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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000889-MR

JAMES T. SCATUORCHIO, LLC
AND JAMES T. SCATUORCHIO — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN E. REYNOLDS, JUDGE
ACTION NO. 17-CI-00894

STEPHEN E. JOHNSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; SPALDING AND L. THOMPSON, JUDGES.

CLAYTON, CHIEF JUDGE: James T. Scatuorchio, LLC and James T. Scatuorchio (collectively "Scatuorchio") appeal from the Fayette Circuit Court's grant of summary judgment to Stephen E. Johnson. The circuit court held that Johnson, who was retained by Scatuorchio's attorney to serve as an expert witness,

was entitled to recover payment for his services from Scatuorchio. Scatuorchio argues that genuine issues of material fact exist concerning the amount of damages Johnson is entitled to recover and also challenges the trial court's award of prejudgment interest.

Johnson is an expert on the management of equine farms and horse breeding in the central Kentucky region. He was retained as an expert witness by attorney Michael D. Meuser, of the law firm Miller, Griffin and Marks, PSC ("MGM"), who was representing Scatuorchio in a federal lawsuit. Johnson agreed to accept $200 per hour for his services. There was no written document memorializing this agreement. According to Meuser, Scatuorchio approved Johnson's retention as an expert on his behalf.

Johnson provided expert services for several months. He reviewed depositions, met with MGM, performed research, formulated expert opinions and provided deposition testimony. Throughout this period, Johnson provided regular, contemporaneous billing statements to MGM showing the hours he billed for his services. According to Scatuorchio, he received monthly bills from MGM but no bills directly from Johnson. After the federal lawsuit was settled, Johnson submitted his final invoice for payment to MGM. MGM advised Johnson that Scatuorchio was going to pay the bill directly, but Scatuorchio refused, claiming that all matters had been resolved and all bills paid.

On March 19, 2017, Johnson filed suit in Fayette Circuit Court against Scatuorchio, MGM, and other defendants not parties to this appeal, raising claims of breach of contract, *quantum meruit* and unjust enrichment. He sought payment for his services as an expert witness in the amount of $28,250 as well as pre- and post-judgment interest.

Scatuorchio responded that there was no written agreement specifying an amount or hourly rate for Johnson's services. Scatuorchio also challenged the time billed by Johnson and suggested his entries were inflated and unreasonable.

After answers were filed, Johnson filed a motion for summary judgment. Following a hearing on June 16, 2017, the trial court denied the motion as premature because issues of fact remained regarding who was responsible for paying Johnson's fees, and set a discovery deadline of September 14, 2017. Johnson served written discovery requests on the defendants. The defendants did not conduct any discovery.

Approximately two months after the discovery deadline had passed, Johnson filed a renewed motion for summary judgment against Scatuorchio and MGM. The defendants responded that genuine issues of material fact existed regarding the amount of compensation Johnson was owed, and the validity of his bill, asserting he was only owed a reasonable value for his services and not the amount he specified on his bill. They provided billing statements with purported

discrepancies between MGM and Johnson's calculation of the number of hours he spent in preparation for trial. They also argued that the amount requested by Johnson was not reasonable, as another expert retained by MGM in the underlying federal lawsuit, Jamie La Monica, charged only $10,625 for almost identical services.

The trial court held a hearing on the motion on December 8, 2017, and ruled that under agency principles MGM was not liable to Johnson. MGM was subsequently granted summary judgment.[1] The trial court stated that under the theory of *quantum meruit*, "the client is on the hook for liability." The trial court accordingly entered partial summary judgment against Scatuorchio as to liability only and reserved the issue of damages for a subsequent ruling by the court.

In support of its motion for summary judgment, MGM had previously filed the affidavit of Michael Meuser, Scatuorchio's former counsel. Johnson used this affidavit to form the basis of another motion for summary judgment, filed on April 3, 2018. Meuser's affidavit stated in part that Johnson's proposed hourly rate was made known to Scatuorchio, and his retention as an expert was approved and authorized by Scatuorchio without objection to the hourly rate. It also stated that Scatuorchio received Johnson's expert report in which the hourly rate was set

[1] A separate appeal from the dismissal of the claims against MGM (*Johnson v. Miller, Griffin and Marks, PSC*, 2018-CA-000901-MR) has been put in abeyance by agreement of the parties pending the outcome of this appeal.

forth, his deposition in which it was discussed, and the invoices detailing the time spent and the hourly rate. Also attached to the motion was a letter from Meuser to Scatuorchio, dated October 28, 2016, which entreated Scatuorchio to pay Johnson for his expert services. The letter stated in part:

> Steve worked for many hours reviewing the records and preparing an expert report on your behalf. He then was subjected to a deposition that lasted many hours. He itemized his bill for services throughout the case. In the end, as we approached trial, it was the unanimous opinion of all the lawyers involved in the case that Steve's testimony would prove the most valuable at trial when compared to that of Jamie LaMonica.
>
> I first sent you Steve's invoices . . . for his services on December 3, 2013, before the case was even nearing settlement. In my letter to you at the time, I stated 'As you know, Steve did a very good job and will be an important witness on your behalf. I would appreciate it if you could have his statement paid as soon as possible.'
>
> Three years have now passed and you still have not taken care of Steven's compensation despite my repeated pleas you do so.

Also attached to the motion was an affidavit from Johnson, stating he had made an agreement with MGM to provide his professional services for $200 per hour; that he supplied MGM with regular, contemporaneous billing statements showing the hours he was billing for his services; and that MGM never expressed any concerns or reservations regarding the amount of time he was billing. When he sent his final invoice to MGM, he was informed he should seek payment from

Scatuorchio. He attached an invoice indicating he was owed $28,250 for his services.

In response, Scatuorchio reiterated that genuine issues of material fact existed concerning the validity of the amount billed and that the amount was not a reasonable value for the services rendered.

Following a hearing on April 20, 2018, the trial court granted Johnson's motion, observing that Scatuorchio had not offered a counter-affidavit to contest the assertions made in the affidavits attached to Johnson's motion for summary judgment. The trial court concluded that the facts were uncontested, and it had no option but to grant the motion. The trial court entered final judgment on May 1, 2018, in the amount of $28,250 plus pre- and post-judgment interest at the statutory rate of six percent. Scatuorchio filed a motion to alter, amend or vacate which the trial court denied, stating in part:

> The facts are that an oral contract was entered into between the parties. The Plaintiff [Johnson] charged an hourly fee. That fee was disclosed. The Plaintiff worked a given number of hours at his standard rate. The Plaintiff presented time logs establishing the time worked. The defendant did not present affirmative evidence to bring a genuine issue of material fact into question. CR 56.03 allows the adverse party until the day (24 hours) prior to the hearing to present opposing affidavits if they so choose. The nonmoving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. Mere allegations of fraud and misrepresentation are insufficient to resist summary judgment. Speculation alone is insufficient evidence.

> Defendant did not present any affidavits or testimony to counter the billing affidavits presented by Plaintiff in this case. The defendant did not pursue discovery or engage in any action following the Court's ruling on December 22, 2017. The Court finds no material facts are in dispute.

This appeal by Scatuorchio followed.

The standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing Kentucky Rules of Civil Procedure (CR) 56.03). "The 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).

Scatuorchio argues that summary judgment was inappropriate because the record shows there was no contract with Johnson. He contends that at the December 8, 2017 hearing, the trial court ruled there was no contract and Johnson could only recover under the theory of *quantum meruit*. He claims the trial court subsequently ignored this earlier ruling, which would have required a hearing to determine damages based on the reasonable value of the services rendered by Johnson, rather than any terms actually agreed to by the parties. He accuses the trial court of inventing a local rule when it granted summary judgment in part

because Scatuorchio had failed to file an affidavit twenty-four hours before the hearing on the motion.

At the December 8, 2017 hearing, the trial court stated that as a matter of *quantum meruit*, the client (Scatuorchio) was "on the hook for liability," as opposed to MGM, and that a hearing would be held if there was a genuine dispute about the amount of damages. The trial court directed the parties to decide if they wanted such hearing. Scatuorchio did not request such a hearing. At the hearing on the renewed motion for summary judgment on April 20, 2018, the trial court again asked whether there was an actual dispute about the amount of time billed by Johnson. Scatuorchio's counsel stated that "if there's an oral contract, there's always a dispute about how much money is owed" and the plaintiff "can't just send in a bill." The trial court then asked whether there was any evidence or testimony to dispute that the number of hours billed by Johnson was accurate. No such evidence was produced. The court told Scatuorchio that without a counter-affidavit it had no option but to grant the summary judgment motion. In its order denying Scatuorchio's motion to alter, amend or vacate, the trial court plainly stated there was an oral contract.

"[U]nder contract law, an oral contract is ordinarily no less binding than one reduced to writing." *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003). In the absence of a written contract, evidence must be adduced to

establish the specific terms of the oral agreement. Johnson produced such evidence in the form of affidavits, Meuser's letter to Scatuorchio, and his invoices. Meuser's affidavit stated that Johnson's hourly rate was made known to Scatuorchio, who approved and authorized his retention as an expert without objection to the hourly rate. Scatuorchio did not provide any evidence or affidavit to contradict these assertions. Scatuorchio admitted liability and was given ample opportunity to present some counter-evidence that the terms of the oral contract were not what Johnson claimed, but failed to do so.

The fact that the trial court referred to *quantum meruit* at the first hearing did not mean Scatuorchio was relieved of the necessity of presenting some affirmative evidence to counter Johnson's well-supported motion for summary judgment. "Recovery under the theory of quantum meruit can be had regardless of the absence of an enforceable contract." *Quadrille Business Systems v. Kentucky Cattlemen's Association, Inc.*, 242 S.W.3d 359, 365 (Ky. App. 2007). "It . . . entitles the one who was harmed to be reimbursed the reasonable market value of the services or benefit conferred." *Lofton v. Fairmont Specialty Ins. Managers, Inc.*, 367 S.W.3d 593, 597 (Ky. 2012) (quoting BLACK'S LAW DICTIONARY (9th ed. 2009)). Even under the theory of *quantum meruit*, Scatuorchio did not present material evidence to show Johnson's requested fees were unreasonable, beyond repeating that expert Jamie LaMonica charged less than Johnson. This claim was

refuted by Meuser's opinion that Johnson's testimony at trial would prove more valuable than LaMonica's. Similarly, Scatuorchio failed to expand on his theory that Johnson's billing more hours one day than Meuser was evidence that his bill was inflated. At the initial hearing, the trial court specifically invited the parties to have a hearing on damages if needed. Scatuorchio failed to produce any evidence that Johnson's fees were unreasonable.

Scatuorchio contends the trial court improperly based its grant of summary judgment on a non-existent local rule that a party responding to a motion for summary judgment must file an affidavit within twenty-four hours of the motion hour. Scatuorchio is correct that CR 56.03 does not require opposing affidavits. "CR 56.03 provides that a party opposing a motion for summary judgment *may* file opposing affidavits, but does not require him to do so." *Davis v. Dever*, 617 S.W.2d 56, 57 (Ky. App. 1981).

On the other hand, a party is required to produce evidence in some form, not necessarily an affidavit, to defeat a properly-supported motion for summary judgment. Once the appellee meets its *prima facie* burden of demonstrating the absence of any genuine issue of material fact, the burden shifts to the appellant to "produce any affirmative evidence, by deposition testimony, affidavits, documents, or otherwise" to counter the appellee's evidence. *Henninger v. Brewster*, 357 S.W.3d 920, 929 (Ky. App. 2012) (citing *de Jong v. Leitchfield*

Deposit Bank, 254 S.W.3d 817, 825 (Ky. App. 2007)). "We think it only sensible to construe the word 'affidavits' in CR 56.03 as including any other pertinent materials which will assist the court in adjudicating the merits of the motion." *Conley v. Hall*, 395 S.W.2d 575, 582-83 (Ky. 1965).

The trial court's statement regarding an affidavit was made in the context of Scatuorchio's failure to produce adequate evidence to challenge Johnson's motion. Johnson filed his first motion for summary judgment on March 19, 2017. Summary judgment was granted over one year later. Scatuorchio had ample opportunity to produce some affirmative evidence that there was no oral contract. Even if he believed the court was proceeding under a *quantum meruit* theory, he provided no affirmative evidence that Johnson's calculations of his fees were unreasonable. "The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since 'hope springs eternal in the human breast.' The hope or bare belief, like Mr. Micawber's, that something will 'turn up,' cannot be made basis for showing that a genuine issue as to a material fact exists." *Neal v. Welker*, 426 S.W.2d 476, 479-80 (Ky. 1968).

Scatuorchio further argues that a fixed rate for Johnson's services was never established and therefore the trial court abused its discretion by awarding prejudgment interest on unliquidated damages. KRS 360.040(1) states that "a

judgment, including a judgment for prejudgment interest, shall bear six percent (6%) interest compounded annually from the date the judgment is entered." "The longstanding rule in this state is that prejudgment interest is awarded as a matter of right on a liquidated demand, and is a matter within the discretion of the trial court or jury on unliquidated demands." *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440, 450 (Ky. 2005) (internal citation omitted). "Liquidated claims are of such a nature that the amount is capable of ascertainment by mere computation, can be established with reasonable certainty, can be ascertained in accordance with fixed rules of evidence and known standards of value, or can be determined by reference to well-established market values." *Id.* "[I]n general 'liquidated' means '[m]ade certain or fixed by agreement of parties or by operation of law.' Common examples are a bill or note past due, an amount due on an open account, or an unpaid fixed contract price." *Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136, 141 (Ky. 1991) (quoting *BLACK'S LAW DICTIONARY* 930 (6th ed. 1990)). As Scatuorchio provided no evidence of substance to contradict Johnson's detailed computation of his fees, the trial court did not err in awarding prejudgment interest.

For the foregoing reasons, the Fayette Circuit Court's grant of summary judgment to Johnson is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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