RENDERED: DECEMBER 16, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001309-MR

DOUGLAS RANK — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 14-CI-00858

BOBBY MILLER, M.D. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND J. LAMBERT, JUDGES.

KRAMER, CHIEF JUDGE: Douglas Rank, *pro se*, appeals the decision of the Kenton Circuit Court to summarily dismiss his breach of contract and fraud claims against appellee, Bobby Miller. Upon review, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In February 2010, Rank was charged with attempted murder in Kenton Circuit Court. He retained attorney Robert Gettys to represent him in the case. In March 2010, Gettys, acting in his capacity as Rank's criminal defense attorney, retained Miller, a forensic psychiatry expert from Huntington, West Virginia, to perform a forensic evaluation of Rank. A "Memorandum of Understanding" dated March 31, 2010, sets forth the terms of the services to be provided to Gettys on behalf of Rank.[1]

On June 28, 2010, Miller performed the forensic evaluation as agreed. According to both Miller and Gettys, when they discussed the evaluation a few days later over the telephone, Gettys instructed Miller to not prepare a written report of the forensic evaluation. Subsequently, in October 2010, Rank accepted a plea agreement to first degree assault in the criminal matter. Gettys requested Miller to appear at the sentencing hearing scheduled October 28, 2010. In return for that service, Miller was paid, in advance, an additional $3,700.00. However, the morning of the initial sentencing hearing, after Miller had already made the trip to Covington, the hearing was postponed. Even though he did not ultimately testify that day, Miller retained the amount paid because of a cancellation provision

[1] The March 31, 2010 agreement states the contemplated services as follows:

> The projected cost of this evaluation is $3,800 and includes travel time round-trip from Huntington, WV to Covington, KY, overnight stay . . . in Covington, a reasonable review of the records[,] a forensic psychiatry evaluation of the examinee, relevant psychological testing, any collateral interviews, a brief verbal communication with the referring attorney and a written report.

in the contract.[2] Gettys arranged to have Miller appear and provide testimony at the rescheduled sentencing hearing, which was held on December 21, 2010. Miller charged and was paid an additional $3,000.00 for his attendance and testimony at the December sentencing hearing. Gettys agreed to these fees and paid in advance of the hearing. At the sentencing hearing, the circuit court sentenced Rank to fifteen years in prison.

Rank now claims that Miller breached the contract by failing to provide a written report of his forensic evaluation. He also claims that Miller committed fraud by "overcharging for [his] services." Rank filed his complaint in Kenton Circuit Court on May 2, 2014, alleging these two claims. The complaint named Miller and "Unknown Defendant identified as any entity which provided malpractice insurance at the time of the alleged claims to Bobby Miller, MD" as defendants. Fair American Insurance and Reinsurance Company (FAIRCO) revealed itself to be the "Unknown Defendant" that was Miller's malpractice insurance carrier.

Miller maintains that he did not breach his agreement in failing to provide a written report due to the fact that Gettys requested that Miller not submit a written report of his evaluation. Miller further argues that a breach of contract action does

[2] The pertinent part of the agreement stated:

> The fee for this service is $3,700 and includes testimony ($2,800) and overnight stay in Covington ($900). Please remit payment in full by October 21, 2010 to guarantee Dr. Miller's appearance.
>
> Should Dr. Miller not be needed for any reason, the fee for testimony ($2,800) shall be forfeited unless three full business days notice is given. Therefore, the last date to cancel or reschedule is 12:00 pm, Friday, October 22, 2010.

not lie since Rank cannot establish any damages as a result of Miller's failure to provide a written report. With regard to the fraud claim of "overcharging," Miller argues that Gettys, as an agent for Rank, agreed to the charges. Thus, Gettys' agreement to pay Dr. Miller is binding upon Rank.

Miller moved for summary judgment on April 20, 2015, setting forth the aforementioned arguments and stating there were no genuine issues of material fact in this case as Rank has failed to present any evidence in support of his claims. In support of his motion, he submitted an affidavit of Gettys. In the affidavit, Gettys admits that he instructed Miller to not prepare a written report and that he did in fact agree to all payments for Miller's services.

In Rank's response to the motion he submitted his own affidavit, which states that Gettys never informed him that Miller was not going to write a report. Furthermore, his affidavit asserts that he is in possession of Gettys' file, as well as Miller's file, and it is not documented in either that Gettys had instructed Miller to not prepare a written report.

The circuit court granted Miller's motion for summary judgment on July 31, 2015. Specifically, the court agreed with Miller that: (1) Gettys, as Rank's agent, instructed Miller to not prepare a written report; (2) Gettys agreed to Miller's fee agreement; and (3) that Rank cannot establish that he sustained any actual damages from this alleged breach.

This appeal followed.

II. STANDARD OF REVIEW

Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 483 (Ky. 1991). Therefore, we operate under a *de novo* standard of review with no need to defer to the trial court's decision. *Davis v. Scott,* 320 S.W.3d 87, 90 (Ky. 2010) (citation omitted). Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[3] 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest,* 807 S.W.2d at 480.

III. ANALYSIS

At the outset we must address Miller's jurisdictional argument that the appeal should be dismissed for failure to join an indispensable party, specifically, because Rank failed to name FAIRCO in his Notice of Appeal. "CR 73.03 should be read as only referring to parties that are truly necessary to the appeal, and presents no bar to the appeal continuing if an unjoined party from below is not indispensable." *Nelson County Bd. of Educ. v. Forte*, 337 S.W.3d 617, 625 (Ky. 2011). In determining whether a party is truly necessary at the appellate level, "the court

[3] Kentucky Rules of Civil Procedure

must ask 'who is necessary to pursue the claim . . . if a party's participation is unnecessary to grant relief, and requiring participation would force unnecessary expense on the party, then . . . such a party is not indispensable.'" *Browning v. Preece*, 392 S.W.3d 388, 391 (Ky. 2013) (citing *Nelson County Bd. Of Educ.,* 337 S.W.3d at 625).

As Miller's malpractice insurance carrier, FAIRCO's place in this action is entirely derivative. Rank never had a breach of contract or fraud claim against FAIRCO because Rank and FAIRCO were never in privity of contract. FAIRCO's purpose in this action is to indemnify Miller if he committed malpractice. In reviewing this claim dismissed on a motion for summary judgment, we are not determining the culpability of Miller; instead, we are determining whether there is a genuine issue of material fact. "We do not interpret the rules as requiring joinder as an indispensable party to an appeal of a party who is unnecessary to the decision of the appeal and who would incur an unnecessary expense if its presence was required." *Braden v. Republic-Vanguard Life Insurance Co.,* 657 S.W.2d 241, 244 (Ky. 2013). As such, we hold that FAIRCO is not an indispensable party to this appeal.

Turning to the merits, Rank makes two arguments on appeal. First he claims the circuit court erred in dismissing his breach of contract claim. Second, Rank argues

that the trial court erred in finding that Miller did not fraudulently induce Rank to overpay for his services. We disagree.

Regarding his first argument, Rank asserts that the circuit court erred in dismissing his breach of contract claim because a genuine issue of material fact existed concerning the lack of a written report. Specifically, he argues that an issue of fact exists as to whether Gettys actually instructed Miller to not prepare a written report. Rank's primary evidence in support of this argument is: (1) the lack of additional documentation in either Miller's file or Gettys' file showing that Gettys had instructed Miller to not prepare a written report; and (2) his own affidavit, which he claims contradicts Gettys' affidavit.

We pause to revisit the well-settled law of agency in the Commonwealth. The relationship between an attorney and a client is generally that of principal and agent. *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996). As such, the attorney is an agent for the client with broad power to act for and on behalf of the client. *Id*. at 575. In circumstances where an attorney does not have actual authority to act for his client, he is deemed to have apparent authority in situations where an attorney customarily has actual authority to act. *Union Cent. Life Ins. Co. v. Glasscock*, 110 S.W.2d 681, 685 (Ky. 1937) (quoting RESTATEMENT OF THE LAW OF AGENCY § 49 cmt. b (1933)).[4] Furthermore, under general agency law the principal is charged with

[4] RESTATEMENT OF THE LAW OF AGENCY § 49 cmt. b states:

"constructive knowledge, regardless of his actual knowledge, of all material facts of which the agent received notice or acquired knowledge while acting in the course of his employment and within the apparent scope of his authority, even though the agent may fail to inform his principal thereof." *Martin v. Provident Life & Acc. Ins. Co.*, 47 S.W.2d 524, 526 (Ky. 1932) (internal citation omitted).

Rank concedes in his complaint that Gettys was his attorney and was acting as such when he hired Miller as an expert in the criminal case. As Rank's agent, Gettys had authority to hire Miller, agree to Miller's fee schedule, and to instruct him not to prepare a written report. As the circuit court stated, "[a]s agent for [Rank], Gettys' employment of, and agreement to pay, Miller is binding upon [Rank]."

Rank has not produced any affirmative evidence to show that Gettys did not instruct Miller not to prepare a written report. Instead, Rank argues that there is no additional documentation in either Miller's file or Gettys' file showing that Gettys had instructed Miller to not write a report. Rank claims this lack of documentation is proof that Gettys never waived the requirement for a written report and that Gettys' affidavit is not true. However, the nonexistence of a notation in the file is

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> If the principal puts one into, or knowingly permits him to occupy, a position in which, according to the ordinary experience and habits of mankind, it is usual for the occupant to have authority of a particular kind, anyone having occasion to deal with one in that position is justified in inferring that the person in question possesses such authority, unless the contrary is then made known.

not enough to create a genuine issue of material fact. The lack of documentation merely suggests that the conversation, between Gettys and Miller, to not prepare a written report was not ultimately memorialized. The only evidence in the record regarding this conversation is Getty's affidavit wherein he swears under oath that the conversation took place.

In his brief, Rank also argues "the trial court arbitrarily ignored or dismissed substantial evidence adduced by Rank which impeaches the credibility of . . . Gettys." The evidence Rank alludes to is three prior cases in which Gettys was a party.[5] Two of these cases are more than twenty-five years old and the other is sixteen years old. We do not find these long-ago cases indicative of any fabrication on the part of Gettys.

Rank next argues that his own affidavit contradicts Gettys' sworn statement. In his affidavit, Rank states that Gettys never informed him that he had instructed Miller to not prepare a written report.[6] However, whether Gettys informed Rank of this

[5] *Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224 (6th Cir. 1989) (dealing with civil sanction against Gettys for failing to conduct an adequate factual investigation as required by the Federal Rules of Procedure before filing a complaint); *Gettys v. Snelling*, No. 83-5658, 1985 WL 13482, at *1 (6th Cir. July 2, 1985) (involving a dispute between Gettys and his client over the disposition of a settlement fund, which was ultimately remanded for a determination of whether the case presented an actual case or controversy); *Gettys v. Kentucky Bar Ass'n*, 11 S.W.3d 46 (Ky. 2000) (dealing with Gettys' suspension from the Kentucky bar and his subsequent motion to terminate disciplinary proceedings based upon his consent to an order of suspension, which arose out of a 1996 felony conviction for possession of cocaine and operating a motor vehicle under the influence.)

[6] The pertinent portion of Rank's affidavit reads, "[G]ettys never provided me a copy of Miller's report, nor did he ever tell me that Miller did not write a report, nor did he ever tell me that he

instruction is irrelevant. It is customary for attorneys to negotiate with experts on behalf of their clients. *See* SCR[7] 3.130(1.2). Therefore, under Kentucky law, apparent authority still existed to bind Rank as the principal to the contract. *See Union Cent. Life Ins. Co.*, 110 S.W.2d at 685. Accordingly, Rank is charged with constructive knowledge, regardless of actual knowledge, of the fact that Gettys had instructed Miller not to prepare a written report. *Martin*, 47 S.W.2d at 526.

Because Rank is bound by Gettys' action as his attorney and agent, the circuit court did not err when it granted summary judgment in favor of Miller in regard to the breach of contract claim. We further conclude Rank's argument that the circuit court was incorrect in finding that he could not establish damages from Miller's failure to prepare a written report moot, as we find no breach of the contract occurred.

Rank next argues that the grant of summary judgment was premature and inappropriate as to his claim of fraud for "overcharging" because he presented "objective documentary evidence" that Miller's "usual fee" for testimony is $1,400.

> In a Kentucky action for fraud, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: (a) material representation[;] (b) which is false[;] (c) known to be

ever instructed Miller to not prepare a written report."

[7] Kentucky Rules of the Supreme Court.

> false or made recklessly [;] (d) made with inducement to be acted upon[;] (e) acted in reliance thereon [;] and (f) causing injury.

United Parcel Service Co v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999).

After reviewing the record, it is apparent Rank cannot satisfy even the first two elements. He did not produce any affirmative evidence that Miller made a material misrepresentation that was false or known to be false regarding his fees. Miller told Gettys in advance what he would charge for his evaluation and testimony in this particular case and that he would retain the fees unless there was three days' notice of cancellation. The record shows that Gettys agreed to the fees and cancellation requirement and subsequently paid Miller prior to all Miller's appearances in this case.

Rank's attempt at producing affirmative evidence is his "objective documentary evidence," which is a contract from another of Miller's clients that states Miller's "usual fee would be $1,400 for testimony," which is half the amount he charged Rank. Rank alleges this discrepancy in fees is evidence of fraud on the part of Miller. We cannot agree. Miller's other client's case could involve completely different, and less complex, medical or legal issues. Regardless, the fact Miller charged another client a different fee is of no consequence to the matter at hand. Miller is allowed to determine his own fee schedule, and he informed Gettys in advance of his fees. *See Aesthetics in Jewelry, Inc. v. Brown, ex rel. coexecutors*,

339 S.W.3d 489, 496 (Ky. App. 2011). Knowing the cost of his services, Gettys was free to hire Miller or continue searching for another expert. As such, Rank was bound as principal to the fee agreement between Gettys and Miller. Thus, Miller did not commit fraud by "overbilling" Rank.

IV. CONCLUSION

For these reasons, the circuit court did not err in its determination that there were no genuine issues of material fact as to Rank's breach of contract and fraud claims and that Miller was entitled to summary judgment as a matter of law. The order of the Kenton Circuit Court is AFFIRMED.

ALL CONCUR

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