[Cite as *Summers & Vargas Co. v. Abboud*, 2008-Ohio-5995.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90786

SUMMERS & VARGAS COMPANY

PLAINTIFF-APPELLEE

vs.

ELIE ABBOUD

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-603357

BEFORE: Blackmon, J., Gallagher, P.J., and Rocco, J.

RELEASED: November 20, 2008

JOURNALIZED:

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Elie Abboud appeals the trial court's granting of summary judgment in favor of appellee Summers & Vargas Co., both on the law firm's claim for payment of legal fees and Abboud's counterclaim for malpractice. He assigns the following two errors for our review:

> "I. Defendant was denied due process of law when the court granted plaintiff's motion for summary judgment which was totally unsupported."
>
> "II. Defendant was denied due process of law when the court granted plaintiff's motion for summary judgment on defendant's counterclaim which was totally unsupported."

{¶ 2} Having reviewed the record and pertinent law, we reverse and remand this cause to the trial court for proceedings consistent with this opinion. The apposite facts follow.

Factual History

{¶ 3} On June 19, 2006, Abboud retained Summers & Vargas to represent him in the United States District Court for the Northern District of Ohio in a pending criminal case for his participation in a check kiting scheme. Abboud's original sentence was vacated and remanded for resentencing; Summers & Vargas was hired to represent Abboud at the resentencing hearing. On September 8, 2006, the federal court resentenced Abboud to 121 months in prison, which was more than Abboud's original sentence of 97 months.

{¶ 4} On October 4, 2006, Summers & Vargas filed a complaint against Abboud seeking payment in the amount of $35,407.94 for legal services it had provided to Abboud. Abboud filed an answer and counterclaim for malpractice.

{¶ 5} In his counterclaim, Abboud argued that the firm breached its contract with him by representing him even though a conflict of interest existed. The firm represented the opposing party in an unrelated civil lawsuit in which Abboud was involved. Abboud also argued the firm committed malpractice due to attorney Summers' prejudicial statements to the court prior to Abboud's re-sentencing hearing.

{¶ 6} Summers & Vargas filed a motion for summary judgment both on its claims and Abboud's counterclaim. Abboud opposed both motions. The trial court granted judgment in favor of the firm stating in its journal entry:

> "Summers & Vargas Co.'s motion for summary judgment filed 7/30/2007 is granted as there exists no genuine issues of material fact pursuant to the fee agreement defendant entered into with the plaintiff, defendant is due and owing to the plaintiff in the amount of $35,407.94 in attorney's fees.
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> "Summers & Vargas Co.'s motion for summary judgment on defendant's counterclaim is granted as there exists no genuine issues of material fact."[1]

Standard of Review

[1]Trial court journal entry, Nov. 19, 2007.

{¶ 7} We review an appeal from summary judgment under a de novo standard of review.[2] Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.[3] Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can reach only one conclusion which is adverse to the non-moving party.[4]

{¶ 8} The moving party carries an initial burden of setting forth specific facts which demonstrate his or her entitlement to summary judgment.[5] If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will be appropriate only if the non-movant fails to establish the existence of a genuine issue of material fact.[6]

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[2]*Baiko v. Mays* (2000), 140 Ohio App.3d 1, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35; *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188.

[3]Id. at 192, citing *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704.

[4]*Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

[5]*Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107.

[6]Id. at 293.

Legal Analysis

{¶ 9} We will address Abboud's first and second assigned errors together as they both argue the evidence submitted by Summers & Vargas in support of its summary judgment motions was improper and inadmissible.

{¶ 10} Abboud contends that Summers & Vargas failed to present proper evidence that fees were in fact due and owing, that the legal services were rendered, and that the fees were reasonable. We conclude there was evidence that the fees were due and owing and that legal services were performed because the record shows an attorney/client fee agreement was signed and the firm also submitted an itemized bill of the services it performed. Although Abboud contends not all the services were performed, he does not detail which services were not rendered.

{¶ 11} As Abboud points out, the itemization and fee agreement were attached to the complaint and not the motion for summary judgment. However, because the documents were in the record, the documents can be considered in determining whether summary judgment was appropriate. As the court in *McDonald Community Fed. Credit Union v. Presco*[7] held:

> "[T]his court does not interpret Civ.R. 56(E) to require a party to attach a second copy of a document to its motion when one copy is already properly of record. While attaching a second copy to the

[7](Nov. 9, 1990), 11th Dist. No. 89-T-4241.

> motion would certainly be good practice in that it aids the trial court in considering the motion, there is no authority in this state for the proposition that the failure to follow this procedure renders the document inadmissible in the summary judgment context."

{¶ 12} Although we conclude there was evidence that legal services were rendered and fees due for the services performed, Summers & Vargas failed to submit evidence that the fees were reasonable. In *Climaco, Seminatore, Delligatti and Hollenbaugh v. Carter*[8] the Tenth District Court addressed a similar situation. In *Climaco,* the attorney produced evidence of the fee agreement and the itemization of legal services, but failed to present evidence the fees were reasonably incurred. The court held:

> "Compensation for services rendered by an attorney is generally fixed by contract prior to employment and the formation of the fiduciary relationship between attorney and client. *Jacobs v. Holston* (1980), 70 Ohio App.2d 55, 24 O.O.3d 72, 434 N.E.2d 738. After the fiduciary relationship is established, the attorney has the burden of establishing the reasonableness and fairness of fees. Id. Where, prior to employment, the attorney and client have reached an agreement as to the hourly rate to be charged and the amount of the retaining fee, but the agreement fails to provide for the number of hours to be expended by the attorney, in an action for attorney fees the burden of proving that the time was fairly and properly used and the burden of showing the reasonableness of work hours devoted to the case rest on the attorney. Id. Furthermore, a trial court must base its determination of reasonable attorney fees upon actual value of the necessary services performed, and there must be some evidence which supports the court's determination. *In re Hinko* (1992), 84 Ohio App.3d 89, 616 N.E.2d 515."

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[8](1995), 100 Ohio App.3d 313.

{¶ 13} In determining the reasonableness of attorney fees, the trial court must consider the following factors: "'(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.'"[9] In *Climaco*, finding no evidence the court considered these factors, the court upheld summary judgment in favor of the firm but remanded the matter for a hearing to determine the reasonableness of the attorney fees.

{¶ 14} Likewise, in the instant case, the record does not contain any evidence that the court considered the above factors in terms of the reasonableness of the attorney fees. Simply because there was a fee agreement and an itemized bill does not mean the firm is entitled to the amount billed. The firm must also show the fees were reasonable. We recognize that under limited circumstances, the court may use its own knowledge and experience in determining the reasonableness of attorney fees.[10] However, in those situations, the court was usually involved in the case in which the fee was

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[9]Id. at 324, citing to *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 35.

[10]See *Goode v. Goode* (1991), 70 Ohio App.3d 125, 134; *Citta-Pietrolungo v. Pietrolungo,* Cuyahoga App. Nos. 81943 and 82069, 2003-Ohio-3357; *Jacobson v. Starkoff*, Cuyahoga App. No. 80850, 2002-Ohio-7059; *Deegan v. Deegan* (Jan. 29, 1998), Cuyahoga App No. 72246.

incurred. In the instant case, the trial court did not preside over the case in which the fees were incurred. Therefore, as to the amount of fees, we reverse and remand for a hearing on the reasonableness of the fees.

{¶ 15} Abboud also contends that the firm did not present admissible evidence to refute his allegation that the firm breached its fiduciary duty by representing him in spite of a conflict of interest. When the firm agreed to represent Abboud, it was also representing the opposition in a civil suit in which Abboud and his brother were the plaintiffs.

{¶ 16} In order to prevail on a claim that he was denied his right to conflict-free counsel, a defendant must demonstrate "an actual conflict of interest."[11] An "actual conflict," for purposes of the Sixth Amendment, is "a conflict of interest that adversely affects counsel's performance."[12] Therefore, to prove an "actual conflict of interest," the defendant must show that his counsel "actively represented conflicting interests," and that the conflict "actually affected the adequacy of his representation."[13] A conflict of interest arises when

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[11]*Wood v. Georgia* (1981), 450 U.S. 261, 273, 101 S.Ct. 1097, 67 L.Ed. 2d 220.

[12]*Mickens v. Taylor* (2002), 535 U.S. 162, 172, 122 S.Ct. 1237, fn. 5, 152 L.Ed.2d 291.

[13]See Id., quoting *Cuyler v. Sullivan* (1980), 446 U.S. 335, 349-350, 100 S.Ct. 1708, 64 L.Ed.2d 333; accord *State v. Pelphrey*, 149 Ohio App.3d 578, 583, 2002-Ohio-5491; *State v. Haberek* (1988), 47 Ohio App.3d 35, 38.

counsel incurs a duty on behalf of one client "to contend for that which [his] duty to another client requires him to oppose."[14]

{¶ 17} The firm attached to its motion attorney Vargas's affidavit in which he states that the civil case was unrelated to the criminal case and that "the subject of this civil action was a bond of Michael Abboud." Abboud did not present evidence disputing the subject matter of the civil case. Abboud merely stated that a conflict existed and failed to provide evidence on how the firm's representation in an unrelated matter constituted a conflict of interest. Once the party moving for summary judgment meets its evidentiary burden, the party opposing the motion must present its own evidence to show a genuine issue of fact remains; the opposing party cannot rest upon the mere allegations or denials of its pleadings.[15] Because Abboud failed to provide evidence of the conflict, the trial court did not err by granting summary judgment in favor of the firm on Abboud's conflict of interest claim.

{¶ 18} Abboud also contends the firm also breached its fiduciary duty when Summers made prejudicial statements to the District Court prior to Abboud's resentencing. Apparently Abboud sought to keep Summers & Vargas for representation, but hired a third attorney to act as lead counsel. This third

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[14]*State v. Manross* (1988), 40 Ohio St.3d 180, 182.

[15]*Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112.

attorney allegedly told an accountant who was working on the case on behalf of Summers & Vargas to not worry about anything because the sentencing would be favorable to Abboud because the attorney was instrumental in getting the sentencing judge appointed to the federal bench.

{¶ 19} Attorney Summers requested a hearing before the sentencing judge to discuss the improper representation made by the third attorney. A hearing was held, after which the court determined that it could be impartial, stating that many people were involved with his appointment to the federal bench. If Abboud thought the disclosure of the attorney's promise compromised his case, he should have requested that the trial judge recuse himself. Moreover, there is no indication that this revelation had any bearing on Abboud's sentencing. A review of the sentencing transcript reveals that Abboud received a longer sentence due to his continued refusal to comply with an outstanding order to turn over financial documents to the prosecutor.

{¶ 20} We disagree with Abboud's contention that we cannot consider the sentencing hearing transcript because it is not part of the current case or because it is an unsworn partial transcript. On July 1, 1999, Civ.R. 56(C) was amended to allow transcripts from cases other than the pending case to be used as evidence. The staff note to Civ.R. 56(C) states:

> "The prior rule provided that 'transcripts of evidence in the pending case' was one of the items that could be considered in deciding a

> motion for summary judgment. The 1999 amendment deleted 'in pending case' so that transcripts of evidence from another case can be filed and considered in deciding the motion."

Also, the partial transcript included the court reporter's certification verifying that the transcript is a valid recitation of the court proceedings.

{¶ 21} In conclusion, we affirm the trial court's decision to grant summary judgment as to the existence of a contract for legal services, but reverse the judgment to the extent it entered a monetary judgment in Summer & Vargas's favor. The matter is remanded for the trial court to conduct a hearing to determine the reasonableness of the attorney fees.

Judgment reversed and remanded for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee its costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and

KENNETH A. ROCCO, J., CONCUR