NO. COA11-1264
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

DONALD J. DUNN,
Plaintiff,

v.

Craven County
No. 09 CVS 2600

HENRY T. DART and
ROBERT E. ZAYTOUN,
Defendants.

Appeal by plaintiff from order entered 18 July 2011 by Judge James L. Gale in Craven County Superior Court. Heard in the Court of Appeals 6 March 2012.

*Donald J. Dunn, pro se, plaintiff-appellant.*

*McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Charles K. McCotter, Jr., and Creech Law Firm, by Paul P. Creech, for defendants-appellees.*

GEER, Judge.

Plaintiff Donald J. Dunn contends on appeal that the trial court erred in granting summary judgment in favor of defendants Henry T. Dart and Robert E. Zaytoun on his breach of contract claim arising out of an alleged fee-sharing agreement. As Mr. Dunn has failed to present evidence that the parties ever

reached an agreement as to all the material terms of the alleged contract, we affirm.

Facts

In 2003, Mr. Dunn and Mr. Dart prosecuted a class action lawsuit arising out of the explosion of a pharmaceutical plant in Kinston, North Carolina. The two attorneys had entered into a fee-sharing agreement pursuant to which Mr. Dart advanced the costs, and the fees were divided with Mr. Dart receiving two-thirds and Mr. Dunn receiving one-third of the total fee.

On 5 October 2006, an explosion occurred at the EQ Industrial Facility in Apex, North Carolina. Soon after, Mr. Dart and Mr. Dunn discussed filing a class action on behalf of those damaged by the fire, but neither attorney had clients injured by the explosion who could serve as class representatives. Mr. Dunn, therefore, contacted Mr. Zaytoun to see whether he would be interested in associating with them in connection with the filing of a class action. Mr. Zaytoun represented two families -- the Carleys and the Wilders -- who had claims arising out of the explosion.

During discussions about the potential suit, the attorneys considered a division of fees similar to that used by Mr. Dunn and Mr. Dart in the Kinston litigation. Mr. Dart would pay the litigation costs and receive two-thirds of any gross fee award,

while Mr. Dunn and Mr. Zaytoun would share the remaining one-third of any fee.

Ultimately, Mr. Dunn, Mr. Dart, Mr. Zaytoun, and a fourth attorney, Allen Usry, filed a class action in the United States District Court for the Eastern District of North Carolina on behalf of those who suffered injury or damage as a result of the explosion either because they were present at the explosion or owned property or businesses nearby. That action was consolidated with three other class actions pursuant to a Case Management Order ("CMO").

The CMO appointed a Plaintiff's Management Committee ("PMC") to serve as interim counsel for the proposed class until a decision was reached on class certification. The parties to this case were members of the PMC, with the CMO designating Mr. Zaytoun as Liaison Counsel.

Following entry of the CMO, all of the named plaintiffs executed supplemental retainer agreements. Those agreements provided in relevant part that the agreements did not alter or amend the attorney employment contracts already signed by the class representatives except that the class representatives agreed to retain the PMC and associated attorneys to represent them in connection with class certification and all common class issues after certification. The agreements further provided

that in the event of a recovery for the proposed class, the trial court could "establish and allocate a reasonable attorneys' fee among [the named plaintiff] individual attorney, the PMC, its associated attorneys, which [might] alter the contingent fee set forth in [their] current attorney's employment contract." These supplemental retainer agreements were the only fee agreements ever signed by the Carleys or the Wilders. They had never signed an initial agreement with Messrs. Dunn, Dart, and Zaytoun.

In early 2008, settlement discussions regarding the class actions were underway. The PMC members had not yet executed a PMC agreement although Mr. Dart and Mr. Zaytoun had advocated having a written agreement. As negotiations continued, Mr. Dart sent Mr. Dunn an email on 9 March 2008 about entering into a separate agreement among Mr. Dart, Mr. Dunn, and Mr. Zaytoun:

> Donny, Robert is getting nervous about not having an agreement among the 3 of us in writing, given that he's spent about $40k on the case so far. Would you be able to come up to Raleigh Tuesday before the mediation so the 3 of us can meet after the Deshong deposition and hammer out an agreement among the 3 of us?

The meeting never occurred.

On 30 May 2008, the members of the PMC entered into a written agreement. The agreement equalized cost responsibility

among the PMC members and appointed a PMC fee subcommittee to recommend allocation of any court-awarded fees.

In July 2009, the federal district court approved a class settlement in the amount of $7,850,000.00. On 8 September 2009, the PMC moved for approval of a gross attorneys' fee award of $2,983,000.00 and reimbursement of costs in the amount of $322,241.50. On 9 October 2009, the federal district court entered a final order approving the requested award of attorneys' fees and expenses. Pursuant to that final order, the district court retained jurisdiction over the case to facilitate orderly administration.

The PMC fee subcommittee issued its recommendation for the allocation of the attorneys' fees and costs awarded by the district court. In relevant part, that recommendation awarded $75,000.00 in fees and $3,911.82 in costs to Mr. Dunn, $995,000.00 in fees and $87,875.00 in costs to Mr. Dart, and $670,000.00 in fees and $59,022.02 in costs to Mr. Zaytoun. Mr. Dunn had, however, submitted a request to the PMC for a fee allocation of $350,000.00.

The PMC agreement provided that the fee subcommittee's recommendation was binding only upon unanimous consent of all PMC members. Any dispute was required to be submitted to binding arbitration. On 20 November 2009, each of the PMC

members demanded arbitration of their allocations. Mr. Dart requested an allocation of $1,675,000.00 and Mr. Zaytoun requested $1,350,000.00. The PMC members, however, continued to negotiate. Mr. Dunn sent an email on 15 December 2009 to Mr. Dart and Mr. Zaytoun asserting that, in accordance with their initial discussions, the total fees ultimately awarded to the three men should be combined and then re-divided, with two-thirds going to Mr. Dart and the remaining one-third split between Mr. Dunn and Mr. Zaytoun. Mr. Dunn announced that he expected to receive a $350,000.00 fee, and he did "not care from whom it comes."

On 18 December 2009 the PMC collectively filed a motion to dismiss their request for arbitration, to approve the previously proposed allocation of attorneys' fees, and to distribute those fees. The federal district court issued its order allowing the allocation of attorneys' fees as initially proposed by the PMC's subcommittee and ordered distribution of those amounts to class counsel on 23 December 2009.

On that same date, Mr. Dunn filed the present action in Craven County Superior Court asserting the existence of a valid side agreement among Mr. Dunn, Mr. Dart, and Mr. Zaytoun to split fees and asserting that Mr. Dart and Mr. Zaytoun had breached that contract and breached their fiduciary duty to him.

Mr. Dart and Mr. Zaytoun removed the case to federal district court, but the federal court remanded the case to state court on the grounds that the case only involved state claims. Subsequently, the case was transferred to the North Carolina Business Court.

Mr. Dart and Mr. Zaytoun filed a motion for summary judgment. The trial court granted that motion on 18 July 2011, concluding there was no meeting of the minds as to all material terms of any fee-splitting agreement and that even had such an agreement been reached, it would have been void as against public policy under Rule 1.5 of the North Carolina Revised Rules of Professional Conduct. Mr. Dunn timely appealed to this Court.

Discussion

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

As this Court has observed, "[i]t is a well-settled principle of contract law that a valid contract exists only

where there has been a meeting of the minds as to all essential terms of the agreement." *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995). To be enforceable, the terms of a contract must be sufficiently definite and certain, *Brooks v. Hackney*, 329 N.C. 166, 170, 404 S.E.2d 854, 857 (1991), and a contract that "'leav[es] material portions open for future agreement is nugatory and void for indefiniteness.'" *MCB Ltd. v. McGowan*, 86 N.C. App. 607, 609, 359 S.E.2d 50, 51 (1987) (quoting *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974)). Therefore, when a plaintiff's forecast of evidence fails to show that the parties reached a meeting of the minds as to the essential terms of the agreement, summary judgment in favor of the defendants is proper. *Elliott v. Duke Univ., Inc.*, 66 N.C. App. 590, 596, 311 S.E.2d 632, 636 (1984).

With respect to agreements to split fees among attorneys, the North Carolina Revised Rules of Professional Conduct provide in Rule 1.5(e):

> (e) A division of fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

> (2) *the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing*; and
>
> (3) the total fee is reasonable.

(Emphasis added.)

Here, there is no evidence that the parties' clients -- the Carleys and the Wilders -- ever agreed to the fee-sharing agreement alleged by Mr. Dunn or, indeed, ever signed any agreement other than the supplemental retainer agreements following creation of the PMC. The latter agreements do not set out the terms of the agreement at issue in this case. We need not, however, decide whether the trial court correctly concluded that the failure to comply with Rule 1.5(e) precludes enforcement of any fee-sharing agreement because Mr. Dunn has failed to demonstrate that the parties ever entered into any such agreement in the first place.

Mr. Dunn points initially to evidence of telephone conversations between Mr. Dunn and Mr. Dart in the first few days after the EQ explosion, arguing that those conversations combined with Mr. Dunn's and Mr. Dart's prior course of dealing established an oral contract. Mr. Dunn, however, is seeking to enforce a purported agreement that also included Mr. Zaytoun who would not have been a member of any such oral contract.

In fact, the deposition testimony of Mr. Dart upon which Mr. Dunn relies indicates that there was not, at that early stage, agreement on which attorneys would participate in any fee-sharing. Mr. Dart testified: "And we were contemplating that perhaps with me and Mr. Ussery [sic], who was one of the co-plaintiff'[s] counsel in Kinston. Mr. Ussery [sic] and myself would get involved in the case in Apex, the EQ case with Mr. Dunn dealing with the clients as we did in Kinston. And we discussed the concept of Mr. Dunn getting 1/3 of the fee and the New Orleans group getting 2/3 of the fee." The alleged agreement at issue here involved Mr. Zaytoun who was not mentioned, while Mr. Usry, who apparently was mentioned, did not end up being a party to the alleged agreement. In short, there was no agreement, at that stage, upon or among all of the participants to the agreement.

Mr. Dunn next points to a conversation with Mr. Zaytoun in the week following the explosion in which Mr. Dunn agreed to share his one-third fee with Mr. Zaytoun on a 50/50 basis. In addition, Mr. Dunn points to an email exchange as evidencing both mutual assent and a writing regarding a fee splitting agreement among Mr. Dunn, Mr. Dart, and Mr. Zaytoun.

On 22 October 2006, Mr. Zaytoun sent the following email to Mr. Dart with a copy to Mr. Dunn:

> In view of the arrangement we have contemplated on fee split and cost-bearing as forecast by Donnie to me early last week, Stacy and I would like to be sure that we are moving forward on the basis that costs will be borne by Hank's firm (to what extent? what expenses?) and the fee split will be 66 2/3 to Hank and we will split with Donnie 50-50 the remaining one-third. Is this correct? If so, I suggest that we put this in the form of a letter memorandum of understanding. We also need to get fee agreements signed with our current clients this week.

Mr. Dart responded with an email on 23 October 2006: "I agree with your understanding of the fee split and cost responsibility. I will be happy to memorialize that in a letter agreement and circulate it among us by tomorrow." There is, however, no evidence that Mr. Dunn ever responded.

Even if we assume without deciding that the lack of a written response by Mr. Dunn is immaterial, Mr. Zaytoun's email reflects continued uncertainty regarding the terms of any agreement regarding the extent to which litigation expenses would be borne by Mr. Dart's firm. That uncertainty was not resolved by Mr. Dart's email.

Moreover, an email a week later, on 31 October 2006, from Mr. Dunn reveals not only that he did not yet believe that an agreement had been finalized, but also that there was not even agreement regarding who would be the participants in the fee-splitting agreement:

> This brings up the attorney fee agreement. Hank according to our ethical requirements, we need to know if Allen [Usry] is going to participate. Our ethical rules require that the attorney fee contract identify all lawyers and their percentage of fee in a fee sharing arrangement. I think Allen needs to be on the contract if he is involved. See how he feels about that. I have drafted a fee agreement which has only you me and Robert on there. You [sic] thoughts Hank?

Mr. Usry had appeared as counsel of record on the class action complaint that the parties filed on 10 October 2006.

Thus, despite Mr. Dunn's assertion that the earlier emails between Mr. Dart and Mr. Zaytoun established the terms of fee-splitting and expenses, Mr. Dunn himself was unclear as to which attorneys would be splitting the fees. Because Mr. Dunn has not pointed to any evidence that an agreement as to all material terms of a fee-splitting agreement, including the identity of the participants and the specifics of how the parties would address expenses, he has failed to show the existence of an enforceable contract. The trial court, therefore, properly granted summary judgment.

Affirmed.

Judges McGEE and McCULLOUGH concur.

Report per Rule 30(e).