UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60250

WILLIAM J. PETERS, ET AL.,

Plaintiffs-Appellants,

versus

LARKIN T. THEDFORD,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas
(90-CV-38)

(June 13, 1995)

Before KING, GARWOOD and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Plaintiffs-Appellants Mr. and Mrs. William Peters and Mr. and Mrs. Louis Peters (collectively "Peters") appeal from a summary judgment dismissing their claims against Larkin T. Thedford ("Thedford"). We vacate and remand.

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS AND PROCEDURAL HISTORY

In March 1988, William Peters ("William") spoke with Thedford, an attorney who had a longstanding personal and professional relationship with the Peters, about an 1,100-acre parcel of land in Jackson County, Texas owned by William, Louis Peters ("Louis"), and their four siblings. Each sibling owned a one-sixth undivided interest. The possibility of selling William's 1/6 interest was discussed and Thedford recommended that William obtain an appraisal of William's interest in the property. It is undisputed that, immediately after speaking with Thedford, William obtained an appraisal of his interest from D. T. Roddy ("Roddy"), who appraised his undivided interest at $500 an acre.

In August 1988, the other siblings sued William and Louis for a partition and an accounting of the land. After the action was filed, the Peters conferred with Thedford about the lawsuit and about selling their interests in the property to him. On September 2, William and Louis executed an agreement by which they agreed to sell Thedford their 1/6 interests in the property, including a 1/4 mineral interest, for $500 an acre. Thedford agreed to represent the Peters in the lawsuit. It was also agreed that, if a conflict of interest arose, other counsel would be retained to represent William and Louis. Thedford secured the dismissal of William and Louis from the lawsuit. Shortly thereafter, the property was offered for sale at an auction as part of an agreement reached in the lawsuit. Thedford and a partner successfully bid on the entire 1,100-acre tract for $725 an acre, without mineral rights.

The Peters brought suit against Thedford in the District Court for the Southern District of Texas, alleging breach of fiduciary duty, negligence, gross negligence, violations of the Texas Deceptive Trade Practices Act ("DTPA"), and fraud. They alleged that Thedford was acting as their attorney at the time of their sale to him; that he paid "many times less than the actual value" for their interests in the property; and that he had knowledge of facts and values which he did not impart to them while advising them that it was in their best interests to sell their interests to him. They sought as damages the difference between the $500 an acre paid by Thedford and the actual value of the property, which they alleged to be in excess of $500,000, as well as punitive damages of $3 million.

The district court granted Thedford's motion for summary judgment, on the grounds that (1) the Peters had not presented evidence that the property's value exceeded Roddy's appraisal or that Roddy's appraisal was "tainted"; (2) the price Thedford paid at the auction does not raise a fact issue as to fraud, because it was based on the entire 1,100-acre tract; (3) there is no evidence to support the Peters's allegation that Thedford advised them, as part of his legal advice, to sell the property to him; and (4) there is no evidence that Thedford lied or coerced the Peters, or that the Peters relied on wrong or misleading legal advice. The Peters appeal the summary judgment as to their claims of fraud, breach of fiduciary duty, and the Texas Deceptive Trade Practices Act.

LAW AND ARGUMENT

Appellate courts review summary judgments *de novo*, applying the same standard as the district court. Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 956 (5th Cir. 1993). Summary judgment shall be rendered if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In making its determination, the court must draw all justifiable inferences in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

I. Attorney-Client Relationship

It is a well-established rule in Texas that, when an attorney enters into a contract with a client, the contract is presumptively fraudulent, and the burden of showing its fairness is on the attorney. Robinson v. Garcia, 804 S.W.2d 238, 248 (Tex.App.--Corpus Christi) ("There is a presumption of unfairness attaching to a fee contract entered into during the existence of the attorney-client relationship, and the burden of showing the fairness of the contract is on the attorney."), *writ denied*, 817 S.W.2d 59 (1991); Ames v. Putz, 495 S.W.2d 581, 583 (Tex.Civ.App.--Eastland 1973, writ refused) ("The relation between an attorney and his client is highly fiduciary in nature and there is a presumption of unfairness or invalidity attaching to a contract between an attorney and his client, and the burden of showing its fairness and reasonableness is on the attorney."); Johnson v. Stickney, 152 S.W.2d 921, 924 (Tex.Civ.App.--San Antonio 1941) ("The rule in this State is that agreements made between attorney and client in the course of that

relation, whereby the former obtains a valuable right from the latter, are presumed to be prima facie fraudulent, and the burden to prove them otherwise is upon the attorney, by showing that he paid a full and fair consideration for the right."); Johnson v. Cofer, 113 S.W.2d 963, 965 (Tex.Civ.App.--Austin 1938) (citations omitted) ("The rule is well settled that the relationship of an attorney to his client is one of uberrima fides, and transactions between them affecting the subject matter which the attorney is employed to protect will be strictly scrutinized against the attorney, even to the extent of being considered prima facie fraudulent."); Baird v. Laycock, 94 S.W.2d 1185, 1189 (Tex.Civ.App.--Texarkana 1936) ("[T]he general rule well recognized by the courts of this state [is] that a sale by a client to his attorney of land in litigation is presumed fraudulent, and the burden is on the attorney to show the fairness of the transaction.").

The rule applies, however, only after the attorney-client relationship has been established. Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964) ("The general rule [that an attorney has the burden of establishing the fairness of a transaction entered into with a client] applies to a contract or other transaction relating to compensation provided the attorney-client relationship was in existence at the time."); Stickney, 152 S.W.2d at 924 ("If the contract was made at the inception of the prior employment, or at or before the present employment, it would not be tainted with the fraud which attaches by presumption to agreements made in the

course of the relation of attorney and client."); Cofer, 113 S.W.2d at 965 ("This rule, however, applies as between them after that relationship of attorney and client has come into existence; and does not apply to a contract of employment, whereby such relationship is created, and by which the attorney's compensation is fixed.").

"The determination of whether . . . a fiduciary relationship exists is a question of fact." Adickes v. Andreoli, 600 S.W.2d 939, 946 (Tex.Civ.App.--Houston (1 Dist.) 1980, writ dismissed w.o.j.). "An agreement to form an attorney-client relationship may be implied from the conduct of the parties. Moreover, the relationship does not depend upon the payment of a fee, but may exist as a result of rendering services gratuitously." Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex.App.--Corpus Christi 1991, writ denied). "The fiduciary relationship between an attorney and his client extends even to preliminary consultations between the client and the attorney regarding the attorney's possible retention. . . . All that is required under Texas law is that the parties, explicitly or by their conduct, manifest an intention to create the attorney/client relationship." Nolan v. Foreman, 665 F.2d 738, 739 n.3 (5th Cir. 1982) (citations omitted).

At oral argument, Thedford's counsel all but conceded that a fact issue is raised by the summary judgment evidence with respect to the existence of the attorney-client relationship at the time

the agreement to sell the property was made.[1] Our review of the summary judgment evidence plainly reveals that a fact issue was created. There was testimony from Louis and/or William that:

1. The Peters went to see Thedford with respect to advice and representation in the lawsuit prior to entering the purchase agreement.

2. Thedford advised Louis that the sale would allow Thedford to get the Peters out of the lawsuit and that eventually Thedford would resell the property back to the Peters. Thedford informed Louis that he would "be better off selling . . . and then buying back."

3. Thedford had a longstanding relationship with the Peters, both personal and professional. The Peters sometimes paid him a retainer fee.

4. Thedford agreed to represent William in the lawsuit if he would sell his interest in the property to Thedford.

Because a fact issue has been raised as to whether an attorney-client relationship existed between the Peters and Thedford at the time of the sale of property, for the purposes of the summary judgment proceeding, Thedford has the burden of proving that the sale was fair.

II. Fairness

Thedford argues that the Peters never offered any evidence that $725 an acre was the value of the property at the time Thedford purchased their undivided interests, or that the independent appraisal of $500 an acre was incorrect. Thedford also argues that the Peters never establish evidence that he withheld information about the property, nor has evidence been offered that the Peters were unhappy about Thedford's advice or the agreement

[1] Counsel stated that, in her review of the evidence, she was not sure that a fact question was not raised.

for sale. These arguments were adopted by the district court in granting summary judgment. However, these arguments are not applicable to the governing standard in this case.

Under the governing substantive law, if an attorney-client relationship existed at the time of the sale agreement, the burden of proving the fairness of the transaction is on Thedford, not the Peters; and, based on the summary judgment evidence, Thedford has not met that burden. Although Thedford paid the appraised price of $500 an acre, the appraisal is not in evidence, and the evidence is inconclusive as to whether that appraised price included a 25% mineral interest. There is no summary judgment evidence that, at the time of the sale, the fair market value of the transferred property was $500 an acre. Moreover, there is evidence that Thedford recommended the appraiser. And, although Thedford's paying $725 an acre for the entire tract at the auction does not establish that $500 an acre was inadequate, Thedford produced no testimony from an appraiser, or any other evidence, to support his implication that the entire tract was worth more than an undivided interest, or that it was worth $725 an acre.

CONCLUSION

For the foregoing reasons, we VACATE the summary judgment, and REMAND the case for further proceedings.

VACATED AND REMANDED