

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PHILIP M. FINESTRAUSS,)
)
Defendant Below, Appellant,)
)
v.)
)
WOLOSHIN, LYNCH, NATALIE &)
GAGNE, P.A.,)
)
Plaintiff Below, Appellee.)
)

C.A. No.: CPU4-09-000871

Philip M. Finestrauss, Esquire
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Submitted: May 5, 2010

Decided: July 2, 2010

***MOTION FOR SUMMARY JUDGMENT BY WOLOSHIN, LYNCH, NATALIE & GAGNE,
PA., PLAINTIFF BELOW, APPELLEE - GRANTED***

***MOTION FOR SUMMARY JUDGMENT BY PHILIP M. FINESTRAUSS
DEFENDANT BELOW, APPELLANT - DENIED***

J. Reigle

PROCEDURAL POSTURE

This matter is before the court on cross Motions for Summary Judgment filed by Defendant Below, Appellant, Philip M. Finestrauss, Esquire and Plaintiff-Below, Appellee, Woloshin, Lynch, Natalie and Gagne, P.A. (“WLN&G”). Mr. Finestrauss represents himself in this action and William O’Day, Jr., Esquire represents WLN&G.

Initially, this action was brought by Plaintiff, WLN&G, in Justice of the Peace Court 12 against Defendant, Mr. Finestrauss, to recover attorneys’ fees under a fee-splitting agreement between two attorneys, James Natalie, Jr., Esquire of WLN&G and Mr. Finestrauss, a solo practitioner. Following a trial and post-trial motion, the Justice of the Peace Court held in favor of WLN&G in the amount of \$7,500. Mr. Finestrauss subsequently appealed to the Court of Common Pleas.

The *Complaint on Appeal*, filed in this Court on March 20, 2009, by WLN&G, requested out-of-pocket expenses in the amount of \$372.24, attorneys’ fees in the amount of \$7,500.00, pre-judgment and post judgment interest and court costs. The *Answer on Appeal*, filed on April 13, 2009, by Mr. Finestrauss, denied the allegations and set forth affirmative defenses including that the complaint failed to state a claim upon which relief could be granted, that the claim was void pursuant to the Statute of Frauds¹ and that the breach of contract claim was void because it was induced by fraud and misrepresentation regarding the nature of the work performed by WLN&G on the case.

After completion of discovery, both sides filed Motions for Summary Judgment. The Court heard oral argument on March 4, 2010, reserved decision and ordered a transcript of the proceedings. This is the Court’s Decision granting WLN&G’s Motion for Summary Judgment and denying Mr. Finestrauss’s Motion for Summary Judgment.

¹ This defense was not reasserted in Mr. Finestrauss’s Motion for Summary.

FACTS NOT IN DISPUTE

The relevant facts follow. Michele Fields-Shaw was the plaintiff in an underlying tort case.² Initially, Ms. Fields-Shaw was represented by Mr. Natalie of WLN&G. Subsequently, Ms. Fields-Shaw asked Mr. Finestrauss to assume representation of her case. Mr. Finestrauss sent a letter, dated January 24, 2005, to Mr. Natalie stating his intention to represent Ms. Fields-Shaw along with a request for the case file, an offer to pay advanced costs and a request for a discussion regarding the allocation of attorneys' fees at the conclusion of Ms. Fields-Shaw's case.³ In response, Mr. Natalie telephoned Mr. Finestrauss. During that telephone conversation, they discussed a division of attorneys' fees if there was a recovery for Ms. Fields-Shaw. Mr. Natalie would receive one-half of the total recovery of attorneys' fees if the case was resolved prior to trial and one-third of the total recovery of attorneys' fees if the case was resolved after a trial. They also agreed that WGL&G would be reimbursed for its out-of-pocket costs incurred on behalf of Ms. Fields-Shaw. There were no reservations at the end of the telephone conversation to discuss the matter with the client or to review the file.

Following this discussion, Mr. Natalie sent a confirming letter to Mr. Finestrauss, dated February 4, 2005. It stated, "[b]ased on our conversation, it is my understanding that based on the office's effort-to-date on Michelle's behalf, you will pay this office one-half (50%) of any recovery, if the case is settled before trial or one-third (33 1/3%) if it goes to trial, plus our itemized costs to date."⁴ Mr. Natalie also provided Mr. Finestrauss with the file for the underlying case, an itemization of the costs incurred by WLN&G and a signed Substitution of Counsel with instructions to please sign and file it with the Court. Mr. Finestrauss accepted the file, signed the Substitution of Counsel and filed it with the Superior Court.

² *Michele Fields-Shaw v. Max Hellstern, C.A. 04C-12-013 RRC.*

³ *See Exhibits to Motions for Summary Judgment filed by Mr. Finestrauss as "A" and WLN&G as "1."*

⁴ *See Exhibits to Motions for Summary Judgment filed by Mr. Finestrauss as "B" and WLN&G as "2."*

Upon review of the case file received from WLN&G, Mr. Finestrauss discovered that Robert Snyder, a paralegal employed by WLN&G, had sent a demand letter to an insurance carrier on behalf of Ms. Fields-Shaw on October 23, 2003 that was written in the first person and signed by Mr. Snyder. Mr. Finestrauss referred the matter to the Office of Disciplinary Counsel (“ODC”). Subsequently, Mr. Snyder signed an Affidavit of Voluntary Compliance on December 19, 2006 with the Board on Unauthorized Practice of Law agreeing to cease and desist in the unauthorized practice of law.⁵ The Supreme Court of the State of Delaware approved the affidavit on April 23, 2007. No action was taken against Mr. Natalie or WLN&G by the ODC.

The out-of-pocket fees were submitted to WLN&G by Mr. Finestrauss on June 12, 2007. WLN&G confirmed this fact, through counsel, by letter to this Court on March 11, 2010. It appears that WLN&G failed to realize that the out-of-pocket expenses had been paid when it filed its complaint.

Ms. Fields-Shaw’s personal injury case was settled prior to the matter going to trial for \$75,000.00.⁶ It generated attorney’s fees in the amount of \$15,000.00. Based on Ms. Fields-Shaw’s assertion that none of WLN&G’s attorneys had been in contact with her during the pendency of her case, the later revelation that Mr. Snyder had possibly engaged in the unauthorized practice of law in handling her claim and the belief that the bulk of the work on the case had been performed by a non-attorney, Mr. Finestrauss concluded that attorneys’ work in the case had been minimal. He unilaterally re-calculated the fee owed to WLN&G to be \$1,500.00 and tendered a check in that amount to WLN&G. The firm did not cash the check and filed a claim in the Justice of the Peace Court for the full amount.

⁵ See Exhibit “C” of Motion for Summary Judgment filed by Mr. Finestrauss.

⁶ Court costs in the amount of \$207.00 were also paid.

LEGAL STANDARD

In order to prevail on a Motion for Summary Judgment, the moving party must prove that there are no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.⁷ “In reviewing the record, the Court must view the facts and all reasonable inferences in the light most favorable to the non-moving party.”⁸ “If a motion for summary judgment is properly supported, the burden shifts to the nonmoving party to demonstrate that there are material issues of fact. The motion for summary judgment will be denied if the Court finds any genuine issues of material fact.”⁹

MOTION FOR SUMMARY JUDGMENT FILED BY WLN&G

In its *Complaint on Appeal*, WLN&G asserts that a contract was formed between WLN&G and Mr. Finestrauss during the telephone conversation between Mr. Natalie and Mr. Finestrauss and that the subsequent letter on February 4, 2005 was a memorialization of the contract that was already established. Further, WLN&G asserts that Mr. Finestrauss breached his contract with WLN&G when he failed to pay fifty percent of his recover of attorneys’ fees from Ms. Fields-Shaw to WLN&G. On its motion for summary judgment, WLN&G submits that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law for the amount set forth in the contract. WLN&G supports its argument with copies of the two letters between the parties, a portion of a transcript of a deposition of Mr. Finestrauss and a representation of factual events after the letters were exchanged.

In his *Answer on Appeal*, Mr. Finestrauss does not contradict the validity of the two letters or WLN&G’s summarization of his conversation with Mr. Natalie or the representation of the actions of the parties after the exchange of letters. In his reply to WLN&G’s motion, Mr.

⁷ Ct. Com. Pls. Civ. Rule 56(a)(c).

⁸ *Stein v. Griffith*, 2002 WL 32072578 at * 1 (Del.Com.Pl.) *citations omitted*.

⁹ *Moore v. Anesthesia Services*, 2008 WL 484452 at *4 (Del.Super.) *citations omitted*.

Finestrauss disputes the characterization by WLN&G that the telephone conversation formed a contract.

First, Mr. Finestrauss asserts there was no “mutual assent” or “meeting of the minds” on all material terms during the telephone conversation because Mr. Natalie failed to disclose Mr. Snyder’s unauthorized practice of law in the underlying case and the limits of actual attorney work on the case. He argues therefore, no contract was formed.

Second, Mr. Finestrauss asserts that although he and Mr. Natalie had discussions on the telephone, a contract did not arise because the follow-up letter from Mr. Natalie to Mr. Finestrauss was not a memorialization of the contract, but, rather a counter-offer. Mr. Finestrauss argues that the letter materially changed the terms of the contract from “attorney fees” to “office fees,” which substantially changed the offer. He asserts that he did not accept that offer and therefore there is no contract.

No affidavits or pleadings have been presented by Mr. Finestrauss in support of his allegation that Mr. Natalie or any member of WLN&G misrepresented the nature of the work done on the file or the amount of time expended by WLN&G’s staff. Mr. Natalie’s letter dated February 4, 2005 to Mr. Finestrauss indicates that the fee division agreement was based upon the WLN&G “office’s effort-to-date”. The language of the letter does not rule out the possibility of non-lawyer work performed on the case. The Court notes that Mr. Finestrauss made no representations to this Court that he made any efforts to ascertain the distinction between work done by WLN&G attorneys and staff.

“A contract has been defined under Delaware law as an agreement upon sufficient consideration to do or not to do a particular thing.”¹⁰ “The elements necessary to create a

¹⁰ *Thomas v. Thomas*, 2010 WL 1452872 at *4 (Del.Com.Pl.) citing *Rash v. Equitable Trust*, 159 A. 839, 840 (Del. Super. 1931).

contract include mutual assent to the terms of the contract, also known as the meeting of the minds, and the existence of consideration.”¹¹ “Mutual assent requires an offer and an acceptance wherein ‘all the essential terms of the proposal must have been reasonably certain and definite.’ Thus, if any portion of the proposed terms is not settled there is no agreement. Where there is no mutual assent or meeting of the minds, there is no enforceable contract in Delaware.”¹²

“It is elementary that determination of the question whether a contract has been formed essentially turns upon a determination whether the parties to an alleged contract intended to bind themselves contractually. A court determining if such intention has been manifested, however, does not attempt to determine the subjective state of mind of either party, but, rather, determines this question of fact from the overt acts and statements of the parties.”¹³ “Overt manifestation of assent rather than subjective intent control[s] contract formation.”¹⁴ “The apparent mutual assent, essential to the formation of a contract, must be gathered from the language employed by them, or manifested by their words or acts, and it may be manifested wholly or partly by written or spoken words or by other acts or conduct.”¹⁵

This case involves two sophisticated parties who are practicing attorneys, who are known to each other, who practice in the same field and geographic area who engaged in an agreement regarding a simple division of fees between them. This Court finds the letter to be a memorization of a verbal contract. If Mr. Finestrauss was dissatisfied with the terms in the letter, he should have affirmatively made a correction. He did not. Rather he accepted the file,

¹¹ *Thomas* at * 4 citing *Quinones v. Access Labor*, 2008 WL 2410170 at *5 (Del.Super.) (quoting *Ramone v. Lang*, 2006 WL 905347 *10 (Del.Ch.) (citing *Wood v. State*, 815 A.2d 350, 2003 WL 168455 at *2 (Del. 2003) citing RESTATEMENT (SECOND) OF CONTRACTS § 18 (1981)).

¹² *Thomas* at 4 citations omitted.

¹³ *Leeds v. First Allied Conn. Corp.*, 521 A.2d 1095, 1097 (Del.Ch. 1986) citing *Industrial America, Inc. v. Fulton Industries*, 285 A.2d 412, 415 (Del. 1971).

¹⁴ *Ramone v. Lang*, 2006 WL 4762877 (Del.Ch.) citing RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

¹⁵ 17 C.J.S. *Contracts* § 37.

filed the Stipulation with the Court and acted in every way as if a contract existed between the parties. Mr. Finestrauss states that he met with his client and learned of the actions of Mr. Snyder as early as February 12th, which was shortly after the February 4th letter from Mr. Natalie. His conduct in failing to repudiate the language of the letter, acceptance of the file and filing of the stipulation of counsel demonstrates acceptance of the letter as a correct memorialization of an earlier contract and is an objective indication of mutual assent.

In addition, Mr. Finestrauss has failed to demonstrate that he misunderstood the terms “attorneys fees.” The agreement was for a percentage of generated attorneys’ fees, not for a breakdown of billable hours attributed to attorneys, paralegals and other staff members. This Court takes judicial notice that it is a common practice for lawyers to use non-lawyers to assist them in preparation of cases and that this time is sometimes incorporated into a flat or contingency fee and other times actually billed to the client. For these reasons, the Court finds that Mr. Finestrauss has failed to raise a genuine issue of material fact that defeats a meeting of the minds and the formation of a contract

There are no *genuine* issues of material fact that are unresolved. It does not matter what Mr. Finestrauss believes he agreed to with Mr. Natalie, the facts show that he demonstrated assent to the contract by the language used in the telephone conversation, the language of the follow-up letter and his actions and inactions following the letter and telephone conversation.

MR. FINESTRAUSS’S MOTION FOR SUMMARY JUDGMENT

Mr. Finestrauss moves the Court to find that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law that no enforceable contract existed between him and WLG&N. He further argues that because there is no enforceable contract, WLG&N is either not entitled to any fee because the firm was terminated by Ms. Fields-Shaw

for cause or it is only entitled to a remedy based upon quantum meruit for the work that its attorneys actually performed on the case.

Mr. Finestrauss contends that the contract that WLN&G's seeks to enforce conflicts with the Delaware Lawyer's Rules of Professional Conduct because of its use of Mr. Snyder's services. He invokes the rule which provides: "[a] lawyer or law firm shall not share legal fees with a non-lawyer except [under certain circumstances.]"¹⁶

The Court finds that no affidavits have been filed and there is no evidence in the record to support Mr. Finestrauss' assertion that WLN&G shared a fee with Mr. Snyder. While it is assumed that he was paid by his employer, there is no evidence that his pay or a bonus was tied in any way to the fee in this case.

Mr. Finestrauss also argues that WLN&G is precluded from recover of attorneys' fees because of the disciplinary action taken against Mr. Snyder and his ultimate consent to the cease and desist order. Mr. Finestrauss contends that this fact, in and of itself, precludes WLN&G from recovering a fee that is derived from Ms. Fields-Shaw.

This Court finds that no affidavits have been filed and there is no evidence in the record to support Mr. Finestrauss's argument. Mr. Finestrauss was unable to represent that Ms. Fields-Shaw sought new representation due to the actions of Mr. Snyder, that any harm could be demonstrated by Ms. Fields-Shaw due to Mr. Snyder's alleged misconduct or that Ms. Fields-Shaw was aware of his conduct at the time that she terminated representation by Mr. Natalie.

Mr. Finestrauss further states that although he proffered \$1,500 to WLN&G as a means of resolving the matter, he now asserts that under his theory of termination for just cause, no amount is owed.

¹⁶ ." Del. Rules Prof. Conduct 5.4(a).

No facts have been presented by Mr. Finestrauss that demonstrate that WLG&N was terminated by Ms. Fields-Shaw for cause. Although Mr. Snyder agreed to cease and desist any future unauthorized practice of law in his voluntary agreement with the Board and the Supreme Court, there was no admission that he engaged in such a practice on behalf of Ms. Fields-Shaw in this case. In addition, there is no evidence that the matter was not dealt with properly by the supervising attorneys at WLN&G. There was no demonstrated harm to Ms. Fields-Shaw. It has not been shown to this Court that there is a requirement that a law firm disgorge a fee for any of the assertions made by Mr. Finestrauss.

Finally, Mr. Finestrauss contends that Ms. Fields-Shaw only authorized the \$1,500.00 be paid to WLN&G and therefore it is improper for him to pay the full alleged amount of \$7,500.00 as it would be a violation of the Rules of Professional Conduct.

The fee division agreement in this case is not in violation of Lawyers' Rules of Professional Conduct which state, "A division of fee between lawyers who are not in the same firm may be made only if: (1) the client is advised in writing of and does not object to the participation of all the lawyers involved; and (2) the total fee is reasonable."¹⁷

No affidavits or evidence in the record demonstrates that Ms. Fields-Shaw objected to the participation of both attorneys. The underlying tort action settled for \$75,000.00, and generated total attorney's fees of \$15,000.00 or one-fifth (20%). There is no allegation that the fee in this matter was unreasonable. Thus, the fee division agreement does not violate the Rules of Professional Conduct.

None of the issues raised by Mr. Finestrauss in his Motion for Summary Judgment have been supported by undisputed facts and he is not entitled to judgment as a matter of law.

¹⁷ Del. Rule of Prof. Conduct 1.5(e).

CONCLUSION

A verbal contract was created on the telephone between Mr. Natalie and Mr. Finestrauss sometime between January 24th and February 4th, 2005. This Court finds that there was a “meeting of the minds” between these two sophisticated parties who are both attorneys who practice in the same area of law, know each other, know the nuances of sharing fees and the typically practices in law firms regarding work performed by non-attorneys. This Court does not find that Mr. Natalie misrepresented the work performed on behalf of Ms. Fields-Shaw.

In addition, it is significant that subsequently, a letter was mailed by Mr. Natalie memorializing the contract, both signed the Substitution of Counsel and the file changed hands. No defense to the formation of the contract has been successfully made. A valid contract bound the parties on the allocation of attorneys’ fees following the conclusion of the underlying personal injury case. When it was settled before trial and generated attorneys’ fees in the amount of \$15,000.00, WLN&G was entitled to half of that amount under the contract or \$7,500.00. Mr. Finestrauss breached the contract when he tendered the amount of \$1,500.00 for attorneys’ fees.

No argument has been successfully made that WLN&G must disgorge its benefit of the contract because of the Voluntary Compliance signed by Mr. Snyder or any Delaware Rule of Professional Conduct.

For the foregoing reasons, WLN&G’s Motion for Summary Judgment is GRANTED for \$7,500.00 plus post-judgment interest at the legal rate and costs. Because of the significance of the legal issues raised, pre-judgment interest is denied. Mr. Finestrauss’s Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

Anne Hartnett Reyle
THE HONORABLE ANNE HARTNETT REYLE