In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00252-CV

JOHN H. CARNEY & ASSOCIATES, APPELLANT

V.

ISHFAQ AHMAD, APPELLEE

On Appeal from the 324th District Court
Tarrant County, Texas
Trial Court No. 324-538990-13, Honorable Jerome S. Hennigan, Presiding

January 28, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

Appellant John H. Carney, an attorney appearing *pro se,* sued his former client, appellee Ishfaq Ahmad, for recovery of unpaid attorney's fees. From a take-nothing judgment in favor of Ahmad, Carney appeals. Finding no error by the trial court, we will affirm its judgment.

Background

Ahmad retained Carney for representation in Ahmad's suit for divorce. They signed a written contract. The divorce case was assigned cause number 324-494783-11. At some point during the pendency of the litigation Carney withdrew from Ahmad's representation and intervened in the divorce, alleging Ahmad breached their contract by failing to pay the full amount of attorney's fees charged.

On February 8, 2013, Carney served Ahmad with requests for admissions, which were never answered. The trial court severed Carney's intervention by order of June 25, 2013. In its severance order, the court ordered that specific documents be placed into the file in the severed suit for attorney's fees. The severed suit, which is the cause from which this appeal is taken, was assigned trial court cause number 324-538990-13.

Carney's suit for attorney's fees was tried to the bench. In a hearing immediately preceding commencement of trial, the court permitted Ahmad to withdraw his deemed admissions.[1]

Trial then began and Carney and his firm's office manager-accountant testified. Documentary evidence with supporting testimony established the alleged amount due from Ahmad as well as the identity, billing rate, and time expended by each attorney or firm employee performing work on the case. Testimony, and an exhibit, showed amounts billed and paid. There was no evidence offered, however, of the nature or detail of the work corresponding to each time entry. According to Carney, a line-item

[1] *See* TEX. R. CIV. P. 198.2(c) "If a response is not timely served, the request is considered admitted without the necessity of a court order."

description of the work performed was omitted from evidence because of the attorney-client privilege.

In a post-trial letter to counsel announcing its judgment the trial court explained, "Mr. Carney gave no details whatsoever about what was done by him, his associates, and his staff in his representation of Mr. Ahmad. It is impossible to tell if any of the work was duplicative, administrative, necessary, etc." Thereafter, the court signed a judgment that Carney take nothing. Findings of fact and conclusions of law were requested and prepared. This appeal followed.

Analysis

Sufficiency of the Evidence

Carney's first three issues concern the trial court's failure to award him an amount of money for Ahmed's alleged failure to pay all the attorney's fees sought under the contract. We will discuss these issues collectively, construing the complaint as one of evidentiary sufficiency.

A party attacking the legal sufficiency of evidence supporting an adverse finding on an issue on which the party bore the burden of proof must demonstrate all vital facts in support of the issue were established as a matter of law. *Dow Chemical Co. v. Francis,* 46 S.W.3d 237, 241 (Tex. 2001) (per curiam); *Petroleum Synergy Group, Inc. v. Occidental Permian, Ltd.,* 331 S.W.3d 14, 21 (Tex. App.—Amarillo 2010, pet. denied). The analysis requires that we first examine the record in the light most favorable to the verdict for some evidence supporting the finding, crediting evidence favoring the finding if a reasonable fact finder could and disregarding contrary evidence unless a

reasonable fact finder could not. *City of Keller v. Wilson,* 168 S.W.3d 802, 807, 822 (Tex. 2005). Some evidence, meaning more than a scintilla, exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharms., Inc. v Havner,* 953 S.W.2d 706, 711 (Tex. 1997). If, however, no evidence appears to support the finding, we then examine the entire record to determine whether the contrary proposition is established as a matter of law. *Francis,* 46 S.W.3d at 241; *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.,* 766 S.W.2d 264, 276 (Tex. App.—Amarillo 1988, writ denied). A proposition is established as a matter of law when a reasonable fact finder could draw only one conclusion from the evidence presented. *City of Keller,* 168 S.W.3d at 814-16; *Brent v. Field,* 275 S.W.3d 611, 619 (Tex. App.—Amarillo 2008, no pet.).

A party challenging on appeal the factual sufficiency of evidence supporting a finding on an issue on which that party had the burden of proof at trial must demonstrate that the adverse finding is against the great weight and preponderance of the evidence. *Francis,* 46 S.W.3d at 242; *Maxus Exploration,* 766 S.W.2d at 276. On review under this standard, the court must consider and weigh all the evidence and may set aside the finding only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Francis,* 46 S.W.3d at 242; *see Maritime Overseas Corp. v. Ellis,* 971 S.W.2d 402, 407 (Tex. 1998) (court of appeals may set aside verdict only if it is so contrary to the overwhelming weight of the evidence that the verdict is clearly wrong and unjust). The appellate court may not pass on the witnesses' credibility or substitute its judgment for that of the trier of fact, even if the evidence would clearly support a different result. *Maritime,* 971 S.W.2d at 407.

A suit by an attorney against a client or former client for the recovery of attorney's fees under an hourly fee contract of representation is governed by the usual rules of contract law. *Howell v. Kelly,* 534 S.W.2d 737, 739 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (discussing contingent fee contract). To recover on the contract Carney was obligated to present sufficient evidence establishing: (1) the existence of a valid contract between the parties; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and (4) as a result of the breach the plaintiff was damaged. *Kleas v. Clark, Thomas & Winters, P.C.,* No. 03-12-00755-CV, 2013 Tex. App. LEXIS 10485, at *4 (Tex. App.—Austin Aug. 21, 2013, pet. denied) (mem. op.); *Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n,* 205 S.W.3d 46, 55 (Tex. App.—Dallas 2006, pet. denied) (stating elements).

The evidence showed Carney's charges to Ahmad totaled $32,903.27 and Ahmad's retainer and other payments totaled $19,351.79. Carney's suit sought the difference of $11,051.48. In its findings of fact, the trial court found Carney's billing statements and the witness testimony provided "so little detail as to be impossible for the Court to determine the [nature] of the work provided for which [Carney] was billing Ahmad." It further found, "Carney was unable to explain to the court either in his direct testimony or under cross examination the nature of the work provided on each date that he billed Ahmad."

We turn then to the sufficiency of Carney's proof of the "services rendered" under the contract. As noted, Carney chose to offer no evidence of the nature of the services performed and for which he sought to be paid. On appeal he argues, "detailed timesheets need not be introduced into evidence to prove attorney's fees." For the

contention he cites *Twin City Fire Ins. Co. v. Vega-Garcia,* 223 S.W.3d 762 (Tex. App.—Dallas 2007, pet. denied); *In re M.A.N.M.,* 231 S.W.3d 562 (Tex. App—Dallas 2007, no pet.); and *Diamond v. San Soucie,* 239 S.W.3d 428 (Tex. App.—Dallas 2007, no pet.). We find these cases inapposite for resolution of the question at hand. To the point, none authorize recovery of attorney's fees, on a client's breach of an hourly-fee contract by non-payment, without some descriptive evidence of the nature of the legal services performed in consideration for the fee sought. Indeed, a paragraph in the Carney-Ahmad contract entitled "Attorney Fee" begins with the statement "Attorney will be compensated for services rendered . . . ." For a fact finder to determine whether the attorney is due unpaid compensation under the contract, it must have some evidence of the "services rendered."

The trial court's express and implicit findings that Carney did not prove the performance element of his breach-of-contract claim are not so against the great weight and preponderance of the evidence as to be manifestly unjust or clearly wrong. Because this evidence was factually sufficient, analysis of its legal sufficiency is unnecessary to the disposition of this appeal. TEX. R. APP. P. 47.1. Further, because Carney did not sufficiently prove one essential element of his breach-of-contract cause of action our analysis of the sufficiency of the evidence supporting the trial court's findings on the remaining elements is also unnecessary. Carney's first, second, and third issues are overruled.

Withdrawal of Deemed Admissions

In his fourth and fifth issues Carney challenges the trial court's ruling allowing withdrawal of Ahmad's deemed admissions.

Carney served Ahmad with requests for admissions in cause number 324-494783-11. The record gives no indication Ahmad served a response. Carney's suit for attorney's fees was later severed into cause number 324-538990-13. On the day of trial, asserting surprise, Ahmad's new counsel orally moved for withdrawal of the admissions. The request was granted and the court permitted Carney to read each requested admission into the record as an offer of proof.

We review a trial court's ruling on a motion to withdraw deemed admissions for an abuse of discretion. *Bernstein v. Adams,* No. 01-12-00703-CV, 2013 Tex. App. LEXIS 11093, at *8 (Tex. App.—Houston [1st Dist.] Aug. 29, 2013, no pet.) (mem. op.); *see Marino v. King*, 355 S.W.3d 629, 633 (Tex. 2011) (per curiam) (same). "A trial court abuses its discretion when it acts arbitrarily or unreasonably, without reference to guiding rules or principles." *Iliff v. Iliff,* 339 S.W.3d 74, 78 (Tex. 2011) (citing *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241-42 (Tex. 1985)).

We find no abuse of discretion here because the admissions Carney sought to use against Ahmad in the underlying breach-of-contract case were from another case, the divorce action. In part, civil rule 41 provides, "[a]ny claim against a party may be severed and proceeded with separately." TEX. R. CIV. P. 41. "A severance splits a single suit into two or more independent actions, each action resulting in an appealable final judgment." *Van Dyke v. Boswell, O'Toole, Davis & Pickering,* 697 S.W.2d 381, 383

(Tex. 1985). "Any admission made by a party under this rule may be used solely in the pending action and not in any other proceeding." TEX. R. CIV. P. 198.3. *See Crowson v. Wakeman,* No. 05-93-01552-CV, 1996 Tex. App. LEXIS 2158, at 12-13 (Tex. App.—Dallas May 29, 1996, no writ) (not designated for publication) (concluding in a probate case involving multiple parties and multiple claims, admissions deemed admitted against a party in the will contest could not be used against her in the heirship proceeding); *Osteen v. Glynn Dodson, Inc.,* 875 S.W.2d 429, 431 (Tex. App.—Waco 1994, writ denied) (holding admissions deemed admitted in a suit terminated by non-suit were not binding against the admitting party when the case was refiled). While the effect of rule 198.3 may seem harsh here, Carney might have ameliorated its effect had he obtained an order from the trial court under rule 191.1.[2] No such order appears in the record, however. Carney's fourth and fifth issues are overruled.

Conclusion

Having overruled Carney's issues, we affirm the trial court's judgment.

James T. Campbell
Justice

[2] In part rule 191.1 provides, "Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order for good cause." TEX. R. CIV. P. 191.1.