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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001166-MR

ROBERT DAVIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 10-CI-007764

BARDENWERPER, TALBOTT
& ROBERTS, P.L.L.C. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, SENIOR JUDGE; CLAYTON AND KELLER, JUDGES.

KELLER, JUDGE: At the outset, we note that, pursuant to Kentucky Rule of Civil Procedure (CR) 76.12(4)(a), briefs before this Court and the Supreme Court of Kentucky must be either printed, which means "typeset," or typewritten, which means computer generated. Robert Davis (Davis), who is proceeding *pro se*, filed a handwritten brief that does not comply with this rule. Therefore, we would be

acting within our authority to strike it. CR 76.12(8)(a). However, because the Appellee has not asked us to do so, we will not strike Davis's brief, and will address the issues raised therein.

Davis appeals from the circuit court's summary judgment in favor of Bardenwerper, Talbott & Roberts, P.L.L.C. (Bardenwerper). In that judgment, the court ordered Davis to pay Bardenwerper's attorney fees related to litigation regarding property located at 811 Rugby Place, Louisville, Kentucky (the Rugby Place property). On appeal, Davis argues that he had no contract with Bardenwerper; that he owned no interest in the Rugby Place property; that his wife, Karla, owned the Rugby Place property; that Bardenwerper's representation was inadequate; and that Bardenwerper contributed to the circuit judge's election campaign, which caused her to be biased in Bardenwerper's favor. Bardenwerper argues that there are no issues of material fact and that several of the issues raised by Davis are, at best, a smoke screen. Having reviewed the record, we affirm.

FACTS

The record in this matter is less than clear regarding the underlying facts. Viewing the record in the light most favorable to Davis, it appears that Karla owned the Rugby Place property. At some point, Karla and/or Davis became involved in a property-line dispute with an adjoining landowner, Melissa Varga. An attorney with Bardenwerper, Clifford H. Ashburner (Ashburner), provided legal services to Davis and/or Karla with regard to that property-line dispute; however, there is no written contract or other writing formalizing Ashburner's or

Bardenwerper's representation of either Karla or Davis. During the course of the litigation of the property-line dispute, Ashburner sent invoices totaling $8,496.00 to Davis for legal services rendered. Davis has not paid any of the invoices.

On November 3, 2010, Bardenwerper filed a complaint in circuit court seeking payment. Davis, who has represented himself throughout these proceedings, responded by denying all of Bardenwerper's allegations. Davis subsequently filed what he designated as a memo in support of a counter-suit. In that document, Davis asserted that: he did not have any ownership in the Rugby Place property; he had not retained Bardenwerper to undertake any representation with regard to that property; if there was a representation agreement, he cancelled it; and the invoices referred to a "tax dispute" not to a property-line dispute. We note that Davis never actually filed a "counter-suit;" however, Bardenwerper filed a motion to dismiss any possible counter-suit, which the court granted.

On March 11, 2011, Bardenwerper filed a motion for summary judgment. In its motion, Bardenwerper noted that it had served Davis with requests for admissions essentially asking Davis to admit that he owed Bardenwerper the amount alleged in the complaint. Bardenwerper noted that Davis had not responded and argued that, pursuant to CR 36.02(2), Davis's failure to do so amounts to an admission that he owes the $8,496.00.

Bardenwerper also noted that it had not received any notice that Davis was cancelling its representation, and that Ashburner met with Davis and spoke with him on the telephone several times after the date on the alleged cancellation

of representation letter. Furthermore, Bardenwerper noted that it had not received any written objection from Davis regarding the invoices or the services rendered by Ashburner. Bardenwerper supported its motion with an affidavit from one of its attorneys verifying the facts set forth in the motion, and with several pleadings from the property-line dispute that had been filed by Ashburner and Randy Perkins, an attorney with another firm who was apparently working with Ashburner on the property-line dispute.

In his response, Davis argued that Bardenwerper had misled the court regarding where he was served with the summons; that he did not reside at or own the Rugby Place property; that he did not retain Ashburner or anyone at Bardenwerper to provide representation with regard to the property-line dispute; that he did complain about the invoices as evidenced by a letter from Bardenwerper; that Ashburner committed malpractice when he failed to discover an easement, the discovery of which ended the property-line dispute; and that he did not receive the requests for admissions. Davis attached an "affidavit" to his response. However, the alleged affidavit is not notarized but simply states, "I swear the above styled letter and facts are true." Presumably, the letter Davis refers to is his response. Davis also attached completed responses to the requests for admissions in which he denies everything, including that he was married to Karla and that she owned the Rugby Place property.

In an opinion and order entered June 8, 2011, the circuit court granted Bardenwerper's motion for summary judgment. In its opinion, the court noted

Davis's allegations of mis-conduct and malpractice by Ashburner and/or Bardenwerper as well as a number of alleged factual inaccuracies in Bardenwerper's pleadings. Having noted those allegations, the court found that:

> Regardless of [Davis's] actual receipt of [Bardenwerper's] admission requests, [Bardenwerper] has demonstrated [Davis's] liability for services rendered and the amount of the debt. [Davis] suggests numerous alleged lies and purported questions of material fact exist. However, while ambiguities may exist, they are not material to the legal issues presented in this case. First, [Davis's] dispute as to whether he ever contested the billing invoices is a non-issue. Viewing [Davis's] assertion as true, for purposes of [Bardenwerper's] motion, his liability is not altered by a prior dispute with [Bardenwerper]. Instead, he must come forth with a modicum of satisfactory evidence disputing the amount alleged and/or the actual liability itself.
>
> Second, [Davis] emphasizes that [Bardenwerper] performed the legal work for Karla Davis, the property owner. The record does not indicate whether [Davis] or his wife owns the Rugby Place property. However, its ownership is also inconsequential. That [Davis's] wife may own the property did not preclude [Davis] from procuring attorneys to litigate issues relating to the property. Liability is predicated upon a contractual relationship, not property ownership. A contractual relationship may still form even absent [Davis] possessing an ownership interest in the property where he actively sought out and contracted for legal representation with [Bardenwerper]. Finally, [Davis's] allegation that [Bardenwerper] unreasonably "stretched out" its representation is unfounded. [Bardenwerper] indicated that it was an aspect of counsel's legal strategy. [Davis] has not pointed to any specific billing entries he believes were unreasonable. He generally argues that [Bardenwerper's] failure to discover an easement caused harm to his case. However, the billing records do not indicate that [Bardenwerper] unjustly billed [Davis] or elongated the case. [Davis] has not presented evidence

that [Bardenwerper's] actions were negligent versus the result of his trial strategy.

[Bardenwerper] has come forth with ample evidence to foreclose all potential questions of material fact. The attorney-client relationship is a contractual one that may be either express or implied. Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. App. 1978). [Bardenwerper] has attached detailed billing statements and pleadings that conclusively prove that, at [Davis's] request, [Bardenwerper] actively represented [Davis] in his property dispute case. There is no question but that the parties entered into a contractual attorney-client relationship. [Davis's] protests to the contrary are belied by numerous time entries wherein he personally or telephonically met with his attorney, as well as the pleadings drafted on his behalf. [Bardenwerper] unambiguously represented both [Davis] and [Davis's] wife in the property dispute matter. [Davis] was the immediate client and contact for said representation.

The parties dispute whether [Davis] cancelled [Bardenwerper's] representation for a separate tax appeal matter. Only two billing entries reference the tax appeal: (a) a January 16, 2008, meeting, lasting 1.00 hour; and [(b)] an April 4, 2008, telephone call, lasting .30 hours. Only the latter occurred after [Davis] alleges he mailed a cancellation letter for representation on the tax matter. That entry indicates that it was a phone call with [Bardenwerper] "about the tax appeal we still need to get moving." Clearly, as of April 4, both parties remained under the impression that [Bardenwerper] would be prosecuting [Davis's] tax appeal. The entry does not acknowledge prior receipt of [Davis's] purported attempt to cancel representation for the tax appeal. It makes no note that [Davis] then informed [Bardenwerper] of a desire to rescind the representation agreement. Therefore, the item is not improper. The entry also references other matters, thus implying the entire .3 hours did not relate to the tax appeal.

The exhibits indicate that the parties had a contractual relationship whereby [Bardenwerper] agreed to perform

> certain legal services for [Davis] in return for pecuniary remuneration. [Davis] has admitted that he has not paid for any of the services rendered. The billing invoices establish the current outstanding debt. Despite [Davis's] dislikes, the detailed records indicate that [Bardenwerper] diligently worked on [Davis's] case. [Davis's] displeasure with [Bardenwerper's] work or the end result does not obviate his liability. [Bardenwerper] has conclusively established that its actions were the result of a well-reasoned, litigation strategy. [Davis] has not demonstrated that any of the billing entries may be erroneous. Accordingly, [Bardenwerper] is entitled to summary judgment as a matter of law.

(Footnote and internal citations to the record omitted.)

As previously noted, Davis appeals from the above opinion and order, making essentially the same arguments that he made to the circuit court.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . 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). A party opposing a summary judgment motion cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported

motion. *Id.* at 482. That evidence, which may be in the form of an affidavit based on personal knowledge, must be admissible. CR 56.05.

ANALYSIS

Having reviewed the record and the circuit court's well-written opinion and order, we adopt its reasoning as our own. Additionally, we emphasize that Davis, who opposed Bardenwerper's motion, was required to present some affirmative evidence via affidavit or otherwise that an issue of fact exists. Davis failed to do so. While he filed a document he designated as an "affidavit," that document was not notarized and therefore would not constitute evidence sufficient to satisfy the requirements of CR 56.05.

Furthermore, we note that Davis's statement in his February 14, 2008, letter to Ashburner contradicts his argument that he had no contractual relationship with Bardenwerper. In that letter, Davis states that he "want[s] to cancel the agreement/contract I signed on 2/4/08, someone else will handle the matters." Clearly, this statement is an admission that a contractual relationship existed.

Davis's actions following the February 14, 2008, letter also contradict his argument that he did, in fact, cancel the representation agreement with Ashburner. Bardenwerper's billing records indicate that, following February 14, 2008, Ashburner had direct personal, email, and/or telephone contact with Davis on February 20, 25, 26, and 27, 2008, March 3, 2008, and April 4, 2008. Davis does not dispute that these contacts took place nor does he explain why he continued to

discuss matters with Ashburner for nearly three months after he sent the letter cancelling Ashburner's representation.

We also note that Davis argues that Ashburner's representation was inadequate and/or amounted to legal malpractice. This argument also contradicts Davis's position that no contract of representation existed, because there must be some contractual obligation before that obligation can be breached.

Finally, we note that Davis has not presented any evidence that the trial judge exhibited any bias in favor of Bardenwerper. Therefore, his argument to the contrary is completely without merit.

CONCLUSION

Based on our review of the record and the arguments of the parties, we discern no error and affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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