RENDERED: October 19, 2001; 2:00 p.m.
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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-003023-MR

MARILYN HANISH,
EXECUTRIX OF ESTATE
OF SIDNEY HANISH, DECEASED — APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH ABRAMSON, JUDGE
ACTION NO. 95-CI-005544

DON E. KEBSCH AND
MARK JOSEPH SMITH — APPELLEES

AND 2000-CA-000133-MR

MARILYN HANISH,
EXECUTRIX OF THE ESTATE
OF SIDNEY HANISH, DECEASED — APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN RYAN, JUDGE
ACTION NO. 98-CI-002190

MANOLA FORD, INDIVIDUALLY
AND AS NEXT FRIEND OF KOTONIA FORD,
AN INFANT AND MARK JOSEPH SMITH — APPELLEES

AND 2000-CA-000649-MR

MARILYN HANISH,

EXECUTRIX OF THE ESTATE
OF SIDNEY HANISH, DECEASED — APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH McDONALD-BURKMAN, JUDGE
ACTION NO. 97-CI-006040

AMANDA PECKHAM AND
MARK JOSEPH SMITH — APPELLEES

AND 2000-CA-000975-MR

MARILYN HANISH,
EXECUTRIX OF THE ESTATE
OF SIDNEY HANISH, DECEASED — APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 98-CI-000135

GREGORY FOW AND
MARK JOSEPH SMITH — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, COMBS, AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant, Marilyn Hanish, Executrix of the Estate of Sidney Hanish, deceased ("Appellant"), asks us to review orders from four divisions of the Jefferson Circuit Court ruling upon motions to set aside attorney fee liens filed by Sidney Hanish ("Hanish"). In each of the four cases, Hanish alleged that he had an oral agreement with the Appellee, Attorney Mark Joseph Smith ("Smith"), for 50% of any attorney fee recovered. In two of the cases, the circuit court determined

that Hanish was entitled to a reduced fee; in two remaining cases, the circuit court denied Hanish's claim for a fee in its entirety. Finding no error, we affirm.

The underlying circuit court cases.

1. In Hanish v. Ford, No. 2000-CA-00133-MR ("Ford"), the trial court held that: "Mr. Hanish is in fact entitled to some proceeds from the contract. The court hereby sets that amount at twenty-five (25) percent of the attorney fees involved in the settlement."

2. In Hanish v. Kebsch, No. 1999-CA-003023-MR ("Kebsch"), the trial court ordered that: Hanish's "lien shall be enforceable only to the extent of 5% any attorney fee realized by Plaintiff's current counsel, whether through settlement or trial of this case. This sum represents a proper division of the fee in proportion to the services performed. SCR 3.130 (1.5)."

3. In Hanish v. Peckham, No. 2000-CA-000649-MR ("Peckham"), the trial court explained that it must determine whether the lien is valid based upon the alleged agreement of Smith and Sidney Hanish, KRS 376.460, and the law of this Commonwealth. The court found that the attorneys had "shared an office relationship" from 1995 until September of 1997. They apparently divided all fees earned on cases on an equal basis. Peckham had signed a contract for representation on July 16, 1997; the contract contained the name of Peckham, as one party and Sidney Hanish and Mark Smith as the attorney parties. Peckham and Smith had signed the contract.

Smith left the firm in September 1997; he filed Peckham's civil suit against William Humphrey on October 21, 1997. Thereafter, he executed another contract with Peckham identical to the previous one, "yet devoid of the name of Sidney Hanish."

Sidney Hanish claimed he was entitled to 50% of the attorney fees based upon his prior oral agreement with Smith. The trial court stated:

> KRS 376.460 allows an attorney to have a lien upon all claims which are put into his hands for suit or collection for an amount of fee agreed upon by the parties or, in the absence of such an agreement, for a reasonable fee. This was a contingency fee contract. The relationship between Mr. Hanish and Mr. Smith dissolved in September, 1997. The question . . . becomes whether or not Mr. Hanish is entitled to have his fee honored and to receive fifty (50%) percent of the attorney fees. In Labach v. Hampton, Ky., 585 S.W.2d 434 (1979), a client was alleged to have wrongfully discharged an attorney who had done considerable work under a contingency fee contract. The Court held in that case that the attorney would be entitled to a lien upon the initial recovery equal to the percentage in the contract less the reasonable value of the work of the successor attorney required to bring the matter to a successful completion . . . . Regardless of whether or not the Court were to find a binding contract between Mr. Hanish and Mr. Smith of a 50-50 split on all cases . . . , this matter is still dictated by Supreme Court Rule 3.130(1.5) with respect to attorney's fees. That Rule states that a lawyer's fee shall be reasonable. Further, . . . Labach speaks to that reasonableness in a contingency fee contract in a situation where the attorney claiming the lien had performed substantial work for the client. That attorney was allowed fees less the reasonable value of the work of the successor attorney . . . .

> When the Court considers all of the above, it is clear that Mr. Smith did 100% of the work. . . . any fee that Mr. Hanish would claim must be reasonable to the services performed. This the Court cannot do. **The proof of the relationship between these two attorneys and any fee agreement they had is not firm Regardless of that, this Court finds that Mr. Smith performed all of the services . . . as such Mr. Hanish is entitled to none of the attorneys fees in her case.** (Emphasis added.)

4. In Hanish v. Fow, No. 2000-CA-000975-MR ("Fow"), the trial court granted Smith's motion and released Hanish's lien, in an opinion and order entered March 27, 2000:

> A hearing was held . . . on [Smith's] motion . . . that any liens by . . . Hanish on settlement monies in this case be released. The Court, having considered the arguments of counsel . . . hereby finds:
>
> 1. The original signed contract and fee arrangement between Mark Smith and Gregory Fow did not include the signature of the Honorable Sidney Hanish. Said signature was added.
>
> The client, Gregory Fow, came to Mr. Smith independent of the business relationship between Smith and Hanish.
>
> There is no signed contract between Smith and Hanish detailing a fee split arrangement, nor one with Fow approving such a fee split arrangement. SCR 3.310(1.5).
>
> For the above stated reasons, Smith's motion is **GRANTED**, and any lien against the settlement monies shall be released. This is a final and appealable order, with no just cause for delay. (Emphasis original.)

By order of this Court, entered April 20, 2000, the Executrix of Hanish's estate was substituted as the appellant, herein. By order entered June 26, 2000, this Court granted Appellant's motions to consolidate to the extent that the above

appeals shall be heard together and assigned to the same three-judge panel for consideration on the merits. On October 31, 2000, this Court entered an order granting Appellant's motion to file one brief for all the appeals.

In her statement of the case, Appellant contends that Hanish began a "business relationship" with Smith in 1994 -- Hanish referred cases to Smith as co-counsel after contracting with the client, with the client's consent. Appellant maintains that Hanish assumed "joint liability" [sic] for the litigation with Smith; further Hanish provided office space, equipment, advertising, bookkeeping, professional advice, and monitored the progress of cases. Appellant explains that the agreed compensation between Hanish and Smith was a 50/50 split of the earned attorney fees. There was no written agreement.

In his counterstatement, Smith asserts that he and Hanish had an office sharing relationship from 1995 until 1997, when Hanish forced him to leave, that they were not partners and that there was no written agreement of partnership or joint venture. Smith contends that he maintained his own office, paid rent, hired and paid his own secretary, and all other expenses incidental to the operation of an "independent" law office, separate and apart from Hanish's practice. Smith also contends that Hanish did no work toward the completion of the cases *sub judice*. [We note that the record contains a copy of a "Verified Petition" Hanish filed against Smith in another division of the Jefferson Circuit Court, Claim No. 98-CI-01779. In that petition, Hanish alleged that he had orally leased premises to

Smith on a month-to-month basis and that Smith owed him rent for July -- December 1997.]

Appellant argues that in two of these consolidated cases, the trial courts "felt Supreme Court Rule 3.180(1.5)(e)[1] applied and denied Appellant any fee. Both these courts did not realize [sic] that the rule applies only when the division of a fee is between lawyers not in the same firm." Appellant also maintains that the courts' reliance upon Labach, supra, is in error. Appellant would have us believe that it was "uncontroverted that the parties had a business relationship" which they conducted as a "partnership or joint venture." Appellant states that, at various times, the parties referred to their relationship as, "the firm"; however, the only reference to the record is the "Hanish deposition." No reference to the particular circuit court case is provided. Nor is any reference provided that the issue on appeal was preserved for review as required by CR 76.12(4)(c)(v).

Smith responds that there was clearly no partnership between the parties, and that the findings of the four trial courts are correct.

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[1] The Supreme Court Rule provides, in pertinent part:

(1.5)(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1)(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; and

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

(3) The total fee is reasonable.

By way of reply brief, Appellant argues that "up to this point" all four of the trial courts and the Appellee have "either failed to address . . . or fully understand and implement" SCR 3.130(1.5)(e) because the rule applies only to division of fees between *lawyers who are not in the same firm.* Appellant insists that Hanish and Smith were in the same firm; thus, the rule does not apply. Appellant makes the curious observation that "to argue whether Mr. Hanish's firm was a partnership, as opposed to a joint venture, . . . or any other business form is an exercise in semantics and sophistry and is unnecessary to the case at hand." We agree, but note that Appellant is the one who engaged in that exercise, not Smith.

Appellant also argues, in her reply brief, that the obligation to share fees survives the dissolution of the business relationship between Smith and Hanish; further, that Kentucky recognizes the concept of "special partnership" where attorneys employ others to assist in litigation. Appellant fails to provide at the beginning of these arguments any reference that the issues were preserved for review as required by CR 76.12(4)(c)(v). Thus, we decline to consider them.

In Ford and Kebsch, the trial court allowed Hanish a fee, but less than the 50% requested. In Ford, the trial court determined that Hanish was entitled to "some proceeds" under the contract, and set that amount at 25%. Although Appellant now argues that Supreme Court Rule 3.130(1.5)(e) does not apply because Hanish and Smith were lawyers in the same firm, that argument does not appear to have been made in the trial court.

At the hearing on Smith's motion to set aside Hanish's attorney fee lien, Hanish argued that there was an ongoing (oral) contractual relationship between the two lawyers to split fees. Hanish argued that the existence of the contract was proven by three years' course of dealing, and he recited the fees paid to Smith for the years 1995, 1996, and 1997. Hanish contended that the client came into his office, and he referred her to Smith. Smith contended that although Hanish's preprinted name appeared on a client contract, Hanish had not signed it. The record contains a letter from the client advising that she wanted Smith to handle the case and did not want Hanish to represent her in any capacity. There does not appear to be any dispute that Smith performed essentially all of the actual work on the case, after whatever relationship he had with Hanish had ended. Where an attorney is employed under a contingent contract and is discharged without cause before completion of the contract, the attorney cannot rely on the contract to collect a full fee but must deduct from the contract fee the reasonable cost of services of other attorneys required to complete the contract. Labach, supra. Under the circumstances, we cannot say that the trial court committed reversible error in awarding 25% of the fee recovered to Hanish.

In Kebsch, evidence was presented that Smith was with the law firm of Napier and Napier when he began representing Kebsch, after the termination of the attorney-client relationship between Kebsch and Hanish. Hanish had no personal recollection of any services he may have rendered to Mr. Kebsch.

In Peckham, the trial court was not persuaded that Hanish and Smith were in the same firm. The court determined that Hanish had not performed any of the work; therefore, the court concluded that Hanish was not entitled to any of the fee.

In Fow, the trial court disallowed Hanish's claim for a fee because it found that Fow was Smith's client, independent of any relationship between Smith and Hanish. The trial court also found that Hanish's signature was not on the attorney-client contract between Fow and Smith but had been "added" after the fact.

In each of these cases, the essential facts were in dispute. Where the facts are tried by the trial court without a jury, the findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. CR 52.01. Based upon our review of the record, the respective trial courts' decisions are supported by the substantial evidence of record and are not clearly erroneous. We affirm.

ALL CONCUR.

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