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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2019

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Sirote & Permutt, P.C.

v.

C. Randall Caldwell, Jr.

**Appeal from Mobile Circuit Court
(CV-18-902403)**

WISE, Justice.

Sirote & Permutt, P.C. ("Sirote"), appeals from a summary judgment entered in favor of C. Randall Caldwell, Jr. We reverse and remand.

Facts and Procedural History

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Caldwell worked for George Woerner, who owned several businesses headquartered in Foley. In 2009, Caldwell was promoted to president of Woerner Landscape, Inc., one of those businesses. Caldwell stated that, at that time, he was a licensed attorney in good standing in Alabama even though he was not engaged in private practice. During his employment with Woerner, the BP oil spill occurred in the Gulf of Mexico.¹ Caldwell contacted an attorney with Cunningham Bounds, LLC, a law firm in Mobile, regarding the possibility of referring Woerner's businesses to Cunningham Bounds for Cunningham Bounds to handle their claims arising out of the BP oil spill. In April 2011, the Woerner companies retained Cunningham Bounds to represent them in the litigation related to the BP oil spill. Cunningham Bounds executed representation agreements with each of the Woerner companies; those agreements provided that Cunningham Bounds would be paid a contingency fee for the work. Each of the representation agreements included the following provisions:

"TO: CUNNINGHAM BOUNDS, LLC

¹The April 2010 oil spill resulted from the Deepwater Horizon oil rig operated by BP entities discharging substantial amounts of oil into the Gulf of Mexico.

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"1. I/We hereby employ Cunningham Bounds, LLC ('Attorneys') to represent me/us on my our claim for damages arising out of the Deepwater Horizon oil spill disaster caused by BP PLC and/or related BP entities, Transocean, LTD and/or other Transocean entities, and in Attorneys' discretion, any other defendants.

". . . .

"Referral fees, if applicable: I/We understand that my/our claims and case were referred to you by Randall Caldwell (Referring Attorney) who may receive up to 1/3 of the attorneys fees set out in this Agreement. I/We understand that this referral fee will not result in total attorneys fees greater than that provided in Paragraph 2."

Caldwell left his employment with Woerner in spring 2012 and returned to the private practice of law.

In 2014, the Woerner companies retained Sirote to assist Cunningham Bounds in the BP oil-spill litigation. Additionally, each of the Woerner companies sent Caldwell a letter dated May 6, 2014, in which they stated that Caldwell had previously assisted with a BP oil-spill claim asserted on behalf of that Woerner company; that the claim had been principally handled by Cunningham Bounds; and that at the time Caldwell provided assistance he was working as in-house counsel for one or more of the Woerner companies. Each letter went on to assert that the claim would have to be reworked

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"based on newly announced guidelines from appellate courts hearing BP's objections to some of the previously filed claims"; that the owners and management of the Woerner companies felt that it would be in their best interest to retain a firm with experienced tax and business attorneys to assist in the claims; that the Woerner companies wished to continue their representation by Cunningham Bounds; that they were terminating the attorney-client relationship between Caldwell and the Woerner companies; and that they were retaining Sirote to assist Cunningham Bounds in reworking the claims asserted by the Woerner companies. After receiving this letter, Caldwell contacted one of the attorneys at Cunningham Bounds and told him that it was his position that he was entitled to the referral fees discussed in the representation agreements because, he said, he had referred the Woerner companies' claims to Cunningham Bounds.

Subsequently, the Woerner companies reached a settlement regarding their BP oil-spill claims. On September 20, 2018, Cunningham Bounds filed a complaint for interpleader and seeking declaratory relief against Caldwell and Sirote. In its complaint, Cunningham Bounds asserted:

"4. Plaintiff Cunningham Bounds represented numerous business entities in connection with the settlement of the Deepwater Horizon catastrophe. Defendant Caldwell referred several clients to Cunningham Bounds for representation. Among the clients referred to [Cunningham Bounds], Caldwell referred Client A, Client B, and Client C.

"5. The representation agreements entered into with Client A, Client B, and Client C specified that:

"'I/we understand that my/our claims and case were referred to you by Randall Caldwell, referring attorney, who may receive up to 1/3 of the attorneys fees set out in this agreement. I/we understand that the referral fee will not result in total attorney fees greater than that provided in Paragraph 2.'

"Those representation agreements were executed on or about April 25, 2011.

"6. On or about May 2, 2014, Client A, Client B, and Client C informed [Cunningham Bounds] that they had terminated Caldwell from any representation relating to the Deepwater Horizon settlement. On May 20, 2014, Client A, Client B, and Client C directed [Cunningham Bounds] to remove Caldwell from any correspondence related to the Deepwater Horizon claims and to deal exclusively with its counsel Sirote as it related to those matters. Client A, Client B, and Client C directed [Cunningham Bounds] not to disburse any fees to Caldwell.

"7. On July 8, 2014, [Cunningham Bounds] reached an agreement with Defendants that it would not disburse any referral fees related to the above-mentioned representation absent an agreement of the parties or direction from a court.

"8. A settlement was reached with BP related to the claims asserted by Client A, Client B, and Client C. Some of the settlement funds have been paid, and additional funds will be paid in the future. [Cunningham Bounds] holds a sum equal to 1/3 of the attorneys fee paid to date and which represents the referral fee in this matter. [Cunningham Bounds] claims no interest in said funds, but seeks direction from this Court as to the proper person or entity to whom to disburse said funds.

"9. Each of the Defendants claims an interest in some or all of the subject property. [Cunningham Bounds] is uncertain as to the appropriate party to receive said funds. [Cunningham Bounds] is subject to competing claims for said sums and would be exposing itself to potential double litigation if it disbursed absent an agreement of the parties or absent some direction from this Court.

"WHEREFORE, [Cunningham Bounds] requests an order of this Court ordering (1) which of the Defendants is entitled to some or all of the subject funds, (2) that each Defendant be restrained from instituting any action against [Cunningham Bounds] for the recovery of the property or any part of it, (3) that Defendants be required to interplead and settle among themselves their rights to the property and that [Cunningham Bounds] be discharged from all liability related thereto, (4) how [Cunningham Bounds] should disburse funds coming into its hands in the future, and (5) such other, further and different relief as may be appropriate under the circumstances of the case."

Caldwell and Sirote both filed answers to the complaint.

On November 4, 2018, Caldwell filed a motion for a summary

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judgment. On December 11, 2018, Sirote filed its response in opposition to Caldwell's summary-judgment motion.

On January 14, 2019, the trial court entered a summary judgment for Caldwell. On February 1, 2019, Cunningham Bounds and Sirote filed a "Joint Motion for Order Clarifying Summary Judgment Order, Approving Requirements for Stay Pending Appeal and Directing Deposit of Funds Covered by the Action into an Interest Bearing Account Pending Appeal."

On February 4, 2019, the trial court entered an amended summary-judgment order, stating:

"This matter came before the Court on the Joint Motion of the parties to clarify the summary judgment order previously entered in this case and to approve the requirements for a stay in this action pending an appeal by Sirote & Permutt, P.C. The Court having considered the merits of the pending Motion, the Court clarifies and substitutes its Order issued on January 14, 2019 for the following language:

"It is ORDERED that the Motion for Summary Judgment filed by C. RANDALL CALDWELL, JR. is GRANTED as to the Interpleader action filed by Plaintiff, CUNNINGHAM BOUNDS, LLC, and all funds currently in the possession of CUNNINGHAM BOUNDS, LLC representing referral fees due pursuant to the terms of the Representation Agreements entered into between CUNNINGHAM BOUNDS, LLC, and any of the following clients of CUNNINGHAM BOUNDS, LLC, namely, Woerner Development, Inc., Woerner AgriBusiness, LLC, Woerner Investments, LLC, Woerner Landscape Source, Inc., Woerner Realty, Inc., Gulf South

Transportation, Inc., Summerdale REI, LLC, Woerner Turf Montgomery, Inc., Woerner Sebring Farm, Inc., and Woerner Turf Anniston, Inc. shall be paid to C. RANDALL CALDWELL, JR. ...

"It is ORDERED that upon payment of the funds currently in the possession of CUNNINGHAM BOUNDS, LLC, to C. RANDALL CALDWELL, JR., that CUNNINGHAM BOUNDS, LLC, shall be dismissed and discharged without any further obligation as to the above-styled Complaint for Interpleader.

"It is further ORDERED that the Motion for Summary Judgment filed by C. RANDALL CALDWELL, JR. is GRANTED as to the Declaratory Judgment action filed by Plaintiff, CUNNINGHAM BOUNDS, LLC, and all funds which will be received in the future by CUNNINGHAM BOUNDS, LLC representing referral fees due pursuant to the terms of the Representation Agreements entered into between CUNNINGHAM BOUNDS, LLC and any of the following clients of CUNNINGHAM BOUNDS, LLC, namely, Woerner Development, Inc., Woerner AgriBusiness, LLC, Woerner Investments, LLC, Woerner Landscape Source, Inc., Woerner Realty, Inc., Gulf South Transportation, Inc., Summerdale REI, LLC, Woerner Tu[rf] Montgomery, Inc., Woerner Sebring Farm, Inc., and Woerner Turf Anniston, Inc. shall be paid upon receipt to C. RANDALL CALDWELL, JR. The costs of this action are taxed to Sirote & Permutt, P.C. ...

"It is ORDERED that execution on the afore-mentioned judgments shall issue unless SIROTE & PERMUTT, PC files a timely Notice of Appeal and posts a supersedeas bond in the amount of Two Thousand and 00/100 Dollars (\$2000.00) to cover costs for this action and for any appeal. Upon the filing of a timely Notice of Appeal and the posting of a supersedeas bond in the amount listed above, any execution on this judgment shall be stayed and CUNNINGHAM BOUNDS, LLC shall place all funds currently in its possession and all funds which will

be received in the future representing referral fees due pursuant to the terms of the Representation Agreements entered into between CUNNINGHAM BOUNDS, LLC, and any of the following clients of CUNNINGHAM BOUNDS, LLC, namely, Woerner Development, Inc., Woerner AgriBusiness, LLC, Woerner Investments, LLC, Woerner Landscape Source, Inc., Woerner Realty, Inc., Gulf South Transportation, Inc., Summerdale REI, LLC, Woerner Turf Montgomery, Inc., Woerner Sebring Farm, Inc., and Woerner Turf Anniston, Inc. into an interest bearing account for the benefit of the parties claiming an interest in the funds. The stay on execution will continue, and the funds deposited in the account along with any interest earned on the funds will be held in the account until the completion of any appeal as to the ownership of the funds in the account."

(Capitalization in original; emphasis omitted; emphasis added.) This appeal followed.

Standard of Review

"We review the summary judgments entered by the trial court under the following standard:

"This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the

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nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce "substantial evidence" as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12.'

"Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004)."

Aliant Bank v. Four Star Invs., Inc., 244 So. 3d 896, 907 (Ala. 2017).

Discussion

Sirote argues that the trial court erroneously granted Caldwell's motion for a summary judgment because, it says, Caldwell failed to establish that there were no genuine issue of material fact and that he was entitled to judgment as a matter of law. In its amended summary-judgment order, the trial court stated that it was awarding Caldwell amounts "representing referral fees due pursuant to the terms of the Representation Agreements entered into between" Cunningham Bounds and each of the Woerner companies. In its brief, Sirote argues that Caldwell was not a party to those representation agreements and that there was no "record

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evidence of any contract or agreement between Caldwell and any of the Woerner entities, or Caldwell and [Cunningham Bounds]." (Sirote's brief at p. 24.) Sirote goes on to argue that the clauses in the representation agreements providing for referral fees are vague and ambiguous. Therefore, Sirote argues, questions of fact existed that precluded a summary judgment in this case.

In his motion for a summary judgment, Caldwell argued that the representation agreements are valid and binding contracts that the trial court must enforce in his favor. Specifically, he alleged:

"On April 25, 2011, a contract was formed between Cunningham and the Woerner Companies concerning the scope of legal representation for the Woerner Companies' claim for damages due to the BP oil spill. At the time the contract was executed concerning the scope of legal representation, a contract was also entered into between Cunningham and Caldwell (approved by the Woerner Companies) which acknowledged that Caldwell would serve as the referring attorney. The contracts were formed at the same time and on the same document, namely the Representation Agreements."

(Emphasis added.)

In this case, Caldwell asserts that he is entitled to the disputed funds as referral fees. Rule 1.5(e), Ala. R. Prof. Cond., provides, in pertinent part:

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"A division of fee between lawyers who are not in the same firm, including a division of fees with a referring lawyer, may be made only if:

"(1) either (a) the division is in proportion to the services performed by each lawyer, or (b) by written agreement with the client, each lawyer assumes joint responsibility for the representation, or (c) in a contingency fee case, the division is between the referring or forwarding lawyer and the receiving lawyer;

"(2) the client is advised of and does not object to the participation of all the lawyers involved;

"(3) the client is advised that a division of fee will occur; and

"(4) the total fee is not clearly excessive."

Further,

" "[t]he basic elements of a contract are an offer and an acceptance, consideration, and mutual assent to the essential terms of the agreement." ' Stacey v. Peed, 142 So. 3d 529, 531 (Ala. 2013) (quoting Hargrove v. Tree of Life Christian Day Care Ctr., 699 So. 2d 1242, 1247 (Ala. 1997))."

Merchants Bank v. Head, 161 So. 3d 1151, 1155 (Ala. 2014).

In support of his summary-judgment motion, Caldwell submitted his affidavit and the representation agreements between Cunningham Bounds and each of the Woerner companies.

In his affidavit, Caldwell stated:

"6. In order to assist with Mr. Woerner's claims, I contacted either Steve Olen or Steve

Nicholas, attorneys employed by Cunningham Bounds, about the possibility of referring the potential claims of Mr. Woerner's businesses. I then arranged and scheduled a meeting between either Steven Olen or Steven Nicholas and Mr. Woerner, as well as other employees of Mr. Woerner's businesses, to discuss the claims.

"7. At that meeting, which occurred sometime in April 2011, the terms of employment were discussed and Cunningham Bounds was retained to represent the following businesses: Woerner Development, Inc., Woerner AgriBusiness, LLC, Woerner Investments, LLC, Woerner Landscape Source, Inc., Woerner Realty, Inc., Gulf South Transportation, Inc., Summerdale REI, LLC, Woerner Tu[rf] Montgomery, Inc., Woerner Sebring Farm, Inc., and Woerner Turf Anniston, Inc.

"8. To formalize the employment agreement between Cunningham Bounds and all of the Woerner businesses, Representation Agreements were executed by each of the Woerner businesses as well as Cunningham Bounds promising to pay me a referral fee on each claim. All of the Woerner businesses consented to this arrangement. The Representation Agreements attached to my Motion for Summary Judgment are the true and accurate copies of the Representation Agreements I received which were executed between Cunningham Bounds and all of the Woerner businesses."

(Emphasis added.) Contrary to Caldwell's assertion in his affidavit, the representation agreements did not include any specific promise to pay Caldwell a referral fee. Rather, they merely included provisions in which each of the Woerner companies acknowledged that their claims had been referred to Cunningham Bounds by Caldwell and that Caldwell "may receive

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up to 1/3 of the attorneys fees set out in" the representation agreements. (Emphasis added.) However, nothing in the representation agreements specified what would trigger the payment of a referral fee to Caldwell or how the actual amount of such a fee would be determined.

Moreover, in his motion for a summary judgment, Caldwell asserted that he had also entered into a contract with Cunningham Bounds pursuant to which Caldwell would serve as the referring attorney. Caldwell also asserted in his motion for a summary judgment that that contract and the contract concerning the scope of Cunningham Bounds' legal representation "were formed at the same time and on the same document, namely the Representation Agreements." Although the representation agreements acknowledged Caldwell as the referring attorney, they did not include any terms of any such agreement between Caldwell and Cunningham Bounds. Finally, Caldwell's affidavit did not include any facts regarding the terms of any alleged contract between him and Cunningham Bounds. Therefore, Caldwell did not present any evidence to establish the existence of a contract between him and Cunningham Bounds.

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For these reasons, Caldwell did not make a prima facie showing that there was no genuine issue of material fact and that he was entitled to a judgment as a matter of law. Therefore, the trial court erred when it granted Caldwell's motion for a summary judgment.²

Conclusion

Based on the foregoing, we reverse the trial court's summary judgment in favor of Caldwell and remand the case to the trial court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Sellers, and Mitchell, JJ., concur.

²Based on our resolution of this issue, we pretermit discussion of the remaining arguments Sirote raises on appeal.