

2014 IL App (2d) 131112-U
No. 2-13-1112
Order filed May 20, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

LISA STEPSON, as the Administrator of the)	Appeal from the Circuit Court
Estate of Elizabeth Shults, Deceased,)	of Kane County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 11-L-67
)	
JESSE GRENIER and LOWELL C. HAGEN)	
TRUCKING, INC.,)	Honorable
)	F. Keith Brown,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court properly denied plaintiff's petition to enforce a settlement, which, despite her contention, did not provide that her attorney would receive any proceeds; (2) plaintiff lacked standing to object to the trial court's personal jurisdiction over her attorney, and in any event she invited the court to exercise such jurisdiction; the court also had inherent power, and thus subject matter jurisdiction, to resolve a fee dispute.

¶ 2 Two issues are raised in this appeal: (1) whether the trial court erred when it denied plaintiff Lisa Stepson's petition to enforce a settlement agreement; and (2) whether the trial court erred when it exercised jurisdiction over one of the attorneys representing plaintiff and over his

fee dispute with a law firm that served as cocounsel. For the reasons that follow, we determine that the trial court did not err. Thus, we affirm.

¶ 3 The following facts are relevant to resolving the issues raised. Elizabeth Shults, plaintiff's sister, was driving to work early on June 1, 2010, when she was involved in a vehicular accident with a semi-trailer truck driven by defendant Jesse Grenier, who worked for defendant Lowell C. Hagen Trucking, Inc. Shults died as a result of the injuries she sustained in that accident, and plaintiff, wanting to sue defendants for damages, retained as her attorney James Mullally, who was an associate of Franks, Gerkin & McKenna (the Franks firm).

¶ 4 On January 7, 2011, Mullally resigned from the Franks firm, giving the firm two weeks' notice of his departure. Plaintiff, who believed that Mullally no longer worked for the Franks firm, left with Mullally, and, on January 8, 2011, plaintiff entered into a written attorney-client agreement with Foote, Meyers, Mielke & Flowers (the Foote firm). According to this agreement, plaintiff retained the services of the Foote firm and Mullally to investigate and prosecute any action arising out of Shults's accident. In the written agreement, plaintiff expressly acknowledged that, if her case were successful, she would pay the Foote firm 33.3% of any amount she received. Although the written agreement did not indicate that any sums were due Mullally, Mullally testified that, pursuant to an oral agreement, he was supposed to receive one third of any third the Foote firm was awarded.

¶ 5 In October 2012, the case was settled for \$1,100,000. Plaintiff executed a full settlement and final release of all claims, which provided that the release "fully extinguishes all claims and causes of action *** for *** attorneys' fees." Soon thereafter, the court entered an order approving the confidential settlement. In this order, the court found "[t]he confidential settlement reached between [plaintiff] and [defendants] *** to be fair and reasonable" and that

“all parties have consented to said settlement.” (Emphasis added.) The court then “specifically approve[d] attorneys’ fees to [the Foote firm] in the amount of \$366,666.33” and approved the award of \$11,895.96 to the Franks firm for attorney fees. Nowhere in the settlement and final release or the order approving the settlement did it outline what, if any, amounts should be paid to Mullally.

¶ 6 On December 5, 2012, the Franks firm sued the Foote firm. The Franks firm alleged that neither the Foote firm nor Mullally should receive any of the attorney fees, because Mullally breached his fiduciary duty to the Franks firm when he solicited plaintiff to leave the Franks firm before Mullally’s employment with that firm ended.

¶ 7 According to Mullally, on the same date that the Franks firm sued the Foote firm, Mullally received a check from the Foote firm for \$75,000. Mullally accepted this amount and asked the Foote firm to pay him the remaining \$44,822 that he thought he was owed.¹ The Foote firm refused.

¶ 8 As a result, on December 10, 2012, plaintiff petitioned to enforce the settlement, and the Franks firm moved to consolidate its case with plaintiff’s petition to enforce the settlement. However, before the court ruled on the motion to consolidate, the Franks firm voluntarily dismissed its case “pursuant to the settlement of the parties.” The record does not disclose any details of that settlement.

¶ 9 The court dismissed the Franks firm from all further proceedings, and plaintiff filed an amended petition to enforce the settlement. In her amended petition, plaintiff claimed that she,

¹ Plaintiff claimed at times in the trial court that Mullally was owed approximately \$122,000, which represents one third of the total amount of attorney fees, and, at other times, she claimed that Mullally was owed \$119,822.

the Foote firm, and Mullally discussed and agreed that Mullally would receive one third of any attorney fees awarded to the Foote firm. Thus, plaintiff alleged that “[a] present controversy exists between the parties concerning the interpretation of the agreement between them, and the proper amount to disburse to the [plaintiff], to the *quantum meruit* claimant, and what part of the costs remain unpaid.” In its response, the Foote firm denied this allegation.

¶ 10 The cause proceeded with an evidentiary hearing, and, after both Mullally and plaintiff testified consistently with the facts presented above and without the Foote firm presenting any evidence, the Foote firm moved for a directed finding. The trial court granted that motion after plaintiff’s new attorney, Douglas Drenk, acknowledged that plaintiff’s testimony had “nothing to do with the settlement.” Plaintiff moved for a rehearing and for the court to clarify its order. Plaintiff claimed that the court had jurisdiction to consider matters ancillary to the settlement, *i.e.*, the distribution of attorney fees, and that she met her burden on this issue. The court found that it had jurisdiction over the parties, including Mullally and the Foote firm, had jurisdiction over the fee dispute, and had properly granted the Foote firm’s motion for a directed finding. This appeal followed.

¶ 11 On appeal, plaintiff claims that Mullally must receive the entire one third he is due, noting that “[t]he payment of any fee to the Franks firm based on a percentage of the overall award would, in effect, deny [plaintiff] her right to choose her own attorney.” Plaintiff also claims that the trial court erred when it claimed to have jurisdiction over Mullally and the fee dispute between Mullally and the Foote firm.² The Foote firm contends that plaintiff cannot

² Plaintiff actually claims in her brief that the court erred in asserting jurisdiction over Mullally and Drenk. According to the court’s written order, the court never found that it had jurisdiction over Drenk. Rather, in its written order, the court found only that it had “personal

argue on appeal that, when it allegedly failed to pay Mullally pursuant to his oral agreement with the Foote firm, she was denied her right to be represented by counsel of her choice, as that argument was not presented below. The Foote firm then claims that, because no evidence indicated that the settlement was not distributed according to the agreement, the court did not err in granting its motion for a directed finding. Regarding plaintiff's jurisdiction claim, the Foote firm contends that, because plaintiff asked the court, in her motion for a rehearing and to clarify the court's order, to exercise jurisdiction over the fee dispute, she cannot claim now that doing so was erroneous. Moreover, the Foote firm claims that Mullally subjected himself to the court's jurisdiction when he answered a counterclaim and affirmative defense targeted at him. We conclude that the trial court did not err.

¶ 12 First, plaintiff never claimed in the trial court that a denial of her petition to enforce the settlement would violate her right to be represented by counsel of her choosing. Rather, plaintiff alleged in her petition that she, Mullally, and the Foote firm disagreed about what their agreement was with regard to attorney fees. Because plaintiff cannot recover under a theory she never presented in the trial court, we will not consider in this appeal whether not paying Mullally the amount he allegedly was owed amounted to denying plaintiff counsel of her choosing. See *Colonial Inn Motor Lodge, Inc. v. Gay*, 288 Ill. App. 3d 32, 40 (1997) (because the plaintiff never advanced in the complaint that the defendant had a duty to inform the plaintiff of the collision after it happened, the court would not consider on appeal whether such a duty existed).

¶ 13 That said, we cannot conclude that the trial court erred when it denied plaintiff's petition to enforce the settlement agreement. In addressing this point, we first consider our standard of review. Section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2012))

jurisdiction over the parties: Estate of Shults, James P. Mullally, and [the Foote firm].”

provides that, in all cases tried without a jury, the defendant may, at the close of the plaintiff's case, move for a finding or judgment in his or her favor. In ruling on this motion, a court must engage in a two-prong analysis. *Kokinis v. Kotrich*, 81 Ill. 2d 151, 155 (1980). "First, the court must determine, as a matter of law, whether the plaintiff has presented a *prima facie* case." *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275 (2003). A plaintiff establishes a *prima facie* case by proffering at least "some evidence on every element essential to [the plaintiff's underlying] cause of action." *Kokinis*, 81 Ill. 2d at 154. If the plaintiff has failed to meet this burden, the court should grant the motion and enter judgment in the defendant's favor. *Id.* at 155. Because a determination that a plaintiff has failed to present a *prima facie* case is a question of law, the trial court's ruling is reviewed *de novo* on appeal. *Cryns*, 203 Ill. 2d at 275.

¶ 14 If, however, the trial court determines that the plaintiff has presented a *prima facie* case, the court then moves to the second prong of the inquiry. *Id.* In its role as the finder of fact, the court must consider the totality of the evidence presented, including any evidence that is favorable to the defendant, and must weigh all the evidence, determine the credibility of the witnesses, and draw reasonable inferences therefrom. *Id.* at 275-76; see also 735 ILCS 5/2-1110 (West 2012). Where the trial court engages in the second-prong review, a reviewing court will give deference to the trial court and will reverse only if the decision is against the manifest weight of the evidence. *Cryns*, 203 Ill. 2d at 276. A finding is against the manifest weight of the evidence when the opposite conclusion is clearly evident or when the court's finding is arbitrary, unreasonable, or not based on the evidence. *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 544 (2007).

¶ 15 Here, under the first prong, we cannot conclude that plaintiff met her burden. The evidence revealed that plaintiff executed a full settlement and release of claims. In that

settlement and release, plaintiff agreed that all claims for attorney fees were fully extinguished. The order approving the confidential settlement specifically provides that “all parties[, which necessarily includes plaintiff,] have consented to said settlement.” The order then delineates how the award of \$1,100,000 will be divided. Specifically, the order provides that one third of the settlement, or \$366,666.33, is to be awarded to the Foote firm for attorney fees. Nowhere in this order does it provide what amount, if any, will be paid to Mullally. This is consistent with the written attorney-client agreement that plaintiff and the Foote firm executed. Although the written agreement indicates that Mullally would also represent plaintiff in her case against defendants, nowhere does it specify that Mullally would be given any of the amount of attorney fees awarded to the Foote firm. Thus, to the extent that Mullally has a cause of action to recover fees he is due, a petition to enforce the settlement is not the proper vehicle for it, as the settlement does not indicate that Mullally is owed anything. See *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849 (using rules of contract law, court looked at terms of settlement agreement to discern whether attorney who represented the plaintiff had standing to bring a claim against the defendants). Accordingly, we determine that the trial court’s order denying the petition to enforce the settlement was proper.

¶ 16 We now address plaintiff’s claim that the court erred in exercising jurisdiction over Mullally and the fee dispute.³ Questions concerning jurisdiction are reviewed *de novo*. See *In re Luis R.*, 239 Ill. 2d 295, 299 (2010).

³ Before addressing this issue, we question the Foote firm’s claim that Mullally subjected himself to the court’s jurisdiction when he answered a counterclaim and affirmative defense targeted at him. The pages in the record to which the Foote firm cites in making its argument show that *plaintiff* answered the counterclaim and responded to the affirmative defense.

¶ 17 Our supreme court has determined that “a party may ‘object to personal jurisdiction *** only on behalf of himself or herself, since the objection may be waived.’ ” *In re M.W.*, 232 Ill. 2d 408, 427 (2009) (quoting *Fanslow v. Northern Trust Co.*, 299 Ill. App. 3d 21, 30 (1998) (applying Pennsylvania law)). Accordingly, plaintiff lacks standing to object to the trial court’s exercise of jurisdiction over Mullally. See *Fanslow*, 299 Ill. App. 3d at 30. Aside from that, even if plaintiff could object to the court’s jurisdiction over Mullally, she invited the court to exercise jurisdiction over him when she filed her posttrial motion, and, thus, she cannot argue now that doing so was erroneous. See *Poplar Grove State Bank v. Powers*, 218 Ill. App. 3d 509, 515 (1991) (a defendant “may not, by his voluntary action, invite the court to exercise its jurisdiction over him while he simultaneously denies that the court has such jurisdiction”).

¶ 18 As to her claim that the court lacked subject matter jurisdiction over the fee dispute, plaintiff, in her motion for a rehearing and for the court to clarify its order denying her petition to enforce the settlement agreement, asserted that “the Court clearly has jurisdiction to rule on matters ancillary to the general Settlement reached in this case.” Plaintiff went on to argue that she “has met his [*sic*] burden on the issues presented as to the distribution of the monies allotted for attorney’s fees in this case and a directed finding was not appropriate.” With this language, plaintiff recognized that the court had subject matter jurisdiction over the fee dispute, which was part of a supplementary or enforcement proceeding within the court’s inherent power. See *Star Charters v. Figueroa*, 192 Ill. 2d 47, 49 (2000).

¶ 19 For these reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 20 Affirmed.