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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001547-MR

ROBERT C. FIELDS APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 06-CI-00934

TILFORD CONTRACTORS, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND MOORE, JUDGES; KNOPF,[1] SENIOR JUDGE.

[1] Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, JUDGE: Robert Fields appeals from a summary judgment granted to Tilford Contractors, Inc., in which the McCracken Circuit Court dismissed Fields' claims for additional compensation for legal services. For the reasons set forth herein, we affirm.

In June 1995, Tilford Contractors, Inc., (hereinafter "Tilford") sought the representation of Robert Fields (hereinafter "Fields") regarding a dispute with a third-party contractor, Stewart Services, Inc., (hereinafter "Stewart"), with whom Tilford had a construction subcontract. Lewis Tilford, the president of Tilford, entered into a written agreement for legal services with Fields on June 27, 1997. At that time, both parties felt that Tilford's claims against Stewart should be brought before the American Arbitration Association given the terms in the agreement between Tilford and Stewart. The legal services agreement between Tilford and Fields specified that Fields was to receive a non-refundable $5,000.00 retainer and was entitled to ten percent of whatever Tilford recovered from Stewart. Specifically, the relevant portions of the agreement stated as follows:

> 1. Client hereby employs Attorney as his attorney to represent the client in *any and all claims* against the Stewart Services, Inc. as described above *arising out of all the aforementioned written subcontract agreement*. Client hereby ratifies all actions and steps heretofore taken by Attorney in furtherance of his claim prior to the execution of this Agreement.
>
> 2. Client hereby agrees to pay Attorney a lump sum non-refundable retainer fee of $5,000.00 upon the execution of this agreement. Additionally, client agrees to pay Attorney a contingent fee upon recovery of his claim an amount of ten percent (10%) of *amounts recovered from*

> *or on behalf of Stewart by negotiation, compromise, settlement or proceedings before the American Arbitration Association* or any amounts recovered against any other party or entity as a pass through liability arising out of the subject subcontract, on Client's behalf.
> 3. In the event of no recovery for said Client, Client shall owe Attorney nothing, except the non refundable retainer, for the legal services rendered, but Client shall reimburse Attorney for any costs or expenses advanced or paid by said Attorney on behalf of said Client in the prosecution of Client's claims...

(Emphasis added).

Ongoing legal proceedings developed between Tilford and Stewart over their many different disputes, which escalated into further legal proceedings lasting over an extended period of eight years. On several occasions throughout this ongoing litigation, Lewis Tilford indicated to Fields that he was going to pay him more than the contract amount because of the length of time and the work involved, and that Fields would be satisfied with the amount of extra money. Eventually, Stewart volunteered to pay the judgment of $1,416,649.06 to Tilford. The McCracken Circuit Court offset $100,589.46 as overpayment, thus Tilford's total recovery from Stewart was $1,316,059.60. At this time, Lewis Tilford tendered payment to Fields in the amount of $207,496.09 and tendered a separate check for the $5,000 non-refundable retainer. Fields responded to Tilford that he would credit the payments received to his account and demanded $176,088.10 as the balance of the fee owed to the attorney for his services. Tilford refused to pay any additional fees and this lawsuit was filed in Jefferson Circuit Court and eventually transferred to the McCracken Circuit Court.

Both Tilford and Fields filed respective motions for summary judgment, which were heard on July 13, 2007. On July 16, 2007, the trial court issued an order granting summary judgment to Tilford and dismissing Fields' claims. In its order, the trial court relied on the reasons set forth in Tilford's counter-motion for summary judgment. This appeal followed.

The standard of review on an appeal of a summary judgment is whether the trial court properly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *See Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); CR 56.03. We are mindful that "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

In its motion for summary judgment, Tilford argued first that venue was proper in McCracken Circuit Court as opposed to Jefferson Circuit Court, where suit was filed. The suit was transferred to McCracken County and that issue is obviously now moot. Tilford also argued that the legal services agreement governed the parties' dispute, in that the written agreement was not ambiguous and should be enforced strictly according to its terms, with the court assigning language its ordinary meaning and without resort to extrinsic evidence. In the alternative, Tilford argued that should the court find the agreement to be ambiguous, the rules of construction would apply. In applying the rules of construction, Tilford argued that the court should ascertain the intent of the parties

by considering the subject matter of the contract, the situation of the parties, and the conditions under which the contract was written by evaluating extrinsic evidence. Tilford argued that any ambiguity in a contract should be construed strongest against the party who drafted it, citing *Perry v. Perry*, 143 S.W.3d 632 (Ky. App. 2004).

Tilford contended that the contract was not ambiguous, given the clear statement that Fields agreed to represent the client in any and all *claims* against Stewart. Tilford argued that the contract did not limit the scope of representation to any particular proceeding. Further, as compensation, Fields was to receive the $5,000 retainer and ten percent of any amount recovered on the claim. To the extent that no money was recovered, Tilford was not obligated to pay Fields anything other than the retainer.

We find the language used in the fee agreement to be somewhat confusing, and therefore ambiguous. In section one, Fields agrees to represent Tilford on all claims against Stewart. However, in section two, Fields seems to limit the scope of his payment to recoveries made only from the arbitration before the American Arbitration Association. Thus, it was necessary for the trial court to examine the intent of the parties, based on the subject matter, the situation of the parties and the conditions under which the contract was written.

The trial court determined that the parties intended for the contingency fee to be the basis on which Fields was paid for his services in pursuing the claims against Stewart. Further, the court found that neither party

intended for the fees to be based on an hourly charge or any other type of fee schedule and that Fields' recovery was limited to the $5,000 retainer and ten percent of the amount recovered from Stewart.

We agree with the trial court that the parties intended for the legal services agreement to cover the parties' fee arrangement. In light of the conflicting language that Fields would pursue all claims against Stewart but that his recovery was to be ten percent of that recovered by settlement or arbitration, we find that the contract was in fact ambiguous. However, in light of the evidence surrounding the parties' intent, the fact that Fields was an attorney and drafted the agreement, and the parties' subsequent conduct in its eight year ongoing relationship, we find that the parties intended for Fields to take ten percent of whatever amount was recovered from Stewart. Had the parties intended an hourly fee to apply absent a settlement at the arbitration, this could have easily been placed into the agreement or a new fee agreement could have been drafted.

Furthermore, during the eight year attorney-client relationship, Fields never once contacted Tilford to explain that he was going to charge an additional fee or that his fee was to be based on the number of hours worked rather than the amount recovered. Neither party ever rescinded the legal services agreement or acknowledged that they intended for a different fee schedule to apply. Fields argues that Tilford's statements that he was going to pay more than what was agreed to in the contract amount to his rescinding the contract. We disagree. A contract cannot be rescinded by one party. A meeting of the minds is essential to

rescind the contract. *Conservative Life Insurance Co. v. Hutchinson*, 52 S.W.2d 709 (Ky. 1932). Fields did not present any evidence on his motion for summary judgment that the parties mutually rescinded the legal services agreement, and we do not find Tilford's promise to pay additional compensation to amount to the parties mutually rescinding the agreement.

Fields' final argument on appeal is that he should recover in quantum meruit for his services not addressed by the written legal services agreement. In its motion for summary judgment, Tilford argued that quantum meruit is not a viable theory when an express contract exists between the parties in reference to the same subject matter. *See Sparks Milling Co. v. Powell*, 143 S.W.2d 75 (Ky. 1940). Tilford argued that since the rights and obligations of the parties were governed by a written express agreement, Fields cannot rely upon *quantum meruit*.

Fields now argues that the additional compensation for extra legal services cannot be said to be the same subject matter as that expressed in the written agreement because it is not mentioned at all in the contract. He contends that the written contract controls only the work covered by the contract and not the extra work he completed. Fields relies on the case of *Baker v. Shapero*, 203 S.W.3d. 697 (Ky. 2006) for the proposition that discharged attorneys are entitled to recover in quantum meruit and not under the terms of their applicable contracts. He claims that he was discharged prior to the ultimate termination of the proceedings against Stewart. However, Fields overlooks the fact that he was paid for his services according to the contract he drafted. In *Baker*, the Kentucky

Supreme Court addressed the issue of when attorneys are discharged before the completion of the contract and are not paid for their services. However, in the instant case, the applicable contract was complete. Tilford had received its money from Stewart and paid Fields pursuant to their fee agreement and some extra compensation for completing the job. Fields' argument that he is entitled to recover additional funds in quantum meruit after recovering his contingency fee is without merit. Fields has cited no law that permits an attorney to collect the full amount of a contingency rate plus an additional amount over and above the contract simply because the attorney believes he spent far more time on the case than he initially anticipated. Thus, we find no error with the trial court's refusal to grant recovery to Fields in quantum meruit.

For the foregoing reasons, we hereby affirm the judgment of the McCracken Circuit Court.

MOORE, JUDGE, CONCURS.

KNOPF, SENIOR JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

Robert C. Fields, *Pro Se*
Frankfort, Kentucky

BRIEF FOR APPELLEE:

David L. Kelly
Denton & Keuler, LLP
Paducah, Kentucky