Nos. 1-09-2071 & 1-10-0154 (Consolidated)

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THIRD DIVISION
February 2, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DANIEL J. DOWNES and DANIEL J. DOWNES, P.C.,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	04 CH 18344
	)	
J. DILLON HOEY, P.C., d/b/a HOEY & FARINA	)	
and JAMES L. FARINA,	)	Honorable
	)	Patrick E. McGann,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Quinn and Justice Steele concurred in the judgment.

O R D E R

HELD: A lawyer who affiliated his practice with another law firm had a duty to disclose to a partner in the law firm that he intended to enforce his contractual right to certain payments, when he had not sought the payments during six years of affiliation, and he knew the partner, who was in the process of purchasing the law firm, did not regard the affiliated lawyer's right to payments as a liability that he would assume when he purchased the law firm. The affiliated lawyer's failure to speak before the partner purchased the law firm equitably estopped the lawyer

> from asserting his right to payments under the contract. The affiliated lawyer had a contractual right to inspect the law firm's books to determine whether the law firm had made all other payments required under the contract.

Daniel Downes and Daniel J. Downes, P.C. (DPC) had an affiliation with J. Dillon Hoey, P.C. (HPC) from 1997 through 2003. The affiliation agreement included elaborate provisions for determining the amounts HPC would pay DPC for cases DPC brought to HPC, and for splitting all of HPC's fees. In 2004, Downes and DPC sued HPC and its owner, James Farina, for access to the books of HPC so that Downes could determine whether HPC had paid DPC all monies HPC owed DPC under the terms of their agreement. Farina and HPC filed a counterclaim in which they requested a judgment declaring that HPC and Farina owed DPC no further compensation under the general fee-splitting provision, and that HPC and Farina adequately accounted for the cases DPC brought to HPC. The trial court entered a declaratory judgment in favor of Farina and HPC with respect to the overall fee-splitting provision. Downes and DPC appeal from that judgment in docket number 1-09-2071. The court separately held that Farina and HPC gave Downes an adequate accounting for the cases Downes brought to HPC, and Downes had no further right to inspect HPC's books, except with respect to a single case. Downes and DPC also appeal from the trial court's order ruling on the accounting in docket number 1-10-0154.

We affirm the judgment for HPC and Farina declaring that Downes and DPC have no right to further compensation under the general fee-splitting clause, (1) because Downes waited so long before asserting the claim, (2) because Downes agreed not to seek compensation for part of the fees, and (3) because Downes should have told Farina of his intention to seek this compensation before Farina purchased HPC in 2003. We reverse the judgment for HPC and Farina barring Downes from inspecting most of HPC's books, because the agreement gives Downes the right to inspect the books to verify the accuracy of the payments he received for cases he brought to HPC.

BACKGROUND

The February 1997 Agreement

On February 1, 1997, J. Dillon Hoey and Downes entered into an agreement to affiliate their law firms, HPC and DPC, for the purpose of practicing under the name of Hoey, Farina & Downes (HFD). The Farina of the firm name referred to Hoey's partner, James Farina. Downes brought his load of 35 cases to HFD. The affiliation agreement included the following provisions for compensation, for inspection of the books, for modification or amendment of the agreement, and for termination of the agreement:

> "6. [HPC] will pay the following amounts *** to [DPC]:
>
> (i) A base amount of $100,000 annually ***.
>
> (ii) $50,000 per year ***. Amounts payable pursuant to clauses (iii) and (iv) shall be reduced by the amount paid during any year pursuant to clause (ii).
>
> (iii) Subject to the provisions of paragraph 7, a percentage of the amount by which [HFD's] 'net firm fees' (as hereinafter defined) exceed $3,730,900 in any calendar year. The percentage will be equal to 20% of such excess up to $1,000,000, 25% of such excess between $1,000,000 and $2,000,000, and 30% of such excess above $2,000,000. ***
>
> (iv) In addition, [DPC] shall be entitled to 55% *** of the 'Downes net fees' (as hereinafter defined) from each of the approximately 35 cases [DPC] brings

to the firm.

(v) Additionally, [DPC] shall be entitled to 33 1/3% of the net firm fees of any non-railroad or non-firm related originated case he brings to the firm, subsequent to February 01, 1997.

***

7. Either party may terminate this agreement as of the end of any calendar month upon 30 days' written notice to [t]he other party. *** If the relationship of the parties is terminated at any time in the 10-year period starting from the date of this agreement, and if this agreement is unilaterally terminated by [HPC], then [HPC] shall guarantee a gross income of $100,000 per year to [DPC] for whatever remains of that 10-year period after the termination. It is understood that any income earned by [DPC] during the post-termination remainder of that 10-year period will be set off against the $100,000 per annum guarantee. *** Nothing in this paragraph shall relieve [HPC] of the obligation to pay [DPC] the percentage of net firm fees [DPC] is entitled to for cases he brought to the firm, pursuant to paragraphs 6(iv) and 6(v), that the firm retains after termination of the agreement between [DPC] and [HPC].

***

8. [DPC] shall have the right to inspect, or cause to be inspected, the books of [HPC] to verify the amount of the payments required to be made to [DPC] hereunder.

* * *

> 13. No modification, alteration or amendment to this agreement shall be binding on any party hereto until such modification, alteration or amendment is reduced to writing and signed by all the parties."

The agreement also included an arbitration clause.

In 1999, HPC increased Downes's base pay to $150,000 per year, although the parties signed no document modifying the February 1997 agreement to reflect the change. Hoey and Downes signed a letter agreement dated May 12, 1999, which purportedly modified the February 1997 agreement. In the modification, Hoey said that HPC needed a loan of $3.5 million. To facilitate the loan, DPC agreed to "forego its rights under Section 6 (iii) of the Agreement for the shorter of a) a period of two years from the date hereof or b) until such loan is repaid." HPC did not repay the loan within two years.

HPC raised Downes's base pay to $200,000 in 2001, again without any written modification of the February 1997 agreement.

Sale of HPC

Hoey fell ill early in 2003. Farina, who exercised most authority over HPC's decisions other than the financial decisions, began negotiations to purchase HPC from Hoey. Farina asked Downes to participate in the purchase, but Downes decided to forego the opportunity. On April 1, 2003, Downes received a document from HPC in which HPC exercised its option to terminate the February 1997 agreement. HPC also offered to pay Downes $200,000 per year plus 1.25% of the fees for every case HPC settled while Downes remained affiliated with HPC. Downes did not sign the proposed agreement.

Farina bought HPC from Hoey in April 2003. Hoey died on April 27, 2003. Later in 2003, Farina needed more loans to continue operating HPC. The bank would not loan the firm money unless all attorneys working with HPC, including Downes, signed documents acknowledging the priority of the bank's interest. Because Downes had qualms about signing the acknowledgment, in December 2003, he decided instead to end his affiliation with HPC.

Complaint and Counterclaim

In March 2004, Downes sent Farina a request for inspection of HPC's books, as agreed in section 8 of the February 1997 agreement. Downes indicated that he needed access to determine the amounts HPC owed him under section 6, and especially section 6(iii) of the February 1997 agreement. HPC denied Downes's request for access to the books.

On November 4, 2004, Downes and DPC filed a complaint against HPC and Farina. Although Downes and DPC labeled the complaint as an action for an accounting, they did not request an accounting. Instead, they sought only access to the books and records of HPC "for the limited purpose of ensuring proper payments" under section 6 of the February 1997 agreement. Farina and HPC filed a counterclaim against Downes and DPC, and requested a judgment declaring that Downes and DPC waived the right to seek any compensation, beyond the compensation already paid under section 6. In a second count of the counterclaim, Farina and HPC also sought compensation from Downes and DPC for an alleged error that reduced the fees HPC received in one case.

Trial

In December 2008, the trial court heard witness testimony and considered documentary evidence concerning the counterclaim for a declaratory judgment, and focused on the issue of whether Downes and DPC retained a right to seek compensation under section 6(iii). Downes admitted that he believed HPC's net fees for 1997 and 1998 did not reach the threshold amount of $3,730,900, and therefore he believed that HPC and Farina owed him no further compensation for those years under section 6(iii). He believed the firm's income exceeded the threshold in 1999, and it remained above the threshold through 2003. Downes testified that in May 1999, he agreed to modify the February 1997 agreement by permitting HPC to defer payments under section 6(iii) for two years. He signed the May 1999 letter agreement, in which he said he would "forego" payments for two years, with the understanding that this meant only that HPC would defer the payments for that time. Downes testified that he met with Hoey and Farina in June 1999, and they both acknowledged that HPC owed Downes and DPC money under section 6(iii).

Downes testified that in March 2001, he complained to Hoey about the way HPC operated. The trial court sustained Farina's objection to further testimony about the conversation, ruling that the testimony would violate the Dead-Man's Act (735 ILCS 5/8-201 (West 2008)). Downes also testified that in 2003, when Farina asked Downes to participate in the purchase of HPC, Downes told Farina that HPC owed him the payments due under section 6(iii). Downes testified that he discussed the matter in a separate meeting with Hoey, who acknowledged that HPC owed Downes money under section 6(iii). The court sustained Farina's objection to testimony about the conversation, again finding the testimony violated the Dead-Man's Act. Downes explained that he did not ask Hoey for immediate payment of the amount owed because Downes wanted HPC to succeed. Downes testified that in March of 2003, Hoey told Downes that Farina was going to purchase HPC, and Farina would honor Downes's February 1997 agreement with HPC, including payment of section 6(iii) amounts. The court struck this part of Downes's testimony under the Dead-Man's Act.

Farina testified that throughout his negotiations to purchase HPC, Downes never mentioned any debt that HPC owed to DPC or Downes. In particular, Downes did not mention the debt when Farina met with him, in March 2003, to discuss Farina's purchase of HPC. Farina testified that he first learned of Downes's claim that HPC owed him money in March 2004, when Downes asked to see HPC's books.

In an order dated May 8, 2009, the trial court held that Downes and DPC had no right to any further compensation under section 6(iii) of the February 1997 agreement. The court looked at four separate time periods, and found that different legal theories barred compensation for each period. According to the court, (1) *laches* barred further compensation under section 6(iii) for 1997 and 1998; (2) the May 1999 agreement barred further compensation for 1999 and 2000; (3) Downes waived his claim for monies due for the years 2001, 2002, and for January through May 2003, and in the alternative, equitable estoppel applied, barring Downes and DPC from asserting a claim for the same time period; and (4) HPC's exercise of its option to terminate the agreement, with the termination taking effect on May 3, 2003, extinguished any right to compensation under section 6(iii) for the rest of 2003 and for subsequent years. However, the trial court held that Downes retained the right to an accounting for amounts due under sections 6(iv) and 6(v) of the February 1997 agreement. The court found no reason to delay enforcement or appeal of the order insofar as it pertained to section 6(iii) claims. Downes and DPC filed a timely appeal, docketed as case number 1-09-2071.

Accounting

On May 18, 2009, Farina and HPC tendered to Downes a document entitled "Defendants' Accounting Regarding Paragraphs 6(iv) and 6(v) of February 1, 1997 Memorandum of Agreement." In the document, Farina claimed that as of January 1, 2004, Downes had received full payment for all cases under section 6(v), and all but two cases under section 6(iv). For one of the two cases, Downes received payment in full in April 2004, and for the final case, Farina placed Downes's fee into an escrow account, ready for payment on resolution of this lawsuit.

Downes objected to the accounting, claiming that the agreement gave him the right to inspect HPC's books to determine his right to payments, and that HPC owed him fees earned in cases entitled *Goldsberry v. Burlington Northern Santa Fe Corp.* and *Fagocki v. Algonquin*.

With respect to *Goldsberry*, HPC presented to the court the letter Downes sent to Carol Goldsberry on January 15, 1999, on behalf of HFD. In the letter, Downes expressed condolences for the death of Goldsberry's husband, who died in the course of his work in a railroad yard on January 12, 1999. Downes emphasized HFD's expertise in effectuating the legal rights of individuals injured in the course of work for the railroad industry. Downes invited Goldsberry to call Hoey, Downes or another attorney for HFD for free legal advice.

Downes submitted an affidavit in which he swore that he spoke with Goldsberry on the telephone on January 16, 1999, and that he subsequently went to her home where she signed a letter engaging HFD to represent her in a lawsuit she intended to bring on behalf of her deceased husband. According to the complaint HFD filed on Goldsberry's behalf, Goldsberry's husband died when the heavy equipment he operated slid on ice and contacted uninsulated high voltage power lines.

In an order dated November 9, 2009, the trial court found that the February 1997 agreement entitled Downes to inspect HPC's records pertaining to *Fagocki*, so that Downes could verify the adequacy of payments for that case. In all other respects, the court overruled Downes's objections to the accounting. The court specifically held that Downes had no right to split fees under section 6(iv) or 6(v) for the *Goldsberry* case. The court found that HFD obtained the case because of its relationship with unions representing railroad workers, and therefore, according to the court, the case "would come within the contemplation of the parties as a railroad case." The court also held that, because Goldsberry contacted the firm in response to a letter, and not because of some relationship with Downes, the case counted as a firm-related case. Section 6(v) governs fee-splitting only for "non-railroad or non-firm related" cases, and therefore section 6(v) did not entitle Downes to any fees for the *Goldsberry* case. Again, the court added a finding of no just cause to delay enforcement or appeal from the order of November 9, 2009. Downes filed a timely appeal, docketed as case number 1-10-0154. We consolidated the appeals.

ANALYSIS

I. Appeal No. 1-09-2071

A reviewing court will not disturb the trial court's findings of fact, following a bench trial, unless the manifest weight of the evidence demands contrary findings. *Board of Education, Proviso Township High School District No. 209 v. Jackson*, 401 Ill. App. 3d 24, 31 (2010). To the extent that the trial court based its judgment on its resolution of questions of law, we review the judgment *de novo*. *Jackson*, 401 Ill. App. 3d at 31. The plaintiff in a declaratory judgment action always bears the burden of proof. *Muhammad v. Muhammad-Rahmah*, 363 Ill. App. 3d 407, 414 (2006). In this case, we will follow the trial court's analysis, and separate the claims into different time periods.

A. Compensation for 1997-98

Although Downes testified that he believed HPC did not owe him any additional compensation under section 6(iii) for 1997 and 1998, he sought access to HPC's books for those years to verify the adequacy of his compensation. The trial court held that *laches* barred Downes from seeking such added compensation. A party may lose a claim due to *laches* if the party has not acted with due diligence, and the delay in asserting the claim prejudiced the opposing party. *Tarin v. Pellonari*, 253 Ill. App. 3d 542, 550 (1993), citing *Tully v. State*, 143 Ill. 2d 425, 432 (1991).

The trial court here based its ruling, in part, on its assessment of the credibility of the parties. The court found Farina credible and Downes not credible, particularly with regard to the conversations they had before Farina bought HPC. Thus, the court found that before the purchase of HPC in 2003, Downes never mentioned to Farina that HPC owed Downes substantial money for 1997 through 2003, pursuant to section 6(iii) of the February 1997 agreement. The court also disbelieved Downes's testimony that he discussed with Hoey the debt HPC owed to Downes and DPC. The court added:

> "[HPC] made an affirmative statement of the amount of net firm fees in each year.
>
> ***
>
> Despite his knowledge of the lack of any intent to pay him additional compensation for [1997 and 1998, Downes] took no action to verify the information given to him. ***
>
> *** Finally, he knew that Mr. Hoey was dying; the affairs of the firm, and

> Mr. Hoey's surviving family were of great importance to Mr. Farina. His former colleague was agreeing to undertake what he knew Mr. Farina perceived to be a significant financial obligation to guarantee the firm's and its affiliates' viability, as well as, provide some financial security for Mr. Hoey's widow.
>
> *** [E]quity demands that Mr. Downes make some statement to alert his 'partner' that he was not satisfied with the financial disclosures made to him four and five years ago."

Downes does not dispute the trial court's factual findings that he knew HPC claimed its fees did not reach the threshold for section 6(iii) compensation in 1997 and 1998. Downes also does not contest the court's credibility assessment or its finding that Downes never told Farina or Hoey that he wanted to inspect the books to verify that HPC did not owe him compensation for 1997 and 1998 under section 6(iii), although Downes knew of Farina's concerns about the financial obligation he was undertaking when he purchased HPC. Downes emphasizes that Farina knew about the February 1997 agreement. However, that knowledge did not alert Farina that Downes intended to contest, belatedly, HPC's representation that it owed Downes no section 6(iii) compensation for 1997 and 1998.

Although Downes knew of his right to inspect the books in 1998 or at least early 1999, he did not assert that right until March 2004, more than five years later. The evidence supports the trial court's finding that Downes did not act with due diligence. See *In re Application of County Treasurer & Ex-Officio County Collector of Cook Co.*, 386 Ill. App. 3d 906, 910 (2008); see also *County of DuPage v. K-Five Construction Corp.*, 267 Ill. App. 3d 266, 275-76 (1994). The evidence also shows that when he purchased HPC, Farina reasonably relied on his belief that HPC had fully compensated Downes for all claims from 1997 and 1998. The detriment to Farina from allowing Downes to belatedly assert his right to compensation warrants the application of *laches* here. See *County of DuPage*, 267 Ill. App. 3d at 275-76. Therefore, we agree with the trial court's finding that *laches* bars Downes and DPC from seeking additional compensation under section 6(iii) for 1997 and 1998.

B. Compensation for 1999-2000

Downes admits that he signed the May 1999 agreement in which he promised to forego compensation under section 6(iii) for 1999 and 2000. He has abandoned the argument he raised at trial, that in the context of the letter agreement, his promise to "forego" payment meant only that HPC would defer the payments. Instead, Downes now contends that the May 1999 agreement does not validly modify the February 1997 agreement because he received no consideration for the modification. He points out that if HPC terminated his employment, it would need to guarantee that he would receive $100,000 per year until 2007. As of May 1999, HPC had increased Downes's base pay to $150,000 per year. His continued employment at that rate of pay provided consideration for the May 1999 modification. See *Simons v. American Dry Ginger Ale Co.*, 335 Mass. 521, 526, 140 N.E.2d 649, 653 (1957); see also *Cement Gun Co. v. Patrick Warren Construction Co.*, 345 Ill. App. 295 (1951) (abstract of op.) (additional pay provided consideration for continued performance under contract, where one party had a right to suspend performance). Therefore, we hold that the trial court did not err when it found that Downes voluntarily entered into an enforceable agreement to forego compensation under section 6(iii) for 1999 and 2000, and that the agreement precludes his recovery under that section for those years.

C. Compensation for 2001 through May 2003

The trial court found that Downes waived his right to compensation under section 6(iii) for the period from 2001 through May 2003, and that equitable estoppel applied to bar compensation for the same period. The trial court again relied on its credibility determination to support its finding that before March 2004, Downes never mentioned to Hoey or Farina his right to compensation for this period. Based on the Dead Man's Act, the court disallowed Downes's testimony that he discussed the issue with Hoey, and Hoey assured him repeatedly that HPC would honor the February 1997 agreement and pay Downes all amounts owed under section 6(iii) of that agreement. Downes contends both that the trial court misapplied the Dead-Man's Act and that the manifest weight of the evidence shows that he did not clearly and unequivocally waive his rights. See *R&B Kapital Development v. North Shore County Bank & Trust Co.*, 358 Ill. App. 3d 912, 922 (2005). We find that we need not address this issue, because we agree with the trial court that equitable estoppel applies under the facts of this case. The ruling on equitable estoppel did not depend in any way on the exclusion of evidence under the Dead-Man's Act.

"Estoppel arises when a party, by his words or conduct, intentionally or through culpable negligence, induces reasonable reliance by another on his representations and thus leads the other, as a result of that reliance, to change his position to his injury." *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 472 (2004). The court should estop a party from asserting its rights if, under the circumstances of the case, conscience and honest dealing require that the party be estopped. *Schwinder*, 348 Ill. App. 3d at 472. Our supreme court, in *Milligan v. Miller*, 253 Ill. 511, 517 (1912), explained that "[e]stoppel may arise from silence as well as words where there is a duty to speak and the party on whom the duty rests has an opportunity to speak, and, knowing the circumstances, keeps silent."

The trial court found that Downes had a duty to tell Farina about his intention to assert his right to additional payments from HPC for the period from 2001 through 2003 before Farina bought HPC. The court explained:

> "Mr. Downes, through his solely owned professional corporation, had affiliated with [HPC] for their mutual benefit. This relationship, in this Court's opinion[,] creates an obligation of full disclosure of facts that will affect the viability of the ongoing concern. Mr. Downes was consulted by Mr. Farina and offered an opportunity to become an equity partner in [HPC] going forward. He was told of the financial commitment that would be required. If he believed that Mr. Farina was not fully aware of the potential liabilities, he should have spoke[n]."

A duty to speak may arise in the context of a fiduciary or other special relationship. *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 25 (2003). When parties have a special relationship, one party has a duty to disclose to the other material facts, at least when the party who knows the concealed material fact also knows that the ignorant party is relying on an erroneous factual belief about the concealed fact, and the ignorant party does not have an equal opportunity to discover the truth. *Union Pacific Resources Group, Inc. v. Rhône-Poulenc, Inc.*, 247 F.3d 574, 586 (5th Cir. 2001).

Partners in a law firm or a joint venture have a fiduciary relationship. *Thornwood*, 344 Ill.

App. 3d at 25; *Holstein v. Grossman*, 246 Ill. App. 3d 719, 738 (1993). When lawyers who have no general partnership agreement jointly undertake representation of a client in a case, the law regards them as joint venturers or special partners for that case. *In re Johnson*, 133 Ill. 2d 516, 525-26 (1989). The special partners have fiduciary duties to each other with respect to the case. *Holstein*, 246 Ill. App. 3d at 738. A court may infer that parties have created a joint venture when the court finds "(1) an express or implied agreement to carry on some enterprise; (2) a manifestation of intent by the parties to be associated as joint venturers; (3) a joint interest as shown by the contribution of property, financial resources, effort, skill or knowledge by each joint venturer; (4) some degree of joint proprietorship or mutual right to exercise control over the enterprise; and (5) provision for the joint sharing of profits and losses." *Holstein*, 246 Ill. App. 3d at 738.

Here, the relationship between HPC and DPC had some, but not all, of the characteristics of a joint venture. HPC entered into an express agreement with DPC to operate jointly; DPC and HPC held themselves out to the public as a single firm, HFD; both parties contributed their expertise in certain kinds of cases; and the parties elaborately specified their arrangement for splitting the fees HFD earned in various classes of cases. However, HPC and Farina exercised primary control over the conduct of litigation, and the parties made no provision for sharing losses. See *Holstein*, 246 Ill. App. 3d at 738.

We agree with the trial court's finding that, although the relationship between DPC and HPC did not fully qualify as a joint venture, Downes and Farina had the kind of special relationship that imposed on Downes a duty to tell Farina, before Farina purchased HPC, that he intended to seek compensation under section 6(iii) of the February 1997 agreement for the entire duration of the affiliation between DPC and HPC.

Equity especially demanded disclosure because of several special circumstances here. Farina invited Downes to join him as a partner and to purchase HPC with Farina. Downes knew of HPC's cash flow problems at least by May 1999. He accepted an increase in his base pay before he agreed to forego section 6(iii) compensation for 1999 and 2000. HPC further increased Downes's base pay in 2001, paying him twice the amount required by the February 1997 agreement, despite HPC's inability to pay back the loan it took in 1999. Downes accepted the increase without disclosing to Farina that he believed the payments in excess of the amounts that the February 1997 agreement required as base pay had no effect on HPC's duty to pay him under section 6(iii) of the February 1997 agreement. When Farina told Downes of his concerns about his ability to take on the financial burden of owning HPC, and especially when Farina identified those burdens and did not include the debt to Downes as part of the debts HPC owed, Downes had a duty to inform Farina that Farina might not understand the full extent of the financial burden he would undertake by buying HPC.

In view of the added compensation Downes accepted from a cash-strapped firm, Farina had a right to rely on Downes's silence as an indication that Downes did not intend to seek additional compensation under section 6(iii) for 2001, 2002 and for 2003 up to the time of the purchase. Accordingly, we find that the trial court's finding - that Downes's breach of his duty to Farina equitably estops him from claiming any right to compensation under section 6(iii) for 2001, 2002, and January through May 2003 - was not against the manifest weight of the evidence .

D. Compensation for Period After May 2003

The trial court found that the notice Downes received from HFD on April 1, 2003, terminated the February 1997 agreement as of May 3, 2003, leaving Downes with a right to compensation under section 7 of the February 1997 agreement for the period from May 2003 until February 2007, but with no further right to compensation under section 6(iii). On appeal Downes argues that the February 1997 agreement required termination at "the end of any calendar month," so the notice could not have terminated the agreement as of May 3, 2003. Downes waived this argument by failing to raise it in the trial court. See *Lemke v. Kenilworth Insurance Co.*, 109 Ill. 2d 350, 354-55 (1985). Downes points out that we have discretion to review the issue, because the interpretation of the contract presents an issue of law. See *People ex rel. Daley v. Datacom Systems Corp.*, 146 Ill. 2d 1, 27 (1991). We choose not to address the waived issue (see *Visvardis v. Ferleger*, 375 Ill. App. 3d 719, 727-28 (2007)), but we note that because Downes received the notice on April 1, 2003, HPC must have sent the notice before the end of March 2003, so that termination by April 30, 2003, apparently would comply with the exact wording of the February 1997 agreement.

E. Conclusion

Laches bars Downes and DPC from receiving any additional compensation under section 6(iii) of the February 1997 agreement for the years 1997 and 1998. Downes and DPC promised not to seek any additional compensation under section 6(iii) for 1999 and 2000, and consideration supported their promise. Downes and DPC's failure to advise Farina of their intention to seek section 6(iii) compensation equitably estops them from seeking such compensation for 2001, 2002, and January through May 2003. HPC's exercise of its right to terminate the February 1997 agreement, effective as of May 3, 2003, bars Downes and DPC from seeking section 6(iii) compensation thereafter. Accordingly, we affirm the declaratory judgment entered by the trial court in favor of HPC and Farina on count I of their counterclaim against Downes and DPC.

II. Appeal No. 1-10-0154

In the consolidated appeal, we also review the trial court's findings of fact to determine whether they are contrary to the manifest weight of the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002). We review *de novo* the trial court's interpretation of the February 1997 agreement. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129 (2005). We must determine the meaning of the contract from the words used, and we must not impose on the contract an interpretation contrary to the plain meaning of those words. *Johnstowne Centre Partnership v. Chin*, 99 Ill. 2d 284, 287-88 (1983).

The trial court granted Farina and HPC a judgment disallowing Downes's request to see HPC's books, except insofar as the books showed fees received in connection with the *Fagocki* case. Downes argues that the February 1997 agreement gives him the right to see the books to check all the amounts he received under the agreement. He separately argues that the court erred in holding that he had no right to fees from the *Goldsberry* litigation.

A. Inspection

The contract provides that Downes and DPC "shall have the right to inspect *** the books of [HPC] to verify the amount of the payments required to be made to [DPC] hereunder." We see no limitation in the contract on this right. In accord with the plain meaning of the contract, HPC and Farina must provide Downes access to HPC's books sufficient for Downes to verify that HPC has paid him all amounts due under sections 6(iv), 6(v) and 7 of the February 1997 agreement. We reverse the trial court's decision insofar as the decision limits Downes's access to HPC's books so that Downes only sees information pertinent to the adequacy of payments in connection with *Fagocki*. HPC and Farina must permit him access to information pertinent to all payments due under sections 6(iv), 6(v) and 7.

B. Goldsberry

The trial court held that the February 1997 agreement did not entitle Downes to any payments in connection with Goldsberry's lawsuit on behalf of her dead husband. The court based the ruling on its factual findings that HFD's relationship with railroad unions gave it access to the information about the accident that led Downes to send the January 15, 1999, letter to Goldsberry, and that Goldsberry contacted Downes only because he named himself in the letter as one of three lawyers at the firm for her to contact for free legal advice.

We find no evidence in the record supporting either finding of fact. No affidavit, deposition, or other evidence shows how Downes obtained the information that led him to send the letter to Goldsberry. No evidence shows why Goldsberry called Downes, or whether she had any prior relationship with him. Farina and HPC made related factual assertions in their briefs in the trial court, but they presented no evidence to support their assertions. Because no evidence supports the trial court's findings of fact, we reverse the court's order overruling Downes's objection to the failure to account for fees generated in Goldsberry's lawsuit, and we remand for further proceedings not inconsistent with this order. We do not mean to imply any factual determination in this order on the issues concerning fees for Goldsberry's lawsuit. We hold only that the evidence in the record does not support the factual findings in the trial court's order of November 9, 2009.

C. Conclusion

The February 1997 agreement gives Downes an enforceable right to inspect HPC's books to verify the adequacy of the payments Downes and DPC have received under sections 6(iv), 6(v) and 7 of the agreement. We reverse the trial court's decision and remand for entry of an order permitting Downes sufficient access to HPC's books to verify the adequacy of all payments he received under those sections of the agreement. We also reverse the ruling that HPC showed that it owed Downes no compensation for Goldsberry's lawsuit, because no evidence in the record supports the trial court's factual findings on which it based its ruling. We remand for further proceedings in accord with this order.

1-09-2071: Affirmed.

1-10-0154: Reversed and remanded.