. In its memorandum, Appellant argued that factual issues existed as to whether many of services rendered by Appellee were either necessary or appropriate. In support, Appellant attached an expert affidavit by Kevin L. Wright, which stated that Appellee had filed pleadings in the federal matter asserting defenses of lack of personal jurisdiction and inappropriate venue, which were unnecessary in an ERISA action. Appellant further argued that nothing in the parties' fee agreement authorized finance charges in the amount of 1 ½ percent per month, and as such, whether it owed Appellee for these charges was a disputed issue of fact.

{¶6} Finally, on February 10, 2009, the trial court granted summary judgment in favor of Appellee, in the amount of $12,618.28.[1] It is from that judgment that Appellant filed its timely appeal.

LEGAL ANALYSIS

{¶7} We note that Appellant's brief fails to comply with the dictates of App.R. 16. to the extent that it has failed to set forth an assignment of error

[1] We note that the trial court did not award Appellee its claimed finance charges; however, because Appellee has not appealed that aspect of the decision, we will not address it herein.

for review. However, after reviewing Appellant's brief, it is apparent that Appellant asserts the following assignment of error:

> "The trial court erred in granting summary judgment in favor of Appellee."

{¶8} Thus, we initially set forth the standard for reviewing for such motions. When reviewing a trial court's decision regarding a motion for summary judgment, appellate courts must conduct a de novo review. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243; *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. As such, an appellate court reviews the trial court's decision independently and without deference to the trial court's determination. *Brown v. Scioto Board of Commissioners* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153.

{¶9} A trial court may grant a motion for summary judgment only when: 1) the moving party demonstrates there is no genuine issue of material fact; 2) reasonable minds can come to only one conclusion, after the evidence is construed most strongly in the nonmoving party's favor, and that conclusion is adverse to the opposing party, and; 3) the moving party is entitled to judgment as a matter of law. Civ.R. 56; see, also, *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.

{¶10} "[T]he moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) * * *." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292, 1996-Ohio-107, 662 N.E.2d 264. These materials include "the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any." Id. at 293; quoting Civ.R. 56(C). " * * * [O]nce the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party 'may not rest upon mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.' " *Foster v. Jackson Cty. Broadcasting, Inc.*, Jackson App. No. 07CA4, 2008-Ohio-70, at ¶ 11, quoting Civ.R. 56(E).

{¶11} As set forth above, on January 23, 2008, Appellee filed a motion for summary judgment in the court below, claiming that Appellant breached its contract and that Appellant had an unpaid account with Appellee. Appellee specifically argued that Appellant owed money for legal services provided in connection with an arbitration matter, for which Appellee allegedly obtained a favorable result on behalf of Appellant.

Appellee also alleged that Appellant owed money for legal services rendered in connection with the federal litigation, prior to the termination of Appellee's services. In support of its motion, Appellee attached an affidavit by Ronald L. Mason, stating that Appellee had represented Appellant since April 1, 2003, and had continuously billed Appellant for legal services from that date until Appellant terminated Appellee's services. Mr. Mason further stated in his affidavit that after Appellant terminated Appellee's services, it refused to pay for all of the legal bills incurred prior to the termination. Mr. Mason stated that Appellant owed Appellee $19,071.21 as of January 2, 2008.

{¶12} Although not attached to the motion for summary judgment, Appellee also relied on the copy of the Client Ledger Report that was attached to its previously filed complaint. The Client Ledger Report simply listed the fee amounts by date, along with hours expended, and provided a running total of charges and payments. The report did not include a description of the services rendered in connection with each fee, nor did it provide the case name for which the services were performed.

{¶13} Appellant opposed Appellee's motion, alleging that there were disputed issues of material fact. Specifically, Appellant alleged there was a factual issue "as to whether many of the services rendered were either

necessary or appropriate." In support of its memorandum in opposition, Appellant attached an affidavit by its expert, Kevin L. Wright, the attorney who ultimately took over the representation of the federal matter when Appellant terminated the services of Appellee. In his affidavit, Mr. Wright, stated that his review of the file indicated that Appellee filed pleadings asserting lack of personal jurisdiction and inappropriate venue, despite the fact that the case was brought in the jurisdiction where the plan at issue was administered. Mr. Wright further stated, with respect to the pleadings filed by Appellee alleging inappropriate venue, that the particular code section at issue in the federal case authorized service of process in any district in which a defendant resides or can be found. Thus, it was essentially the opinion of Appellant's expert that Appellee prepared, filed, and billed for unnecessary and inappropriate work. Mr. Wright also stated that Appellee had failed to assert a statute of limitations defense in the federal matter.

{¶14} On appeal, Appellant contends that while Appellee supported its motion for summary judgment with the affidavit of Mr. Mason, Appellee failed to provide evidence as to what legal services were performed, the cases to which those services were related, or whether the services provided were necessary and whether the rates charged were reasonable. Appellee counters by arguing that it has proven all of the elements of its breach of

contract claim and further asserts that because Appellant did not make any billing complaints "during" the representation that the accounts became "accounts stated," for which the amounts due have become a "sum certain" which is now due. Appellee cites *Creditrust Corp. v. Richard*, (July 7, 2000), Clark App. No. 99-CA-94, 2000 WL 896265, in support. However, *Credittrust* involved an assignee debt collector's attempt to collect on a delinquent credit card account issued by a bank to a borrower and did not involve the issue of the collection of attorney fees as between an attorney and client. Appellee further argues on appeal that it was not required to provide expert testimony as to the reasonableness of fees charged to Appellant and that the affidavits submitted by Appellant in support of its motion for summary judgment were merely conclusory. Appellee goes on to argue that Appellant was required to prove all elements of her malpractice claim at the summary judgment phase.

{¶15} We initially note that we reject Appellee's contention that Appellant was required to demonstrate all elements of a malpractice claim at the summary judgment phase. Because Appellant's counterclaim for malpractice was dismissed by the trial court as being time-barred, an actual claim for malpractice no longer exists. Further, Appellee has conceded that while Appellant may no longer pursue a claim for malpractice, it may

nevertheless assert that theory as a defense. As held by the Supreme Court of Ohio in *Riley v. Montgomery*,

> "A claim of a defendant which would be barred by the statute of limitations if brought in an action for affirmative relief is available as a defense or under the common-law theory of recoupment, when the claim arises out of the same transaction as the plaintiff's claim for relief, and when it is offered only to reduce plaintiff's right to relief." (1984), 11 Ohio St.3d 75, 463 N.E.2d 1246, paragraph one of the syllabus.

Here, Appellant came forward and supported its memorandum in opposition to Appellee's motion for summary judgment with an expert affidavit calling into question the services provided by Appellee in the federal matter. Thus, we conclude that Appellant met the burden required with respect to its asserted defense of malpractice, in essence by demonstrating a genuine issue of material fact as to the reasonableness of Appellee's charges.

{¶16} Further, although we agree with Appellee's contention that because Appellant did not express dissatisfaction regarding billing for services *during* Appellee's representation that it was not required to provide expert testimony as to the reasonableness of the fees charged to Appellant, Appellee was required to produce more evidence than the one-page list of charges that it provided. *Reminger & Reminger Co., L.P.A. v. Fred Siegel Co.* (Mar. 1, 2001), Cuyahoga App. No. 77712, 2001 WL 210024 (reasoning that because there was no complaint regarding fees during the tenure of the representation, no expert testimony was required to establish reasonableness

of the fees). For instance, and as cited by Appellant in its reply brief, in *Reminger*, the law firm seeking to collect fees presented evidence concerning the reasonableness of the attorney's time computations, efforts expended, novelty of the issues involved, counsel's skill and ability in pursuit of the representation and the results obtained. Id. Here, Appellee simply alleged in its pleadings the total amount of fees claimed, and that it obtained a favorable result on behalf of Appellant in the arbitration matter, without providing any explanation of the services provided or reasonableness of the those services. Further, it presented no evidence regarding the services performed on behalf of Appellant in the federal matter. Thus, we conclude that Appellee failed to demonstrate that it was entitled to judgment as a matter of law as to the amount of fees owed by Appellant.

{¶17} Further, we conclude that Appellant's expert affidavit demonstrated a genuine issue of material fact regarding the reasonableness of the fees to survive the motion for summary judgment. Specifically, Appellant's expert stated that certain pleadings which asserted defenses of lack of personal jurisdiction and inappropriate venue were unnecessary and inappropriate. Although Appellee provided the court with no detail regarding a breakdown of its billing, Appellee's fees presumably included

charges for the preparation of these pleadings. Thus, we conclude that Appellant sufficiently demonstrated in the court below that a factual question exists as to the reasonableness of the attorney fees sought by Appellee.

{¶18} Accordingly, based on the foregoing, we conclude that the trial court erred in granting summary judgment in favor of Appellee. Therefore, we reverse the decision of the trial court and remand this matter for further proceedings consistent with this opinion.

JUDGMENT REVERSED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and that the Appellant recover of Appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Kline, P.J.: Concurs in Judgment Only.
Abele, J.: Concurs in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.