

[Cite as *Jochum v. Listati*, 2019-Ohio-166.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106957

TERRY L. JOCHUM, ET AL.

PLAINTIFFS-APPELLANTS

vs.

EZIO LISTATI, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-17-875986

BEFORE: E.A. Gallagher, P.J., Jones, J., and Keough, J.

RELEASED AND JOURNALIZED: January 17, 2019

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EILEEN A. GALLAGHER, P.J.:

¹Effective November 22, 2018, David M. Lynch resigned from the practice of law with disciplinary action pending. This was after briefing. *See In re Resignation of Lynch*, Slip Opinion No. 2018-Ohio-4671.

{¶1} Appellants Terry Jochum and her companies, TLJ Management, Inc., Always There, Inc. d.b.a. Angels on Call, Angels in Waiting Healthcare Providers, L.L.C. and The Thomas Agency, L.L.C. (collectively, “Jochum”) appeal from the decision of the Cuyahoga County Common Pleas Court granting summary judgment in favor of appellees Ezio Listati, Mary Jane Trapp, Daniel Cronin and Thrasher Dinsmore & Dolan, L.P.A. (collectively, “TD&D”)² on their counterclaim for unpaid legal fees and expenses. For the reasons that follow, we affirm the trial court.

Factual Background and Procedural History

{¶2} Jochum retained TD&D to represent her in several related lawsuits filed in the Lake County Court of Common Pleas (the “Lake County litigation”). On July 31, 2013, Jochum executed an engagement letter sent by Attorney Listati that set forth the terms of the representation, providing in relevant part:

We are very pleased that you have decided to retain us as co-counsel with Benesch to represent you with regard to the pending litigation involving Josh McDonald and Robert Boyd. * * *

This letter describes the basis on which our firm will provide legal services to you and how we will be compensated for our services. The fees and costs relating to this matter are not predictable. Accordingly, we have made no commitment to you concerning the maximum fees and costs that will be necessary to resolve or complete this matter. It is also expressly understood that payment of the firm’s fees and costs is in no way contingent on the ultimate outcome of the matter.

We take into account many factors in billing for services rendered * * * . The principal factor is usually our time involved in your legal matter. Our statements for services rendered to you will include the product of the hours worked multiplied by the hourly rates for the attorneys, legal assistants, and law clerks that did the work. The bill may also reflect the complexity of the matter, the time constraints imposed upon us and in certain circumstances the results obtained. * * *

²At the time they provided legal services to or on behalf of Jochum, Ezio Listati, Mary Jane Trapp and Daniel Cronin were all attorneys with TD&D.

Our schedule of hourly rates for attorneys and other members of the professional staff is based on years of experience, specialization in training and practice, and level of professional attainment. My present hourly rate is \$360.00 (which includes travel time, if applicable, and telephone calls), and to the extent that other attorneys, legal assistants and law clerks are involved, their present rates will vary from \$100.00 to \$375.00 an hour for the most senior partners. These rates may increase even though we are still engaged in the same legal matter for you. * * *

{¶3} Jochum also agreed to reimburse TD&D for all out-of-pocket expenses relating to the representation.

{¶4} In February 2016, Jochum terminated the parties' attorney-client relationship. Nearly a year later, on February 15, 2017, Jochum filed a complaint for legal malpractice against TD&D. Jochum alleged that TD&D had failed to act "in a minimally reasonable fashion regarding [Jochum's] legal matters," causing her financial injury. TD&D filed an answer, denying the material allegations of Jochum's complaint and asserting a laundry list of affirmative defenses. TD&D also filed a counterclaim against Jochum, asserting claims of breach of contract, unjust enrichment, quantum meruit and promissory estoppel to recover the balance due for legal services TD&D had provided in connection with the Lake County litigation. TD&D attached a copy of the engagement letter to its counterclaim. The amount of legal fees and expenses that remained unpaid was not specified in the counterclaim. Jochum filed a reply, denying the allegations of the counterclaim.

{¶5} Jochum failed to timely file an expert report. In November 2017, TD&D filed a motion to strike Jochum's untimely expert report. The trial court granted the motion to strike, and TD&D filed a motion for summary judgment on Jochum's legal malpractice claim and its counterclaim for unpaid legal fees and expenses. TD&D argued that it was entitled to summary judgment on Jochum's legal malpractice claim because Jochum lacked the expert testimony

necessary to establish a breach of the applicable standard of care and damages proximately caused by that breach. TD&D argued that it was entitled to summary judgment on its counterclaim because there was no genuine issue of fact that (1) the engagement letter governed the terms of the parties' relationship, (2) TD&D had submitted itemized invoices to Jochum, (3) Jochum had paid some (but not all of those invoices) and (4) the amounts billed by TD&D were reasonable and necessary. In support of its motion, TD&D submitted copies of Jochum's answers to interrogatories and responses to requests for admissions, a certified copy of the docket from the Lake County litigation, an affidavit from Attorney Listati attaching copies of the engagement letter, the invoices for legal services TD&D sent to Jochum and biographies of the attorneys who provided legal services on Jochum's behalf, and an expert report from Attorney Robert Glickman.

{¶6} Jochum opposed TD&D's motion for summary judgment on its counterclaim.³ In support of her opposition, she submitted only her own affidavit. Jochum argued that, based on her affidavit, there was a factual dispute as to whether "the services charged were in fact rendered" and "urge[d] the court * * * to allow the jury to determine if the service was rendered."

{¶7} The trial court granted TD&D's motion for summary judgment on both Jochum's legal malpractice claim and TD&D's counterclaim. With respect to Jochum's legal malpractice claim, the trial court held that without expert evidence, she could not support her legal malpractice claim. With respect to TD&D's counterclaim, the trial court found that Jochum had failed to present evidence of specific facts showing that there was a genuine issue for trial. The trial court held that Jochum's "self-serving affidavit uncorroborated by other evidence" could not

³Jochum did not include any argument in her response to TD&D's motion for summary judgment with respect to her legal malpractice claim and does not challenge the trial court's ruling as to her legal malpractice claim on appeal.

defeat TD&D’s “well-supported motion for summary judgment.” The trial court entered judgment in favor of TD&D and against Jochum for \$147,398.14 — the amount of the unpaid legal fees and expenses set forth in the invoices attached to Attorney Listati’s affidavit — plus postjudgment interest at the statutory rate and costs.

{¶8} Jochum appealed the trial court’s judgment, raising the following assignment of error for review:

The trial court committed error in granting summary judgment based on the self-serving affidavit rule.

Law and Analysis

Standard of Review

{¶9} We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). We accord no deference to the trial court’s decision and conduct an independent review of the record to determine whether summary judgment is appropriate.

{¶10} Under Civ.R. 56, summary judgment is appropriate when no genuine issue exists as to any material fact and, viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party, entitling the moving party to judgment as a matter of law.

{¶11} On a motion for summary judgment, the moving party carries an initial burden of identifying specific facts in the record that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party has the reciprocal burden to point to evidence of specific facts

in the record demonstrating the existence of a genuine issue of material fact for trial. *Id.* at 293. Summary judgment is appropriate if the nonmoving party fails to meet this burden. *Id.*

{¶12} Following a thorough review of the record, viewing the facts and evidence in the light most favorable to Jochum, we find that the trial court properly entered summary judgment in favor of TD&D on its counterclaim for unpaid legal fees and expenses.

{¶13} There is no dispute in this case that the parties entered into an enforceable fee agreement, the terms of which were set forth in the engagement letter. In support of its motion for summary judgment, TD&D submitted a copy of the engagement letter that contained the parties' fee agreement and copies of itemized invoices detailing the specific services for which it sought payment from Jochum under the terms of the fee agreement. TD&D also submitted Jochum's responses to requests for admissions in which she acknowledged signing the engagement letter, receiving itemized invoices for services rendered under the engagement letter and paying some of the fees and expenses charged by TD&D.

{¶14} Where an attorney brings an action to recover attorney fees based on a fee agreement that specifies the hourly rate, the attorney must demonstrate that (1) the time spent was fairly and properly used and (2) the work hours devoted to the case were reasonable. *Koblentz & Koblentz v. Ferrante*, 8th Dist. Cuyahoga No. 86969, 2006-Ohio-1740, ¶ 24, quoting *Climaco, Seminatore, Delligatti & Hollenbaugh v. Carter*, 100 Ohio App.3d 313, 323, 653 N.E.2d 1245 (10th Dist.1995); *Reminger & Reminger Co., L.P.A. v. Fred Siegel Co., L.P.A.*, 8th Dist Cuyahoga No. 77712, 2001 Ohio App. LEXIS 760, 16-18 (Mar. 1, 2001); *see also Bolek v. Miller-McNeal*, 8th Dist. Cuyahoga No. 103320, 2016-Ohio-1383, ¶ 11 ("Before granting summary judgment, a trial court must determine whether attorney fees are reasonable based upon the actual value of the necessary services performed by the attorney and evidence must exist in

support of the court’s determination.”). In determining the reasonableness of attorney fees, courts consider numerous factors, including the time and labor involved, the novelty and difficulty of the legal issues raised, the customary fees in the locality for similar legal services, the experience, reputation and ability of counsel and the results obtained. *See, e.g., Bolek* at ¶ 11; *Blisswood Village Home Owners Assn. v. Cleveland Community Reinvestment, LLC*, 8th Dist. Cuyahoga No. 105450, 2018-Ohio-2299, ¶ 22, citing *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 569 N.E.2d 464 (1991); Prof.Cond.R. 1.5. “[A]ttorney fees are not justified merely because the lawyer has charged his professional time and expenses at reasonable rates; a legitimate purpose must also explain why the lawyer spent that time and incurred those costs.” *Lillie & Holderman v. Dimora*, 8th Dist. Cuyahoga No. 99271, 2013-Ohio-3431, ¶ 12, quoting *Disciplinary Counsel v. Johnson*, 113 Ohio St.3d 344, 2007-Ohio-2074, 865 N.E.2d 873, ¶ 71.

{¶15} In his affidavit, Attorney Listati testified that the itemized invoices TD&D submitted “accurately reflect the skill necessary to represent [Jochum]” in the Lake County litigation and that the billing rates and fees charged were “reasonable” given (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill required to perform the legal services properly, (4) the time limitations imposed by the client or the circumstances, (5) the fees customarily charged in Lake and Cuyahoga County for similar legal services, (6) the nature and length of the firm’s professional relationship with Jochum and (7) the likelihood that acceptance of the matter for Jochum would preclude other employment by TD&D. Attorney Listati also testified as to the experience, reputation and abilities of the TD&D attorneys who provided legal services on Jochum’s behalf and included copies of biographies of certain of those attorneys.

{¶16} With respect to the amount of time spent, why that time was spent and the necessity of the services performed, Attorney Listati explained that the Lake County litigation “present[ed] complex issues of law and fact” and that “[g]iven the acrimonious nature of the dispute, and the personal stake of the parties, the litigation was vigorously contested at the direction of Ms. Jochum,” leading to “early dispositive motion practice, discovery stays, temporary restraining orders and preliminary injunction hearings,” “[t]he cost and expense of which was further exacerbated by the urgency conveyed by Ms. Jochum.” The docket from the Lake County litigation corroborated certain of these statements. TD&D also submitted an expert report from Attorney Robert Glickman addressing the quality of TD&D’s representation and the appropriateness of the fees it charged Jochum. In his report, Attorney Glickman opined: “There is a broad objection to the amount charged by the Defendants in the Underlying Litigation, but a review of the billing statements do not reflect actions that were unnecessary or that time spent for said actions was out of the ordinary.”⁴

⁴We note that Attorney Glickman’s unsworn expert report does not comply with Civ.R. 56(C). *See, e.g., Rogoff v. King*, 91 Ohio App.3d 438, 446, 632 N.E.2d 977 (8th Dist.1993). Under Civ.R. 56(C), the materials that may be considered on a motion for summary judgment include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence and written stipulations of fact. Other types of documents may be introduced as evidentiary material only through incorporation by reference in a properly framed affidavit. *Dzambasow v. Abakumov*, 8th Dist. Cuyahoga No. 80621, 2005-Ohio-6719, ¶ 26.

Although TD&D’s expert’s report was not in the form required for consideration on summary judgment, because Jochum did not object to it, the trial court could consider it in ruling on TD&D’s motion for summary judgment within the court’s discretion. *See, e.g., Zapata Real Estate L.L.C. v. Monty Realty Ltd.*, 8th Dist. Cuyahoga No. 101171, 2014-Ohio-5550, ¶ 27; *see also Dzambasow*, at ¶ 27 (“[I]f the opposing party fails to object to improperly introduced evidentiary materials, the trial court may, in its sound discretion, consider those materials in ruling on the summary judgment motion.”), quoting *Christe v. GMS Mgt. Co., Inc.*, 124 Ohio App.3d 84, 90, 705 N.E.2d 691 (9th Dist.1997); *Papadelis v. First Am. Savs. Bank*, 112 Ohio App.3d 576, 579, 679 N.E.2d 356 (8th Dist.1996) (“When ruling on a motion for summary judgment, a trial court may consider documents other than those specified in Civ.R. 56(C) in support of the motion when no objection is raised by the party against whom the motion is directed.”), quoting *Rodger v. McDonald’s Restaurants of Ohio, Inc.*, 8 Ohio App.3d 256, 456 N.E.2d 1262 (8th Dist.1982), paragraph one of the syllabus.

{¶17} In this case, TD&D met its burden under Civ.R. 56(C), presenting evidence of specific facts in the record demonstrating its entitlement to summary judgment on its counterclaim for unpaid legal fees and expenses. However, based on the record before us, it cannot be said that Jochum met her reciprocal burden, i.e., pointing to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial, as required to defeat summary judgment.

{¶18} Jochum contends that her affidavit created a factual issue as to whether TD&D “did not render the service they say they provided” and that the trial court, therefore, erred in entering summary judgment against her on TD&D’s counterclaim. We disagree.

{¶19} An affidavit submitted on summary judgment must contain more than general, conclusory assertions to create a genuine issue of material fact for trial:

“Generally, a party’s unsupported and self-serving assertions, offered by way of affidavit, standing alone and without corroborating materials under Civ.R. 56, will not be sufficient to demonstrate material issues of fact. Otherwise, a party could avoid summary judgment under all circumstances solely by simply submitting such a self-serving affidavit containing nothing more than bare contradictions of the evidence offered by the moving party.”

Davis v. Cleveland, 8th Dist. Cuyahoga No. 83665, 2004-Ohio-6621, ¶ 23, quoting *Bell v. Beightler*, 10th Dist. Franklin No. 02AP-569, 2003-Ohio-88, ¶ 33.

{¶20} In this case, much of Jochum’s affidavit appears to relate to her claim for legal malpractice and her complaints regarding the manner in which TD&D handled her case, including strategic decisions that were made that had adverse consequences, the “poor advise [sic], threats and poor workmanship” she received and the alleged “careless way [her] case ha[d] been handled.”

{¶21} Although Jochum asserts in her affidavit that TD&D “bill[ed] me for work I didn’t want nor needed,” that TD&D “did not render the service they say they rendered” and that TD&D “should not be paid, they should be punished,” she does not identify any specific services she contends she was charged for that (1) she did not want or need or (2) were not actually provided. Nor does she otherwise challenge the reasonableness of the time billed or fees charged for any particular task. Because Jochum’s conclusory statements are unsupported by any specific facts or corroborating evidence, her affidavit does not create a genuine issue of fact for trial regarding the alleged “non-rendering of service” by TD&D. *See, e.g., Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 42 (“An affidavit submitted on summary judgment must contain more than denials and conclusory assertions to create a genuine issue of material fact.”); *Zapata Real Estate*, 2014-Ohio-5550, at ¶ 48 (affidavit that contained conclusory statements unsupported by any facts or evidence did not create a genuine issue of fact for trial). The trial court, therefore, properly entered summary judgment in favor of TD&D on its counterclaim.

{¶22} Accordingly, Jochum’s assignment of error is overruled.

{¶23} Judgment affirmed.

It is ordered that appellees recover from appellants the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN A. GALLAGHER, PRESIDING JUDGE

LARRY A. JONES, SR., J., and
KATHLEEN ANN KEOUGH, J., CONCUR