

FIRST DIVISION  
January 19, 2016

No. 1-15-0768

**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).

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**IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT**

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SOVEREIGN BANK, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	
	)	
AMERICAN TOWING ASSOCIATION, INC.	)	No. 13 L 2089
and DAVID JILWAYA,	)	
	)	
Defendants,	)	
	)	
DEUTSCHMAN & ASSOCIATES P.C.,	)	Honorable
	)	Alexander P. White,
Adverse Claimant-Appellant.	)	Judge Presiding.

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JUSTICE HARRIS delivered the judgment of the court  
Presiding Justice Liu and Justice Cunningham concurred in the judgment.

**ORDER**

*Held:* The judgment of the circuit court denying Deutschman's adverse claim for attorney fees based on the common fund doctrine is affirmed where Sovereign's claim to compensation did not depend on the fund's creation, and therefore Sovereign did not benefit from the fund.

¶ 1 Appellant, Deutschman & Associates, P.C. (Deutschman), appeals the order of the circuit court denying its adverse claim under the common fund doctrine to recover a fee for legal services rendered on behalf of defendants American Towing Association, Inc. (American Towing), and denying its motion to reconsider. On appeal, Deutschman contends that the trial court erred in its application of existing law when it denied the adverse claim because the common fund doctrine entitles Deutschman to a fee for the recovery of proceeds from Farmers Insurance Company (Farmers). For the following reasons, we affirm.

¶ 2 JURISDICTION

¶ 3 The trial court denied Deutschman's motion to reconsider on February 26, 2015. Deutschman filed its notice of appeal on March 18, 2015. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 4 BACKGROUND

¶ 5 On February 4, 2011, appellee Sovereign Bank, N.A. (Sovereign), entered into a promissory note and security agreement with American Towing, in which Sovereign provided a loan for American Towing to purchase a tow truck. Pursuant to the agreement, American Towing agreed to make 72 consecutive monthly payments in the amount of \$1,525 plus tax. Paragraph 2 of the agreement granted Sovereign a security interest in the tow truck "together with \*\*\* all proceeds thereof, including, but not limited to, insurance proceeds (collectively, "Collateral".)" Paragraph 5.2, addressing liens, stated that American Towing "will not create or permit to exist any mortgage, pledge, title retention lien, or other lien, encumbrance or security interest with respect to the Collateral, other than encumbrances in favor of" Sovereign. Pursuant to paragraph 5.3, American Towing agreed to "cooperate with [Sovereign] and any

insurers in the investigation, prosecution and defense of all claims resulting from the use or operation of the vehicle" and "take all action necessary to comply with the provisions of any policy of insurance relating to the vehicle or the operation thereof. [American Towing] hereby appoints [Sovereign] as [its] attorney in-fact to adjust all insurance claims and endorse all checks and drafts in settlement thereof."

¶ 6 On August 19, 2011, the tow truck sustained irreparable damage in a fire. The vehicle was insured through a policy issued by Farmers. American Towing made a claim on the policy, but the matter remained unsettled and American Towing retained the services of Deutschman. The contract for legal services provided that Deutschman would be entitled to "33 1/3 percent of what ever may be recovered from said claim whether by suit, settlement, or in any manner." After the fire event, American Towing failed to make the monthly payment due November 10, 2011, and all payments due thereafter.

¶ 7 On March 15, 2012, Deutschman sent a letter to Farmers demanding payment on American Towing's claim, stating that his client "has been waiting long enough for resolution and at this time the loss of the truck and failure to replace it within the fleet is causing my client loss of business revenue. We intend to seek damages against Farmers should this matter continue to remain unsettled." On May 2, 2012, Deutschman received a letter from Farmers' attorney acknowledging American Towing's claim and stating that "in order to evaluate your client's insurance claim we will require that he provide the following documentation, as well as appear for an examination under oath \*\*\*." The letter requested various names and phone numbers, as well as a credit report. It further stated that "all of the aforementioned documentation is being requested pursuant to the terms of Farmer's Insurance Company policy"

which provides that Farmers "has no duty to provide coverage under the policy *unless* there has been full compliance with several duties \*\*\*." [Emphasis in the original.]

¶ 8 In a letter dated October 31, 2012, Farmers stated that the requested information has not been provided and that "[t]he lack of cooperation is preventing [Farmers] from investigating this claim." Farmers again requested the documentation and warned that further refusal to produce the information will result in denial of coverage. Mr. Jilwaya provided his sworn statement on December 17, 2012. In an April 16, 2013, letter, Deutschman provided the documentation and requested a resolution on the claim "as soon as possible" or American Towing "will be filing suit for breach of contract by the end of April." On May 10, 2013, Farmers issued a draft in the amount of \$25,545.63 in settlement of American Towing's claim on the policy.

¶ 9 Meanwhile, Sovereign filed suit against American Towing and Mr. Jilwaya for breach of contract and to recover the remainder of the amount due under the promissory note and security agreement. Sovereign filed a motion for summary judgment on its claim, which the trial court granted on April 14, 2014. The judgment awarded Sovereign a total amount of \$152,732.98. After obtaining the judgment, Sovereign sought a turn-over order against Farmers for the insurance proceeds.

¶ 10 On May 28, 2014, Deutschman asserted an attorney lien in open court and the trial court gave it until June 11, 2014, to provide documents in support of the lien. Deutschman did not file any documentation so on July 1, 2014, the trial court ordered it to file an adverse claim which it filed on July 2, 2014. In its adverse claim, Deutschman alleged that it was entitled to one-third of the amount recovered against Farmers pursuant to a contingency fee contract it signed with American Towing. Deutschman based its argument on the common fund doctrine, arguing that Sovereign would be unjustly enriched if the bank did not share in the costs of

litigating American Towing's claim against Farmers. Deutschman requested a total amount of \$8,530.21.

¶ 11 On October 29, 2014, the trial court denied Deutschman's adverse claim finding that the common fund doctrine was inapplicable in a creditor-debtor relationship, no personal injury fund was created that will compensate claimants other than American Towing, and that Sovereign held a perfected lien over the insurance proceeds. Deutschman filed a notice of appeal on October 30, 2014, which it dismissed by stipulation on December 3, 2014. Deutschman also filed a motion to reconsider on November 21, 2014, which the trial court denied on February 26, 2015. Deutschman filed its notice of appeal on March 18, 2015. In a footnote, Sovereign Bank argues that Deutschman's notice of appeal is untimely because an order denying a motion to reconsider is not itself appealable, and Deutschman had dismissed the original timely appeal filed on October 30, 2014. However, Illinois Supreme Court Rule 303(a)(1) (eff. Jan. 1, 2015) provides that if a timely posttrial motion is filed, the notice of appeal must be filed "within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order." The trial court denied Deutschman's motion to reconsider on February 26, 2015, and Deutschman filed a notice of appeal on March 18, 2015, within the 30 days required by Rule 303(a)(1). Therefore, Deutschman filed its appeal in a timely manner.

¶ 12 ANALYSIS

¶ 13 Deutschman contends that in denying its motion to reconsider, the trial court erred in applying existing law because the common fund doctrine entitles Deutschman to a fee for the recovery of proceeds from Farmers. "Whether the common fund doctrine applies to any particular case is a question of law which we review *de novo*." *Linker v. Allstate Insurance Co.*, 342 Ill. App. 3d 764, 770-71 (2003).

¶ 14 The general rule is that the prevailing party bears the costs of litigation, unless otherwise provided by a statute or by agreement between the parties. *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill. 2d 235, 238 (1995). The common fund doctrine is an exception to the general rule which allows an attorney who "creates, preserves, or increases the value of the fund in which others have an ownership interest be reimbursed from that fund for litigation expenses incurred, including counsel fees." *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 572-73 (2000). The doctrine's underlying rationale "is the equitable concept that the beneficiaries of a fund will be unjustly enriched by the attorney's services unless they contribute to the costs of the litigation." *Wendling v. Southern Illinois Hospital Services*, 242 Ill. 2d 261, 265 (2011). To prove a claim under the common fund doctrine, an attorney must show that (1) his legal services created the fund; (2) the subrogee or claimant did not participate in the fund's creation; and (3) the subrogee or claimant benefited or will benefit from the fund. *Morris B. Chapman*, 307 Ill. App. 3d at 105.

¶ 15 In support of its contention that Sovereign benefited from the fund created by the insurance proceeds, Deutschman relies on *Bishop v. Burgard*, 198 Ill. 2d 495 (2002). In *Bishop*, the plaintiff was injured in an automobile accident and her employer's ERISA plan paid her medical expenses. Under the plan's subrogation provisions, the plan had the right to recover 100% of the benefits paid to the extent of any settlement or judgment. *Id.* at 498-99. After the plaintiff's attorney obtained a settlement on her personal injury claim, the attorney alleged that pursuant to the common fund doctrine the plan's subrogation lien should be reduced by one-third to reflect its share of the attorney fees. *Id.* at 506-07. The supreme court agreed, reasoning that the plan benefited from the fund because but for plaintiff's claim and the efforts of her attorney, "there would have been no fund from which the plan could have obtained

reimbursement. For purposes of the common fund doctrine, it is irrelevant that the party \*\*\* has a *right* to compensation, be it an undifferentiated right of reimbursement or subrogation as is asserted here, or a right to compensation under some other theory. \*\*\* The real question is whether the plan obtained the benefit of a lawsuit without contributing to its costs." *Id.* at 510.

¶ 16 However, in *Wendling* the supreme court revisited the issue to determine whether the common fund doctrine applied to statutory health care liens. The plaintiffs in *Wendling* were injured in automobile accidents and treated at defendant hospitals. The hospitals filed statutory liens against any proceeds obtained by the plaintiffs in claims against their tortfeasors. Both plaintiffs reached settlement agreements with their respective defendants. They also filed petitions to adjudicate the hospitals' liens, alleging that the hospitals should have their share of the proceeds reduced by one-third to reflect their share of legal fees incurred by the plaintiffs. The trial court granted the petitions and the hospitals appealed. *Wendling*, 242 Ill. 2d at 264.

¶ 17 The supreme court noted that "Illinois courts have never applied the common fund doctrine to a creditor-debtor relationship" like the ones between the hospital lien holders and the plaintiffs at issue. *Id.* at 265. The court distinguished its case from *Bishop*, holding that *Bishop* did not expand the application of the common fund doctrine to include all situations where a claimant has a right to compensation such as the hospital lienholders in the case before it. Rather, the relevant consideration was whether the plan in *Bishop* benefited from the fund by obtaining reimbursement " 'it would not have received absent the fund's creation.' " *Id.* at 269 (quoting *Bishop*, 198 Ill. 2d at 509). The plan's claims were "contingent on the plaintiff's rights against a third party or the creation of a fund." *Id.* at 270. In contrast, the "[h]ospitals' claims existed irrespective of the outcome of the personal injury litigation. The benefit to the [h]ospitals by having their liens paid under the Act was merely an incidental benefit because the

[h]ospitals' claims were primarily against the plaintiffs rather than the fund." *Id.* Therefore, the common fund doctrine did not apply because "the [h]ospitals did not directly benefit from, and were not unjustly enriched by, the efforts of the plaintiffs' attorneys." *Id.*

¶ 18 Here, Sovereign obtained a judgment against American Towing on its breach of contract claim based on the promissory note and security agreement the parties signed. As such, Sovereign's situation was akin to that of the hospitals in *Wendling* in that its claim to compensation existed irrespective of the outcome of American Towing's claim against Farmers. Likewise, the benefit to Sovereign of having part of its judgment paid through the proceeds from the Farmers' policy was an incidental benefit because Sovereign's claim for breach of contract was against American Towing rather than the insurance proceeds covering the fire-damaged tow truck. Sovereign's claim to compensation did not depend on the creation of the fund. Therefore, since Sovereign did not benefit from the creation of the fund, the common fund doctrine does not apply. *Wendling*, 242 Ill. 2d at 270.

¶ 19 Due to our disposition of the issue, we need not address Sovereign's other arguments supporting the trial court's judgment.

¶ 20 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 21 Affirmed.