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Attorney and Client- Attorney's Rights Under Contract of Partial Assignment-Effet of Premature Termination or Settlement of Action

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RECENT DECISIONS

ATTORNEY AND CLIENT—ATTORNEY'S RIGHTS UNDER CONTRACT OF PARTIAL ASSIGNMENT—EFFECT OF PREMATURE TERMINATION OR SETTLEMENT OF ACTION—In an action for personal injuries, defendant caused a subpoena to be served upon plaintiff requiring him to appear to give his deposition. Plaintiff wholly failed to appear, and no cause was shown for such failure. Defendant then filed a motion for dismissal of the suit pursuant to subsection (c), 215a, of the Texas Rules of Civil Procedure, and notice thereof was served upon plaintiff. Although plaintiff again made no appearance, his attorneys moved to intervene, asserting the contingent interest in the cause of action acquired by their contract with plaintiff. The trial court denied the motion for intervention and dismissed the suit as to both plaintiff and the attorneys. On appeal by the attorneys, *held,* reversed. An attorney may contract for a partial assignment in a client's cause of action and, as an assignee, may intervene to protect his share of the claim. *Benton v. Dow Chemical Co.,* 351 S.W.2d 899 (Tex. Civ. App. 1961).

A contingent fee contract, unaccompanied by an assignment, gives an attorney no right in his client's cause of action before final judgment is rendered,[1] and, under such circumstances, an attorney may not intervene in the suit for the purpose of prosecuting it on his own behalf.[2] However, an assignment of an interest in a client's cause of action,[3] as distinguished from a contingent fee contract, immediately vests certain rights in an attorney. If the person allegedly liable has notice of the assignment,[4] and proceeds to compromise the claim with the client before judgment, the attorney may intervene in the original suit and prosecute it to conclusion for his own portion.[5] Assignment contracts have been recognized in Texas for over seventy years[6] and represent the general practice in personal injury liti-

1 Browne v. King, 111 Tex. 330, 235 S.W. 522 (1921); Texas & N.O. Ry. v. Marshall, 184 S.W. 643 (Tex. Civ. App. 1916). For similar holdings in other jurisdictions, see Annot., 124 A.L.R. 1509 (1940).

2 Carroll v. Hunt, 140 Tex. 424, 168 S.W.2d 238 (1943); Wheeler v. Fronhoff, 270 S.W. 887 (Tex. Civ. App. 1925).

3 If the contract refers to the claim and states that the client "sells, conveys, transfers and assigns" an interest in the claim to the attorney, the attorney is vested immediately with the described interest. Powell v. Galveston, H. & S.A. Ry., 78 S.W. 975 (Tex. Civ. App. 1904). This was the language of the contract in the principal case.

4 Actual notice may be proved. TEX. REV. CIV. STAT. ANN. art. 6636 (1960), provides for statutory notice when a copy of the assignment is filed with the papers of the suit.

5 Powell v. Galveston, H. & S.A. Ry., 78 S.W. 975 (Tex. Civ. App. 1904); Texas & Pac. Ry. v. Vaughan, 16 Tex. Civ. App. 403, 40 S.W. 1065 (1897); Gibson v. Texas Pac. Coal Co., 266 S.W. 137 (Tex. Comm. App. 1924). Other available remedies would allow the attorney either to ratify the settlement and sue the person liable for his share, or to sue the client for his portion of the settlement. Gulf, C. & S.F. Ry. v. Stubbs, 166 S.W. 699 (Tex. Civ. App. 1914). As to the statutes creating attorneys' liens, see generally Annot., 67 A.L.R. 442, 448-60 (1930).

6 Stewart v. Houston & T.C. Ry., 62 Tex. 246 (1884).

gation in that state.[7] However, there is seemingly little justification for giving an attorney the added protection of an assignment contract. Although intervention is a useful device in appropriate circumstances, in the context of the attorney-client relationship, absent any fraud, allowing intervention by an attorney holding a contract of assignment results in pitting the attorney against a defendant whose actions allegedly injured a party legally barred from recovery. Such an accommodation to an attorney in securing his fee seemingly in no way facilitates the primary purpose of allowing the recovery of damages in a tort action—to make the plaintiff himself whole.

In moving for dismissal of the suit, the defendant asserted subsection (c), 215a, of the Texas Rules of Civil Procedure[8] (derived from rule 37(d) of the Federal Rules of Civil Procedure), which gives the trial judge discretion to dismiss a party's suit for failure to facilitate court-sanctioned discovery. The Texas procedural rule relied on by the defendant became effective in 1957, and there are as yet no decided cases interpreting it. However, the corresponding federal rule has been held to allow dismissal of only those parties actually at fault. Thus, where five of eight plaintiffs failed to appear for deposition, dismissal was appropriate only to those five, and the remaining three were permitted to continue.[9] In applying the rule to a situation involving an intervening plaintiff, a federal court has held that although a final order of dismissal was entered against the original plaintiff for failure to comply with discovery procedures, the intervenor-plaintiffs could continue the suit, since they never had control or custody of the particular documents sought and were without fault.[10] An analogous problem is presented by a partial assignment contract which passes a separate interest in the cause of action to the assignee. It would follow that by application for intervention such assignee should also be able to protect his interest from a dismissal occasioned through no fault of his own. No real prejudice to the opposing party would ordinarily result,[11] for his right to discovery of the

7 TEX. REV. CIV. STAT. ANN. art. 5525 (1958) has been held to allow the assignment of personal injury claims. At common law personal injury claims died with the person and hence were not assignable. As to the statutory assignability of these claims in other jurisdictions, see generally Annot., 40 A.L.R.2d 500 (1955).

8 "Failure of Party or Witness to Attend. If a party . . . except for good cause shown, fails to appear before the officer who is to take his oral deposition . . . after proper service of subpoena, the court in which the action is pending on motion and notice may . . . dismiss the action or proceeding or *any part thereof*. . . ." (Emphasis added.)

9 Demeulenaere v. Rockwell Mfg. Co., 23 F.R.D. 686 (S.D.N.Y. 1959).

10 Société Internationale v. McGranery, 111 F. Supp. 435 (D.D.C. 1953). The decision was later reversed as to the original plaintiffs in Société Internationale v. Rogers, 357 U.S. 197 (1958).

11 Hovey v. Elliott, 167 U.S. 409 (1897), held that due process of law was violated by the entering of a default judgment against a defendant who was in contempt of court for failure to pay into court the sum of money in dispute in the suit. Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909) concerned a state statute under which a

assignee's case remains, and this necessarily includes proof of the assignor's claim. And should the assignor's testimony be necessary to the assignee, a refusal by the assignor, as a witness, to give deposition would subject him to contempt proceedings.[12]

Granting the fairness of the interpretation of subsection (c), 215a, as to an intervening assignee, it is submitted that in its application to the attorney-client relation, such intervention is supported by neither former decision nor sound policy. The practice of partial assignments in a cause of action was first recognized in Texas in order to protect a plaintiff's attorney from fraudulent interference with his compensation.[13] In those cases a defendant, apprised of the attorney's interest, was able to obtain a low settlement by excluding the attorney from the compromise. From this narrow precedent evolved the broad language cited in the principal case—that the interest of an attorney who had an assignment could not be defeated by the client's dismissal of the suit.[14] Yet the court dismissed the suit in the principal case, not the client. Moreover, there was no attempt here by the defendant wrongfully to prejudice the attorney's rights. As such, policies designed to counteract fraud should have no application in the principal case.

The better approach would allow an attorney to intervene and prosecute an action to judgment only where there has in fact been a fraudulent attempt to deprive him of his compensation under a contingent fee contract.[15] Apart from a "fraudulent compromise" situation, the attempt to protect an attorney by allowing him to accept a partial assignment of his client's cause of action preponderates adversely to a reasoned public policy. The

default judgment was entered against a defendant for failure to comply with court-ordered discovery. This statute was held not to violate due process. The court said that the law-making power could create a presumption of fact that a refusal to produce evidence was an admission of want of merit in the asserted defense. The Federal Advisory Committee in 1938 cited the distinction between these cases in its notes to rule 37. Though the defendant might contend that a "presumption" of want of merit in the plaintiff's claim arose in the principal case, it should be noted that in the twenty-four year history of rule 37(d), no court has relied on this "presumption" in order to sustain its power under the rule. Discovery practice rests in the inherent power of the court; a legal fiction has no place here.

12 Subsection (c), 215a, also provides that "any Witness who, except for good cause shown, fails to appear before the officer who is to take his oral deposition . . . may be punished as for contempt of the court in which the action is pending. . . ."

13 Stewart v. Houston & T.C. Ry., 62 Tex. 246 (1884). See also cases cited note 5 *supra*.

14 See principal case at 900. See also 7 TEX. JUR. 2d *Attorneys at Law* § 98 (1959).

15 Where there has been a fraudulent attempt to deprive an attorney of his compensation the attorney has been allowed to intervene and prosecute the action to judgment to protect his contingent fee. Bennett v. Sinclair Nav. Co., 33 F. Supp. (E.D. Pa. 1940); Ekelman v. G. Marano Realty Corp., 251 N.Y. 173, 167 N.E. 211 (1929); Finkelstein v. Roberts, 220 S.W. 401 (Tex. Civ. App. 1920). See generally Annot., 67 A.L.R. 442, 462-67 (1930). On the possibility of a suit against the defendant for malicious interference with contract, see Bennett v. Sinclair Nav. Co., *supra*. *Contra*, Krause v. Hartford Acc. & Indem. Co., 331 Mich. 19, 49 N.W.2d 41 (1951).

introduction of the attorney as an interested third party into what is normally a two-party compromise situation necessarily frustrates the settled policy of the law to encourage settlement and discourage litigation. Texas courts have recognized this policy, but only in its application to divorce actions, in which assignment contracts are held to be unenforceable after a reconciliation of the parties.[16] Moreover, an assignment contract produces two claims for possible compromise by vesting the attorney with a separate interest in the cause of action entirely his own. In comparison, a contingent fee interest in the settlement, absent an assignment, is seemingly sufficient to guarantee the plaintiff a wholehearted bargaining effort on his behalf by the attorney during settlement negotiations. And, from the client's point of view, no greater benefits are derived from an assignment contract than from the usual contingent fee agreement.

Thus, barring any fraud, should a client decide to compromise a claim over his attorney's objection, he should be able to do so, since the client was the one injured, and the lawsuit is his own. If the attorney is not satisfied with his contingent share of the settlement, a quasi-contractual remedy would usually be available.[17] The historical justification for contingent fee contracts was to enable the penniless client to obtain competent legal counsel. Assignment contracts shift the emphasis from the layman's plight to overt protection for the attorney.

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[16] Kull v. Brown, 165 S.W.2d 1011 (Tex. Civ. App. 1942); Kelly v. Gross, 4 S.W.2d 296 (Tex. Civ. App. 1928). See 7 TEX. JUR. 2d *Attorneys at Law* § 104 (1959). See generally Annot., 45 A.L.R. 941 (1926) as to the right of an attorney to continue a divorce suit against the wishes of his client.

[17] For a discussion of an attorney's right to a remedy in quasi-contract after settlement by the client, see Note, 15 U. DET. L.J. 146 (1951).