2018 IL App (1st) 163321-U
No. 1-16-3321
Order filed April 13, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

KENNETH NEIMAN and JANICE NEIMAN, Plaintiffs-Appellants, v. MICHAEL ROACHE, Defendant (Anesi, Ozmon, Rodin, Novak & Kohen, Ltd., Intervening Defendant-Appellee).	)	Appeal from the Circuit Court of Cook County. No. 14 L 062019 Honorable Larry G. Axelrood, Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in denying the motion for substitution of judge as a matter of right; the circuit court properly awarded attorney fees in *quantum meruit.*

¶ 2 This appeal arises from a circuit court order denying the motion for substitution of judge as of right filed by plaintiffs Kenneth and Janice Neiman, brought pursuant to section 2-1001(a)(2) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1001(a)(2) (West 2012)). This

section of the Code requires that for a motion for substitution of judge as of right to be considered timely, it must be brought before the assigned judge makes a substantive ruling in the case. 735 ILCS 5/2-1001(a)(2)(ii) (West 2012). Under these facts, we find that plaintiffs' motion for substitution of judge as of right was properly denied as untimely because plaintiffs did not file their motion at the "earliest practical moment"; the case had been pending on Judge Larry G. Axelrood's call for 17 months and substantive rulings had been made.

¶ 3 The plaintiffs also argue that the award of attorney fees was improper because they terminated the law firm before a lien was filed and no admissible evidence of *quantum meruit* was presented. We find no abuse of discretion in the trial court's award of attorney fees.

¶ 4 We affirm on both issues.

¶ 5 BACKGROUND

¶ 6 Plaintiffs-appellants Kenneth and Janice Neiman sued defendant Michael Roache for permanent injuries Kenneth suffered on September 29, 2013, after he crashed into defendant's car that had broken down and was illegally parked in the express lanes of the Kennedy Expressway. When defendant's car broke down, he stopped in the roadway but did not turn on his flashing lights or otherwise warn of the existence of a disabled car in the lane of traffic. Plaintiff's medical expenses through April 15, 2015, exceeded $90,000, excluding permanent injury, disfigurement, and other losses. Defendant was insured by Unique Insurance for $20,000 in bodily injury and $15,000 for property damage.

¶ 7 Allstate insured plaintiffs for additional "Under Insured Motorist" (UIM) coverage. The UIM provision of the Allstate insurance contract the Neimans both signed clearly stated that the maximum UIM coverage available to them was $100,000. However, the Neimans claimed that

before the injury at issue they had asked Allstate to increase their UIM coverage to $300,000 and, in addition, asked for umbrella coverage up to $1 million, but Allstate failed to comply with their requests.

¶ 8 After Allstate denied plaintiffs' claim, plaintiffs filed their complaint *pro se* in May 2014. Plaintiffs later hired the McNabola Law Office, which filed a first amended complaint at law (14 L 62019) in the Second Municipal District of Cook County in January 2015 against defendants Roache, Unique, and Allstate (corporate and the insurance agency which sold plaintiffs' policy). Plaintiffs also sued BMW for products liability and negligence related to the BMW vehicle Kenneth was driving at the time of the accident. At the request of the parties, the case was transferred to the First Municipal District and, on January 28, 2015, assigned to Judge Larry G. Axelrood.

¶ 9 In the meantime, defendant Roache countersued plaintiff Kenneth Neiman and his employer, Mercantile Brokerage, claiming Neiman was negligent in his operation of the BMW. This case (14 L 10925) was consolidated with Neiman's case in April 2015.

¶ 10 In March 2015, Allstate and its insurance agency were dismissed from case 14 L 62019.

¶ 11 In April 2015, plaintiff Kenneth Neiman re-injured his foot in a separate accident.

¶ 12 On April 15 and May 22, 2015, Judge Axelrood twice continued the consolidated cases.

¶ 13 In July 2015, Judge Axelrood allowed McNabola to withdraw as counsel. Before McNabola's withdrawal, no written discovery had been answered, and there had been no settlement discussions nor settlement offers made. Plaintiffs Kenneth and Janice Neiman immediately retained defendant-appellant Anesi, Ozmon, Rodin, Novak & Kohen, Ltd. (Anesi)

law firm to represent them in exchange for a contingency fee of one-third of the amount of recovery plus their costs or the *quantum meruit* to which the law firm would be entitled.

¶ 14 In August, Anesi filed an emergency motion to compel discovery pursuant to a discovery motion filed in March 2015. On August 18, Judge Axelrood ordered defendant to produce the insurance policy in one week and continued for a status hearing on September 1.

¶ 15 In October 2015, Anesi procured a settlement offer from Unique Insurance for the full policy liability limit of $20,000 in exchange for a release and dismissal order. In December, Unique's attorney sent a letter to Anesi approving a modification made by Anesi.

¶ 16 On January 29, 2016, Anesi received a faxed document entitled "Pro Se Appearance and Jury Demand," signed by plaintiffs. On February 1, plaintiffs filed a motion to strike the appearance of Anesi and for the return of documents related to the case.

¶ 17 On February 4, 2016, Anesi mailed a notice to third parties to perfect a statutory attorney's lien over the litigation/settlement proceeds. On February 9, Judge Axelrood granted Anesi leave to withdraw as the attorney of record. On March 11, the case was set for status of settlement; both plaintiffs and defense counsel appeared in court and the case was continued to April 1 for a case management conference on discovery status. On April 1, Judge Axelrood entered an order as follows: "Plaintiffs to provide notice to defendants whether they will accept tender of $20,000 policy limits in exchange for release of defendants with prejudice. Defendants shall provide settlement papers to plaintiffs upon receipt of said notice. Payment to be tendered upon dismissal of case with prejudice."

¶ 18 On June 13, 2016, 14 L 62019 was dismissed for want of prosecution by Judge Marcia Maras after plaintiffs failed to appear. On June 16, plaintiffs filed a motion to vacate the dismissal which was granted by Judge Flannery.

¶ 19 With the law case reinstated, plaintiffs moved to enforce the offer of settlement. On July 11, 2016, plaintiff Janice Neiman sought a substitution of judge as a matter of right, pursuant to section 5/2-1001(a)(2)(i) and (ii) of the Code. 735 ILCS 5/2-1001(a)(2)(i) and (ii) (West 2014). Plaintiffs-appellants tendered their "Motion to Enforce Payment & Other Relief" which included the following language: "1. Plaintiffs seek a hearing on a motion for a Substitution of Judge as a matter of right from Judge Axelrood to another jurist before a hearing on this motion or any other substantive matter." Judge Axelrood denied the motion, stating "It's been on my call for a period of time well in excess of 30 days."

¶ 20 On July 21, 2016, Anesi filed a motion for leave to file a petition to intervene, which was granted.

¶ 21 On July 29, plaintiff Janice Nieman moved to reconsider the substitution of judge as of right, which the trial court denied. On August 1, Judge Axelrood denied the motion to reconsider.

¶ 22 In November 2016, the trial court found the plaintiffs and Anesi had a written agreement. The trial court also found that Anesi did "substantial work on the case" by answering discovery, responding to motions to dismiss, procuring medical records, drafting policy demand letters, and conducting extensive client communications. Anesi made multiple court appearances and was "at the very high end of plaintiffs being engaged in their case." Thus, the trial court reasoned, the firm was entitled to the compensation based on its successful procurement of settlement offers of

the policy limits. The trial court awarded Anesi one-third of the $20,000 settlement amount plus costs in *quantum meruit*.

¶ 23 Plaintiffs timely appealed.

¶ 24 ANALYSIS

¶ 25 After plaintiffs-appellants filed their initial brief, intervenor-appellee Anesi moved to strike, which this court denied. Despite our denial of the motion, we admonish plaintiffs to heed the Illinois Supreme Court Rules regarding briefing. First, Rule 342(a) (eff. July 1, 2017) requires appellants to attach a "complete table of contents, with page references, of the record on appeal." Appellants' brief has no table of contents. Second, Rule 341(h)(1) (eff. Nov. 1, 2017) requires "A summary statement, entitled 'Points and Authorities,' of the points argued and the authorities cited in the Argument. This shall consist of the headings of the points and subpoints as in the Argument, with the citation under each heading of the authorities relied upon or distinguished, and a reference to the page of the brief on which each heading and each authority appear. Cases shall be cited as near as may be in the order of their importance." Appellants included a so-called "Table of Authorities" that lists cases and statutes in alphabetical order with no regard to the argument they purportedly support. Moreover, the table itself is incomplete because it omits cases relied upon and is inaccurate in its page numbers.

¶ 26 Supreme Court Rules are not advisory suggestions, but mandatory rules to be followed. *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 57. While failure to abide by the rules may result in the brief being stricken, we nevertheless will address the merits of the appeal. *Id.* ¶¶ 57-58.

¶ 27 A. Substitution of Judge

¶ 28 In civil cases substitution of judge is governed by section 2-1001 of the Code (735 ILCS 5/2-1001 (West 2012)). Generally, a party is entitled to one substitution of judge without cause as a matter of right. 735 ILCS 5/2-1001(a)(2)(i) (West 2012). The trial judge must grant such a motion if it is presented before a trial or hearing begins and before the judge has ruled on any substantial issue in the case. 735 ILCS 5/2-1001(a)(2)(ii) (West 2012). A substantial ruling is one that directly relates to the merits of the case. *In re Estate of Gay*, 353 Ill. App. 3d 341, 343 (2004). We review an order denying substitution of judge as a matter of right *de novo*. *Partipilo v. Partipilo*, 331 Ill. App. 3d 394, 398 (2002).

¶ 29 The Illinois Supreme Court has stated that the provisions of section 2-1001 are to be liberally construed to promote, rather than defeat, the right of substitution. *Bowman v. Ottney*, 2015 IL 119000, ¶ 17; *In re Estate of Wilson*, 238 Ill. 2d 519, 553 (2010). The principle of liberal construction cannot excuse a party from complying with the statute's express requirements, however. *Bowman*, 2015 IL 119000, ¶ 17.

¶ 30 Even though the right to a substitution of judge is absolute when properly made, parties may not "judge shop" until finding a judge in total sympathy to his or her cause. *Id.* ¶ 18. Section 2-1001(a)(3) of the Code does not contain a specific time frame "within which requests for substitution of judge must be asserted." *Wilson*, 238 Ill. 2d at 556. However, motions for substitution based on cause in both civil and criminal cases must be asserted at the "earliest practical moment" after the cause for the request has been discovered. *Id.*; see *Petalino v. Williams*, 2016 IL App (1st) 151861, ¶ 18 (requirement that motion be "timely" requires, among other things, that it is filed "at the earliest practical moment before commencement of trial or hearing").

¶ 31 Here, plaintiffs-appellants' motion for substitution of judge was filed more than 17 months after the case had been assigned to Judge Axelrood in January 2015. Plaintiffs appeared in court on multiple occasions during that time, represented by two different law firms and ultimately representing themselves *pro se*. In February 2016, Judge Axelrood allowed Anesi to withdraw as the plaintiffs' attorney, and in April 2016, ordered plaintiffs to provide notice to Roache that they would accept the tender of the $20,000 policy limit in exchange for a release of defendants, and ordered defendants to provide settlement papers to plaintiffs. The motion was untimely due to the substantive rulings of Judge Axelrood and the court did not err in denying plaintiffs' motion for substitution of judge as of right.

¶ 32 B. Attorney Fees

¶ 33 A "trial court has broad discretionary powers in awarding the attorney fees sought" and this court will not reverse unless the trial court has abused its discretion, which occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. *McGill v. Garza*, 378 Ill. App. 3d 73, 75 (2007).

¶ 34 Plaintiffs argue they terminated the attorneys "for cause" and the trial court erred by awarding fees and costs in *quantum meruit*. Plaintiffs complain that the trial court abused its discretion by awarding the *quantum meruit* fees, asserting Anesi performed "minimal work" in this case and accusing Anesi of unethical behavior. In their reply brief, plaintiffs insist that this case required "no complex skill or issues involved in settling the case," complain that Anesi failed to pursue additional agreed-upon litigation arising from the second accident, which occurred in April 2015, and reassert that the trial court abused its discretion in awarding a full contingency fee without sufficient admissible details.

¶ 35 In Illinois, a client may discharge his or her attorney at any time, with or without cause. *Wegner v. Arnold*, 305 Ill. App. 3d 689, 693 (1999). When a client fires an attorney working under a contingent-fee contract, the contract ceases to exist and the contingency term is no longer operative. *In re Estate of Callahan*, 144 Ill. 2d 32, 40 (1991). 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 where the trial court is to award the attorney literally "as much as he deserves." *Wegner*, 305 Ill. App. 3d at 693.

¶ 36 An attorney or firm withdrawing for good cause is allowed to recover the value of services rendered provided in *quantum meruit*. See *McGill*, 378 Ill. App. 3d at 75-76. In *McGill*, a law firm was permitted to withdraw as counsel for the plaintiff during pretrial proceedings; subsequently, the law firm sought to collect fees on a *quantum meruit* basis. The trial court found that the good-cause finding was a "necessary prerequisite" for a fees and costs award in *quantum meruit*. *Id.* at 75.

¶ 37 To determine 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 same type of work in the field; and, the benefits to the client. *Id*. The trial judge has broad discretion because of the advantage of close observation of the attorney's work and the trial judge's deeper understanding of the skill and time required in the case. *Thompson v. Buncik*, 2011 IL App (2d) 100589, ¶ 8 (citing *Wegner*, 305 Ill. App. 3d at 693).

¶ 38 Indeed, in appropriate circumstances, the *quantum meruit* reward may equal the full contingency fee. *Whalen v. Shear*, 190 Ill. App. 3d 84, 86-87 (1989). The amount awarded is fact-dependent and is to be determined according to the weight afforded the evidence by the trial court. *Lee v. Ingalls Memorial Hospital*, 232 Ill. App. 3d 475, 479 (1992). We will not disturb an award of fees merely because we may have made a different award. *Id.*

¶ 39 In *Whalen*, the attorney received an oral offer to settle the plaintiff's case prior to his discharge. After communicating the offer to the plaintiffs, the attorney was discharged. 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. *Whalen*, 190 Ill. App. 3d at 87. The court reasoned that the trier of fact properly awarded the full contingency fee where the discharged attorney had procured the offer for the entire settlement, which was eventually accepted, and where the amount offered was attributable to the efforts primarily if not exclusively of the discharged attorney. *Id.*

¶ 40 Similarly, in *Reed Yates Farms, Inc. v. Yates*, 172 Ill. App. 3d 519 (1988), the Fourth District appellate court held that the withdrawing attorney was entitled to *quantum meruit* compensation even though he was employed under a contingent fee contract, because he withdrew for good cause. In *Leoris & Cohen, P.C. v. McNiece*, 226 Ill. App. 3d 591 (1992), the Second District appellate court held that a complete breakdown in the attorney-client relationship, if proven, is a justifiable basis for allowing an attorney to withdraw from a contingent fee case and still receive his fees on a *quantum meruit* basis. *Id.* at 597.

¶ 41 In the case at bar, Anesi, as the plaintiffs' attorney of record, answered discovery in September 2015, and in October received a settlement offer in the full amount of the insurance policy. The record contains numerous emails between the plaintiffs and Anesi, indicating discussions were had and paperwork completed in connection with this case. As in *Whalen*, the settlement offer appears primarily attributable to the efforts of the discharged attorney. The contracted price of one-third of the settlement was reasonable for the value of the services rendered. *Whalen*, 190 Ill. App. 3d at 87.

¶ 42 Relying on *Will v. Northwestern University*, 378 Ill. App. 3d 280 (2007), plaintiffs argue that Anesi did not provide even a "modicum of detail" to justify an award of the full contract fee. However, in *Will* this court noted the law firm's request for attorney fees originated from its contingent fee agreement with one of the plaintiffs, not hourly rates and fee contracts, a key difference. *Id*. at 301. The *Will* court distinguished *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978 (1987), as totally inapposite and found "no merit" to the argument that the attorney's award should be reversed because its petition was insufficient due to a lack of detail regarding the work performed and time expended. *Id*. at 302. In fact, the attorney's inability to account with precision the time spent on each task performed for the client will not preclude recovery of the fees under a *quantum meruit* theory of recovery. *Id*.

¶ 43 We find additional support in *Johns v. Klecan*, 198 Ill. App. 3d 1013 (1990). In that case, this court found that trial courts could adequately guard against the possibility of excessive fees without requiring contingent fee attorneys to account for their time with the same specificity and exactitude of hourly fee attorneys. *Johns*, 198 Ill. App. 3d at 1019. Additionally, in *Anderson v. Anchor Organization for Health Maintenance*, 274 Ill. App. 3d 1001, 1008 (1995), this court

found that the attorney's failure to maintain detailed time records did not preclude her right to recovery asserted under *quantum meruit* pursuant to a contingent fee agreement; rather, records presented sufficient evidence from which a trial court could determine a reasonable fee for services.

¶ 44 Moreover, plaintiffs combine the concept of an attorney's lien for fees with an award in *quantum meruit*. The existence or non-existence of a perfected lien is irrelevant where the fees are based on the work performed under a contingency fee contract. See *Rhoades v. Norfolk & Western Ry. Co.*, 78 Ill. 2d 217, 230 (1979) (attorneys entitled to be paid on a *quantum meruit* basis a reasonable fee for services rendered before discharge).

¶ 45 The time and labor required in a case is just one of the multiple factors the trial court must consider in determining reasonable attorney fees under the doctrine of *quantum meruit*; the record indicates other evidence was available to enable the trial court to assess Anesi's skill and standing, the nature of the cause and novelty and difficulty of the subject matter, Anesi's degree of responsibility, the usual and customary charge in the community, and the benefits resulting to the plaintiffs. As such, we conclude that the trial court properly awarded attorney fees in *quantum meruit*.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 48 Affirmed.