

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 1840

**VIVIAN L. SMITH INDIVIDUALLY AND ON BEHALF
OF THE MINOR, EDWARD L. SMITH**

VERSUS

**ALLIED WASTE IND., INC., AND
AIG INSURANCE COMPANY**

—
**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 504,701, Section 27
Honorable Donald R. Johnson, Judge Presiding**
—

Elizabeth Baker Murrill
Baton Rouge, LA

Attorney for
Defendant-in-Concursus/Appellant
Vivian L. Smith, Individually and on
behalf of the minor, Edward L. Smith

Clarence T. Nalls, Jr.
Baton Rouge, LA

In Proper Person
Plaintiff-in-Concursus/Appellee

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

Judgment rendered AUG - 8 2008

Downing, J. concurs.

*RHP
by PAA
JEK
by PAA*

PARRO, J.

In this dispute over an attorney's contingency fee, Vivian L. Smith appeals a judgment granting summary judgment in favor of her former attorney, Clarence T. Nalls, Jr., and dismissing her claims in a reconventional demand against him. For the following reasons, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

This matter began when Clarence T. Nalls, Jr. filed a lawsuit for his client, Vivian L. Smith, alleging that she and her minor son had been injured in an automobile accident. An answer was filed by BFI Waste Services, LLC and its insurer, American Home Assurance Company, admitting they were the proper defendants and generally denying all other allegations.

The next pleading in the record is a petition in concursus proceeding filed by Nalls, claiming the parties had negotiated a settlement in the amount of \$47,500 and that he had a check for those funds.¹ Nalls alleged that Smith had reneged on her agreement to the settlement, that he was claiming one-third of that amount as his contingency fee pursuant to a fee agreement she had signed, and that he wished to deposit the check into the registry of the court so his and Smith's interests in the funds could be determined by the court. The court granted him leave to deposit the sum of \$47,500 into the registry of the court; however, the Clerk of Court did not accept the cashier's check for deposit, because Smith had not endorsed it.

Smith filed an answer and reconventional demand, disputing Nalls' claim that she had signed an agreement authorizing him to collect a fee of one-third of the total recovery of any amount over \$40,000 and that she had agreed to the \$47,500 settlement. Her reconventional demand alleged she told Nalls the \$47,500 settlement offer was unacceptable and terminated him as her counsel. She also claimed that, despite this, Nalls settled the lawsuit without her knowledge or consent, failed to provide an accurate accounting of the settlement proceeds, and claimed a one-third interest in the proceeds, to which she had not agreed. Smith further claimed she had initially

¹ A copy of the \$47,500 check is in the record, showing it was issued by American Home Assurance Company and was payable to Vivian L. Smith and Clarence T. Nalls, Jr., her attorney.

refused to sign the settlement documents, but signed them and endorsed the check under duress after being told she could be responsible for attorney fees and costs in a proceeding to enforce the settlement. She stated that instead of then depositing the funds in the registry of the court, Nalls had a cashier's check issued to her in the amount of \$31,248; she requested permission to deposit this amount into the registry of the court. She claimed Nalls did not account for the balance that he withheld and was not entitled to a contingency fee, because she had fired him. She claimed damages for Nalls' breach of his professional responsibilities and breach of contract, as well as tort damages for certain actions he took at her place of employment when he tried to get her to sign the settlement agreement. The trial court granted Smith leave to deposit the \$31,248 into the registry of the court and denied her request that the court order Nalls to deposit the remaining proceeds.²

Nalls answered the reconventional demand, denying most of her allegations and averring that the parties had signed a fee agreement, that he had a valid claim to one-third of the settlement proceeds, that he had sent Smith an itemized statement, and that Smith had never told him he was fired. He reconvened for damages against her for defamation of character, humiliation, embarrassment, and mental anguish stemming from her filing of a complaint against him with the Louisiana Attorney Disciplinary Board, in which she called him a liar, a cheat, and an ambulance chaser and claimed he had propositioned her. A copy of her complaint was attached. He also filed an exception raising the objections of no cause or right of action, and asked for the imposition of sanctions on her new attorney for filing baseless claims against him. In a separate pleading, Nalls filed a declinatory exception of *lis pendens*, asserting that since Smith's complaint was pending against him with the Disciplinary Board, the court had no subject matter jurisdiction over her reconventional demand.

Smith filed a request for reconsideration of the court's ruling declining to order Nalls to deposit the remaining settlement funds into the registry of the court. This request was denied, along with Nalls' exceptions of no cause of action, no right of action,

² The record does not indicate whether the \$31,248 was ever deposited into the registry of the court.

and *lis pendens* regarding Smith's reconventional demand. His request for sanctions was deferred to the merits. Eventually, Smith's new attorney enrolled as her counsel and filed a motion and order of dismissal of Smith's original petition for personal injury damages, which was granted.

The parties engaged in discovery, and Smith filed a motion to compel Nalls to respond to interrogatories seeking information concerning the bank in which he maintained his IOLTA account and to a request for production of copies of bank statements for his IOLTA account showing that the money in dispute had remained in an IOLTA account continuously since the dispute arose. Nalls opposed the motion and filed an exception of *res judicata* concerning the court's prior ruling declining to order him to deposit the disputed funds into the registry of the court. He also filed another motion for sanctions against Smith and her attorney.

Nalls then filed a motion for summary judgment, supported with photocopies of his fee agreement, the \$47,500 settlement check with Smith's endorsement, the signed receipt and release, the \$31,248 cashier's check issued to Smith for her portion of the settlement, an itemized statement of expenses, and the court's denial of Smith's request to order him to deposit disputed funds into the registry of the court. Nalls claimed there were no genuine issues of material fact, because the signed fee agreement showed that if Smith recovered over \$40,000, Nalls' fee was to be one-third of the total amount. Nalls claimed Smith agreed to accept \$47,500 in settlement, as shown by her endorsement on the settlement check and her signature on the receipt and release documents. He said he deposited the funds into his client trust account, deducted one-third of the proceeds as per the agreement, and remitted to Smith a cashier's check in the amount of \$31,248, "minus \$200.00 for court costs and medicals in the amount of \$144.00."

Smith opposed the motion, supporting her opposition with excerpts from her deposition. She argued that there were many genuine issues of material fact, including whether or not she had fired Nalls, whether she had voluntarily agreed to the settlement or signed the documents under duress, and whether she had agreed to his contingency fee, as he interpreted it.

After a hearing, the trial court granted Nalls' motion for summary judgment, and

Smith appealed. Because the judgment said nothing about the dismissal of Smith's claims and was not designated as final, this court remanded to the trial court to provide appropriate decretal language in the judgment. A judgment was signed on January 9, 2008, granting Nalls' motion for summary judgment and dismissing all claims asserted by Smith in her reconventional demand. Smith's motion to compel was denied as moot. The judgment was designated as final, having dismissed all of Smith's claims. Accordingly, consideration of this appeal followed.

APPLICABLE LAW

An appellate court reviews a district court's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the district court's consideration of whether summary judgment is appropriate. Smith v. Our Lady of the Lake Hosp., Inc., 93-2512 (La. 7/5/94), 639 So.2d 730, 750. The motion should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show there is no genuine issue of material fact and the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B); Johnson v. Evan Hall Sugar Co-op., Inc., 01-2956 (La. App. 1st Cir. 12/30/02), 836 So.2d 484, 486.

On a motion for summary judgment, if the moving party will not bear the burden of proof at trial on the matter before the court on the motion, the moving party must point out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. If the adverse party then fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact and summary judgment must be granted. LSA-C.C.P. art. 966(C)(2); Washauer v. J.C. Penney Co., Inc., 03-0642 (La. App. 1st Cir. 4/21/04), 879 So.2d 195, 197. However, if the issue before the court on the motion for summary judgment is one on which the party bringing the motion will bear the burden of proof at trial, the burden of showing that there is no genuine issue of material fact is on the party bringing the motion. LSA-C.C.P. art. 966(C)(2); Buck's Run Enterprises, Inc. v. Mapp Const., Inc., 99-3054 (La. App. 1st Cir. 2/16/01), 808 So.2d 428, 431.

Article 967 of the Louisiana Code of Civil Procedure describes the type of

documentation a party may submit in support of or in opposition to a motion for summary judgment. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181 (La. 2/29/00), 755 So.2d 226, 231. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits. LSA-C.C.P. art. 967. A document that is not an affidavit or sworn to in any way, or is not certified or attached to an affidavit, is not of sufficient evidentiary quality on summary judgment to be given weight in determining whether or not there remain genuine issues of material fact. Sanders v. J. Ray McDermott, Inc., 03-0064 (La. App. 1st Cir. 11/7/03), 867 So.2d 771, 775; Boland v. West Feliciana Parish Police Jury, 03-1297 (La. App. 1st Cir. 6/25/04), 878 So.2d 808, 813, writ denied, 04-2286 (La. 11/24/04), 888 So.2d 231.

DISCUSSION

Nalls would bear the burden of proof at trial on his claim that he is due one-third of the \$47,500 settlement, pursuant to a contingency fee agreement signed by Smith. He would also bear the burden of proving that he had properly accounted for the fee, plus any deductions for out-of-pocket expenses, such as medical expenses and court costs paid by him. Therefore, the burden of proof on this motion for summary judgment remained with Nalls.

After reviewing this matter *de novo*, we conclude that for many reasons, Nalls failed to carry his burden of proof on the motion. For the sake of brevity, we will address only three of those reasons. First, the check Nalls remitted to Smith was in the amount of \$31,248, which supposedly represented the balance due to her after his one-third contingency fee and expenses were deducted. Yet, based on the documents he submitted, it is not possible to compute that amount. In his memorandum in support of the motion, Nalls stated that he "remitted Ms. Smith a cashier check in the amount of \$31,248.00, minus \$200.00 for court cost and medicals in the amount of \$144.00." The

documentation submitted in support of this amount was an "Agreement" that was not signed by Smith and stated the following:

Be it known this 3rd day of March 2004, that I Vivian Smith [have] received \$ 47500.00 in settlement of my claim against AIG Insurance Co resulting from auto wreck which occurred on _____.

Further, my attorney, Clarence T. Nalls, Jr. has received _____ or \$9166.00 as his fee for handling this matter for me, as agreed.

Further, [as] agreed, he has deducted the cost of my medical services in the amount of \$ -0-. This leaves me a net amount of \$37876.00.

The amounts shown in italics above are handwritten on the form. At the bottom of the form, underneath the blank signature line, appears another handwritten notation, indicating a filing cost of \$318.00 and an advance to Dr. Kidder in the amount of \$140.00, for a total of \$458.00. This computation would suggest that Nalls first deducted \$20,000 from the settlement amount, possibly because Smith already had an offer for that amount when she retained his services, and then computed a one-third contingency fee on \$27,500, the amount obtained as a result of his services, and did not deduct anything for fees and expenses. However, he did not remit to Smith the \$37,876 balance shown on this computation, but paid her \$31,248, keeping \$16,252 for his fee and expenses. We have not found any computation based on one-third of \$47,500 and allowing for fees and expenses that would result in a balance for Nalls of \$16,252.

The second problem with Nalls' motion for summary judgment is the document signed by Smith and Nalls on December 12, 2002, purporting to represent the contingency fee agreement. The entire half-page document is handwritten and appears to be a few sketchy notes about Smith's claims. The notations pertinent to the attorney fee are as follows:

\$20,000 -- \$500.00
\$21,-2500.00 -- \$1500.00
\$26,000-30,000 = 20%
\$31,000-40,000 = 20%
\$40,000 over = 1/3

Nothing in this document addresses the handling of out-of-pocket expenditures, such as filing fees and medical expenses. Also, from various other documents and pleadings in the record, it is obvious that the document lends itself to various interpretations. In Smith's complaint to the Disciplinary Board, she stated that she believed Nalls was

entitled to \$9,185 (33-1/3% of \$27,500). Yet, in her deposition, she claimed he assured her that his fee would not exceed \$5,000. In contrast, Nalls obviously made some kind of computation based on the entire settlement amount of \$47,500 when he withheld \$16,252 for his fee and expenses. Therefore, the document is too ambiguous to support Nalls' claims.

Finally, although we have reviewed these documents to point out their ambiguities, none of the documentation submitted by Nalls in support of his motion for summary judgment meets the evidentiary criteria of LSA-C.C.P. art. 967. Nalls did not support his motion with an affidavit, but merely attached photocopies of various documents to his motion and memorandum. A document that is not an affidavit or sworn to in any way, or is not certified or attached to an affidavit, is not of sufficient evidentiary quality on summary judgment to be given weight in determining whether or not there remain genuine issues of material fact. Therefore, the documents should not have been considered by the trial court in reaching its decision on the motion. Without those documents, there is nothing to carry Nalls' burden of proof, and the judgment in his favor must be reversed.

Smith also assigned as error the trial court's denial of her motion to compel discovery of certain documents relating to Nalls' IOLTA account. The trial court did not address this issue, but merely dismissed it as moot after dismissing all of Smith's claims in her reconventional demand. Since this court is reversing the trial court's judgment, that issue is no longer moot and should be considered on remand, along with other outstanding issues in the case.

CONCLUSION

For the foregoing reasons, we reverse the judgment of January 9, 2008, and remand this case to the trial court for further proceedings. All costs of this appeal are assessed to Nalls.

REVERSED AND REMANDED.