

NOT DESIGNATED FOR PUBLICATION

PAT M. FRANZ

VERSUS

PETER YOUNG

**COURT OF APPEAL,
FIFTH CIRCUIT**

FILED DEC 30 2002

Sol Gothard

NO. 02-CA-827

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE 29TH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES, STATE OF LOUISIANA
NO. 54,488, DIVISION "D"
HONORABLE KIRK R. GRANIER, JUDGE PRESIDING

DECEMBER 30, 2002

**SOL GOTHARD
JUDGE**

Panel composed of Judges Edward A. Dufresne, Jr.,
Sol Gothard, and Walter J. Rothschild

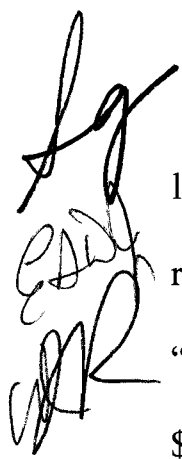
LYNNE W. WASSERMAN

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Metairie, Louisiana 70002

COUNSEL FOR PLAINTIFF/APPELLANT

**REVERSED IN PART AND
AMENDED; AFFIRMED IN PART**



This is a suit on open account filed by plaintiff, Pat Franz, for payment of legal fees rendered. The record shows that Ms. Franz is an attorney who represented defendant, Peter Young, in divorce proceedings. Ms. Franz filed a "Petition on Open Account" in which it is alleged that defendant owes a balance of \$14,284.30, with interest until paid at the rate of 18%. The petition was filed on December 5, 2001 and includes a copy of the written agreement between the parties, copies of overdue bills, a demand letter, and a return receipt for the demand letter showing Mr. Young received the letter on June 7, 2000. Mr. Young failed to answer the petition and on January 7, 2002, plaintiff moved for and was granted a preliminary default. However, on the same day the court, on its own motion, issued an order setting the matter for a "trial", and requesting service on defendant.

At the hearing/trial Ms. Franz arrived prepared to confirm the default. She introduced the original agreement between the parties, a certification of attorney in which the clerk of court certified that no answer, exception, or opposition has been filed by defendant and all court costs were paid. Also attached were an Affidavit of Correctness and Non-military service, a demand letter with certified mail return receipt, itemized statements and payments received.

The trial court refused to confirm the preliminary default. The trial court did not find the documentation supporting the confirmation request insufficient. Rather, the court simply stated "Okay. No. I deny that and we'll just proceed like it's a trial, all right?" Plaintiff, apparently confused by this curious procedural posture and faced with a trial on the merits of the petition without the benefit of an answer or any joinder of the issues, again objected for the record.

The hearing/trial continued with the trial court hearing testimony from Ms. Franz regarding the contract and its clauses, the amounts charged, the payments made and the outstanding, unpaid balance. Ms. Franz identified the other documents introduced to support the motion for default judgment and the court took judicial notice of the pleadings in the record. Ms. Franz also gave testimony regarding the number, length and complications of court appearances made on behalf of Mr. Young. Ms. Franz also explained that she told defendant prior to trial that he would have to pay past due charges or representation would cease. Mr. Young assured her that he would do so. Ms. Franz explained that there was a delay of two months between the first and second day of trial on the partition of community property, and she could not withdraw as counsel during that period. During that period the record had to be supplemented with additional documents. After the judgment was rendered on the community property division, some errors had to be corrected that required a motion for new trial and further proceedings. Ms. Franz testified that, throughout the course of her representation, Mr. Young never complained that the charges were incorrect or requested a new billing arrangement.

Although Mr. Young filed no pleadings in the matter, he made an appearance at the hearing without representation. He testified that he retained Ms. Franz to handle his divorce and ancillary custody and community property matters. He acknowledged that he signed the contract and reassured the trial judge that he

understood the contract and its terms, including the hourly rate set forth in the contract. He did not deny the claim that he owed \$14,067.14 in legal fees to Ms. Franz. Mr. Young's defense was merely that he had no money with which to pay the bill. He testified that when he received the demand letter by certified mail, he tried to call Ms. Franz to resolve the matter. Mr. Young stated, "when the price finally got that high, I finally said, Look Pat, I can't go any further." He stated that Ms. Franz told him they could "work it out." Mr. Young admitted getting the itemized bills and did not refute the correctness of those bills. He again simply stated that he could not afford to pay them. Mr. Young testified that he told Ms. Franz that he could only afford about \$5,000 after the retainer of \$2,000. But, as he stated, there were "countless retrials." The trial court asked Mr. Young directly if he ever told Ms. Franz he "wanted to terminate the contract." Mr. Young's answer was, "(w)ell, she just kept insuring (sic) me that it won't be much longer. It's almost—you know, we'll work out the payments or whatever." After that testimony, the trial court questioned Mr. Young extensively about his personal finances and his ability to pay the debt.

On cross-examination, Mr. Young testified that he did not discharge Ms. Franz and did not hire another attorney. Mr. Young also admitted that the trial judge in the divorce proceeding found him "grossly underemployed" after finding his testimony less than credible on what he earned and what he was capable of earning.

After taking the matter under advisement, the trial court rendered a judgment in favor of plaintiff in the amount of \$9,000 in legal fees and \$2,000 in attorney fees, plus legal interest from date of judicial demand. It is from that judgment that Ms. Franz appeals.

In a footnote to the judgment, the trial court indicated its willingness to issue separate findings of fact and reasons for judgment on request by any party and

stated, “(t)he Court feels the above award represents a reasonable fee under all the circumstances in this case.” Subsequently, the trial court did issue written findings of fact and reasons for judgment in which it found that the parties contracted for legal services, those services were performed and Mr. Young paid \$9,000 for legal services and “then notified the Defendant after the two-day community property trial that he was financially insolvent and could not pay any further legal expenses.” The trial court also found that Ms. Franz assured Mr. Young that the matter could be “worked out” and she continued to perform legal work for which she billed Mr. Young.

After making these findings of fact, the trial court used LSA-C.C. art. 3025¹ as the basis in law for the finding that “(i)n this Court’s opinion, at the point and time the Defendant stressed repeatedly to the Plaintiff that he could no longer afford her legal services, she should have ceased work and withdrawn from the case; however, she did not do this.” The trial court then awarded \$9,000 in legal fees to Ms. Franz because it felt “that this additional judgment of \$9,000 is a reasonable compensation for the work performed by the plaintiff up to that point and time, when in this court’s opinion, the Defendant terminated the contract of mandate.” The trial court denied an award of 18% interest requested by plaintiff and provided for by the contract. In that regard the trial court stated, “the Plaintiff has provided no legal grounds that in this Court’s opinion would justify her charging the Defendant 18 percent interest on the amounts that she billed that remain unpaid.”

The plaintiff obtained a valid preliminary default and she was entitled to confirm the default in accordance with LSA-C.C.P. art. 1702 C, which provides in pertinent part:

¹ The principal may terminate the mandate and the authority of the mandatary at any time. A mandate in the interest of the principal, and also of the mandatary or of a third party, may be irrevocable, if the parties so agree, for as long as the object of the contract may require.

In those proceedings in which the sum is on an open account....
The judge shall in seventy-two hours of receipt of such submission
from the clerk of court, sign the judgment or direct that a hearing be
held.

Although the trial judge was permitted to hold a hearing prior to confirming
the default judgment, he was without the authority to order that a “trial” be held in
which the defendant, who had not filed an answer, was allowed to testify and
defend himself against the plaintiff’s lawsuit.

If the requirements of LSA-C.C.P. art. 1702 and 1702.1 are met, a plaintiff is
entitled to confirm a valid preliminary default. Therefore, we find that the trial
judge was clearly wrong when he refused to allow the plaintiff to utilize the default
confirmation procedure provided by law.

Even if the hearing or “trial” had been proper, after review of the entire
record we find the trial court was manifestly erroneous in its finding of facts and
application of law. There is no evidence to support the trial court’s finding that
Mr. Young terminated the contract. Mr. Young testified to the contrary. His
defense was not that he fired Ms. Franz and she continued to bill him, it was that
he could not afford her services. Further, had Ms. Franz withdrawn in the midst of
a hotly contested community property trial simply because her client expressed
financial problems, she may well have violated ethical cannons of practice for
lawyers.

Mr. Young testified that he signed the contract and fully understood its terms
including the hourly rate. It is clear that he did not expect the litigation to be so
costly and expressed those concerns to his attorney. However, that does not
support the factual finding that he fired her, or refused her representation.

We also find manifest error in the trial court’s refusal to uphold the
provision in the contract that sets 18% interest on unpaid balances. Although, the
trial court stated it found no legal grounds to justify the charge, it is clear from the

written reasons that the court changed the rate of interest because it considered the rate to be “exorbitant.”

A valid contract constitutes the law between the parties, and may be dissolved only through the consent of the parties or on grounds provided by law. LSA-C.C. art. 1983. Courts are bound to give legal effect to such agreements according to the true intent of the parties. *Edenborn Partners. Ltd. Partnership v. Korndorffer*, 94-891 (La.App. 5 Cir. 3/1/95), 652 So.2d 1027, writ denied, 95-1234 (La. 6/23/95), 656 So.2d 1032. The trial court did not find the contract invalid. Accordingly, legal effect must be given to it. The two contract provisions that are at issue herein are:

(1) You will be charged for all time actually devoted to your case at the following rates:

Attorney time - \$175.00 per hour

Paralegal/support staff time - \$50.00

(2) Any statements which are more than ninety (90) days past due will be subject to a finance charge of 1.5% per month (18% APR) on the unpaid balance.

Those provisions are clear and unambiguous, and were agreed to by the parties. Even assuming there was support for the finding that Mr. Young terminated the contract at some point, Ms. Franz would still be entitled to her fees as charged pursuant to the contract until the termination. There is no justification for the trial court’s substitution of an award of a “reasonable fee.” Further, the interest rate on the unpaid balance is a matter of contract and is not subject to change by a trial court absent a finding that the contract is invalid. Accordingly, we find the trial court erred in reducing the amount of fees due to Ms. Franz and in reducing the rate of interest due, and we reverse the judgment and enter a judgment for plaintiff, Ms. Franz, in the amount of \$14,067.14 plus interest at the rate of

18% per annum from July 7, 2000. That portion that awards \$2,000 in attorney fees is affirmed. Costs are assessed to defendant, Young.

REVERSED IN PART AND
AMENDED; AFFIRMED IN PART



EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

SOL GOTHARD
JAMES L. CANNELLA
THOMAS F. DALEY
MARION F. EDWARDS
SUSAN M. CHEARDY
CLARENCE E. McMANUS
WALTER J. ROTHSCHILD

JUDGES

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA

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GRETNA, LOUISIANA 70054

PETER J. FITZGERALD, JR.
CLERK OF COURT

GENEVIEVE L. VERRETTE
CHIEF DEPUTY CLERK

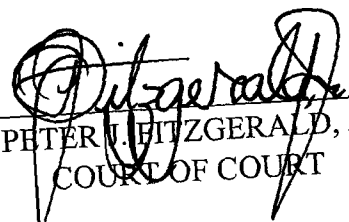
GLYN RAE WAGUESPACK
FIRST DEPUTY CLERK

JERROLD B. PETERSON
DIRECTOR OF CENTRAL STAFF

(504) 376-1400
(504) 376-1498 FAX

CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY DECEMBER 30, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:


PETER J. FITZGERALD, JR.
CLERK OF COURT

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Ms. Lynne W. Wasserman
Attorney at Law
3445 N. Causeway Blvd., Suite 501
Metairie, LA 70002

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Mr. Peter Young
In Proper Person
127 St. Nicholas Street
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