[Cite as *Baker & Hostetler, L.L.P. v. Delay*, 2009-Ohio-2507.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Baker & Hostetler, LLP,	:	
Plaintiff-Appellee,	:	No. 08AP-1007 (C.P.C. No. 07CVH-08-11751)
v.	:	(REGULAR CALENDAR)
Todd J. Delay,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 28, 2009

Baker & Hostetler, LLP, John H. Burtch, and *Joseph E. Ezzie*, for appellee.

Cooper & Elliott, LLC, Charles H. Cooper, Jr., and *Rex H. Elliott*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Defendant-appellant, Todd J. Delay, appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, Baker & Hostetler, LLP, in an action against appellant for failure to pay for legal services rendered. Because we find that there are no genuine issues of material fact and that appellee is entitled to judgment as a matter of law, we affirm.

{¶2} In September 2005, the United States Commodity Futures Trading Commission ("CFTC") brought a civil enforcement action against appellant and two others in federal court. On September 14, 2005, appellant contracted with appellee, through its partner, Robert M. Kincaid, Jr., to act as trial counsel in the CFTC action.[1] The contract provided that appellee's fees for legal services would be determined "by the amount of time our attorneys and paralegals spend and their applicable hourly rates in effect at the time our invoices are rendered." The contract also provided that "[i]n addition to fees for our professional services, there may be charges for expenses which we incur * * * and for other charges in connection with our engagement." In addition, the contract provided that appellee would provide appellant monthly invoices itemizing legal services, expenses, and other charges.

{¶3} Pursuant to the contract, appellee billed appellant on a monthly basis for the legal services rendered in the CFTC litigation. Monthly invoices dated October 28, 2005 to February 28, 2006, which included legal services rendered from August 9, 2005 through January 31, 2006, totaled $206,072.52.

{¶4} Sometime prior to March 7, 2006, appellant raised concerns with Kincaid about his mounting legal fees. Kincaid and appellant had several discussions about the fees. Kincaid memorialized these discussions in a letter dated March 7, 2006. In the letter, Kincaid reminded appellant that, prior to his engagement of appellee, another law firm had advised him that its fees for trying the case could exceed $1 million. Kincaid noted that "[w]hen we first started this litigation, * * * I told you I thought the case could be tried for $500,000 - $700,000, plus the experts' fees. I also told you the experts' fees

[1] The contract is dated September 14, 2005; appellant signed it on September 20, 2005.

could be as much as $100,000." He further stated that "[w]hile I do not believe this case will cost $1 million to try, I do believe we are on track with the estimate that I gave you for both attorneys' fees and experts' fees." Kincaid also stated that "[y]ou have always maintained that the case could be tried for $250,000 - $300,000 and I think I told you on two or three different occasions that that was not going to happen."

{¶5} Kincaid further wrote that "[w]ith respect to expenditures between now and the trial date, you can expect to incur the same type of monthly fees with our firm that you did last month." He also stated that appellee's management committee would not permit him to try the case unless appellant's bill was current. Indeed, Kincaid stated that "[o]ur firm's risk on this at any one time is about $200,000, which would include the outstanding bill for the previous thirty days plus the amount of work currently being done but which would not be billed until the end of the month."

{¶6} Kincaid told appellant he wrote the letter to allow appellant time to cash flow the upcoming expenses and to determine whether he wanted to attempt to settle the case or proceed to trial. Kincaid opined that settlement efforts would likely prove unsuccessful, but cautioned that, if appellant was unable to pay the costs of a trial, he and Kincaid would need to discuss other options.

{¶7} After transmittal of the March 7, 2006 letter, appellee continued to bill appellant for ongoing legal services rendered in the CFTC matter. Invoices dated from March 31, 2006 through October 25, 2006, which included legal services provided from February 1, 2006 through September 30, 2006, totaled $599,733.54. After a two-week bench trial, the federal court entered judgment in favor of appellant on all claims asserted

by the CFTC. In sum, appellee billed appellant $805,806.07 for legal services provided during the CFTC litigation.

{¶8} Appellant ultimately refused to pay $209,958.90. As a result, on August 31, 2007, appellee filed a three-count complaint alleging that appellant was in breach of contract (Count One); was liable to appellee on his account (Count Two); and was unjustly enriched by his failure to compensate appellee for its provision of legal services (Count Three). Appellee attached to its complaint a copy of the September 14, 2005 contract and sought damages thereunder in the amount of $209,958 plus statutory interest.

{¶9} Appellant, on October 29, 2007, filed his answer and counterclaim. In his answer, appellant asserted that the September 14, 2005 contract was "not his complete contract" with appellee. He further asserted that the amount appellee billed for services was excessive, unreasonable, and inconsistent with the contract. Appellant's counterclaim alleged that, prior to September 14, 2005, appellee and appellant discussed the legal services to be performed as well as an estimate of total fees to be billed by appellee for performance of those services and that appellee breached the agreement by billing appellant twice the estimated fees. Appellant further alleged that appellee had a duty to inform him of the revised estimate of fees prior to providing the legal services, that appellee "failed to advise [him] that the original estimate of fees was to be exceeded and unilaterally modified their agreement," and that appellee "billed [him] excessive fees for services rendered under the parties agreement and further that the fees were unreasonable under Ohio law."

{¶10} On November 1, 2007, appellee filed its reply to appellant's counterclaim. Appellee admitted that Kincaid and appellant discussed estimated total fees prior to September 14, 2005, but denied that it breached any agreement with appellant.

{¶11} Thereafter, appellee moved for summary judgment on its complaint and on appellant's counterclaim. Appellee argued that the fees charged appellant, pursuant to the September 14, 2005 agreement, were reasonable given the complex nature of the CFTC defense. Appellee further asserted that the September 14, 2005 agreement did not include a fee cap nor was it ever amended. Appellee further maintained that appellant never objected to appellee's monthly invoices nor asserted that any of the fees charged by appellant were unreasonable or excessive. Appellee argued that appellant had no evidence to prove that its fees were unreasonable and that appellant should be estopped from asserting such claim because he had espoused a contrary position in a separate action against his former employer where he sought indemnification for, among other things, reasonable attorney fees incurred in connection with the CFTC action. Appellee supported its motion with relevant portions of appellant's deposition testimony as well as the affidavit testimony of Kincaid, which incorporated by reference numerous exhibits pertaining to his representation of appellant, including the September 14, 2005 contract and the monthly invoices which provided a detailed account of the services provided to appellant and the fees associated with those services.

{¶12} In his memorandum contra appellee's motion for summary judgment, appellant challenged the reasonableness and validity of appellee's fees. In particular, appellant asserted that the March 7, 2006 letter essentially modified the September 14, 2005 fee agreement by capping the fees at $500,000 to $700,000 and that appellee

breached the agreement by charging appellant more than the capped amount. Appellant further contended that appellee charged him for duplicative work already performed by outside attorneys. Appellant also argued that, because appellee did not provide independent expert testimony as to the reasonableness of its fees, the court was required to hold a hearing to determine the reasonableness of those fees.

{¶13} In a decision filed October 6, 2008, the trial court granted appellee's motion for summary judgment. The court held that appellee's evidentiary materials, particularly Kincaid's affidavit, established that appellee's rates and fees were reasonable considering the circumstances and complexity of the CFTC action. The court further held that appellant failed to present any opposing or contradictory evidence that appellee's fees were unreasonable. Accordingly, the court found that appellant had not demonstrated a genuine issue of material fact and appellee was thus entitled to summary judgment on its breach of contract claim. The court further determined that, since appellee had established by its own evidence that appellant was in breach of contract by failing to pay for the legal services rendered and presented invoices that further confirmed the amount owed appellee under the contract, appellee was entitled to summary judgment on its account claim. Finally, the court found that appellant had presented no evidence to support his counterclaim that appellee's fees were unreasonable or excessive. In addition, the court adopted appellee's estoppel argument. Accordingly, the court held that appellee was entitled to summary judgment on appellant's counterclaim. The court journalized its decision in a judgment entry filed October 16, 2008.

{¶14} Appellant appeals, assigning one error for our review:

> The trial court erred in granting summary judgment where the record contained evidence that facts material to plaintiff's claims were in sharp dispute.

{¶15} Appellant's sole assignment of error challenges the trial court's granting of summary judgment for appellee. Appellate review of summary judgment is de novo. *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103. Summary judgment is appropriate only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶16} The party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The moving party may not discharge its initial burden simply by making a conclusory assertion that the non-moving party has no evidence to prove its case. Id. Rather, the moving party must point to some evidence of the type listed in Civ.R. 56(C), which affirmatively demonstrates that the non-moving party has no evidence to support the non-

moving party's claims. Id. If the moving party fails to satisfy its initial burden, the court must deny the motion for summary judgment. Id. However, once the moving party discharges its initial burden, the non-moving party bears the burden of offering specific facts demonstrating a genuine issue for trial. Id. The non-moving party may not rest upon the mere allegations and denials in the pleadings, but, instead, must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. Id.; Civ.R. 56(E).

{¶17} Appellant contends the trial court improperly granted summary judgment to appellee. Appellant does not dispute that the September 14, 2005 contract states that appellee's fees would be determined by the amount of time appellee spent in defense of appellant in the CFTC action times the applicable hourly rates. However, appellant contends there is a genuine issue of material fact as to whether the parties orally and/or in writing modified the September 14, 2005 agreement to limit the total amount of appellant's legal fees to $700,000.

{¶18} Initially, we note that appellant did not raise an oral modification argument in the trial court. Appellant's counterclaim did not allege that the parties orally modified the written contract. Rather, appellant asserted that "*on or before* September 14, 2005, the [appellant] and [appellee] had additional verbal discussions regarding * * * the estimate of the total fees that *were to be billed.*" (Emphasis added.) Further, appellant did not argue in his memorandum contra appellee's motion for summary judgment that the parties orally modified the written agreement. Appellant's failure to assert this argument before the trial court waives the argument for purposes of appeal. *Wells Fargo Bank, NA v. Ward*, 10th Dist. No. 06AP-745, 2006-Ohio-6744, ¶16; *Porter Drywall, Inc. v. Nations Const., LLC*,

10th Dist. No. 07AP-726, 2008-Ohio-1512, ¶11. Even assuming the issue appellant now raises had been properly preserved for appeal, appellant would still be unable to demonstrate a genuine issue of material fact establishing that the parties orally modified the contract to cap appellant's legal fees at $700,000.

{¶19} Contracts may be written or oral. *Ayad v. Radio One, Inc.,* 8th Dist. No. 88031, 2007-Ohio-2493, ¶24, citing *Eckliff v. Walters,* 168 Ohio App.3d 727, 2006-Ohio-4817, ¶22. A written contract may be modified orally or by subsequent acts. Id., citing *Wilhelmy v. 15201 Detroit Corp.* (June 5, 1997), 8th Dist. No. 71290. However, " '[t]he general rule is that a written contract may be orally amended if the oral amendment has the essential elements of a binding contract.' " Id., quoting *Carrocce v. Shaffer* (Oct. 31, 1997), 11th Dist. No. 96-T-5521, quoting *Richland Buildings v. Thome* (1950), 88 Ohio App. 520, 527. The burden of proving an oral modification is on the party seeking to establish the modification. *Caldwell Banker Residential Real Estate Servs. v. Sophista Homes, Inc.* (Oct. 26, 1992), 2d Dist. No. CA-13191.

{¶20} In support of its motion for summary judgment, appellee attached, inter alia, the affidavit of Kincaid, who testified that, in his verbal discussions with appellant following execution of the contract, he quoted appellant an estimated fee in the range of $500,000 to $700,000. (Kincaid Affidavit, ¶5-6.) According to Kincaid, he did not negotiate a cap on the fees, and, in fact, advised appellant that the fees could exceed the estimate depending upon the amount of work required. (Kincaid Affidavit, ¶5-6.) He explained to appellant that the amount of work appellee would need to perform was directly dependent upon the CFTC's approach to prosecuting the case, a situation over which appellee had no control. (Kincaid Affidavit, ¶5-6.) Kincaid stated that he repeatedly cautioned appellant

that the range of fees discussed was an estimate and not a firm figure. (Kincaid Affidavit, ¶7.) He further advised appellant that he would remain responsible for paying any amounts which exceeded the estimate. (Kincaid Affidavit, ¶7.) According to Kincaid, appellant stated that he understood the quote was an estimate and that he would be responsible for the fees, even if they exceeded the estimate. (Kincaid Affidavit, ¶7.) Kincaid's affidavit thus establishes that the parties did not orally modify the written agreement to cap the fees at $700,000.

{¶21} The burden then shifted to appellant to point to or produce Civ.R. 56(C) evidence creating a genuine issue of material fact about the parties' alleged oral modification of the contract. As noted, appellant did not assert this argument before the trial court; as such, he did not point to or produce any Civ.R. 56(C) evidence in support of his claim. However, in his appellate brief, appellant cites selected portions of his deposition testimony which he asserts establish a genuine issue of material fact. For example, appellant notes in his testimony that, although he understood that under the contract appellee would charge him fees on an hourly basis, he and Kincaid discussed "parameters" regarding the likely total cost of the litigation. Depo., 45, 47, 49-50. However, appellant ultimately admitted that he and Kincaid never discussed "specific parameters" regarding the total cost of the fees. Depo., 57.

{¶22} Upon review of the evidence, we find that there is no genuine issue of material fact as to whether the parties orally modified the September 14, 2005 agreement to cap appellant's legal fees at $700,000. To be sure, both Kincaid's affidavit and appellant's deposition testimony establish that appellant and Kincaid discussed the legal fees after the contract was executed; however, appellant's own deposition testimony

establishes that these discussions did not result in the capping of the fees at $700,000. As such, no genuine issue of material fact exists as to whether the contract was orally modified such that it nullified the original terms of the contract.

{¶23} Appellant also argues that Kincaid's March 7, 2006 letter constituted a written modification of the September 14, 2005 contract. "[W]ritten contracts may be modified or amended by express agreement of the parties to the contract, either in writing or by parol." *Ashwell v. Dir., Ohio Dept. of Job & Family Servs.*, 8th Dist. No. 20522, 2005-Ohio-1928, ¶48.

{¶24} In his affidavit, Kincaid states that the March 7, 2006 letter merely memorialized his post-contract discussions with appellant regarding fees "reiterat[ing] to Mr. Delay that Baker & Hostetler's estimated fees for the Lawsuit ranged from $500,000.00 to $700,000.00." (Affidavit, ¶8.) Kincaid further states that "at no time was there an agreement to cap Baker & Hostetler's fees at $700,000." Kincaid's affidavit thus establishes that his March 7, 2006 letter did not constitute a written modification of the agreement to cap the fees at $700,000.

{¶25} The burden then shifted to appellant to point to or produce Civ.R. 56(C) evidence creating a genuine issue of material fact regarding the parties' alleged written modification of the contract. Appellant does not point to any Civ.R. 56(C) materials demonstrating that the parties expressly agreed to modify the written contract; rather, appellant argues that two assertions in Kincaid's March 7, 2006 letter establish a factual issue as to whether the fees would be capped at $700,000. Appellant first focuses on Kincaid's statement that "the case could be tried for $500,000.00 to $700,000.00." Appellant argues that "reasonable people could be expected to interpret such a quote as

that the fees would be not less than $500,000.00 nor more than $700,000.00." Even if we accept appellant's argument, it fails to account for another of Kincaid's assertions, i.e., that Kincaid "believe[d] we are on track with the estimate that I gave you for * * * attorneys' fees." Kincaid's latter assertion clearly establishes that the $500,000 to $700,000 range he quoted was merely an estimate, not a fixed amount.

{¶26} Appellant also points to Kincaid's statement that "[w]ith respect to expenditures between now and the trial date, you can expect to incur the same type of monthly fees with our firm that you did last month." Appellant contends that, since the last monthly invoice he received before Kincaid's letter totaled approximately $105,000, he expected all future monthly invoices to approximate that amount. According to appellant, many of the monthly invoices received after Kincaid's letter far exceeded $105,000.

{¶27} Kincaid's estimation of future monthly fees does not constitute an express agreement by the parties to modify the terms of the written contract. Other statements in Kincaid's letter clearly establish that any quoted amounts were intended as estimates, not set amounts. Further, we note that Kincaid's estimate was fairly accurate. As noted, the monthly invoices for legal services rendered for the six months following the March 7, 2006 letter totaled almost $600,000, which approximates the monthly fee Kincaid referenced in the letter. Accordingly, we find that no genuine issue of material fact exists as to whether the March 7, 2006 letter modified the original terms of the contract such that it nullified the original terms of the contract.

{¶28} Having concluded that appellant failed to establish a genuine issue of material fact as to either an oral or written modification of the September 14, 2005

contract, we find that the evidence submitted by appellee supported the trial court's determination that appellee was entitled to summary judgment on its claims on appellant's account and for breach of contract and on appellant's counterclaim that appellee's fees were unreasonable and excessive. As noted, the September 14, 2005 contract unambiguously states that appellee's fees would be based upon the hours worked times the applicable billing rate of the individual providing the service. The contract does not contain a cap on fees. Kincaid's affidavit incorporates by reference the monthly invoices submitted to appellant pursuant to the contract, which detailed the services appellee performed on his behalf. The invoices include the date and description of the services performed for the billing period, the name of the attorney performing the services, and the hours expended in performing the services; accordingly, the invoices constitute a valid account for the services rendered. See *Gabriele v. Reagan* (1988), 57 Ohio App.3d 84, 87. Kincaid's affidavit also avers that appellant owes $209,958.90 in unpaid legal fees under the contract, thereby establishing that appellant breached the contract.

{¶29} Kincaid's affidavit further establishes that appellee's fees were reasonable and commensurate with the work performed. Factors to be considered in determining the reasonableness of legal fees include, inter alia, (1) time and labor, novelty of issues raised, and necessary skill to pursue the course of action; (2) customary fees in the locality for similar legal services; (3) result obtained; and (4) experience, reputation, and ability of counsel. *Brannon & Assoc. v. Barnard* (Dec. 31, 1997), 2d Dist. No. 16693, citing *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 35.

{¶30} Testimony of the attorney seeking recovery of fees that the case involves complex issues, that the fees were within a reasonable range for that type of case, and

that the client never questioned statements sent to the client constitutes sufficient evidence to establish the reasonableness of the charged fees, thereby negating the need for independent expert testimony. Id., citing *Thomas & Boles v. Burns* (Mar. 31, 1994), 8th Dist. No. 64995. See also *Reminger v. Reminger Co., L.P.A. v. Fred Siegel Co., L.P.A.,* 8th Dist. No. 77712 (stating that, if a client does not complain during representation that legal fees are unreasonable or excessive, and the attorney keeps the client apprised of the work being performed, then the attorney who bills the fees may provide expert testimony as to the reasonableness of the fees).

{¶31} Here, Kincaid's affidavit states that "[t]he rates charged by the attorneys and paralegals working on [appellant's] behalf were reasonable considering the experience, reputation, and ability of those providing the work, and are commensurate with rates charged by comparable attorneys in this State." (Affidavit, ¶13.) He further avers that "[t]hese rates are based upon the prevailing rates in the geographical area in which the attorney or paralegal practices, as well as their experience and the nature of their practice. (Affidavit, ¶13.) Kincaid further asserts that "[a]t all times, work was assigned to attorneys and paralegals consistent with their knowledge and skill level." (Affidavit, ¶13.) He also avers that "[d]uring [appellee's] representation of [appellant], [appellant] never declared any dissatisfaction with [appellee's] services, [and] never stated that [appellee's] fees were unreasonable or excessive." (Affidavit, ¶10.) Kincaid ultimately opined that "based on my 30-years of experience in civil litigation, * * * the fees incurred by [appellant] are reasonable and necessary considering the complex nature of the matter, the expertise and experience of the attorneys and paralegals that worked for [appellant], the

work necessary in order to defend [appellant], and the success of [appellee's] efforts." (Affidavit, ¶14.)

{¶32} In his reply brief, appellant appears to dispute Kincaid's affidavit testimony that, during appellee's representation, appellant never expressed any dissatisfaction with appellee's services and never stated that appellee's fees were unreasonable or excessive. Appellant contends that he did object to the escalating fees during the representation and cites Kincaid's March 7, 2006 letter, wherein Kincaid acknowledged appellant's frustration with the cost of the litigation, as evidence that he did so. Appellant's argument suggests that Kincaid's affidavit may not be used to establish the reasonableness of the claimed fees and, accordingly, appellee was required to present independent expert testimony as to the reasonableness of the fees. We disagree.

{¶33} While Kincaid's March 7, 2006 letter acknowledges that appellant voiced his concerns about the rising cost of the litigation, it does not establish that appellant ever expressed dissatisfaction with the legal services provided or the reasonableness of the fees associated with those services. Nor does appellant's deposition testimony establish that he challenged the reasonableness of the fees during appellee's representation. During his deposition, appellant asserted only that he discussed his "sensitivities" to the fees with Kincaid after September 14, 2005. Depo., 56. As neither Kincaid's March 7, 2006 letter nor appellant's deposition testimony establish that appellant expressed dissatisfaction with the services rendered or the fees charged, Kincaid's affidavit was sufficient to establish the reasonableness of the charged fees. Accordingly, appellee was not required to provide independent, expert testimony as to the reasonableness of the charged fees.

{¶34} As the monthly invoices and Kincaid's affidavit satisfied appellee's Civ.R. 56(C) evidentiary burden as to the reasonableness of appellee's fees, the burden then shifted to appellant to point to or produce Civ.R. 56(C) evidence creating a genuine issue of material fact as to that issue. Appellant has failed to satisfy his burden. Appellant offers no expert affidavit or other testimony contradicting Kincaid's assertion that appellee's fees are reasonable. Further, in his deposition testimony, appellant admitted that he had no evidence to support his assertion that appellee's fees are unreasonable or excessive. Indeed, appellant testified that he could not point to any specific charge in the monthly invoices that was unreasonable or excessive. Depo., 121, 124, 128-29, 132-34, 136, 144-46, 160-61. Accordingly, we find that no genuine issue of material fact exists as to the reasonableness of the fees charged by appellee.

{¶35} Based upon the foregoing, we hold that the trial court properly granted summary judgment to appellee on its claims and on appellant's counterclaim. Accordingly, we overrule appellant's single assignment of error, and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and McGRATH, JJ., concur.
