

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

JANET ADELE YATES

Appellant

v.

JAMES V. BARILLA

Appellee

C. A. No. 09CA009681

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 08CV157209

DECISION AND JOURNAL ENTRY

Dated: May 3, 2010

BELFANCE, Presiding Judge.

{¶1} Appellant, Janet Yates, has appealed the judgment of the Lorain County Court of Common Pleas that granted summary judgment in favor of Appellee, James Barilla. We reverse and remand for further proceedings.

BACKGROUND

{¶2} In 2006, Yates filed a complaint for divorce. During the pendency of the divorce action, Yates was represented by three different attorneys. Barilla represented Yates from February 8, 2007 until June 14, 2007. Per the fee agreement, Yates paid Barilla \$10,000 for the first 50 hours of work. Any work Barilla performed beyond those 50 hours would be billed at a rate of \$200 per hour. In lieu of trial, an agreed judgment entry of divorce was submitted on June 14, 2007. However, litigation with respect to the divorce is ongoing.

{¶3} On June 13, 2008, Yates filed a complaint against Barilla alleging legal malpractice. Barilla answered the complaint and filed a counterclaim for fees allegedly owed by

Yates. Barilla avers that he provided Yates with 89 hours of legal services. Thus, after subtracting the \$10,000 previously paid, Barilla claims he is owed \$7,800, plus interest from June 14, 2007. In her answer to the counterclaim, Yates denied that any monies remained due because Barilla told her the day before the scheduled trial that he had not accumulated 50 hours of legal services, and that no additional money was owed. Yates further alleged that Barilla did not actually provide her with 89 hours of services as claimed and that his representation was inadequate.

{¶4} On May 21, 2009, Yates dismissed her legal malpractice claim against Barilla without prejudice.

{¶5} Barilla filed a motion for summary judgment on his counterclaim on July 10, 2009. He argued that Yates did not adequately set forth malpractice as a defense to payment of legal fees. Yates responded that she properly presented legal malpractice as a defense. However, she also argued that she was relying on additional defenses other than malpractice in opposition to Barilla's summary judgment motion. Barilla filed a response in support of his motion for summary judgment disputing Yates' claims.

{¶6} On August 21, 2009, the trial court issued a judgment entry granting Barilla summary judgment on his counterclaim for legal fees owed. The trial court found that there were no questions of fact to be decided at trial.

{¶7} On appeal, Yates argues that the trial court erred in granting summary judgment. Barilla has not filed a brief in response.

SUMMARY JUDGMENT

{¶8} This Court reviews a trial court's ruling on a motion for summary judgment de novo and applies the same standard as the trial court. *Chuparkoff v. Farmers Ins. of Columbus*,

Inc., 9th Dist. No. 22712, 2006-Ohio-3281, at ¶12. The facts are viewed in the light most favorable to the nonmoving party. *Id.*

{¶9} Pursuant to Civ.R. 56(C), summary judgment is appropriate when: “(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.” *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 448.

{¶10} On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issues of material fact exist. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact does exist. *Id.* at 293. Pursuant to Civ.R. 56(E), the nonmoving party may not simply rest on the allegations of its pleadings; it must provide the court with evidentiary material, such as affidavits, written admissions, and/or answers to interrogatories, to demonstrate a genuine dispute of fact to be tried. See, also, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶11} Because Barilla claims that Yates has not paid for services rendered as provided in their written agreement, his counterclaim asserts a cause of action for breach of contract. In order to demonstrate a breach of contract, Barilla must demonstrate that: “(1) a contract existed, (2) [Barilla] fulfilled his obligations, (3) [Yates] failed to fulfill [her] obligations, and (4) damages resulted from this failure.” *Second Calvary Church of God in Christ v. Chomet*, 9th Dist. No. 07CA009186, 2008-Ohio-1463, at ¶9. Both parties agree that a contract existed.

However, they disagree as to whether, pursuant to that contract, additional money over and above the \$10,000 retainer is owed.

{¶12} In his summary judgment motion, Barilla focused solely on demonstrating that Yates had failed to adequately set forth legal malpractice as a defense to payment. Barilla attached several exhibits in support of his motion for summary judgment, including the court docket for the Yates' divorce matter, Barilla's affidavit, and a copy of Barilla's counterclaim with Yates' engagement letter and Barilla's time sheets attached. In his affidavit, Barilla avers that he expended 89 billable hours on Yates' divorce case, that Yates agreed to pay at the rate of \$200 per hour, and that she paid a total of \$10,000, leaving a balance of \$7,800, plus interest. The affidavit incorporates by reference the docket, engagement letter, and time sheets to support Barilla's statements. Barilla further avers in the affidavit that the fee charged was reasonable and his representation complied with the applicable standard of care.

{¶13} In opposition to the motion for summary judgment, Yates argued that her contention that she did not owe further money did not rest solely upon the allegation of malpractice. Yates also alleged that she did not owe additional money because Barilla specifically told her that the \$10,000 payment covered the hours he expended. In light of Barilla's assurance that no additional money was owed, Yates suggests that Barilla did not actually complete 89 hours of work as he claims, pointing to the fact that prior to the filing of her malpractice action against Barilla, she was never billed for additional hours, Barilla never attempted to collect any fees, and she never received a statement of the hours Barilla allegedly worked. Yates also contends that the time sheets submitted in support of Barilla's summary judgment motion misrepresent the amount of time Barilla devoted to the divorce case. In support of her contentions, Yates attached several exhibits to her brief in opposition to summary

judgment, including her own affidavit outlining her allegations and the affidavit of her daughter, Karen Yates who was present when Barilla is alleged to have made the statements. They aver in their affidavits that on June 13, 2007, the day before the scheduled trial, Barilla told Yates that he had expended less than 50 hours on her divorce matter and that she did not owe him any additional fees.

{¶14} Barilla filed a reply to Yates' brief in opposition to summary judgment. He asserted that his time sheets were accurate and truthful and he disputed that he made the aforementioned statements to Yates. He further pointed out that Yates' allegations contradicted the accurate fee statements he presented to the court.

{¶15} The trial court found that summary judgment was appropriate because there were no disputes of fact to be decided at trial. However, the record reflects otherwise. Yates asserted in her opposition to summary judgment that she had a conversation with Barilla at the conclusion of her divorce matter during which he stated that he had accumulated under 50 billable hours in her case and that no additional fees were due. Yates also presented additional evidence that additional fees were not due because Barilla's conduct was consistent with understanding that no fees were owed: Barilla never attempted to collect additional fees and never sent her a bill for any additional fees beyond the \$10,000 she had paid. Yates alleged that it was only after she filed the malpractice claim that Barilla asserted that fees were owed. Viewing the evidence most strongly in favor of Yates, we find that a genuine issue of material fact exists as to whether Barilla was entitled to additional fees beyond the \$10,000 retainer in accordance with the terms of the parties' agreement.

{¶16} Contrary to Barilla's assertion in his reply to Yates' opposition to summary judgment, Yates is not attempting to modify the parties' written contract by introducing Barilla's

oral statement. Yates at no time disputes the terms of the parties' agreement, including that she agreed to pay Barilla \$200 per hour for his services provided beyond 50 hours. Instead, she contends that based upon that agreement, Barilla informed her that no more fees were due. In light of that discussion, Yates suggests that the time sheets submitted in support of his counterclaim in October 2008 are suspect especially because he made no attempts to collect any additional fees and the time sheets contradict the statements he made to her in June 2007. The resolution of this factual dispute will hinge on the fact finder's assessment of the credibility of the witnesses. See *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341 (stating that summary judgment is not appropriate when one litigant's statement conflicts with another's because the trier of fact must resolve the conflict by assessing credibility).

{¶17} Viewing the evidence in the light most favorable to Yates, we find that the statements contained in the affidavits attached to her brief in opposition to summary judgment demonstrate the existence of a material dispute of fact. See *Dresher*, 75 Ohio St.3d at 293. Accordingly, summary judgment was not appropriate. See Civ.R. 56(C); *State ex rel. Zimmerman*, 75 Ohio St.3d at 448.

CONCLUSION

{¶18} The trial court erred in granting summary judgment in favor of Barilla as Yates demonstrated a material dispute of fact. The judgment of the Lorain County Court of Common Pleas is reversed and the matter remanded for further proceedings.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

JANET YATES, pro se, Appellant.

JOHN T. MURPHY, Attorney at Law, for Appellee.