NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4668-14T3

STUART P. SCHLEM, ESQ.,

Plaintiff-Appellant,

v.

SHPENDI MYRTEZA,

Defendant-Respondent.

Argued November 10, 2016 – Decided March 20, 2017

Before Judges Alvarez and Manahan.[1]

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2269-12.

Stuart P. Schlem, appellant, argued the cause pro se.

---

[1] Hon. Carol E. Higbee participated in the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:13-2(b), "Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge determines that an appeal should be determined by a panel of 3 judges." The presiding judge has determined that this appeal shall be decided by two judges.

Demetrios K. Stratis argued the cause for respondent (Ruta, Soulios & Stratis, LLP, attorneys; Mr. Stratis, of counsel and on the brief; Gabriel F. Luaces, on the brief).

PER CURIAM

Plaintiff Stuart Schlem appeals from a May 5, 2015, award of counsel fees in the amount of $5471 against defendant Shpendi Myrteza. Based upon our review of the record and the applicable law, we affirm.

We discern the following facts from the record as essential to our determination. On February 24, 2011, a fire occurred at defendant's rental property located at 2-06 Fair Lawn Avenue, Fair Lawn. Due to the fire and the ensuing loss of monthly rental income, defendant states he was unable to continue mortgage payments on the property to mortgagee MetLife Home Loans, a division of MetLife Bank, N.A. (MetLife).

The subject property was insured by Amica Mutual Insurance Company (Amica). In 2010, prior to the fire loss, the Amica policy was cancelled due to failure to pay the premium. Apparently, when alerted to the cancellation, to protect its interest, MetLife obtained a force-placed insurance policy through American Security Insurance Company (ASIC).

According to defendant, he first became aware that his insurance policy lapsed when he contacted Amica after the fire.

He also learned of the existence of the ASIC policy, which provided mortgage redemption coverage, but did not provide coverage for the structure. Defendant then contacted an insurance adjuster, who put him in contact with plaintiff.

Defendant and plaintiff met to discuss the matter for the first time in April 2011. When plaintiff informed defendant that his hourly rate was $275, defendant replied that he could not afford that rate. Plaintiff and defendant agreed on a contingent fee arrangement. On June 6, 2011, plaintiff and defendant entered into a written retainer agreement, entitling plaintiff "to retain from the proceeds of the litigation, whether obtained by trial, settlement or otherwise, an amount equal to thirty (30%) percent of any recovery obtained." The agreement also called for defendant to pay a $5000 retainer in regular installments. Pursuant to the agreement, defendant was responsible for all disbursements incurred in connection with the litigation, including "filing fees, deposition transcript fees, expert witness fees, major photocopying expenses, overnight mailing expenses and the like."

On July 6, 2011, plaintiff commenced an action on behalf of defendant against MetLife, for failure to advise defendant of the absence of coverage on his rental property, to confirm coverage under the Amica policy issued to defendant, and to compel ASIC's coverage obligation to MetLife in order to satisfy the mortgage.

After several months of settlement negotiations, in December 2011, defendant terminated the services of plaintiff and retained new counsel. Plaintiff withdrew as counsel.

In April 2012, defendant, represented by new counsel, entered into a settlement agreement with ASIC and MetLife. Under the terms of the agreement, ASIC agreed to pay $197,969.95 to MetLife in satisfaction of the balance owed on the note as secured by the mortgage and an additional amount of $34,905.05 paid directly to defendant representing the total loss from the fire. The agreement specifically called for the parties not to disclose any information to plaintiff, to remove plaintiff's name from any and all settlement drafts, and for defendant to resolve any fee disputes with plaintiff without any involvement or liability on the part of MetLife or ASIC. ASIC agreed to compensate defendant for the rebuilding of the structure "for a sum equal to the amount actually expended to rebuild in excess of [$232,875]," so long as the recoverable depreciation amount does not exceed $70,125, as per the remaining limits on the policy.

In May 2012, plaintiff filed a complaint against defendant demanding payment in the amount $74,187.98 for attorney services rendered in accordance with the written retainer agreement. Defendant filed an answer in June 2012, asserting certain affirmative defenses and demanding dismissal of the complaint

along with attorney's fees and costs. Subsequently, plaintiff filed a motion for summary judgment.

On February 21, 2014, the Law Division judge granted summary judgment as to liability in favor of plaintiff and ordered a proof hearing to determine the amount to which plaintiff was entitled. After the proof hearing, the judge rendered an oral decision. The judge entered an order memorializing the decision. The order stated that plaintiff was "entitled to recover a contingency fee of 30% only against any all settlement proceeds paid to or on behalf or for the benefit of the defendant [] pursuant to the settlement[,] . . . beyond the $197,969.95 paid to satisfy defendant's mortgage[.]" The judge granted plaintiff a contingency fee in the amount of $5471 derived from 30% of the $34,905[2] paid by ASIC directly to defendant minus the $5000 retainer fee defendant paid to plaintiff. This appeal followed.

POINT I

THE DEFENDANT-RESPONDENT'S CONTENTION BELOW THAT HE DID NOT UNDERSTAND THE LETTER OF ENGAGEMENT IS NOT SUPPORTED BY THE FACTS.

POINT II

THE DECISION OF THE COURT BELOW WAS BASED UPON ERRONEOUS FACTS.

---

[2] While the precise amount paid by ASIC to defendant was $34,905.05 pursuant to the settlement agreement, we assume the court rounded the figure for ease of calculation.

POINT III

PLAINTIFF-APPELLANT SHOULD HAVE BEEN AWARDED A LEGAL FEE ON THE FULL AMOUNT PAID ON DEFENDANT-RESPONDENT'S BEHALF IN SATISFACTION OF THE MORTGAGE.

POINT IV

DEFENDANT-RESPONDENT WAS COLLATERALLY ESTOPPED FROM ARGUING HIS LACK OF UNDERSTANDING OF THE TERMS OF THE LETTER OF ENGAGEMENT.

POINT V

THE COURT BELOW ERRED IN LIMITING PLAINTIFF-APPELLANT'S LEGAL FEE TO THE AMOUNTS PAID DIRECTLY TO THE DEFENDANT-RESPONDENT.

POINT VI

THE COURT BELOW ERRED IN FAILING TO AWARD PLAINTIFF-APPELLANT A LEGAL FEE BASED UPON THE INCREASED COVERAGE UNDER THE ASIC POLICY.

We give substantial deference to a trial court's findings of fact. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). Deference to the court's factual findings is particularly appropriate when "the evidence is largely testimonial and involves questions of credibility" because the trial court "has a better perspective than a reviewing court in evaluating the veracity of witnesses." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting Cesare, supra, 154 N.J. at 412). These findings should only be disturbed when there is no doubt that they

are inconsistent with the relevant, credible evidence presented below, such that a manifest denial of justice would result from their preservation. Cesare, supra, 154 N.J. at 412 (citing Rova Farms, supra, 65 N.J. at 484). In contrast, the trial court's legal conclusions are reviewed de novo, as its "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995).

Trial courts have considerable latitude in resolving fee applications, and a reviewing court will not set aside an award of attorneys' fees except "on the rarest occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995). Moreover, absent an abuse of discretion, an appellate court will not disturb a trial court's decision regarding attorneys' fees when such fees are authorized expressly in a statute, court rule, or contract. Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 25 (2004). We have intervened, for example, when a court's determination "was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005) (citing Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)).

Here, plaintiff contends the settlement agreement does not differ in any substantial way from the settlement he negotiated on defendant's behalf before being released and is, in fact, merely a finalization of the agreement he negotiated. Therefore, plaintiff asserts he is contractually entitled to an amount representing 30% of $263,959.93, the fair market value of the property as determined by ASIC, minus the $5000 retainer already paid by defendant. Alternatively, plaintiff argues he is entitled to $64,862.50, which is 30% of the $232,875 ($197,969.95 to MetLife to cover the outstanding balance of the mortgage and $34,905.05 to defendant for the total loss of the house on the property), minus the $5000 retainer already paid to plaintiff. The judge disagreed and limited plaintiff's recovery to 30% of the $34,905.05 paid directly to defendant minus the $5000 retainer, for a total of $5471.50.

In reaching his determination, the judge found, in pertinent part:

> [T]here was no real risk which would entitle [plaintiff] to the windfall which would be received if the judgment were allowed to include that $197,969.95 in the calculation of the contingency fee. It is undisputed there was a forced[-]place policy in effect at the time of the fire that was in place for the sole benefit of the mortgage holder not for the sole benefit of the defendant. The mortgagor MetLife was the proper party to seek the reimbursement of the insurance proceeds.

> . . . .
>
> [D]efendant personally collected $34,905.05 to date from the insurance company ASIC for a total loss of the house on the property in question. It is clear that the defendant was not the policy holder. Defendant was not in a position to retain plaintiff for the benefit of the payee of the insurance policy but only for his own benefit. Further, it would be unrealistic to believe that the insurance policy would not have been collected at the very least to cover the fees and the mortgage of the defendant in the amount [of] $197,969.95 for MetLife, the [mortgagor].
>
> Since MetLife put the forced policy in place in order to protect [its] interest in [its] amount remaining on defendant's mortgage, . . . even in the absence of any action by the plaintiff that amount would still have gone to MetLife for the mortgage payments unquestionably in this [c]ourt's mind.

The judge determined the 30% contingency only applied to the $34,905.05, reflecting the amount defendant directly received from ASIC in excess of the balance on the mortgage and other fees defendant owed MetLife and as a result of plaintiff's representation. After consideration of the record and our standard of review, we conclude there is no reason to disturb the judgment, which is supported by substantial credible evidence in the record.

The crux of the dispute concerns the language of the retainer agreement. Interpretation and construction of a contract is a matter of law for the trial court, subject to de novo review on

appeal. Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 474 (App. Div. 2009) (citation omitted); Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998). "As a general rule, courts should enforce contracts as the parties intended[,]" and "it is a basic rule of contractual interpretation that a court must discern and implement the common intention of the parties." Pacifico v. Pacifico, 190 N.J. 258, 266 (2007) (citations omitted). According to the retainer agreement, plaintiff was to receive as his fee, "thirty [] percent of any recovery obtained" by defendant, in addition to a $5000 retainer.

When construing a contract, its terms must be given their "plain and ordinary meaning" and the agreement must be interpreted as a whole. Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) (citation omitted). Applying these principles, it is evident defendant benefited from the payoff of the mortgage, but these are amounts that he did not "recover." See also Pacifico, supra, 190 N.J. at 268 (citation omitted) ("[W]here one party chooses the term of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party."). Had plaintiff wished to define "recovery" with specificity, he could have done so.

The beneficiary of the policy, which resulted in the redemption of the mortgage was, as the judge found, MetLife, and

not defendant. Moreover, defendant could not himself "recover" the monies paid on behalf of MetLife by ASIC which were designed to allow MetLife, as mortgagee, to "recover" the amount of its loan to defendant.

Presumably, plaintiff understood the nature and purpose of the contemplated civil action when he drafted the retainer agreement: "[s]aid action . . . will seek to compel payment to you from Amica and/or MetLife, as well as payment to MetLife from [ASIC] so as to eliminate the existing mortgage on the property." (emphasis added). In light of the "expressed general purpose" of the retainer agreement, and "in the context of the circumstances at the time of the drafting," Id. at 266 (citation omitted), we conclude that the interpretation promulgated by plaintiff seeking an additional entitlement to 30% of the $197,969.95 paid to MetLife runs afoul of the parties' intent.

We are informed in our determination by the Rules of Professional Conduct (RPC) 1.5(a), that require that "[a] lawyer's fee shall be reasonable in all cases, not just fee-shifting cases[.]" Furst, supra, 182 N.J. at 21-22 (internal quotation marks omitted). In fixing a reasonable fee, a judge should consider:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and

> the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.
>
> [RPC 1.5(a).]

While here, the judge did not specifically address the RPC 1.5(a) factors, given our deferential review, we discern no clear abuse of discretion. In terms of reasonableness, we note the gross fee amount awarded to plaintiff of $10,471 approximates the value of the undisputed 43 hours plaintiff expended on defendant's case at his hourly rate of $275 (43 x 275 = $11,825). The disparity

between these amounts, in our view, does not detract from the reasonableness of the fee award.[3]

Plaintiff's remaining arguments raised on appeal are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

[3] On the other hand, were we to adopt plaintiff's claim of fee entitlement, he would be compensated at an hourly rate in excess of $1500 per hour.