IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

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)	C.A. No. CPU5-13-000427
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Submitted: November 13, 2013 Decided: December 13, 2013 Supplemented: December 16, 2013

Gary R. Dodge, Esquire 584 North Dupont Highway Suite B Dover, DE 19901 Attorney for the Plaintiff

Shawn Russum 384 Denney Street Dover, DE 19901 Pro Se Defendant

OPINION

RENNIE, J.

INTRODUCTION

This action involves a fee dispute that arises out of legal representation of the Defendant by the Plaintiff in several courts. On April 10, 2013, the Law Offices of Gary R. Dodge (hereinafter "the Firm") filed a Complaint against the Defendant, Shawn Russum (hereinafter "Russum") alleging breach of contract for unpaid invoices. Mr. Russum filed a Counterclaim seeking damages against the Firm. On September 30, 2013, the Firm filed a motion for partial summary judgment which the Court denied by Memorandum Opinion dated November 6, 2013. A trial was held on November 13, 2013, and the Court reserved decision. This is the Court's Opinion in connection with the relief sought by the Firm in its Complaint and Mr. Russum in his Counterclaim.

FACTUAL BACKGROUND

I. The Chancery Matter

On January 19, 2010, Mr. Russum met with Gary Dodge¹ to seek legal assistance from the Firm. On that date, he and Mr. Dodge discussed Mr. Russum's legal concerns, and Mr. Russum indicated that he wanted to be as cost-conscious as possible. Mr. Russum's legal concerns stemmed from the handling of his deceased grandfather's personal estate, along with real estate matters involving his father. At the meeting, Mr. Dodge indicated that there was nothing the Firm could do with regards to the estate, because it needed to be handled by the executor or an administrator. Mr. Dodge, therefore, outlined a course of action for Mr. Russum to take concerning the distribution of personal property related to the estate and the division of real property.

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¹ Gary Dodge is a principal with the Firm.

Mr. Russum's grandfather's will identified Mr. Russum's father as executor of the estate, but Mr. Russum's father failed to file for the appointment. Although he lacked the power to do so, Mr. Russum's father attempted to dispose of personal property of the estate without any consultation from his son, who held an ownership interest in the property. As a result of his father's actions, Mr. Russum filed for letters of administration so that he could oversee the property distribution. After he was granted the letters, Mr. Russum utilized the Firm to send letters to his father's counsel in order to expedite the probate process. In response, Mr. Russum's father filed for appointment as executor, which was granted, and which resulted in the revocation of Mr. Russum's designation as administrator. Mr. Russum's father filed multiple inventories for the estate, all of which Mr. Russum opposed. The Firm continued to advise Mr. Russum in an attempt to resolve the matter outside of court but, by the fall of 2011, it was evident that the matter would only be resolved by Court intervention. The matter ultimately ended up in the Court of Chancery before Vice Chancellor Glasscock. The Firm filed documents with the Court of Chancery and represented Mr. Russum in the Chancery action. Eventually, the parties entered into a settlement agreement with respect to the division of property.

In the fall of 2012, however, the relationship between the Firm and Mr. Russum soured; each had differing opinions on the goals of the representation and the ways in which the matter was being handled. As a result, on October 19, 2012, Mr. Russum discharged Gary Dodge and the Firm from further representation. Consequently, Mr. Dodge filed an application to withdraw with the Court of Chancery. Vice Chancellor Glasscock granted Mr. Dodge's application on January 22, 2013. That same day, Vice Chancellor Glasscock addressed the remaining issue in the Chancery action (the disposition of personal property) and Mr. Russum began representing himself in the Court of Chancery.

Throughout its representation, the Firm mailed regular invoices for work done in the Chancery action to Mr. Russum. The first invoice in the Chancery action was dated February 4, 2010, and the final invoice was dated February 24, 2012.² Mr. Russum did make some payments, but the Firm contends that he still owes a balance for legal services rendered in the Chancery action.

II. The Superior Court and Court of Common Pleas Actions

In addition to the Chancery matter, Mr. Russum needed assistance with the recovery of money from a CD that was established in his name, but which his mother had cashed without his knowledge. Mr. Russum discussed this matter with the Firm at his initial meeting in January 2010, but neither a formal fee agreement nor an agreement to represent was signed regarding the CD matter at that time. Instead, mindful of Mr. Russum's request to be cost-conscious, Mr. Dodge wrote letters to Mr. Russum's mother's attorney in an attempt to resolve the matter without the need for litigation.

On November 30, 2010, Mr. Russum, acting *pro se*, filed a Complaint in the Court of Common Pleas against his mother for the repayment of the cash value of the CD. After Mr. Russum's mother made an oral motion to dismiss the matter, the Court of Common Pleas dismissed Mr. Russum's Complaint on the basis that the action was barred by the applicable statute of limitations.

Subsequent to the dismissal of his Complaint, Mr. Russum sought the assistance of the Firm to file and prosecute an appeal to Superior Court. On April 25, 2011, Mr. Russum signed a fee agreement for the Firm's representation in the Superior Court appeal. The fee agreement

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² The Firm's Exhibits in the record demonstrate that Mr. Dodge did not charge Mr. Russum for legal work performed between March 2012 and January 2013. *See* the Firm's Rebuttal Exhibits 16-25.

required a retainer of \$2,500, which Mr. Russum paid. The Firm filed a notice of appeal with the Superior Court, and after briefing and argument, the Superior Court reversed and remanded the Court of Common Pleas decision on September 28, 2011.

Following the reversal and remand from the Superior Court, the Court of Common Pleas held trial on March 5, 2012, at which Mr. Dodge appeared on behalf of Mr. Russum. The Court ultimately found in favor of Mr. Russum. The Court later denied Mr. Russum's mother's motion for reargument. Thereafter, the parties entered negotiations regarding the amount of pre-and post-judgment interest to be charged. Letters were sent between the parties, and on September 27, 2012, they ultimately settled for a total of \$22,000 in favor of Mr. Russum.

The Firm sent invoices to Mr. Russum at regular intervals for its involvement with the Superior Court and Court of Common Pleas actions. The first invoice is dated March 9, 2012, and the last invoice for legal work performed, separate from filing fees, is dated July 13, 2012. Mr. Russum made some payments, but the Firm contends that Mr. Russum still owes a balance for the legal services provided for the Superior Court and Court of Common Pleas actions.

PARTIES' CONTENTIONS

The Firm asserts that Mr. Russum owes an outstanding balance for work performed and billed in the Chancery, Superior Court and Court of Common Pleas actions. Mr. Russum admits that he owes the Firm money, but he denies owing the amount alleged by the Firm. Mr. Russum argues that he is not responsible to pay the fees incurred in the Chancery action after the signing of the settlement agreement, because he believed that his father was responsible for payment. Mr. Russum also asserts that he should not have to pay the fees incurred as a result of his appeal to Superior Court, because the appeal would have been unnecessary if the Firm had represented him in his initial Court of Common Pleas matter. The Firm contends that the scope of its

representation did not include representing Mr. Russum in the initial Court of Common Pleas matter, because he specified that he would pursue that action on his own to save on costs.³

Further, Mr. Russum asserts that the Firm did not satisfactorily represent him in the subsequent Court of Common Pleas action, which resulted in Mr. Russum recovering less money than the judgment entered by the Court. As a result, Mr. Russum, in his Counterclaim, requests that this Court enter judgment against the Firm for \$8,500, plus pre- and post-judgment interest.⁴ The Firm denies that it did not effectively represent Mr. Russum in the subsequent Court of Common Pleas action.

DISCUSSION

In order to succeed on its breach of contract claim for fees owed, the Firm must prove the following elements by a preponderance of the evidence: (1) the existence of a contract; (2) that defendant breached an obligation imposed by the contract; and (3) that plaintiff incurred damages as a result of the breach.⁵

I. The Chancery Matter

Although the parties were unable to produce a written agreement outlining the scope of the Firm's representation of Mr. Russum for the Chancery action, both parties recognized that the Firm would provide services to Mr. Russum, and in turn Mr. Russum would pay the Firm for its work. The Firm began billing Mr. Russum on February 4, 2010, and Mr. Russum began paying the invoices on March 22, 2010, which demonstrates that Mr. Russum was aware of the

³ Prof. Cond. R. 1.2, "A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent."

⁴ In his Counterclaim Mr. Russum asserts a claim for \$6,000 against the Firm as the amount by which his judgment was reduced as part of the settlement with his mother. Mr. Russum also asserts that the Firm failed to apply the \$2,500 retainer that he paid to the amounts claimed by the Firm.

⁵ VLIW Tech., LLC v. Hewlett-Packard, Co., 840 A.2d 606, 612 (Del. 2003).

agreement and therefore acted upon it. There existed no issue at trial that Mr. Russum and the Firm entered a valid contract for the Firm to provide legal services in the Chancery action in exchange for payment by Mr. Russum for those services. The Court is therefore satisfied that the Firm has proven the existence of the contract by a preponderance of the evidence.

The second element that the Firm must prove by a preponderance of the evidence is whether Mr. Russum breached an obligation imposed by the contract. Mr. Russum stopped paying invoices on or about April 1, 2011, even though he testified at trial that he knew he had an obligation to pay them. The lack of payments subsequent to April 1, 2011, demonstrates a breach of Mr. Russum's obligation to pay the Firm's invoices. The Firm has therefore met its burden with respect to this element.

The final element in a breach of contract claim is damages. The standard amount of damages recoverable in a breach of contract action is "the expectation interest of the non-breaching party." The damages cannot be speculative, and the party must prove the damages to a reasonable certainty. The Firm provided the Court with copies of invoices sent to Mr. Russum from February 4, 2010, through February 24, 2012 for the Chancery action. The invoices total \$4,701.8 Based on the evidence in the record, the Firm has established each element required for a breach of contract claim by a preponderance of the evidence.

Mr. Russum, however, raised an issue at trial with respect to the payment of the fees incurred after the execution of the settlement agreement with his father. Mr. Russum believed that from the time the settlement agreement was signed, his father would be responsible for the payment of the Firm's invoices for the matter. Mr. Dodge testified that he was unsure about the

⁶ Munro v. Beazer Home Corporation, et al., C.A. No. U608-03-081, at *11 (Del. C. P., June 23, 2011)(citing E.I. DuPont de Nemours and Co. v. Pressman, 679 A.2d 436, 445 (Del. 1996)).

⁷ Munro, at *11 (citing LaPoint v. AmerisourceBergen Corp., 2007 WL 2565709, at *9 (Del. Ch. Sept. 4, 2007), aff'd sum nom. AmerisourceBergen Corp. v. LaPoint, 956 A.2d 652 (Del. 2008).

The invoices show that Mr. Russum paid the Firm \$430, leaving a difference of \$4,271. See Pl. Ex. 1.

origin of Mr. Russum's belief, since there was no clause in the settlement agreement requiring the opposing party to pay Mr. Russum's fees.

Delaware follows the American rule with respect to attorneys' fees. Under this rule, each party bears its own attorneys' fees unless such fees are to be awarded in accordance with a contractual agreement or statute. Mr. Russum could not produce a writing that confirms his belief regarding the payment of attorneys' fees, nor could he confirm the source of the information giving rise to his belief about the fees. Mr. Dodge testified that no one at the Firm informed Mr. Russum that his father would be responsible for the payment of the fees. Indeed, the Settlement Agreement contains an express provision that makes each party to the litigation responsible for his own legal fees and costs.

Because his claim for attorneys' fees was raised for the first time at trial, the Court will treat it as part of Mr. Russum's Counterclaim. Thus, Mr. Russum was required to establish that claim by a preponderance of the evidence. ¹² However, based on the evidence in record, Mr. Russum failed to prove that the Firm did not properly represent him in the Chancery action due to its purported negligence in failing to pursue attorneys' fees. Accordingly, the Court finds in favor of the Firm on its breach of contract claim for payment of invoices related to the Chancery matter.

II. The Superior Court and CCP Matters

The record shows that Mr. Russum owes \$7,178 for legal services rendered in the Superior Court and Court of Common Pleas actions. ¹³ Based on the evidence presented at trial,

⁹ Swain v. Heritage Place Condominium, Inc., 2012 WL 6097657, at *2 (Del. C. P. Dec. 7, 2012).

¹⁰ Mr. Dodge testified that he informed Mr. Russum that there was no viable basis to proceed against his father or fees, and if he chose to do so it would be at great cost to Mr. Russum. Pl. Ex. 18.

The clause in question reads, "The parties hereto agree that each are responsible for all costs and expenses incurred by them in the pursuit of this litigation..." (Pl. Ex. 6).

¹² Warwick Park Owners Ass'n, Inc. v. Sahutsky, 2005 WL 2335485, at *4 (Del. Ch. Sept. 20, 2005).

¹³ This amount reflects the fees billed to Mr. Russum reduced by the retainer amount applied to the invoices.

there is no dispute between the parties that Mr. Russum is liable for the services rendered by the Firm in the subsequent Court of Common Pleas action. The only challenge made to the subsequent Court of Common Pleas action is Mr. Russum's claim that Mr. Dodge improperly agreed to accept \$6,000 less than the judgment awarded, as a settlement of that action. Mr. Russum also contends that the Firm is not entitled to payment for the fees incurred in the Superior Court appeal because those fees would not have been generated if the Firm had complied with his alleged request to represent him in the initial Court of Common Pleas action. Thus, in deciding whether the fees charged by the Firm for the Superior Court appeal were proper, the Court must decide the scope of the Firm's agreed upon representation in the initial Court of Common Pleas action. In addition, the Court will address Mr. Russum's argument in his Counterclaim that the Firm owes him \$6,000 for agreeing to reduce the Court of Common Pleas judgment by \$6,000 as a settlement of the action. The Court will address these two issues seriatum.

Mr. Russum argued that if the Firm had represented him in the initial Court of Common Pleas action as he alleged he requested, that case would not have been dismissed on statute of limitations grounds, and he would not have incurred the fees related to the appeal process in Superior Court.

The Court denied the Firm's pre-trial Motion for Summary Judgment on this point because the record, as developed at that time, presented a genuine material issue of fact as to whether Mr. Russum requested the Firm to file the first Court of Common Pleas action, thus rendering the fees incurred in the Superior Court appeal unnecessary. After hearing testimony at trial on that issue, the Court finds that the Firm was not retained to file a Complaint in the initial Court of Common Pleas action.

Mr. Dodge testified that the Firm had no direct involvement in the Court of Common Pleas action until March of 2012. ¹⁴ In support of this contention, the Firm states that if it had represented Mr. Russum, it would have required Mr. Russum to sign a retainer agreement at the first meeting in January 2010. Mr. Dodge testified that at the initial meeting between Mr. Russum and Mr. Dodge, Mr. Russum stated that he wished to pursue the matter through the Delaware State Police. In fact, Mr. Dodge noted Mr. Russum's intention to contact the Police concerning the CD matter in a letter to opposing counsel, Roy Shiels, dated, May 10, 2010. ¹⁵ Mr. Dodge testified at trial that his reference to the CD in the letter was to see if he could recover the money from Mr. Russum's mother without engaging in any litigation.

In contrast, Mr. Russum testified that he believed the Firm was representing him prior to his initial Court of Common Pleas appearance. Mr. Russum testified about an email from Ms. Julie Weidert of the Firm, which states that she discussed the CD matter with Mr. Dodge. Ms. Weidert requested in the email that Mr. Russum provide more information about the CD. Mr. Russum argued that he believed the Firm sought more information because it needed it in order to properly represent him. Additionally, Mr. Russum highlighted the fact that the Firm included details about the CD matter in letters to his parents' attorney. Mr. Russum believed that the references to the CD in those letters constituted an open-ended representation and required the Firm to handle all legal matters pertaining to the CD.

Mr. Dodge acknowledged that he had asked for more information about the CD, and discussed the matter with both Mr. Russum and his parents' attorney prior to the initial Court of

¹⁴ Indeed, the first entry that references legal work performed in the Court of Common Pleas action was made on an invoice dated January 31, 2011. Notably, this is two months after Mr. Russum's filing of the complaint in the initial Court of Common Pleas action. The detailed description of the work performed on the invoice states, "Meeting with client about CCP Hearing against Carla Russum." *See* Pl. Ex. 1.

¹⁵ Roy Shiels was the attorney representing Mr. Russum's mother in the Court of Common Pleas and Superior Court actions.

Common Pleas hearing. However, Mr. Dodge testified that the scope of his involvement only consisted of Mr. Dodge sending letters to opposing counsel in the hopes that he could avoid litigation, and informing Mr. Russum about important issues for him to consider prior to his pretrial hearing in the initial Court of Common Pleas action. Mr. Dodge testified that the scope of his involvement was intentionally limited out of respect for Mr. Russum's request to remain cost-conscious during this process.

Based on the evidence adduced at trial, the Court finds that the scope of the representation of Mr. Russum by the Firm did not include the filing of the initial Court of Common Pleas action. And, Mr. Russum failed to provide the Court with sufficient evidence, other than his belief that the Firm was representing him, to defeat a finding that the scope of the Firm's representation did not include the filing of the initial complaint in the Court of Common Pleas. It is clear that in an effort to reduce fees Mr. Russum believed that he could handle the Court of Common Pleas action *pro se*. It was only after the matter was dismissed on statute of limitations grounds that Mr. Russum sought representation from the Firm to pursue the Superior Court appeal. It is noteworthy that Mr. Russum promptly paid a \$2,500 retainer and signed a fee agreement in connection with that representation. The Court, therefore, finds that the fees incurred for the appellate work in the Superior Court were necessary.

In addition, although Mr. Russum does not dispute the amount owed for the Firm's representation in the subsequent Court of Common Pleas action, he took exception to the \$6,000 reduction of the judgment against his mother in the Court of Common Pleas action. After, considering the evidence at trial, the Court finds that the compromise reached with respect to the judgment was fully negotiated and Mr. Russum was aware of and consented to the reduced amount to fully and finally settle the action. The record reflects that there were negotiations

between the parties over pre- and post- judgment interest and there existed the overarching specter of a further challenge to the judgment, which led to the compromise. On that basis, the Court finds that the reduction of the judgment by \$6,000 was the result of a negotiated, consensual settlement without any undue pressure by the Firm.¹⁶

Mr. Russum also asserts a claim for \$2,500 in his Counterclaim based on an alleged failure by the Firm to deduct the \$2,500 retainer from its claim for fees. The Court has reviewed the invoices submitted at trial and finds that the \$2,500 retainer paid by Mr. Russum in the Superior Court appeal was deducted from the amount sought as damages by the Firm. As a result, Mr. Russum's Counterclaim for damages against the Firm is denied.

Based on the evidence adduced at trial, Mr. Russum is obligated to pay the invoices generated from the Firm's representation of him in the Superior Court and Court of Common Pleas actions. The failure by Mr. Russum to pay for those legal services constitutes a breach of contract. For the reasons set forth above, judgment is granted in favor of the Firm on the Complaint and denied on the relief sought in the Counterclaim.

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¹⁶ Mr. Russum, in his Counterclaim, raised an issue about the Firm's failure to pursue attorneys' fees in the Court of Common Pleas action. Although that issue did not form the basis for the damages claimed in the Counterclaim, the Court feels that a brief notation is warranted to address this issue. Based upon the evidence presented at trial, the Court finds that Mr. Dodge utilized his professional discretion in not pursuing attorneys' fees based on what he viewed as a speculative claim for attorneys' fees in the Court of Common Pleas action. Under the Rules of Professional Conduct, "A lawyer is not bound...to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued." Prof. Cond. R. 1.3, Comment 1.

CONCLUSION

For the foregoing reasons, the Court finds in favor of the Law Offices of Gary R. Dodge in the amount of \$4,271 for the Chancery action and \$7,178 for the Superior Court and Court of Common Pleas actions, for a total of \$11,449 plus pre-judgment interest at a rate of 1.5% from April 10, 2013, the date of the filing of the Complaint. Post-judgment interest will be awarded at the legal rate of interest.

IT IS SO ORDERED.

The Honorable Sheldon K. Rennie, Judge