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RE: Earl Holden v. Gaico Inc. and Liberty Mutual Insurace Co.,
C.A. No. 97C-03-018

Date Submitted: June 11, 2001
Dated Decided: September 20, 2001

Dear Counsel:

On March 26, 1997, Earl Holden ("Plaintiff") initiated a claim for non-payment of medical witness and court reporter fees, attorneys' fees, and liquidated damages against Gaico, Inc. and Liberty Mutual Insurance Company ("Defendants"). Plaintiff also filed a bad faith claim which was withdrawn shortly thereafter. This Court, Judge T. Henley Graves presiding, granted Defendants' Motion for Summary Judgment, which the Supreme Court later reversed. *Holden v. Gaico, Inc.*, Del. Supr., 736 A.2d 202 (1999). Upon remand, this case was transferred to Judge E. Scott Bradley. On June 1, 2001, Plaintiff filed a Motion for Summary Judgment, which this Court granted. In response to that grant, the Defendants have filed a motion for reargument pursuant to Superior Court Civil Rule 59(e). The Defendants argue that disputed material factual issues still exist that preclude summary judgment.

"The manifest purpose of all Rule 59 motions is to afford the Trial Court an opportunity to correct errors prior to an appeal." *Hessler, Inc. v. Farrell*, Del. Supr., 260 A.2d 701 (1969). In a motion for reargument, the moving party must show the Court "overlooked a precedent or legal principle that would have controlling effect, or that it has misapprehended the law or facts such as would affect the outcome of the decision." *Monsanto Co. v. Aetna Cas. & Surety Co.*, Del. Super., C.A. No. 88-JA-118, Ridgely, P.J. (Jan. 14, 1994) *citing Wilshire Rest. Group, Inc. v. Ramada, Inc.*, Del. Ch., C.A. No. 11506, Jacobs, V.C. (Dec. 19, 1990) (Letter Op.). To determine if this Court has misapprehended the facts supporting its grant of summary judgment, a review of those facts is necessary.

I.

On October 30, 1996, the Industrial Accident Board awarded the Plaintiff $894.04 for medical bills, plus 30% thereof for attorneys' fees. The Plaintiff was also awarded reimbursement for medical witness fees and the court reporter's fees. The award was compensation for an injury the Plaintiff sustained in a prior industrial accident.

On December 21, 1996, the Plaintiff's attorney, John J. Schmittinger, Esquire, sent a letter to the Defendants' attorney, Colin M. Shalk, Esquire, demanding payment of the workers' compensation benefits, the attorneys' fees, the medical witness fee, and the court reporter's fee. Attached to the letter were bills from the medical witness and the court reporter. On December 26, 1996, Mr. Schmittinger sent a second letter to Mr. Shalk demanding payment of all workers' compensation benefits owed to the Plaintiff. Mr. Shalk replied on December 31, 1996, stating that the workers' compensation benefits were being paid by Liberty Mutual. Enclosed with the letter was a check for $268.21 for the attorneys' fees. Mr. Shalk also indicated that he did not

have the amounts of the medical witness' and the court reporter's fees. On January 2, 1997, Mr. Schmittinger replied to Mr. Shalk, indicating that the bills for the medical witness and the court reporter's fees had been sent in the December 21st letter.

After failing to receive reimbursement for the remaining fees, Mr. Schmittinger wrote both Mr. Shalk and Nancy Chrissinger on March 6, 1997.[1] Mr. Schmittinger demanded payment of the remaining fees within ten days. On March 18, 1997, nearly three months after the Plaintiff's original demand, a check for $1,267.00 representing reimbursement for the remaining fees was sent to Mr. Schmittinger from the law office of Chrissinger and Baumberger. Plaintiff's counsel received payment on March 21, 1997, fifteen days after the final demand was sent. On March 26, 1997, the Plaintiff filed suit pursuant to *Huffman v. C.C. Oliphant & Son, Inc.*, Del. Supr., 432 A.2d 1207, 1211 (1981).

II.

Under Superior Court Civil Rule 56, a party may move for summary judgment in the party's favor upon all or part of any claims, counterclaims or crossclaims asserted. Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. *Moore v. Sizemore*, Del. Supr., 405 A.2d 679, 680 (1979). Once the moving party meets its burden, then the burden shifts

[1]At this point, Mr. Schmittinger was unaware of who was handling the file. Although it is not clear from the record, the file was apparently transferred from Colin M. Shalk at the law offices of Casarino, Christman & Shalk to Nancy Chrissinger, Esquire, at the law offices of Chrissinger and Baumberger sometime between December 31, 1996, and March 6, 1997.

to the non-moving party to establish the existence of material issues of fact. Id. At 681. Where the moving party produces an affidavit or other evidence sufficient under Super. Ct. Civ. R. 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, then summary judgment must be granted. *Burkhart v. Davies*, Del. Supr., 602 A.2d 56, 59 (1991), cert. den., 112 S. Ct. 1946 (1992); *Celotex Corp. v. Catrett*, *supra*. However, if material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate. *Ebersole v. Lowengrub*, Del. Supr., 180 A.2d 467, 470 (1962).

The Defendants advance four arguments supporting their position to deny summary judgment. The first two arguments may be addressed simultaneously. The Defendants argue that a disputed material issue of fact exists regarding whether the Defendants were aware of the amounts for the remaining fees. They state that no affirmative evidence exists to prove that the Defendants had the information necessary to tender payment. Therefore, they claim, the demand for payment was not "proper." The Defendants also argue that a material issue exists regarding whether Defendants had reasonable justification to dispute the Plaintiff's demand for payment. Their basis for this argument is similar to the first argument - that the Defendants did not have the information necessary to tender payment.

The Defendants are resting their arguments on the quicksand of potential possibilities rather than the bedrock of the factual record. The Supreme Court has recognized that "[i]t is

fundamental that a motion for summary judgment must be decided on the record presented and not on evidence potentially possible." *Rochester v. Katalan*, Del. Supr., 320 A.2d 704, 708 n. 7 (1974). While the Defendants attempt to argue that there is a disputed material issue of fact regarding the receipt of the fee information, their argument fails upon examination of the facts.

The record reveals that the Plaintiff provided the medical witness and court reporter fee information in his intial letter to the Defendants on December 21, 1996. The record also reveals that when the Defendants later requested the fee amounts from the Plaintiff, the Plaintiff told the Defendants that the information could be found in the December 21st letter. A full two months passed without a response or payment from the Defendants. The Plaintiff has stated, uncontroverted by the Defendants, that the fee infromation was sent only once - December 21st. Because the Defendants tendered the correct amount as payment on March 18, 1997, the only logical inference is that the Defendants had the proper information in their files the entire time. Without evidence from the Defendants to the contrary, which the Defendants have had plenty of time to produce if they were able to do so, the Court must assume that the information was sent only once. Therefore, no factual dispute exists.

Moreover, Defendants' attorney effectively settled the potential factual dispute during the hearing for the Plaintiff's Motion for Summary Judgment. At the hearing, Defendants' counsel explained how he obtained the correct amount owed:

> THE COURT: Did you ever get the information a second time?
>
> MR. LOGULLO: I can't recall from my review of the file, but I have seen Mr. Schmittinger's letters in there, and I have seen the copy of the court reporter's costs and the medical witness costs in there. So it's in the file. I don't know what happened with Mr. Shalk's office and why he couldn't locate it. *But when we got the file, we located it and paid it within ten days.* (emphasis added).

(Hr'g. Tr. of 6/1/01 at 10-11.) No factual dispute exists in this instance because defense counsel admitted that the bills were in the file the entire time.

Next, Defendants argue Superior Court Civil Rule 6(a) applies to the ten day time period mandated by the Plaintiff's March 6th letter.[2] Defendants argue that, under the rule, they would have had until March 24, 1997, to tender payment to the Plaintiff. However, an examination of the rule shows that it is not applicable to time periods prescribed by a private party. The first sentence of the rule clearly states that it applies in only three situations - (1) time periods prescribed or allowed by the Superior Court Civil Rules, (2) court ordered time periods, and (3) statutorily mandated time periods. The instant case does not fall into any of these categories.

[2]Superior Court Civil Rule 6(a) states: "In computing any period of time prescribed or allowed by these Rules, by order of court, or by statute, the day of the act, event or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or Sunday, or other legal holiday, or other day on which the office of the Prothonotary is closed, in which event the period shall run until the end of the next day on which the office of the Prothonotary is open. When the period of time prescribed or alowed is less than 11 days, intermediate Saturdays, Sundays, and other legal holidays shall be excluded in the computation. As used in this Rule, "legal holidays" shall be those days provided by statute or appointed by the Governor or the Chief Justice of the State of Delaware."

Therefore, the rule does not apply.

Finally, Defendants argue that this Court's decision to grant attorneys' fees to the Plaintiff was inconsistent with Judge Graves' stance on the issue, producing inconsistent "rulings."[3] Such an argument holds no merit with this Court. The Defendants mischaracterize Judge Graves' general statements from the bench as "rulings" when they clearly are not. While Judge Graves may have expressed his misgivings about granting attorneys' fees, he never issued a ruling on the matter. Therefore, the attorneys' fees issue was undecided and clearly within this Court's power to adjudicate.

III.

The Defendants have failed to proffer any material issues of fact, cases, or principles of law that legitimately support their petition for reargument. Given the factual record, summary judgment is appropriate in this case. As such, the Defendants' Motion for Reargument is denied.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary

[3]The Defendants' argument is based upon comments made by Judge T. Henley Graves in a hearing conducted on March 3, 2000. In that hearing, Judge Graves indicated that he was "inclined to be conservative" regarding the award of attorneys' fees. (Hr'g Tr. of 3/1/2000 at 7.) However, the context in which this statement was made concerned revisiting the issue at a later date, clearly an indication that such a statement was not meant to be a ruling.