2013 IL App (1st) 130433-U

FIRST DIVISION
FILED: December 30, 2013

No. 1-13-0433

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SAFECO INSURANCE COMPANY OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff,	)	
v.	)	No. 07-CH-37978
JOHN NIZZI and BLAKE HARMON,	)	
Defendants-Appellees,	)	The Honorable Mary Lane Mikva,
(Goldberg & Goldberg, Plaintiff-Appellant).	)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: The order of the circuit court which awarded the plaintiff-law firm *quantum meruit* fees was affirmed as the circuit court correctly determined that the contingency agreement did not apply and it did not abuse its discretion in determining the amount of the award.

¶ 2 The plaintiff-law firm, Goldberg & Goldberg (hereinafter referred to as "Goldberg"), appeals from the circuit court order which awarded it *quantum meruit* attorney fees for its representation of

the defendants, John Nizzi[1] and Blake Harmon, in connection with their underinsured motorist (UIM) insurance coverage dispute with Safeco Insurance Company of Illinois (Safeco). Goldberg argues *quantum meruit* fees were inappropriate where its fees were governed by its November 17, 2004, engagement agreement with Blake Harmon for services to pursue his claims resulting from the injuries he sustained following an automobile collision. For the reasons that follow, we affirm.

¶ 3 On November 12, 2004, Blake Harmon[2], a minor at the time, was severely injured in an automobile accident caused by Daniel Kmieciak. At the time of the accident, Blake resided with his mother, Kimberly Harmon, and John Nizzi.[3] On November 17, 2004, Kimberly and Jeff Harmon, Blake's father, retained Goldberg to represent Blake and signed an "Attorney-Client Agreement," which stated, in relevant part:

> "I (we) hereby agree to retain the law firm of [Goldberg] *** to prosecute or settle all claims of personal injuries and property damage against persons responsible sustained by me (us) on or about ____, at or near Drury Lane[,] Grayslake, IL.
>
> In consideration for services rendered by [Goldberg], I (we) agree to pay said attorney based upon the following:

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[1] Kimberly (*nee* Harmon) Nizzi was appointed guardian for John Nizzi sometime in September 2012 because of his failing health. *In re Estate of John Nizzi*, a Disabled Person (Lake County Case No. 12-P-788)

[2] During the course of the proceedings, Harmon reached the age of majority and was substituted as a named party.

[3] Sometime after the accident, Kimberly Harmon and John Nizzi were married.

(a) A sum equal to 33 1/3% of the gross amount recovered from the claim by settlement or verdict."

¶ 4 Goldberg filed a personal injury action for Blake against Kmieciak in Lake County (case no. 05-L-383), which resulted in Kmieciak's insurer settling for his $250,000 policy limit in 2006. From that settlement, Goldberg received $83,333.33 in attorney fees pursuant to the Attorney-Client Agreement.

¶ 5 Subsequently, Nizzi filed a claim under his Safeco UIM policy. On December 21, 2007, Safeco filed a complaint for declaratory judgment, alleging that Nizzi's UIM policy did not cover Blake (hereinafter referred to as "Harmon") because he was not considered a "family member" under the policy definition of the phrase. On January 22, 2008, Goldberg wrote to the defendants, informing them of Safeco's lawsuit and that it was "involved in an ongoing dialogue with Safeco on how [they] should proceed with" the matter. On May 6, 2008, Goldberg filed an appearance on behalf of the defendants in Safeco's coverage suit.

¶ 6 On September 23, 2008, Michael Murphy Tannen of the Law Office of Michael Murphy Tannen (hereinafter "Tannen") wrote to the defendants, indicating that Goldberg had referred them to him to represent them in the coverage dispute with Safeco. Tannen's letter stated, in relevant part, that it "will serve as our modified engagement letter so that our firm can formally represent your interests in Safeco's declaratory judgment action," and it set forth his fee structure, including a $23,500 total maximum fee for his services in the Safeco suit. Tannen also indicated in the letter that he would "not be participating in any UM/UIM arbitration proceeding." The defendants signed Tannen's engagement letter on October 19, 2008. Thereafter, Tannen represented the defendants in

the Safeco coverage dispute, which continued through August 2012 when the circuit court heard and ruled on the parties' cross-motions for summary judgment.

¶ 7 On August 23, 2012, the circuit court granted summary judgment in favor of the defendants, finding that Harmon was a covered person under Nizzi's UIM policy. On September 21, 2012, Safeco and the defendants entered into a settlement agreement whereby Safeco agreed to pay the defendants $210,000 and waived its right to appeal the summary judgment order. At some point, Goldberg became involved in the settlement discussions. The defendants contend that the settlement negotiations did not involve more than a couple of telephone calls on September 12 and that they were not told why Tannen had not made the calls. Goldberg contends that it merely resumed its efforts to pursue the defendants' UIM claim and demand for arbitration; efforts which led to the settlement agreement.

¶ 8 On December 12, 2012, Goldberg filed its petition to enforce its lien and contingency fee contract pursuant to the Attorneys Lien Act (Act) (770 ILCS 5/1 (West 2012). In the petition, Goldberg alleged that it had arranged for Tannen to represent the defendants in Safeco's declaratory judgment action and had advanced $9,080.55 to Tannen for his work. Goldberg further alleged that, after coverage was determined, it was able to negotiate the $210,000 settlement with Safeco. Pursuant to its November 17, 2004, contingency fee agreement with the defendants, Goldberg sought $70,000 in attorney fees and $17,511 in costs from the settlement proceeds.

¶ 9 The defendants objected to Goldberg's petition, arguing that the 2004 Attorney-Client Agreement did not apply to the coverage dispute and applied only to claims of personal injuries and property damage against "persons responsible." The defendants also argued that Goldberg failed to

perfect its lien because it failed to provide Safeco with notice in writing of its claim as required by the Act. During the hearing on the petition, the attorney representing Goldberg stated to the court that Goldberg did provide Safeco with notice and that the document evincing to service of the notice would be filed with the court. However, the document was never submitted.

¶ 10 On January 7, 2013, the circuit court issued its order releasing the lien and providing that, out of the $210,000 settlement award, Goldberg: (1) shall be reimbursed for the $9,080.55 fees it advanced to Tannen and $473.13 for the court reporter costs that it paid; and (2) shall receive $2,350 in *quantum meruit* fees for the work it performed for the defendants in the coverage suit, which equated to 10% of Tannen's $23,500 maximum flat fee. In its oral ruling, the circuit court explained that Goldberg's Attorney-Client Agreement covered its representation of Harmon in claims for personal injury against "persons responsible," and that neither Nizzi nor Safeco were persons responsible for Harmon's injuries. The court stated that the Attorney-Client Agreement was, at best, ambiguous as to whether it extended to coverage claims and such an ambiguity must be construed against Goldberg, the drafter of the agreement. The court then explained that it knew that Goldberg spent some time on the coverage case, making it eligible for an award of *quantum meruit* fees. However, Goldberg had refused to provide any time records, representing that it did not keep any time records. Based on the court's knowledge of Tannen's involvement in the coverage case and Goldberg's admissions in court that it did not spend a great deal of time on the coverage matter and its failure to maintain any time records, the court concluded that it had no alternative other than to make its best estimate of a reasonable award. The court awarded Goldberg $2,350 in *quantum meruit* fees, which was equal to 10% of Tannen's maximum fee. The court explained that its award

amounted to payment for 10 hours of work at $235 per hour, which it determined was a reasonable time and rate estimate for Goldberg's work in the matter. The court stated that it realized its award was a "somewhat arbitrary and capricious number," but based on the facts and circumstances of the case, it was the court's best estimate of a *quantum meruit* recovery. Goldberg timely appealed.

¶ 11 Goldberg first contends that the circuit court erred in determining that the contingency provision contained in its Attorney-Client Agreement did not extend to the coverage dispute between the defendants and Safeco. We disagree.

¶ 12 Where, as here, the trial court has construed a contingent fee agreement as a matter of law, our review is *de novo*. *Guerrant v. Roth*, 334 Ill. App. 3d 259, 263, 777 N.E.2d 499 (2002). When interpreting a contract, our function is to ascertain the intent of the parties and give effect to that intent. *Id.* We first look to the language of the contract itself to determine the parties' intent, construing the contract as a whole. *Thompson v. Gordon*, 241 Ill. 2d 428, 441, 948 N.E.2d 39 (2011). "If the words in the contract are clear and unambiguous, they must be given their plain, ordinary and popular meaning." *Id.* Whether a contract is ambiguous is a question of law for the court to determine, and it is not ambiguous merely because the parties disagree as to its meaning. *Guerrant*, 334 Ill. App. 3d at 264.

¶ 13 In this case, the circuit court determined, and we agree, that Goldberg's Attorney-Client Agreement unambiguously provided that it applied only to "claims of personal injuries and property damage against persons responsible" for the injuries Harmon sustained in the automobile accident in Grayslake. The claim for which Goldberg filed his fee petition in this case involved the defendants' claim under Nizzi's UIM policy with Safeco; and, neither Nizzi nor Safeco were "persons

responsible" for Harmon's injuries. The language of the agreement is not susceptible to more than one reasonable interpretation. Even if the language of the agreement was ambiguous, any ambiguities would be resolved against the drafter, which in this case was Goldberg. *Guerrant*, 334 Ill. App. 3d at 265 (stating that the court believed "that the rule of ambiguities in a contract are to be construed against the drafter is particularly applicable to a contingent fee agreement drafted by an attorney"). Therefore, we agree with the circuit court's conclusion that the Attorney-Client agreement did not extend to the coverage dispute between the defendants and Safeco.

¶ 14 Even if the Attorney-Client Agreement did apply, Goldberg failed to perfect a lien upon the $210,000 settlement with Safeco. The Act provides that, in order to enforce a lien, the attorney "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 ***, claiming such lien and stating therein the interest they have in such suits." 770 ILCS 5/1 (West 2012). Thus, an attorney's lien is perfected from and after the time of service of the notice on the party against whom the client has a claim. *T.M. Ryan Co. v. 5350 South Shore, LLC*, 361 Ill. App. 3d 352, 356-7, 836 N.E.2d 803 (2005). The validity of a lien may also be upheld where there is proof of actual notice. *Id.* "Attorneys who do not strictly comply with the Act have no lien rights." *Id.* at 357. Here, the record contains no evidence that Goldberg properly served Safeco with notice of its interest in the settlement or that Safeco had actual notice.

¶ 15 Next, Goldberg contends that the circuit court should have awarded *quantum meruit* fees in the amount of the contingency fee provision contained in the Attorney-Client Agreement because the contracted fees are the reasonable value of the legal services rendered. Again, we disagree.

¶ 16 Where there is not an enforceable fee contract between the attorney and client, the attorney may still be entitled to payment on a *quantum meruit* basis. *Wegner v. Arnold*, 305 Ill. App. 3d 689, 693, 713 N.E.2d 24 (1999). "Under the theory of *quantum meruit*, the trial court is literally to award the attorney " 'as much as he deserves.' " *Id.* (citations omitted). In determining a reasonable fee under a *quantum meruit* theory, the trial court should assess all of the relevant factors, including: the time and labor required; the attorney's skill and standing; the nature of the cause; the novelty and complexity of the subject matter; the attorney's degree of responsibility in managing the cause; the usual and customary charge for the type of work in the field; and, the benefits resulting to the client. *Id.* The circuit court's decisions regarding attorney fees are matters within its broad discretion due to its "deeper understanding of the skill and time required in the case"(*id.*), and its resolution of such issues will not be disturbed on review absent an abuse of that discretion (*Kaiser v. MEPC Am. Properties, Inc.*, 164 Ill. App. 3d 978, 984, 518 N.E.2d 424 (1987)).

¶ 17 Relying on *Whalen v. Shear*, 190 Ill. App. 3d 84, 546 N.E.2d 1 (1989), Goldberg contends that, even if the Attorney-Client Agreement was unenforceable, any reasonable fee under a *quantum meruit* theory should still have been $70,000–the contingent fee under the agreement. *Whalen*, however, does not support Goldberg's argument because the attorney in that case had been discharged after he had procured a settlement offer, which was eventually accepted, and the amount offered was "attributable to the efforts primarily if not exclusively of the discharged attorney." *Id.* at 87. The circuit court in *Whalen* considered the discharged attorney's amount of time and effort when it determined that a reasonable attorney fee under a *quantum meruit* theory was the one-third contingency fee in the client's agreement with the discharged attorney. *Id.*; *but cf. Rhoades v.*

Norfolk &Western Railway Co., 78 Ill. 2d 217, 229, 399 N.E.2d 969 (1979) (where the attorney was discharged one day after signing retainer and "little, if any, legal work" had been performed, supreme court determined that awarding the firm 25% of settlement as provided by agreement would constitute excessive *quantum meruit* fees and allowed payment only for work actually performed before discharge).

¶ 18 Unlike in *Whalen*, Goldberg never had a fee agreement with the defendants for its representation of them in the coverage claim, and Goldberg did minimal work to resolve the coverage dispute. In fact, after the May 2008 appearance filed by Goldberg, there is no other evidence of Goldberg's involvement in the coverage dispute until it filed its fee petition in 2012. The only work alleged to have been performed by Goldberg took place in September 2012, after Tannen obtain summary judgment in the defendants' favor in the preceding month, and the work consisted of a few phone calls to Safeco to coordinate the settlement.

¶ 19 The circuit court properly considered the relevant factors when it determined its *quantum meruit* award, including that: Goldberg spent little time on the coverage dispute; Goldberg referred the defendants to Tannen for representation in the coverage dispute; the defendants signed an engagement letter with Tannen, who then represented them for several years, eventually prevailing on their argument that Harmon was a covered family member under Nizzi's policy; Goldberg's negotiations with Safeco regarding the settlement offer after the summary judgment order consisted of only a few phone calls; and Goldberg refused to produce time records for its work on the case. Additionally, the circuit court considered that its award translated to payment for 10 hours of work at a rate of $235 per hour, which it concluded was a reasonable time and rate given the complexity

of the work that Goldberg performed and the fact that the rate was comparable to Goldberg's normal rate. We note that no evidence was submitted contradicting $235 per hour as a reasonable rate, and Goldberg is in no position to contest the circuit court's estimate of 10 hours of work having failed to submit time records showing the time that it expended in the Safeco coverage dispute. Considering these relevant factors, the circuit court did not abuse its discretion by awarding Goldberg *quantum meruit* attorney fees in the sum of $2,350.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.