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IN THE
COURT OF APPEALS OF INDIANA

BERTRAM ANTHONY GRAVES, M.D.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 49A02-0901-CV-37
	)	
BINGHAM McHALE, LLP,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John F. Hanley, Judge
Cause No. 49D11-0806-CC-26365

May 26, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Bertram Anthony Graves, M.D. ("Dr. Graves") appeals following the denial of his motion to correct error, which challenged the grant of summary judgment in favor of Bingham McHale, LLP ("Bingham McHale") upon a complaint for attorney's fees. We affirm.

Issue

Dr. Graves presents a single issue for review: whether the trial court erroneously granted summary judgment to Bingham McHale.

Facts and Procedural History

On June 10, 2008, Bingham McHale filed a complaint against Dr. Graves seeking payment of $19,150.33 in attorney's fees. Dr. Graves, acting pro-se, filed a motion for a continuance. On July 8, 2008, the trial court granted Dr. Graves an enlargement of time to September 12, 2008 in which to file an answer. Bingham McHale's contemporaneous motion for a default judgment was denied.

On July 22, 2008, Bingham McHale filed a motion for summary judgment and designation of evidentiary materials. On July 25, 2008, the trial court ordered Dr. Graves to respond to the motion for summary judgment within thirty days, and set the matter for a summary judgment hearing on September 26, 2008. Dr. Graves did not timely file a response.

On September 4, 2008, Dr. Graves filed a document in letter format, captioned "Motion to Continue." (Appellee's App. 18.) Therein, Dr. Graves requested "that this

motion for summary judgment be denied as all conditions Bingham had incumbent upon it pursuant to the agreement between Bingham and myself had not been performed nor as indicated." (Appellee's App. 18.) The trial court denied the motion for a continuance.

On September 26, 2008, counsel for Dr. Graves entered an appearance and filed a brief opposing summary judgment, and a summary judgment hearing was conducted. On October 2, 2008, the trial court granted summary judgment in favor of Bingham McHale. Dr. Graves filed a motion to correct error, which was denied. He now appeals.

Discussion and Decision

I. Standard of Review

When reviewing a grant of summary judgment, the well-settled standard of review is the same for this Court as it is for the trial court: whether there are genuine issues of material fact, and whether the moving party is entitled to judgment as a matter of law. Rood v. Mobile Lithotripter of Indiana, Ltd., 844 N.E.2d 502, 506 (Ind. Ct. App. 2006). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. Id. However, the review of a summary judgment motion is limited to those materials designated to the trial court. Id. The party appealing the grant of summary judgment has the burden of persuading this Court that the trial court's ruling was improper. Carter v. Indianapolis Power & Light Co., 837 N.E.2d 509, 514 (Ind. Ct. App. 2005), trans. denied.

II. Analysis

Dr. Graves argues that summary judgment was improper because there exists a

genuine issue of material fact, that is, whether Bingham McHale's fees were reasonable.

Bingham McHale's complaint alleged that it was entitled to payment for legal services performed for Dr. Graves "which were reasonably worth the sum of $19,150.33." (App. 6.) Exhibit A, a "Reminder Statement" listing outstanding invoices, was attached. (App. 8.) In support of its motion for summary judgment, Bingham McHale designated its complaint, including Exhibit A, and an affidavit of attorney Mary Watts. Dr. Graves did not timely respond; nor did he designate materials in opposition to summary judgment.

At the summary judgment hearing, counsel for Dr. Graves admitted that Dr. Graves had not filed an opposing evidentiary designation, but argued that Bingham McHale had not established, prima facie, that its fees were reasonable. Dr. Graves' brief opposing summary judgment included his argument that the reasonableness of attorney's fees is an "inherently factual issue for which there ought to be an evidentiary hearing." (Appellee's App. At 27.)

Indiana Trial Rule 56(C) requires that a party opposing a motion for summary judgment timely designate each material issue of fact precluding summary judgment and the relevant evidence. Trial Rule 56(H) provides, "No judgment rendered on the motion shall be reversed on the ground that there is a genuine issue of material fact unless the material fact <u>and the evidence relevant thereto</u> shall have been specifically designated to the trial court." (emphasis added.)

Arguably, language in Dr. Graves' pro-se letter and motion to continue advised the trial court that he disputed the reasonableness of Bingham McHale's fees. <u>See</u> <u>Filip v. Block</u>, 879 N.E.2d 1076, 1081 (Ind. 2008) (observing that Trial Rule 56(C) does not mandate either

the form of designation, i.e., the degree of specificity, or its placement, i.e., the filing in which the designation is to be made). However, Dr. Graves had failed to timely file this response, and he did not designate any evidence relative to a factual issue. A failure to designate evidence is not necessarily fatal, because Trial Rule 56(C) provides that '"[s]ummary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court."' Filip, 879 N.E.2d at 1081 (quoting T.R. 56(C)).

Here, the designated summary judgment materials before the trial court consisted of the complaint, the attached exhibit, and the Watts affidavit. The complaint asserted that $19,150.33 was a reasonable amount of unpaid legal fees for work performed by Bingham McHale for Dr. Graves. No evidentiary matter before the trial court contradicted this assertion. The trial court, and this Court, are constrained to consider only the designated materials. Rood, 844 N.E.2d at 206.

Moreover, Trial Rule 56(H) specifically prohibits appellate courts from reversing a grant of summary judgment on the ground that there is a genuine issue of material fact unless the material fact and the evidence relevant thereto shall have been specifically designated to the trial court. Therefore, we affirm the grant of summary judgment to Bingham McHale.

Affirmed.

DARDEN, J., and ROBB, J., concur.