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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000419-MR

ANNA D. MELVIN

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 97-CI-00029

J. SCOTT PRESTON

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: HUDDLESTON, PAISLEY AND TACKETT, JUDGES.

TACKETT, JUDGE: Anna D. Melvin appeals from the judgment of the Johnson Circuit Court, Special Judge Marc Rosen, awarding summary judgment to J. Scott Preston in an action regarding fee-splitting in a toxic tort case. The circuit court held that the contract between Melvin and Preston was unambiguous and required that Preston receive 2% of the total recovery obtained on behalf of Melvin's clients in the litigation, referred to as the Dayhoit Litigation. Melvin argues on appeal that the contract was breached and that Preston should recover nothing, that the

contract was unenforceable, and that the language of the contract was misinterpreted by the circuit court. We affirm.

This case arises from an agreement relating to the toxic tort litigation known as the Dayhoit Litigation. Melvin and Preston were working as co-counsel until August 9, 1993, when Preston filed a motion to withdraw. On August 27, 1993, the parties executed an agreement providing, in part:

Because J. Scott Preston has contributed time and money to the cases, he agrees to receive 2% of any recovery received by Anna D. Melvin when and after the cases are settled or a jury verdict is awarded, any appeals are completed and after costs are deducted from the award.

Melvin and Preston separated their practice at this time, and Melvin was to continue to be responsible for the litigation. After executing the agreement with Preston, however, Melvin agreed with Gilreath and Associates of Knoxville, Tennessee, to allow Gilreath to take over the litigation. Preston claims to have had no knowledge of the existence of Melvin's agreement with Gilreath. In the agreement with Gilreath, Melvin stated that "[Melvin] shall receive thirty-six percent of the attorney's fees collected and will satisfy any attorney fee claim by Scott Preston out of her share. . . ."

The litigation was ultimately settled in 1997 for an undisclosed amount. Melvin received approximately \$1 million as her fee. After the litigation, Melvin sent Preston a check for

\$15,000 as his portion of the fee and \$16,000 for expenses. Preston filed this action, and on the plaintiff's motion for summary judgment, the Johnson Circuit Court determined that the language of the contract was not ambiguous and that the agreement provided for Preston to receive 2% of the total recovery in the litigation, not 2% of Melvin's fee as argued by Melvin. This appeal followed.

Melvin advances three arguments on appeal. First, she argues that Preston materially breached the contract by not providing adequate deposition summaries as agreed in the contract. Second, she argues that Supreme Court Rule (SCR) 3.130(1.5)(e) was violated, and therefore the contract between the parties is void, because the client was not notified of the fee-splitting arrangement. Third, she argues that the court misinterpreted the contract and that the intent of the parties is an issue to be tried before a jury. We reject all three arguments.

With respect to any material breach by Preston, the circuit court held that the evidence presented by Melvin clearly contradicts her claim that Preston materially breached the contract. Melvin argued that lead counsel Donna Holt, of Gilreath and Associates, needed the deposition summaries for the purpose of selecting bellwether plaintiffs from among the deponents. However, Holt testified that the deposition

summaries provided by Preston were not necessary, and that in order to select bellwether plaintiffs, she would have had to personally interview each plaintiff and the lack of detailed summaries was not significant. Melvin argues on appeal that Holt's testimony does not matter, since "the product was so utterly devoid of skill, care, diligence and professionalism that it is as if the deposition summaries were not performed at all, thus rendering performance fatally defective and breaching the . . . contract." We cannot agree with Melvin's assertion that even though the evidence shows that detailed summaries would not have been enough for Holt to make her decision, any breach must be material because the summaries were inadequate. The evidence also shows that Preston had done substantial work and invested substantial time and money in the case prior to the deposition summaries. We agree with the reasoning of the special judge in holding that any claimed breach arising from the quality of the deposition summaries is not sufficient reason to avoid enforcement of the contract as written.

Turning to the argument regarding SCR 3.130(1.5)(e), we disagree that the rule is applicable in such a way as to render the agreement void. We are not persuaded that the rule, which prohibits fee splitting arrangements between lawyers who are not in the same firm without notification of their client(s), requires a finding that this agreement was void.

Preston points out that Melvin and Preston were in the same firm during part of the litigation, and were separating their practice when the agreement was drafted. Moreover, even if they were not in the same firm, it is clearly the responsibility of both Melvin and Preston to notify the clients, and neither did so. Melvin's own failure to comply with the rule should not absolve her of any obligations under this agreement. Finally, as the circuit court noted, there is no indication that the clients' rights were violated, and any speculation that the clients might have objected to Preston's receipt of part of the fee for this litigation is unavailing. The clients were fully advised that Preston was representing them in the litigation, and they raised no objection at that time; Melvin's speculation regarding any objection their clients might have had to Preston's association with another attorney that the clients had rejected carries no weight here.

Finally, the agreement was correctly interpreted by the circuit court. It is well settled that a contract's terms will be given their ordinary meaning. From the face of the contract, it appears that Preston agreed to receive 2% of any "recovery" obtained by Melvin. "Recovery," in the legal sense, means "the obtaining of a thing by the judgment of a court, as the result of an action brought for that purpose. The amount finally collected, or the amount of judgment." Black's Law

Dictionary, 5th Ed., p. 1147. Melvin argues that the circuit court fixated on the use of the term "recovery" when it should have focused on the language "received by Melvin." Melvin argues that "recovery" as used in the contract really means "fee". However, because of principles of construction, we are not at liberty to change the meaning of the language of an unambiguous contract. In order to reach the interpretation Melvin seeks, we would have to hold that the contract is ambiguous; however, as it is clearly not, we hold that the circuit court ruled correctly.

For the foregoing reasons, the judgment of the Johnson Circuit Court is affirmed.

ALL CONCUR.

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