

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Flynn, Py & Kruse Co., L.P.A.

Court of Appeals No. OT-13-013

Appellee

Trial Court No. CVF 1100420

v.

Richard K. Highfield

DECISION AND JUDGMENT

Appellant

Decided: February 21, 2014

* * * * *

John A. Coppeler, for appellee.

Richard K. Highfield, pro se.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the judgment of the Ottawa County Municipal Court, affirming a magistrate’s decision in favor of a law firm in a fee dispute. For the reasons that follow, we affirm.

{¶ 2} In February 2009, appellant, Richard K. Highfield, retained attorney James W. Hart to represent him in defense of a domestic violence accusation by appellant's then wife and in the divorce between the two. Attorney Hart is a member of appellee law firm Flynn, Py & Kruse Co., L.P.A. On February 27, Hart sent appellant a letter acknowledging receipt of a \$6,000 retainer and advising appellant that he would be billed at a rate of \$200 per hour, plus costs.

{¶ 3} By all accounts, the litigation was extraordinarily contested. According to the testimony of attorney Hart, the case was the most contentious he had ever handled. Appellant's wife accused appellant of physically assaulting her, fraud and hiding assets. She obtained a protective order against her husband, the result of which was that the parties communicated only through their respective counsel. Hart and another lawyer in the firm represented appellant in these proceedings for nearly two years.

{¶ 4} Over the course of the litigation, appellee submitted seven invoices totaling \$39,857 to appellant. Appellant does not dispute that he paid \$27,551.88 of this amount. When he refused to pay the remaining \$12,305.12, appellee sued on account and for unjust enrichment. Appellant answered, denying that he had entered into a written contract and asserting that appellee's fees were excessive.

{¶ 5} The matter proceeded to a trial before a magistrate at which attorney Hart testified to the agreement and identified the confirming letter. Hart also identified the invoices that had been tendered to appellant and testified to the accuracy of the invoices with regard to the legal work performed by himself and another attorney in the firm.

Indeed, according to Hart, the hours billed represented less than the actual hours worked because, when he and the other attorney in the firm worked together, they only billed for one of the attorney's time. On cross-examination Hart maintained that the complexity of the proceeding and the contentiousness of the parties warranted the time expended.

{¶ 6} Appellant called several attorneys on his behalf who testified that the total amount billed pressed the upper limits of the amount they had billed for handling a divorce. On cross, however, all of appellant's witnesses agreed that \$200 per hour was a reasonable rate for an attorney in handling these types of cases in Ottawa and the surrounding counties.

{¶ 7} The magistrate found an oral contract between the parties and rejected appellant's argument that the fees charged were unreasonable or that the work was not competently performed. The court found appellee's testimony and exhibits "credible, concise, convincing and conclusive" and granted judgment to appellee in the amount of \$12,305.12.

{¶ 8} Appellant filed objections to the magistrate's decision which the trial court overruled. The court adopted the magistrate's decision and entered final judgment in favor of appellee. From this judgment, appellant now brings this appeal, setting forth the following six assignments of error:

1. The Trial Court erred by relying on information not admitted into evidence at trial[.]

2. The Trial Court erred by relying on vague, inconsistent and statistically flawed evidence in determining damages after it found an implied contract for services existed[.]

3. The Trial Court erred by failing to rely on standards promulgated by The Supreme Court of Ohio as expressed in the Ohio Rules of Professional Conduct and the Ohio Code of Professional Responsibility in determining damages after it found an implied contract for services to exists [sic][.]

4. The Trial Court erred by denying evidence establishing the usual and customary value for services in determining damages after it found an implied contract for services to exists [sic][.]

5. The Trial Court erred by denying the defendant the opportunity to reveal the Real Party in Interest[.]

6. The Trial Court erred by granting the Plaintiff compensation or benefit, by way of an implied contract, for his lack of diligence[.]

{¶ 9} As a point of clarification at the outset, appellant repeatedly refers to the trial court having found an “implied contract.” An “implied contract” is one not created by an explicit agreement, but inferred from the conduct of the parties as an unspoken understanding. *Black’s Law Dictionary* 323 (6th Ed.1990). The magistrate in this matter found an express oral contract. In an express contract there is an actual agreement of the parties, the terms of which are declared at the time of its making. *Id.*

{¶ 10} At trial, attorney Hart testified appellant came to his office and asked him to represent appellant in matters related to his divorce and criminal domestic violence charge. According to attorney Hart, he advised appellant that he would charge \$200 per hour, plus costs. A confirming letter was introduced into evidence. This letter references receipt of a \$6,000 retainer and reiterates the hourly cost. That appellant paid these invoices for most of the time of representation infers his acceptance of the terms. This is evidence which, if believed, establishes an express oral contract.

I. Legal Existence of Plaintiff

{¶ 11} In his first assignment of error appellant maintains that the trial court erred in finding that appellee was a legally existing business entity under the laws of Ohio. According to appellant, there was no trial testimony concerning the firm's existence and no evidence was introduced to show its legal existence or its standing with the Ohio Secretary of State.

{¶ 12} As the magistrate and the trial court pointed out when appellant raised this issue below, appellee alleged its legal existence in its complaint and appellant admitted the allegation in its answer. An admission in a pleading dispenses with the need for proof of an allegation and acts as an equivalent to proof of the fact. *Esho v. Shamoan, Inc.*, 6th Dist. Lucas No. L-06-1189, 2007-Ohio-1529, ¶ 10. Accordingly, appellant's first assignment is not well-taken.

II. Vague Evidence

{¶ 13} In his second assignment of error, appellant maintains that the proof of damages submitted by appellee at trial was “vague, inconsistent and statistically flawed” and, therefore, insufficient to prove damages. We shall construe this assignment of error as an assertion that the trial court’s finding of fact with respect to hours billed was against the manifest weight of the evidence.

{¶ 14} The standard of review for manifest weight is the same in a civil case as in a criminal case. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17. Weight of the evidence concerns the greater amount of credible evidence offered in trial to support one side or the other of an issue. The party having the burden of proof will be entitled to a verdict if the trier of fact, on weighing the evidence, finds that the greater amount of credible evidence sustains the issue to be determined. *Id.* at ¶ 12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Moreover, the trier of fact may believe or disbelieve any or all of the testimony of a witness. *Swan v. Skeen*, 40 Ohio App.2d 307, 308-309, 319 N.E.2d 221 (10th Dist.1974). On review, there is a presumption in favor of the decision of the trier of fact. *Eastley* at ¶ 21. The appeals court acts as a “thirteenth juror” to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the verdict must be overturned and a new trial ordered. *Thompkins* at 387.

{¶ 15} Here, appellee introduced into evidence, not only the billing summaries that had been presented to appellant for payment, but the detailed underlying attorney

daily time sheets enumerating the purpose of each period of timed billed. Attorney Hart testified that the work performed was necessary for the representation of appellant. Appellant presented no evidence refuting this assertion. The magistrate found this evidence credible. We find nothing to suggest that this finding is the result of the fact finder losing its way or that a manifest miscarriage of justice occurred. Accordingly, appellant's second assignment of error is not well-taken.

III. Unethical Behavior

{¶ 16} Appellant's third assignment of error is somewhat perplexing. He cites to Ethical Considerations stated in the now superseded Ohio Code of Professional Responsibility, apparently for the proposition that a lawyer should, in general, not sue his client, EC 2-22, and should follow the fee schedules from state or local bar associations. EC 2-17. He also cites provisions from both the prior code and the present rules that require a lawyer not charge excessive fees. DR 2-106, Prof.Cond.R. 1-5. Appellant asserts that appellee provided no evidence that "its total fees were compliant with [that] standard."

{¶ 17} Ethical Considerations in the Ohio Code of Professional Responsibility were always aspirational rather than mandatory. Moreover, the code was superseded by the Ohio Rules of Professional Conduct in 2007. The rules contain no provisions comparable to EC 2-22 and EC 2-17. *See* Prof.Cond.R. Appendix B Correlation Table.

{¶ 18} The prohibition against charging excessive fees remains under the rules, but there is no evidence that the fees charged by appellee were excessive. Attorney Hart

and every other attorney who testified, including those called by appellant, testified that the hourly rate charged was reasonable for an attorney of attorney Hart's experience practicing in Ottawa County. Attorney Hart and the other lawyer from appellee's firm testified that the time expended was necessary in the furtherance of representing appellant in the criminal matter and in his divorce. Appellant presented no evidence to the contrary. Appellant's third assignment of error is not well-taken.

IV. Desktop Reference

{¶ 19} In his fourth assignment of error, appellant complains that the trial court erred when it refused to accept into evidence a publication of the Ohio State Bar Association titled *The Economics of Law Practice in Ohio in 2010* (2010). Appellant maintains that the publication is admissible as an exception to the hearsay rule as a "market report" under Evid.R. 803(17).

{¶ 20} Hearsay is an oral or written assertion "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Hearsay is not admissible into evidence unless permitted by constitution, law or rule prescribed by the Supreme Court of Ohio. Evid.R. 802.

{¶ 21} Appellant offered the publication at issue, presumably to establish a reasonable fee for the legal work performed by appellee. Since this publication is an assertion made by someone other than a witness in this trial and it was being offered for

the truth of the matter asserted, it is hearsay and appellant must establish that it fits within one of the hearsay exceptions to be admitted.

{¶ 22} Appellant maintains that the publication is admissible pursuant to Evid.R. 803(17). Evid.R. 803(17) provides an exception to the hearsay rule for “Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.” As foundation for admission of this document, appellant must show that it is a compilation generally used or relied upon by lawyers. Appellant offered no testimony from any witness that the Ohio State Bar Association publication was generally relied upon or used by lawyers. Consequently, the trial court did not abuse its discretion when it refused to admit the document into evidence. Appellant’s fourth assignment of error is not well-taken.

V. Real Party in Interest

{¶ 23} In his fifth assignment of error, appellant expresses a belief that because interrogatories directed to attorney Hart were on occasion answered in the first person (“I”), and contained frequent references to appellee’s members as “partners,” the case was not being prosecuted by the real party in interest as required by Civ.R. 17(A). As previously discussed, appellant’s admission in his answer as to the legal sufficiency of appellee negates the need for further proof of that issue. The unrefuted testimony at trial by both attorney Hart and the other attorney from appellee firm who worked on the case was that they were members of appellee firm. Aside from casual statements, there is

nothing in the record to suggest otherwise. Accordingly, appellant's fifth assignment of error is not well-taken.

VI. Delays and Misrepresentations

{¶ 24} In his remaining assignment of error, appellant suggests that the trial court should have reduced the money award to appellee in compensation for various acts or omissions that appellant characterizes as unnecessary delays or misrepresentations.

{¶ 25} Appellant complains that documents were filed without requisite check for filing fees and files were misplaced, delaying relief. He also claims appellee became unresponsive.

{¶ 26} Appellee responds that delays suffered from ordinary mistakes were de minimus and ultimately did not result in prejudice to appellant. Any unresponsiveness occurred after appellant refused to pay the balance which is the subject of this suit.

{¶ 27} We have carefully examined the record of these proceedings and fail to find the egregious incompetence appellant asserts. There is certainly nothing in the record to support a setoff against the contractual obligation appellant incurred.

Accordingly, we find no error in the trial court's denial of such setoff. Appellant's sixth assignment of error is not well-taken.

{¶ 28} On consideration, the judgment of the Ottawa County Municipal Court is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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