SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4800-13T4

THE IRWIN LAW FIRM, P.A.,

Plaintiff-Appellant,

v.

RICHARD GRABOWSKY,

Defendant-Respondent.

Argued October 26, 2016 – Decided March 28, 2017

Before Judges Alvarez and Accurso.[1]

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-59-13.

Andrew R. Turner argued the cause for appellant (Turner Law Firm, LLC, attorneys; Mr. Turner, of counsel and on the brief).

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[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. 2:12-2(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.

Jonathan T. Guldin argued the cause for respondent (Clark Guldin, attorneys; Mr. Guldin, of counsel and on the brief).

PER CURIAM

Plaintiff The Irwin Law Firm, P.A. sued its former client defendant Richard Grabowsky when he failed to pay a contingent fee of $57,695.78 for two property tax appeals the firm filed on his behalf. Following discovery, Grabowsky got partial summary judgment dismissing the firm's breach of contract claims. The firm's remaining claims for its contingent fee, collection fees and interest were tried to the bench before Judge Payne, on recall.

Following a four-day trial, Judge Payne found the firm was entitled to fees of $4600 in quantum meruit. The judge subsequently awarded Grabowsky $46,168.41 in fees and expenses under Rule 4:58-1 as a consequence of his unaccepted offer of judgment, resulting in a net award to him of $41,568.44. The firm deposited that sum with the Clerk of the Superior Court, staying execution on the judgment while it pursued this appeal. Having reviewed the record, we find no error and thus affirm, substantially for the reasons expressed by Judge Payne in her two written opinions in this matter.

Grabowsky engaged The Irwin Law Firm in 2008 to file three tax appeals, one in Paramus and two for properties in Montclair.

Pursuant to a signed retainer agreement, the firm would receive a contingent fee of one-third of any realized tax savings. The retainer agreement also provided that in the event the case was dismissed or withdrawn at Grabowsky's direction, the firm would be reimbursed for its out-of-pocket expenses "and such other reasonable fee as may be established based upon the potential and unrealized savings or work and effort expended."

The firm settled the Paramus appeal and Grabowsky paid his bill in full. The Montclair negotiations did not go as smoothly. Although Grabowsky was willing to accept the offer The Irwin Law Firm negotiated for one of the properties, he was not satisfied with the other. He was particularly disappointed with Montclair's insistence on reserving its right to increase the assessment on this latter property by $2.2 million pending completion of fit up for a new national retail tenant.

When the firm advised him in January 2010 that the offer Montclair presented was its final one and was contingent on settlement of the appeals on both properties, Grabowsky discharged the firm and proceeded to negotiate on his own behalf. Several months later, Grabowsky achieved a global settlement with Montclair on more favorable terms. Although the assessed value negotiated by The Irwin Law Firm for one of the properties did not change, Grabowsky succeeded in not only

reducing the assessment on the other, but also winning the Township's concession not to increase the assessment "for the work completed for [the] Anthropologie fit up." He also succeeded in lowering the assessment on both properties for 2011.

At trial, The Irwin Law Firm contended Grabowsky entered into the retainer agreement in bad faith and discharged the firm in order to avoid paying the contingent fee negotiated in the retainer agreement. It also suggested Grabowsky was biased against the associate who worked on the files because she was a woman and almost nine months pregnant when he fired the firm.

The firm contended Grabowsky accepted the benefit of the firm's services by settling for the same assessed value the firm successfully negotiated on his behalf for one of the properties and using its framework for the slightly improved settlement he achieved on the other. Thus, the firm argued, it should receive one-third of the realized tax savings for the settlements it negotiated, a sum of $66,802.36,[2] interest of $15,385.24 and attorney's fees of $16,700.67 in accordance with its retainer agreement, for a total award of $98,888.58.

[2] The firm was granted leave prior to trial to amend its complaint to seek additional damages based on the Tax Court settlements produced in discovery.

After hearing the testimony of Grabowsky, Steve Irwin, the associate at his firm responsible for Grabowsky's matters and the real estate appraiser the firm engaged, and reviewing the deposition testimony of the Township's tax counsel admitted in evidence, Judge Payne rejected the firm's theory of the case. Specifically, the judge found Grabowsky had not acted in bad faith, but "simply sought a better deal tha[n] [the associate] had been able to negotiate, and in the face of a 'final' settlement offer that he found to be unacceptable, [Grabowsky] determined to negotiate pro se."

The judge also rejected "any suggestion that [Grabowsky] harbored a bias against [the associate] as the result of her sex and her pregnancy." The judge noted the associate "herself found nothing improper in [Grabowsky's] conduct toward her," and the judge's own review "of the trial testimony and documents in evidence offer[ed] no suggestion of bias."

Judge Payne rejected The Irwin Law Firm's entitlement to a contingent fee "because a final settlement had not been reached at the time [the firm's] services were terminated with respect to the Montclair properties." Addressing the firm's argument that Grabowsky accepted the benefits the firm had negotiated, Judge Payne acknowledged the assessed value "set for 499 Bloomfield Avenue did not change." She emphasized, however,

that "at the time of [The Irwin Law Firm's] termination, Montclair was willing only to enter into a global settlement that included terms with respect to the Church Street property that [Grabowsky] was unwilling to accept and was eventually able to alter to his advantage."

Judge Payne underscored her point by noting Grabowsky had authorized the firm to settle the 499 Bloomfield Avenue appeal for the assessed value it negotiated when he discharged the firm. There was no dispute The Irwin Law Firm was unable to secure that settlement because of Montclair's insistence on a resolution that included both properties.

Because Montclair would not accept the settlement for 499 Bloomfield Avenue the firm negotiated without the settlement for Church Street, which Grabowsky reasonably found unacceptable, the judge concluded "the condition that a judgment or settlement resulting in tax savings, set forth in the retainer agreement, was not met during the period" The Irwin Law Firm represented Grabowsky. Relying on Dinter v. Sears, Roebuck & Company, 278 N.J. Super. 521, 535 (App. Div.), certif. denied, 140 N.J. 329 (1995), the judge concluded The Irwin Law Firm was not entitled to a contingent fee on a settlement Grabowsky had rejected.

Although the judge was willing to entertain an award to the firm in quantum meruit based on the hours it expended on

Grabowsky's behalf, "together with any enhancement [the judge] might add based upon the degree of success obtained," The Irwin Law Firm did not keep time records. More significantly, the firm was unwilling to reconstruct the hours it spent representing Grabowsky, determining instead to stand on its entitlement to a contingent fee. Accordingly, the court was left with only the Township attorney's time records on which to base a quantum meruit award.

Acknowledging the hours spent by the Township's attorney "do not perfectly mirror the time that may have been spent" by the firm's associate on Grabowsky's Montclair appeals, Judge Payne rightly noted it was the firm's "burden to establish a greater expenditure of time, and it failed to do so." There was, however, no dispute that during the two years The Irwin Law Firm pursued the Montclair appeals, it did not engage in any written discovery, depositions or motion practice, made no appearances and was not required to prepare for trial. In addition, the settlement proposal the associate made to the town was a demand formulated by Grabowsky, who all acknowledged was very well informed about the real estate market in Montclair, having lived in the town for over thirty-five years and being one of its largest commercial landowners.

Based on the significance of the concession Grabowsky was able to wrest from the town regarding its waiver of up to a $2.2 million added assessment for the Church Street property following the Anthropologie fit up, Judge Payne was "unwilling to hold that the settlement eventually reached in the appeals was primarily as the result of [The Irwin Law Firm's] efforts." Using the Township attorney's time records multiplied by the hourly rate The Irwin Law Firm charged for the associate's time for a client it billed hourly, the judge awarded the firm a judgment of $4600 (18.40 hours x $250).

After considering Grabowsky's fee application premised on The Irwin Law Firm's rejection of his $19,000 offer of judgment under Rule 4:58-1 to -3, and the firm's objections, which included applicability of the offer of judgment rule to an equitable claim and what it termed its "nominal" recovery, Judge Payne awarded Grabowsky fees and expenses of $46,168.41, for a net award to him of $41,568.41. She found the fees charged Grabowsky "lower than those customarily charged by comparable attorneys in the area" and "reasonable in the circumstances."

The Irwin Law Firm appeals, contending the dismissal of its contract claims on summary judgment was error and that the trial judge "did not properly apply principles of quantum meruit to

the facts of this case." It also claims the offer of judgment rule was not properly applied. We reject those arguments.

The Irwin Law Firm's principal argument on appeal is the same one it made in the trial court, that quantum meruit should not be defined exclusively here as hours expended multiplied by a reasonable hourly rate. It contends "[t]he Law Division should have evaluated the value of services, the result obtained, and the theory of unjust enrichment." What the firm refuses to accept is that the judge did precisely that.

After rejecting the firm's contention that Grabowsky terminated its services in bad faith to avoid paying the contingent fee, Judge Payne considered the evidence in the record to evaluate the value of the firm's services to Grabowsky, which included the result Grabowsky ultimately obtained and the firm's clearly articulated theory of unjust enrichment. The difference between The Irwin Law Firm's assessment of the value of its services to Grabowsky and Judge Payne's assessment hinged on the significance each accorded to the spectre of a $2.2 million increase in the assessed value of the Church Street property following the then ongoing renovations to the space rented by Anthropologie.

At trial, The Irwin Law Firm characterized that assessment as speculative, arguing "the $2.2 million hypothetical

theoretical added assessment that never came into existence should not be considered," and ignores its effect entirely in its brief on appeal. But Judge Payne found "[t]hat such an assessment was contemplated is demonstrated by [the associate's] handwritten notes and her September 17, 2009 letter to [Grabowsky]." Moreover, the judge found the town's agreement to concede the increased assessment so significant that she could not find the final settlement to be primarily the result of the firm's efforts.

Those factual determinations have substantial credible support in the evidentiary record, and thus are binding on this appeal. See Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) ("We do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." (internal quotation marks omitted)). Because we agree with Judge Payne's assessment of the controlling law regarding an attorney's fee award in quantum meruit, see Starkey, Kelly, Blaney & White v. Estate of Nicolaysen, 340 N.J. Super. 104, 124-25 (App. Div. 2001), aff'd as modified, 172 N.J. 60 (2002), and have no reason to fault her factual determination regarding The Irwin Law Firm's

contribution to Grabowsky's ultimate settlement of the Montclair tax appeals, see Glick v. Barclays De Zoete Wedd, Inc., 300 N.J. Super. 299, 311 (App. Div. 1997), we affirm the judgment in his favor.

That The Irwin Law Firm declined as a matter of litigation strategy to reconstruct its time records to allow Judge Payne a fuller record on which to assess the value of the services it rendered to Grabowsky, leaving the Township attorney's time records as the only basis for entry of an award, does not render that award a nominal one for purposes of assessing an appropriate allowance under the offer of judgment rule. See Reid v. Finch, 425 N.J. Super. 196, 204-05 (Law Div. 2011).

As Judge Payne noted in her opinion awarding the fees, this was a commercial dispute between two knowledgeable businessmen. "Irwin took an intractable legal position [the judge] found not to be sustainable." Accordingly, Judge Payne found "nothing that would suggest that Irwin should not bear the risk inherent in the legal course that was taken and bear the consequences of his rejection of an offer of judgment that, under the circumstances, would have provided a reasonable recovery for the legal services provided." The Irwin Law Firm's arguments to the contrary do not merit discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Having reviewed the record and considered The Irwin Law Firm's arguments in light of applicable law, we affirm the judgment, substantially for the reasons expressed by Judge Payne in her thorough and thoughtful written opinions of June 13, as supplemented by her letter to counsel of June 25, and September 19, 2014.

Affirmed.