2016 IL App (1st) 15-1224-U

THIRD DIVISION
April 13, 2016

No. 1-15-1224

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

BRIDGET A. CLARK,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois,
Plaintiff-Appellant	)	County Department,
	)	Law Division.
v.	)	
	)	No. 2014 L 5252
FRANCISCO J. OLAVARRIA, et al.,	)	
	)	
Defendants-Appellees.	)	The Honorable
	)	Eileen O'Neill Burke,
	)	Judge Presiding.
	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Dismissal pursuant to section 2-619 was improper where Rule 1.5(e) of the Illinois Rules of Professional Conduct did not work to bar an attorney's claim for referral fees against its former employer. The record established that in addition to the referral, the attorney provided legal services to the client, while still an employee of the firm. In addition, according to the oral separation agreement the attorney agreed not to take the client with her in return for a percentage of the fees generated by the settlement of the case. Finally, since the majority of the fees earned would be remitted to the firm, even after the attorney was paid her share, there was no public policy ground on which to deny payment of that share, since the firm still had incentive to work in the client's best interest, even after the attorney departed the firm.

¶ 2 This causes arises from a two count-complaint for breach of contract and violation of the Illinois Wage Payment and Collection Act (820 ILCS 115 (West 2010)), filed by the plaintiff, Bridget A. Clark, against her former employers, the defendants, Francisco J. Olavarria, and Lynn Olavarria, individually, and as officers of the defendant law firm, The Law Offices of Francisco J. Olavarria, P.C. (hereinafter the law firm). During her employment with the law firm, the plaintiff, who was an associate attorney, referred a contingent fee case to the firm through another attorney. When she left the firm, she entered into an oral agreement with the firm to receive a portion of the fee generated by that referral case. The parties' dispute arose when the law firm refused to pay her the fee, arguing that any fee sharing agreement they had made, was not enforceable under Rule 1.5(e) of the Illinois Rules of Professional Conduct (Rules) (Ill. R. Prof. Conduct (2010) R. 1.5(e) (eff. Jan. 1, 2010)). The circuit court agreed with the defendants and granted their motion to dismiss pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (Code of Civil Procedure) (735 ILCS 5/2-169(a)(9) (West 2010)). The plaintiff appeals, contending that Rule 1.5(e) (Ill. R. Prof. Conduct (2010) R. 1.5(e) (eff. Jan. 1, 2010)) does not apply: (1) to lawyers previously associated in the same law firm; or (2) to a division of fees made pursuant to a separation agreement. For the reasons that follow, we reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 In her verified amended complaint, filed on July 8, 2014, the plaintiff, Bridget A. Clark (hereinafter Clark) alleged the following. Between February 15, 2007 and January 13, 2012, Clark worked as an associate attorney at the law firm, which was owned and operated by the defendants, Francisco J. Olavarria (hereinafter Francisco) and Lynn Olavarria (hereinafter Lynn). About a year into her employment, on January 13, 2008, Clark entered into an agreement with

Francisco, individually and as an officer of the law firm, wherein the parties agreed that Clark would receive one-third of the law firm's fee on personal injury or medical malpractice cases that Clark referred to the law firm directly and/or through her contacts. This agreement was attached to the Clark's complaint and is signed by Francisco. The law firm would make payments of the fees to Clark upon settlement of the relevant cases.

¶ 5 Clark further alleged that during her employment with the firm, she referred Patricia Burkowski (hereinafter Burkowski) as a client, with respect to a personal injury case, *Burkowski v. Walsh Construction Company* (No. 07 L 10749) (hereinafter the *Burkowski* case), and in support attached a letter from Burkowski's prior attorney. Clark also alleged that during the course of her employment, she did legal work on the *Burkowski* case.[1]

¶ 6 According to Clark's complaint, during 2011, the Burkowski case was pretried before the circuit court, resulting in the parties reaching a settlement in the amount of $325,000. The *Burkowski* case was then entered and continued, *inter alia*, for approval by the bankruptcy court and resolution of liens.

¶ 7 On January 2, 2012, Clark spoke to Francisco and informed him that she wanted to voluntarily terminate her employment with the firm. In her complaint, Clark alleged that she and Francisco then entered into an oral separation agreement whereby Francisco agreed to "protect" her "interests in the *Burkowski* case," ancillary to and beyond the terms of their original fee sharing agreement, if she "agreed to leave the client Patricia Burkowski and the *Burkowski* case with [the] defendant firm."

[1] Specifically, Clark alleged, albeit in her motion to reconsider, that she performed many hours of work on the *Burkowski* case, including, *inter alia*, discussing the case with Burkowski and her husband, performing research, arguing and defeating a motion to dismiss on behalf of Burkowski, without which settlement never would have been possible. Additionally, Clark alleged that she prepared for an attended multiple pre-trial conferences and court appearances, as well as prepared the settlement statement that the bankruptcy court eventually approved.

¶ 8 On March 25, 2014, the bankruptcy court approved a settlement in the *Burkowski* case, whereby the law firm received attorneys' fees in the amount of $90,333. The order approving the settlement is attached to Clark's complaint. On May 8, 2014, Clark telephoned Francisco demanding payment, and on May 9, 2014, made a written demand via fax and email to both Francisco and Lynn. Despite demand, the law firm informed Clark of its intention to retain the entirety of the fees collected under the *Burkowski* case.

¶ 9 Accordingly, Clark filed her suit against the firm and its principals alleging breach of contract and violation of the Illinois Wage Payment Act (820 ILCS 115 (West 2010)).

¶ 10 On August 19, 2014, the defendants filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)). Therein the defendants argued that Clark had failed to provide any document establishing Burkowski's assent to Clark receiving any portion of the fees earned by the firm in representing her in the Burkowski case. As such, the defendants contended, any referral agreement between Clark and the law firm was unenforceable under Rule 1.5(e) of the Illinois Rules of Professional Conduct. Ill. R. Prof. Conduct (2010) R. 1.5(e) (eff. Jan. 1, 2010). In support, the defendants attached an affidavit from Burkowski stating, *inter alia*, that she retained Francisco to represent her in her personal injury case, after Clark, who was working for the firm introduced her to Francisco. According to the affidavit, Burkowski signed a representation agreement with Francisco, and not with Clark. Burkowski averred that according to that agreement, the firm would get one-third of any settlement or award that was achieved in the case. It was Burkowski's understanding that Clark was an employee of Francisco, and she believed that only Francisco would receive a percentage of the attorneys' fees.

¶ 11 In her response, filed on September 15, 2014, Clark asserted that her breach of contract claim

was premised not upon the fee representation agreement between Burkowski and the law firm, but upon the employment agreement reached between Clark and the law firm, as well as the oral separation agreement created prior to Clark's departing from the firm. Citing to *Romanek v. Connley*, 324 Ill. App. 3d 393 (2001), under the facts of this case, Clark argued that Rule 1.5(e) (Ill. R. Prof. Conduct (2010) R. 1.5(e) (eff. Jan. 1, 2010)) did not bar her from collecting her share of the attorneys' fees. In support, she again attached the written agreement entered into by her and Francisco on January 13, 2008, as well as her own affidavit. In addition, Clark attached a copy of the attorney representation agreement (hereinafter engagement agreement) entered into by Patricia Burkowski and the law firm executed on April 23, 2009. Contrary to Burkowski's affidavit, that engagement agreement revealed that Burkowski employed and appointed the law firm, rather than just Francisco to represent her in the *Burkowski* case.

¶ 12 On November 21, 2014, the trial court granted the defendants' motion to dismiss pursuant to section 2-619(a)(9) (735 ILCS 5/2-619(a)(9) (West 2010)). Clark filed a motion to reconsider which was denied on April 14, 2015. Clark now appeals.

¶ 13 II. ANALYSIS

¶ 14 We begin by noting that the defendants here have not filed an appellees' brief. Nevertheless, because the record is simple and the issues straightforward, we will consider the merits of the plaintiff's claims pursuant to the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill.2d 128, 133, 345 N.E.2d 493 (1976) (holding that "if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits on appeal;" noting that in doing so the court of review should not "be compelled to serve as an advocate for the appellee or *** be required to search the record for the purpose of sustaining the judgment of the trial court.").

¶ 15 A motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)) admits the legal sufficiency of the complaint (*i.e.*, all facts well pleaded) but asserts an affirmative matter that appears on the face of the complaint that avoids the legal effect of or defeats a claim. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006); see also *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002); *Dewan v. Ford Motor Co.*, 363 Ill.App.3d 365, 368 (2005). An "affirmative matter" is "something in the nature of a defense which negates the cause of action completely" (*Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003)) or "refutes crucial conclusions of law or material fact contained in or inferred from the complaint" (*Dewan*, 363 Ill. App. 3d at 368). When ruling on a section 2-619 motion to dismiss, a court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Van Meter*, 207 Ill. 2d at 367. The relevant inquiry on appeal is "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." (Internal quotation marks omitted.) *Betts v. City of Chicago*, 2013 IL App (1st) 123653, ¶ 13 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)). Our review of the circuit court's grant of a motion to dismiss pursuant to section 2-619 is *de novo*. *Peregrine Financial Group, Inc. v. Futronix Trading, Ltd.*, 401 Ill. App. 3d 659, 660 (2010).

¶ 16 In the present case, the trial court granted the defendants' motion to dismiss on the basis that any fee-sharing agreement between Clark and the firm was unenforceable under Rules 1.5(c) and 1.5(e) of the Illinois Rules of Professional Conduct, which govern the propriety of attorney fee

arrangements. Ill. R. Prof. Conduct (2010) R. 1.5(c), (e) (eff. Jan. 1, 2010)). Specifically, Rule 1.5(c), which pertains to contingency fees, states in pertinent part:

> "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. ***." Ill. R. Prof. Conduct (2010) R. 1.5(c) (eff. Jan. 1, 2010)).

¶ 17 Rule 1.5(e) further governs fee-sharing agreements between attorneys that are not in the same firm, and states in full:

> "A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable." Ill. R. Prof. Conduct (2010) R. 1.5(e) (eff. Jan. 1, 2010)).

Comment 8, to Rule 1.5(e) explains that this rule "does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm, or payments made pursuant to a separation or retirement agreement." Ill. R. Prof. Conduct

(2010) R. 1.5(e), Comment 8 (eff. Jan. 1, 2010)).

¶ 18 It is well-settled that the provisions of Rule 1.5 " 'operate with the force and effect of law.' " *Donald W Fohrman & Associates, Ltd. v. Mark D. Alberts,* P.C., 2014 IL App (1st) 123351, ¶ 34 (quoting *Romanek v. Connelly,* 324 Ill. App.3d 393, (2001)). Rule 1.5"embod[ies] this state's public policy" of protecting the client's rights. *Romanek,* 324 Ill.App.3d at 399; *Richards,* 311 Ill.App.3d at 564 (The requirements of Rule 1.5 are "designed to protect the client."). "This public policy embodies an understanding 'that the client's rights rather than the lawyers' remedies have always been this state's greatest concern.' " *Fohrman*, 2014 IL App (1st) 123351, ¶ 35 (quoting *Friedman*, 304 Ill.App.3d at 985)). Accordingly, [c]ontracts between lawyers that violate Rule 1.5 are against public policy and cannot be enforced." *Richards v. SSM Health Care, Inc*., 311 Ill.App.3d 560, 564 (2000); see also *In re Vrdolyak,* 137 Ill. 2d 407, 422 (1990) (where the supreme court held the disciplinary code "as a binding body of disciplinary rules, has, *sub silentio,* overruled prior judicial decisions which conflict with its mandates and proscriptions").

¶ 19 In the instant case, Clark contends that the trial court erred in relying on Rules 1.5(c) and 1.5(e) to grant the defendants' section 2-619(a)(9) (735 ICLS 5/2-619(a)(9) (West 2010)) motion to dismiss. She asserts that these rules do not apply to the agreement she made with Francisco on behalf of the law firm to recoup one third of the fees generated from the settlement of the *Burkowski* case, because that was an oral separation agreement made in lieu of her departure from the firm, she was a former employee of the firm, and performed substantial work on the *Burkowski* case, while still employed by the firm. For the reasons that follow, we agree.

¶ 20 In that respect, we find the decision in *Romanek v. Connelly*, 324 Ill. App. 3d 393 (2001) directly on point. In that case, the plaintiff was a former associate of a Chicago law firm. *Romanek*, 324 Ill. App. 3d at 396. At some point during her employment, the plaintiff brought in

a contingent fee case to the firm through a personal acquaintance and an attorney. *Romanek*, 324 Ill. App. 3d at 396. The client whom the plaintiff had referred retained the firm to represent it, on a contingency fee basis, in a matter against a plastics company. *Romanek*, 324 Ill. App. 3d at 396. At the inception of the law suit, the plaintiff provided some services to the client in the litigation with the plastics company. *Romanek*, 324 Ill. App. 3d at 396. The plaintiff subsequently left the firm. *Romanek*, 324 Ill. App. 3d at 396-97.

¶ 21 Before doing so, however, she alleged that she entered into a separation agreement with two of the firm's partners, pursuant to which she agreed not to take the client, nor the case with the plastics company with her, if she were permitted to keep the referral fee (generated from the contingency fee). *Romanek*, 324 Ill. App. 3d at 397. The firm in turn promised either to "obtain" or to "make a good faith effort to obtain" the written consent of the client to the "fee sharing agreement." *Romanek*, 324 Ill. App. 3d at 397. However, the firm never made an attempt to fulfill its obligation. *Romanek*, 324 Ill. App. 3d at 397. Instead, when it secured a settlement for the client, after the plaintiff had left the firm, it refused to pay the plaintiff any portion of the fee. *Romanek*, 324 Ill. App. 3d at 397.

¶ 22 The plaintiff sued, alleging, *inter alia*, breach of contract. *Romanek*, 324 Ill. App. 3d at 396. The firm responded by filing a section 2-619 motion to dismiss, alleging that the fee sharing agreement was unenforceable under Rule 1.5 as a matter of law because the client never consented to the parties' fee-splitting arrangement. *Romanek*, 324 Ill. App. 3d at 396. In support of its argument, the firm attached an affidavit by the client's president who expressly averred that the client had never consented to any fee-sharing agreement between the plaintiff and the law firm. *Romanek*, 324 Ill. App. 3d at 399. The trial court granted the section 2-619 motion to dismiss. *Romanek*, 324 Ill. App. 3d at 399.

¶ 23 On appeal, we reversed, holding that the parties' fee sharing agreement, as it was alleged in the complaint, fell within the scope of Rule 1.5, so as to permit the plaintiff to collect her share of the referral fee. *Romanek*, 324 Ill. App. 3d at 403-404. In doing so, we held that Rule 1.5 explicitly permitted fee-sharing agreements between lawyers, even when the primary service performed by one lawyer was the referral of the client to another lawyer, so long as the referring attorney assumed "the same legal responsibility for the performance of the services in question as would a partner of the receiving lawyer." *Romanek*, 324 Ill. App. 3d at 403. We held that in the past our courts have found that such fee sharing agreements could not be sanctioned only where public policy so dictated, such as where one attorney was "entitled to a remittance of all of the fees generated by the legal work of the other" because in such a scenario the clients' best interests would be severely compromised by the paying attorney's lack of incentive to effectively handle the client's matter. *Romanek*, 324 Ill. App. 3d at 402-03 (citing *Corti v. Fleisher*, 93 Ill. App. 3d 517 (1981)). We specifically held that whether public policy concerns arise, will depend "on the circumstance and particular terms of the agreement involved in each case." *Romanek*, 324 Ill. App. 3d at 402.

¶ 24 In *Romanek* we found no such public policy concerns. We held that the fee-sharing agreement between the departing attorney and the law firm did not compromise the client's best interests since, while the firm was responsible for the "majority" of the work on the plastics case, it was "not required to remit the entire fee recovered for its efforts to the plaintiff," thereby retaining incentive to use its best efforts on behalf of the client. *Romanek*, 324 Ill. App. 3d at 403. In addition, we found relevant that the fee-sharing agreement was not predicted on a mere client referral. *Romanek*, 324 Ill. App. 3d at 403. While acknowledging that in her complaint, the plaintiff repeatedly referred to being owed the "referral fee," we nonetheless found that a

liberal reading of the complaint established that the firm's payment of this fee represented its consideration for the plaintiff agreeing not to take the client's file with her upon leaving the firm. *Romanek*, 324 Ill. App. 3d at 404. Accordingly, we found that the agreement constituted a separation agreement, and that under the record of that case, the plaintiffs' contract claim was not precluded as a matter of law. *Romanek*, 324 Ill. App. 3d at 403.[2]

¶ 25 Applying the principles articulated in *Romanek* to the facts of this case, we find that the trial court erred in grating the defendants' section 2-619 (735 ILCS 5/2-619 (West 2010)) motion to dismiss. The facts in the instant matter are nearly identical to the facts in *Romanek*. Here, just as in *Romanek*, Clark entered into a separation agreement with the firm not to take the *Burkowski* case with her if the firm promised to preserve her right to the referral fee in that case. Moreover, just as in *Romanek*, Clark alleged that in addition to referring Burkowski as a client to the firm,

[2] We note that although Rule 1.5 has been amended since *Romanek*, a comparison of the pre-2010 Rule (applied in *Romanek*) and the post-2010 Rule (applicable here) reveals that the requirements for attorney-fee sharing agreements, as well as the public policy behind the Rule, remain the same. *Compare* 134 Ill. 2d R. 1.5(f), (g), (h), (j) (Requiring that in fee-sharing agreements between lawyers who are not in the same firm, the client must consent by signing a document which discloses: (1) the division of the fees, (2) the basis of the division, including, the responsibility to be assumed and the economic benefit to be received by each attorney. In addition, the division of fees must be in proportion to the services rendered and the responsibility assumed by each lawyer, *except* where the primary service is referral, in which case, the referral must be disclosed, including: (1) the economic benefit to the referring attorney, (2) the extent and basis of such economic benefit, and (3) that the referring attorney agrees to assume the same legal responsibility for the performance of the services as would a partner of the receiving attorney. Finally, the rule also required that all fees be reasonable. Nonetheless, regardless of the aforementioned written consent requirements to attorney-sharing agreements, permitting payment of referral fees to attorneys formerly in the firm, pursuant to a separation or retirement agreement.); *with* Ill. R. Prof. Conduct (2010) R. 1.5(e), including Comment 8, (eff. Jan. 1, 2010) (permitting fee-sharing agreements between lawyers who are not in the same firm if: (1) the division is proportionate to the services performed by each attorney, or if the primary service is referral that each attorney assume joint financial responsibility for the representation; (2) the client agrees in writing to the arrangement, including the share each attorney will receive; and (3) the total fees are reasonable. Explicitly exempting "fees to be received in the future for work done when lawyers were previously associated in the [same] law firm or payments are made pursuant to a separation or retirement agreement" from these requirements).

she performed substantial work on the *Burkowski* case, including drafting the settlement document that was eventually approved by the bankruptcy court. Accordingly, under the principles articulated in *Romanek,* we see no public policy reason to preclude the plaintiff from receiving the referral fee, despite a lack of written consent by Burkowski. See *Romanek*, 324 Ill. App. 3d at 403.

¶ 26 Since the matter before us is only on appeal from a section 2-619 motion to dismiss (735 ILCS 5/2-619 (West 2010)), and such a motion admits the legal sufficiency of the plaintiff's complaint, we necessarily conclude that the plaintiff may proceed with her claim.

¶ 27 III. CONCLUSION

¶ 28 For all of the aforementioned reasons, we reverse the order of the circuit court and remand for further proceedings.

¶ 29 Reversed and remanded.