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2011 IL App (3d) 100649-U

Order filed October 3, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

<i>In re</i> MARRIAGE OF TRACY R. RUPP,)	Appeal from the Circuit Court
)	of the 13th Judicial Circuit,
Petitioner-Appellant,)	La Salle County, Illinois,
)	
and)	Appeal No. 3-10-0649
)	Circuit No. 07-D-137
KELLY J. RUPP,)	
)	
Respondent)	Honorable
)	Daniel J. Bute,
(Krista Carls, Attorney-Appellee).)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion when it awarded attorney fees to Tracy Rupp's former attorney; and it was within the discretion of the trial court to refuse to order Tracy's former attorney to turn over her case file to Tracy's current attorney.

¶ 2 On January 7, 2010, the trial court entered an order permitting Tracy Rupp to substitute attorney K.O. Johnson for his former counsel, Krista Carls. After the substitution, Tracy filed a petition to bar Carls' attorney fees. Thereafter, Carls filed a petition for

attorney fees. The court granted Carls' petition for fees and denied Tracy's petition to bar fees. Tracy appeals, arguing that the trial court: (1) abused its discretion when it granted Carls' petition for fees; and (2) did not have discretion to permit Carls to withhold her case file. We affirm.

¶ 3 Tracy and Kelly Rupp were married on May 28, 2004. On March 16, 2007, Tracy filed a petition for dissolution of marriage. At the time, Tracy was represented by Carls. On January 7, 2010, Tracy requested a substitution of attorneys. The trial court allowed attorney Johnson to substitute for Carls and directed Carls to forward Tracy's file to Johnson in accordance with the client's rights and responsibilities requirements stated in section 508 of the Illinois Marriage and Dissolution of Marriage Act (Act). 750 ILCS 5/508 (West 2008).

¶ 4 On March 3, 2010, the court granted Carls leave to file a fee petition. Tracy responded with a motion to bar attorney fees and costs. In the petition, Tracy admitted that he had "executed [a] fee agreement which complies with §508(f) of the [Act] with [Carls.]" See 750 ILCS 5/508(f) (West 2008). However, the petition continued that Carls was not entitled to fees because she had refused to tender the file to Johnson and refused to provide a detailed billing statement to Tracy.

¶ 5 In response to the allegations made in Tracy's motion to bar fees, the court ordered Tracy to file a petition for rule to show cause. On March 25, 2010, Tracy filed his petition for rule to show cause, which alleged that Carls refused to forward the file as required by section 508 of the Act and the court's January 7, 2010, order. See 750 ILCS 5/508 (West 2008). The court then issued an order on the rule to show cause that required Carls to forward Tracy's original file to Johnson or to show cause why she should not be held in

contempt of court for failing to comply with the order.

¶ 6 On April 9, 2010, Carls filed her petition for attorney fees pursuant to section 508(a) of the Act. 750 ILCS 5/508(a) (West 2008). The petition alleged that Tracy was charged \$175 per hour at the beginning of the case until Carls' hourly rate was increased to \$200 per hour on June 1, 2008. Carls also admitted in the petition that Tracy signed a retainer agreement, but the agreement could not be located at the time the petition was filed. Nonetheless, Carls had attached to the petition an itemized billing statement and attorney affidavit. The statement indicated that a total of \$11,728.75 remained outstanding on Tracy's bill.

¶ 7 The court held a hearing on Carls' petition for attorney fees on June 9, 2010. Tracy and Johnson did not attend the hearing; however, attorney Nancy Alamia from Johnson's office appeared in his place for the hearing. Carls testified that she learned of Tracy's decision to switch attorneys in January 2010. In response, she sent Johnson a substitution of attorney form and an agreed order for fees. Carls alleged that Tracy had indicated that he did not contest her fees and that he would pay her when he had the money. Carls' agreed order proposed that a judgment be entered against Tracy in the amount of \$7,610. However, Johnson urged Tracy to contest Carls' fees, and Tracy did not sign the agreed order.

¶ 8 On cross-examination, Alamia questioned Carls about the \$4,000 difference between the amount stated in the agreed order and the petition for fees. Carls stated that she discovered a billing omission while she was verifying her billed hours in preparing her petition for fees. She testified that the \$4,000 increase was for the time she spent preparing an emergency petition for child custody. Alamia also inquired if Carls had a copy of the

retainer agreement executed between Tracy and herself. Carls replied that she did have a copy of the retainer agreement, but she did not offer the agreement into evidence, and Alamia did not inquire further. Carls also admitted that she had not turned over Tracy's case file to Johnson.

¶ 9 The court granted Carls' petition for fees and entered a judgment against Tracy for \$11,728.75. Alamia then inquired if the court was going to be hearing argument on the rule to show cause against Carls for not turning over the file. The court responded that it had done "a lot of research" and found that Carls did not have to turn her file over because the matter was within the discretion of the court. Moreover, it indicated that the file could be recreated and that it was not ordering Carls to turn over the entire file because the case was extensive. However, the court stated that it would order Carls to provide Johnson with access to the file if he was missing documents. The court then discharged the rule to show cause.

¶ 10 Thereafter, Tracy filed a motion for reconsideration of the court's award of attorney fees. The motion alleged that Carls continued to refuse to turn over the file as purportedly required by section 508(f) of the Act. 750 ILCS 5/508(f) (West 2008). The court denied the motion, and Tracy appeals.

¶ 11 On appeal, Tracy first argues that the court abused its discretion when it denied his petition to bar attorney fees and granted Carls' petition for fees. Tracy contends that the court did not have the discretion to make such an award and the award was made in violation of section 508 of the Act. 750 ILCS 5/508 (West 2008). Specifically, Tracy alleges that Carls' petition did not contain a written fee agreement as required by sections 508(c)(2) and

508(f) of the Act. Tracy also alleges that Carls did not provide a client rights and responsibilities form in her fee agreement. 750 ILCS 508(c)(2), (f) (West 2008). Lastly, he argues that Carls did not provide quarterly billing statements, as required by section 508(f)(5).

¶ 12 Section 508 of the Act permits a substituted attorney, who previously represented a client in a dissolution of marriage proceeding, to recover her fees and costs. 750 ILCS 5/508(c)(3) (West 2008). Section 508(c)(3) directs a trial court to award reasonable fees and costs if it finds a valid contract existed. 750 ILCS 5/508(c)(3) (West 2008). The decision to award reasonable attorney fees and costs under this section is within the sound discretion of the trial court. *Kaufman, Litwin & Feinstein v. Edgar*, 301 Ill. App. 3d 826 (1998). On appeal, we will not disturb a trial court's order regarding attorney fees in a postdissolution proceeding absent an abuse of discretion. *In re Marriage of Devick*, 335 Ill. App. 3d 734 (2002).

¶ 13 We initially note that the record does not include the retainer agreement entered between Tracy and Carls. However, Carls stated in her petition for fees that a retainer agreement was executed. This position was further supported by Carls' uncontroverted testimony that she had executed a retainer agreement with Tracy. Additionally, Tracy admitted in his petition to bar fees that he executed a valid fee agreement that complied with section 508(f) of the Act. This admission and Carls' allegations provided the court with grounds to find that Carls executed a valid retainer agreement that included a client's rights and responsibilities statement. See 750 ILCS 5/508(c)(2), (f) (West 2008). Although the retainer agreement was absent from the record, we find that the court had sufficient evidence

to rule that a valid contract existed. We hold that the court's award of attorney fees was not an abuse of discretion.

¶ 14 Tracy also contends that he did not receive quarterly billing statements for the first time on appeal. Because it was not raised at the attorney fee hearing or in his motion to reconsider, he has waived review of this issue. See *Wagner v. City of Chicago*, 166 Ill. 2d 144 (1995) (as a general rule, any issue not raised in the trial court is waived).

¶ 15 Next, Tracy argues that it was not within the discretion of the trial court to allow Carls to withhold the case file after the termination of her representation. Tracy contends that the trial court's order violated section 508(f)(3) of the Act because the statute required Carls to turn over her case file before an award of attorney fees could be made. See 750 ILCS 5/508(f)(3) (West 2008).

¶ 16 Section 508(f) of the Act requires attorneys to append to their written client engagement agreements a "Statement of Client's Rights and Responsibilities." 750 ILCS 5/508(f) (West 2008). The statement provided in section 508(f)(3) of the Act states "[i]n the event that the counsel withdraws from representation, or is discharged by the client, the counsel will turn over to the substituting counsel *** all original documents and exhibits together with complete copies of all pleadings and discovery within thirty (30) days of the counsel's withdrawal or discharge." 750 ILCS 5/508(f)(3) (West 2008).

¶ 17 The trial court initially ordered Carls to turn over her file to Johnson. However, the court changed its position after the attorney fees hearing and required Carls to make the file available to Johnson for copying. The court noted that although the file was extensive, it could be recreated. In this situation, we find that the court correctly recognized that Carls

had a retaining lien in her file that ensured payment of her fees. See *Upgrade Corp. v. Michigan Carton Co.*, 87 Ill. App. 3d 662 (1980). However, the court also had the inherent power to order Carls to "release property in [her] possession in the interest of equity and fairness." *Upgrade Corp.*, 87 Ill. App. 3d at 665. The court's decision accommodated both Carls' right to her own work product while protecting Tracy's interest in uninterrupted representation. Therefore, we find that the trial court properly exercised its discretion regarding both parties' access to the file.

¶ 18 Finally, Carls urges us to impose sanctions on Johnson for filing a frivolous, bad faith appeal, and for his failure to file a motion for additional time to file his initial brief. See Ill. S. Ct. R. 375 (eff. Feb. 1, 1994). We decline to impose sanctions on Johnson. We find that this appeal was brought in good faith. Therefore, the imposition of sanctions are not justified under Illinois Supreme Court Rule 375 (eff. Feb. 1, 1994).

¶ 19 The judgment of the circuit court of La Salle County is affirmed.

¶ 20 Affirmed.