

IN THE UTAH COURT OF APPEALS

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Christopherson, Farris, White)	MEMORANDUM DECISION
& Utley, P.C.,)	(Not For Official Publication)
)	
Plaintiff and Appellee,)	Case No. 20040705-CA
)	
v.)	F I L E D
)	(February 24, 2006)
Deanna Pugh,)	
)	2006 UT App 68
Defendant and Appellant.)	

Fifth District, St. George Department, 030501122
The Honorable G. Rand Beacham

Attorneys: Michael W. Sanft, Las Vegas, Nevada, for Appellant
Heath H. Snow, St. George, for Appellee

Before Judges Greenwood, Billings, and McHugh.

GREENWOOD, Associate Presiding Judge:

Defendant Deanna Pugh (Ms. Pugh) appeals the trial court's grant of summary judgment on behalf of Plaintiff Christopherson, Farris, White & Utley, P.C. (the Law Firm). We affirm.

The instant case arises out of the Law Firm's representation of Ms. Pugh in prior litigation, culminating in Pugh v. Dozzo-Hughes, 2005 UT App 2003, 112 P.3d 1247. In Dozzo-Hughes, we reversed the trial court's grant of summary judgment for Ms. Pugh in a case involving the disposition of her son's remains. See id. at ¶¶1-7. Prior to committing suicide, the decedent wrote a note addressed to Ms. Pugh stating his wish that his remains be cremated and his ashes placed in the Rio Grande River. See id. at ¶¶3-4. Ms. Pugh, however, arranged for the decedent's burial at a cemetery in St. George, Utah. See id. at ¶5. Subsequently, the decedent's wife learned of the note's contents. Believing that the decedent's wishes had not been honored, his wife sought to have his remains disinterred so that they could be cremated. See id. at ¶8. The trial court granted summary judgment for Ms. Pugh, permanently enjoining the decedent's wife from disinterring and cremating the decedent's remains. See id. at ¶11. On appeal, we reversed, noting that there were disputed issues of

material fact and determining that the trial court erred by improperly weighing and evaluating evidence. See id. at ¶26.

Before the Law Firm undertook representation of Ms. Pugh, the parties entered into a signed legal services contract. However, Ms. Pugh apparently became dissatisfied with the representation provided by the Law Firm. While the case was still in the trial court, the Law Firm withdrew and Ms. Pugh retained new legal counsel.

The Law Firm subsequently filed this action against Ms. Pugh for breach of contract. In its complaint, the Law Firm alleged the parties had entered into a contract for legal services and that it had performed such services and advanced costs, for which Ms. Pugh had agreed to pay. The Law Firm also claimed that Ms. Pugh had breached the contract and the firm had suffered financial damages. In addition, the Law Firm alleged that it had demanded payment from Ms. Pugh and she had refused to pay. The Law Firm claimed that Ms. Pugh owed \$9806 as of April 17, 2003, plus interest as provided for in the contract. The Law Firm also sought attorney fees under the contract.

Ms. Pugh answered, admitting she signed the contract. In her answer, she denied the breach of contract claim and other allegations. Ms. Pugh also filed counterclaims for breach of contract, breach of fiduciary duty, fraud, and intentional infliction of emotional distress.

After numerous filings and arguments in the trial court, the trial court granted the Law Firm summary judgment on its breach of contract claim and dismissed all of Ms. Pugh's counterclaims. This appeal followed.

Summary judgment is proper when there is no genuine issue of material fact and "the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). "When reviewing a grant of summary judgment, we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Carrier v. Salt Lake County, 2004 UT 98, ¶3, 104 P.3d 1208.

Ms. Pugh first alleges that the trial court erred in granting the Law Firm summary judgment on its breach of contract claim. She argues that the Law Firm's pleadings were inadequate and that material issues of fact remained concerning the amount owed and the reasonableness of the fees claimed by the Law Firm. As support for her claims, Ms. Pugh refers repeatedly to a billing for services rendered after the Law Firm withdrew as counsel and a sample invoice. However, the Law Firm, in proceedings involving an earlier motion for summary judgment,

clarified that a clerical error had occurred, that it did not seek to collect for the billing of services after its withdrawal, and that it deducted the post-withdrawal fees from its billing and from the amount sought in summary judgment. The Law Firm's first motion was denied, but clarification of the billing clearly occurred at that point in the litigation. In the Law Firm's second motion for summary judgment, filed May 11, 2004, this issue had been resolved and the judgment sought included only fees for the services rendered before withdrawal. Therefore, there is no issue of fact concerning this item.

The Law Firm's motion for summary judgment attached a memorandum in support thereof, affidavits of attorneys with the Law Firm who had worked on Ms. Pugh's case, answers to requests for admission by Ms. Pugh, and Ms. Pugh's amended proposed pretrial order. In the course of the proceedings on the motion for summary judgment, the Law Firm also provided ledgers and billing statements describing the work done, the time spent, the lawyers or staff who performed services, their charging rate, and the amounts charged for those services. Also included was the trial court docket from the earlier case that identified the documents filed by the Law Firm in that case. The affidavits averred the work done, the reasonableness of charges, and the similarity of rates to those in the legal community.

Ms. Pugh opposed summary judgment on the contract claim, submitting various memoranda and her own affidavit. In addition to resurrecting the settled issue of the post-withdrawal fee, Ms. Pugh generally claimed that the Law Firm's work was incompetent and the fees charged were unfair and/or unreasonable. However, she did not present any admissible evidence or cite any authority disputing the reasonableness of the rates.¹

In Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, 70 P.3d 17, the supreme court announced the elements necessary to prove breach of a legal services contract in Utah:

"To properly state a cause of action for breach of contract in the context of legal representation and an attorney-client relationship, a plaintiff must plead '(1)

¹For example, Ms. Pugh argues that the Law Firm's rates were unfair because part of the Law Firm's staff was comprised of legal assistants, rather than paralegals. Such an argument is clearly unavailing because the legal services agreement entered into by Ms. Pugh and the Law Firm states that all services are billed on an hourly basis, including those services performed by nonattorney staff, and enumerates the rates for those services.

[existence of] a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of the express performance by the defendant; and (4) damages to the plaintiff resulting from the breach.'"

Id. at ¶32 (quoting 1 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 8.5, at 590 (4th ed. 1996)) (alteration in original).

In the instant case, the Law Firm's complaint included all four of the Bennett elements. Therefore, Ms. Pugh's argument that the elements were not properly pleaded is without merit.

In opposing summary judgment, Ms. Pugh was required to "set forth specific facts showing that there [was] a genuine issue for trial." Utah R. Civ. P. 56(e). This she has failed to do. Ms. Pugh offers only her own opinion and speculation about the reasonableness of fees and the competence of the Law Firm. She provides no admissible evidence by expert opinion or otherwise. Moreover, Ms. Pugh's argument concerning the Law Firm's competence is refuted, in part, by the Law Firm's success in obtaining a permanent injunction in her case below. In sum, a nonmoving party is required to demonstrate disputed issues of material fact. See Dairy Prod. Servs. v. City of Wellsville, 2000 UT 81, ¶54, 13 P.3d 581. As the trial court indicated, Ms. Pugh apparently misunderstood the attorney-client relationship and the nature of legal services. Her mere opinion, without substantiation, is not enough to defeat the Law Firm's motion for summary judgment. See Walker v. Rocky Mountain Recreation Corp., 29 Utah 2d 274, 508 P.2d 538, 542 (1973) (explaining that "[s]tatements made merely on information and belief will be disregarded.").

Ms. Pugh further asserts that it was improper for the trial court to dismiss her fraud, breach of contract, breach of fiduciary duty, and intentional infliction of emotional distress claims. We do not agree. Instead, we agree with the Law Firm that each counterclaim was not properly pleaded by Ms. Pugh. Furthermore, the "facts" asserted by Ms. Pugh do not constitute sufficient support for those causes of action. For example, the legal services contract states that the firm "encourages a process of communication with its clients as legal work proceeds to insure not only that they are kept abreast of events, but that matters progress to their satisfaction." Ms. Pugh claims that the Law Firm's communication with her was inadequate and therefore bolsters her claim for breach of contract and her counterclaims. The contract language does not support her contention, affidavits of the Law Firm's staff contradict her claim, and even she does not argue that the Law Firm failed

completely to communicate with her. As with her defense to the Law Firm's breach of contract claim, Ms. Pugh's response "reveals no evidentiary facts but merely reflects [her] unsubstantiated opinions and conclusions." Id. As a result, this argument, too, is unpersuasive.

Finally, Ms. Pugh asserts the trial court erred in awarding attorney fees incurred by the Law Firm's counsel. In her briefing to this court and the trial court, Ms. Pugh mixes the issues of fees recoverable by the Law Firm pursuant to the legal services contract for the Law Firm's services to Ms. Pugh, with those recoverable for fees incurred in this action. The contract clearly provides for both types of fees, stating that "[a]ll the costs and expenses, including but not limited to, reasonable attorney[] fees incurred in collecting such delinquent account shall be added to [a client's] bill." As to these fees, Ms. Pugh claims that the fee request does not comply with rule 73, which states, in relevant part:

- (a) When attorney fees are authorized by contract or by law, a request for attorney fees shall be supported by affidavit or testimony
- (b) An affidavit supporting a request for or augmentation of attorney fees shall set forth:
 - (b)(1) the basis for the award;
 - (b)(2) a reasonably detailed description of the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work;
 - (b)(3) factors showing reasonableness of the fees [.]

Utah R. Civ. P. 73(a), (b)(1)-(3).

Counsel for the Law Firm provided an itemization of fees incurred, which detailed the date, time, who had performed the service, and a description of the tasks performed. The trial court, apparently sua sponte, deducted charges for nonattorney fees from the attorney fee award. Ms. Pugh nevertheless argues that the trial court should not have awarded attorney fees for defending against her counterclaims. This is true in many cases. See Loosle v. First Fed. Sav. & Loan Ass'n, 858 P.2d 999, 1003 (Utah 1993) (determining attorney fee provision in trust deed and promissory note did not contemplate attorney fees for quiet title action); Turtle Mgmt., Inc. v. Haggis Mgmt., Inc., 645 P.2d 667, 671 (Utah 1982) (stating that attorney fees authorized by

contract are awardable only in accordance with explicit terms of the contract); Maynard v. Wharton, 912 P.2d 446, 451 (Utah Ct. App. 1996) (same). However, in the instant case, we agree with the trial court that legal work performed on the complaint for breach of contract was inextricably mixed with the defense on the counterclaims. Ms. Pugh relied on the same factual assertions for the entire case, based on her belief that the Law Firm had not properly represented her in the prior case. Hence, the trial court did not abuse its discretion in awarding the Law Firm attorney fees incurred in this case. See Valcarce v. Fitzgerald, 961 P.2d 305, 319 (Utah 1998) ("[W]hen a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal.") (quotations and citation omitted); R & R Energies v. Mother Earth Indus., Inc., 936 P.2d 1068, 1081 (Utah 1997) (where party entitled to attorney fees below prevails on appeal, attorney fee award on appeal is proper); Dejavue, Inc. v. U.S. Energy Corp., 1999 UT App 355, ¶21, 993 P.2d 222 (determining that the trial court did not abuse its discretion by awarding attorney fees where plaintiff successfully defended against defendant's breach of contract counterclaim, and plaintiff's contract and tort claims were based on "related legal theories involving a common core of facts").²

We affirm.

Pamela T. Greenwood,
Associate Presiding Judge

WE CONCUR:

Judith M. Billings, Judge

Carolyn B. McHugh, Judge

²The Law Firm does not request an award of attorney fees incurred on appeal. Accordingly, we do not consider any possible entitlement to such fees. See Utah R. App. P. 24(a)(9).