Lawyer to be paid despite withdrawing prior to trial

Took case on contingency, quit for ‘good cause’

By: Eric T. Berkman  Jul 28, 2016

A lawyer who represented a client on a contingency basis for 17 years of protracted litigation in a single case, but withdrew before a different attorney secured a $27 million judgment, was entitled to quantum meruit recovery for his services, the Appeals Court has found.

Boston lawyer George C. Deptula agreed in 1992 to represent a car dealership and its owner in litigation against their bank. In return, Deptula was to receive a portion of any recovery on his clients’ counterclaim. He ultimately prevailed in two trials — one on liability and one on damages — and secured an $8 million judgment that was reversed on appeal in 2009.

Citing a breakdown in the attorney-client relationship, Deptula withdrew — over his clients’ objections — before a third trial in 2010, which resulted in the $27 million judgment. He subsequently filed a lien for his services.

A Superior Court judge ruled that Deptula withdrew without good cause, finding that his subjective motivation for withdrawing was a belief that the case would not be profitable, and thus he forfeited his lien.

But the Appeals Court reversed.

"The proper method for assessing good cause in determining the applicability of the attorney’s lien statute in a contingency fee case ... does not involve determining the withdrawing attorney’s subjective motivation, something that would be difficult to do with any confidence," Judge Peter J. Rubin wrote on behalf of the court.

"Rather ... the proper inquiry is whether, viewed objectively, the facts demonstrate the existence of good cause for withdrawal," Rubin said, noting that the facts here showed a history of criticism, second-guessing and accusations by the clients that undermined the attorney-client relationship.

The 18-page decision is Bank of America, N.A. v. Prestige Imports, Inc., et al., Lawyers Weekly No. 11-087-16. The full text of the ruling can be found here.

‘Creating consistency’

Steven J. Bolotin of Boston, who represented Deptula in the fee dispute, said the decision creates consistency with respect to how an attorney’s determination on whether to leave a case is to be treated.

"As the Appeals Court recognized, it’s usually not possible to establish an attorney’s subjective motive reliably, and it’s always subject to challenge," Bolotin said. "And a subjective standard would create different standards for different attorneys. You can imagine a circumstance where two attorneys facing the same set of facts might behave or feel differently."

By recognizing that an objective standard is the correct state of the law, the Appeals Court took such uncertainties out of the equation, he said.

Boston attorney Timothy J. Fazio, who represented the clients, said the decision "totally rewrites the attorney-client relationship in Massachusetts" and predicted that it would have significant unintended consequences.

As a result of the decision, Fazio said, a lawyer working on a contingent-fee basis who wants out because he thinks he will not make enough money can just put together a catalogue of all past disagreements with the client.

"If they add up to what an outside person says is an objectively reasonable basis for withdrawing, the lawyer can then abandon his client and retain the lien, even though he didn’t actually believe the relationship had broken down," Fazio said. "Or he can use the threat to withdraw at any time for leverage to increase his fee."

Fazio said his clients are considering whether to seek further review.

But Michael J. Stone of Boston, who handles cases involving attorney professional ethics and fee disputes, said the ruling is consistent with prior case law.
"The court's philosophy is twofold: Lawyers should be paid for their work if they're compelled to leave, and at the same time a lawyer shouldn't have to stay around in order to get paid," he said. "Otherwise you're bouncing up against ethical considerations. How does a lawyer give it his best effort if he has a bad relationship with his client?"

Additionally, if an attorney could not get paid under such a scenario, it could incentivize a client in a contingent-fee situation to orchestrate a breakdown in the relationship near the end of a case and cut a better deal with another lawyer, Stone said.

"I don't know that anything like that happened in this case, but that's some of the rationale behind the objective standard," he said.

Meanwhile, Stone said the decision serves as a reminder to attorneys who take cases on a contingency basis to carefully document their time the same way they would in an hourly matter.

"One of the factors that goes into determining the 'quantum meruit' value of a lawyer's services in a contingent-fee matter such as this is the amount of time devoted to the case," he said, explaining that by documenting their time, attorneys will be prepared in the event that their representation ends before the matter is concluded.

"[T]he decision totally revives the attorney-client relationship in Massachusetts."

— Timothy J. Fado, lawyer for clients

**Contentious representation**

In 1991, the South Shore Bank (later Bank of America) sued Hanover car dealership Prestige Imports and its principal, Helmut Schmidt, in Superior Court for alleged nonpayment of loans.

Prestige counterclaimed, alleging violations of Chapter 93A and the Uniform Commercial Code, and negligence arising from the bank's handling of certain checks and its issuance of treasurer checks by which Prestige's comptroller embezzled significant sums.

In 1992, Deputla agreed to represent Prestige in return for a nonrefundable retainer and a percentage of any recovery on the counterclaims.

The attorney spent the next nine years conducting extensive discovery and opposing two summary judgment motions by Bank of America.

In 2001, he asked Schmidt for permission to bring in another attorney to help try the case and proposed that the attorney he had in mind be compensated with a share in his contingent fee. Instead, Schmidt hired an attorney of his choosing, Thomas S. Francis of Boston, whom he paid on an hourly basis.

In 2002 and 2003, Deputla and Francis prevailed twice at trial — once on liability and again on damages — obtaining a net damages award of $8 million. Bank of America appealed, and, primarily due to delays in the preparation of trial transcripts, the Appeals Court did not hear the case until 2008.

During the period between the damages trial and the 2008 oral argument, Schmidt expressed frustration with Deputla's performance, stating or implying on multiple occasions that the delays were Deputla's fault and accusing him of disrespect, procrastination and overusing Francis to make up for his supposed deficiencies.

The relationship apparently became particularly contentious after the oral argument, when Schmidt allegedly yelled at Deputla outside the courtroom for failing to make the argument he apparently expected Deputla to make. He later accused Deputla of avoiding certain issues in order to avoid the possibility of a re-trial.

In November 2009, the Appeals Court reversed large portions of the verdicts in Prestige's favor and remanded the case for a new trial.

At that point, Schmidt's son-in-law, attorney Ted Killory, started consulting on the case.

On March 25, 2010, Deputla met with Killory to discuss a fee structure for the rest of the case, allegedly expressing his opinion that the case was a "loser" and that without restructuring the fee, he would have to resign and file a lien for the value of his services.

In another meeting a week later, Schmidt said he would consider increasing the contingency percentage but could
not consider paying more money up front. Deputula allegedly countered that he could not see how that was possible since Schmidt had paid $400,000 to Francis.

Schmidt replied that Francis' charges were that steep only because Deputula had delegated so much work to him. That meeting allegedly ended in "yelling and swearing."

In a letter on April 12, 2010, Deputula withdrew over Schmidt's objection, citing a breakdown in the attorney-client relationship.

Killory and Francis handled the third trial, which resulted in a $27 million judgment, much of which consisted of statutory interest.

In July 2013, Deputula filed a notice of attorneys' fees lien, which Prestige challenged. A year later, after a five-day bench trial, Judge Patrick F. Brady ruled that Deputula had forfeited his lien by withdrawing without good cause.

Deputula appealed.

"The decision serves as a reminder to attorneys who take cases on a contingency basis to carefully document their time in the same way they would in an hourly matter," says Michael J. Stone of Boston.

Objective standard

The Appeals Court found that a breakdown of the attorney-client relationship had indeed occurred, creating good cause for Deputula to withdraw.

"Schmidt's statement that he had to pay Francis $400,000 because Deputula delegated so much work to him was just the latest in a long line of similar accusations against Deputula [that] dated back to 2004, but had intensified after the 2008 argument in this court," Rubin wrote. "Schmidt had degraded and humiliated Deputula in e-mails, in letters, and, after oral argument in this court, in public, over the course of several years. In light of this history, Schmidt's statement amounted to a renewal of these accusations, which confirmed the continued existence of a longstanding breakdown of the attorney-client relationship."

Thus, the court found, Deputula had not forfeited his right to a lien for the value of the work he had performed during the 17-year engagement.

In making that finding, the court rejected the notion that Deputula's objective case for good cause was irrelevant because his supposed subjective motivation for withdrawal — a belief that the case would be unprofitable — did not constitute good cause.

Instead, the proper inquiry is whether the facts themselves objectively indicate good cause for withdrawal, Rubin said.

The court further commented that an attorney who agrees to bear the risk of losing a case by taking it on a contingency basis should not also have to bear the risk that the client's behavior will cause the attorney-client relationship to break down.

Accordingly, the court reversed, remanding the case for a quantum meruit determination of the value of Deputula's services.


THE ISSUE: Was a lawyer who represented a client on a contingency basis for 17 years of protracted litigation in a single case, but withdrew before a different attorney secured a $27 million judgment, entitled to quantum meruit recovery for his services?

DECISION: Yes (Appeals Court)

LAWYERS: Steven J. Bolotin of Morrison Mahoney, Boston (counsel for the attorney)

Timothy J. Fazio and Jennifer L. Morse, of Manion, Gaynor & Manning, Boston (counsel for the client)