2016 IL App (2d) 150447-U
No. 2-15-0447
Order filed June 21, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THOMAS G. ODDO,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11-L-0612
	)	
SHAWN M. COLLINS, THE COLLLINS	)	
LAW FIRM, P.C., and EDWARD J.	)	
MANZKE,	)	Honorable
	)	Kenneth L. Popejoy,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's decision that plaintiff did not sustain his burden of proving the existence of a separation agreement between the parties that would comport with Illinois Rules of Professional Conduct 1.5(j) (eff. Aug. 1, 1990) is not against the manifest weight of the evidence; other issues are moot.

¶ 2 I. INTRODUCTION

¶ 3 Following a bench trial in the circuit court of Du Page County, the trial court entered judgment in favor of defendants, Shawn M. Collins, Edward J. Manzke, and the Collins Law Firm, P.C. Plaintiff, Thomas G. Oddo, now appeals, and, for the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 Plaintiff initiated the instant action to recover a commission he allegedly earned while he was employed by defendant, the Collins Law Firm (the firm). Plaintiff worked at the firm as an associate attorney. Defendants Collins and Manzke, along with a third individual (Charles Corrigan), were partners in the firm. The firm had a commission policy to incentivize associates to procure new clients for the firm. While employed there, plaintiff obtained a client, James Nelson, which led to the firm being involved in a class-action suit. The suit settled for approximately $7,000,000, and the firm received about $1,158,000 dollars as a fee for its involvement (other attorneys were involved as well). Based on this, plaintiff claimed he was owed $173,750 plus interest.

¶ 6 In the trial below, plaintiff testified that he has been a licensed attorney since 1990. He practices primarily civil litigation. He worked for the the firm from May 2001 to January 2004. He received a salary and commissions of 10% of any fee for cases he brought to the firm. Commissions were typically paid the month after the firm received the fee.

¶ 7 In 2002, plaintiff was given a written policy regarding commissions. It stated as follows:

> "Commissions: A commission is paid to any associate who brings new clients to the firm. The commission is equal to 10 percent of the fee received by the firm. The commission is paid in the month following the month the fee is received by the firm with a mid-month payroll.
>
> In order to receive a commission, associates must, one, be responsible for bringing in the client. Any doubt about this will be resolved by the partners. The partners' decision is final.

> Two, notify [partner Charles J. Corrigan] that the client has been billed and that a fee is expected. Provide a written list of clients/matters to [Charles J. Corrigan] of the associate's expected commission. Costs expended by the firm are deducted from the payments by the clients before commissions are calculated. Each month the firm will publicly announce what associates have earned commissions that month and why."

Plaintiff testified that associates were told that this was an incentive to encourage them to bring cases in to the firm. Plaintiff added that it was his understanding that the fee was earned at the time the firm agreed to represent the client. No distinction was made between hourly work and contingency fees. Furthermore, nothing said an attorney had to be employed by the firm to earn a commission, and plaintiff was, in fact, paid commissions on certain cases after he left the firm. It was not necessary for an attorney to actually work on a case to receive a commission, so long as the attorney had brought the case to the firm. Plaintiff had received commissions under such circumstances. Plaintiff testified that he had received a commission on every case he brought in to the firm except for the case at issue in the instant action.

¶ 8 Plaintiff testified that he brought the firm a class-action case, with Nelson as the named representative (the case at issue here). He asked that the commission policy be altered so that he would receive a 15% commission with respect to the Nelson case. Plaintiff stated that the firm agreed. Plaintiff learned that the firm had agreed when Shawn Collins left him a voicemail to that effect. Subsequently, a complaint was filed and a class was certified.

¶ 9 In September 2003, plaintiff met with Collins and Manzke. They informed plaintiff that he would not be made a partner and that he should look for work elsewhere. He was allowed to continue working until he found other employment. In early January 2004, he informed Collins that he had found another job. Plaintiff contacted Nelson and told Nelson that he was leaving the firm. He told Nelson that the firm had the ability to handle Nelson's case and that the assistance of an attorney the firm was partnering with was necessary due to his experience in similar cases. However, plaintiff met with Collins on January 5, 2004, and told Collins that he intended to take the Nelson case with him when he left. On January 9, 2004, plaintiff left Collins a voicemail stating that he would leave the Nelson case with the firm and he expected to receive his 15% commission. Collins never responded. About two years later, plaintiff sent a written inquiry to Collins asking the status of the Nelson case, and Collins responded that he never agreed to pay a commission to plaintiff, "15 percent or otherwise." Prior to this communication, no one ever told plaintiff that he would not receive a Commission on the Nelson case, and the firm continued to pay him commissions on other cases.

¶ 10 Subsequently, the Nelson case settled for about $7,000,000. The court approved attorney fees not to exceed one-third of the settlement. The firm received approximately $1,158,333. Plaintiff believed he was owed 15% of that, or $173,749. He made a demand for payment. Defendants responded that no commission was owed, and they threatened sanctions. Plaintiff instituted the instant suit.

¶ 11 On cross-examination, plaintiff acknowledged that he filed a verified complaint in this case. He drafted the complaint. In it, he averred that commissions were earned when the firm received a payment from a client. In the Nelson case, the firm did not receive a payment until 2006. Plaintiff agreed that this allegation was inconsistent with his testimony that a commission was earned when the firm first took a case. Plaintiff further acknowledged that he contributed nothing toward the costs of prosecuting the Nelson case, which were estimated to exceed $200,000. The case involved no out-of-pocket risk to him. He explained that the separation agreement between the parties consisted of the policy under which they were operating, as evidenced by the fact that he continued to receive commissions after he left the firm. He noted that the commission policy contained no provision limiting it to the time a person remained employed with the firm. However, he acknowledged that he drafted a memorandum on January 7, 2004, stating that the parties have not reached an agreement regarding the Nelson case. Plaintiff explained that the memorandum concerned cases other than the Nelson case, and the statement was intended to reflect that it did not speak to any agreement regarding the Nelson case. He agreed that he had never received a commission other than 10%. Plaintiff testified that there was no written agreement that he would receive commissions after he left the firm; rather, this was the custom and practice of how commissions were handled.

¶ 12 Plaintiff next called Charles Corrigan. Corrigan testified that the firm had a policy whereby associates were paid 10% commissions if they brought in a new client. The attorney who brought in the client did not have to be the one that did the work for the client in order to receive a commission. There was no distinction between hourly cases and contingency cases. Corrigan did not recall the issue of whether a commission would be paid to someone who left the firm being an issue while he was employed by the firm; however, he received commissions after he left the firm. Corrigan recalled plaintiff being responsible for bringing the Nelson case to the firm. He also recalled plaintiff asking for a higher than usual commission for the case. Corrigan stated that plaintiff initially asked for "something more than the 15 [percent] we eventually agreed to."

¶ 13 On cross-examination, Corrigan testified that when he left the firm, he did so pursuant to a "withdrawal agreement as a partner." It addressed continuing compensation. He did not recall an associate ever receiving a commission after leaving the firm.

¶ 14 Manzke then testified for defendants. He is a partner in the firm. Plaintiff was an associate. Manzke confirmed that plaintiff had asked for an enhanced commission on the Nelson case, and the partners discussed it during a meeting on December 12, 2002. Manzke testified that they never agreed to pay plaintiff a 15% commission for bringing the case to the firm. Manzke explained that the firm had previously come close to overextending itself on a large case, and they were cautious about taking on the Nelson case. As such, they did not want to agree to an upfront commission payment to plaintiff. They did discuss the possibility of re-evaluating whether to give plaintiff an enhanced commission after the conclusion of the case based on how the the case was resolved and what role plaintiff had played in prosecuting the case. Manzke could find no documentation of plaintiff being paid a commission on a contingency-fee case; however, he conceded that the client files from the time plaintiff worked for the firm had been destroyed. He testified that commissions were only paid on hourly-rate cases. Neither Manzke nor anyone in his presence ever told plaintiff he would receive a 15% commission on the Nelson case. Moreover, no one ever discussed a separation agreement with plaintiff. The commission policy was intended to apply to employees of the firm. Manzke asserted that they never agreed to pay plaintiff a commission on the Nelson case after he left the firm. On the day plaintiff left the firm, Collins was agitated. He told Manzke that plaintiff was "trying to steal the Nelson case."

¶ 15 On cross-examination, Manke agreed that the firm had a bonus policy that expressly stated an associate had to be employed at the end of a year to be eligible for a bonus. Conversely, the commission policy contains no similar language. The commission policy also does not state that commissions can only be earned on hourly-rate cases. Manzke was not aware if the partners' decision to re-evaluate whether to give plaintiff a commission based on the success of the Nelson case had been communicated to plaintiff. He acknowledged he could not prove that plaintiff had never received a commission on a contingency-fee case.

¶ 16 Collins testified next. He explained that the Nelson case was a risky case for the firm. He stated that he never agreed to give plaintiff a 15% commission on it. Collins denied ever leaving plaintiff a voicemail agreeing to do so. He did tell plaintiff that he could continue to work on the Nelson case and that plaintiff would be compensated based on the hours he worked.

¶ 17 The trial court found for defendants. Essentially, it held that plaintiff had not carried his burden of proving the existence of a separation agreement. It based this conclusion on its findings regarding defendants' and plaintiff's respective credibility. This appeal followed.

¶ 18 III. ANALYSIS

¶ 19 On appeal, plaintiff raises three main issues. First, he contends that the trial court erred in concluding that there was no agreement between the parties regarding plaintiff receiving a commission on the Nelson case. Second, he contends that the trial court should have allowed him to amend his pleadings to conform to the proofs. Third, he alleges error in the trial court's decision to strike his claim for interest on the commission he allegedly earned. We find the first claim unpersuasive, and the latter two moot.

¶ 20 A. THE AGREEMENT

¶ 21 Plaintiff bases his claim that an agreement existed between the parties concerning the Nelson case on two primary factors. First, he points to a document given to him and other associates that set forth the conditions under which the firm would pay them commissions. Second, he asserts that the course of dealings between the parties, particularly the fact that he was paid commissions on other cases after he left the firm, shows that an agreement existed.

¶ 22 Splitting fees between attorneys raises certain ethical issues, so the Illinois Rules of Professional Conduct also have a bearing on the outcome of this case, specifically Rule 1.5 (eff. Aug. 1, 1990). At all times relevant to this case, Rule 1.5(f) provided, in pertinent part as follows:

> "Except as provided in Rule 1.5(j), a lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm, unless the client consents to employment of the other lawyer by signing a writing which discloses:
>
> (1) that a division of fees will be made;
>
> (2) the basis upon which the division will be made, including the economic benefit received by the other lawyer as a result of the division; and
>
> (3) the responsibility to be assumed by the other lawyer for performance of the legal services in question."

Rule 1.5(j) is also relevant here: "Notwithstanding Rule 1.5(f), a payment may be made to a lawyer formerly in the firm pursuant to a separation or retirement agreement." The dispositive question in this case is whether any sort of separation agreement existed that would satisfy this rule as it pertained to the fees generated by the Nelson case. In response to a certified question in an earlier appeal in this case, we held that this rule made it necessary for plaintiff to plead and prove the existence of a separation agreement in order to prevail. See *Oddo v. Collins*, 2012 IL App (2d) 120467-U.

¶ 23 Plaintiff first points to the firm's commission policy. Generally speaking, when confronted with a document, we initially limit our inquiry to its four corners and look to its content. See *Air Safe Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999). Ascertaining the meaning of a writing by examining its content is a matter we review *de novo*. See *Village of*

Palatine v. Palatine Associates, LLC, 2012 IL App (1st) 102707, ¶ 44. By its own terms, the commission policy is not limited to the term of employment, so it could govern the division of fees subsequent to employment. However, plaintiff's claim is not based solely on material lying within the four corners of the document. Quite simply, plaintiff claims an entitlement to 15% of the Nelson fees, but the commission policy could, at most, support a claim for 10%. Plaintiff's theory is then, in essence, that the commission policy was modified by various oral communications and the course of dealing between the parties (which we will discuss below when we address plaintiff's contention that the fact the he was paid some commissions after leaving the firm evinces an agreement).

¶ 24 Whether such oral communication occurred is a question of fact, so the manifest weight standard applies. See *Laughlin v. France*, 241 Ill. App. 3d 185, 195 (1993). Applying this standard, we will disturb a decision of the trial court only if an opposite conclusion is clearly apparent. *De Long v. Cabinet Wholesalers*, 196 Ill. App. 3d 974, 978 (1990). On these questions, the trial court ruled against plaintiff.

¶ 25 The trial court found that plaintiff's "pleadings and testimony at the time of trial showed divergent and inconsistent positions in regard to" the existence of a separation agreement. It found that plaintiff failed to carry his burden of proving the existence of an agreement by a preponderance of the evidence. It noted that "[t]here was clearly no *written* separation or retirement agreement." (Emphasis in original.) The trial court discounted Corrigan's testimony, as he was no longer with the firm at the time plaintiff left. It explained that while Corrigan may have been present while discussions regarding the commission plaintiff would receive for the Nelson case occurred, a separation agreement would not have been discussed because Corrigan left a year before plaintiff. It cited plaintiff's failure to put anything in writing regarding a purported 15% commission while he was employed by the firm as well as plaintiff's failure to respond to two letters from Collins that were inconsistent with plaintiff's position at trial. Furthermore, the memorandum agreement that plaintiff drafted in conjunction with his leaving the firm addressed plaintiff's entitlement to a commission on other cases, but stated that the parties had not reached an agreement on the Nelson case.

¶ 26 The trial court also discounted plaintiff's testimony that he left Collins a voice mail "confirming" the 15% commission. Collins denied ever receiving such a message. The trial court found plaintiff's version incredulous because plaintiff never received a response from Collins regarding the purported voice mail, yet never did anything to follow up and ensure that Collins had received the message. It found plaintiff's conduct inconsistent with the existence of an agreement concerning the Nelson case. It noted plaintiff neither made demands nor inquiries regarding the case. When the fee for the Nelson case was received by the firm, plaintiff made no contemporaneous demand for his alleged share. The trial court stated, "I find Plaintiff's testimony to not have been credible." It explained that plaintiff was "impeached on numerous occasions," and stated it was also relying on plaintiff's "manner and demeanor *** while testifying."

¶ 27 We cannot say that these findings are contrary to the manifest weight of the evidence. As set forth above, the trial court provided a reasoned basis for its decisions and supported them with reference to the evidence in the record. For example, it cited plaintiff's lack of follow up in rejecting his testimony that he left a message for Collins "confirming" their purported arrangement. Similarly, it discounted Corrigan's testimony because, having left the firm a year before plaintiff's departure, Corrigan was in no position to know about the existence of a separation agreement. Drawing such inferences is primarily a matter for the trier of fact. See

Williams v. Cahill, 258 Ill. App. 3d 822, 825 (1994). Given that these inferences are reasonable and find support in the record, we cannot say that they are contrary to the manifest weight of the evidence.

¶ 28 While it is true that the commission policy provides some evidence that an agreement regarding the payment of commissions existed, as to an agreement concerning a 15% commission on the Nelson case, it is insufficient in itself. Indeed, on its face, it states associates would receive a 10% rather than 15% commission. Further, as explained above, the trial court's rejection of plaintiff's claim that various oral communications augmented the commission policy and resulted in a complete agreement is not contrary to the manifest weight of the evidence. Accordingly, the commission policy, in itself, is insufficient to constitute a separation agreement.

¶ 29 It is also insufficient in light of the course of dealing between the parties. It is true that the course of dealings between parties to an agreement may give meaning to or otherwise qualify the agreement. *H & H Press, Inc. v. Axelrod*, 265 Ill. App. 3d 670, 677 (1994). Here, plaintiff contends that defendants' payment of commissions on other cases to him after he left the firm provides evidence of the existence of an agreement. Plaintiff asserts, "[d]efendants paid [p]laintiff eleven separate commission payments for fees that were paid to the firm after January 9, 2004, on matters that [plaintiff] procured for the [f]irm while employed there." However, plaintiff's argument suffers from a fatal flaw—while it may show an agreement, it does not show an agreement concerning the Nelson case.

¶ 30 In connection with his departure from the firm, plaintiff and Collins discussed the status of plaintiff's cases. Plaintiff acknowledged drafting a document entitled Memorandum Agreement Regarding Thomas G. Oddo's Separation from The Collins Law Firm, P.C. He did so in order to "memorialize the cases [he] would be taking with [him]" and "to confirm the existing agreement *** that [he] would continue to receive the commissions even after [he] left." This agreement included a paragraph stating the parties had reached no agreement concerning the Nelson case. Collins testified as to the occurrence of a meeting with plaintiff regarding the cases plaintiff had been working on and what would happen to them when plaintiff left the firm. Collins agreed that plaintiff would receive commissions on cases he had worked on even if the fee was paid after plaintiff's departure. Collins received a copy of plaintiff's Memorandum Agreement, which he "regarded as an unremarkable summation of what [they] had agreed to in the office." Collins stated the memorandum was consistent with what they had agreed to.

¶ 31 Thus, there is clear evidence in the record that an agreement existed regarding plaintiff's other cases, and it expressly excluded the Nelson case. That plaintiff continued to receive commissions after he left the firm was obviously a consequence of this agreement. As the agreement expressly excludes the Nelson case, that plaintiff received these commissions says nothing about the existence of an agreement concerning the Nelson case. In other words, that plaintiff continued to receive commissions provides evidence of *an* agreement (the one memorialized by plaintiff in the memorandum agreement), but it does not provide evidence of any further agreement concerning the Nelson case.

¶ 32 In sum, we find neither of plaintiff's arguments concerning the trial court's judgment persuasive, and we cannot find that judgment contrary to the manifest weight of the evidence.

¶ 33 B. OTHER ISSUES

¶ 34 Plaintiff raises two additional issues before this court. First, he contends that the trial court should have allowed him to amend his complaint to conform to the proofs adduced at trial. Specifically, plaintiff's complaint alleged that a commission was earned when the firm received a fee payment from a client of plaintiff's. He sought to amend it to state that the commission was earned when the firm entered in to an attorney-client relationship with the client. Second, plaintiff asserts that the trial court erred in striking his claim for interest on the commission he allegedly earned. As plaintiff has not proved the existence of a separation agreement concerning the Nelson case, both of these arguments are moot. It is not apparent to us how allowing the amendment would alter the outcome here, and as plaintiff has not proven an entitlement to a commission on the Nelson case, there can be no interest on a commission

¶ 35 IV. CONCLUSION

¶ 36 In light of the foregoing, the judgment of the circuit court of Du Page County is affirmed.

¶ 37 Affirmed.