IN THE COURT OF APPEALS OF IOWA

No. 0-705 / 09-1868
Filed December 22, 2010

DANIEL D. BERNSTEIN,
Plaintiff-Appellee/Cross-Appellant,

vs.

WILLIAM J. BRIBRIESCO & ASSOCIATES and WILLIAM J. BRIBRIESCO, Individually,
Defendants-Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Scott County, L. Vern Robinson, Judge.

The defendants appeal from a district court decree allocating attorney fees received by the plaintiff after he left the defendants' law firm. Plaintiff cross-appeals the denial of his claim against the defendants for unpaid wages. **AFFIRMED.**

Anthony J. Bribiesco and William J. Bribriesco of William J. Bribriesco & Associates, Bettendorf, for appellants.

Charles T. Traw of Leff Law Firm, L.L.P., Iowa City, for appellee.

Daniel D. Bernstein, Davenport, pro se.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

MANSFIELD, P.J.

This lawsuit is between two lawyers over the termination of their relationship within a single law firm. William Bribriesco, the proprietor of William J. Bribriesco & Associates, alleges his former associate, Daniel Bernstein, breached an oral agreement regarding the division of attorney fees on several contingent cases that Bernstein took with him when he left the firm. Bribriesco also alleges Bernstein breached fiduciary duties owed to the firm. Bernstein cross-appeals, asserting Bribriesco is liable for liquidated damages because Bribriesco did not timely pay his wages while Bernstein worked at the firm. *See* Iowa Code § 91A.8 (2009).

Upon our review, we affirm the district court's rejection of these claims. The district court's finding of no oral agreement is supported by substantial evidence. Bribriesco's breach of fiduciary duty claim also fails because it depends on the existence of such an oral agreement, and the evidence shows Bernstein did not breach fiduciary duties as claimed. Additionally, we find chapter 91A does not support Bernstein's claim for liquidated damages under the circumstances of this case.

I. Background Facts and Proceedings

The law firm of William J. Bribriesco & Associates (the Firm) is located in Bettendorf and primarily practices in workers' compensation, personal injury, and medical malpractice on a contingency fee basis. In July 1996, Bernstein joined the Firm as an associate. Under his oral employment agreement, Bernstein was paid an annual salary of $30,000 in biweekly installments plus fifty percent of the net contingency fee on cases he worked on or brought in. This agreement

contained no understanding concerning the termination of the employment relationship or how fees would be allocated in the event of termination.

In 2000, another associate at the Firm, Ed Cervantes, decided to leave and form his own firm. At this time, Cervantes and Bribriesco came to an oral separation agreement whereby Cervantes took certain files he was already working on. Cervantes and Bribriesco further agreed to split evenly the fees earned on those cases and that the Firm would forward any needed costs upon request. Over the next several years, Cervantes and Bribriesco were able to close all the files under the oral agreement without dispute.

Beginning in January 2006, the Firm began to fall behind on Bernstein's biweekly salary. Bernstein claims he repeatedly complained to Bribriesco and the Firm's office manager. Bribriesco acknowledged that not all payments were made in a timely fashion, but asserts that he and Bernstein entered into an oral agreement whereby payments would be made when the Firm was able to do so. Although Bernstein was always paid his wages, payments were made anywhere from one to four months late.

Bernstein lives in Iowa City and commutes to Bettendorf. During the years 2006 and 2007, Bernstein paid for advertising space in the Yellow Book and Dex phone books for the Iowa City area. The ads made no reference to the Firm and provided a phone number that was forwarded to Bernstein's cell phone. Bernstein would generally meet individuals who responded to these ads away from the Firm in Iowa City. Bernstein did not clear these ads in advance with Bribriesco, but he maintains all clients gained through them were processed through the Firm.

Bernstein's employment with the Firm came to an end late in 2007. On December 18, 2007, Bribriesco and Bernstein had a heated argument in the Firm's library that concluded with Bribriesco firing Bernstein. Both parties admit the argument occurred and that choice words were exchanged; however, what followed the "blowup" is highly disputed. Bribriesco claims he and Bernstein reached an oral agreement that Bernstein would take the files he had been working on, the Firm would continue to advance fees on a case-by-case basis, and upon the conclusion of each case, fees would be split fifty-fifty between Bernstein and the Firm—essentially the same arrangement Bribriesco had reached earlier with Cervantes. Bernstein denies any such agreement was reached.

Bernstein claims that during the heated argument, Bribriesco raised the subject of an agreement, stating, "We're going to do with these files the same way we did with Ed Cervantes' files," to which Bernstein responded, "We'll see about that, or like hell we will." At this point, Bernstein states he left the library and returned to his office. After a cooling down period, Bernstein says he returned to the library and apologized to Bribriesco. However, Bernstein claims no further conversations occurred regarding how clients were going to be handled or how costs and fees were to be allocated.

Bribriesco insists the handling of cases was not discussed during the "blowup." Rather, Bribriesco states that, following the blowup, he went to another office that contained a workout bike and started to ride it. While Bribriesco was riding the bike, Bernstein entered the room and yelled, "Truce, truce, truce," before asking, "Can I have the same type of deal as Ed Cervantes?" to which

Bribriesco replied, "Yes." Bribriesco then claims Bernstein asked about advancing costs, and Bribriesco replied it would be handled on a case-by-case basis. Bernstein left and Bribriesco continued to ride the bike. Later that day, according to Bribriesco, he and Bernstein met again in the library and talked further about the advancing of costs.

Bernstein's final day of employment at the Firm was December 31, 2007. On his last day of work, Bernstein packed up approximately twenty-eight client files that he had primarily been working on and took them with him. Before Bernstein left, the Firm's office manager made a list of the files Bernstein was taking with him. Bernstein says he spoke with each of those clients at some point, either in person or over the phone, and gave them the option of staying with the Firm or retaining him as their attorney. The clients opted to retain Bernstein as their attorney.

On February 8, 2008, Bribriesco wrote a letter to Bernstein regarding the wages Bernstein was still owed. This letter stated:

> Per our discussion, I am memorializing the status of your health insurance. We have paid your portion of the health insurance for the months of January and February. The cost per month for your health insurance is $538.09. Thus, we have paid a total of $1,076.18.
>
> As you know, you have been paid through November 30, 2007. There remains 4 weeks, or 2 pay periods remaining to be paid to you by our office. Said two pay periods would total $2,307.16. Therefore, we have calculated the following:
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> | | |
> |---|---|
> | Salary owed thru 12-31-07: | $2,307.16 |
> | Insurance premiums paid to date: | $1,076.18 |
> | Net due: | $1,230.98 |
>
> I would propose that we continue to make your insurance payments through April 30, 2008, at that time we will reassess the situation. Please advise.

Bernstein never replied to this letter. He does not dispute that the Firm paid his health insurance premiums for March, April, and May 2008.

In mid-March 2008, Bernstein settled two of the cases he had taken with him from the Firm. The settlement payments were endorsed by the Firm, but Bernstein did not reimburse the Firm any portion of the fee or costs advanced.

On May 15, 2008, Bribriesco wrote a letter to Bernstein inquiring about the settlement proceeds and threatening to place attorney liens on all of Bernstein's cases. The letter further set forth Bribriesco's understanding of the oral separation agreement:

> When your relationship as an Associate with this firm was terminated effective January 1, 2008, you and this firm reached the following agreement:
>
> 1. Cases that you were assigned would be completed with any assistance required by this firm. A list of the cases in question should be in your possession and has been retained by this firm;
> 2. As in the past, any fees recovered would be divided equally between you and the firm and this firm's portion of any fee would be paid at time of disbursement (i.e. a $30,000 fee would be disbursed $15,000 to you and $15,000 to the firm);
> 3. Like attorney fees, any costs advanced by this firm would be paid at time of disbursement; and
> 4. That if any further costs were required to be advanced after January 1, 2008, same would be considered by this firm on a case-by-case basis.

Bernstein responded by letter on May 29, 2008, denying the existence of "a formal written separation agreement" and denying he had agreed to the terms set out in Bribriesco's letter. Bernstein went on to assert that the Firm's consistently late payment of his salary had placed him in "a state of financial desperation" where he struggled to make mortgage, car, utility, credit card,

medical, and other various payments. Following this exchange, Bribriesco placed attorney liens on all cases removed from the Firm by Bernstein.

In June, Bernstein settled two additional cases. For these two cases, Bernstein paid the Firm one half of the attorney fees collected without reserving any rights.

In November 2008, Bernstein settled a fifth case. At this time, Bernstein filed a petition for declaratory judgment as well as a cause of action under the Iowa Wage Payment Collection Law, Iowa Code chapter 91A. Bribriesco answered and counterclaimed, alleging breach of the oral separation agreement and breach of fiduciary duty. The causes of action came to trial before the district court without a jury on September 30 and October 1, 2009.

In its decision, the district court concluded there was no separation agreement between the parties and that the rights of the parties relating to fees should be based on quantum merit. It then accepted Bernstein's quantum meruit calculations and entered a monetary award in his favor.[1] All remaining claims were dismissed, including Bribriesco's breach of fiduciary duty claim and Bernstein's chapter 91A wage payment claim.

Bribriesco appeals and Bernstein cross-appeals the district court decree.

[1] For quantum meruit purposes, Bernstein estimated the amount of time he had spent on each of the disputed cases while at the Firm, as opposed to the time he had spent on each case on his own. Using those percentages, Bernstein requested all of the fees he had earned after he left, and half of the fees he had earned while at the Firm. Bribriesco did not challenge this methodology if the court had to resort to a quantum meruit calculation; he simply argued the parties had an oral agreement that should be enforced.

II. Standard of Review

Our review is for the correction of errors at law. *Gallagher, Langles & Gallagher v. Burco*, 587 N.W.2d 615, 617 (Iowa Ct. App. 1998). The trial court's findings of fact have the effect of a special verdict and are binding on us if supported by substantial evidence. *Id*.

III. Analysis

A. Existence of An Oral Separation Agreement

Bribriesco argues the district court erred in finding there was no oral separation agreement. Bribriesco claims Bernstein's testimony is unbelievable and is contrary to the testimony of the "neutral" witness, Ed Cervantes. Bribriesco further urges Bernstein's own conduct of accepting the equal division of fees in two matters supports the existence of an agreement, and that by stating in his May 29, 2008 letter that no "formal *written* separation agreement" existed, Bernstein implicitly acknowledged an oral agreement had been reached. Finally, Bribriesco argues it is implausible that he would have allowed Bernstein to walk out of the Firm on December 31, 2007, with twenty-eight files, and made no effort ever to contact those clients himself (e.g., via a joint letter from both lawyers), if he did not believe he had an understanding with Bernstein.

Under Iowa law:

> The existence of an oral contract, as well as its terms and whether it was breached, are ordinarily questions for the trier of fact. To prove the existence of an oral contract, the terms must be sufficiently definite for a court to determine with certainty the duties of each party, the conditions relative to performance, and a reasonably certain basis for a remedy. Where a contract appears to exist, courts are reluctant to find it too uncertain to be enforceable. However, when the terms are too indefinite, courts are reluctant to impose reasonable terms on contracting parties.

Id. (citations omitted).

In this case, the district court was presented with conflicting testimony from Bernstein and Bribriesco as to whether an oral separation agreement was entered into immediately following the heated exchange on December 18, 2007. When evidence is in conflict, we entrust the weighing of testimony and decisions about the credibility of witnesses to the trier of fact. *Seastrom v. Farm Bureau Life Ins. Co.*, 601 N.W.2d 339, 346 (Iowa 1999). The district court gave greater weight to Bernstein's version of the events, which was its prerogative.

In addition, Cervantes's testimony is ambiguous and, if anything, actually supports a finding that no agreement was reached.[2] As Cervantes testified, it was his understanding that Bernstein and Bribriesco were "trying to work out some agreement," but he had no idea if they ever agreed on "the specifics." Cervantes was also unsure on the time frames of his conversations with both Bernstein and Bribriesco, but believed that Bernstein did not begin to ask him about the specifics of his situation until approximately a month to two months before trial. As Cervantes put it, "[W]hen I spoke to Bill and Dan, it was more like *I'm going to offer him* the same deal and *I'm seeking* the same deal . . . ." (Emphasis added.)

We also do not find Bernstein's conduct after he left the Firm mandates a finding that there was a separation agreement. Bernstein's payment of half the fees on two cases does not necessarily mean he agreed to or acquiesced in the

[2] Cervantes, of course, was not a direct witness to what happened on December 18, 2007, but had discussions with both parties afterward. Cervantes testified that he was friendly to both parties and he appeared without a subpoena, but he clearly was uncomfortable about his position in the middle of their dispute.

alleged separation agreement, because at the same time Bernstein was still refusing to make payment in two other cases. In addition, while Bernstein's May 29, 2008 letter does not unequivocally deny the existence of an oral separation agreement, it does not admit such an agreement either, and Bernstein unequivocally denied the existence of such an agreement when he testified at trial.

In sum, while one could find that an oral separation agreement had been proved on this record, the district court's finding of no agreement certainly is supported by substantial evidence. Further, assuming that no separation agreement existed, neither party has challenged the district court's quantum meruit award. *See Phil Watson, P.C. v. Peterson*, 650 N.W.2d 562, 568 (Iowa 2002). Accordingly, we affirm those findings.

B. Breach of Fiduciary Duty

Bribriesco also claims the district court should have found that Bernstein breached a fiduciary duty owed to the Firm. In the district court, Bribriesco focused on the advertisements placed by Bernstein in two Iowa City phone books in 2006 and 2007 without Bribriesco's knowledge or approval. These advertisements did not mention the Firm and the phone number provided went to Bernstein's cell phone. The district court dismissed this claim, finding, "[A]ny cases which may have been generated from that listing were handled through the Bribriesco law firm. There was no disloyalty, and, if anything, Bribriesco benefited from the arrangement." Bribriesco has not raised or briefed this argument on appeal; therefore, we find it to be waived. Iowa R. App. P. 6.903(*g*).

On appeal, Bribriesco has changed course. He insists Bernstein breached his fiduciary duties after December 31, 2007, when he influenced clients improperly to choose him as their attorney rather than the Firm. However, this issue was not ruled upon by the district court, and Bribriesco did not file a motion to enlarge or amend. Accordingly, we find that error was not preserved. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Even if error had been preserved, the breach of fiduciary duty claim would be without merit. In *Phil Watson, P.C.*, 650 N.W.2d at 565 n.1, our supreme court stated:

> [C]lients do not "belong" to the firm or its individual members; clients are free to choose their own attorney, and a departing lawyer has an equal right to notify clients of an impending change so clients may make an informed choice of lawyers.

There is no evidence that Bernstein contacted any clients about joining him until after he had been fired by Bribriesco. Although Bernstein took those clients' files with him on December 31, 2007, the Firm was aware of this activity and did not object at the time. In any event, it was up to the clients where their files should go. Bribriesco had an equal right to notify those clients and ask them to remain with the Firm. As stated in his brief, Bribriesco's real objection seems to be that he "believed that Bernstein would honor their separation agreement." But the district court found the separation agreement was not proved. There was no error in the rejection of the fiduciary duty claim.

C. Liquidated Damages for Untimely Paid Wages

Lastly, Bernstein cross-appeals the district court's denial of his claim under Iowa Code chapter 91A for compensation for the wages he was paid late while employed by the Firm. Bernstein claims the Firm intentionally failed to pay his wages on regular intervals. Although the wages were ultimately paid, Bernstein contends he should be entitled to liquidated damages under section 91A.8.

Under the Iowa Wage Payment Collection Law, an employer shall "pay all wages due" to its employees, and shall do so "on regular paydays which are at consistent intervals from each other." *See* Iowa Code § 91A.3(1). Bernstein has claimed that because of the Firm's untimely payments in violation of section 91A.3(1), he struggled to make mortgage, car, utility, credit card, medical, and other various payments. However, Bernstein put no evidence in the record of those damages. Instead, he simply sought liquidated damages under section 91A.8 based on the late payments.

However, we agree with Bribriesco that liquidated damages are not available under chapter 91A in the absence of some unpaid wages. Section 91A.2(6) specifically provides that liquidated damages "shall not exceed the amount of the unpaid wages." We are unaware of any precedent where liquidated damages were awarded under section 91A.8 when, at the time the action was brought, there were no unpaid wages. Thus, Bernstein's claim was properly rejected.

IV. Conclusion

For the foregoing reasons, we affirm the district court's ruling in its entirety.

AFFIRMED.