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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001330-MR

MATTHEW DEHART — APPELLANT

v.

APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, SPECIAL JUDGE
ACTION NO. 05-CI-00056

THEODORE LAVIT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MAZE AND THOMPSON, JUDGES.

MAZE, JUDGE: Appellant, Matthew DeHart, appeals following a bench trial before the Washington Circuit Court finding him liable for negligence and breach of contract in his role as counsel in a 2002 divorce case opposite Appellee, Theodore Lavit. DeHart challenges the trial court's refusal to dismiss the case against him for lack of proper venue, improper impleader, and because Lavit's

claims were untimely filed. DeHart further challenges the trial court's finding that both a contractual relationship and a duty existed between himself and Lavit forming the basis for breach and negligence. Observing no clear error in the issues DeHart raises on appeal, we affirm.

Background

This case derives from DeHart's and Lavit's respective representations of Garry Lawless and Janet Lawless during their 2002 divorce action. The court in the divorce action ordered the disposition of marital property, the proceeds of which the parties agreed DeHart would hold in escrow until division. DeHart maintained the checkbook for this account at his law office in Russell County.

In a phone conversation prior to settlement of the marital finances, DeHart and Lavit agreed that when final dispersements were made, DeHart would place both Ms. Lawless's and Mr. Lavit's names on the settlement check. Lavit referenced this conversation in a subsequent letter concerning entry of the Decree and requesting that the checks be dispersed as he and DeHart had agreed.

On September 24, 2003, Mr. Lawless purchased the remaining item of real estate and Mr. DeHart drafted several checks from the marital account which constituted final settlement of the marital estate. Mr. DeHart appeared, as did Ms. Lawless. Despite having notice of the closing, Mr. Lavit was not present. Ms. Lawless demanded her distribution check, and Mr. DeHart obliged without first placing Mr. Lavit's name on the check. This check was for a total of $89,433.05,

and at least a portion of it was to serve as payment for Lavit's legal services.[1] However, Ms. Lawless used the proceeds of the check to purchase a home in the month following distribution. Neither DeHart nor Ms. Lawless informed Lavit of his client's receipt of the check. DeHart later acknowledged his mistake in issuing the check to Ms. Lawless without including Lavit's name. He did so in a memorandum to file in the Lawless case, in conversation with Lavit, at trial, and on appeal.

On October 24, 2003, at Mr. Lavit's urging, Ms. Lawless applied for and received a loan from Citizens National Bank ("CNB") of Marion County for $12,056.00, the entire amount of which she paid to Lavit's law firm. Lavit was present during this transaction and even cosigned the promissory note. In 2005, after Ms. Lawless defaulted on the loan and filed bankruptcy, CNB filed suit in Washington County against Lavit for the remaining balance of the loan, as well as late fees and interest. A month later, Lavit filed a third-party complaint against DeHart for negligence, breach of contract, and breach of a fiduciary duty in connection with the accrual of the debt he owed CNB.

In his Answer to the third-party complaint, DeHart asserted defenses including inappropriate venue and a lapse of the statute of limitations. DeHart filed a motion to dismiss based upon these and other issues. The trial court

[1] The fee arrangement between Lavit and Ms. Lawless is not abundantly clear from the record. However, it appears that Ms. Lawless paid Lavit an initial retainer of $1,200. Subsequently, she accumulated a balance of more than $12,000 in legal fees over the course of the dissolution case. We glean that Lavit planned to "settle up" with Ms. Lawless after receipt of the settlement check, which was to be made out to both of them.

overruled this motion, observing that DeHart provided no statutory or precedential law in support of his argument concerning the statute of limitations and stating that DeHart's argument regarding venue did not merit dismissal. The trial court further concluded that Lavit's allegations of negligence and breach were "sufficient to bring Mr. DeHart into the action … under [Kentucky Rule of Civil Procedure (CR)] 14.01."

Discovery ensued and the trial court held a bench trial in December 2012. At trial, an expert, attorney John Hubbard, testified on behalf of Lavit that DeHart had a duty to ensure that Lavit's name was on the settlement check and should not have spoken, or had any contact with, Ms. Lawless outside of Lavit's presence. Lavit also testified to the events of the divorce case and his subsequent efforts to collect his fee from Ms. Lawless. DeHart also testified regarding his recollection of the divorce case and his handling of the settlement check.

Following this testimony, the trial court found in favor of Lavit and awarded him the sum of $14,751.44, the full amount of the loan, fees, and interest that had not yet been paid. DeHart now appeals from the trial court's rulings concerning his Motion to Dismiss and its findings at trial.

Analysis

I. Motion to Dismiss

We first address DeHart's arguments concerning the trial court's ruling on his Motion to Dismiss, as our decision on those issues may impact whether we proceed to the trial court's substantive rulings. In reviewing these

rulings, we remember that such a motion should only be granted if "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Benningfield v. Pettit Envtl., Inc.*, 183 S.W.3d 567, 570 (Ky. App. 2005) (quoting *Pari–Mutuel Clerks' Union v. Kentucky Jockey Club,* 551 S.W.2d 801, 803 (Ky. 1977)). When ruling on the motion, the allegations in "the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Id*. (quoting *Gall v. Scroggy,* 725 S.W.2d 867, 868 (Ky. App. 1987)).

We further note that in making its decision on the issues raised in the Motion to Dismiss, the trial court is not required to make any factual findings. *Id*. (quoting *James v. Wilson,* 95 S.W.3d 875, 884 (Ky. App. 2002)). Therefore, we review the trial court's decision *de novo. Id*. (citing to *Revenue Cabinet v. Hubbard,* 37 S.W.3d 717, 719 (Ky. 2000)).

A. Statute of Limitations

DeHart argues that the trial court apparently, and wrongly, applied Kentucky Revised Statutes (KRS) 413.120 in holding that Lavit's third-party complaint against him was timely filed. That statute provides a five-year limitation on all claims arising from, *inter alia*, "a contract not in writing, express or implied" or "injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated." KRS 413.120(1) and (7). Instead, DeHart contends that the trial court should have applied the statute of limitations for claims arising from his "rendering, or failing to render, professional services" under KRS 413.245,

because his allegedly injurious actions occurred in his capacity as Mr. Lawless's attorney. The trial court found this argument unpersuasive, as do we.

KRS 413.245 imposes a limitation upon suits between a client and his attorney, and that attorney-client relationship is an essential element of any legal malpractice claim. *See Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. App. 1979) (holding that a plaintiff in a professional malpractice suit was required to prove, *inter alia*, that the defendant was employed by the plaintiff). DeHart owed a duty to render capable professional services solely to his client. He was not Lavit's attorney; therefore, no duty under a theory of professional negligence exists.

More importantly, Lavit does not assert in his third-party complaint that such a duty existed. Lavit's complaint did not contain allegations of professional malpractice, which would invoke the statute DeHart urges that the trial court should have applied. Rather, the third-party complaint alleged breach of an unwritten contract, breach of a fiduciary duty, and common law, not professional, negligence.

In sum, that DeHart's alleged actions occurred during his representation of his client is not determinative of the appropriate statute of limitations; the subject matter of Lavit's third-party complaint is. Accordingly, the trial court correctly applied the five-year statute of limitations found in KRS 413.120; and Lavit's third-party complaint, filed approximately two years after DeHart's alleged actions, was timely filed.

B. Venue

DeHart's second argument in favor of dismissal was that the third-party claim against him was improperly brought in the venue of Washington Circuit Court where the primary action between CNB and Lavit already existed. More specifically, the question presented to us is whether the trial court was compelled to dismiss the case once DeHart, a party who asserted the defense of improper venue and who had no connections with Washington County, was brought into the case. We answer this question in the negative.

KRS 452.400, *et seq*. establishes the appropriate venue in civil cases. This includes so-called "transitory actions," which KRS 452.480 defines as "[a]n action which is not required by the foregoing provisions … to be brought in some other county" and which the statute states may be brought "in any county in which the defendant, or in which one (1) of several defendants … resides or is summoned." CNB's claim against Lavit was such an action.

In Kentucky, a third party may be brought into a case as a third-party defendant regardless of whether venue is appropriate under KRS 452.400, *et seq*. as to the third-party claim. *See American Collectors Exchange, Inc. v. Kentucky State Democratic Central Executive Committee*, 566 S.W. 2d 759, 761 (Ky. App. 1978) (citing *Goodwin Bros. v. Preferred Risk Mut. Ins. Co.*, 410 S.W.2d 714, 716 (Ky. 1967); *Hoop v. Hahn*, 568 S.W.2d 57 (Ky. App. 1978). Known as the "ancillary venue rule," this precept deems the third-party claim ancillary to the original one and declares that a statutory venue defect in the third-party claim will not preclude impleader. This well-established rule has its origins in the obvious

benefit to judicial economy and expediency created by impleader.[2] Accordingly, we see no reason to abandon it in this case.

The facts of the case indeed reveal Washington County to be an inappropriate venue for the case between CNB and Lavit, as none of the parties and none of the assets concerned in CNB's claim against Lavit live or lie within that county.[3] However, after CNB filed its complaint in Washington County, Lavit either failed or chose not to assert a defense of improper venue, thus waiving the issue. *See Seymour Charter Buslines, Inc. v. Hopper*, 111 S.W.3d 387, 390 (Ky. 2003). Under *American Collectors Exchange, Inc.* and *Goodwin Bros.*, Lavit's third-party claim against DeHart need not comply with the statutory requirements for venue because the issue of venue in the original action had been resolved. Hence, the trial court did not err in denying DeHart's motion to dismiss the third-party complaint on the basis of venue.

II. Impleader Under CR 14.01

The more compelling procedural question we glean from DeHart's appeal is whether impleader of DeHart was appropriate. We hold that it was.

We first note that whether to grant impleader is addressed to the sound discretion of the trial court. *Nally v. Boop*, 428 S.W.2d 607, 609 (Ky. 1968); *see*

[2] As the Court in *Goodwin Bros*. certified, "[a]lthough the third party may often be inconvenienced, [] this fact appears to be outweighed by the advantages to be gained in allowing impleader over an objection based upon lack of proper venue, and such is the weight of authority." 410 S.W.2d at 716 (quoting Cecil D. Walden, *Kentucky Law Journal*, Vol. XL, No. 1, p. 95 (1951)).

[3] Lavit's office is located in Marion County, as is CNB. DeHart's office is located in Russell County, as were the parties to the underlying divorce case.

also Gray v. Bailey, 299 S.W.2d 126, 127 (Ky. 1957). Accordingly, we will not reverse the trial court's decision unless it was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

CR 14.01 states that "[a] defendant may move for leave as a third-party plaintiff to assert a claim against a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." DeHart argues that because he was not a party to the transaction among CNB, Ms. Lawless, and Lavit, the suit between CNB and Lavit is "an entirely distinct and separate matter" for which he cannot be liable. Lavit contends that impleader was appropriate, and the matters were sufficiently related, because the debt for which CNB later sued him would not have accrued but for DeHart's injurious conduct.

The purpose behind impleader is to avoid circuity of action. *Jackson & Church Division, York-Shipley, Inc. v. Miller*, 414 S.W.2d 893, 895 (Ky. 1967). Impleader is meant "to accelerate the accrual of rights and permit the determination of ultimate liability in one lawsuit." 6 Ky. Prac. R. Civ. Proc. Ann. Rule 14.01. This procedural tool is appropriate only in cases where the … third-party defendant would be secondarily liable to the original defendant in the event the latter is liable to the plaintiff." *Id*. Both practically and procedurally, the critical characteristic of a claim under CR 14.01 is that the defendant is attempting to transfer to the third-party defendant the liability the plaintiff is asserting against the defendant. *Id*. Thus, a trial court's chief considerations in deciding whether to

permit impleader are whether the third-party complaint indeed seeks to shift liability and "whether the impleader will avoid a circuity of action and eliminate duplication of lawsuits based on closely related matters." *Id*.

The trial court acted within its discretion in permitting impleader of DeHart. In its most basic form, Lavit's claim against DeHart is contingent upon a finding of Lavit's liability to CNB for the original claim, and it seeks to transfer that liability to DeHart. This is permissible under CR 14.01.

III. The Trial Court's Findings at Trial

Having resolved the procedural issues DeHart raises on appeal, we turn to his substantive argument that the trial court erred in finding that an implied contract existed between himself and Lavit and that he owed a general duty of care to Lavit. Specifically, DeHart alleges that the agreement between himself and Lavit lacked the essential element of consideration and that he owed no such duty to Lavit. He further asserts that Lavit's fee arrangement with his client violated the prohibition against contingency fees in domestic relations cases under Kentucky Supreme Court Rule (SCR) 3.130(1.5)(d)(1).

In matters tried outside the presence of a jury, we will not set aside the trial court's findings of fact absent clear error, and we show due regard for the superior position of the trial court to judge the credibility of witnesses. CR 52.01; *see also Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409 (Ky. 1998). "A factual finding is not clearly erroneous if it is supported by substantial

evidence." *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). Substantial evidence constitutes proof of facts which have sufficient probative value to permit a reasonable person to reach a factual determination. *Clark v. Bd. of Regents of Western Kentucky University*, 311 S.W.3d 726 (Ky. App. 2010). Additionally, we review *de novo* any conclusions of law contained within the trial court's judgment. *See Arnold v. Patterson*, 229 S.W.3d 923 (Ky. App. 2007).

The trial court's Findings of Fact and Conclusions stated,

> Mr. Lavit believes Mr. Dehart is responsible for the money as he negligently breached their agreement, he did not follow normal attorney practices in the Commonwealth of Kentucky and in violation of their agreement failed to secure Mr. Lavit's fee by making the check payable only to his client. Mr. Lavit is correct on all counts.

The trial court found DeHart liable under theories of contract and common law negligence for failing to ensure Lavit's name was also on Ms. Lawless's check. Though DeHart raises legitimate questions regarding the trial court's finding that a contract existed between himself and Lavit, the record contains substantial evidence supporting the trial court's second finding, that DeHart had, and breached, a duty to Lavit. Hence, without addressing the contract-related issues, we hold that the trial court did not err in finding DeHart liable to Lavit; and we address DeHart's duty to Lavit.

The trial court's findings seem to be largely reliant upon John Hubbard's testimony. Hubbard, an attorney with forty-five years' experience, testified that the normal course of dealing between attorneys in divorce cases is to

place both the client's and her attorney's names on the settlement check. Mr. Hubbard asserted that this course of dealing stems from the existence of a duty on the disbursing attorney's part to acknowledge the lien the other attorney has on his client's settlement and to ensure the appropriate amount of money goes to the appropriate parties. In his testimony, Mr. Hubbard cited no rules or statutes which created this duty. From this testimony, the trial court concluded that "attorneys in Kentucky … always place the name of the attorney on the check when there is a settlement unless there is an understanding between the lawyers."

On appeal, DeHart very briefly counters Mr. Hubbard's testimony and the trial court's finding of negligence, stating that Mr. Lavit's request that his name be included on the check demonstrated that DeHart did not otherwise owe a duty to do so. However, we hold that DeHart's brief arguments regarding negligence are insufficient to counter the evidence of record and to warrant reversal.

At trial, Lavit testified at length that his practice has always been to include opposing counsel on settlement checks. Mr. Hubbard testified as an expert to the same. Following Hubbard's lengthy testimony, DeHart offered no testimony other than his own, expert or otherwise, in opposition to Hubbard's assertion that he owed Lavit a duty to include his name on the settlement check. From this, we conclude that Lavit provided evidence of substance at trial sufficient to sustain the trial court's finding that DeHart owed him a duty and that DeHart breached that duty. DeHart's contractual arguments notwithstanding, we hold that the trial court's finding of liability on negligence was supported by the evidence of record.

Lastly, DeHart argues, somewhat tangentially, that Hubbard's testimony was incorrect, and Lavit's conduct was unethical, because Lavit's fee arrangement with Ms. Lawless was impermissibly contingent upon his securing the divorce and property settlement in the underlying case. DeHart is incorrect.

SCR 3.130(1.5)(d)(1) forbids the collection of "any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, maintenance, support, or property settlement in lieu thereof…." However, the record demonstrates that Lavit's fee arrangement with Ms. Lawless was not contingent upon his success in gaining her divorce or a settlement agreement. Rather, Ms. Lawless paid a $1,200 retainer at the beginning of the case. From that point until the end of the case, Lavit billed hourly, documenting the work performed and eventually resulting in a balance of more than $12,000. While Lavit's decision to permit his client to accrue such a debt without payment may have been unwise, it was not unethical. Such an arrangement was not a contingency fee in violation of SCR 3.130(1.5)(d)(1).

Conclusion

In conclusion, we would be remiss if we did not mention the appalling conduct and poor judgment which precipitated this case. The idea in the collective mind of this Court of an attorney taking his client to the bank, standing over her as she incurs more than $12,000 in debt for payment of his fee, and then cosigning the loan is sickening. It is both an affront to professional ethics and a punch line to a lawyer joke. While Lavit's behavior was not a factor in the trial court's findings,

and while it does not impact our decision now, ethical considerations must stem from it, and the public's confidence in our profession has suffered for it. While we agree that Lavit had a cause of action against DeHart, and that the trial court did not err in finding liability, we condemn Lavit's preceding conduct in the strongest possible terms.

Nevertheless, for the aforementioned reasons, the ruling of the Washington Circuit Court is affirmed.

ALL CONCUR.

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