2018 IL App (1st) 172969-U

FIRST DIVISION
September 28, 2018

No. 1-17-2969

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STOLTMANN LAW OFFICES, P.C.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 17 L 5914
	)	
ECCLESTON LAW, LLC,	)	Honorable
	)	Raymond W. Mitchell,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Pierce and Griffin concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's dismissal of plaintiff law firm's complaint alleging breaches of contract and fiduciary duty by defendant law firm is affirmed. The fees plaintiff alleged it was entitled to share were earned through litigation falling outside the scope of the written engagement agreement with the client. To the extent that plaintiff argues defendant had a duty to draft a broader engagement agreement, plaintiff failed to include that theory in its complaint or in any proposed amendment to its complaint.

¶ 2 I. BACKGROUND

¶ 3 This is a dispute between two Chicago law firms, plaintiff Stoltmann Law Offices, P.C. (Stoltmann) and defendant Eccleston Law, LLC (Eccleston). Stoltmann alleged that, pursuant to

a joint-venture agreement between the two firms, it was entitled to a fifty-percent share of the fees received by Eccleston for the settlement of a securities class action brought on behalf of Eccleston's client, Susan Moses, and a class of similarly situated investors.

¶ 4 On June 12, 2017, Stoltmann filed a two-count complaint against Eccleston for breach of contract and breach of fiduciary duty. Stoltmann alleged that in the past the two firms had worked together on various matters—class action litigation and dispute resolution before the Financial Industry Regulatory Authority (FINRA) or Judicial Arbitration and Mediation Services (JAMS)—and had always split the contingent fees earned in those matters equally. According to Stoltmann, at some unspecified time the firms entered into a joint-venture agreement to pursue FINRA claims against David Lerner and Associates (Lerner), a broker-dealer who promoted a failed real-estate investment, and class action claims against the investment itself, Apple Hospitality REIT, Inc. (Apple Hospitality). A real-estate investment trust, or REIT, is "a company that invests and manages a portfolio of real estate, with the majority of the trust's income distributed to its shareholders." Black's Law Dictionary (10th ed. 2014). Pursuant to this arrangement, the parties pursued a number of FINRA claims against Lerner, with Eccleston referring the clients, Stoltmann performing the legal work, and the firms splitting any fees that they recovered equally.

¶ 5 Stoltmann alleged that the parties' joint-venture agreement "was memorialized in the client agreements," and attached, by way of example, an engagement agreement entered into with Ms. Moses on August 3, 2011. The document bears the heading "Engagement Agreement for Services Against David Lerner Associates" and contains the following provisions:

> "Thank you for selecting Eccleston Law Offices, P.C. to represent you. The scope of our engagement is to investigate your personal claims against David Lerner Associates

related to the sale of investments including, but not limited to, Apple REITs, CMOs and other investments, and, if appropriate, to settle, arbitrate or otherwise advance your claim with co-counsel Andrew Stoltmann of Stoltmann Law Offices in order to recover your investment losses and other damages and/or to provide liquidity and any other relief. This is the engagement letter for those services.

We will prosecute your claim on a contingency fee basis. We will receive a contingency fee from any and all monetary amounts you receive by way of settlement, award, judgment or otherwise, and by way of mediation, arbitration, court action, regulatory action or prosecutorial action. If the monetary amount is received 30 days or more ahead of the first scheduled arbitration hearing date, the firm will receive a contingency fee equal to 37½%. If the monetary amount is received thereafter, the firm will receive a contingency fee equal to 40%. The contingency fee will be calculated on the gross recovery before deduction of expenses.

* * *

Our engagement to represent you will be deemed to have terminated when we have completed our services contemplated by this agreement. You may terminate our services at any time, provided you do so in writing."

¶ 6 Stoltmann further alleged that on October 23, 2012, the firms also jointly filed a class action against Lerner and "reaffirmed their agreement to split the fees arising therefrom equally." But in the spring of 2014 Eccleston, working with other co-counsel, filed a separate class action on behalf of Ms. Moses and a class of similarly situated investors against Apple Hospitality and its officers and directors. Stoltmann alleged that Eccleston kept this lawsuit a secret from Stoltmann, and that Stoltmann did not find out about it until on or about March 9, 2017, when it

learned that the case had resulted in a $5,500,000 settlement, including legal fees in the amount of $1,833,331.50 (one-third of the settlement amount).

¶ 7 In an email exchange on March 8 and 9, 2017, Andrew Stoltmann confronted Jim Eccleston about the class action settlement, asking: "When do I get my share of our Apple derivative lawsuit settlement? It settled approximately 6 weeks ago. Please let me know." Mr. Eccleston responded "Hah! Have our law firms merged?" prompting Mr. Stoltmann to explained why he felt his firm was due a share of the settlement proceeds:

> "No Jim. But we had a joint venture in these Apple cases to work and split the cases evenly. We handled the class action [against Lerner] together. [Stoltmann Law Offices] handled a bunch of Finra cases and paid you your share. I was shocked to just learn that not only had you been Cocounsel on another Apple related case but it's settled for I believe $5 million and you were clearly planning on keeping this fee for yourself and not share it equally with me. In this joint venture we were fiduciaries to one another and therefore owed each other duties like candor and truthfulness. In other words not to discreetly try to settle a multi-million fee and abscond with it without telling me. Please give me details on this case including when our share is coming in and whether you agree to split it equally consistent with all of our other Apple reit cases. If not I will take the appropriate next step."

¶ 8 Stoltmann alleged that, by keeping the class action against Apple Hospitality a secret and refusing to share the fees generated from the settlement of those claims, Eccleston had breached its fiduciary duties of reasonable care, loyalty, and candor that it owed Stoltmann as a party to the firms' joint venture.

¶ 9 Stoltmann also alleged that Eccleston breached the August 3, 2011, written engagement agreement entered into with Ms. Moses, which, according to Stoltmann, "provided that Stoltmann and Eccleston would jointly represent Moses in her claim against Apple."

¶ 10 Stoltmann sought damages in the amount of $916,665.75, one half of the fees awarded in the class action against Apple Hospitality.

¶ 11 Eccleston moved to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)), on the basis that the August 3, 2011, engagement letter with Ms. Moses was unenforceable because it did not strictly comply with Rule 1.5 of the Illinois Rules of Professional Conduct. Specifically, Eccleston pointed out that the letter failed to state the percentage share of any contingent fee that each firm would receive, as required by Rule 1.5(e). Ill. R. Prof'l Conduct R. 1.5(e) (eff. Jan. 1, 2010).

¶ 12 Eccleston also sought dismissal pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2016)), arguing that the scope of the August 3, 2011, written engagement agreement with Ms. Moses was limited to claims against the broker-dealer, David Lerner Associates, and that the representation contemplated by that document concluded on August 2013, when an arbitration panel found in Lerner's favor on those claims. The class action filed months later against Apple Hospitality included no claims against Lerner and was, according to Eccleston, a completely separate matter.

¶ 13 In support of its motion, Eccleston submitted an affidavit from one of its attorneys, Mark Roth, attaching copies of both the November 2011 FINRA complaint against Lerner jointly filed on Ms. Moses's behalf by Stoltmann and Eccleston and the August 22, 2013, fee award in Lerner's favor resolving the claims in that complaint.

¶ 14 In opposition to the motion, Stoltmann insisted that its claims for breach of fiduciary duty

and breach of contract were "well-pled, simple, and sufficient to withstand a Motion to Dismiss without further amendment." According to Stoltmann, the written engagement agreement with Ms. Moses substantially complied with Rule 1.5, and Eccleston, as the drafter of that agreement, should not be rewarded for failing to include in it a precise allocation of fees between the two firms. Stoltmann also maintained that, even if the court found there was no enforceable fee-sharing agreement, it had still stated a claim for breach of fiduciary duty, based on the fact that Eccleston "secretly lured Ms. Moses to pursue a class action case separate from Stoltmann without Stoltmann's knowledge."

¶ 15 The circuit court heard argument and dismissed Stoltmann's complaint with prejudice, concluding that there was "no set of facts which [Stoltmann] [could] plead which would entitle it to a share of the contingent fee earned on the class action lawsuit." The court set forth two independent bases for its ruling: (1) the August 3, 2011, engagement agreement with Ms. Moses was unenforceable because it failed, as required by Rule 1.5, to specify how fees would be apportioned between the two firms and (2) "[t]he class action lawsuit [against Apple Hospitality] [wa]s simply outside the scope of that written engagement agreement."

¶ 16 Stoltmann filed a motion for reconsideration or clarification of the dismissal order, arguing that strict compliance with Rule 1.5(e) was not required where Eccleston was both the party that drafted the written engagement agreement with Ms. Moses and the firm initially retained by Ms. Moses. The circuit court denied the motion, and Stoltmann appealed.

¶ 17 II. JURISDICTION

¶ 18 The circuit court dismissed Stoltmann's complaint with prejudice on September 18, 2017, and denied its motion to reconsider or clarify that ruling on November 8, 2017. Stoltmann timely filed its notice of appeal from those orders on November 27, 2017. We have jurisdiction over this

matter pursuant to Illinois Supreme Court Rules 301 and 303, governing appeals from final judgments in civil cases. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. Jan. 1, 2015).

¶ 19 III. ANALYSIS

¶ 20 A motion to dismiss under section 2-615 challenges the legal sufficiency of a complaint. *Kanerva v. Weems*, 2014 IL 115811, ¶ 33. "The essential question is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted." *Cochran v. Securitas Security Services USA, Inc.*, 2017 IL 121200, ¶ 11. Dismissal pursuant to section 2-615 is proper when "it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recover." *Id.*

¶ 21 A motion to dismiss under section 2-619 of the Code, by contrast, "admits the legal sufficiency of the complaint but asserts that some affirmative matter defeats the plaintiff's claim." *Stone Street Partners, LLC v. City of Chicago Department of Administrative Hearings*, 2017 IL 117720, ¶ 4.

¶ 22 When considering a motion to dismiss under either section, a court accepts as true all well-pleaded facts and reasonable inferences that may arise from those facts. *Kanerva*, 2014 IL 115811, ¶ 33; *Stone Street*, 2017 IL 117720, ¶ 4. Our review of an order granting or denying a motion to dismiss under either section is *de novo*. *Cochran*, 2017 IL 121200, ¶ 11; *Stone Street*, 2017 IL 117720, ¶ 4.

¶ 23 Here, the circuit court's dismissal of Stoltmann's claims, based on a failure to allege that the disputed fees fell within the scope of an enforceable fee-sharing agreement, appears to have been under section 2-615. For the reasons that follow, we agree that dismissal under that section was proper.

¶ 24 Rule 1.5(e) of the Illinois Rules of Professional Conduct of 2010 governs fee-sharing agreements between lawyers who are not in the same firm. Ill. R. Prof'l Conduct R. 1.5(e) (eff. Jan. 1, 2010). The Rule provides that such agreements may be made only under the following circumstances:

> "(1) The division [of fees] is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable." *Id.*

¶ 25 We have noted that Rule 1.5 "embod[ies] this state's public policy of placing the rights of clients above and beyond any lawyers' remedies in seeking to enforce fee-sharing arrangements." *Romanek v. Connelly*, 324 Ill. App. 3d 393, 399 (2001). "The provisions of Rule 1.5 'operate with the force and effect of law.' " *W. Fohrman & Assoc., Ltd. v. Mark D. Alberts, P.C.*, 2014 IL App (1st) 123351, ¶ 33 (quoting *Romanek*, 324 Ill. App. at 399). As such, "[c]ontracts between lawyers that violate [the Rule] are against public policy and cannot be enforced." *Richards v. SSM Health Care, Inc.*, 311 Ill. App. 3d 560, 564 (2000).

¶ 26 In their briefs the parties focus primarily on the first of the two alternative bases the circuit court relied on in its dismissal order, arguing over whether the August 3, 2011, engagement agreement with Ms. Moses is enforceable given that, in contravention of Rule 1.5(e), it fails to disclose a specific allocation of fees between the firms. As it did in the circuit court, Stoltmann insists that the agreement may be enforced, both because it at least substantially

complies with Rule 1.5(e) and because Eccleston, as the drafter of the agreement, should not be allowed to benefit from its own failure to include in the agreement an essential term under the Rules. Eccleston maintains that the agreement is unenforceable.

¶ 27 In our view, it is unnecessary to resolve these arguments because the scope of the written engagement agreement with Ms. Moses could not be clearer; it pertains only to Ms. Moses's claims against Lerner, the broker-dealer. At the top of the page, in bold lettering, the document states that it is an "Engagement Agreement for Services *Against David Lerner Associates*." (Emphasis added.) The second sentence of the first paragraph reiterates that limited scope: "[t]he scope of our engagement is to investigate your personal claims *against David Lerner Associates* related to the sale of investments including, but not limited to, Apple REITs ***. This is the engagement letter for those services." (Emphasis added.) Although the FINRA arbitration award Eccleston attached as support for its argument that dismissal was proper under section 2-619 of the Code further demonstrates that the claims against Lerner were resolved on August 22, 2013, well before the class action against Apple Hospitality was even filed, one need not rely on that external document to conclude that the fees Stoltmann now seeks fall outside the scope of the only written engagement letter it has alleged. See *Loyola University of Chicago v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 130984WC, ¶ 23 ("Where the language of a contract is plain, it provides the best evidence of the parties' intent and will be enforced as written."). Dismissal was proper under section 2-615 of the Code because it was clear from the face of the agreement itself—which was attached to and incorporated into the complaint—that it did not extend to any claims against Apple Hospitality.

¶ 28 Stoltmann insists, however, that the firms orally entered into a much broader joint-venture agreement, pursuant to which they agreed to work together to pursue claims on behalf of

Eccleston's clients against both Lerner *and* Apple Hospitality. Perhaps they did. But the law is quite clear that oral fee-sharing agreements are unenforceable. *Anderson v. Anchor Organization for Health Maintenance*, 274 Ill. App. 3d 1001, 1011 (1995). As we noted in *Holstein v. Grossman*, 246 Ill. App. 3d 719, 735 (1993), where we considered the predecessor to Rule 1.5(e), the purpose of a "signed writing requirement" is to guarantee "[t]he client's right to counsel of his choosing." We stressed there that the "paramount concern must be the effect [that] fee-sharing agreements have on the clients, not the attorneys involved." *Id.* at 737.

¶ 29 We must also reject Stoltmann's argument that the circuit court improperly resolved an ambiguity in the complaint on a section 2-615 motion to dismiss. Stoltmann refers to the conflict between its allegation that the parties' oral joint-venture agreement covered claims against Apple Hospitality as well as Lerner and its allegation that the August 3, 2011, written engagement agreement with Ms. Moses—which mentions only claims against Lerner—"memorialized" the joint-venture agreement. Both cannot be true. But, again, it does not matter. The law is clear that a fee-sharing agreement must be in writing and the only written agreement referred to in Stoltmann's complaint is the August 3, 2011, agreement, which plainly does not entitle Stoltmann to share in fees obtained in connection with claims against any party other than Lerner. Based on the only written agreement referenced in its pleading, Stoltmann clearly failed to state a claim against Eccleston for breach of contract.

¶ 30 On appeal, Stoltmann seems to argue in the alternative that Eccleston breached its fiduciary duties as a party to the joint venture by failing to disclose that broader joint-venture agreement to Ms. Moses and obtain her assent to an enforceable agreement memorializing the firms' fee-sharing arrangement with respect to claims against Apple Hospitality. For purposes of this alternative argument Stoltmann concedes "that the engagement letter that formed the basis of

the Circuit Court's decision only pertained to the Lerner litigation, not the REIT [Apple Hospitality] litigation," but argues that "Rule 1.5(c) [governing the contents of contingent-fee agreements] required Eccleston to create a separate engagement letter signed by its clients to memorialize its contingent fee arrangement for the REIT class action." Stoltmann faults the circuit court for "void[ing] the joint venture agreement based upon an engagement letter that had nothing to do with the litigation at issue in this case."

¶ 31 This theory, articulated somewhat obscurely and for the first time on appeal, is inconsistent with the allegations of Stoltmann's complaint, which attached the August 3, 2011, written engagement agreement with Ms. Moses and alleged that it did indeed encompass her class action claims against Apple Hospitality. Stoltmann alleged, for example, that the parties' joint-venture agreement "*was memorialized*" (emphasis added) in the agreement, and that "[o]n August 3, 2011, Stoltmann, Eccleston, and Susan Moses entered into a written engagement agreement that provided that Stoltmann would jointly represent Moses *in her claim against Apple [Hospitality]*" (emphasis added). For the reasons discussed above, there is no support for this reading of the engagement agreement.

¶ 32 Stoltmann had every right to plead in the alternative. *Heastie v. Roberts*, 226 Ill. 2d 515, 557 (2007). We recognize that there is some support in Illinois law for a claim that it was Eccleston's fiduciary duty to its joint venture partner to draft and present Eccleston's client with an agreement memorializing the purported arrangement between the firms to share fees on claims against Apple Hospitality. In *Holstein*, for example, a bankruptcy attorney alleged that he had entered into an oral joint-venture agreement with another attorney, pursuant to which he would refer his clients with personal injury claims to the attorney in exchange for a one-half share of any fees generated on those claims. *Holstein*, 246 Ill. App. 3d at 721-22. The plaintiff

alleged that he had even drafted a model engagement agreement that the personal injury attorney was supposed to use with the referred clients, but that the attorney had instead presented them each with an agreement making no mention of the firms' arrangement. *Id*. at 723. We held in that case that, although the plaintiff's breach of contract claim failed as a matter of law because there was no written fee-sharing agreement that complied with Rule 1.5(e), "a breach of fiduciary duty action m[ight] nevertheless lie," where the plaintiff alleged that it was the defendant's own breach of fiduciary duty that rendered the agreement unenforceable as a matter of contract law. *Id*. at 737, 742.

¶ 33 There are some concerns that the decision in *Holstein* does not fully address. These include the speculative nature of a claim that presumes a client would have signed a written agreement that could have been, but was not, presented to her as well as the concern that permitting the recovery of fees under one theory where the same recovery is prohibited for public policy reasons under another theory undermines the protections of Rule 1.5(e). But we need not resolve those concerns here, where Stoltmann failed to even include in its complaint any allegation that Eccleston had a duty to draft and present a different fee agreement to its client. The complaint that was presented to the trial court was properly dismissed and there is no way to read that complaint as encompassing this claim.

¶ 34 We note that the only breach of fiduciary duty alleged in the complaint was that Eccleston breached its fiduciary duty to Stoltmann because it kept the class action against Apple Hospitality a secret. That is a completely different theory of liability, apparently premised on the idea that, if it had only known sooner that it had a claim against Eccleston, Stoltmann could somehow have more effectively enforced its right to half the fees in the Apple Hospitality class action. Stoltmann does not make any specific argument on appeal in support of this count of its

complaint and indeed, it would appear that any damages on that alleged breach would be completely speculative.

¶ 34 Stoltmann also appears to argue that, at the very least, it should have been permitted to amend its complaint. However, this argument, to the extent that it is made, is forfeited. Although Stoltmann included cursory requests for leave to amend in its opposition brief and motion for reconsideration, it advanced no argument for why leave to amend should be granted and presented no proposed amendment for the circuit court's consideration. In exercising its discretion to decide whether leave to amend should be granted a circuit court "must review the proposed amended pleading to determine," among other things, "whether it would cure the defect in the pleadings." *In re Huron Consulting Group, Inc., Shareholder Derivative Litigation*, 2012 IL App (1st) 103519, ¶ 68. A proper motion for leave to amend a complaint accordingly "must contain an argument for permitting an amendment *** and [attach] a copy of the proposed amended pleading." *Id.* Our supreme court has made clear that when, as here, a party fails to make a proposed amended pleading part of the record it forfeits its right to have this court review the circuit court's denial of leave to amend. *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507, 521 (1987).

¶ 35 In sum, the claims against Apple Hospitality were not part of the written engagement agreement that Ms. Moses signed, and we decline to consider for the first time on appeal the argument, contradictory to Stoltmann's allegations, that Eccleston breached its fiduciary duty by failing to draft a broader engagement agreement with Ms. Moses disclosing the parties' purported oral agreement to share fees generated in connection with those claims.

¶ 35 IV. CONCLUSION

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court dismissing

Stoltmann's complaint with prejudice.

¶ 37 Affirmed.