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2012 IL App (3d) 100915-U

Order filed February 17, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

BRUGGEMAN, HURST and ASSOCIATES, P.C.,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellant,)	Will County, Illinois,
)	
v.)	Appeal No. 3-10-0915
)	Circuit No. 08-AR-1184
)	
THE RETIREMENT ADVANTAGE, INC.,)	Honorable
)	James E. Garrison,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Schmidt and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court had jurisdiction to make an award of attorney fees; (2) the court did not err in awarding attorney fees under the Plan Services and Fee Agreement; (3) the court did not err in dismissing plaintiff's complaint; and (4) we decline to award attorney fees for pursuing this appeal.

¶ 2 Plaintiff, Bruggeman, Hurst and Associates, P.C., sued defendant, The Retirement Advantage, Inc., for the alleged breach of an oral contract and common law fraud. The trial court dismissed the case, and defendant filed a petition for attorney fees and costs pursuant to the Plan

Services and Fee Agreement. After an evidentiary hearing, the court awarded defendant \$46,417.50 in attorney fees and \$161 in costs. Plaintiff appeals. We affirm.

¶ 3

FACTS

¶ 4 On September 17, 2008, plaintiff filed suit against defendant for an alleged breach of an oral contract and common law fraud. The complaint specifically alleged that plaintiff had contacted defendant in December 2006 to provide plaintiff with a retirement plan that rewarded plaintiff's long-serving employees. Plaintiff alleged that defendant represented that it could create a 401(k) plan that would meet these objectives. Plaintiff paid defendant \$2,000 to establish the plan. On December 14, 2006, the parties signed the Plan Services and Fee Agreement (hereinafter, agreement). Section 9.3 of the agreement specified:

"[t]his Agreement, together with the schedules hereto, constitutes the entire agreement between [defendant] and the [plaintiff] with respect to the subject matter hereof. There are no restrictions, promises, warranties, covenants or undertakings other than those expressly set forth herein and therein. This Agreement supersedes all prior negotiations, agreements, and undertakings between the parties with respect to such matter."

¶ 5 On March 28, 2007, defendant informed plaintiff that it could not devise a plan that would meet plaintiff's objectives.

¶ 6 Defendant moved to dismiss the complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure. 735 ILCS 5/2-615, 2-619 (West 2008). Defendant attached the agreement to this motion as exhibit A. Section 9.2 of the agreement provided:

"In the event of litigation to enforce the terms of this agreement, the parties consent to venue in an exclusive jurisdiction of the courts of Milwaukee County, Wisconsin, and the Federal

District Court for the Eastern District of Wisconsin. The parties further consent to the jurisdiction of any federal or state court located within a district that encompasses assets of a party against which a judgment has been rendered, either through arbitration or litigation, for the enforcement of such judgment or award against such party or the assets of such party."

¶ 7 The court granted defendant's motion to dismiss under section 2-615, but also granted plaintiff 28 days to file an amended complaint.

¶ 8 Plaintiff filed its amended complaint, alleging defendant's breach of an oral contract to provide plaintiff with a 401(k) retirement plan in exchange for \$2,000 and common law fraud based on false statements that defendant could create a retirement plan to meet plaintiff's objectives.

¶ 9 Defendant filed a motion to dismiss plaintiff's amended complaint, arguing that counts I and II were barred by the terms of the agreement, which placed jurisdiction and venue in Milwaukee County, Wisconsin, and the Federal District Court for the Eastern District of Wisconsin. Defendant also argued that plaintiff's claims were time barred under the one-year limitation in section 7.3 of the agreement.

¶ 10 Section 7.3 states:

"No lawsuit or other action may be brought by either party hereto, or on any claim or controversy based upon or arising in any way out of this Agreement, after one (1) year from the date on which the cause of action arose regardless of the nature of the claim or form of action, whether in contract, tort (including negligence) or otherwise[.]"

¶ 11 Defendant concluded its motion with a request for attorney fees and costs, as permitted by section 9.8 of the agreement. Section 9.8 stated:

"If any legal action is commenced in connection with the enforcement of this Agreement or any instrument or agreement required under this Agreement, the prevailing party shall be entitled to costs, attorneys' fees actually incurred, and necessary disbursements incurred in connection with such action, as determined by the court."

¶ 12 The court granted defendant's motion to dismiss. Defendant later filed a petition for attorney fees and a supplemental petition for fees requesting a total of \$49,890.14. The court conducted an evidentiary hearing on the petitions. At the hearing on the petitions, defendant's attorneys testified to their hourly rate, work performed and the total amount of fees billed, *i.e.* over \$62,500.

¶ 13 The court found that billing rates of \$300 per hour were common in Will County. The court noted that the vast majority of legal effort was created by plaintiff's actions and that plaintiff sought damages not to exceed \$50,000. The trial court then awarded defendant \$46,417.50 in attorney fees and \$161 in costs. Plaintiff filed a motion to reconsider, and the court denied the motion.

¶ 14 ANALYSIS

¶ 15 I. Trial Court's Jurisdiction to Award Attorney Fees

¶ 16 Plaintiff argues that because the court's June 25, 2009, dismissal order was a final judgment, the court did not have jurisdiction to hear defendant's fee petition, which was filed more than 30 days after that order.

¶ 17 Generally, a trial court loses jurisdiction over a matter 30 days after a final order is entered unless a timely postjudgment motion is filed. *Beck v. Stepp*, 144 Ill. 2d 232 (1991), *abrogated on other grounds by Kingbrook, Inc. v. Pupurs*, 202 Ill. 2d 24 (2002). However, the trial court retains jurisdiction if it has not determined the ultimate rights of the parties and the matter is not merely incidental to the ultimate rights which have been adjudicated. *In re D.D.*, 212 Ill. 2d 410 (2004).

A request for attorney fees pursuant to a contract is not a claim incidental to the ultimate rights of the parties, and jurisdiction remains in the trial court until the issue is decided. *Home State Bank National Ass'n v. Potokar*, 249 Ill. App. 3d 127 (1993).

¶ 18 We review a trial court's exercise of jurisdiction *de novo*. *In re Marriage of Chrobak*, 349 Ill. App. 3d 894 (2004).

¶ 19 Here, since the dismissal order did not adjudicate defendant's request for attorney fees, the order was not final. See *Home State Bank*, 249 Ill. App. 3d 127. Further, the court's setting of the status date indicated that the court did not intend its dismissal decision to operate as a final order. The court recognized that it had not ruled on attorney fees and allowed defendant 30 days from its status hearing to file a petition for fees. Therefore, the court had jurisdiction to award attorney fees and costs.

¶ 20 II. Grounds for Trial Court's Award of Attorney Fees

¶ 21 Plaintiff argues that the trial court erred in awarding attorney fees to defendant under the agreement. An attorney fees provision in a written contract represents an exception to the general rule that the unsuccessful litigant in a civil action is not responsible for the payment of the opponent's fees. *LaHood v. Couri*, 236 Ill. App. 3d 641 (1992). The determination of reasonable attorney fees rests within the discretion of the trial court. *Anest v. Audino*, 332 Ill. App. 3d 468 (2002). We will not vacate an award of attorney fees unless the total award of fees and costs was so excessive or so inadequate as to amount to an abuse of discretion. *Sampson v. Miglin*, 279 Ill. App. 3d 270 (1996).

¶ 22 A.

¶ 23 Plaintiff argues that the contract was supported by insufficient consideration to enforce the provision for attorney fees. Plaintiff contacted defendant to inquire if a retirement plan could be

created to reward plaintiff's long-serving employees, and defendant suggested creating a 401(k) plan. Defendant's attempt to create a 401(k) plan was sufficient consideration to support a contract.

¶ 24

B.

¶ 25 Section 9.8 of the agreement provided that the prevailing party in "any legal action *** commenced in connection with the enforcement of this Agreement" shall be entitled to attorney fees and costs incurred. Plaintiff's oral contract claim in count I arose out of the agreement because it was brought in an effort to enforce plaintiff's perceived contract rights. Plaintiff's fraud claim also arose out of the agreement because it was based on statements defendant made regarding the contract. The trial court correctly determined that the attorney fee provision applied to this action.

¶ 26

C.

¶ 27 The trial court stated that it considered several factors in making its ruling including (1) the attorneys' skill and standing; (2) nature of the case; (3) novelty and difficulty of the issues; (4) degree of responsibility required; (5) usual and customary charge for the same or similar services in the community; and (6) whether there was a reasonable connection between the fees charged and the litigation. The court determined that \$300 per hour was a usual and customary rate in Will County, and awarded \$46,417.50 in fees and \$161 in costs. Defendant had requested nearly \$50,000 in attorney fees and costs in its written motion, and one attorney testified that the actual fees had risen to over \$62,500. The trial court properly considered the appropriate factors for determining the amount of reasonable fees; thus it did not abuse its discretion in awarding fees and costs to defendant.

¶ 28

III. Dismissal of the Underlying Complaint

¶ 29 Plaintiff argues that the trial court erred in dismissing its complaint.

¶ 30 Section 7.3 of the agreement provided for a one year limitation for any contract or tort claims that arose out of the agreement. Plaintiff alleged that defendant's misrepresentation took place in December 2006 and the purported breach of contract occurred on March 28, 2007. However, plaintiff did not file its first complaint until September 17, 2008, more than one year after the alleged misrepresentation and breach of contract occurred.

¶ 31 The record also supports the trial court's dismissal of count II because plaintiff raised only a bare allegation of fraud. Plaintiff failed to plead with the heightened specificity required for fraud cases. See *Candlewick Lake Utilities Co. v. Quinones*, 82 Ill. App. 3d 98 (1980) (general conclusions of fraud are not sufficient in a pleading, and fraud is never presumed but must be shown by allegation of facts from which fraud is a necessary or probable inference).

¶ 32 IV. Attorney Fees for the Appeal

¶ 33 Finally, defendant requests that we allow it to supplement its petition for fees and costs to include those incurred in responding to this appeal. In light of the early stage at which this case was dismissed and the trial court's substantial fee award, we decline to exercise our discretion to grant defendant leave to file a supplemental petition for attorney fees for responding to this appeal. See *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978 (1987) (in awarding attorney fees, a court should consider a variety of factors, including the novelty and/or difficulty of the work involved and whether there is a reasonable connection between the fees and the amount involved in the litigation).

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Will County is affirmed, and defendant's request for leave to file a supplemental petition for attorney fees is denied.

¶ 36 Affirmed.