COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP600 **Cir. Ct. No. 2006CV833**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

LAW OFFICES OF CHARLES B. HARRIS, S.C.,

PLAINTIFF-APPELLANT,

V.

U.S. BANK NATIONAL ASSOCIATION, N.D.,

DEFENDANT-RESPONDENT,

ROXANN M. STONE,

DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT,

V.

FRANCIS E. STONE,

THIRD-PARTY DEFENDANT.

APPEAL from orders of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Law Offices of Charles B. Harris, S.C. (Harris) appeals orders granting Roxann Stone a setoff against a judgment lien her ex-husband, Francis Stone, assigned to Harris. The orders permitted Ms. Stone to set off a personal injury award Mr. Stone owed her against the lien. Harris argues Ms. Stone was not entitled to the setoff because Mr. Stone transferred the lien to him to pay for legal services. We affirm.

BACKGROUND

¶2 Roxann and Francis Stone filed a joint petition for divorce on September 7, 2004. About a week later, Ms. Stone also filed a personal injury action against Mr. Stone. On March 2, 2006, the circuit court rendered a decision in the divorce. The court awarded Ms. Stone the parties' homestead, subject to a lien to Mr. Stone for $86,805, which represented his share of the property division.

¶3 On October 17, 2006, the parties participated in mediation in the personal injury case. The mediation was unsuccessful. That day, Mr. Stone assigned his $86,805 judgment lien to Harris for payment of legal fees. At the time, Mr. Stone had incurred about $17,000 of fees from Harris for the divorce and his work to date on the personal injury case. Two weeks later, Harris commenced this action to foreclose the lien against Ms. Stone. Harris claimed the lien belonged to him and that he was entitled to collect on it.

¶4 Ms. Stone responded that Harris could not foreclose the lien because Mr. Stone had assigned it in order to defraud her. She claimed Mr. Stone assigned

the lien to impoverish himself so Ms. Stone would not be able to recover any award she received in the personal injury action. She therefore added Mr. Stone as a third-party defendant to this action and requested the court to set the assignment aside.

¶5 In April 2007, Ms. Stone's personal injury action was tried to a jury. The jury found in her favor, awarding her a judgment against Mr. Stone in excess of the divorce judgment lien. Ms. Stone then requested the circuit court in the foreclosure case to set off her personal injury award against the divorce judgment lien, reiterating her assertion that the lien assignment was fraudulent and therefore voidable. The court granted the setoff, but it did not decide whether the assignment was fraudulent. The court reasoned that because the judgment lien and the personal injury award both arose out of the Stones' marriage, Ms. Stone's right to setoff was superior to Harris's claim for attorney fees.

¶6 Harris appealed, arguing that the lien had been fully assigned to him before Ms. Stone's claim to setoff against Mr. Stone arose. Ms. Stone countered that the circuit court's reasoning was sound, but she also continued to assert the assignment was fraudulent. Because this argument depended on factual questions the circuit court had not addressed, we retained jurisdiction over the appeal but remanded the record for the circuit court to determine several issues, including whether the transfer of Mr. Stone's lien to Harris was fraudulent.

¶7 The circuit court's inquiry into this issue required it to apply WIS. STAT. ch. 242,[1] Wisconsin's enactment of the Uniform Fraudulent Transfer Act.

[1] References to the Wisconsin Statutes and Supreme Court Rules are to the 2007-08 versions.

Under this chapter, a transfer by a debtor is fraudulent in either of two circumstances: (1) if the debtor made the transfer with "actual intent to hinder, delay, or defraud" a creditor, WIS. STAT. § 242.04(1)(a); or (2) if the debtor (a) made the transfer without receiving reasonably equivalent value in exchange and (b) the debtor believed, or reasonably should have believed, he or she would incur debts beyond his or her ability to pay. WIS. STAT. § 242.04(1)(b)2. Although the statute does not define "reasonably equivalent value," chapter 242 defines "value" as follows: "Value is given for a transfer … if, in exchange …, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor of another person." WIS. STAT. § 242.03(1).

¶8 On remand, Harris argued the assignment was not fraudulent because Ms. Stone did not prove actual intent to defraud and because Mr. Stone received "reasonably equivalent value" for the assignment. He asserted the legal services Mr. Stone received fit within the statute's definition of value because what was exchanged for the assignment was not a promise to perform legal services, but the actual performance of legal services. In other words, Harris argued the October 17, 2006 assignment functioned as an advance fee to secure payment, but that the assignment only became final once Harris earned it.

¶9 The circuit court disagreed. It concluded it could not find actual intent to defraud, but rejected Harris's argument that the lien assignment was not final until he earned it. Rather, it found "the transfer on its face was a full assignment of the lien under which Mr. Stone retained no control." It further found "there was no contractual obligation entered into by Mr. Harris on October 17, 2006 ... to repay Mr. Stone the excess after calculating the attorney

fees." The court concluded that satisfaction of Mr. Stone's $17,000 legal bill plus Harris's unperformed promise to perform future legal services was not reasonably equivalent value for the $86,805 judgment lien. It therefore held the assignment was fraudulent under WIS. STAT. § 242.04(1)(b).

DISCUSSION

¶10 The central issue in this appeal is whether Ms. Stone must pay Harris the amount due under the lien Mr. Stone assigned to Harris, or whether she may set off her personal injury award against the lien because the assignment was fraudulent under WIS. STAT. § 242.04. To resolve this question, the circuit court made certain factual findings. We will uphold these findings unless clearly erroneous. ***Steinbach v. Green Lake Sanitary Dist.***, 2006 WI 63, ¶10, 291 Wis. 2d 11, 715 N.W.2d 195. However, we review independently the application of these facts to the relevant statutes. ***Reese v. City of Pewaukee***, 2002 WI App 67, ¶4, 252 Wis. 2d 361, 642 N.W.2d 596.

¶11 In his letter brief to this court following remand, Harris does not challenge the circuit court's factual finding that Mr. Stone fully assigned the lien to Harris on October 17, 2006. Nor does he challenge the circuit court's conclusion that the legal services he had provided up to that point were not reasonably equivalent to the full value of the lien. Instead, he argues the circuit court incorrectly interpreted value, under WIS. STAT. § 242.03, to only include satisfaction of antecedent debts. He argues that the statute instead contemplates that value may also include "promises made and *performed* prior to the time the transfer is sought to be voided." (Emphasis Harris's.) Thus, he argues Mr. Stone received reasonably equivalent value for the assignment because Harris performed the legal services he promised to provide.

¶12 Our analysis of the merits of Harris's argument, however, compels us to first address the inconsistency of the factual representations Harris has made during this litigation. The record is clear that when Harris initiated this action, he claimed to own all of the rights to the judgment lien. Not only does the complaint state this, but as the circuit court correctly noted, "[T]he foreclosure proceedings were commenced with reference only to the Plaintiff, Law Offices of Charles B. Harris, S.C., as the owner and legal entity entitled to all funds being sought." Further, Harris confirmed in his memorandum in support of summary judgment that the lien was fully assigned to him before he completed the promised legal services:

> While initial assignments of the lien [prior to October 17, 2006] were for security purposes, it became obvious that the fees to defend the civil matter to a conclusion would become very substantial. That resulted in Mr. Harris requiring that the lien rights *be assigned to him completely* so that a lien foreclosure could be commenced, with the understanding and agreement being that any balance recovered pursuant to the lien foreclosure action above and beyond the fees of Mr. Harris would be paid back to Mr. Stone.[2] (Emphasis added.)

Thus, Harris's initial assertion was that his ownership of the lien did not depend on legal work he had already performed.

[2] The record contains no evidence indicating any understanding or agreement that unused portions of the judgment lien would be returned to Mr. Stone. Harris's assertions of such an understanding are unsupported by citation to the record. Further, his own testimony casts serious doubt on such claims. He testified he neither executed a revised fee agreement with Mr. Stone concerning the lien nor told Mr. Stone whether any portion of the lien would be refundable to him. Further, the circuit court explicitly found there "was no contractual obligation entered into by Mr. Harris on October 17, 2006 … to repay Mr. Stone the excess after calculating the attorney fees." Harris does not challenge this finding. The court's finding is not clearly erroneous in any event. *See* WIS. STAT. § 805.17(2).

¶13 The record is equally clear that when we remanded for the circuit court to determine whether the lien transfer was fraudulent, Harris's representation about when he owned the lien changed. On remand, Harris insisted that "the assignment became final … only for work *previously done* when the amount Harris was to be paid was agreed to." Contrary to his earlier assertions that the lien was completely assigned to him on October 17, 2006, he argued on remand:

> Value had been given for each transfer by the time it became final and the work was indeed performed by the time the notes were signed and the transfer became final [*sic*]. At the time the work became final is when the transfer occurred since Harris admittedly, prior to that time, was not entitled to any interest in the lien for work which had not been performed.

He then claimed the assignment became final in the following increments: approximately $17,000 on October 16 and 17, 2006; approximately $44,000 on April 6, 2007; and approximately $7,300 on May 10, 2007.

¶14 These factual representations are clearly contradictory. Either the lien was assigned to Harris completely on October 17, 2006 as he said it was when he initiated foreclosure, or it was only partially assigned to him then and became final later. Both scenarios are not possible.

¶15 Even if we were to accept at face value the argument Harris now advances—that value may include promises made and performed before the creditor attempts to void the transfer—it would still fail. First, his formulation depends on work having been performed. But there is no question that value includes services that have already been performed. His addition of the element of "a promise to perform" is therefore superfluous. Further, he offers absolutely no authority to support the idea that a transferee need only perform the promise before the creditor attempts to void the transfer.

¶16 Second, Harris's current argument is at odds with any version of the factual representations he has made during this litigation. It defies reason to argue the transfer was not fraudulent because he followed through on his promise to provide legal services when these services were performed almost entirely *after* he initiated this foreclosure action. Nor does it make sense to argue that a transferee need only perform the promise before the creditor seeks to void it when the record is clear that Ms. Stone requested the assignment be set aside as fraudulent before Harris himself claims to have performed his promise.

¶17 Finally, Harris's characterization of the lien assignment as a "retainer" fails to salvage his argument. To begin with, a retainer is "an amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of a client."[3] However, Harris claimed the fee was to cover future services. While attorneys may collect an advance fee to secure payment for future legal services, this fee does not belong to the attorney until it is earned.[4]

¶18 Harris's description of the assignment as a "retainer" is fraught with contradictions. If the assignment was meant solely to retain his availability, then it did not become final—as Harris claimed on remand—as he performed services. But if it was meant to be an advance fee, Harris was not entitled to claim it for himself—as he did—when he initiated this action. At any rate, there is simply

[3] "Retainer" denotes an amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of a client …. This amount does not constitute payment for any specific legal services, whether past, present, or future and may not be billed against for fees or costs at any point. A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16(d). SCR 20:1.0(mm).

[4] An "advanced fee" is "an amount paid to a lawyer in contemplation of future services which will be earned at an agreed-upon basis, whether hourly, flat, or any other basis." SCR 20:1.0(ag).

nothing in the record documenting how the assignment was part of a valid fee agreement.[5] Indeed, Harris admitted he neither executed a fee agreement with Mr. Stone pertaining to the lien transfer nor told Mr. Stone whether any portion of the lien would be refundable to him.

¶19 Accordingly, we conclude the circuit court did not err when it concluded Mr. Stone fully assigned his judgment lien to Harris without receiving reasonably equivalent value in exchange. Further, because according to Harris the express purpose of the assignment was to pay him to defend Mr. Stone in the tort action, Mr. Stone either believed or reasonably should have believed he would incur debts beyond his ability to pay. *See* WIS. STAT. § 242.04(1)(b)2. Therefore, the assignment was fraudulent and Ms. Stone is entitled to void the transfer to satisfy her claim against Mr. Stone. WIS. STAT. § 242.07(1)(a).

MOTION TO STRIKE

¶20 After the parties filed letter briefs with this court addressing the circuit court's April 20, 2009 decision, Harris filed a motion to strike one sentence in Ms. Stone's brief. That motion is denied.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[5] The only document that alludes to such an agreement is an affidavit from Mr. Stone executed after Harris initiated the foreclosure proceedings, stating that he assigned Harris the lien "to secure payment of [legal fees previously incurred] and also so that Mr. Harris will continue to represent me in the lawsuit my former wife is pursuing. He has requested of me an additional retainer in the amount of $69,504.80."