United States District Court
Southern District of Texas

Case Number: 04-3618

ATTACHMENT

Description:

☐ State Court Record ☐ State Court Record Continued

☐ Administrative Record

☐ Document continued - Part _____ of _____

☐ Exhibit to: _____
number(s) / letter(s) _____

Other: 37-44

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very person's own firm was experiencing cash flow problems. This Court believes, and so finds, that the Debtor paid the money because she believed that the Agreement so required and that Rainey would have a meritorious suit against her if she refused to pay him.[17]

The Debtor's testimony at trial that Rainey was an incompetent attorney and a weak person also calls into question the Debtor's credibility for a reason wholly unrelated to the characterization of the $400,000.00 paid to Rainey as an advance. In the proceeding at bar, the Debtor has pleaded as an affirmative defense that Rainey did not mitigate his damages because after he had resigned from her firm and joined another firm, she asked him to help her prosecute the Davenport/Brio Litigation but he refused. [Transcript D1, p. 160, lines 5 - 15].

This Court believes that the Debtor's mitigation defense must fail because Rainey had no duty to participate in the prosecution of the Davenport/Brio Litigation. *See infra*. However, even if this mitigation theory is viable in certain circumstances, it is completely illogical in this situation given the Debtor's testimony about Rainey's skills as an attorney. She has testified that Rainey allowed people to step all over him [Transcript D3, p. 150, lines 3 - 4] and she told the mediator that he was completely ineffective. Indeed, she testified that she also has an affirmative defense of contributory negligence because when Williams pulled the funding of $65,000.00 per month, Rainey "was not performing his duties as he was required to perform." [Transcript D1, p. 160, lines 18 - 23]. If all this was true–and the Debtor was adamant at trial that it was–then as an attorney who had a duty to zealously represent her clients in the Davenport/Brio Litigation, why would she want to

[17]This finding of fact is Number 84.

bring Rainey back and have him assist in the remaining Brio/DOP Litigation? No capable attorney—and the Debtor testified at trial that she was "a very good lawyer" [Transcript D1, p. 205, line 2]—would want to bring another attorney into a case as co-counsel if the attorney already working the case believes that the prospective co-counsel is as horrid a lawyer as the Debtor described Rainey at trial and in pre-trial correspondence. Indeed, to bring such a poor attorney into the suit as co-counsel would probably be a negligent referral and expose the attorney already on the suit to a negligence claim by the clients. A cause of action for negligent referral of one professional by another is a legitimate claim for a client to assert. *See, e.g. Novis v. Silver*, 701 So. 2d 1238 (Fla. Ct. of App. 1997) (discussing a client's cause of action against an attorney for that attorney's negligent referral to the client of a personal injury attorney who, upon retention, committed malpractice); *Tranor v. The Bloomsburg Hosp.*, 60 F. Supp. 2d 412 (M.D. Pa. 1999) (discussing a client's cause of action against her doctor for negligently referring her to a surgeon who botched the operation). Moreover, and by no means the least important point, to take such action would be unethical because bringing an incompetent attorney on board would constitute a violation of the Debtor's fiduciary duty to her clients for failing to protect the interests of her clients. *Cf.* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.14, *reprinted in* TEX. GOVT. CODE ANN., tit. 2, Subt. G app. A, Art. 10, § 9, Rule 1.14 (Vernon 2005) (TEX. STATE BAR R. art. X, § 9).

Under these circumstances, this Court finds that the Debtor's testimony about Rainey's incompetence is not credible. The Court believes that the Debtor, who never once told Rainey that he was performing poorly when he was at her firm [Transcript D4, p. 18, line 12 through p. 19, line 13], and who never removed him from the Brio/DOP Litigation during his entire tenure at her firm

[FOF No. 9], chose to fabricate stories about Rainey after he departed her law firm in order to create what she believed would be meritorious affirmative defenses. The Debtor has failed in this endeavor.

The Debtor's letter to Rainey of January 12, 1998, [FOF No. 40], provides a further indication of the Debtor's poor credibility. The Debtor wrote this letter to Rainey approximately four months after he had departed her firm and roughly three months before he filed the 1998 Lawsuit. At this point, the Debtor and Rainey were communicating directly about whether the Debtor was going to pay Rainey what he believed she still owed him under the Agreement. The Debtor wrote him a lengthy letter setting forth her reasons as to why she did not owe him anything. Nowhere in this letter is there any reference to the reason that the Debtor constantly gave at trial: namely, that Rainey was entitled to nothing until (a) all of the Brio/DOP Litigation was complete; and (b) it was determined that total aggregate fees exceeded total aggregate expenses. It strains credulity that this letter is wholly devoid of any such discussion if the Debtor has really believed all along—as she testified at trial—that the Agreement requires Rainey to wait until the end of all the Brio/DOP Litigation before receiving any distribution.

Indeed, the last paragraph of the Debtor's January 12, 1998, letter is telling because the message is not that Rainey must wait until the end of the Brio/DOP Litigation to see if money will be coming his way. Rather, the message is that the Brio/DOP Litigation has not generated the fees that the Debtor thought it would; that Rainey has already received a "great profit;" that the Debtor has absorbed a staggering loss; and that therefore "[i]n light of these facts my feeling is that we are more than right with each other"—i.e. the Debtor has already paid Rainey enough money to fulfill

her promise and he will receive no more. At that time, the Debtor's position was clear: she was not going to pay one more cent to Rainey, not because total expenses exceeded total fees—this determination could not yet be made because the Davenport/Brio Litigation was far from over—but because the fees that had already been generated fell short of expectations, the Debtor herself was in financial difficulty, and she had already paid Rainey enough money. Under these circumstances, the Court finds that the Debtor was not being candid at trial when she testified that her position all along has been that the Agreement provides that Rainey is not entitled to any money until the entire Brio/DOP Litigation is completely over.

It is worth noting that in many respects, the Debtor's position on January 12, 1998, was the same position that she communicated to the mediator over a year later when Rainey and she were in mediation attempting to settle the 1998 Lawsuit. On April 19, 1999, the Debtor wrote the mediator a 7-page letter setting forth her thoughts as to why Rainey was not entitled to receive any more money. [FOF No. 47]. She informed the mediator that she was experiencing "mounting debt" and that the Brio/DOP Litigation had not generated the fees that she had initially anticipated. Then, in the last two paragraphs of this letter, the Debtor expressed her belief that a further reason that Rainey was not entitled to any money was not because the Brio/DOP Litigation was still ongoing but rather because:

> As far as VWD [i.e. the Debtor] is concerned, RSR [i.e. Rainey] has been grossly over-paid and his skills highly over-rated. Many others who worked directly with RSR are ready to attest to his lack of competence, commitment and effective contribution to the ultimate result (albeit less that [sic] all had hoped) in the Brio case. His lack of commitment to the clients can and will, if necessary, clearly be shown by what has now happened in Galveston. Finally, as far as any benefit or income (beyond Brio) that he supposedly brought to VWD's firm, the numbers speak

> for themselves. In the entire time he worked at the Law Offices of VWD, RSR's total, combined figure for all four years amount to less than $25K in fees.
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> It is VWD's position that RSR is not entitled to one more dime from her firm, via Brio or otherwise. I guess this makes the potential for an amicable settlement look pretty bleak, doesn't it? [Debtor's Exhibit #64].

If the Debtor really believed that the Agreement required Rainey to wait until all of the Brio/DOP Litigation was completed before he was entitled to receive any money, why did she not convey this position to the mediator? Why would she spend time discussing her own financial situation or blasting Rainey for his lack of competence and commitment? This Court believes, and so finds, that the Debtor, up until the time Rainey initiated this adversary proceeding, never believed that the Agreement required Rainey to wait until the end of all Brio/DOP Litigation.[18] At the time of the mediation, this Court believes, and so finds, that the Debtor interpreted the Agreement just as Rainey did, but because the fees were not as high as she anticipated, she decided to argue that Rainey's incompetence and her deteriorating financial condition barred Rainey from receiving more than the $400,000.00 that she had already paid him.[19] Then, once Rainey filed this adversary proceeding, the Debtor devised yet another basis for arguing that Rainey is not entitled to a dime more: the Agreement requires him to wait until the completion of every suit comprising the Brio/DOP Litigation. The interpretation that the Debtor articulated at trial is an interpretation that the Debtor formulated as a litigation strategy. It will not work.

In addition to the glaring inconsistencies of the Debtor's testimony on the key points of the

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[18]This finding of fact is number 85.

[19]This finding of fact is number 86.

dispute, discussed above, the Debtor's demeanor as a witness further undermined her credibility. At various points during trial, the Debtor did everything she could to avoid answering the question posed to her. For example, when Rainey's counsel asked the Debtor whether she had ever given Rainey back-up information on the expenses she claims relate to the O'Quinn/Brio Litigation, the Debtor did not want to answer the question:

Q We had the discussion about the $178,301.10 and in your direct testimony a moment ago you said that was definitely related to the Allen-Brio case expenses, correct?

A Yes, I think it is.

Q And what I need to know is do you have the back up for those expenses?

A I'll tell you one of the - - I don't know if I do but I think that, perhaps, Mr. Williams does because if you look - -

Q Okay. What I'm trying to find out today is do we - - have you ever given Mr. Rainey the back up for those expenses; you haven't have you?

A I think Mr. Rainey has in the material he has been provided, yes.

Q Listen to my question.

A Yes, I do.

Q You've never given those – you personally have never given those to Mr. Rainey, have you?

A I've given Mr. Rainey access to that information. An (sp?) I believe it has been in the information he has reviewed.

Q One last time, if I may, perhaps my question wasn't clear. You, personally, have not handed to Mr. Rainey the back up for those documents, have you?

A I want to say it's not my job but - -

THE COURT: Just answer the question, Ms. Davenport.

THE WITNESS: No, I have never personally done that, I've had other people do it for me.

[Transcript D3, p. 228, line 13 through p. 229, line 13].[20]

Finally, the Debtor's credibility is compromised by a pleading that she filed in one of the suits comprising the Davenport/Brio Litigation. One of these suits was in the United States District Court for the Southern District of Texas, Galveston Division. The Debtor failed to designate expert witnesses for the plaintiffs as required by the docket control order issued by the presiding U.S. District Judge, The Honorable Samuel B. Kent. The Debtor then moved for a continuance of the trial, which Judge Kent denied. [Debtor's Exhibit #47]. Thereafter, the defendant filed a Motion for Summary Judgment on the grounds that the plaintiffs' failure to designate expert witnesses was

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[20]It is worth noting that the Debtor's sister, Denise Novotny, who helps run the office of the Davenport Law Firm, disagreed with the Debtor about Rainey having access to the records at the law firm concerning expenses, thereby casting further aspersions on the Debtor's credibility. Novotny's testimony was as follows:

Q All right. And I believe the testimony was he had free rein of the accounting. If Mr. Rainey came back after 9/15/1997, he wasn't going to have free rein of your accounting department was he?

A No.

Q In fact, he would have been ushered out of the offices?

A Well, politely.

Q He would have been asked to leave, correct?

A He would have been asked to leave.

Q And he would not have been allowed to look at the books after 9/15/1997, would he?

A Well, not on his own. He wouldn't have been able to go back there and have free rein of it. He could have asked for it and given some information maybe.

[Transcript D5, p. 53, lines 4 - 17].

sufficient grounds for granting summary judgment. The Debtor, as counsel for the plaintiffs, responded by filing a motion requesting the Court: (a) to reconsider its earlier order denying the motion to continue the trial setting; and (b) to grant the plaintiffs an extension of time to respond to the motion for summary judgment. [Debtor's Exhibit #49]. Judge Kent denied this motion, but the Debtor again filed a motion for reconsideration. [Debtor's Exhibit #52]. Judge Kent decided to hold a hearing on the motion for reconsideration simultaneously with the docket call for trial. In an order Judge Kent issued after this hearing, he wrote:

> On January 7, 2003, docket call was held as scheduled in the case. At that time, four months beyond the deadline and one week before trial, Plaintiffs still had not designated any expert witnesses, nor had Plaintiffs responded to Defendants' Motion for Summary Judgment. In an abundance of caution, this Court held an emergency hearing on Plaintiffs' Motion for Reconsideration. This Court and counsel for Plaintiffs and Defendants explored the options available to the Court in light of Plaintiffs' counsel's astonishing lapses in the handling of the case. At the hearing, the Court went to genuine lengths to seek out a way to balance the equities between the Parties and to avoid draconian results to Plaintiffs arising solely from Plaintiff's counsel's conduct. After protracted discussion on the record, Plaintiffs' counsel orally withdrew from this case and any other cases that she might have pending before this Court and agreed to submit to the Court written Motions to the same effect by the close of business on January 10, 2003.
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> Typical of her handling throughout this case, Plaintiffs' counsel hand-delivered the written Motion minutes before said deadline. Although these Motions are timely filed and will be GRANTED, they are in all other respects manifestly misleading. Plaintiffs' counsel's Motions are disingenuous at best and deceitful at worst, by failing to incorporate either the spirit or the egregious facts of the crisis in which Plaintiffs' counsel found herself and placed her clients and by failing to acknowledge either the cause or the effects of her withdrawal. For example, in the Motions, Plaintiffs' counsel states that "[s]aid withdrawal of Plaintiffs Counsel will not delay the proceedings in this matter." Counsel for Pls. Mot. to Withdraw at ¶7. Nothing could be further from the truth. Plaintiffs' counsel was facing trial this week in the *Greek* case. It has consequently been delayed for months. For Plaintiffs' counsel to suggest that her withdrawal will not delay her clients' trials is simply preposterous. (emphasis added) [Rainey's Exhibit #45].