

[Cite as *Hill Hardman Oldfield L.L.C. v. Gilbert*, 2010-Ohio-5733.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

HILL HARDMAN OLDFIELD, LLC., et al.

C.A. No. 25122

Appellees

v.

EDWARD L. GILBERT, ESQ., et al.

Appellants

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV-2008-07-5101

DECISION AND JOURNAL ENTRY

Dated: November 24, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Attorney Edward Gilbert represented James Hall in a racial discrimination case, a black mold case, and a dog bite case. When Mr. Hall fell behind in some of his payments for costs in the racial discrimination case, he, allegedly, told Mr. Gilbert that he would pay him from his award in the black mold case. Mr. Hall later fired Mr. Gilbert in the black mold case and hired John Hill, who negotiated a settlement of the case. When Mr. Gilbert claimed an interest in Mr. Hall’s settlement award, Mr. Hill interpleaded part of the award in the common pleas court. Mr. Gilbert filed a cross-claim against Mr. Hall, alleging four causes of action. At trial, Mr. Gilbert presented his case first. Before he had finished, however, the trial court awarded Mr. Hall a “direct[ed] . . . verdict.” Mr. Gilbert has appealed, arguing that the trial court incorrectly failed to let him present his entire case, that it incorrectly called Mr. Hill as its own witness, that the trial judge incorrectly failed to recuse herself, that the trial court committed plain error, and

that the court's judgment was against the manifest weight of the evidence. We reverse because the trial court should have given Mr. Gilbert the opportunity to prove his breach of contract claim against Mr. Hall.

BACKGROUND

{¶2} In 1997, Mr. Hall hired Mr. Gilbert to sue Consolidated Freightways for racial discrimination. A jury found in favor of Mr. Hall and awarded him \$800,000. The trial court, however, reduced the verdict to \$300,000. Mr. Gilbert appealed, and the appellate court reinstated the full award. Consolidated Freightways, meanwhile, had gone bankrupt. Because it had only put up a supersedeas bond of \$450,000, the trial court awarded Mr. Hall that amount. Mr. Gilbert filed a second appeal, but the appellate court upheld the trial court's decision. The fee agreement that Mr. Hall and Mr. Gilbert had entered into regarding the racial discrimination action did not cover appeals. Mr. Hall, however, agreed to make periodic payments to Mr. Gilbert for his work on the two appeals.

{¶3} In 2002, Mr. Hall hired Mr. Gilbert to file a black mold case against his landlord. They did not sign a written fee agreement. In 2006, while the black mold case was still pending, Mr. Hall hired Mr. Gilbert to file a dog bite case against one of his neighbors. The fee agreement that they signed regarding the dog bite case provided that Mr. Hall would pay Mr. Gilbert a contingency fee and his costs.

{¶4} According to Mr. Gilbert, in 2008, Mr. Hall told him that he could no longer afford to make payments for the appellate work Mr. Gilbert had done in his discrimination case. They, allegedly, agreed that Mr. Gilbert could take the balance out of whatever Mr. Hall recovered in the black mold case. Mr. Hall later fired Mr. Gilbert in the black mold and dog bite cases. In the dog bite case, Mr. Hall eventually received a default judgment. Mr. Hall hired

Mr. Hill to represent him in the black mold case, and Mr. Hill negotiated a settlement with Mr. Hill's landlord.

{¶5} Mr. Gilbert learned about the settlement of the black mold case and requested part of the proceeds from Mr. Hill. Mr. Gilbert told Mr. Hill that Mr. Hill still owed him approximately \$6700 for costs he incurred prosecuting the second appeal in the discrimination case and \$6000 for costs he incurred in the dog bite case. After Mr. Hill told Mr. Hill that he did not owe Mr. Gilbert anything, Mr. Hill interpleaded \$12,700 of the settlement amount.

{¶6} At trial, Mr. Gilbert made an opening statement and called several witnesses, including Mr. Hill. During his examination of Mr. Hill, the trial judge interrupted Mr. Gilbert and told him that it was going to call Mr. Hill out of order. After the court examined Mr. Hill, and each side cross-examined him, the court "direct[ed] a verdict" for Mr. Hill. Eleven days later, it entered a judgment, explaining its decision. Mr. Gilbert has assigned five errors on appeal.

INVOLUNTARY DISMISSAL

{¶7} Mr. Gilbert's first assignment of error is that the trial court incorrectly stopped the proceedings before giving him the opportunity to complete his case-in-chief. His second assignment of error is that the trial court incorrectly called Mr. Hill as its own witness. His fourth assignment of error is that the court incorrectly issued a directed verdict, and his fifth assignment of error is that the court's judgment was against the manifest weight of the evidence. Because these assignments of error are related, we will consider them together.

{¶8} Although the trial court labeled its decision a directed verdict, it was actually an involuntary dismissal under Rule 41(B)(2) of the Ohio Rules of Civil Procedure. See *Kowalski v. Smith*, 9th Dist. No. 09CA0059, 2010-Ohio-3662, at ¶9 ("[A] motion for directed verdict . . .

in a bench trial[] will be deemed to be a motion for involuntary dismissal under Civ.R. 41(B)(2)[.]” (quoting *Alh Props. P.L.L. v. Procare Auto. Serv. Solutions L.L.C.*, 9th Dist. No. 20991, 2002-Ohio-4246, at ¶8). Under Rule 41(B)(2), “[a]fter the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff’s evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.” The criteria for an involuntary dismissal under Rule 41(B)(2) is different from a directed verdict under Rule 50(A). *Alh Props. P.L.L.*, 2002-Ohio-4246, at ¶9. “A motion for directed verdict challenges the sufficiency of the evidence, and when ruling on such a motion, the trial court is required to view the evidence in the light most favorable to the nonmoving party.” *Id.* “In contrast, when the trial court rules on a motion for involuntary dismissal under Civ.R. 41(B)(2), the court weighs the evidence, resolves any conflicts, and may render judgment in favor of the defendant if the plaintiff has shown no right to relief.” *Id.*

{¶9} The trial court did not wait until Mr. Gilbert completed presenting his evidence to dismiss his claims. Whether Mr. Gilbert is entitled to a new trial, however, depends on whether he could have proved any set of facts that would have entitled him to relief. If he could not have, any error in the trial court’s sua sponte dismissal was harmless. See Civ. R. 61 (describing harmless error).

SETTLEMENT FUNDS

{¶10} Although he was not able to present all of his evidence, Mr. Gilbert had three possible theories of recovery. First, that, in light of his prior representation of Mr. Hall, he had a lien on the black mold settlement award. Second, that Mr. Hall had assigned him a right to part of the settlement award. Third, that Mr. Hall’s failure to pay him from the proceeds of the settlement breached their contract for legal services.

{¶11} Regarding the lien theory, “Ohio Courts have recognized the right of an attorney to attach a lien to a client’s judgment despite the absence of any statute to that effect.” *Telxon Corp. v. Smart Media of Delaware Inc.*, 9th Dist. Nos. 22543, 22673, 2005-Ohio-6223, at ¶7; *Petty v. Kroger Food & Pharmacy*, 165 Ohio App. 3d 16, 2005-Ohio-6641, at ¶11 (“A charging lien is a lien upon a judgment or other monies awarded to a client, or former client, for work previously performed by the attorney.”). Actually, it is not a true lien. “The right of an attorney to payment of fees earned in the prosecution of litigation to judgment, though usually denominated a lien, rests on the equity of such attorney to be paid out of the judgment by him obtained, and is upheld on the theory that his services and skill created the fund.” *Cohen v. Goldberger*, 109 Ohio St. 22, syllabus (1923).

{¶12} It was not possible for Mr. Gilbert to establish a charging lien against the black mold settlement award because he incurred the costs he sought to recover while prosecuting other cases. *Petty v. Kroger Food & Pharmacy*, 165 Ohio App. 3d 16, 2005-Ohio-6641, at ¶12. “A strict reading of the *Cohen* requisites allows an attorney to be paid out of funds created by him for the work done in creating those funds. However, *Cohen* does not authorize the reimbursement of all monies owed to an attorney, whether related to the judgment or not.” *Id.*

{¶13} Mr. Gilbert also could not recover based on assignment. It is not disputed that, at the time Mr. Hall attempted to assign his right to the proceeds from the black mold case to Mr. Gilbert, the black mold case had not settled. The Ohio Supreme Court has held that “[a] person may not assign the right to the future proceeds of a settlement if the right to the proceeds does not exist at the time of the assignment.” *W. Broad Chiropractic v. Am. Family Ins.*, 122 Ohio St. 3d 497, 2009-Ohio-3506, at ¶26.

BREACH OF CONTRACT

{¶14} Mr. Gilbert's other theory of recovery was that Mr. Hall breached their oral contract. According to Mr. Gilbert, while he was working on Mr. Hall's black mold case, Mr. Hall owed him for costs he had incurred in the discrimination case and for the costs he was in the process of incurring in the dog bite case. Because Mr. Hall was unemployed and could not pay the discrimination and dog bite case costs, he agreed that Mr. Gilbert could take them from the black mold case after it had concluded.

{¶15} Under Rule 13(G) of the Ohio Rules of Civil Procedure, "[a] pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action." The trial court dismissed Mr. Gilbert's cross-claims against Mr. Hall because it concluded that they "[did] not arise out of the same action or occurrence that is the subject matter of the original action." It did not consider, however, whether Mr. Gilbert's breach of contract cross-claim "relat[ed] to any property that is the subject matter of the original action." Civ. R. 13(G). Mr. Gilbert's claim related to Mr. Hall's proceeds in the black mold case, which was the same "property" that Mr. Hill interpleaded.

{¶16} Mr. Hall has argued that the trial court's determination that Mr. Gilbert's cross-claim was not properly before the court was correct under *Dean v. Harshaw/Filtrol P'ship*, 55 Ohio App. 3d 67 (1988). In that case, the Eighth District concluded that a lawyer could not intervene in another action by his former client "to protect his claim for unpaid professional fees." *Id.* at 68. The difference between that case and this one, however, is that it involved

intervention under Civil Rule 24(A) and the lawyer did not assert a contractual right to the proceeds in the subsequent case.

{¶17} In *West Broad Chiropractic v. American Family Insurance*, 122 Ohio St. 3d 497, 2009-Ohio-3506, the Ohio Supreme Court explained the difference between assignment and breach of contract claims. In that case, Kristy Norregard was injured in an automobile collision. Three days later, she received treatment from West Broad Chiropractic. At the time of the treatment, Ms. Norregard signed a document purporting to assign her right to the proceeds of a settlement or judgment against the insurer of the person who caused the collision. Later, West Broad Chiropractic attempted to sue the tortfeasor's insurer under the assignment. The Supreme Court concluded that the "assignment" was ineffective because Ms. Norregard did not have a present right to settlement funds at the time she signed it. *Id.* at ¶26. The Supreme Court noted, however, that West Broad Chiropractic did have a contract with Ms. Norregard, which might be enforceable. *Id.* Similarly, although Mr. Gilbert does not have a claim for the interpleaded funds based on assignment, he may have a breach of contract claim against Mr. Hall for his share of the proceeds from the black mold case. The trial court, therefore, incorrectly concluded that Mr. Gilbert's breach of contract claim was not a proper cross-claim under Civil Rule 13(G).

{¶18} The trial court also concluded that, even if Mr. Gilbert's claims were properly before the court, he failed to prove them. The court, however, did not let Mr. Gilbert present all of his evidence on his breach of contract claim. Mr. Gilbert did not have the opportunity to ask Mr. Hall whether they had a contract regarding the proceeds of the black mold case or testify on his own behalf. Assuming without deciding, therefore, that a trial court can sua sponte dismiss a case under Civil Rule 41(B)(2), we conclude that the trial court incorrectly sua sponte dismissed Mr. Gilbert's case before he had the opportunity to present all of his evidence on his breach of

contract claim. See *Sargeant v. Sampson*, 9th Dist. No. 18947, 1999 WL 195019 at *6 (Mar. 31, 1999) (Carr, J., concurring) (quoting *Gibbons v. Price*, 33 Ohio App. 3d 4, 12 (1986)). Mr. Gilbert's first and fourth assignments of error are sustained. His second and fifth assignments of error are moot, and are overruled on that basis.

RECUSAL

{¶19} Mr. Gilbert's third assignment of error is that the trial judge incorrectly failed to recuse herself. "This Court, however, is without authority to review a matter involving the disqualification of a judge." *State v. Roderick*, 9th Dist. No. 18521, 1998 WL 289698 at *3 (June 3, 1998); see *Beer v. Griffith*, 54 Ohio St. 2d 440, 441-42 (1978). "The procedure for seeking disqualification of a judge is set forth in Section 2701.03 of the Ohio Revised Code." *Roderick*, 1998 WL 289698 at *3. Mr. Gilbert's third assignment of error is overruled.

CONCLUSION

{¶20} The trial court incorrectly dismissed Mr. Gilbert's breach of contract claim under Civil Rule 41(B)(2). The judgment of the Summit County Common Pleas Court is reversed, and this cause is remanded for a new trial on Mr. Gilbert's breach of contract claim.

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 Summit, 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.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

EDWARD L. GIBERT and TRACEE D. HILTON-RORAR, attorneys at law, for appellant.

JAMES R. SILVER, attorney at law, for appellee.