United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued September 11, 2025
Decided October 10, 2025

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

NANCY L. MALDONADO, *Circuit Judge*

No. 25-1417

BARBARA SIMONSON,
Plaintiff-Appellant,

v.

THOMAS M. OLEJNICZAK, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 23-C-526

William C. Griesbach,
Judge.

O R D E R

John Hohler died in 2013. The assets in his estate and living trust were to be distributed to three sub-trusts: one for each of his daughters (Barbara Simonson and Mary Vaira) and one for his only grandchild. Simonson was named as trustee and personal representative of the estate.

In June 2014 Simonson retained Thomas Olejniczak and his law firm (Conway, Olejniczak & Jerry, S.C.) to represent her, the estate, and the trusts. Olejniczak and the firm did so until August 2015, when Simonson was about $80,000 behind in paying for the firm's services. Simonson disputed some of the bills but never provided details of her objections, and after repeatedly demanding payment without much success the firm decided that it would no longer handle her affairs on credit.

The retention contract authorized the law firm to withdraw if Simonson failed to pay fees on time. At the end of July 2015 Olejniczak wrote to Simonson: "[W]e believe our representation is concluded." Simonson disagreed with this stance, which led the law firm to ask the state's probate court for permission to withdraw. The motion to withdraw, coupled with the email the previous month, provided Simonson with the notice required by the retention contract. The court granted the law firm's motion on August 26, 2015, and it did nothing further on Simonson's behalf.

Early in August 2015 Simonson or her counsel should have filed papers to close the estate. Olejniczak and his firm did not file those papers. On August 31 Simonson sought an extension of time. The court granted that request, giving her until October 30 to file the necessary papers. In September she filed a "Personal Representative's Statement to Close Estate", which the probate court deemed insufficient. By letter of September 18 the court identified several additional documents that it needed and set a new closing date of October 5. When Simonson neither tendered the documents nor requested extra time, Vaira filed a motion to hold her in contempt. The court set a hearing for November 9. Simonson sent an email to Vaira's attorney stating that she was not available on November 9 and that someone would need to ask the court for a different date, but neither she nor anyone else did that. When Simonson did not appear, the probate court removed her as trustee and personal representative, and the court later imposed surcharges that reduced the assets distributed to Simonson's sub-trust. Simonson's appeals within the state system were unsuccessful.

In this suit under the diversity jurisdiction, Simonson accuses Olejniczak and his firm of breaching the retention contract. She seeks to collect damages at least equal to the amount her sub-trust lost because of the probate court's sanction. After the district court granted summary judgment for the defendants, 2024 U.S. Dist. LEXIS 148456 (E.D. Wis. Aug. 20, 2024), Simonson appealed.

Wisconsin requires contracting parties to keep their promises. That's the principle underlying Simonson's claim: the law firm promised to represent her but failed to close the estate. The need to keep promises likewise is the principle underlying the defense: Simonson promised to pay but did not, and she agreed that nonpayment would justify withdrawal. Once the arrearages were enough to be a material breach, defendants maintain, they were entitled to lay down their pens and unplug their word processors. Although Simonson insists that she would have paid eventually (the estate had enough assets), defendants took her foot-dragging as a sign that they were in for a fight and elected to cut their losses. The contract, after all, required *monthly* payment; the law firm did not agree to work indefinitely on long-term credit.

Simonson proceeds as if a federal judge (and perhaps a federal jury) should decide whether nonpayment justified the law firm's withdrawal. But that subject has been decided by the state's probate court, which gave an affirmative answer. Principles of issue preclusion do not allow Simonson to relitigate the propriety of withdrawal. The state judge granted leave to withdraw "based on the motion"—and nonpayment was the only reason given in the motion. The propriety of withdrawal for nonpayment therefore was litigated and resolved in state court. (Defendants suggest that there is a jurisdictional problem under the *Rooker-Feldman* doctrine, but there is not. Simonson wants damages for events that preceded the state court's decision, so preclusion rather than the *Rooker-Feldman* doctrine supplies the appropriate analysis. See *Gilbank v. Wood County Department of Human Services*, 111 F.4th 754 (7th Cir. 2024) (en banc).)

Simonson could have appealed the probate judge's order within Wisconsin's judicial system but didn't. She asserts that she did not receive notice of the probate judge's decision, but she concedes receiving a copy of defendants' motion to withdraw and could have inquired to see what the state judge had done. She also could have sought more time to respond to the law firm's motion or appeal the judge's decision, but she did not do either of those things. By the end of August Simonson had begun to file papers on her own behalf; she evidently knew that she was unrepresented.

To the extent that there is room for an independent federal decision, we agree with the district court that a reasonable jury could not find that Simonson kept her part of the bargain. Her material breach allowed the law firm to withdraw.

Still, she observes, the time to close the estate was early August 2015—after defendants said that they deemed the representation concluded but before the state judge allowed them to withdraw. If the defendants had done the job in early August, Simonson asserts, she would not have been hit with a surcharge.

That may be so, but she had an obligation to mitigate damages. *Kuhlman, Inc. v. G. Heileman Brewing Co.*, 83 Wis. 2d 749, 752 (1978). The court granted her more time to close the estate, and when her filing in September proved to be inadequate the court told her what more was needed. She did not hire a new lawyer yet chose not to comply with the court's instructions (saying in an affidavit in the federal litigation that she was sure that she had done enough). Then she did not appear at the hearing set for November 9. She asserts in this suit that she was unavailable and anyway thought the date tentative, but the right time to make such assertions was before the scheduled date, and the right place was state rather than federal court.

AFFIRMED

MALDONADO, *Circuit Judge*, concurring in the judgment. I agree with the majority that Simonson failed to mitigate her damages after the law firm's withdrawal, and that her failure to do so forecloses her breach of contract claims. But I disagree with the majority's determination that there is no genuine dispute of material fact that Simonson materially breached the Legal Services Agreement, excusing the law firm from its obligation to close the estate on time. I see the facts presented by the parties somewhat differently, even though I reach the same result.

To start, the record contains evidence from which a reasonable jury could find that Simonson's nonpayment was not material and did not "destroy the essential object of the [Agreement]." *See Ranes v. Am. Fam. Mut. Ins. Co.*, 219 Wis. 2d 49, 57 (1998) (citing *Appleton State Bank v. Lee*, 33 Wis. 2d 690, 692–93 (1967)). As trustee, Simonson was obligated under Wisconsin law to "incur only costs that are reasonable" "[i]n administering [the] trust." Wis. Stat. § 701.0805. Indeed, the probate court stated in its June 5, 2015 order, when the firm was still counsel of record, that Simonson "shall be given the opportunity to review [attorney's] fees consistent with Wis. Stat. §§ 701.1004 and 701.0805 and the terms of the Trust." And the firm knew that it would ultimately be paid, with 5% interest, from the trust, which indisputably had ample funds to cover attorney's fees. Wis. Stat. § 701.1004. Simonson also paid the first six invoices (which totaled more than $60,000) on time and in full, and she made an additional $27,000 worth of good faith, partial progress payments after the fee dispute began, including a $12,000 payment on July 30, 2015, less than a month before the firm's withdrawal on August 26, 2015. Lastly, Simonson questioned whether the invoices had charged excessive fees for inaccurate work product, and when Simonson made these concerns known to the firm, it took them seriously enough to offer Simonson a series of substantial discounts. Thus, while Simonson may not have been a dream client, in my view, she has introduced sufficient evidence to create a triable issue as to whether her imperfect payments were a material breach of the Agreement. *See Ash Park, LLC v. Alexander & Bishop, Ltd.*, 317 Wis. 2d 772, 785 (Wis. Ct. App. 2009), *aff'd*, 324 Wis. 2d 703, 783 (2010) ("Whether a breach is material is, except in clear cases, a question for the jury.").

Further, even if Simonson's breach was material, evidence in the record suggests that the firm waived its claim of materiality by sending Simonson mixed messages about its willingness to perform legal work on her behalf and by failing to enforce its rights under the Agreement. *Mgmt. Comput. Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 184 (1996) ("Moreover, even where such a material breach has occurred, the non-breaching party may waive the claim of materiality through its actions"); *Entzminger v. Ford Motor Co.*, 47 Wis. 2d 751, 754–55 (1970) (a party's delay before it refuses to perform under the contract waives the materiality of the other party's breach). On April 6, 2015, after several months of Simonson's non-payment, Steve Krueger, an associate at the law firm, threatened to stop working and send the fee dispute to arbitration. But in spite of his threats, Krueger made filings in the probate court on April 7, April 27, April 29, June 1, and June 8, 2015, and he appeared at a hearing before the probate court on May 20, 2015. Then, on June 15, 2015, Krueger emailed Simonson a list of to-dos stretching out through August 2015. And on July 21, 2015, Krueger emailed Simonson requesting "payment of our outstanding legal fees as soon as possible," but also offering to "assist" Simonson "when and where requested." Even though Olejniczak told Simonson later that day: "we believe our representation is concluded," and threatened to submit the fee dispute to arbitration, Krueger emailed Simonson the following day, acknowledging Olejniczak's ultimatum, but stating, "[i]f there are additional issues in which you'd like our assistance, please let me know." A reasonable jury could find that the law firm waived any claim as to the materiality of Simonson's breach by accepting partial payments, continuing to perform some work for Simonson, and failing to promptly move to withdraw as counsel of record.

On August 3, 2015, the deadline to close the estate—which the probate court had set at least a year earlier—passed, rendering the estate delinquent. On August 5, 2015, rather than endeavoring to close the estate, as he and Simonson had purportedly repeatedly discussed since the outset of the attorney-client relationship, Olejniczak instead sent Simonson a letter offering to "settle this matter for $65,000"—a $15,000 discount from Simonson's $80,000 outstanding balance—and again threatened arbitration. Simonson did not accept the discounted fee offer, and again, the firm did not file for arbitration or promptly move to withdraw.

It was not until August 24, 2015, after Simonson complained to Olejniczak that she had learned of the firm's failure to close the estate, that the firm gave any indication that it would be moving to withdraw from representation. For nearly five months after Krueger's April 6, 2015 warning email, the firm continued to represent Simonson—making filings, appearing in court, handling trust administration, and speaking with Vaira's counsel on Simonson's behalf—while accepting partial payments on the outstanding invoices. Importantly, throughout this time, the firm retained its appearance on file with the probate court, clouding the boundaries of the attorney-client relationship, even as it alleged that its representation was over. Thus, even if Simonson's delayed, partial payments were a material breach of the Agreement, there are triable issues of fact as to whether the firm waived the claim of materiality "by continuing to live with the contract as if it existed." *Mgmt. Comput. Servs.*, 206 Wis. 2d at 184 n.25.

The majority sees the record as suggesting, indisputably, that the firm withdrew because Simonson did not pay her bills and was not likely to do so any time soon. But as I see it, the facts permit an alternative narrative: that the firm, despite having an appearance on file during and after the August 3, 2015 estate closure deadline, only sought to withdraw its representation after they blew that long-set deadline and Simonson complained that the estate had not been closed. Because the purpose of summary judgment is "not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe," *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994), I part ways with the conclusion that there is no genuine dispute of material fact that Simonson breached the Agreement. But for Simonson's complete failure to mitigate damages after the firm's withdrawal, I would have returned this dispute to the district court for further factfinding.