2011 IL App (1st) 101091-U

FIFTH DIVISION
November 4, 2011

No. 1-10-1091

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DANDRA WETHERSPOON, as SPECIAL ADMINISTRATOR OF THE ESTATE OF EARL THOMPSON, DECEASED, Plaintiff, v. THC-NORTH SHORE, INC., an Illinois corporation, d/b/a KINDRED CHICAGO LAKESHORE, Defendant,	)	Appeal from the Circuit Court of Cook County 06 L 03629
SAL INDOMENICO, and SAL INDOMENICO & ASSOCIATES, P.C., Petitioners-Appellees, v. CRAIG HOFFMAN, Respondent-Appellant.	)	Honorable Maureen Durkin-Roy and Marcia Maras, Judges Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

O R D E R

HELD: Claims which circuit court expressly declined to reach and issue which was never in dispute were not properly adjudicated on appeal, and it was not shown that dispute between attorneys regarding their division of fees had to be heard within client's underlying action; cross-appellant's request for attorney fees as a sanction was waived.

¶ 1 The parties to this appeal are the named partner of a small Chicago law firm, the firm,

and a former associate. After leaving the firm, the associate contended he had an attorney's lien against the proceeds of a client's medical malpractice suit pursuant to the Attorneys Lien Act, 770 ILCS 5/1 (West 2004) (hereinafter Act). The trial court rejected the associate's statutory claim on the merits and determined two alternative claims that were directed at the partner were not properly before the court. The associate appeals. The partner cross-appeals in pursuit of fees as a sanction.

¶ 2 Brenda Thompson filed a *pro se* medical malpractice action on April 4, 2006, in the circuit court of Cook County against a hospital, THC-Northshore, Inc., doing business as Kindred Chicago Lakeshore, regarding the premature death of her husband, Earl Thompson, two years earlier. While at the courthouse on September 29, 2006, Mrs. Thompson met Craig A. Hoffman, an attorney who had been practicing less than a year and was attending a status hearing on an unrelated matter in his capacity as an associate of the law firm known as Sal Indomenico and Associates. Hoffman helped Mrs. Thompson with her case management conference and then took her to the firm's offices to discuss her suit.

¶ 3 At the time, Hoffman was a salaried employee of the firm and was developing an independent practice that was unrelated to the firm. According to the firm's founder, Sal Indomenico, because Hoffman was inexperienced, he was never given independent authority to decide whether the firm would accept a case. According to Hoffman, he did have "full authority," he "met with clients alone several times" and he "entered into contracts on behalf of [Sal Indomenico]'s firm."

¶ 4 In this instance, however, the attorneys discussed the viability of Mrs. Thompson's

suit and then she executed a "Medical Malpractice Contingency Fee Contract" stating she "retained SAL INDOMENICO & ASSOCIATES, P.C." to investigate and represent her interests, Hoffman executed the contract on the signature line provided for "SAL INDOMENICO & ASSOCIATES, P.C.," and Indomenico affixed his signature in the blank area just below Hoffman's signature. Mrs. Thompson and the two lawyers also executed a document entitled, "Agreement as to Division of Legal Fees – Personal Injury pursuant to Rule 2-107 of the Model Rules." This document stated Mrs. Thompson was the "client" and that as the "referring attorney," Hoffman would receive a specified percentage of the attorney fees "received pursuant to the contract between the CLIENT and SAL INDOMENICO & ASSOCIATES, P.C." It also stated, "It is anticipated that the REFERRING ATTORNEY shall contribute a share of the legal services to be rendered the [*(sic)*] CLIENT, in a proportion to the percentage of fee to be earned."

¶ 5 Hoffman worked on Mrs. Thompson's medical malpractice case until he left the firm in May 2008.

¶ 6 Hoffman had no affiliation with the firm when Mrs. Thompson died about three months later on August 30, 2008, or when her daughter Dandra Wetherspoon and Indomenico subsequently executed an undated contingency fee contract indicating Wetherspoon "retained SAL INDOMENICO & ASSOCIATES, P.C." to handle the suit.

¶ 7 On December 31, 2008, attorney Hoffman gave written notice to Indomenico and to the lawyer representing the hospital that Hoffman was claiming a lien against the suit and its proceeds based on the Act. 770 ILCS 5/1 (West 2004). On March 26, 2008, the hospital's

lawyer acknowledged his receipt of Hoffman's letter and asked for a copy of the contract that purportedly indicated "all claims, demands and causes of action *** were placed in my [Hoffman's] hands by Brenda Thompson for suit or collection" and "[I am owed] the amount of the fee which was agreed upon by myself, Brenda Thompson, and Sal Indomenico and recorded in writing." The record does not disclose whether Hoffman responded to this request. There is, however, no indication in the record or the appellate briefs that the hospital remitted any funds to Hoffman or engaged in any motion practice regarding his correspondence. Furthermore, the hospital is not participating in this appeal. On August 3, 2009, Wetherspoon settled her suit against the hospital for a sum of money that is not disclosed by the record or appellate briefs. On August 14, 2009, Indomenico and his firm filed a petition for adjudication of Hoffman's statute-based claim and asked the court to find the lien defective for a variety of reasons. Indomenico filed his petition within the same case number as Wetherspoon's malpractice claim against the hospital. Hoffman countered by filing a document he styled as a response and counter-petition which not only addressed his entitlement to a statutory lien but also asserted two common-law theories against Indomenico: that Indomenico had breached the referral fee agreement which entitled Hoffman to collect equivalent damages or that an equitable lien arose which entitled Hoffman to collect "*quantum meruit* fees" from Indomenico. Although Hoffman styled his document as both a response and counter-petition, the records of the clerk of the circuit court do not reflect that Hoffman filed an actual petition or complaint. After briefing and oral arguments, circuit court Judge Maureen Durkin-Roy found that Hoffman's statutory lien was not "effective" because his supposed client had hired the firm that employed Hoffman instead of hiring Hoffman

individually and because Hoffman signed the contingency fee contract on behalf of the firm not himself. Judge Durkin-Roy also found that Hoffman's breach of contract and *quantum meruit* claims against Indomenico were "not properly before the Court." Judge Durkin-Roy retired from the bench a few weeks later. Circuit court Judge Marcia Maras subsequently denied Hoffman's motion to reconsider the ruling and also denied Indomenco's "objection"/motion to be awarded attorney fees as a sanction for filing a frivolous motion. Hoffman appeals, raising three arguments as to why his lien attached to Wetherspoon's settlement.

¶ 8 Hoffman contends Judge Durkin-Roy did not "specifically articulate" why she concluded "an effective lien does not exist," but "presumably" her ruling was due to the language in the attorneys lien statute indicating lawyers create effective liens by giving notice "upon the party against whom their clients may have such suit." 770 ILCS 5/1 (West 2008). He further contends strict construction of the statute's language would force him to directly notify the defendant hospital, THC-Northshore, Inc. d/b/a Kindred Chicago Lakeshore, in violation of Rule 4.2 of the Rules of Professional Conduct, which prohibits direct communication with a party represented by counsel. See *TM Ryan & 5350 South Shore, L.L.C.*, 361 Ill. App. 3d 352, 356, 836 N.E.2d 803, 807 (2005) (indicating the attorneys lien statute must be strictly construed); 134 Ill. S. Ct. R. 4.2 (eff. Aug. 1, 1990) (known as the no contact rule). He argues strict construction cannot be justified in this instance and urges us to find that he properly gave notice to the hospital's attorney and has an effective lien.

¶ 9 Judge Durkin-Roy did, however, articulate specific reasons for ruling that Hoffman's lien was defective. Her written order indicates she considered the undisputed facts in light of

pertinent authority including the attorney lien statute and principles of agency law and that she expressed no concern about the appropriate recipients of Hoffman's notice of lien. Accordingly, we will not address Hoffman's contention that his correspondence was effective when addressed to the hospital's attorney instead of the hospital.

¶ 10 We review Judge Durkin-Roy's ruling *de novo* because questions of statutory construction and rulings that are based on the face of documents and do not require determinations of credibility or the weighing of evidence are questions of law. *Roach v. Coastal Gas Station*, 363 Ill. App. 3d 674, 676, 843 N.E.2d 393, 843 (2006). Our *de novo* examination leads us to conclude that Hoffman did not have a valid statute-based claim.

¶ 11 The Act provides:

> "Attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such suits, claims, demands or causes of action, plus costs and expenses. ***
>
> To enforce such lien, such attorneys shall serve notice in writing, which service may be made by registered or certified mail, upon the party against whom their clients may have such suits, claims or causes of action, claiming such lien and stating therein the interest they have in such suits, claims, demands or causes

> of action. Such lien shall attach to any verdict, judgment or order entered and to any money or property which may be recovered, on account of such suits, claims, demands or causes of action, from and after the time of service of the notice. On petition filed by such attorneys or their clients any court of competent jurisdiction shall, on not less than 5 days' notice to the adverse party, adjudicate the rights of the parties and enforce the lien." 770 ILCS 5/1 (West 2004).

See *Rhoades v. Norfolk and Western Ry. Co.*, 78 Ill. 2d 217, 227, 399 N.E.2d 969, 973 (1979) (summarizing the statute to mean that the attorney must have been hired by the client to assert a claim, that the attorney must perfect the lien by serving notice upon the party against whom the client has the claim, and that the lien attaches from and after the time of the service of notice).

¶ 12 We need not resolve whether Mrs. Thompson did in fact hire attorney Hoffman when she visited the law firm offices on September 29, 2006, and provided him with grounds to assert a statute-based attorney's lien, because we find that any statute-based rights he had were extinguished before he gave written notice of his purported lien. We find that her death on August 31, 2008, terminated her attorney-client relationship and her contractual obligation, and that his subsequent written notice to Indemenico and the hospital's attorney on December 31, 2008, was too late to be effective. We make these findings because it is well-settled that an attorney-client relationship terminates on the death of the client and that the attorney cannot proceed with the case because he or she no longer represents a party to the litigation. In *Washington v. Caseyville Health Care Ass'n, Inc.*, 284 Ill. App. 3d 97, 672 N.E.2d 34 (1996), the court explained and applied this principle, stating:

> "It is axiomatic that for every suit, there must always be a plaintiff, a defendant, and a court. [Citation.] An attorney's employment and his authority is revoked by the death of his client, so an attorney cannot proceed where he does not represent a plaintiff or a defendant. [Citation.]
>
> In the instant case, [plaintiff] Therman died on August 22, 1995. At the time [plaintiff's] attorney Hammel and [the] defense counsel appeared before the court to have the settlement agreement approved on August 28, 1995, there was no plaintiff of record. *** [Therefore,] the court's order approving the settlement agreement was invalid."

Accord *Clay v. Huntley*, 338 Ill. App. 3d 68, 76, 787 N.E.2d 317, 313 (2003) (an attorney's employment and authority are revoked by the death of his or her client); *In re Estate of Simmons*, 362 Ill. App. 3d 944, 946, 841 N.E.2d 1034, 1035 (2005) (an attorney-client relationship terminates on the death of the client and the attorney cannot proceed with the case because he or she no longer represents a party to the litigation). We also base our conclusion on the fact that a statute-based attorney lien "attaches from and after the time of the service of the notice required by statute." *Rhoades*, 78 Ill. 2d at 227, 399 N.E.2d at 973. Thus, giving written notice after Mrs. Thompon's death accomplished nothing. *Rhoades*, 78 Ill. 2d at 227, 399 N.E.2d at 973 ("[B]y the time the firm attempted to perfect its lien, there was no longer an underlying attorney-client relationship, a necessity for the perfection of the attorney's lien"). Hoffman's basis for a statutory lien, if he ever had one, had been extinguished by the time Indomenico petitioned Judge Durkin-Roy to adjudicate Hoffman's claim.

¶ 13 The principle of *quantum meruit* has been asserted these proceedings. *Quantum meruit* is a common law, quasi-contractual principle which may allow a discharged attorney to be compensated for the services rendered before the discharge. *Fleissner v. Fitzgerald*, 403 Ill. App. 3d 355, 368, 937 N.E.2d 1152, 1165 (2010) (referring to *quantum meruit* as an equitable, quasi-contract theory); *Thompson v. Hiter*, 356 Ill. App. 3d 574, 581, 826 N.E.2d 503, 509 (2005) (indicating discharged counsel may be compensated on a *quantum meruit* basis), citing *Rhoades*, 78 Ill. 2d at 230, 399 N.E.2d at 974-75. In a *quantum meruit* recovery, the attorney may recover for the reasonable value of the services rendered during the attorney's employment. *Thompson*, 356 Ill. App. 3d at 581, 826 N.E.2d at 509; *In re Estate of Callahan*, 144 Ill. 2d 32, 40, 578 N.E.2d 985, 988 (1981). There is, however, no mention of the principle of *quantum meruit* in the attorney lien statute and Hoffman cannot use the common law concept to create a statute-based lien.

¶ 14 Hoffman relies on *Tulka v. Chicago City R.R.*, 259 Ill. App. 234, 238 (1930), for the proposition that it was not necessary for him to be the attorney of record to benefit from the attorney lien statute. His reliance on *Tulka* is misplaced. One problem with citing *Tulka* is that it was issued in an era when state law specified that intermediate appellate court opinions "shall not be of binding authority in any cause or proceeding other than that in which they may be filed." *Knickerbocker Ice Co. v. Katlinsky*, 55 Ill App. 284, 1894 WL 2638 (1894); *Graham v. White-Phillips Co.*, 296 U.S. 27, 31, 56 S.Ct. 21, 22 (1935). Any intermediate appellate court opinion issued before 1935 is not binding on this court and has no precedential value. *Sklodowski v. Countrywide Home Loans*, 358 Ill. App. 3d 696, 701, 832 N.E.2d 189 (2005).

Another problem with citing *Tulka* is that it is not on point. In *Tulka*, the client executed an attorney-client contract, the attorney gave timely, effective notice of his lien, the client decided to change firms, but the courts concluded the client's change of heart did not affect his contractual obligation to his first attorney. *Tulka*, 259 Ill. App. At 238. The case does not involve a client's death or an untimely notice of lien and it does not speak to the circumstances here.

¶ 15 Accordingly, we find that Judge Durkin-Roy's decision to reject Hoffman's statutory lien claim was proper. Hoffman had no right to rely on the Act. 770 ILCS 5/1 (West 2004).

¶ 16 Hoffman also argues that once Indomenico filed his petition to adjudicate the statutory lien issue within the Thompson case number, it was an abuse of discretion for the judge to decline to also adjudicate Hoffman's claims against Indomenico. An abuse of discretion occurs when no reasonable person would adopt the same view as the trial court. *McGill v. Garza*, 378 Ill. App. 3d 73, 75, 881 N.E.2d 419, 422 (2007) (abuse of discretion occurs when a ruling is arbitrary or unreasonable and no reasonable person would reach the same conclusion). Hoffman cites section 2-1006 of the Code of Civil Procedure which provides that "actions pending in the same court may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right." 735 ILCS 5/2-1006 (West 2008) (hereinafter Code). Hoffman also relies on *Anderson v. Anchor Organization for Health Maintenance*, 274 Ill. App. 3d 1001, 654 N.E.2d 675 (1995), in which a discharged attorney sued her replacement, claiming breach of contract or *quantum meruit*, tortious interference, an attorney's lien, and breach of fiduciary duty; and her action was consolidated with the client's underlying medical

malpractice suit. On appeal, the clients argued against consolidation, but "failed to identify any prejudice to which they were exposed by reason of the consolidation." *Anderson*, 274 Ill. App. 3d at 1005, 654 N.E.2d at 680. Consequently, the appellate court found "no abuse of discretion in the consolidation as a matter of convenience and judicial economy." *Anderson*, 274 Ill. App. 3d at 1005, 654 N.E.2d at 680. Hoffman contends the interests of convenience and judicial economy dictate that in this instance he be allowed to proceed under Wetherspoon's medical malpractice case number instead of having to "file his claims for breach of fiduciary duty, breach of contract and *quantum meruit* in a new cause of action." We do not find this argument persuasive.

¶ 17 The circuit court judge that was handling the medical malpractice suit that arose from Earl Thompson's death also resolved the statutory attorney lien claim against the lawsuit's proceeds. The judge concluded that the other issues between attorneys Hoffman and Indemenico, which amounted to a personal disagreement between the two lawyers and involved common law theories of contract (breach of the referral agreement) and quasi-contract (*quantum meruit*), were not properly before the court at that time. Judge Durkin-Roy reached a sound conclusion. There is no language in the statute which entitled Hoffman to piggyback his common law allegations against Indomenico onto the statute-based action. The Act, set out above, provides that upon the filing of a petition regarding a statutory lien and notice to the adverse party, the lien rights will be adjudicated and enforced. 770 ILCS 5/1 (West 2004). There is no provision for the court to adjudicate other issues. Furthermore, Hoffman never filed an actual complaint or petition, he presented the common law theories only in a response brief to

Indomenico's petition to adjudicate the statute-based claim. The Illinois Code of Civil Procedure requires persons to plead, not merely argue claims. See 735 ILCS 5/2-201 (West 2004) (indicating every action, unless otherwise expressly provided by statute, shall be commenced by the filing of a complaint); 735 ILCS 5/2-608 (West 2004) (indicating any claim brought by a defendant against a plaintiff, "whether in the nature of setoff, recoupment, cross claim or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross claim in any action, and when so pleaded shall be called a counterclaim"). The Code of Civil Procedure also requires a defendant to pay a filing fee for initiating a counterclaim. See 705 ILCS 105/27.2a (West 2008) (indicating one must pay a filing fee for initiating a civil action, however, when a defendant files a counterclaim as part of his answer, his filing fee will be reduced by the amount of his appearance fee). Hoffman did not plead his common law claims and pay the related filing fee, he only argued them in opposition to a statute-based claim. Thus, the manner in which Hoffman asserted his allegations against Indomenco was inadequate and not the proper means of bringing them before the court.

¶ 18 Turning more directly to his argument, we point out that the statute he relies upon indicates cases "may" be consolidated, not that they "must" be consolidated. Hoffman had no legal basis for insisting that the matters be resolved together or that he not incur the filing fee for commencing an actual claim. Furthermore, even if Judge Durkin-Roy had been willing to address Hoffman's allegations within the Thompson case number, her impending retirement meant she could not adjudicate his claims before leaving the bench and that a new judge would have to become familiar with the parties and the facts. Consequently, the interests he argues

here of convenience to the parties, judicial economy, and the efficient resolution of cases were not implicated by her decision to adjudicate only the statute-based lien.

¶ 19 Under the facts presented, we do not find that Judge Durkin-Roy acted arbitrarily and that no reasonable person would take the same view as the court when she decided it was appropriate to adjudicate the attorney lien claim within the Thompson case number, but decline to also adjudicate Hoffman's claims against Indomenico.

¶ 20 Hoffman next argues that he and Indomenico entered into a joint venture when they executed the referral fee contract with Thompson concerning the representation of her deceased husband's estate, that joint venturers owe each other fiduciary duties of honesty and good faith until the profits of their venture are distributed (*Larry Karchmar, Ltd. v. Nevoral*, 302 Ill. App. 3d 951, 957, 707 N.E.2d 223, 226-27 (1999), and that Indomenico breached these duties when he did not ensure that Hoffman's interests were addressed in the contract which Wetherspoon executed about the continuation of the tort suit. Hoffman contends his joint venture relationship with Indomenico entitled Hoffman to asset a lien against the proceeds of the Thompson suit. He quotes from *Thompson v. Hiter*, 356 Ill. App. 3d 574, 585, 826 N.E.2d 503, 513 (2005), for the proposition that "the key factor in determining the existence of a joint venture is whether the client named each of her attorneys in the initial *** agreement," and "[h]aving done so, they [(the attorneys and client)] are deemed to be in a joint venture with respect to that transaction."

¶ 21 We reiterate that Judge Durkin-Roy declined to address the substance of Hoffman's arguments regarding a contractual or quasi-contractual relationship between Hoffman and Indomenico because she concluded these allegations were "not properly before the Court."

Thus, this issue is not properly before us on appeal. *In re T.P.S.*, No. 5–10–0617, slip op. at 3 (Ill. App. June 20, 2011) (indicating an appellate court should not consider any issues yet to be decided by the trial court because to do so would mean rendering an advisory opinion).

¶ 22 For these reasons, we affirm the rulings challenged by appellant Hoffman.

¶ 23 On cross-appeal, Indomenico argues Judge Maras abused her discretion by denying his motion for fees as a sanction for filing a frivolous motion for reconsideration of Judge Durkin-Roy's ruling. He asks us to reverse Judge Maras and also shift his appellate expenses to Hoffman, for a total award of $7,025. Unfortunately, none of the authority Indomenico cites is a basis for determining that Hoffman's motion for reconsideration was frivolous or that any fee shifting is warranted.

¶ 24 Indomenico first cites *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 518 N.E.2d 424 (1987), a case which is often cited for its thorough discussion of the proper contents of an attorney fee petition. Attorney fees were shifted in *Kaiser* because the parties contractually agreed they would be shifted and their agreement overcame the "general rule that the unsuccessful litigant in a civil action is not responsible for the payment of the opponent's fees." *Kaiser*, 164 Ill. App. 3d at 983, 518 N.E.2d at 427. Thus, *Kaiser* does not speak to the issue of when motion practice warrants fee shifting and does not indicate that a motion which is merely unsuccessful justifies sanction.

¶ 25 Indomenico next contends, "A motion not made in good faith should result in sanctions against the party pursuant to Illinois Supreme Court Rule 219(c)." The rule he cites states the consequences of party's unreasonable failure to comply with any rule or court order

regarding discovery, requests for admission, or pretrial procedure. Ill. S.Ct. R. 219(c). A rule concerning the lead-up to a trial is not pertinent here.

¶ 26 By Indomenico's own account, his last authority, *Wakefield*, concerns "[t]he imposition of sanctions pursuant [to] Rule 219(c)." *Wakefield v. Sears, Roebuck and Co.*, 228 Ill. App. 3d 220, 592 N.E.2d 539 (1992).

¶ 27 Illinois Supreme Court Rule 341(h)(7) requires parties before this court to provide pinpoint citation and discussion of relevant authority. 210 Ill. 2d R. 341(h)(7) (formerly Rule 341(e)(7)). *See also Kindernay v. Hillsboro Area Hospital*, 366 Ill. App. 3d 559, 562, 851 N.E.2d 866, 870 (2006) (failure to comply with the rules regarding appellate briefs results in waiver); *In re Estate of Schilling*, 304 Ill. App. 187, 189, 26 N.E.2d 188, 189 (1940) (if questions involved in a case are of sufficient importance to justify this court's resolution, they are worthy of the careful consideration of counsel presenting them). After considering Indomenico's presentation, we find he has waived the fee issue and we affirm Judge Maras' ruling. *Kindernay*, 366 Ill. App. 3d at 563, 851 N.E.2d at 870.

¶ 28 Affirmed.