

**Reversed and Rendered in Part and Reversed and Remanded in Part and
Memorandum Opinion filed February 9, 2010.**



In The

Fourteenth Court of Appeals

NO. 14-08-00327-CV

SALOMON JUAN HERNANDEZ, Appellant

V.

**JOSEPH J. LABELLA AND LABELLA DENNIS & ASSOCIATES, P.L.L.C.,
Appellees**

**On Appeal from the 284th District Court
Montgomery County, Texas
Trial Court Cause No. 04-08-06362-CV**

MEMORANDUM OPINION

Appellant, Salomon Juan Hernandez, sued appellees, Joseph J. LaBella and LaBella, Dennis & Associates, P.L.L.C., for breach of fiduciary duty arising out of their legal representation of appellant. After the jury rendered a verdict in favor of appellant, the parties negotiated a settlement of the dispute. Following a short delay by a third party in the completion of one of the terms of the settlement agreement, the trial court entered a final judgment holding that (1) the settlement agreement was unenforceable; (2) the issue

of damages in the case was a question of law for the court; and (3) appellant's damages were limited to the forfeiture of the \$1,000.00 fee collected by appellees. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001 appellant was convicted of driving while intoxicated and placed on probation. In March 2004, while still on probation, appellant was arrested for public intoxication. Facing both the public intoxication charge and a motion to revoke his probation, appellant retained appellees for a flat fee of \$1,000.00.

April 5, 2004 was appellant's court date on the public intoxication charge. Appellant appeared at the Conroe Municipal Court, however, neither LaBella nor anyone from LaBella's firm appeared to represent appellant. Unsure what to do when his case was called, appellant pled guilty to the public intoxication charge. Following appellant's guilty plea, a motion to revoke his probation was filed and appellant was arrested when he made a scheduled visit to his probation officer. As a result, appellant was in jail from June 16 until July 9, 2004.

Having failed to appear on April 5, 2004, LaBella appealed appellant's public intoxication conviction to county court. On July 9, 2004, the motion to revoke appellant's probation was withdrawn and appellant was released from jail. Once appellant was released from jail, LaBella demanded an additional \$5,000.00 fee from appellant as well as appellant's employer. From that initial demand, LaBella made numerous threats against appellant, appellant's employer, and appellant's psychologist regarding this additional amount of money.

Eventually, appellant initiated a breach of fiduciary duty lawsuit against appellees. The case went to trial and on January 17, 2008, the jury returned a verdict in favor of appellant. The jury found that (1) appellees had an attorney-client relationship with appellant; (2) appellees failed to comply with the fiduciary duty they owed to appellant; and (3) appellant's damages were \$500,000.00.

Following the jury verdict, the parties agreed to settle their dispute. The Settlement Agreement provides, in pertinent part:

1. LaBella shall pay to Hernandez \$100,000.00 by cashier's check or money order by 1 p.m., Friday, January 18, 2008.
2. LaBella and Hernandez shall execute mutual releases of each other and their attorneys, agents, heirs, successors, assigns, and representatives of any and all claims that were brought or that could have been brought in this lawsuit.
3. Hernandez shall nonsuit his lawsuit against LaBella and LaBella Dennis & Associates PLLC with prejudice upon receipt of the funds in paragraph 1.
4. LaBella shall dismiss with prejudice his lawsuit against Stephen Dennis, Kandis Renee Garrett Dennis Individually and as Executrix of the Estate of James H. Garrett in the 9th District Court under cause number 06-05-04490-CV and all of those people shall dismiss their counterclaims with prejudice against LaBella in that lawsuit.¹

The Settlement Agreement was then signed by appellant, appellant's attorneys, LaBella, and appellees' attorney. The Settlement Agreement was then filed with the trial court.

Problems quickly began to develop with the pending settlement. First, LaBella had difficulties timely funding the \$100,000.00 payment owed to appellant and asked for a delay. Appellant agreed to extend the time for LaBella to make the \$100,000.00 payment until the following week, after the Martin Luther King holiday. In addition, LaBella's attorney drafted various settlement documents that included mutual releases and an agreed order of dismissal of the LaBelle-Dennis litigation. Appellant's attorney responded with suggested changes and LaBella accepted those changes. LaBella then asked appellant's counsel to forward the Labella-Dennis dismissal documents to Mr. Medley, Dennis's attorney.

¹ This clause refers to a separate, unrelated lawsuit. Stephen Dennis testified during the jury trial of this lawsuit as a witness for appellant.

On January 22, 2008, LaBella's attorney sent appellant a letter notifying appellant that LaBella was ready to fund the settlement. LaBella also requested signatures on all settlement documents. That same day, Medley refused to sign the dismissal documents which had been forwarded by appellant's counsel. In a January 22, 2008 letter sent to appellant's counsel, Medley explained: "[m]y clients have instructed me *not* to execute the order (as a matter of substance, and not merely of form)." Appellant's counsel then talked to Medley and learned that he was unwilling to sign the LaBella-Dennis dismissal documents because the documents did not indicate their purpose and Medley had not heard from either LaBella or LaBella's counsel. On January 23, 2008, Medley notified appellant's counsel he had no objection to a proper motion for and order of dismissal of the LaBella-Dennis litigation. On January 24, 2008 Medley sent appellees' attorney an executed agreed motion and order of dismissal in the LaBella-Dennis litigation.

On January 22, 2008, within hours of learning of Medley's initial refusal to sign the dismissal documents, appellees filed a document in the trial court entitled: "Joseph J. LaBella's and Labelle Dennis & Associates P.L.L.C.'s Election of Remedy for Material Breach of Settlement Agreement, Motion for Judgment *Non Obstante Veredicto*, or for Remittur, re-Urged Motion for Mistrial, Re-Urged Motion for Directed Verdict, Motion to Set Aside the Verdict, and Motion for New Trial." In this document, appellees argued Medley's initial refusal to sign the LaBella-Dennis dismissal documents constituted an absolute repudiation of the Settlement Agreement allowing appellees to elect the remedy of declaring the Settlement Agreement breached and unenforceable thereby returning the litigation to its posture prior to the signing of the Settlement Agreement. In response, appellant filed a motion to enforce the Settlement Agreement.

After a bench trial on the disputed Settlement Agreement, the trial court entered a final judgment holding (1) the Settlement Agreement was unenforceable and the case was returned to its posture before the attempted settlement; (2) the issue of damages for breach

of fiduciary duty is a question of law;² and (3) appellees were to forfeit their \$1,000.00 fee as damages for their breach of fiduciary duty. This appeal followed.

DISCUSSION

While appellant raises five issues on appeal, they can be divided into two groups. First, appellant contends the trial court erred when it (1) ruled the issue of damages for breach of fiduciary duty is a question of law for the trial court, (2) disregarded the jury's damages finding, and (3) determined appellant's damages were limited to appellees' forfeiting their \$1,000.00 fee. Second, appellant argues the trial court erred when it determined the Settlement Agreement was breached and unenforceable as a result of a third party's failure to perform, thereby allowing appellees to elect the remedy of setting the Settlement Agreement aside. Because they are dispositive, we need only address appellant's second group of issues.³

I. Did the trial court err when it refused to enforce the Settlement Agreement?

A. The Standard of Review

The law of contracts is applicable to settlement agreements. *Shaw v. Kennedy, Ltd.*, 879 S.W.2d 240, 247 (Tex. App.—Amarillo 1994, writ denied). Once the parties accept the terms of the settlement, the agreement is binding and can be enforced by the

² The Supreme Court held that forfeiture of an attorney's fee is an appropriate remedy when an attorney breaches his fiduciary duty to a client even in the absence of actual damages. *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999).

³ We address appellant's issues on the enforceability of the Settlement Agreement first because appellant, when faced with appellees' refusal to pay appellant the required \$100,000.00, filed a motion seeking to enforce the Settlement Agreement rather than rescinding it and seeking a judgment based on the jury's verdict. Having made that election, appellant cannot now, on appeal, ignore that election and attempt to pursue his underlying breach of fiduciary duty cause of action. *See Hanks v. GAB Bus. Servs., Inc.*, 644 S.W.2d 707, 708 (Tex. 1980) (holding that a non-breaching party must decide whether to rescind the contract or seek to enforce it when the material breach occurred rather than waiting until after trial to decide, and stating that a non-breaching party waives its right to rescind a contract based on the other party's material breach by (1) treating the contract as still in effect following the material breach, and (2) filing suit to enforce the contract); *Bumb v. InterComp Technologies, L.L.C.*, 64 S.W.3d 123, 125 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (holding that a nonrepudiating party must either treat a repudiation of a contract as a breach or ignore it and wait for the time of performance, it cannot do both).

courts. *Id.* When, as in this case, the contract is unambiguous and the relevant facts are undisputed, we interpret the contract and determine whether a party has breached the contract as a matter of law. *Gupta v. E. Idaho Tumor Inst.*, 140 S.W.3d 747, 756 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

B. Was the Settlement Agreement enforceable?

Citing *Murray v. Crest Const., Inc.*, appellees argued in the trial court and again here that Medley's January 22, 2008 letter constituted an anticipatory repudiation or breach of the Settlement Agreement which permitted appellees to elect not to go forward with the Settlement Agreement. *Murray v. Crest Const., Inc.*, 900 S.W.2d 342, 344 (Tex. 1995). We disagree.

If a settlement agreement is breached by one of the parties, the other party may treat the agreement as repudiated and claim rights either under the settlement or the underlying cause of action. *Shaw*, 879 S.W.2d at 247. An anticipatory repudiation of a contract may consist of either words or actions by a party to a contract which indicate an intention that he or she is not going to perform the contract according to its terms in the future. *Builders Sand, Inc. v. Turtur*, 678 S.W.2d 115, 120 (Tex. App.—Houston [14th Dist.] 1984, no writ). The intention to abandon a contract must be expressed in positive and unconditional terms. *Pollack v. Pollack*, 39 S.W.2d 853, 856–57 (Tex. Comm'n App. 1931, holding approved).

A party claiming anticipatory breach of a contract must establish the following three elements: (1) a party to a contract has absolutely repudiated the obligation; (2) without just excuse; and (3) the other party is damaged as a result. *Id.* at 855; *Hauglum v. Durst*, 769 S.W.2d 646, 651 (Tex. App.—Corpus Christi 1989, no writ). Appellees' claim of anticipatory repudiation falls short on each element; however, we need only address the first.

We conclude that no party to the Settlement Agreement absolutely repudiated an obligation under the Settlement Agreement when appellant forwarded Medley's January 22, 2008 letter to appellees' attorney. The January 22, 2008 letter from Medley cannot represent an absolute repudiation by a party as neither Stephen Dennis nor Kandis Renee Garrett Dennis, Medley's clients, were parties to the Settlement Agreement. *See Willis v. Donnelly*, 199 S.W.3d 262, 271 (Tex. 2006) (holding that shareholder of corporate defendant was not a party to agreement as he had no duties under the agreement and refused to sign the agreement); *see also Haddad v. Bagwell*, 317 S.W.2d 781, 786 (Tex. App.—Amarillo 1958, writ ref'd n.r.e.) (holding architects were not parties to contract at issue in litigation even though the parties to the contract agreed architects would do certain things).

Appellees attempt to avoid this simple fact by arguing appellant's forwarding Medley's letter to appellees' attorney constituted a material breach of a contractual duty to obtain a signature from the Dennis parties. Appellees' argument is not persuasive. Even if we were to accept appellees' contention that appellant alone had the contractual duty to obtain the Dennis parties' signatures on documents dismissing the LaBella-Dennis litigation, the fact appellant's attorney forwarded, without comment, a copy of Medley's letter to appellees, is insufficient to constitute a distinct and absolute refusal to perform the Settlement Agreement by appellant. *See McKenzie v. Farr*, 541 S.W.2d 879, 882 (Tex. App.—Beaumont 1976, writ ref'd n.r.e.) (holding that a party not in default will be justified in treating the contract as repudiated or abandoned only where the other party to the agreement by his conduct or misconduct, clearly shows a fixed intention during nonperformance to repudiate the agreement and not to comply with its terms in the future). The undisputed evidence also demonstrates that appellant continued his efforts to obtain the Dennis parties' approval of the dismissal of the LaBella-Dennis litigation and attempted to deliver the executed LaBella-Dennis settlement documents two days later on January 24, 2008, which appellees would not accept. Therefore, we hold that (1) appellant did not repudiate or breach the Settlement Agreement as a result of Medley's

initial refusal to execute the LaBalla-Dennis dismissal documents, and (2) the Settlement Agreement was an enforceable contract between appellant and appellees.

C. Did appellees breach the Settlement Agreement?

Finally, the undisputed evidence establishes appellees materially breached the Settlement Agreement when they rejected the delivery of the LaBella-Dennis dismissal documents and refused to pay appellant the required \$100,000.00 settlement amount. Therefore, we sustain appellant's third, fourth, and fifth issues on appeal.⁴

CONCLUSION

Having sustained appellant's third, fourth, and fifth issues, we reverse the judgment of the trial court and render judgment that (1) the Settlement Agreement was enforceable; (2) appellees breached the Settlement Agreement when they refused to perform their obligation to pay appellant \$100,000.00; and (3) appellant recover \$100,000.00 from appellees. We remand to the trial court for further proceedings to determine appellant's entitlement to prejudgment interest and the calculation of the amount of prejudgment interest to be awarded, if any.

/s/ John S. Anderson
 Justice

Panel consists of Chief Justice Hedges and Justices Anderson, and Boyce.

⁴ Because we have sustained appellant's third, fourth, and fifth issues, we need not address his first three issues addressing his breach of fiduciary duty cause of action. Tex. R. App. P. 47.1.