



NUMBER 13-15-00042-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

BELINDA LOPEZ,

Appellant,

v.

SANTOS MALDONADO JR.,

Appellee.

On appeal from the 275th District Court
of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Garza, and Longoria
Memorandum Opinion by Justice Garza

By a single issue, appellant Belinda Lopez contends the trial court erred in granting summary judgment for attorneys' fees and expenses in favor of her former counsel, appellee Santos Maldonado. We reverse the trial court's summary judgment and remand for further proceedings.

I. BACKGROUND

In November 2010, Lopez filed a petition for divorce from her husband, Erasmo Lopez. In July 2011, she retained Maldonado to represent her in the divorce. Lopez and Maldonado signed a “Contingent Contract of Employment” on July 21, 2011.

The parties and their attorneys met on February 25, 2013 and again on May 22, 2013 and dictated terms of a purported agreement to a court reporter. Lopez contends that Maldonado advised her to accept property valuations and a property distribution that were not in her interest. For example, she argues that Maldonado advised her to accept a valuation of furniture of \$150,000, although the furniture was worth substantially less. She also contends that Maldonado advised her to accept a valuation of the community property residence of \$400,000, although the appraised value of the residence was \$219,000. After becoming dissatisfied with Maldonado’s representation, Lopez terminated him on October 2, 2013. On November 11, by written letter from her new counsel, Lopez withdrew her consent to the purported agreement.

On November 20, 2013, Maldonado filed an intervention in the divorce proceeding asserting that he was entitled to attorneys’ fees and costs for his representation of Lopez. On December 12, 2013, Lopez filed a response to Maldonado’s intervention, in which she alleged a counterclaim for legal malpractice in connection with Maldonado’s representation in the divorce. Despite Lopez’s repudiation of the purported agreement, the trial court granted the divorce decree based on the purported agreement on June 5, 2014.¹

¹ Eventually, the trial court severed the divorce into one proceeding and Maldonado’s claim for attorneys’ fees and Lopez’s malpractice claims into this proceeding. Lopez appealed the judgment in the divorce in a related appeal, *Lopez v. Lopez*, No. 13-14-514-CV, ____WL____ (Tex. App.—Corpus Christi Dec. 21, 2016, no pet. h.) (mem. op.).

On July 3, 2014, Lopez filed a motion for new trial, in which she argued that the trial court erred in granting judgment on the purported agreement because she had repudiated the agreement.

On July 28, 2014, Maldonado filed a traditional motion for summary judgment on his own claims, in which he asserted entitlement to: (1) \$19,431.82 in expenses (\$24,431.82 in expenses minus a \$5,000 retainer paid by Lopez) and (2) pursuant to his contingent fee agreement with Lopez, 20% of the amount Lopez was to recover under the divorce. See TEX. R. CIV. P. 166a(c). As summary judgment evidence, Maldonado attached two exhibits: (1) the four-page contingent fee agreement with Lopez; and (2) a typewritten list of purported “case expenses” totaling \$24,431.82, minus the \$5,000 retainer, for a total of \$19,431.82.

Lopez filed a response to Maldonado’s motion, in which she argued that: (1) Maldonado’s claim for attorneys’ fees and costs was a claim for specific performance of the contingent fee contract, to which he was not entitled because he had breached his duties to her; (2) the contingent fee agreement provided that if Lopez terminated Maldonado—as she had—he was entitled only to a “reasonable fee,” not the 20% contingency fee; (3) the contingent fee contract was voidable at Lopez’s option because it contained a provision prohibiting settlement without Maldonado’s consent, in violation of Texas Disciplinary Rule of Professional Conduct 1.02(a)(2), see TEX. DISCIPLINARY R. PROF’L CONDUCT 1.02(a)(2), *reprinted in* TEX. GOV’T CODE ANN. tit. 2, subtit. G, app. A (West, Westlaw through September 1, 2016); and (4) Maldonado proffered no evidence to establish the alleged expenses. Lopez attached her own affidavit to her response.

On October 21, 2014, Lopez filed a traditional motion for summary judgment on her claims and Maldonado's claims, see TEX. R. CIV. P. 166a(c), in which she made the same arguments that she made in her response to Maldonado's motion. As summary judgment evidence, Lopez attached the petition for divorce, her own affidavit, and the contingent fee contract. On October 29, 2014, Lopez filed a no-evidence motion for summary judgment. See *id.* R. 166a(i). In her motion, Lopez alleged that Maldonado had "no evidence to demonstrate he is entitled to recover anything" from her pursuant to the contingent fee contract.

On October 23, 2014, the trial court granted Maldonado's motion for summary judgment, granting him expenses in the amount of \$19,431.82 and the "contractual amount of 20% of [Lopez's] recovery" ²

On November 12, 2014, Lopez filed a "Supplemental Traditional Motion for Summary Judgment," in which she argued that the contingent fee contract is unenforceable as against public policy because it contains a provision requiring her to obtain Maldonado's consent to settle. The following day, November 13, 2014, Lopez filed a "Supplemental Counterclaim" to Maldonado's petition in intervention, in which she asserted that the contingent fee contract is "unenforceable as a matter of law."

On November 26, 2014, Maldonado filed a response to Lopez's no-evidence motion. Maldonado attached several documents as evidence, which he alleged constituted "summary judgment proof of the existence of a material fact concerning entitled [sic] of attorney[s]' fees and expenses" pursuant to the contingent fee contract. Maldonado attached: (1) a copy of the contingent fee contract; (2) the typed list of Lopez's

² The order did not state that Lopez's motion for summary judgment was denied, and did not state that her malpractice claim was dismissed.

case expenses, totaling \$19,431.82; (3) his own affidavit, in which he outlines the division of the community property, states that Lopez's share of the community estate was \$1,155,000, and states that pursuant to the contingent fee contract, he is entitled to 20% of her share or \$231,000, plus expenses of \$19,431.82; (4) a copy of the transcript from the February 25, 2013 purported agreement of the parties; (5) a copy of the transcript from the May 22, 2013 purported agreement of the parties; and (6) copies of checks from Lopez's ex-husband to Lopez (presumably evidencing Lopez's receipt of community property).

On December 3, 2014, the trial court held a hearing purportedly on Lopez's motions. At the hearing, however, Lopez's counsel primarily argued that the trial court had erred in earlier granting Maldonado's motion for summary judgment and should reconsider its ruling. For example, Lopez's counsel argued that: (1) the contingent fee contract provided that if Maldonado were terminated, he was entitled only to a reasonable fee, not the 20% contingency fee³; (2) the contingent fee contract was unenforceable because it contained a provision requiring Lopez to obtain Maldonado's consent to settle; and (3) Maldonado's summary judgment evidence failed to establish that his fees or expenses were reasonable and necessary. Maldonado's counsel argued that, by granting his motion for summary judgment on attorneys' fees, the trial court had effectively already denied Lopez's motion for summary judgment on her malpractice claim. In contrast, Lopez's counsel argued that the malpractice claim had been severed and was therefore not before the trial court at that time. The trial court took matters under

³ At the hearing, Lopez's counsel stated that the trial court held a hearing on Maldonado's motion for summary judgment on September 4, 2014. There is no reporter's record of a September 4, 2014 hearing before us in this appeal.

advisement and did not issue a ruling. No order ruling on Lopez's motions appears in the record.

II. STANDARD OF REVIEW AND APPLICABLE LAW

We review summary judgments de novo. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156 (Tex. 2004). We review the evidence presented in the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). The party moving for traditional summary judgment bears the burden of showing no genuine issue of material fact exists and it is entitled to judgment as a matter of law. *Id.*; see TEX. R. CIV. P. 166a(c). When both sides move for summary judgment and the trial court grants one motion and denies the other, we review the summary judgment evidence presented by both sides and determine all questions presented. *Fielding*, 289 S.W.3d at 848. In such a situation, we render the judgment that the trial court should have rendered. *Id.*

III. DISCUSSION

Here, the order on appeal is the trial court's October 23, 2014 order granting Maldonado's motion for summary judgment. In her brief, Lopez addresses only that the trial court erred in granting Maldonado's motion. Lopez does not discuss the trial court's failure to rule on her motions. Accordingly, our discussion will be limited to whether the trial court erred in granting Maldonado's motion for summary judgment.

By a single issue, Lopez contends the trial court erred in granting Maldonado's motion for summary judgment because he failed to establish that he was entitled to

attorneys' fees and expenses. By several sub-issues, she argues that: (1) because she terminated him, he is not entitled to the 20% contingency fee, but only to a reasonable attorneys' fee; (2) Maldonado failed to establish that his attorneys' fees were reasonable; and (3) the contingent fee contract is not enforceable under Texas law.

We begin with Lopez's last sub-issue: that the contingent fee contract is unenforceable and voidable because it contains a clause prohibiting settlement without Maldonado's consent in violation of Texas Disciplinary Rule of Professional Conduct 1.02(a)(2). See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a)(2).⁴ We agree with Lopez.⁵

The contingent fee contract—offered by Maldonado as summary judgment evidence—contains the following provision: “Client will make no settlement of the claim herein, or accept any sum as reimbursement for any bodily injuries or expenses, without the Attorney's consent.” In *Sanes v. Clark*, the Waco Court of Appeals held that an attorney's employment contract that contained a similar provision authorizing the attorney to settle his client's case without the consent of the client violated Texas Disciplinary Rule of Professional Conduct 1.02(a)(a), and that the provision rendered the entire contract voidable at the clients' option. 25 S.W.3d 800, 805 (Tex. App.—Waco 2000, pet. denied) (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a)(2)). Similarly, this Court, in *Davis Law Firm v. Bates*, held that a contract including a clause prohibiting settlement without the attorney's consent violated Texas Disciplinary Rule of Professional Conduct

⁴ Texas Disciplinary Rule of Professional Conduct 1.02(a)(2) requires that an attorney “abide by a client's decision[]” regarding whether to accept a settlement offer. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a)(2), reprinted in TEX. GOV'T CODE ANN. § tit. 2, subtit. G, app. A (West, Westlaw through 2016) (TEX. STATE BAR R. art. X, § 9). See also *id.* R. 1.04 cmt. 9 (noting that contingent fee arrangements in domestic relations cases are rarely justified).

⁵ We note that Lopez made this argument in her response to Maldonado's motion for summary judgment.

1.02(a)(2) and was unenforceable as against public policy. No. 13-13-00209-CV, 2014 WL 585855, at *3 (Tex. App.—Corpus Christi Feb. 13, 2014, no pet.) (citing *In re Plaza*, 363 B.R. 517, 521–22 (Bankr. S.D. Tex. 2007)). We conclude that the contingent fee contract was voidable at Lopez’s option. See *Clark*, 25 S.W.3d at 805; see also *Bates*, 2014 WL 585855, at *3.

Even if we were to assume, without deciding, that the provision prohibiting settlement without Maldonado’s consent was severable, the contingent fee contract provides that if Lopez terminated the contract—as she indisputably did—then Maldonado was entitled to a “reasonable fee” pursuant to guidelines approved by the Texas Supreme Court and Code of Professional Responsibility. Maldonado’s only summary judgment evidence attached to his motion was the typed half-page list entitled “Belinda Lopez[s] Case Expenses,” which listed various expenses totaling \$19,431.82. On September 3, 2014, Maldonado submitted a “Billing Records Affidavit Pertaining to Belinda Lopez,” in which he attached the same list of expenses and stated that the “service” provided was “necessary” and the amount charged for the service was “reasonable.”⁶ Maldonado offered no evidence whatsoever regarding attorneys’ fees, and the list of expenses is devoid of any detail or explanation. Maldonado failed to provide any evidence supporting a claim for reasonable attorneys’ fees and failed to establish that his expenses were necessary or reasonable. Because Maldonado failed to establish that he was entitled to

⁶ We note the September 3, 2014 “Billing Records Affidavit” does not appear in the record in this case. Instead, it was included in the record of the related case, *Lopez*, ____WL at *____. Even if the trial court considered the document, we find that it provided no evidence of Maldonado’s entitlement to attorneys’ fees or expenses.

recover attorneys' fees or expenses from Lopez, the trial court erred in granting summary judgment in Maldonado's favor.⁷

We sustain Lopez's sole issue.

IV. CONCLUSION

We reverse the trial court's order granting summary judgment in Maldonado's favor and remand the cause for further proceedings consistent with this opinion.

DORI CONTRERAS GARZA
Justice

Delivered and filed the
21st day of December, 2016.

⁷ We note that, on remand, Maldonado may offer evidence that he is entitled to reasonable attorney's fees.