IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

ALLAN A. CHRISTIAN, Plaintiff, v. MARY O. JOSEPH, Defendant.	CIVIL NO. 505/84 ACTION FOR DEBT

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FINCH, Judge

MEMORANDUM OPINION
(May 1, 1986)

This matter came before this Court on an action for debt. Plaintiff, Allan A. Christian, sued to recover attorney's fees allegedly owed to him by defendant, Mary O. Joseph, in the amount of $4500. Mrs. Joseph counterclaimed for an accounting and excess legal fees she claims plaintiff paid himself on her behalf. This matter was tried without a jury. Plaintiff was represented by, Gregory E. Miller, Esquire and defendant by Judith L. Bourne, Esquire. After having heard the testimony and being fully advised in the premises, this Court hereby enters the following findings of fact.

On or about March, 1978 Defendant, Mrs. Mary O. Joseph, consulted with Plaintiff, Attorney Allan A. Christian, in reference to a problem concerning real property. Mrs. Joseph had transferred some real property to a Brojal International Corporation. Mrs. Joseph encountered problems with the corporation which led her to believe she was being defrauded. Therefore, she went to see Christian to ascertain whether she had any legal redress against the corporation and its officers. After discussing the matter with Mr. Christian, Mrs. Joseph retained him to prosecute the case against Brojal International Corporation. During the initial discussion, Mrs. Joseph informed Mr. Christian that she had no money available, since her assets and income were tied up in the corporation. In response, Mr. Christian informed her that he was unable, at the time, to ascertain what the legal fees would be, but that he would require a retainer fee of $250. Mrs. Joseph paid Mr. Christian the $250 and he commenced work on the matter against Brojal. Subsequently, the date is unclear from the testimony, the parties again discussed attorney's fees and costs. Mr. Christian informed Mrs. Joseph that money was needed to cover the cost of litigation in the Brojal matter. As a result of the discussion, Mrs.Joseph agreed to turn over Plot 31 Estate Whim, Frederiksted, St. Croix to Mr. Christian for him to sell and collect the proceeds to cover the incurring debts and expenses. Mr. Christian sold four plots of land in Whim and collected $16,800 in proceeds. In addition to the Whim properties, Mr. Christian also sold for Mrs. Joseph real property she owned in Calquohoun. The precise date Mr. Christian took control of the Calquohoun property is uncertain but the evidence clearly establishes that it was in 1978. This is evidenced by a letter written by Mr. Christian to Mrs. Joseph, dated June 28, 1978 in which he indicates that the Calquohoun properties were going to be sold at $12,000 per plot. Mr. Christian collected rents for Mrs. Joseph from the Calquohoun properties prior to selling them. Mr. Christian collected a total of $24,745.00 in rents and sales proceeds from the Calquohoun land. Thereafter, on February 27, 1979 the parties entered into a contingency fee agreement, whereby Mrs. Joseph agreed to pay Mr. Christian 33-1/3% of the recovered judgment, if any, in the Joseph v. Brojal International Corporation matter, as and for attorney's fees.

Mrs. Joseph, at the time the agreement was executed, was 62 years old. She was an elderly woman whose health was poor. She suffered from severe arthritis. Furthermore, she was anxious over the thought of losing her properties. She deposited her complete confidence in Mr. Christian. The real property she had left, she turned over to him, trusting him blindly. Although she did not understand the necessity of the contingency fee agreement, or the ramifications of it, she signed it because Mr. Christian told her to do so.

During the pendency of the Brojal matter, Mrs. Joseph encountered other legal problems, which Mr. Christian also handled for her. These matters are as follows:

1) Royal Bank of Canada moved to foreclose on Mrs. Joseph's home as a result of a mortgage executed thereon by Brojal Corporation;

2) three eviction actions prosecuted on behalf of Mrs. Joseph;

3) the return of Mrs. Joseph's daughter, who was incarcerated in Louisburg, Pennsylvania, to the Virgin Islands to testify as a witness in the Brojal matter; and

4) other miscellaneous matters, such as writing letters to tenants.

In late 1979, Mrs. Joseph requested an accounting from Mr. Christian. Mr. Christian met with Mrs. Joseph and her son, Cephus Rogers, in his office. They were given an oral accounting and both were satisfied. In March, 1980, the parties again met, accompanied by Mr. Rogers, for another accounting. This was the last accounting given by Mr. Christian to Mrs. Joseph, although she made several requests, which were never complied with.

The Joseph v. Brojal International Corp. matter terminated in January 25, 1980. A default judgment was entered by the District Court in favor of Mrs. Joseph in the amount of $123,000. The judgment was appealed by Mr. Oswald John to the Third Circuit Court of Appeals. On appeal, the District Court's judgment was affirmed. Mr. John attempted to appeal to the U.S. Supreme Court but certiorari was denied. Upon the filing of the appeal to the Third Circuit, Mr. Christian wrote to Mrs. Joseph informing her that his fee for handling the appeal would be $2500. However, on November 28, 1980 Mr. Christian wrote to Mrs. Joseph stating that he was increasing his fee for handling the appeal to $4500, since it was no longer "economical" for him to charge her $2500. Subsequently, in December, 1980, Mr. Christian sent Mrs. Joseph a retainer agreement for her to execute, wherein she agreed to pay him $4500 as attorney's fees for handling the appeal. Mrs. Joseph signed the document in early 1981.

Mrs. Joseph transferred to Mr. Christian two parcels of land as payment of attorney's fees in the Brojal matter. A dispute arose as to Mr. Christian's fees. Mrs. Joseph believed that he had paid himself from the proceeds of the land sales. Mr. Christian insisted that she owed him money. The amount in dispute did not come out in the testimony in Court. In settlement of the dispute, Mrs. Joseph deeded 12AD Calquohoun, valued at $8500, and 47A Hospital Street, Frederiksted, valued at $12,500 to Mr. Christian.

Mr. Christian commenced this action against Mrs. Joseph to collect $4500 for the legal fees in the appeal to the Third Circuit. Mrs. Joseph filed a counterclaim, wherein she requested a full accounting of all the proceeds received by Mr. Christian on her behalf. She also alleged in her counterclaim that Mr. Christian misused the funds received by him as a fiduciary, on her behalf. Mrs. Joseph argues that the contingency attorney's fees agreement is void and that a quantum meruit basis should be applied to determine attorney's fees.

The first issue presented before this Court is the reasonableness of the contingency fee arrangement entered into by the parties.

Under the Virgin Islands Law, contingency fee arrangements are permissible, except in criminal cases and greatly discouraged in domestic relations cases. The agreement must be fair, just and reasonable. It must be entered into in "good faith, without suppression or reservation of fact, and without undue influence." McKenzie Construction, Inc. v. Maynard, 20 V.I. 207 (D.V.I. 1983). Courts have the power to monitor contingent fee agreements and determine the reasonableness of a fee resulting from the application of such contracts. McKenzie Construction, Inc. v. Maynard, 758 F.2d 97 (3rd Cir. 1985).

In reviewing a dispute over attorney's fees, a Court must apply an equity and fairness standard. The Court must determine whether the attorney's conduct, as against the client, "has resulted in such an enrichment at the expense of the client that it offends a court's sense of fundamental fairness and equity." McKenzie Const.,Inc. v. Maynard, 758 F.2d at 101. An attorney has the burden of proof as to the reasonableness of his fees, even if the client is the plaintiff suing to recover fees already paid. Id. This is premised on the special relationship of trust that arises between an attorney and client, and the attorney's obligation to charge a reasonable fee, regardless of whether the arrangement is contingent or fixed.

There are several factors which must be considered by a Court in analyzing the reasonableness of a contingency fee agreement:

1) the circumstances which existed when the arrangement was entered into;

2) whether a contingency fee arrangement was appropriated under such circumstances;

3) status and sophistication of the client;

4) the quality of the work;

5) the amount involved and the results obtained;

6) whether the attorney's efforts substantially contributed to the results; and

7) whether any events occurred after the agreement was made which would render it unfair in its enforcement.

McKenzie Constr.,Inc. v. Maynard, 758 F.2d 97; Dunn v. H.K. Porter Co., Inc., 602 F.2d 1105 (3rd Cir. 1979). Although a Court has power to review attorney's fees agreements, the Third Circuit has cautioned that "courts should be reluctant to disturb contingent fee arrangements freely entered into by knowledgeable and competent parties. McKenzie Constr., Inc. v. Maynard, 758 F.2d at 102. (emphasis added). In applying the above listed criteria to the case at bar, this Court concludes that the contingency fee arrangement entered into by the parties is unreasonable.

An examination of the circumstances surrounding the engagement of Mr. Christian and the execution of the agreement, shows that a contingency fee arrangement was inappropriate in the case at bar. When Mrs. Joseph first approached Mr. Christian, no decision was made as to attorney's fees. Mrs. Joseph gave Mr. Christian a retainer of $250 for him to commence work on the Brojal matter. No discussion was had about a contingency fee agreement. Thereafter, when the subject of costs and fee arose again, Mrs. Joseph gave Mr. Christian authority to sell the property she owned in Whim and Calquohoun, and collect the proceeds. These transactions commenced before any contingency agreement was executed. It was not until February, 1979, almost a year after Mr. Christian was retained, that the contingency arrangement was entered into. At this point in time, Mr. Christian was collecting proceeds from the rental and/or sale of the properties. He had full knowledge, as a real estate broker, of the value of the properties and the amount he would realize from the sale thereof. Therefore, Mr. Christian, as an attorney and real estate broker, was in the better position to determine whether he would get enough monies from the sale of the properties to cover the cost of litigation and attorney's fees, thereby eliminating the need for the contingency agreement. A fair and competent analysis would have indicated that sufficient monies would be collected to pay his attorney's fees for the Brojal matter on an hourly basis, in addition to the cost of litigation, the brokerage fees, and other expenses incurred such as taxes and insurance. Mrs. Joseph, at the time the agreement was executed, was a 62 year old woman who lacked the sophistication, experience and education to knowledgeably deal with Mr. Christian on an equal basis. She entrusted Mr. Christian with all her affairs, precisely due to her lack of knowledge and expertise.

Mr. Christian would want this Court to believe that the sole reason why he entered into an agreement with Mrs. Joseph to sell her properties in 1978 was due to "a series of problems which descended on Mrs. Joseph." He then refers to the foreclosure action and the three evictions which he handled for her. The foreclosure action, which was Mrs. Joseph's major problem besides Brojal, did not arise until March, 1979, after the contingency agreement was made. Thus, Mr. Christian's contention is without merit and incredible. The circumstances under which the fee agreement was entered into leads this Court to conclude that such arrangement was not warranted.

The Court agrees that a one-third contingency agreement is common in this jurisdiction, although it is more common in tort actions. However, the fact that it is common does not make it reasonable and appropriate in every matter, and a Court must review the matter on a case by case basis.

There is no question that the results obtained were very favorable to Mrs. Joseph. A default judgment was entered against Brojal Corporation, in favor of Mrs. Joseph in the amount of $123,000, the value of the property transferred to the corporation by Mrs. Joseph. However, the work entailed was not novel or extremely complicated. In prosecuting the matter, Mr. Christian:

1) filed a complaint;

2) filed a motion to recover possession of a motor vehicle;

3) filed a motion for an order directing Mr. John to stop harrassing Mrs. Joseph;

4) filed for leave to amend the prayer clause in the complaint;

5) filed a motion for summary judgment;

6) applied for a writ of habeas corpus to bring Mrs. Joseph's daughter to testify in the trial;

7) filed a motion to make the preliminary injunction issued by the Court applicable to Royal Bank of Canada;

8) filed a motion for dissolution of Brojal Corporation and removal of its officers;

9) served interrogatories on Oswald John; and

10) filed a motion for sanctions for John's failure to answer the interrogatories.

Mr. Christian appeared in Court on several occasions but he was unable to state the number of appearances due to his lack of recordkeeping. The matter did not go to trial since the District Court found Mr. John to be in default and entered a default judgment on Mr. Christian's motion for sanctions. The whole matter was pending for a period of one year and nine months. Although Mr. Christian's efforts contributed to the results, this Court also recognizes that Mr. John contributed to the result by failing to appear and otherwise defend.

Mr. Christian had the burden of proving the reasonableness of his fees in this matter. This Court finds that he failed to sustain that burden. Mr. Christian maintained no records of the time spent in the prosecution of the case, the costs and expenses of litigation or even the number of court appearances he made. He stated in Court that he kept no such records simply because he had taken the matter on a contingency basis. In addition, Mr. Christian has likewise failed to substantiate the reasonableness of the $4500 he is seeking as attorney's fees for the appeal. Therefore, after weighing the evidence and applying a standard equity and fairness, this Court finds the contingency fee agreement entered into by the parties on February 27, 1979 to be unreasonable.

Having found the arrangement unreasonable, this Court will review and award determine the attorney's fees on a quantum meruit basis.

As stated previously, Mr. Christian failed to provide this Court with records or testimony showing the time and costs expended on the Brojal matter. This puts this Court in a somewhat difficult situation in determining Christian's fees based on quantum meruit. Mr. Christian's hourly fee in 1978 was $75 per hour. Based on the evidence presented, this Court finds that Mr. Christian spent approximately 125 hours on the Brojal matter, including the defense of the appeal. Thus, Mr. Christian will be awarded $10,000 as and for attorney's fees.

The second issue before this Court is whether Mr. Christian breached the fiduciary duty he owed Mrs. Joseph. Defendant claims that Mr. Christian breached his fiduciary duty to Mrs. Joseph by misusing the funds collected on her behalf for his benefit.

An attorney that receives property or money for a client acts as a fiduciary in regard to such property. Any proceeds collected on behalf of a client must be deposited in an identifiable bank account. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102(A) (1979)(adopted by 5 V.I.C. App. V R. 57(e)(1982)). As a fiduciary, the attorney must maintain accurate and complete records of all funds and property entrusted to him, and make a property accounting to the client regarding such funds. Id. DR 9-102(B). The failure to promptly and accurately account for funds constitutes misconduct, even in the absence of harm to the client.

The evidence before this Court shows that Mr. Christian, as a fiduciary, did not keep accurate records of the monies he received on behalf of Mrs. Joseph. Mr. Christian occasionally wrote to Mrs. Joseph informing her of the progress of pending matters. However, no records were submitted indicating the funds received and disbursed, nor the balance at any given point. Mr. Christian gave two accountings to Mrs. Joseph, but thereafter failed to do so, even though she made several requests. The accounting given to the Court delineated the disbursements for costs of litigation and sale of the properties, but is very vague as to the fees which Mr. Christian paid himself on behalf of plaintiff. It was after cross-examination that Mr. Christian was able to explain and account for the following fees:

(a)	Royal Bank of Canada vs. Brojal Corporation - representation of Mrs. Joseph, including Court appearances	$1,500.00
(b)	Three eviction cases	$750.00
(c)	Negotiation of sale; preparation of sale contracts; negotiations with Roe-Win, conference with tenants and prospective buyers - Calquohoun properties	6,200.00
(d)	Negotiating, collecting and preparing contracts - Whim prepar deed sale	977.50
(e)	Broker's fees - Whim	2,200.00
(f)	Miscellaneous chores including writing of letters	1,500.00

The total fees accounted for is $13,127.50. In addition, Mr. Christian paid out the following sums of monies on behalf of Mrs. Joseph: $165.44 for costs of litigation in the Brojal matter; $5,028.51 for expenses and costs deriving out of the management and sale of the Whim and Calquohoun properties, which included roadfill costs, insurance, delinquent and accruing taxes, surveys and appraisals; $5,655 given to Mrs.

Joseph over a period of approximately three years; and $7,595.32 paid to Royal Bank of Canada on behalf of Mrs. Joseph, for a total of $18,624.27. Therefore, the total accounted for by Mr. Christian is $31,751.77.

Mr. Christian received $41,745.00 on behalf of Mrs. Joseph and $21,000 in property from Mrs. Joseph, or a total of $62,745.00. He has accounted for $31,751.77, in addition to $10,000 in attorney's fees for the Brojal matter, for a total of $41,751.77. The difference and amount therefore owed to Mrs. Joseph is $20,993.23.

Accordingly, it is hereby ordered that judgment be entered in favor of defendant, Mrs. Joseph and against Mr. Christian in the amount of $20,993.23.

DATED: May 1, 1986

Raymond L. Finch, Judge