

Judge Eaton

STATE OF VERMONT
WINDSOR COUNTY, SS

<p>Brenda Taite Plaintiff</p> <p>v.</p> <p>Norman E. Watts, Esq. Defendant</p>	<p>SUPERIOR COURT Docket No. 123-2-09 Wrcv</p>
--	--

DECISION ON APPEAL

This is an appeal of a dispute over a retainer collected by Norman Watts, Esq. on behalf of Watts Law Firm, P.C. concerning representation of Plaintiff/Appellant. Oral argument was held on June 25, 2009, with both parties present. In the proceedings below, the judge undertook to substitute the Watts Law Firm, P.C. as the party defendant. However, the decision of the Small Claims court is captioned as above. This court's decision is not affected by the identity of the defendant, whether it is the attorney individually or the firm employing him.

Appellant asserts an "abuse of discretion" by the Small Claims court in reaching its decision that Attorney Watts did not breach the written retainer agreement for hourly services between the law firm and Ms. Taite. In support of her arguments, Ms. Taite asserts that Attorney Watts abandoned her representation, thus breaching their agreement for services. She further claims that the agreement, which called for a non-refundable retainer, should not be permitted under Vermont law. Finally, she claims Attorney Watts should only be entitled to that portion of the fee earned in representation of her, which, she asserts, is less than the \$2500 retainer she paid.

A small claims appeal is limited to issues of law. V.R.S.C.P. 10 (d). It is not the function of the appellate court to reweigh the evidence on appeal. The weight to be given to evidence is a matter for the trial court. *Jeffords v. Poor*, 115 Vt. 147 (1947).

As to the issue of the claimed abandonment of representation by attorney Watts, the Small Claims court found the existence of a written agreement between the parties which the court identified in its findings. Although no specific factual finding was made concerning the terms of representation, the document provides that "either party may terminate the agreement." As the court concluded, the agreement does not limit the conditions of termination. The court further found that Ms. Taite consented to Mr. Watts' withdrawal when he sought to do so.

FILED

JUN 26 2009

It is not for the court to re-write the terms of an agreement between the parties. *Downtown Barre Development v. C&S Wholesale Grocers, Inc.*, 177 Vt. 70 (2004). The court's findings and conclusions concerning the termination by Attorney Watts as not being in breach of the contract were correct. Attorney Watts was entitled, under the terms of the agreement, to terminate his representation as he wished.

The Small Claims court considered the retainer to be non-refundable, as per the express terms of the written agreement. Despite this, the court made findings on the billings made by attorney Watts, which exceeded the retainer amount and his waiver of claims for additional sums beyond the retainer amount. The court did not make findings as to the amount of fees earned by attorney Watts, an issue in dispute between the parties.

As a matter of law, a "non-refundable" retainer is not permitted. *Matter of Cooperman*, 633 N.E. 2d 1069 (N.Y. 1994). To the extent the Small Claims court denied Appellants claim for return of the retainer on that basis, the court was in error.

The Court found attorney Watts' billings were more than the retainer. The court did not find that the billed amount was earned, which Appellant vigorously contested. It is not for this court, on appeal, to make factual findings. V.R.S.C.P. 10 (d). An appellate court can and should make findings where the evidence is uncontradicted. *Yokohama Specie Bank v. Higashi*, 133 P.2d 487 (Cal. App. 1943). But where there is a total failure to find on a material issue, and the evidence on that issue is highly conflicting, the appellate courts will not make findings. *Estate of Pendell*, 14 P.2d 506 (Cal. 1932); *Packer v. Sillas*, 57 Cal.App.3d 206, 221 (Cal.App. 1976).

Generally, when a trial court fails to make factual findings on a material issue, such failure constitutes reversible error, and appellate court remands to the trial court to enter the necessary findings unless appellate court determines that such error is harmless, i.e., the undisputed evidence clearly establishes the missing findings or the missing findings may reasonably be implied; however, if the error is harmless, appellate court affirms the judgment in the interest of judicial economy. *Uhrhahn Const. & Design, Inc. v. Hopkins* 179 P.3d 808 (Utah App.,2008).

Appellee argues the Small Claims court necessarily considered the fees earned and that such a finding can be implied. "Unstated findings can be implied if it is reasonable to assume that the trial court actually considered the controverted evidence and necessarily made a finding to resolve the controversy, but simply failed to record the factual determination it made." (quoting *Hall v. Hall*, 858 P.2d 1018, 1025 (Utah Ct.App.1993)). On the other hand, "[f]indings ... may not be implied ... when the ambiguity of the facts makes such an assumption unreasonable. This court [has] held that we will not imply any missing finding where there is a matrix of possible factual findings and we cannot ascertain the trial court's actual findings." (quoting *Hall*, 858 P.2d at 1025-26) (internal quotation marks omitted). *Uhrhahn Const. & Design, Inc. v. Hopkins* 179 P.3d 808, 816 (Utah App.,2008).

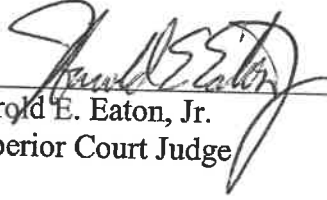
FILED

JUN 26 2009

The absence of a finding that the retainer had been earned requires reversal here given the unenforceability of the "non-refundable" aspect of the retainer agreement. Since the retainer had to have been earned for the Appellee to retain it, the Small Claims court was required to make findings in that regard and it was a material issue in the case. Especially in light of the dispute as to the amount which had been earned, a finding that an amount in excess of the retainer had been billed was insufficient.

For the reasons stated herein, the Small Claims court judgment concerning lack of breach by attorney Watts' in withdrawing from representation and terminating the agreement is **AFFIRMED**. The Small Claims judgment for the Defendant/Appellee concerning the \$2500 retainer is **REVERSED** and remanded to the Small Claims court for further findings and/or hearing consistent with this opinion.

Dated at Woodstock this 26th day of June, 2009.


Harold E. Eaton, Jr.
Superior Court Judge

FILED

JUN 26 2009