STATE OF MICHIGAN

COURT OF APPEALS

JACK C. CHILINGIRIAN,

Plaintiff-Appellee/Cross-Appellant,

v

J. EDWARD KLOIAN,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
May 22, 2003

No. 229186
Oakland Circuit Court
LC No. 97-539215-CK

Before: Jansen, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Plaintiff commenced this action to collect attorney fees that defendant allegedly owed for plaintiff's legal services. Defendant appeals as of right, and plaintiff cross-appeals, from the trial court's judgment, following a bench trial, awarding plaintiff $32,915.82, inclusive of interest and costs, on his claim for recovery of attorney fees. We affirm.

I. Facts and Procedure

Plaintiff first represented defendant in February 1994. Plaintiff's usual hourly rate for legal representation was $150, however, the retention letter for the Kloian v Van Fossen case used a lesser hourly rate of $50 for the first one hundred hours due to defendant's representations that he would have plaintiff handle a number of other matters for him. In total, plaintiff handled twenty to twenty-two files for defendant. Plaintiff submitted full payment for legal services rendered in approximately four or five cases that were completed. However, after defendant did not pay plaintiff for his services in various other cases, plaintiff withdrew from all of the cases underlying the instant litigation. The last withdraw was in July 1995.[1]

On February 26, 1997, plaintiff filed the instant action through another attorney, Harry Kalogerakos, for legal services performed by plaintiff on behalf of defendant in sixteen cases based on theories of breach of contract, account stated, quantum meruit, and fraud in the inducement or negligent misrepresentation. Plaintiff sought to recover $78,462.15.

[1] Prior to plaintiff's withdrawal in the underlying cases, plaintiff received payments for the cases in question and other cases totaling approximately $50,000.

In August 1997, plaintiff moved to compel certain discovery, while defendant moved for a protective order sought to direct that he not be required to produce tax returns or answer questions about his bank records. Plaintiff's attorney also requested discovery sanctions. Defendant's attorney then withdrew from the case. On September 2, 1997, plaintiff filed a motion for defendant to disclose his expert witness or, alternatively, to strike the expert witness, on the ground that a May 17, 1997, scheduling order indicated that experts were to be named by the parties by August 20, 1997. On September 5, 1997, defendant's new attorney, Robert Roether, filed his appearance on defendant's behalf. Discovery was extended to November 15, 1997, by court order.

On September 17, 1997, plaintiff filed a motion to amend his complaint for the purpose of modifying the amount claimed to $84,889.69. That same day, defendant moved to amend the pleadings to file a counterclaim for legal malpractice against plaintiff. The trial court denied defendant's motion to add a counterclaim for legal malpractice against plaintiff. Defendant's affirmative defenses to plaintiff's claims were that defendant paid for the services in the McNally case [Kloian v McNally], that plaintiff committed malpractice by withdrawing from cases, and the existence of a conflict of interest.

On October 14, 1997, attorney Roether filed a motion to withdraw as defendant's attorney. This motion was granted. Defendant appeared in propria persona at a status conference held on November 3, 1997. The trial court indicated that the trial date would remain December 19, 1997. On November 10, 1997, plaintiff filed a motion barring defendant from filing witness and proposed exhibit lists as a discovery sanction for failure to comply with the May 17, 1997, scheduling order and requested for admissions deemed admitted because defendant had not responded to the requests. This motion was subsequently granted on December 1, 1997. On December 3, 1997, defendant, through new counsel, James Hacker, filed a motion to adjourn the trial date, set aside the December 1, 1997 order, and extend the time for discovery. The trial court denied the motion to adjourn the trial date. On December 19, 1997, when the bench trial commenced, defendant did not appear due to hospitalization. The trial court ordered a show cause hearing to determine if representations about defendant's hospitalization could be substantiated.

The show cause hearing was held on January 7 and 14, 1998, at which time defendant had new counsel, Harold Fried and Robert Forrest, for the limited purpose of the show cause hearing. The show cause hearing established that defendant voluntarily admitted himself to Chelsea Community Hospital for two weeks on December 11, 1997, but only stayed during daytime hours. Following the show cause hearing, the trial court entered an order, dated January 21, 1998, quashing a contempt motion directed against defendant, but imposing a sanction of no more than $4,500 against defendant to compensate plaintiff for preparing for the December 19, 1997, trial and preparing for and attending the show cause hearing.

A five-day bench trial was held between April 17 and May 14, 1998. Following the bench trial, the trial court ordered a judgment in favor of plaintiff for $29,126.99, plus interest and costs. Both parties appealed.

II. Analysis

A. Defendant's Appeal

Defendant first challenges the trial court's December 1, 1997, order granting plaintiff's motion to "strike" defendant's witness and proposed exhibit lists, and barring defendant from calling witnesses and presenting exhibits at trial. The record reflects that there were no lists on file for the trial court to "strike" and that defendant was actually sanctioned for not filing a witness or proposed exhibit list. Defendant failed to properly preserve his challenge to this sanction, because he failed to respond to, or otherwise oppose, plaintiff's motion, despite the trial court affording him notice of, and an opportunity to make written objections to, the proposed sanction order. For this reason, and given defendant's failure to demonstrate any unusual circumstances to warrant consideration of this unpreserved challenge to the trial court's entry of the December 1, 1997, order, we decline to address it. See generally *Peterman v Dep't of Natural Resources,* 446 Mich 177, 183; 521 NW2d 499 (1994). Further, defendant failed to cite supporting authority or a factual basis for his assertion that his then attorney, James Hacker, offered to promptly file witness and exhibits lists, therefore this issue is not properly before us. See *In re JS & SM,* 231 Mich App 92, 98; 585 NW2d 326 (1998)

The record does reflect, however, that the trial court afforded defendant's trial attorneys, Harold Fried and Robert Forrest, an opportunity to make offers of proof concerning excluded evidence at the trial, which concluded in May 1998. The record also reflects that the trial court permitted defendant to testify on his own behalf at trial, notwithstanding the December 1, 1997, order, and that defendant had some success at trial in challenging the attorney fees sought by plaintiff. Because defendant has not identified any specific witness or exhibit that was presented to the trial court as part of an offer of proof, which allegedly was excluded by the December 1, 1997, order, and which thereby caused a verdict inconsistent with substantial justice, we conclude that defendant has not shown any basis for relief. MCR 2.613(A).[2]

Defendant next challenges the trial court's denial of his motion to add a counterclaim for legal malpractice against plaintiff. Because plaintiff did not file a clearly designated countercomplaint with his answer, we review defendant's claim in accordance with the standard for the amendment of pleadings in MCR 2.118. See MCR 2.110(C); MCR 2.203(E).

Under MCR 2.118, a trial court should grant leave to amend pleadings freely when justice so requires and deny leave only for particularized reasons. MCR 2.118(A)(2); *Price v Long Realty, Inc,* 199 Mich App 461, 469; 502 NW2d 337 (1993). Particularized reasons for denying a motion to amend include: (1) undue delay; (2) the movant's bad faith or dilatory motive; (3) repeated failures to cure deficiencies by amendments previously allowed; (4) undue prejudice to the nonmoving party; and (5) futility. *Sands Appliance Services, Inc v Wilson,* 463 Mich 231, 239-240; 615 NW2d 241 (2000). A trial court's decision regarding a motion to

[2] We also decline to consider defendant's additional argument that the trial court's handling of attorney Robert Roether's motion to withdraw before entry of the December 1, 1997, order violated the court rules, resulting in prejudice. This issue is not properly before us because it is outside the statement of the question presented with regard to the December 1, 1997, order. See MCR 7.212(C)(5); *Meagher v McNeely & Lincoln, Inc,* 212 Mich App 154, 156; 536 NW2d 851 (1995). However, to the extent that defendant's claim relates to his failure to file a witness or proposed exhibit list, our foregoing discussion concerning the December 1, 1997, order under MCR 2.613(A) is dispositive of this claim. Defendant has not established a verdict inconsistent with substantial justice.

amend will not be reversed absent an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

The record reflects that the trial court gave particularized reasons for denying defendant's motion to file a countercomplaint and third-party complaint against Chilingirian, P.C., a nonparty to plaintiff's cause of action. The trial court not only found that defendant's motion was untimely, it also considered the prior discovery issues in the case, which resulted in the appointment of a discovery master, and the preservation of judicial economy.

Further, defendant claims on appeal that his proposed countercomplaint and third-party complaint did not involve new evidence, compel new discovery, or complicate case issues because he had also alleged legal malpractice as an affirmative defense. An affirmative defense is "a matter that accepts the plaintiff's allegation as true and even admits the establishment of the plaintiff's prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings." *Stanke v State Farm Mutual Automobile Ins Co*, 200 Mich App 307, 311-316; 503 NW2d 758 (1993). Examples of affirmative defenses include, but are not limited to, payment, release, satisfaction, duress, statute of limitations, a failure of consideration, and a void or voidable transaction. MCR 2.111(F)(3). Conversely, a defendant's counterclaim is not limited by the amount or nature of the relief claimed by the plaintiff. 2 Dean & Longhofer, Michigan Court Rules Practice (4th ed), § 2203.15, p 53. "[C]ounterclaims need not arise out of the transaction or occurrence set forth in the plaintiff's claim." *Id.* Pursuant to MCR 2.110(C), a counterclaim must clearly be designated as such when combined with an answer.

Plaintiff sought recovery of attorney fees for legal services he provided to defendant in sixteen cases based on theories of breach of contract, account stated, quantum meruit, and fraud in the inducement or negligent misrepresentation. With regard to the breach of contract and quantum meruit theories pursued by plaintiff, we note that there are circumstances in which an attorney may lose a right to recover fees based on unprofessional conduct. See *Rippey v Wilson*, 280 Mich 233, 245; 273 NW 552 (1937); *Reynolds v Polen*, 222 Mich App 20, 27; 564 NW2d 467 (1997); see also *Mudge v Macomb Co*, 458 Mich 87, 106; 580 NW2d 845 (1998) (an equitable defense of "recoupment" in a contract action affords a defendant a right to cut down a plaintiff's demand because the plaintiff did not comply with some cross obligation under the contract upon which he or she has sued or because the plaintiff violated a legal duty in the making or performance of the contract). In a legal malpractice action, however, the focus is not on the attorney's entitlement to recover a fee for the legal services provided, but rather on injury sustained by the client. Such injury may, for example, take the form of mental anguish suffered by the client, *Gore v Rains & Block*, 189 Mich App 729, 740-741; 473 NW2d 813 (1991), or an adverse judgment in the underlying lawsuit that was proximately caused by the attorney's negligence, *Law Offices of Lawrence J Stocker, PC v Rose*, 174 Mich App 14, 25; 436 NW2d 70 (1989).

From a review of defendant's alleged "affirmative defenses," it is apparent that defendant's claims went beyond an attempt to deny plaintiff's entitlement to recover attorney fees based on alleged unprofessional conduct. Some of defendant's claims, e.g., his claim of payment, were appropriate affirmative defenses. Some of defendant's malpractice claims might fall within either a recoupment type of defense or a counterclaim. Other claims, such as defendant's claim of malpractice in a case for which plaintiff was not seeking recovery of

attorney fees, would only be relevant as a counterclaim. Finally, some of defendant's claims, e.g., that files were disorganized, would not qualify as either an affirmative defense or a counterclaim.

While there was some overlap between defendant's alleged "affirmative defenses" and proposed countercomplaint and third-party complaint, it is apparent that the monetary damages and mental anguish sought by defendant in his proposed countercomplaint and third-party complaint for legal malpractice would alone add to the complexity of the case, because such damages were not relevant to plaintiff's cause of action and were not clearly designated as counterclaims in the stated "affirmative defenses." Considering the discovery issues that had already led the trial court to appoint a discovery master to monitor discovery, and that defendant's own attorney, in seeking leave to file the countercomplaint and third-party complaint, proposed that defendant could file a separate lawsuit for legal malpractice, we conclude that the trial court did not abuse its discretion in denying defendant's motion to amend.

Defendant next argues that certain evidentiary rulings by the trial court constituted an abuse of discretion. Defendant's claim concerning the testimony of how and what four other attorneys charged is not properly before us because defendant gives only cursory treatment of this issue in his appeal brief. *Eldred, supra* at 150. Further, we find it unnecessary to consider defendant's claim concerning the fraud evidence, because the trial court made no finding of fraud. Hence, even if there was error, it was harmless. MCR 2.613(A); MRE 103(a); *Merrow v Bofferding,* 458 Mich 617, 634; 581 NW2d 696 (1998).

With regard to defendant's claim that the trial court abused its discretion by excluding evidence concerning plaintiff's services in the McNally case, we note that the McNally case was not one of the underlying matters for which plaintiff requested attorney fees in his first amended complaint. Hence, to the extent defendant argues that this excluded evidence was relevant to establish his "affirmative defense" of legal malpractice, we find no merit to the issue. Defendant's reliance on *Rippey, supra* at 245, is misplaced. Although *Rippey* recognizes a recoupment type of defense to an attorney's claim for attorney fees, where the services are severable, misconduct as to one phase does not forfeit attorney fees as to another. *Id.*

Moreover, the particular evidence on which defendant relies in support of his claim that plaintiff was negligent in the McNally case is the proposed testimony of a witness, Louis Porter, whom defendant was not permitted to call based on the court's December 1, 1997, sanction order. Nevertheless, the trial court stated in its findings of fact following the bench trial that Porter's proposed testimony did not rebut plaintiff's argument. Defendant's failure to establish the relevancy of Porter's testimony or show that its exclusion otherwise resulted in a verdict inconsistent with substantial justice further buttresses our determination that defendant has not shown a basis for relief stemming from the trial court's December 1, 1997, order. MCR 2.613(A)

We decline to address defendant's argument that evidence about the McNally case would have made it more probable that plaintiff neglected the matters underlying plaintiff's claim for attorney fees. Defendant has failed to show that he made any offer of proof to the trial court on this ground. MRE 103(a)(2); *People v Hatchett,* 421 Mich 338, 352; 365 NW2d 120 (1984); see also *Norman, supra* at 260.

The record indicates that the only two grounds for which defendant sought to introduce evidence about the McNally case were to establish legal malpractice in the McNally case and the existence of an agreement between plaintiff and defendant in the nature of an accord and satisfaction. Unlike defendant's claim of legal malpractice in the McNally case, an accord and satisfaction could provide an affirmative defense. An accord and satisfaction consists of an agreement of the parties to settle a claim or previous agreement and the performance or execution of the new agreement. *Faith Reformed Church v Thompson*, 248 Mich App 487, 491-492; 639 NW2d 831 (2001). Here, however, defendant has not shown that he made an offer of proof relative to an agreement reached by the parties, which was rejected by the trial court. Indeed, while defendant relies on an offer of proof made by his attorney during plaintiff's testimony as an offer of proof to establish an agreement, the trial court sustained only an objection to cross-examination about the alleged malpractice. The record reflects that defendant's attorney was thereafter able to ask plaintiff whether he reached an agreement with defendant that fees would not be owed as a result of his performance in the McNally case, and that plaintiff denied such an agreement. Hence, limiting our review to the factual record and arguments presented by defendant with regard to his claim of evidentiary error, defendant has not shown any basis for vacating the judgment. MCR 2.613(A).

Next, defendant raises two issues concerning an alleged contempt sanction ordered by the trial court. Because the trial court's January 21, 1998, order expressly quashed a motion for contempt directed at defendant, we find no basis for this claim. Defendant does not cite any record support for his claim that he was found in contempt within the meaning of *In re Contempt of Dougherty*, 429 Mich 81; 413 NW2d 392 (1987). We further note that a trial court in a civil action has the power to sanction a party independent of a civil contempt proceeding. See, e.g., *Persichini v William Beaumont Hosp*, 238 Mich App 626, 640; 607 NW2d 100 (1999). Because defendant neither addresses the reasons for the trial court's January 21, 1998, sanction, nor the factual or legal basis for his claim that plaintiff did not actually incur the attorney fees that defendant was ordered to pay, appellate relief is not warranted. See *Eldred, supra* at 150; *Norman, supra* at 260; *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

B. Plaintiff's Cross-Appeal

Plaintiff's sole issue on cross-appeal concerns his claim for attorney fees based on a quantum meruit theory. We review the trial court's findings of fact under the clearly erroneous standard, giving due deference to the trial court's special opportunity to judge the credibility of witnesses who appeared before it. MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Regarding plaintiff's claim for attorney fees in the Kloian v Van Fossen case, we are not left with a definite and firm conviction that the trial court clearly erred in finding that plaintiff did not meet the one hundred hour threshold reflected in the parties' April 18, 1994, retention agreement necessary to apply the quantum meruit doctrine. Although plaintiff's well credentialed legal expert was permitted to base his opinion on facts or data not in evidence, MRE 703, the weight of his testimony, like other evidence, was for the trial court to decide. *People v Whitfield*, 425 Mich 116, 123-124; 388 NW2d 206 (1986); *Phillips v Deihm*, 213 Mich App 389,

401-402; 541 NW2d 566 (1995). The fact that the legal expert's opinion was unrebutted does not aid plaintiff's position of clear error. The expert's legal opinion was unrebutted only in the sense that defendant did not present the opinion of an opposing legal expert as evidence. Members of the judiciary are also members of the Bar and, thus, possess some familiarity with the amount of professional effort necessary to develop a lawsuit. The trial court was free, as it did, to look to plaintiff's limited documentary proofs concerning his work in this case to determine if he met the one hundred hour threshold notwithstanding the opinion of plaintiff's legal expert. *People v Jackson*, 390 Mich 621, 624-625; 212 NW2d 918 (1973).

Plaintiff's additional challenge to the trial court's finding that 27-1/2 hours formed a basis for reasonable fees in the Kloian v Bane (Essex) case is not properly before us because it is not set forth in plaintiff's statement of the question presented. *Meagher, supra* at 156. Regardless, we are not persuaded that plaintiff has shown clear error in the trial court's findings with regard to the Kloian v Bane (Essex) case. MCR 2.613(C); *Walters, supra* at 456.

III. Conclusion

The trial court did not err in granting plaintiff's motion to "strike" defendant's witness and proposed exhibit lists, and barring defendant from calling witnesses and presenting exhibits at trial. The trial court did not err in denying defendant's motion to add a counterclaim for legal malpractice against plaintiff. Moreover, the trial court did not abuse its discretion concerning the fraud evidence, or by excluding evidence concerning plaintiff's services in the McNally case. Further, the trial court did not error in ordering an alleged contempt sanction because a subsequent court order expressly quashed the motion for contempt directed at defendant. Last, the trial court did not err in its finding of fact in determining the appropriate attorney fees based on a quantum meruit theory.

Affirmed. No costs pursuant to MCR 7.219(A), neither party having prevailed in full.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra