2016 IL App (2d) 150519-U
No. 2-15-0519
Order filed February 26, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DANIEL MCNAMARA d/b/a MCNAMARA FINANCIAL,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellant,	)	
v.	)	No. 12-MR-619
O'DONNELL HADDAD LLC,	)	
Defendant-Appellee	)	
(JLM Financial Investments, LLC; JLM Financial Investments 13, LLC; Larry Meyer; and Jimmy Nassour, Defendants).	)	Honorable Theodore S. Potkonjak, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in ordering that a law firm be paid its entire contingency fee out of the first of a series of settlement payments. The trial court did not err in finding that an agreement for hourly fees was enforceable and was not an improper liquidated damages clause or penalty provision.

¶ 2 This matter concerns an attorney-client fee dispute between the plaintiff, Daniel McNamara d/b/a McNamara Financial, and the defendant, O'Donnell Haddad LLC (the Firm). The Firm represented McNamara in an underlying real estate brokerage dispute which ultimately resulted in a series of settlement payments to be paid to McNamara over a three-year period in

the total amount of $950,000. The parties had entered a contingency fee agreement as to the initial suit and an hourly fee agreement with respect to fees for supplemental proceedings and appeal. Following the Firm's motion to adjudicate attorney fees, the trial court ordered that the entire contingency fee of $200,000 be paid to the Firm out of the initial $300,000 settlement payment. As to the agreement between the parties concerning hourly fees, the trial court awarded the Firm $98,313.41, also to be paid out of the funds received from the initial settlement payment. McNamara appeals from these fee awards. We affirm.

¶ 3 BACKGROUND

¶ 4 At some point in 2010, McNamara, a real estate broker, presented certain real estate for sale to JLM Financial Investments, LLC; JLM Financial Investments 13, LLC; Larry Meyer; and Jimmy Nassour (collectively "JLM"). JLM ultimately purchased the real estate. McNamara contended that he was owed $1.507 million as a brokerage commission on the sale. JLM refused to pay McNamara. On February 10, 2012, McNamara retained the Firm to represent him in legal efforts to recover his commission from JLM. With respect thereto, McNamara and the Firm entered a contingency fee agreement that provided for payment of fees as follows: (1) if the dispute was settled prior to filing a lawsuit, 20% of the settlement amount in excess of $600,000; (2) if the dispute was settled after a lawsuit was filed, but before a final judgment order or verdict, 33% of the settlement amount in excess of $600,000; or (3) if the dispute was resolved by final judgment order or verdict, 40% of any amount in excess of $600,000. If the dispute was settled, the Firm's fee was to be paid by McNamara upon McNamara's "receipt of funds sufficient to pay the required fee."

¶ 5 On December 5, 2013, McNamara and the Firm entered into an amended fee agreement. The original fee agreement was structured as if JLM was not disputing that it owed a $600,000 commission to McNamara. However, by December 2013, it was clear that JLM's position was

that it owed McNamara nothing. The amended agreement provided for "attorneys' fees in the amount of 10% of the amount of any settlement, jury verdict or final judgment up to $600,000." Additionally, the amendment provided that if the settlement or verdict was $1,200,000 or more, the contingency fee would be 33% of the total if it was procured by settlement and 40% if procured by verdict.

¶ 6 The JLM lawsuit was tried in February 2014 and resulted in a verdict for McNamara in the amount of $1.507 million. Thereafter, the Firm, on behalf of McNamara, proceeded to pursue the assets of JLM in satisfaction of the verdict.

¶ 7 On July 1, 2014, the Firm and McNamara entered into a third fee agreement that required McNamara to pay the Firm hourly fees for its work to enforce the judgment or defend an appeal. The hourly fees were $300 per hour for attorneys, $275 per hour for associates, and $50 per hour for paralegals. This agreement also reaffirmed the Firm's contingency fee interest as follows:

> "The contingent fee remains in effect for all amounts received, including post judgment interest. For all amounts received up to $1,200,000 we will be paid ten (10%) percent of the first $600,000 and forty (40%) of any amount recovered between $600,000 and $1,200,000. For any amount received over $1,200,000 the fee will be forty (40%) of all amounts in excess of $600,000."

¶ 8 Thereafter, McNamara paid hourly fees of $15,000 but was eventually unable to pay all sums that were due. The Firm informed McNamara that it was planning to withdraw because McNamara was not paying his hourly fees. From the Firm's perspective, failure to pay the hourly fees effectively turned the hourly fee arrangement into a contingent fee arrangement because bills would only be paid upon a monetary recovery. The Firm offered to increase the percentage on the contingent fee agreement but McNamara refused. On December 5, 2014, the Firm and McNamara decided to modify the fee agreement as follows:

> "For any bill which is currently more than 30 days old, the fees will be recomputed at the hourly rate of $450 for all attorney time and $75 per hour for paralegal time. Hereafter you may pay any bill in full within 30 days of receipt; however, after 30 days without payment in full, that bill will automatically be recomputed at the increased rates referred to above. *** For any out-of-pocket costs that remain unpaid after 30 days, the amount due for reimbursement of those costs will increase by 50%."

¶ 9 On January 2, 2015, McNamara filed a motion for turnover order against JLM. The matter was set for hearing on February 27, 2015. However, on February 26, 2015, the parties reached a settlement whereby JLM would pay $950,000 to McNamara over a three-year period. An initial payment of $300,000 was to be paid upon execution of the settlement agreement and the balance of $650,000 was to be paid periodically over a period of 36 months.

¶ 10 On February 27, 2015, the Firm sent McNamara a letter in anticipation of the settlement. In that letter the Firm suggested that the settlement would be $950,000 and that the contingency fee would be $200,000 (10% of the first $600,000 and 40% of the remaining $350,000). The Firm stated that the fee represented 21% of the total settlement and that, "therefore, we will be paid 21% of each payment made, e.g., the first payment of $300,000 will result in fees of $63,000."

¶ 11 On March 19, 2015, the written settlement agreement between McNamara and JLM was executed and the initial settlement payment of $300,000 was deposited in the Firm's client trust account. Thereafter, McNamara and the Firm disagreed as to the amount of the contingent fee interest to be paid from the initial payment and whether the Firm was entitled to impose penalties. As of March 2015, McNamara owed the Firm $1,498.70 for the JLM appeal and $62,548.39 for the supplemental proceedings. However, to the bill on appeal, the Firm added finance charges of $28.07 and an additional $550.43 pursuant to the penalty provision, for a total

of $2,057.52. With respect to the final bill for the supplemental proceedings, the Firm added finance charges of $460.37 and a penalty of $30,987.79, thus seeking total fees of $96,255.89. McNamara agreed that the Firm was entitled to its hourly fees minus the finance charges and penalties.

¶ 12 On April 10, 2015, the Firm filed a motion to adjudicate attorney fees and distribute the settlement proceeds. A hearing was held on April 23, 2015. At the hearing, the Firm stated that prior to the July 2014 agreement McNamara was given the choice to either increase the contingency fee or to start paying hourly for work done on postjudgment proceedings in the JLM lawsuit. The Firm alleged that McNamara chose to pay by the hour. The Firm argued that it was entitled, from the initial JLM settlement payment, to its contingency fee ($200,000) and hourly fees ($98,313.41) for total fees of $298,313.41. At one point during the hearing, the Firm suggested that it would take 21% of each settlement payment. The trial court stated that the parties could step outside and negotiate what they want, but that if the trial court ruled, it would rule based on the written agreements. The Firm withdrew its suggestion to take 21% of each payment. McNamara argued that, based on the plain language of the fee agreements, the Firm was entitled to 10% in amounts "received" up to $600,000 and that, therefore, the Firm should receive $30,000 of the initial $300,000 settlement payment collected to date. McNamara also argued that the 50% increase in hourly rates for fees and costs not paid within 30 days, as set forth in the December 2014 agreement, was unreasonable and an unenforceable liquidated damages provision. McNamara testified that he executed the December 2014 agreement based on the Firm's threat to withdraw and his lack of funds.

¶ 13 Following argument, the trial court found that the Firm was entitled to $298,313.41 in attorney fees from the initial $300,000 settlement payment. The trial court found that when the agreements indicated that the contingent fee remained in effect for all amounts "received," it

referred to the total settlement of $950,000. The trial court further held that the increase in hourly fees for late payments was not an improper liquidated damages clause. Rather, it was a renegotiated fee agreement with higher rates because the Firm was not getting paid. The trial court noted that the Firm gave McNamara a few options—the Firm could withdraw; the contingency fee could be increased; or the hourly fee could be renegotiated. McNamara chose the third option. Thereafter, McNamara filed a timely notice of appeal.

¶ 14 ANALYSIS

¶ 15 On appeal, McNamara argues that the trial court erred in: (1) finding that the Firm had a contingency fee interest of $200,000 from the initial settlement payment and (2) enforcing the penalty provisions contained in the December 2014 fee agreement. McNamara asserts that the Firm should have received only 10% of the initial settlement payment plus its hourly fees without the imposition of penalties or finance charges. McNamara asserts that the 50% increase in hourly fees that are unpaid after 30 days, as provided in the December 2014 agreement, was an unenforceable penalty provision.

¶ 16 McNamara first asserts that the trial court erred in granting the full $200,000 contingency fee from the first settlement payment because such was contrary to the July 2014 fee agreement and the nature of a contingency fee interest. When interpreting a contingency fee contract a court should ascertain and give effect to the intent of the parties. *Guerrant v. Roth*, 334 Ill. App. 3d 259, 263 (2002). When the language of a contract is clear, a court must determine the intent of the parties solely from the plain language of the contract, which must be given its plain and ordinary meaning. *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 164 (2002). A contract is ambiguous if its language is susceptible to more than one reasonable interpretation. *Guerrant*, 334 Ill. App. 3d at 264. Extrinsic evidence may be used when interpreting an ambiguous contract. *Gomez v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 130568, ¶ 14. A contract is not

ambiguous merely because the parties disagree as to its meaning. *Id.* Whether a contract is ambiguous is a question of law for the court to determine. *Guerrant*, 334 Ill. App. 3d at 264. Questions of law are reviewed *de novo*. *Barbara's Sales, Inc. v. Intel Corporation*, 227 Ill. 2d 45, 58 (2007). The trial court's interpretation of an ambiguous contract is a question of fact that is reviewed for manifest error. *Mayol v. Weiner Companies, Ltd.*, 98 Ill. App. 3d 985, 987 (1981).

¶ 17 In this case, the original February 2012 contingency agreement stated that "[i]f the dispute is settled, [the Firm's] fee must be paid upon [McNamara's] receipt of funds sufficient to pay the required fee." This clause of the fee agreement is not ambiguous and clearly required McNamara to pay the entire fee when sufficient funds were available. Sufficient funds were clearly available when he received the initial settlement payment of $300,000. However, the fee agreement was clarified in the July 2014 letter, the main purpose of which was to set forth the agreement on hourly fees for supplemental proceedings and the appeal. The July 2014 letter "confirmed and clarified" the fee agreement as follows:

> "The contingent fee remains in effect for all amounts, *received*, including post judgment interest. For all amounts *received* up to $1,200,000 we will be paid (10%) percent of the first $600,000 and forty (40%) percent of any amount *recovered* between $600,000 and $1,200,000. For any amount *recovered* over $1,200,000 the fee will be forty (40%) of all amount in excess of $600,000." (Emphasis added.)

At the hearing, the trial court noted that McNamara's interpretation was that the fee would be paid as actual funds were placed in his hands, while the Firm's interpretation was that the contingency fee would be based on the total agreement of $950,000 and be paid in full when sufficient funds were available to McNamara. The trial court did not explicitly resolve the question of whether the above clause is ambiguous. The trial court noted that its interpretation

was that the clause referred to the total amount recovered of $950,000 not to the installment payments individually.

¶ 18 We hold that the contract language in the July 2014 letter was not ambiguous as it was subject to only one reasonable interpretation. The July 2014 letter was to confirm and clarify the previous agreement. Since the original fee agreement had been entered, the case had resulted in a verdict. The confirmation and clarification as to the contingency fee agreement in the July 2014 letter was to reiterate that the fee was 10% of the recovery up to $600,000 and 40% of the recovery in excess of $600,000, as the case had already been resolved by verdict. "Received" and "recovery" in the July 2014 letter clearly referred to the ultimate settlement reached between the parties in the underlying suit. The clarification did not change the original language of the fee agreement that the fee would be paid upon "receipt of funds sufficient to pay the required fee." As the contingency fee was $200,000, and McNamara had received funds of $300,000, he clearly had sufficient funds to pay the fee from the initial settlement payment.

¶ 19 McNamara argues that the trial court's interpretation is fundamentally inconsistent with the nature of a contingency fee interest because, if no further payments are made by JLM, the Firm will have received a windfall and McNamara will have received no settlement funds. We disagree. First, McNamara did receive $300,000 of settlement funds. Merely because those funds were due to the Firm for contingent and hourly fees and to another creditor, did not alter the fact that McNamara received the funds for purposes of the underlying litigation because the funds were used for his benefit. See *Hapaniewski v. Rustin*, 179 Ill. App. 3d 951, 955 (1989) (if a creditor has placed a lien on a judgment, the payment to the creditor is considered part of the recovery, because the plaintiff-client has received a benefit in the form of reduction of a debt to the creditor). Further, there is nothing in the record that would bring the solvency of JLM into question or cast doubt on its ability to make the future payments. Based on the settlement

agreement, McNamara had a right to receive the funds from JLM and, if not paid, he could maintain an action for it. Finally, McNamara has failed to cite any case law to support the assertion that the payment of the entire contingency fee from the initial settlement payment is inconsistent with the nature of contingency fee agreements and, therefore, we find his argument unpersuasive.

¶ 20 McNamara's second contention on appeal is that the December 2014 fee agreement is unenforceable because it was the result of undue influence and because it was an improper liquidated damages provision. McNamara further argues that the trial court erred in imposing finance charges that were not provided for in any of the fee agreements.

¶ 21 The Firm argues that McNamara has forfeited his claim that the December 2014 fee agreement was the result of undue influence. McNamara never argued in front of the trial court that the December 2014 amendment was the product of undue influence or that the Firm bore a burden to overcome a presumption of undue influence. It is well settled that arguments not raised in the trial court are forfeited and may not be raised for the first time on appeal. *In re Estate of Chaney*, 2013 IL App (3d) 120565, ¶ 8.

¶ 22 McNamara relies on *Durr v. Beatty*, 142 Ill. App. 3d 443, 450 (1986), for the proposition that a party need not expressly argue a claim of undue influence in the trial court and that, therefore, his argument is not forfeited. In *Durr*, the reviewing court noted that the defendant did not expressly state that he was relying on a theory of undue influence but that the evidence was sufficient to raise a presumption of undue influence. *Id.* However, *Durr* did not involve the issue of forfeiture and the trial court specifically made a finding that the plaintiff did not exercise undue influence in negotiating the contract at issue in that case. *Id.* at 448. As such, although the *Durr* defendant did not expressly state that he was relying on a theory of undue influence, the trial court found his arguments sufficient to make a finding as to that issue in its ruling. The

defendant also cites *Lossman v. Lossman*, 274 Ill. App. 3d 1, 5 (1995) and *Bruzas v. Richardson*, 408 Ill. App. 3d 98, 103 (2011), for the same proposition. However, in those cases, as in *Durr*, the trier of fact addressed the issue of undue influence. *Lossman*, 274 Ill. App. 3d at 5 (trier of fact concluded that the plaintiff rebutted the presumption of undue influence); *Bruzas*, 408 Ill. App. 3d at 104 (same).

¶ 23 In this case, unlike *Durr*, *Lossman* and *Bruzas*, McNamara did not argue the issue of undue influence and the trial court did not make a finding on this issue. Nonetheless, there is case law to support the proposition that a claim of undue influence is preserved by arguing that a fee agreement is oppressive and thus void and unenforceable. See *Lustig v. Horn*, 315 Ill. App. 3d 319, 322 (2000). In *Lustig*, although the issue of undue influence was not argued directly by the client, and the trial court did not address the issue, the reviewing court held that the evidence established a presumption of undue influence that the attorney had failed to overcome. *Id.* at 326-27. In this case, McNamara argued that the fee agreement was unreasonable and he only agreed to it because his precarious financial situation left him with "no choice." Accordingly, as forfeiture is a limitation on the parties and not on this court (*O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 438 (2008)), under the circumstances in this case we decline to find that the issue of undue influence is forfeited (*Lustig*, 315 Ill. App. 3d at 322). Even if the claim of undue influence is not forfeited, however, it is without merit.

¶ 24 A fiduciary relationship exists as a matter of law between an attorney and client, and all transactions between them are subject to the closest scrutiny. *Lossman*, 274 Ill. App. 3d at 7. Contracts made or changed after an attorney-client relationship has been established are of particular concern. *Id.* A presumption of undue influence arises when an attorney fee contract is entered into after the attorney has been retained. In that instance, the attorney must rebut the presumption of undue influence with clear and convincing evidence. *Id.*

¶ 25 In this case, the December 2014 agreement was clearly entered into after the Firm and McNamara had an established attorney-client relationship and the agreement is thus subject to the presumption of undue influence. *Id.* The factors to which courts have looked to determine whether the presumption has been overcome include whether: "(1) the attorney made a full and frank disclosure of all relevant information; (2) the client's agreement was based on adequate consideration; (3) the client had independent advice before completing the transaction; (4) the agreement was offered by the lawyer with unquestionable good faith and with complete disclosure; and (5) the client entered into the agreement with a full understanding of all facts and their legal importance." *Id.* at 8.

¶ 26 Here, the record indicates that, by December 2014, McNamara was $47,000 in arrears and was unable to pay for future legal services. The Firm told McNamara it planned to withdraw because it was not getting paid. The Firm suggested that the supplementary proceedings and appeal be handled on a contingent fee basis, but McNamara refused. McNamara wanted the Firm to continue in his representation even though he was unable to pay them and he did not want the Firm to withdraw. The parties subsequently entered into the agreement for a higher hourly fee in exchange for the Firm to continue working without payment. The trial court found that the higher hourly fee was consideration for the Firm to continue representing McNamara despite not being paid. It is clear from our review of the record that the Firm made a full disclosure to McNamara and the fee agreement was consideration for the Firm to continue representing McNamara. Additionally, McNamara was capable of understanding and entering into the agreement at issue. The agreement was to his benefit in that the Firm was already familiar with the case. We acknowledge that McNamara did not have independent legal advice before entering the agreement; however, the failure to counsel a client to seek independent legal advice does not, by itself, establish undue influence. *Bruzas*, 408 Ill. App. 3d at 104.

Accordingly, we find that the Firm rebutted the presumption of undue influence as to the December 2014 fee agreement.

¶ 27 McNamara also argues that the December 2014 fee agreement was unenforceable because it was an improper liquidated damages provision. McNamara argues that the 50% increase in hourly rates is an unreasonable penalty for failing to pay within 30 days and is greatly out of proportion to the actual damages resulting from the failure to timely make payments.

¶ 28 Whether a provision is a valid liquidated damages clause is a question of law. *Morris v. Flores*, 174 Ill. App. 3d 504, 506 (1988). A liquidated damages provision is a term in a contract that establishes a predetermined amount of damages in the event of a breach by one of the parties. *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670, ¶ 27. This predetermined amount may or may not exceed the actual damages and both parties agree to accept this inherent risk. *Id.* However, "'[a] term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy ***.'" *Penske Truck Leasing Co. v. Chemetco, Inc.*, 311 Ill. App. 3d 447, 454 (2000) (quoting Restatement (Second) of Contracts § 356 (1979)). "It is a general rule of contract law that, for reasons of public policy, a liquidated damages clause that operates as a penalty for nonperformance or as a threat to secure performance will not be enforced." *Jameson Realty Group v. Kostiner*, 351 Ill. App. 3d 416, 423 (2004).

¶ 29 In arguing that the December 2014 agreement was improper, McNamara relies on *GK Development, Inc. v. Iowa Malls Financing Corp.*, 2013 IL App (1st) 112802. In that case, the parties entered into a commercial real estate purchase agreement. *Id.* ¶ 2. The agreement had a holdback provision such that a certain amount of money would not be paid to seller unless certain conditions were met by a certain date. *Id.* ¶ 3. The trial court found that since the conditions were not met by the specific date, the buyer was entitled to the holdback as liquidated damages for breach of contract. *Id.* On appeal, the reviewing court held that the holdback was

not a valid liquidated damages clause but was an unenforceable penalty provision because it did not distinguish between a complete failure to the meet the conditions versus a slight delay in meeting the conditions and it resulted in a windfall to the buyer. *Id.* ¶ 75. Because the conditions had ultimately been met, albeit late, the reviewing court held that the buyer was only entitled to any actual damages it suffered as a result of the 90-day delay. *Id.* ¶ 76.

¶ 30 We find the defendant's reliance on *GK* misplaced as the December 2014 fee agreement was not a liquidated damages clause or an unenforceable penalty provision. The trial court found that the December 2014 agreement was a renegotiated fee agreement that was negotiated at arm's length. We agree. The change in the hourly fee set forth in the December 2014 agreement was not a liquidated damages or penalty provision as it was not intended to be damages for breach of contract or a penalty for untimely payment of previous legal fees. Rather, it was consideration for the Firm continuing its representation of McNamara in the JLM suit, as opposed to withdrawing due to McNamara's failure to pay the Firm's fees. In negotiating the December 2014 agreement, McNamara was given the choice to allow the Firm to withdraw, increase the contingency fee, or pay higher hourly fees. If McNamara allowed the Firm to withdraw, he could have paid the legal fees that were then due as set forth in the July 2014 agreement. However, McNamara chose to contract for higher hourly fees. This was clearly a renegotiated fee agreement and not a penalty for failing to pay past legal fees.

¶ 31 Finally, McNamara argues that the trial court erred in imposing finance charges that were not provided for in any of the fee agreements. The record indicates that a line for "finance charge" did appear on some of the original invoices sent to McNamara. McNamara cites to these invoices in support of his contention. However, the summary of the hourly charges for supplementary proceedings and appeal submitted to the trial court, the Firm's Exhibit No. 8, did not contain any finance charges. The trial court relied on this exhibit in awarding the hourly

fees of $98,313.41. As such, the trial court's award of hourly fees did not include a finance charge.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 34 Affirmed.