Mann v. Watts, No. 1948-07 CnSC (Katz, J., Aug. 18, 2008)

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STATE OF VERMONT SMALL CLAIMS COURT
Chittenden County, ss.: Docket No. 1948-07 CnSC

MANN

v.

WATTS

ENTRY
(Motion for Reconsideration)

Defendant, Attorney Watts, seeks reconsideration of our denial of his request to reopen this Small Claims case, in which he failed to appear at trial. We have reviewed his papers.

Plaintiff Mann is a psychologist who was retained to be an expert witness for a client of Watts. Mann seeks payment of the balance of his professional fee. A trial was scheduled for May 16, 2008, but Watts failed to appear, so judgment was entered against him. He then sought to "re-open" the case — in other words have a second trial scheduled — saying "this matter was inadvertently placed on [his] calendar for today (May 23). Hence he missed the hearing." His request to re-open raises two defenses: (1) that it is not Attorney Watts as an individual who is liable, but rather his firm, and (2) that even the firm is not liable, for the psychologist was really engaged by the client.

We denied the request to re-open, noting that it was Watts's error in failing to come to trial and he had failed to show that he has a meritorious defense. He has now responded with some greater detail.

Preliminarily, we note that there is no automatic right to a "do-over" trial. This is not backyard baseball. Ordinarily, if you fail to show up for trial, you lose. V.R.C.P. 55(b) (default judgment is appropriate sanction for failure to appear at trial).

On the question of whether Watts or his firm is liable for the expert's bill, the question is whether the evidence shows that Watts would probably prevail. We continue to conclude that Watts's May 24, 2004 letter constitutes significant evidence. While that letter was written to suggest to Plaintiff that the lawyer or his firm were not liable for their client's bill, it states "Our agreement was that he [the client] would cover all such expenses and we engaged you in that context — on his behalf." This sentence contains three concepts. First, the fact that Plaintiff was engaged on the client's behalf is so obvious it goes without saying. Obviously, he was engaged to further the client's case. Second, the statement "we engaged you" strongly suggests that either the lawyer or the law firm did the engaging, which is quite obviously what happened. It was the lawyer who communicated with the psychologist, not the client, on the issue of hiring him for use in litigation. Third, the first part of this sentence, "Our agreement was that he would cover all such expenses" is actually irrelevant. It constitutes communication between the attorney and the client. Mann was not a party to those communications and there is no reason to believe he should have known about them. They are not binding on him.

On the question before us, of responsibility for the witness fee, third-party discussions are irrelevant. Vis à vis Watts and Mann, the discussions of Watts with his client are the equivalent of undisclosed mental impressions, they are irrelevant to formation or contents of the contract at issue. <u>Quenneville v. Buttolph</u>, 2003 VT 82, ¶ 15; <u>Norton & Lamphere Const. Co. v. Blow & Cote, Inc.</u>, 123 Vt. 130, 135. Indeed, this is apparently the conclusion in a decision involving Attorney Watts retaining an expert witness for the very same client. <u>Independent Rehab. Res. v. Watts</u>, 2006 WL 5847297, at * 1 (No. 2005-531, July 12, 2006, unpub. Entry Order).

Moreover, in Watts's present motion to re-open, he proffers testimony "that all of his actions regarding the Sullivan case—including engaging plaintiff—were performed … on behalf of Mr. Sullivan …. [plaintiff] should have sued Mr. Sullivan…." On the one hand, it states the obvious, that Watts was working to present his client's case. On the other, however, Watts's more detailed setting out of the facts, even after receiving his adverse decision from the Supreme Court, contains not a whiff of evidence that Watts told Mann something to the effect of "by the way, I'm not responsible for the fee, only Sullivan is." It is only the communications to Mann that are relevant in explaining the contract formed by Watts and accepted by Mann. Arguably, the 2004 letter is ambiguous, in that it does say "our agreement was that [Sullivan] would cover all such expenses." Hence, it could be read to mean that "only Sullivan is liable to you." But even if it is ambiguous, Watts has proffered no admissible parol evidence to explain the ambiguity. Watts's discussions with his client, Sullivan, are not relevant, admissible evidence. V.R.E. 502(b) (attorney-client communications are privileged). Watts has suggested no communication to Mann of exclusive responsibility on the part of the client. We are still left with "we engaged you," and the legal principle that even an ambiguous contract document, if not accompanied by relevant, admissible evidence, raises a question of law, not a mixed question of fact and law. State Univ. Constr. Fund Aetna Cas. & Sur. Co., 189 A.2d 929, 931 (N.Y.A.D. 1993) (affirming trial court's grant of summary judgment based on ambiguous agreement and inadmissibility of movant's parol evidence). Without admissible parol evidence, there is no triable issue. Id.

Plaintiff Mann has written the court to say that defendant Watts called him to discuss resolution of the case three days before the scheduled hearing and then failed to return calls after he failed to appear in court. Mann suggests Watts was aware of the court date, but we have in mind that Mann does not show that he sent a copy of his letter to Watts. We therefore persist in the view that Watts has really shown no excusable neglect in failing to appear for trial and probably has no meritorious defense to Mann's contention that he or his firm is liable for the bill balance.

But this does not answer the contention that it is the corporate firm, not Watts personally, which is actually liable. That corporate entity is

referred to in the papers by two names. We do not know if one firm has changed its name, or if there are two firms. If two, we do not know if the successor is liable for the debts of the former.

Because we reject the notion that Watts is entitled to a second trial date, merely by asking for it, and it is anything but obvious that he is free of liability, we will condition the grant of a new trial on his payment to Mann of $500, as a rough estimate of a professional's loss of a half day's appointments, necessitated by coming to court a second time. That payment will not be a credit toward any judgment. If Watts delivers to the clerk a check made out to Mann, in the amount of $500, no later than fifteen days from date hereof, the clerk shall schedule a new trial and forward the check to Mann. If Watts fail to so deliver a check, the present motion shall be marked DENIED.

Dated at Burlington, Vermont, August ____, 2008.

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M. I. Katz, Judge