

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2168-21

ARBUS, MAYBRUCH &
GOODE, LLC,

Plaintiff-Respondent,

v.

DANIEL COHEN and COHEN
CAPITAL MANAGEMENT,
LLC,

Defendants-Appellants.

APPROVED FOR PUBLICATION

May 25, 2023

APPELLATE DIVISION

Argued March 14, 2023 – Decided May 25, 2023

Before Judges Sumners, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law
Division, Monmouth County, Docket No. L-2646-20.

Jeffrey Lubin argued the cause for appellants (Law
Offices of Lee M. Nigen, attorneys; Jeffrey Lubin, and
Matthew B. Weisberg (Weisberg Law), on the briefs).

Sam Maybruch argued the cause for respondent (Arbus,
Maybruch & Goode, LLC, attorneys; Sam Maybruch
and Matthew R. Goode, on the brief).

The opinion of the court was delivered by

BERDOTE BYRNE, J.S.C. (temporarily assigned)

In this appeal from an award of summary judgment to plaintiff law firm, defendants urge reversal, arguing plaintiff's fee and retainer agreements were illegal and unethical and the court abused its discretion in awarding costs and fees. We discern no error in the trial court's findings and affirm.

On February 8, 2018, Daniel Cohen and his company, Cohen Capital management (defendants) retained plaintiff law firm Arbus, Maybruch & Goode (AMG) to represent him in a negligent construction lawsuit captioned "Sollecito Custom Homes, LLC v. Daniel Cohen" (the Sollecito matter). When AMG commenced representing defendants in the Sollecito matter, discovery had already commenced. AMG was the seventh law firm to represent defendants in the Sollecito matter, in which there were thirty different parties, sixteen different law firms, and tens of thousands of pages of discovery. The issue before us involves a fee dispute for AMG's legal work in the Sollecito matter.

AMG and defendants entered into a three-page retainer and fee agreement, providing AMG would represent defendants in the Sollecito matter, and the parties "may make a new agreement" for additional legal services or matters. The agreement provided the firm "cannot predict or guarantee what your final bill will be. This will depend on the amount of time spent on your case and the amount of other expenses" The retainer required a \$25,000 initial deposit

and set forth the hourly billing rate for each of the three attorneys at the firm. Martin Arbus and Sam Maybruch both billed at \$400 per hour, and Matthew Goode billed at \$300 per hour. The agreement highlighted defendants would be responsible for certain costs, such as photocopying charges, experts' fees, postage, and any other necessary expenses in the matter, and contained a fee-shifting provision in the event AMG was required to institute collection proceedings.

AMG prosecuted the Sollecito matter for more than two years, for which it billed approximately 720 hours, evidenced by the monthly and bimonthly invoices appended to the record, dating from February 2018 through June 2020. The scope of work performed by AMG included twenty-two days of depositions, thirty-three motions, five oral argument appearances, multiple case management conferences, mediation, and an order to show cause. AMG concluded its representation of defendants having billed \$279,660.60 in fees and \$14,245.50 in expenses. Defendants paid \$191,000, leaving a remaining balance of \$102,906.10 unpaid.

The parties entered into a second retainer agreement in February 2018 concerning a separate New York action filed against defendants by their former counsel, Weg & Myers, who were seeking unpaid legal fees in excess of

\$200,000 (The W&M matter). The initial deposit for the W&M matter was \$3,000, and the other provisions in the W&M retainer agreement, including the hourly rates, were identical to the Sollecito retainer agreement. During the scope of representing defendants in the W&M matter, AMG spent approximately 131 hours, incurring legal fees totaling \$47,260, and expenses of \$3,151.65. Defendants paid a total of \$11,500, and a balance of \$38,911.65 remains unpaid.

Ultimately, AMG ended its legal representation of defendants in the Sollecito and W&M matters, substituting out of both cases in July 2020. On August 24, 2020, AMG filed a complaint for breach of contract against defendants for failing to pay fees pursuant to the retainer agreement. On October 2, 2020, defendants filed an answer and affirmative defenses, arguing for the first time the agreements did not permit billing on an "incremental" basis.

AMG filed a motion for summary judgment. In opposition, defendants claimed RPC 1.5 requires attorneys to include language defining what unit of incremental billing the attorneys planned to use. After reviewing the invoices, the trial judge found AMG was billing in increments of one tenth of an hour.

The court stated:

Now I can't say there's nothing in the record to indicate what the increments meant. If Mr. Maybruch is correct,

there's a rounding involved and in terms of looking at the invoices, all of the invoices are, you know, .1, .2, .3, .4, you know, 2.0. It looks from the face of the document that they are billing in increments, increments of one-tenth of an hour.

Finding no disputed issue of material fact, the court ruled the billable increments of one-tenth of an hour were reasonable, and AMG's legal fees were reasonably presented and assented to by the parties in both retainer agreements.

The trial court also granted fees and costs pursuant to the fee-shifting provision in the agreements. The court noted the decades of experience each attorney at AMG had handling such matters, finding their fee rate reasonable after comparing them to the regional market, their level of involvement, and amount of time spent.

Defendants argue a retainer agreement must explain which increment of time--for example, one-tenth of an hour--the law firm will be utilizing despite hourly rates and initial deposits being otherwise clearly defined. The trial court noted a dearth of case law, statutes, and comments to the rule addressing this issue and ruled AMG was entitled to summary judgment for breach of contract. We agree.

We review a trial court's decision on a summary judgment motion de novo, applying the same standard used in the trial court. Samolyk v. Berthe, 251 NJ.

73, 78 (2022); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). We consider "whether the competent evidential materials presented, when reviewed in light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142, N.J. 520, 540 (1995).

The interpretation of a contract is generally subject to de novo review. Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011). "A retainer agreement between a lawyer and a client is not an ordinary contract subject to the rules of the marketplace." Balducci v. Cige, 240 N.J. 574, 580 (2020). Ordinary contract principles must yield to our more demanding rules of professional conduct which guide and govern the attorney-client relationship. Ibid.; see also Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 529 (App. Div. 2009).

We acknowledge lawyers typically prepare retainer agreements, clients rely on the integrity of their lawyers who fashion those agreements, and, as such, an agreement susceptible to two reasonable interpretations should be construed in favor of the client. See Starkey, Kelly, Blaney & White v. Estate of Nicolaysen, 172 N.J. 60, 67 (2002). "When a court reviews a retainer agreement, it should do so 'from the standpoint of a reasonable person in the client's

circumstances." Balducci, 240 N.J. at 594 (quoting Restatement (Third) of the Law Governing Lawyers § 18 cmt. h). Ultimately, "the attorney bears the burden of establishing the fairness and reasonableness of the transaction." Ibid. (quoting Cohen v. Radio Elec. Officers Union, 146 N.J. 140, 156 (1995)).

We remain dutifully mindful of the New Jersey Supreme Court's "exclusive constitutional authority to regulate the practice of law by establishing ethical duties that attorneys owe their clients and potential clients." Id. at 591-91 (citing N.J. Const. art. VI, § 2, ¶ 3). Our Supreme Court refines these rules and guidelines only after a deliberative rulemaking process, with assistance from advisory committees. Id. at 606 ("This Court generally establishes professional standards governing attorneys through the rulemaking process. Several Supreme Court committees have overlapping jurisdiction. . . the Civil Practice Committee, the Professional Responsibility Rules Committee, and the Advisory Committee on Professional Ethics.").

Absent a specific pronouncement promulgated by the New Jersey Supreme Court, we interpret the rules as written, together with commentary provided by the Supreme Court Practice Committees, and apply them within the context of our common law. Id. at 604-607 (affirming Appellate Division but questioning several ethical pronouncements made in the opinion as

inappropriately set forth without rulemaking authority and referencing same to ad hoc committee.).

Fundamentally, "[a] lawyer's fee shall be reasonable." RPC 1.5(a). Lawyers must set forth "the basis or rate of the fee . . . in writing to the client." RPC 1.5(b). "That professional imperative requires that the lawyer also make a '[f]ull and complete disclosure of all charges which may be imposed upon the client.'" Balducci, 240 N.J. at 592-93 (quoting Alpert, 410 N.J. Super. at 531).

The policy underlying the written disclosure requirement at the very outset of representation underscores the lawyer's fiduciary duty to interact fairly with all clients and prospective clients. See Balducci, 240 N.J. at 592. That requirement mandates attorneys provide sufficient information for a client to make an informed choice. See id. at 603 ("an attorney has an obligation to provide the client with meaningful information about the potential aggregate hourly fees and costs that may be incurred during the course of the litigation so that the client may make an intelligent assessment whether to retain the attorney and on what terms."); see also, Michels, New Jersey Attorney Ethics § 33:4-4 (2023) (discussing sufficient writing requirement). An attorney has a corresponding duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," RPC

1.4(c), and is forbidden from making "false or misleading communications" relating to "legal fees," RPC 7.1(a)(4).

Our jurisprudence has interpreted sufficient writings to require, in addition to a sum certain for an initial retainer fee, a disclosure of the out-of-pocket costs of representation, such as photocopying and secretarial overtime. See, e.g., Alpert, 410 N.J. Super. at 532 (failing to simultaneously present at signing the fee agreement and a separate master retainer agreement which included charges, including twelve percent interest on late charges, collection fees, and secretarial overtime, deemed unreasonable omission in violation of RPC 1.5(b)). A sufficient writing may include a scope of work to be performed, especially if a lawyer has not regularly represented that client. Ibid.; see also In re Estate of Travarelli, 283 N.J. Super. 431, 437 (App. Div. 1995). Additionally, the disclosure of fees and costs through a sufficient writing must be made at the outset of representation, or reasonably close enough thereto, so as not to constitute a material omission or a surprise charge. RPC 1.5(b); see generally Michels, § 33:4-4.

Having reviewed the express terms of both retainer agreements entered into between AMG and defendants, we find AMG's agreements with defendants comport with RPC 1.5, fully apprising defendants of their fee, and affirm for

substantially the same reasons as the trial court. Further, based upon the parties' course of dealing, where defendants availed themselves of AMG's legal services for more than two years without objecting to any invoices or raising the incremental billing issue, defendants' claim suggests an improper motive. Defendants' assertion they were unaware billing was occurring in increments of one-tenth of an hour is not supported by the record. We add only the following observation regarding defendants' claim a retainer agreement must include the unit of incremental billing by which a client will be charged.

Based upon our review of the relevant rules, commentary thereto, and case law, there is no rule as rigorous as the one defendants urge us to adopt; there is no specific pronouncement requiring a retainer agreement to explicitly set forth the unit of incremental billing to be used. Defendants urge us to require retainer agreements include disclosure of incremental billing units, although unsupported in our current jurisprudence. While the request is perhaps an issue for one of our Supreme Court's practice committees, it cannot provide a basis for reversal of summary judgment in this case. To pronounce otherwise would usurp our Supreme Court's exclusive rulemaking process. See Balducci, 240 N.J. 604-07.

Having found the issue of incremental billing was ripe for summary judgment, and the parties assented to all provisions of the retainer agreements, as demonstrated by their course of conduct for two years, we also conclude the trial court's award of attorneys' fees and costs was supported by Rule 4:42-9(a)(8) and N.J.S.A. 2A:13-6.¹ "Attorney's fees may be allowed where the parties have agreed thereto in advance by stipulation in a . . . contract." Pressler and Verniero, Current N.J. Court Rules, cmt. 2.10 on R. 4:42-9 (2023). The fees awarded here were based upon a reasonable hourly rate, as determined by the trial judge, who made detailed findings regarding the type of matter involved, the rates charged by other New Jersey attorneys possessing similar experience in like matters, and regional considerations regarding the amount billed.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION

¹ "Every attorney and counsellor may commence and maintain an action for the recovery of reasonable fees, charges or disbursements against his client or his legal representative, provided he shall have first delivered to the client or his legal representative . . . a copy of his bill of fees, charges and disbursements or shall forward a copy of same. . . ."