

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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AUG 05 2016

SC Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2015-002558

CHRIS M. DOMNICK, Respondent,

v.

FRANK LEROY DOMNICK, Jr. and
SHELLY L. DOMNICK, Appellants.

INITIAL BRIEF OF APPELLANTS

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Save Charleston Found. v. Murray, 286 S.C. 170, 333 S.E.2d 60 (Ct.App. 1985)

STATEMENT OF ISSUES ON APPEAL

- I. WAS THE CIRCUIT COURT PRESENTED WITH SUFFICIENT EVIDENCE TO APPLY THE REQUIRED FACTORS FOR AN AWARD OF ATTORNEYS' FEES?

STATEMENT OF THE CASE

By filing of July 22, 2013, the Respondent CHRISTOPHER N. DOMNICK sued his brother and sister-in-law, FRANK LEROY DOMNICK, Jr. and SHELLY L. DOMNICK, the Appellants herein, for sums advanced in the amount of \$55,000.00¹. Based upon a contract signed September 11, 2009, the Respondent also sought attorney's fees and expenses. The Respondent's suit was for breach of contract, breach accompanied by a fraudulent act, fraud, constructive fraud and *quantum meruit*.

After trial before the Court without a jury on November 9, 2015, the Circuit Court ruled for the Respondent against the Appellant FRANK LEROY DOMNICK, Jr. in the amount of \$43,000.00. The Court was presented with an unverified statement of attorneys fees in a total amount of \$27,023.14. The Court entered an Order against the Appellant FRANK LEROY DOMNICK, Jr. on behalf of the Respondent awarding \$17,000.00 in attorneys fees.

STATEMENT OF FACTS

The Respondent CHRIS M. DOMNICK and the Appellant FRANK LEROY DOMNICK, Jr. are brothers. The Appellant SHELLY L. DOMNICK is the wife of FRANK. From 2009 on, CHRIS DOMNICK loaned FRANK DOMNICK funds and had business dealings with him. In 2009, FRANK DOMNICK signed a contract promising repayment. Of this amount, it is undisputed that FRANK DOMNICK repaid \$12,000.00.

In 2011, CHRIS DOMNICK filed a Chapter 7 Bankruptcy and received a discharge. He did not list any debts owed by the Appellants. Relations between the parties deteriorated. In July, 2013, CHRIS DOMNICK filed suit in Chester County against the Appellants for \$55,000.00, less the \$12,000.00 he acknowledged as paid back. In November, 2013, CHRIS DOMNICK reopened his 2011 Bankruptcy, listing the debt as a "potential suit" against his brother which was "non-collectible."

1. Both in the Complaint and the accompanying Verified Statement of Account, this figure is recited, along with acknowledgment of payments in the amount of \$12,000.00. [Record on Appeal, Plaintiff's Complaint, p.____.]

The Appellants maintained that oral agreements were made with the Respondent, and carried out, to satisfy the remaining debt owed the Respondent. After hearing before the Court without a jury, the Circuit Judge found for the Respondent against FRANK DOMNICK alone in the amount of \$43,000.00. On the basis of Counsel for Respondent's unverified and undetailed Invoice for attorneys' fees and costs, he awarded the Respondent \$17,000.00 against FRANK DOMNICK alone.

ARGUMENT:

ALLOWANCE OF ATTORNEYS' FEES

The general rule, followed in our State as in other jurisdictions, holds that attorneys' fees are not recoverable by a party unless authorized by contract or Statute. *Black v. Patel*, 357 S.C. 466, 594 S.E.2d 162 (2004); *Brown v. Spann*, 21 S.C.L. (3 Hill) 324 (1837); *Save Charleston Found. v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct.App. 1985).

In this case, the claim for attorneys' fees and expenses is based upon a contract between the Respondent and FRANK L. DOMNICK, Jr. dated September, 2009. That document provides, in relevant part:

Should it ever become necessary to begin legal proceedings in any manner in order to collect any amounts due and payable on these loans, the undersigned BORROWER, Frank L. Domnick, Jr., agrees to pay the LENDER, Chris N. Domnick for any and all legal fees and/or court costs expended by the LENDER to collect any remaining balance due and payable to the LENDER..[sic]

[RECORD ON APPEAL, Plaintiff's Exhibit No. 3, p.____.]

The factors to be weighed by the Trial Court in the award of attorney's fees have been summarized by the Supreme Court in *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991):

[W]e clarify the six factors cited by this Court in determining a reasonable attorney's fee:

- (1) the nature, extent, and difficulty of the case;
- (2) the time necessarily devoted to the case;
- (3) professional standing of counsel;
- (4) contingency of compensation;

(5) beneficial results obtained;

(6) customary legal fees for similar services.

[204 S.C. at 161, 403 S.E.2d at ____; capitalization in brackets for clarity.]

APPLICATION OF GLASSCOCK FACTORS IN AWARD

In awarding \$17,000.00 in attorneys' fees and expenses, the Circuit Court held as follows:

(13) Plaintiffs [sic] counsel submitted invoices totaling \$22,479 in attorney's fees and costs. Both counsel presented arguments on the attorney's fees issue. These documents and arguments reflected the nature and difficulty of pursuing and proving Plaintiffs [sic] case and denoted the substantial time devoted to the matter on Plaintiffs behalf. Further, Plaintiffs [sic] counsel is of sound professional standing, charged a reasonable and customary rate for services, and obtained beneficial results for Plaintiff. I therefore find that Plaintiff is entitled to an award of attorney's fees in the amount of \$17,000.

[RECORD ON APPEAL, Final Order of Judgment entered November 19, 2015, p.____.]

It is clear on the face of these quoted findings that the Circuit Court never considered the factor of time necessarily devoted to this action. This objection is not merely technical.

The dealings between the parties involved two lawsuits, later tried as one matter. [*Record on Appeal*, Order entered June 11, 2015, p.____.] The Respondent filed Motions to request additional time for discovery responses, and to continue the case. [*Record on Appeal*, p.____.] The Respondent's suit was against the Appellant FRANK DOMNICK and his wife, SHELLY L. DOMNICK; no basis for Mrs. DOMNICK's liability was found by the Court. [*Record on Appeal*, Final Order of Judgment, p.____.]

Most basically, the proof of attorneys' fees and expenses was presented in the form of an unverified, summary form which does not indicate the work performed or the actions taken. [*Record on Appeal*, Plaintiff's Exhibit No. 13, p.____.] Objection to the claimed attorneys' fees was made at trial on these points. [*Record on Appeal*, Transcript, p.____.]

It is submitted that work performed owing to the Plaintiff's ability to timely respond to discovery, or to try the action when the same was called for trial, and work to prosecute SHELLY L. DOMNICK cannot – at least without additional findings – represent work “necessarily devoted to the case”, in the language of factor (2) under *Glasscock*, quoted above.

In addition, the Appellants' separate action, designated as “Frank Domnick v. Chris

Norman Domnick”, filed as Civil Action 2014-CP-29-0382, was, as stated above, joined with the action which has produced this appeal. That other action, and the defenses raised thereunder, arose from dealings between the parties other than those directly related to the claimed debt.

In addition to the above, the Respondent sued the Appellants on claims of breach of contract, breach accompanied by a fraudulent act, fraud, constructive fraud, and *quantum meruit*. The contract claim was allowed by the Circuit Court; the other causes of action relating to fraud were disallowed. [*Record on Appeal*, Final Order of Judgment, p.____.] Since the Invoice of Respondent’s counsel was obviously prepared prior to trial², some determination was required of the Court as to the portion attributable to that fraud claim and as to the accuracy of the claimed billing for the trial itself.

The submitted invoice [*Record on Appeal*, Plaintiff’s Exhibit No. 13, p.____] details only costs: attorney’s fees are listed only as amounts and names. There is no indication of what work gave rise to the fees claimed by this document, which is the sole evidentiary basis for the Circuit Court’s allowance of attorneys’ fees.

NON-APPLICABILITY OF MAYBANK RULING

In advancing this position, the Appellants are aware of the decision of the Supreme Court in *Maybank v. BB&T Corp.*, App. Case No. 2014-002638, Op. No. 27640 (June 3, 2016). In that case, the Supreme Court dealt with a claim of insufficient detail in the attorneys’ affidavit for fees and expenses.³ In *Maybank, supra*, the party awarded fees had prevailed on five out of eleven claims. His opponent argued that the submitted affidavit lacked detail sufficient to identify how the billed hours correlated to the successful claims. There, the Supreme Court held that the claims of the party whose fees were awarded “shared the same common facts and required combined efforts throughout the litigation process.” [*Id.*, p.29.]

The facts of *Maybank* do not apply in this case. The claim for the monies advanced is one cause of action. The claims involving fraud required separate and entirely different facts to provide their proof. In addition to this fact, there was no evidentiary basis for the Trial Court to weigh the time involved in the Respondent’s delays in discovery, his requests for continuance, his defense against the second suit, which was based upon the Respondent’s dealings with the

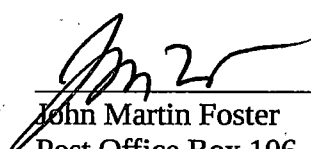
2 The Invoice is dated the same date as trial but presented at the end of the trial [*Record on Appeal*, Transcript, p.____.] It includes, however, hours spent and mileage for that date. No explanation as to the accuracy of those items, or how the same were arrived at, was requested or given. [*Id.*]

3 The Appellants again note that no affidavit as to the claimed fees and expenses was submitted in this case.

United States Bankruptcy Court and the delay occasioned thereby. The Appellants would further note the complete lack of any proven basis for suit against the Appellant SHELLY L. DOMNICK.

CONCLUSION

The Appellants argue, in summary, that the Circuit Court lacked documentation sufficient to make any determination as to which actions or work of counsel for the Plaintiff were "necessarily devoted to the case". As such, the award of attorneys' fees fails to address the requirements of *Glasscock, supra*, and cannot be sustained. This matter must be returned to the Circuit Court, upon a proper submission for attorneys' fees and expenses, for a proper determination.



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August 3, 2016

Rock Hill, South Carolina

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CERTIFICATE OF SERVICE

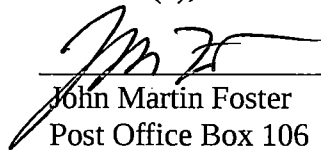
I certify that, on the date below, I have served the Initial Brief of Appellants and Designation of Matter to Be Included in the Record on Appeal on the following counsel of record:

D. Alan Lazenby
Ginger D. Goforth
Lazenby Law Firm, LLC
Post Office Box 6099
Spartanburg, S. C. 29304

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

August 3, 2016



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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

SC Court of Appeals

Re: Charles M. Domnick, Respondent,
v. Frank Leroy Domnick and Shelly L. Domnick, Appellants
Appeallate Case No. 2015-002558

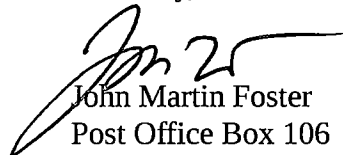
Dear Ms. Kitchings:

In accordance with Rules 208 and 210, S.C.A.C.R., enclosed herewith please find the original and one (1) copy of both the Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal, together with Certificate of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorneys for the Respondent with copies of the said Initial Brief and Designation of Matter, as evidenced by the Certificate of Service.

Please return the extra conformed copies to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

Sincerely,



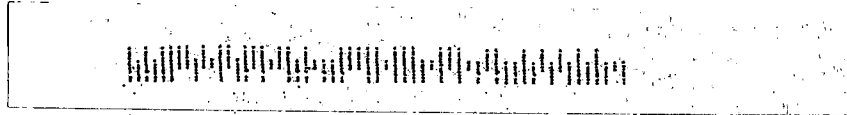
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