

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0304

WOODROW A. DOLES, II

VERSUS

CENTRAL BOAT RENTALS, INC.

DATE OF JUDGMENT: December 28, 2006

ON APPEAL FROM THE SIXTEENTH JUDICIAL DISTRICT COURT
(NUMBER 112,238 DIV. "A"), PARISH OF ST. MARY
STATE OF LOUISIANA

THE HONORABLE GERARD B. WATTIGNY, JUDGE

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Gray, Louisiana

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Disposition: RULE TO SHOW CAUSE RECALLED; APPEAL MAINTAINED AND RECORD ORDERED CORRECTED; AFFIRMED IN PART; REVERSED IN PART.

Handwritten initials and signatures:
EJC
JRW

Kuhn, J.

Appellant/intervenor, Ungar & Byrne, appealed the trial court's dismissal of its intervention pursuant to a motion for summary judgment filed by defendant-in-intervention, Central Boat Rentals, Inc. ("Central Boat"). We affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

In March 2004, plaintiff, Woodrow A. Doles, II, filed suit against Central Boat, his employer, alleging that he sustained injuries while working as a seaman and crewmember of a vessel. At the time the suit was filed, Douglas H. Greenburg represented Doles, but Doles later discharged Greenburg, who withdrew as counsel of record. In May 2004, Doles signed a retainer agreement with the firm of Ungar & Byrne, APLC, ("Ungar & Byrne") to represent him with respect to his personal injury claim. The retainer agreement provided for a contingent fee, and further provided that it was agreed between the parties that the claim "shall not be compromised without the written consent of ATTORNEY and CLIENT." Randy J. Ungar, George W. Byrne, Jr., and the Ungar & Byrne firm were substituted as counsel of record for Doles in June 2004.

According to the deposition testimony of Michael Scott Patterson, Central Boat's designated representative, Doles approached Central Boat on October 27, 2004, requesting to settle his claim. He presented to Patterson a handwritten letter "addressed to Mr. Ungar and Mr. Brynes [*sic*]," discharging them as his counsel as of that date.¹ He also signed on that date, in Patterson's presence, a typewritten

¹ Ungar & Byrne contend it did not receive notice of the discharge before the settlement was negotiated.

notice of discharge of counsel. It is undisputed that Doles and Central Boat finalized a settlement on October 29, 2004.

On November 19, 2004, Mr. Ungar, Mr. Byrne, and the law firm of Ungar & Byrne filed a motion to withdraw as counsel of record, stating that Doles had discharged Ungar & Byrne. On that same date, Ungar & Byrne also filed a petition of intervention in Doles's suit, asserting, among other things, that: 1) pursuant to the retainer agreement executed with Doles, it had spent considerable time and expense representing Doles; 2) without its knowledge, Doles had approached Central Boat to settle the pending claim; 3) Central Boat had discussed settlement of the claim with plaintiff without notifying Ungar & Byrne, and Central Boat had induced Doles to terminate his retainer agreement without cause, which actions constituted a tortious interference of contract; and 4) without justification or notice to Ungar & Byrne, Central Boat distributed settlement funds to Doles that recited incorrect figures for Ungar & Byrne's attorneys' fees and made no provisions for the full reimbursement of its costs and expenses. Ungar & Byrne further contended that Central Boat was liable for the full amount of its attorneys' fees, all costs and expenses incurred in the representation of Doles, and attorneys' fees and costs associated with the filing of its petition of intervention.

Central Boat filed a motion for summary judgment seeking the dismissal of Ungar & Byrne's petition of intervention. Central Boat asserted that Ungar & Byrne was not entitled to recover its attorneys' fees and expenses from Central Boat or to otherwise enforce its alleged fee agreement against Central Boat, who was not a party to the alleged retainer agreement. Further, with respect to Ungar & Byrne's claim for tortious interference with contract, Central Boat asserted that

because it was neither a corporate officer of Ungar & Byrne nor a party to Ungar & Byrne's alleged retainer agreement with Doles, there is no basis under Louisiana's narrowly defined cause of action for such recovery.

Following a hearing on the motion for summary judgment, the trial court signed a judgment granting the motion and dismissing Ungar & Byrne's petition of intervention with prejudice at its cost. Ungar & Byrne has appealed urging that the trial court erred in granting Central Boat's motion.²

II. ANALYSIS

A summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2); *Fagan v. LeBlanc*, 05-1845, p.6 (La. App. 1st Cir. 2/10/06), 928 So.2d 576, 581.

On a motion for summary judgment, the burden of proof is on the movant. If, however, the movant will not bear the burden of proof at trial on the matter that

² Although Ungar & Byrne filed a motion for appeal requesting an order allowing it to file an appeal, the order of appeal, despite referencing the foregoing motion for appeal, granted the appeal to plaintiff, Woodrow Doles, II. Thereafter, Ungar & Byrne filed its appellate brief. In Central Boat Rentals' appellee brief, it pointed out that the order of appeal was granted in favor of Doles rather than Ungar & Byrne. On November 17, 2006, this court issued a show cause order addressing this inconsistency. Therein, the parties were ordered to show cause "as to why Ungar & Byrne should or should not be allowed to continue as an appellant in this matter." Ungar & Byrne responded, indicating that: 1) its motion correctly named Ungar & Byrne as appellant; 2) Doles made no appearance or filing in response to Central Boat Rentals' motion for summary judgment; 3) Doles did not file a motion for appeal; and 4) the order language contained an unintentional error or oversight in its use of Doles's name rather than Ungar & Byrne's name. Because appeals are favored and because no prejudice results from a correction of such error, we hereby order that the record be corrected to reflect that Ungar & Byrne is the proper appellant. See La. C.C.P. art. 2132; *Dickerson v. Krogers, Inc.*, 504 So.2d 1008 (La. App. 1st Cir. 1987). Accordingly, we order the correction of the record to reflect that Ungar & Byrne is the proper appellant, and we maintain this appeal.

is before the court on the motion for summary judgment, the movant's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. C.C.P. art. 966(C)(2); *Fagan v. LeBlanc*, 05-1845, p.6, 928 So.2d at 581.

Summary judgments are reviewed on appeal *de novo*. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. *Fagan v. LeBlanc*, 05-1845, p.6, 928 So.2d at 581.

In the instant case, Ungar & Byrne argues that Doles's action of writing a note stating he was terminating its representation was insufficient to do so. Ungar & Byrne argues that the note was not communicated or forwarded to Ungar & Byrne prior to Doles's settlement of his claim and that "his purported termination of [the] contract was without effect at the time of the negotiation of the settlement...." The record establishes, however, that Ungar & Byrne knew it had been discharged as Doles's counsel upon the filing of its petition for intervention. And based on the applicable law discussed more fully below, whether Ungar & Byrne knew it had been discharged at the exact moment that Doles effected the

settlement with Central Boat has no bearing on Ungar & Byrne's right to recover against Central Boat.

Even when a client is obligated by a contract, the client has a right to discharge the attorney (and terminate the contract) at any time, with or without cause, subject to liability for payment for reasonable attorneys' fees. *Scott v. Kemper Ins. Co.*, 377 So.2d 66, 70 (La. 1979). The parties to the contingency fee contract may stipulate "that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue, or otherwise dispose of the suit or claim." La. R.S. 37:218A.³ If an agreement between the attorney and client is breached, and the contract was recorded with the clerk of court, the statute speaks of a right to treat the settlement as "null and void" and proceed with the suit. *Id.* However, because the attorney's interest in the suit is no more than a privilege on any settlement funds, the attorney "may not proceed with the suit" and "has no right to interfere with or nullify the settlement which his former client has made ... or chooses to make." *Francis v. Hotard*, 00-0302, p.3 (La. App. 1st Cir. 3/30/01), 798 So.2d 982, 985, *writ not considered*, 01-1323 (La.

³ Louisiana Revised Statutes 37:218A provides:

By written contract signed by his client, an attorney at law may acquire as his fee an interest in the subject matter of a suit, proposed suit, or claim in the assertion, prosecution, or defense of which he is employed, whether the claim or suit be for money or for property. Such interest shall be a special privilege to take rank as a first privilege thereon, superior to all other privileges and security interests under Chapter 9 of the Louisiana Commercial laws. In such contract, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue, or otherwise dispose of the suit or claim. Either party to the contract may, at any time, file and record it with the clerk of court in the parish in which the suit is pending or is to be brought or with the clerk of court in the parish of the client's domicile. After such filing, any settlement, compromise, discontinuance, or other disposition made of the suit or claim by either the attorney or the client, without the written consent of the other, is null and void and the suit or claim shall be proceeded with as if no such settlement, compromise, discontinuance, or other disposition has been made.

6/22/01), 793 So.2d 1263, citing *Scott*, 377 So.2d at 70. In *Francis*, this court further explained the effect of a recorded contract:

Subject to recordation of the contract, the attorney may impose ‘an obligation upon the client’s obligor in the suit,’ ... “to retain settlement funds until determination of fee entitlement.” If the settlement funds have been disbursed, the “extinguishing effect of the settlement will ... be suspended ... until recognition and payment of” the fee. Failure to record the contingency fee contract forfeits the attorney’s right to impose the obligation on third parties to that contract. La. R.S. 37:218A.

Id. (Case citations omitted.)

In the instant case, Central Boat pointed out to the trial court that Ungar & Byrne did not file and record its retainer agreement with Doles in accordance with La. R.S. 37:218 until February 3, 2005. Accordingly, because the settlement occurred prior to this date, Central Boat urged that Ungar & Byrne had no basis for recovery against it pursuant to La. R.S. 37:218.

The imposition of an obligation upon the client’s obligor in the suit (in this case, Central Boat) to retain settlement funds until a determination of fee entitlement is dependent upon the attorney’s full compliance with La. R.S. 37:218A, including the recordation of the contract prior to the disbursement of settlement proceeds. See *Scott*, 377 So.2d at 70. Accordingly, because Ungar & Byrne would bear, at trial, the burden of proving its full compliance with Louisiana Revised Statutes 37:218A, the burden shifted to Ungar & Byrne to produce factual support to establish that it would be able to meet its evidentiary burden of proof at trial. Because timely recordation is necessary for the imposition of liability on a third person, and because Ungar & Byrne failed to establish recordation of the retainer agreement prior to Central Boat’s disbursement of settlement funds, Ungar & Byrne did not establish its entitlement

to recovery against Central Boat pursuant to La. R.S. 37:218. See *Hall v. St. Paul Fire and Marine Ins. Co.*, 03-1333 (La. App. 5th Cir. 2/23/04), 868 So.2d 910, 912-913, *writ denied*, 04-0756 (La. 5/7/04).

In its intervention, Ungar & Byrne also asserted a claim against Central Boat for tortious interference with its contract with Doles. In *9 to 5 Fashions, Inc v. Spurney*, 538 So.2d 228 (La. 1989), the supreme court did not adopt the broad common law doctrine of tortious interference with contracts, but recognized a limited and narrowly defined cause of action for the breach of duty by a corporate officer to refrain from intentionally and unjustifiably interfering with a contractual relationship between the officer's corporate employer and the particular plaintiff involved therein.

Louisiana courts have limited the *Spurney* decision to its facts. See *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 618 So.2d 1076, 1080 (La. App. 1st Cir. 1993), *writ denied*, 626 So.2d 1172 (La. 1993); *Healthcare Management Services, Inc. v. Vantage Healthplan, Inc.*, 32,523 p.4 (La. App. 2d Cir. 12/8/99), 748 So.2d 580, 582. The "interference" alleged in this case is entirely beyond the cause of action created in *Spurney*. Further, Ungar & Byrne does not make any argument as to why the cause of action should be expanded to address the situation presented herein. Accordingly, we find that Ungar & Byrne is not entitled to recovery based on its claim of tortious interference with contract.

For these reasons, we find the trial court properly concluded that there were no genuine issues as to material fact and that Central Boat was entitled to a judgment that dismissed Ungar & Byrne's claims asserted against Central Boat.

We find error, however, in the trial court's dismissal of Ungar & Byrne's entire intervention; the trial court improperly dismissed Ungar & Byrne's intervention with respect to its claim for the recovery of costs and attorneys' fees against Doles. As discussed in the *Francis* decision, when addressing a claim by an attorney against his former client, it is irrelevant whether a contingency agreement has been recorded in accordance with La. R.S. 37:218A. Recordation is not required for the attorney to maintain a privilege on the compromise or settlement funds, and failure to record does not extinguish the attorney's right to recover his fees. *Francis*, 00-0302 at pp. 4-5, 798 So.2d at 985-86. There are remaining genuine issues as to material fact regarding whether Ungar & Byrne was discharged by Doles with or without cause and regarding the extent of the work performed on Doles's behalf. Accordingly, the trial court erred by dismissing Ungar & Byrne's intervention insofar as it may be entitled to a judgment against Doles based on the facts alleged in the petition of intervention.

III. CONCLUSION

For these reasons, we affirm the trial court's judgment insofar as it granted Central Boat's motion for summary judgment, dismissed Ungar & Byrne's claims against Central Boat, and imposed costs on Ungar & Byrne. We reverse that portion of the judgment that dismissed Ungar & Byrne's petition of intervention with prejudice. Appeal costs are assessed against Ungar & Byrne.

RULE TO SHOW CAUSE RECALLED; APPEAL MAINTAINED AND RECORD ORDERED CORRECTED; AFFIRMED IN PART; REVERSED IN PART.