COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1247 **Cir. Ct. No. 2008CV4302**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

SIMANDL & MURRAY, S.C.,

PLAINTIFF-RESPONDENT,

V.

MAINSTREET HOMES, LLC,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Mainstreet Homes, LLC (Mainstreet), appeals from the order granting summary judgment to Simandl & Murray, S.C. Mainstreet argues that the trial court erred in granting summary judgment because Simandl & Murray failed to attach essential documents to the affidavit it submitted in support

of its summary judgment motion and the trial court erred when it utilized the documents attached to the complaint. Additionally, Mainstreet submits that even if it is appropriate to permit the use of documents attached to the complaint in furtherance of a request for summary judgment, the documents here were inadequate. Because Mainstreet failed to raise these issues below and because the trial court's award of summary judgment was proper, we affirm.

I. BACKGROUND.

¶2 In March 2008, the law firm of Simandl & Murray sued Mainstreet, claiming that Mainstreet breached its contract with Simandl & Murray by refusing to pay after Simandl & Murray demanded $27,709.50 for legal services performed on Mainstreet's behalf. A copy of the original letter of engagement, as well as itemized bills, were attached to the complaint. The letter of engagement was signed by a Mainstreet representative. Mainstreet filed an answer, in which it claimed that: (1) there was improper service of process; (2) the court lacked personal jurisdiction over Mainstreet; (3) any judgment entered by the court would be subject to the statutes affecting the distribution of assets of a limited liability company upon dissolution; and (4) if the court found that a valid contract for legal services existed, Simandl & Murray breached the terms of the contract by engaging in a conflict of interest.

¶3 The trial court held a scheduling conference on June 26, 2008, and issued a scheduling order. As pertinent to this appeal, the order stated that:

> Counsel shall provide in writing to opposing counsel: (a) the name and addresses of lay witnesses (with a brief statement as to their testimony); (b) the names, addresses and resumes together with a written report for each expert named; … and (c) an itemized statement of damages claimed, including any special damage claims and

> permanency, on or before 10/27/2008 by Plaintiff[,] 12/1/08 by Defendant[.]

While the case was pending, Simandl & Murray filed an offer of settlement pursuant to WIS. STAT. § 807.01(3) (2007-08)[1] to settle the matter for $15,000 with costs. Mainstreet declined and Simandl & Murray filed a motion seeking summary judgment along with a brief setting forth the reasons why summary judgment was appropriate in this case. In addition, the brief addressed the issue of a conflict of interest raised in Mainstreet's answer and informed the court that no conflict existed because the parties acknowledged in the letter of engagement that a member of the law firm was dating one of the members of Mainstreet. The law firm had agreed to and did segregate that attorney from all involvement with the representation of Mainstreet and Mainstreet had agreed to this arrangement. Simandl & Murray also filed an affidavit of Attorney Robert Simandl several days later (the original affidavit which accompanied the summary judgment motion and the brief was not signed).

¶4 In his affidavit, Attorney Simandl stated that he was a shareholder of Simandl & Murray and that the firm was hired by Mainstreet to do certain legal work which was listed in the affidavit after the members of Mainstreet in July 2007 voted to retain the firm. In his affidavit, he stated that work began on Mainstreet's behalf and the contract was later formalized with a letter of engagement. Attorney Simandl also stated in his affidavit that regular monthly bills were sent to Mainstreet with a demand for payment and Mainstreet failed to pay the bills.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶5 Approximately one month later, Mainstreet filed a request for an extension of time to respond to the motion and submitted an affidavit of Attorney Jerold Fennell on behalf of Mainstreet. In his affidavit, Attorney Fennell claimed that a settlement agreement (concerning a dispute between two members of Mainstreet—not a settlement of this litigation) he had prepared had been altered by Simandl & Murray to favor the member of Mainstreet who was dating a lawyer in the law firm, and that this act constituted a material breach of the contract to provide legal services. In addition, Attorney Fennell opined that a comparison of the time periods listed in the itemized bills of Simandl & Murray with the corresponding tasks referenced revealed that some of the time periods claimed were unreasonable and the work performed was unnecessary. Approximately two weeks later, another attorney representing Mainstreet filed two documents that were to have been attached to Attorney Fennell's affidavit. These documents consisted of a copy of the original settlement agreement authored by Attorney Fennell and, for comparison, the actual copy signed by the two members.

¶6 In response, Simandl & Murray filed a motion opposing the request for an extension of time to file an affidavit and requested that the trial court disregard the tardy documents. A reply brief was also filed in support of its summary judgment motion. In its brief, Simandl & Murray explained by way of a second affidavit of Attorney Simandl that, contrary to Attorney Fennell's implication that Simandl & Murray had altered the settlement agreement to favor one of the members, Attorney Simandl had refused to review the settlement agreement with one of the Mainstreet members because of the firm's representation of Mainstreet, and that Attorney Simandl did not alter the settlement agreement.

¶7 Simandl & Murray also advised the trial court that Attorney Fennell was not named as an expert witness, the time for naming expert witnesses as well as conducting discovery had long passed, and his opinion that the fees charged were unreasonable was simply an opinion of defense counsel and not one of a named expert witness. Further, Simandl & Murray argued that since no counterclaim was filed, the narrow issues were: whether there was a contract for Simandl & Murray to provide legal services; whether those services were provided; whether the law firm sent itemized bills seeking payment for the legal services provided; and whether Mainstreet made any payments.

¶8 On February 9, 2009, the trial court granted summary judgment to Simandl & Murray. Mainstreet filed a motion for reconsideration. In support of the motion seeking reconsideration was another affidavit of Attorney Fennell, claiming that on December 2, 2008, he mailed and faxed a letter to Simandl & Murray's attorney containing his list of witnesses. In it, he named himself as a witness who would "testify as to the facts related to the issue of the reasonable necessity and fair value for legal services provided by the plaintiffs to Mainstreet Homes, LLC." Further, his witness list contains a paragraph entitled "EXPERT WITNESSES," which states that Attorney Fennell and Attorney Kenneth Dunlap "may provide expert testi[mony] regarding the reasonable necessity and fair value for legal services provided by the plaintiffs." The list then went on to say that "[r]eports from one or both expert witnesses will be prepared and submitted to opposing counsel no later than March 1, 2009."

¶9 Simandl & Murray then filed a response to the motion for reconsideration. In it, its lawyer pointed out that the witness list was not filed by the date set by the trial court's scheduling order, nor did Mainstreet include the expert witnesses' resumes or written reports as was required by the order. Further,

Simandl & Murray argued that the issue of whether the fees were reasonable was never pled, and "was not timely raised nor fleshed out."

¶10 The trial court signed the order granting summary judgment. Later, the trial court signed an order addressing the motion for reconsideration. The trial court stated that "[i]n order to prevail on a motion for reconsideration, the moving party must set forth the existence of newly discovered evidence or establish a manifest error of law or fact." The trial court determined that Mainstreet had done neither and denied the motion. This appeal follows.

II. ANALYSIS.

¶11 On appeal, Mainstreet has abandoned its claim that the trial court should have considered the affidavit of Attorney Fennell who stated that the fees were unreasonable and the work unnecessary, and instead contends that Simandl & Murray "utterly and completely failed to meet its burden at summary judgment of establishing a prima facie case"; and that, as a result, Mainstreet "was not required to respond with specific facts that established a genuine material fact issue for trial." As a basis for this argument, Mainstreet claims that it was error for the trial court to consider the documents attached to the pleadings when deciding the summary judgment motion, and that even if those documents were properly considered, there is a lack of evidence to permit summary judgment.

¶12 In ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 334 N.W.2d 580 (Ct. App. 1983), we set out the methodology to be used in summary judgment.

> Under that methodology, the court, trial or appellate, first examines the pleadings to determine whether claims have been stated and a material factual issue is presented. If the complaint … states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts

> admissible in evidence or other proof to determine whether that party has made a prima facie case for summary judgment. To make a prima facie case for summary judgment, a moving defendant must show a defense which would defeat the claim. If the moving party has made a prima facie case for summary judgment, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts, and therefore a trial is necessary.

Id. at 116.

¶13 "Summary judgment methodology prohibits the trial court from deciding an issue of fact. The court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment." ***Id.***

¶14 In its main brief, Mainstreet contends that the trial court erred in accepting the documents (the signed letter of engagement and the itemized bills sent to Mainstreet) that were attached to the complaint. Mainstreet claims that "[o]nce you eliminate facts erroneously borrowed by the trial court from Simandl & Murray S.C.'s complaint, and the attachments thereto, there is a complete and utter failure by Simandl & Murray to prove the bare essential facts of a prima facie case for summary judgment." After Simandl & Murray pointed out in their response brief that several of the cases cited for support for this argument referenced a now outdated summary judgment statute, Mainstreet took a slightly different tack in its reply brief.

¶15 While defending the cases cited in its main brief as still containing good law, Mainstreet argued that the additional phrase found in the current summary judgment statute, WIS. STAT. § 802.08(3), that reads, "[c]opies of all papers or parts thereof referred to in an affidavit shall be attached thereto and

served therewith, *if not already of record*" (emphasis added), "would mark a significant change in Wisconsin law" and maintains that "Wisconsin law requires more."

¶16 Although Simandl & Murray does not argue waiver, we note at the outset that our review of the record reveals that Mainstreet failed to raise an issue related to the sufficiency of the documents submitted by Simandl & Murray in support of its summary judgment motion. Mainstreet could have argued before the trial court that Attorney Simandl's affidavit, standing alone, was insufficient to support an award of summary judgment. Furthermore, Mainstreet did not object during the summary judgment hearing when the trial court explained that it was relying on the documents attached to the complaint together with the affidavits submitted in support of summary judgment, nor did it raise the issue in its subsequent motion for reconsideration. "The party alleging error has the burden of establishing, by reference to the record, that the error was raised before the trial court." ***Young v. Young***, 124 Wis. 2d 306, 316, 369 N.W.2d 178 (Ct. App. 1985). Mainstreet has not shown that it raised this issue before the trial court; accordingly, we deem it waived.[2]

¶17 Next, Mainstreet asserts that even if the trial court could consider the documents in the record, the trial court erred in granting summary judgment because Attorney Simandl's affidavit failed to include critical evidentiary facts

[2] In using the term "waiver," we are aware of ***State v. Ndina***, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612, where our supreme court clarified the distinction between the terms "forfeiture" and "waiver." *See* ***id.***, ¶29 ("Although cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody very different legal concepts. 'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'") (citation omitted). Although forfeiture is applicable in this context, we use waiver to be consistent with the case cited.

concerning the itemized bills attached to the complaint. Again, we deem this issue waived because Mainstreet failed to raise it below.

¶18 Looking to Mainstreet's filings, besides the answer, which never mentions a claim that the bills were too high or the work unnecessary, the only accepted filing was Attorney Fennell's affidavit which recites his suspicions that Simandl & Murray modified a document written by him to assist a member of Mainstreet who was engaged in a dispute with another Mainstreet member. In opposing Attorney Fennell's insinuation, another affidavit was submitted by Attorney Simandl which discredits Attorney Fennell's suspicions. Attorney Fennell's affidavit also contains his opinion that Attorney Simandl's legal work was unnecessary and the firm's fees unreasonable. However, these conclusions are those that must be made by an expert witness, and Mainstreet failed to timely file its list of witnesses. Therefore, Mainstreet had no expert witness to address the questions as to whether the work was unnecessary or the fees unreasonable.

¶19 As the trial court noted:

> Mr. Fennell summarily asserts that the plaintiff's fees were unreasonable; but defendant presents no affidavits, deposition testimony, or other evidence to support this conclusory opinion by an attorney in the case. There is no witness list identifying Mr. Fennell as a witness as someone who would be in a proper position to testify regarding the reasonableness of the plaintiff's fees.

¶20 Given the state of the record at the time of the summary judgment motion, the trial court correctly found that the affidavit opposing summary judgment failed to raise material issues of fact. Had Mainstreet raised the issue of unreasonable fees in its answer, or had Mainstreet's attorney filed a timely witness list naming an expert witness on attorney fees, conducted discovery or deposed a member of Simandl & Murray addressing the unreasonableness of the fees or the

allegedly unnecessary work, this case probably would not have been appropriate for summary judgment. However, none of these events occurred and the trial court properly granted Simandl & Murray's motion for summary judgment. Accordingly, we affirm.[3]

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

[3] Simandl & Murray filed a motion pursuant to WIS. STAT. RULE 809.25(3) seeking frivolous costs. To be "frivolous" as would support an award of attorney fees and costs as a sanction, an appeal must be without any basis in law. ***Black v. Metro Title, Inc.***, 2006 WI App 52, ¶15 n.3, 290 Wis. 2d 213, 712 N.W.2d 395. We cannot find that the appeal was without any basis in law. Therefore, the motion for frivolous costs is denied.