

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LOTHAR BACHMANN,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 88-0302 P
)	
LEWIS G. POLLOCK,)	
)	
<i>Defendant</i>)	

**RECOMMENDED DECISION ON PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

In this declaratory judgment action, the plaintiff seeks the invalidation of a certain agreement he gave the defendant, his former attorney, by which, in partial consideration for the defendant's services, he promised to hold, for the defendant's benefit, ten percent of his equity in Tuboflex, Inc. ("Tuboflex"), a closely-held Maine corporation. The defendant has counterclaimed to enforce the agreement. Before the court at this time is the plaintiff's motion for summary judgment limited to one of the several grounds he asserts as to why the agreement should not be enforced, namely that it violates the following three distinct public policies embodied in the rules governing attorney conduct: (1) the prohibition against obtaining an interest in the subject matter of litigation; (2) the prohibition against contingent fee agreements that fail to conform with Bar requirements; and (3) the prohibition against renegotiation of fees after the inception of the attorney/client relationship. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment p. 2.

I. FACTS

The plaintiff's business relationship with the defendant, an attorney practicing in Waltham, Massachusetts, began in connection with a dispute with Hans Berghofer, owner of Tuboflex KG, a West German corporation which at that time owned fifty percent of the stock of Tuboflex. Deposition of Lothar Bachmann pp. 26-28, 14; Deposition of Lewis G. Pollock pp. 11-15. In this dispute with Berghofer, the defendant was retained by Tuboflex. Deposition of Lothar Bachmann pp. 26-28. The plaintiff was President of Tuboflex and owner of twenty-five percent of the corporation's voting stock; Robert Hamilton owned the other twenty-five percent. Deposition of Lothar Bachmann pp. 13-14. Tuboflex was engaged in sales and engineering for products that it turned over for manufacture by Hamilton & Son, Inc., a business controlled by Hamilton. *Id.* pp. 14-15; Deposition of Lewis G. Pollack pp. 16-17. The plaintiff was also employed by and owned stock in Hamilton & Son, Inc. Deposition of Lothar Bachmann p. 15; Deposition of Lewis G. Pollack pp. 17-18. The matter was resolved in January 1977 in part by converting Berghofer's voting stock into non-voting preferred stock, leaving Hamilton and the plaintiff with fifty percent of the voting stock each. Deposition of Lothar Bachman p. 28; Deposition of Lewis G. Pollack pp. 19-20.

After this dispute was resolved, the plaintiff contacted the defendant in late June or early July at a time when Hamilton had locked the plaintiff out of the building occupied by Tuboflex and Hamilton and Son, Inc. Deposition of Lothar Bachmann pp. 33-35; Deposition of Lewis G. Pollock pp. 20-22. The defendant agreed to represent the plaintiff and Tuboflex in this matter. Deposition of Lewis G. Pollock pp. 21-22. The lockout turned out to be the opening volley in a larger controversy involving these same parties. The defendant asserts that this controversy was concluded in October or November, 1977 when an agreement in principal was reached whereby the plaintiff was to purchase Hamilton's shares in Tuboflex and Hamilton & Son, Inc. was to redeem shares held by the plaintiff.

Id. p. 43. For his services, the defendant was fully paid on an hourly rate basis. Deposition of Lothar Bachmann pp. 50-52.

The defendant's law firm next assisted the plaintiff in arranging financing for Tuboflex to acquire Hamilton's shares. Deposition of Lewis G. Pollock p. 52. The defendant's then partner, Dennis O'Connor, prepared the necessary private placement securities paperwork allowing for the issuance of debentures which were sold to raise the necessary funds. *Id.* p. 51. Debentures were also issued to the defendant; the defendant claims that these were for services rendered.

It is an undisputed fact that at some point in the relationship the plaintiff signed an undated agreement to hold ten percent of his equity in Tuboflex for the benefit of the defendant. *Id.* pp. 62-63; Deposition of Lothar Bachmann pp. 59, 63 and Exhibit 15. The plaintiff asserts that the defendant demanded this additional compensation in the late fall or early winter of 1977 while the Hamilton litigation was ongoing and the defendant was actually involved in the case; that this equity position demand was over and above previously agreed upon legal fees and was to serve as an inducement for the defendant's continued representation in what the plaintiff describes as the ongoing series of lawsuits; and that the plaintiff unwillingly acceded to the defendant's demand because he believed his only alternative was to lose the defendant's services at a crucial phase in the litigation. Deposition of Lothar Bachmann pp. 55-65.

The defendant, on the other hand, characterizes the ten percent equity agreement as part of the fee arrangement he sought in late December, 1977 in connection with an entirely separate and distinct representation of the plaintiff. Deposition of Lewis G. Pollock pp. 54-55. He states that, after the plaintiff's dispute with Hamilton and his corporations had been settled,¹ the plaintiff sought his

¹ The defendant characterizes his status as non-litigation counsel, explaining that the plaintiff employed separate litigation counsel in Maine with whom he worked cooperatively. The defendant

representation in connection with a discrete dispute involving Tuboflex KG, which was then a nonvoting preferred stockholder of Tuboflex and a licensor to Tuboflex of certain trademark and other rights. *Id.* The dispute involved Tuboflex KG's attempts to rescind the licensing agreements. Exhibit 12 to Deposition of Lothar Bachmann. The defendant claims he sought a revised fee arrangement for this engagement to reflect the more complex nature of the matter and the risk he was assuming that he might be unable to recover fees if the controversy were not successfully resolved. Deposition of Lewis G. Pollack pp. 62-63, 86. This dispute was settled by working out a new licensing arrangement. Deposition of Lothar Bachmann p. 68; Deposition of Lewis G. Pollack pp. 68-69.

II. PROHIBITION AGAINST ACQUISITION OF AN INTEREST IN THE SUBJECT MATTER OF LITIGATION

accordingly argues that his engagement in connection with the Hamilton dispute ended when the underlying controversies were settled without regard to whether litigation counsel had yet arranged for the filing of all necessary papers to formally terminate the litigation itself.

Rule 3.7(c) of the Maine Bar Rules² states that:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

- (1) Assert a lien granted by law against the proceeds of such action or litigation to secure his fee or expenses. . . .
- (2) Contract with a client for a reasonable contingent fee as provided in Rule 8.

The term "lien granted by law" does not include an interest created by agreement. Opinion No. 64 of the Professional Ethics Commission of the Board of Overseers of the Bar. The purpose of Rule 3.7(c) is to protect the attorney's objectivity in pursuing the case. Opinion No. 57 of the Professional Ethics Commission of the Board of Overseers of the Bar.

The defendant argues that the disputed agreement does not constitute an acquisition by an attorney in the subject matter of litigation. According to the defendant, the controversy with Tuboflex KG involved separate contractual disputes under trademark and licensing agreements, not the ownership of the plaintiff's equity interest in Tuboflex. Rule 3.7 does not forbid an attorney from acquiring an interest in a client which is separate from and independent of litigation on behalf of the client. Opinion No. 92 of the Professional Ethics Commission of the Board of Overseers of the Bar. However, "if a lawyer, with a view towards contemplated litigation on behalf of his client were to acquire an interest in the client for the purpose of benefitting from the enhanced value of that interest as a result of that litigation, the provisions of Rule 3.7(c) would be implicated." *Id.*

² I need not decide whether Maine or Massachusetts law applies because the relevant rules are substantially identical in both states. See Mass. S.J.C. Rule 3:07; Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment p. 8.

If the plaintiff's version of the facts is correct, the defendant's equity interest in Tuboflex was acquired as payment for ongoing lawsuits involving the ownership and control of Tuboflex before the plaintiff's settlement agreement with Hamilton and his companies was final. The defendant claims that even if the equity agreement was related to this litigation with Hamilton, it did not violate Rule 3.7 because there was no dispute about the plaintiff's ownership of Tuboflex stock. Nevertheless, since the control of Tuboflex was directly at issue and since the settlement agreement itself involved negotiations about the ownership of Tuboflex stock, Rule 3.7(c) would be implicated if the defendant had acquired the equity interest in Tuboflex while he was still representing the plaintiff in that litigation. However, if the equity agreement was part of the fee arrangement only for the defendant's representation of the plaintiff in a separate licensing dispute between Tuboflex and Tuboflex KG, the defendant's interest in Tuboflex may not have related to the subject matter of the litigation under Rule 3.7(c).

The parties have presented conflicting evidence regarding whether or not the equity agreement was made to compensate for the defendant's representation in the litigation with Hamilton and whether the equity agreement was made before the Hamilton dispute was settled. These disputed facts are material to the question whether the defendant's proprietary interest in Tuboflex was an interest in the subject matter of litigation in which he was representing the plaintiff. Consequently, I conclude that summary judgment is inappropriate on the issue of whether the defendant violated the prohibition against obtaining an interest in the subject matter of litigation.

III. CONTINGENT FEE REQUIREMENTS

The plaintiff also argues that the equity agreement is an invalid contingent fee arrangement because it fails to conform to the requirements of Rule 8 of the Maine Bar Rules. The defendant does not dispute that the agreement does not satisfy the formal requirements of Rule 8; instead, he claims

that Rule 8 is inapplicable because the agreement does not constitute a contingent fee agreement.

Under Rule 8,

“Contingent fee agreement” means an agreement, express or implied, for legal services of an attorney or attorneys . . . under which compensation, contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement, is to be in an amount which either is fixed or is to be determined under a formula. The term “contingent fee agreement” shall not include an arrangement with a client, express or implied, that the client in any event is to pay to the attorney the reasonable value of his services and his reasonable expenses and disbursements.

The defendant admits that his fee arrangement was partially determined under a formula: he was to share in ten percent of the proceeds of the plaintiff's Tuboflex stock upon sale, liquidation or transfer of that stock. Nevertheless, he contends that this fee arrangement was not contingent upon the outcome of the Tuboflex licensing dispute with Tuboflex KG. In support of his claim that the agreement was contingent on the success of the lawsuit, the plaintiff cites the following statement by the defendant:

I said that I would be willing to indicate [sic] these new actions and which would entail pursuing Tuboflex K.G. aggressively and doing whatever had to be done with Hamilton again on Mr. Bachmann's personal behalf. And I would do so on the basis that we would bill and be paid based on a good result obviously and that in addition that I would ask Mr. Bachmann, should he win and obtain control and get rid of his -- terminate his partners, that I would have an opportunity to participate in 10 percent of Mr. Bachmann's equity.

Deposition of Lewis G. Pollack p. 62. The defendant claims that this statement simply meant that the equity agreement was dependent on the client's financial ability to pay, and that the plaintiff's stock would not be worth much if the litigation was unsuccessful. “We both recognized that this matter was going to probably be a very big enormous effort but there was no contingent fee. The fee was going to be billed, hopefully it would be paid sometime if he lost.” *Id.* at pp. 63-64. Because the defendant's

statements concerning whether the fee arrangement was contingent on the outcome of the litigation are subject to conflicting interpretations, there remains a genuine issue of material fact as to whether the agreement was a contingent fee arrangement.

IV. RENEGOTIATION OF FEES

The plaintiff also argues that the equity agreement is unenforceable because the defendant's fee was renegotiated after the inception of the attorney-client relationship. The defendant claims that the equity agreement was fair and free from deception and undue influence because it was a new fee contract with respect to new professional business with the same client. *See Powell v. Wandel*, 146 A.2d 61, 66 (Pa. Super. 1958). As discussed above, the plaintiff has submitted evidence indicating that the equity agreement was made as new compensation for the defendant's representation in ongoing litigation, while the defendant has presented facts supporting his claim that the equity agreement was made after the Hamilton litigation was completed as part of his fee for undertaking a new lawsuit. Because of this factual dispute, summary judgment on this question is inappropriate.

For the foregoing reasons, I recommend that the plaintiff's motion for summary judgment be **DENIED.**

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 1st day of September, 1989.

David M. Cohen
United States Magistrate