

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

DAVID F. NELSON, SR., individually
and as member of Francis, Nelson &
Brison, P.L.L.C.,

Plaintiff,

v.

CIVIL ACTION NO. 16-C-1590

M. ANDREW BRISON,

Defendant.

SECOND AMENDED COMPLAINT

NOW COMES the Plaintiff, David F. Nelson, individually and in his capacity as a Member of Francis, Nelson, & Brison, PLLC, by and through his counsel, Paul M. Stroebel, Esquire, and for his Second Amended Complaint against M. Andrew Brison, states the following:

JURISDICTION AND VENUE

1. At all times relevant Francis, Nelson & Brison, PLLC, (hereinafter referred to as "FNB") was a professional limited liability corporation engaged in the practice of law in the State of West Virginia, with its sole offices located at 1560 Kanawha Boulevard, East, Charleston, West Virginia. FNB was the owner of certain assets, including but not limited to existing bank checking accounts, active client trust accounts, unbilled work in progress ("WIP"), accounts receivable ("AR"), leasehold interests in its offices, office equipment, and office furnishings, collectively referred to as "FNB Assets." Beyond the "FNB Assets," other than existing goodwill and client relationships, FNB had no other assets.

2. At all times relevant R. Ford Francis ("Francis"), David F. Nelson, Sr. ("Nelson"), and M. Andrew Brison ("Brison") were licensed attorneys and equity shareholders/members of FNB. In these capacities Francis, Nelson and Brison were each personal guarantors on certain commercial banking debt instruments, including a line of credit and a term commercial note, issued by Fifth Third Bank, N.A.

("Fifth Third"). At all times relevant the FNB Assets were secured collateral for the subject Fifth Third debt instruments.

3. Allen & Newman, PLLC, is the successor corporation to Allen, Kopet and Associates, PLLC, which at all times relevant was a professional limited liability corporation registered and authorized to do business in West Virginia, with its principal offices located in Chattanooga, Tennessee, and Hilton Head, South Carolina. Allen & Newman, PLLC ("A/N") is a regional law firm with offices located in Alabama, Georgia, Mississippi, Florida, Tennessee, North Carolina, South Carolina, Virginia, Kentucky, Indiana and Illinois.¹

FACTS

4. In the spring of 2010, FNB and A/N entered into contact negotiations regarding A/N's acquisition of the FNB law practice. On May 19, 2010, the material terms and conditions of the contract were reached and were memorialized in a written document which A/N drafted. The material terms and conditions of the contract included, *inter alia*, the following terms and conditions:

a) That in exchange for the acquisition of the FNB Assets, A/N promised to pay off the Fifth Third line of credit and commercial note that were secured by the FNB Assets. The line of credit was to be retired within two months of the agreement and the Fifth Third commercial note would be retired by the end of 2011. Francis, Nelson & Brison remained personal guarantors on the note and commercial loan until retirement.

b) That A/N would pay to FNB \$150,000.00 from A/R and WIP in effect on the date of acquisition to assist the members with the tax consequences of the acquisition. It promised to pay this amount in 2010. Because A/N agreed to provide this compensation, it demanded a penalty provision which stated that if any Managing Attorney departed the firm prior to five years from

¹ For the purpose of the complaint, A/N shall be used to describe both A/N and Allen, Kopet and Associates, PLLC.

the date of acquisition, which was set as June 14, 2010, there would be a penalty as follows: \$60,000.00 if an attorney departed during the first three years; \$50,000.00 if the attorney left during the fourth year; and \$40,000 if the attorney left during the fifth year. Payment of the penalty would be due within six (6) months of the attorney departure.

5. Following acquisition, A/N fulfilled its commitment to retire the Fifth Third line of credit. Subsequently, A/N made payments or distributions to FNB of approximately \$150,000.00, although these payments were not completed until 2011.

6. During 2011, Francis, Nelson and Brison agreed to permit A/N to continue to make scheduled payments on the remaining commercial note rather than retiring it prior to the end of 2011. Accordingly, A/N continued to make monthly principal and interest payments on the commercial note with the permission of the personal guarantors.

7. In June of 2011, A/N announced that it wanted Brison to assume the role of Managing Attorney for its Charleston office and provided him with an increase in compensation relative to Nelson and Francis. Brison continued in that position from the beginning of July, 2011, through December of 2012. Upon Brison's assumption of this position in July of 2011, Nelson and Francis no longer held the title of Managing Attorney.

8. In December of 2012, with the agreement and consent of A/N, Brison resigned from the position of Managing Attorney of the A/N Charleston office. A/N consented to Nelson's concurrent assumption of the Managing Attorney position. Concurrent with or immediately after resigning from his position as Managing Attorney, Brison informed both Nelson and Francis that his resignation as Managing Attorney was done with the express purpose of attempting to avoid the \$50,000.00 penalty for early departure under the theory that he was attempting to exploit language in the acquisition contract. Upon

information and belief, Brison was actively seeking employment with other firms at this time. It is also alleged that Brison was using his book of business as a bargaining chip in obtaining new employment.

9. In July of 2013, Brison tendered his resignation notice to A/N. Brison pursued this course of action knowing that several insurance clients desired for their open files leave the firm with him, knowing that the clients would no longer refer work to A/N. Indeed, in addition to his own employment, Brison also had been able to negotiate offers of employment for one other senior attorney, a litigation paralegal, and a support secretary. Brison understood that the departure of these attorneys and these litigation files would have a materially negative impact on A/N's earning capacity in the Charleston office, as well as having a negative impact on A/N's desire to pay the remainder of the balance on the still-existing commercial note.

10. Nelson sought other professional opportunities and arrangements and by the end of October of 2013, notified A/N that he would leave the firm on or about November 15, 2013. Nelson did not take any office staff or professionals with him.

11. In January of 2014, David Allen wrote a letter to Brison notifying him that the firm expected him to make a payment of the \$50,000.00 early departure penalty by the six (6) month anniversary of his departure. In his letter Allen suggested that if Brison did not make the departure payment then A/N might cease the monthly commercial note payments it had continued to make. At this time Nelson, wrote a letter to Allen stating that he did not consent to remaining personally liable for an uncollateralized debt being paid for by a law firm for which he no longer worked. Nelson again demanded that the commercial note be retired by the end of January 2014. A/N refused to retire the debt, but unilaterally stated that it would continue to make the monthly payments, stating its intention to refinance any amounts owed in excess of \$100,000.00 when the note became due in August of 2014.

12. In August of 2014, A/N advised FNB that it could not refinance the expiring commercial note, but advised that if the principals would obtain the financing, A/N would continue to make payments on the note until the principal balance was reduced to \$100,000.00, plus interest, which amounts represented the combined total of the penalties it contended were owed by Nelson and Brison for their respective early departures. Francis, Nelson and Brison secured a commercial note from Fifth Third Bank, which they all personally guaranteed, and A/N immediately began to make the monthly payments on the note.

13. In January of 2016, A/N ceased its payments on the refinanced note as the balance had been reduced to approximately \$108,000.00. After notice from Fifth Third Bank that the note was going to go into default, Nelson took steps to refinance the note prior to default, with Francis and Brison unwilling or unable to participate in refinancing. Nelson was compelled to secure a personal loan and retired the entirety of the commercial note by obtaining an equity line of credit on his home. Brison was financially capable of participating but intentionally failed to assist in the refinancing, all to Nelson's detriment.

14. On or about February 22, 2016, after having made one monthly principal and interest payment in the amount of \$5,357.20, Nelson secured refinancing of the substitute Fifth Third note by paying an additional \$103,743.34.

15. Nelson initially instituted this civil action against A/N, David Allen, and Brison. Regarding his claims against A/N, Nelson raised claims for breach of contract, breach of fiduciary duty, and for violations of the West Virginia Wage and Hour Act relating to A/N's withholding of wages and benefits from his compensation from September of 2011 through November of 2013. Nelson's claims against A/N and Allen have been resolved by compromise.

16. A/N has contended that it did not retire certain debt obligations in full as a result of Nelson's and Brison's non-payment of the early departure penalties. However, as noted, in January and February of 2016, Nelson paid over \$108,000.00 to retire the commercial note, thus extinguishing any obligation. A/N has now assigned to Nelson any and all equitable, legal or contractual rights and defenses to enforce and collect the \$50,000.00 penalty owed by Brison.

COUNT I
BREACH OF CONTRACT AND ASSIGNMENT OF CLAIMS BY A/N
TO NELSON AGAINST M. ANDREW BRISON

17. Plaintiff hereby references and incorporates paragraphs 1 through 16 of the Complaint as if they were set forth fully herein.

18. A/N has an enforceable right to an early departure penalty from Brison, which penalty right has been assigned to Nelson. As a result, A/N was entitled to a set off from amounts it owed to Nelson or FNB, if any. As a result of the assignment, Brison is liable to Nelson for his \$50,000 departure penalty, as well as his portion of Nelson's additional payment in full of the outstanding loan/note for the amount owed. In settlement of Nelson's claims against A/N, A/N has assigned any and all rights, claims and defenses that it may have held against Brison. As such, Brison has breached his contractual duty to both A/N, (which has been assigned to Nelson) as well as to Nelson, individually.

19. As a result of the breach of contract, Brison proximately caused plaintiff to suffer monetary damages, including incidental and consequential damages.

COUNT II
BREACH OF FIDUCIARY DUTY

20. Plaintiff hereby references and incorporates paragraphs 1 through 19 of the Complaint as if they were set forth fully herein.

21. Defendant Brison had a fiduciary duty to plaintiff Nelson to pay his portion of the FNB line of credit and commercial note.

22. Defendant Brison breached the fiduciary duty to Nelson when he failed to pay his \$50,000 departure fee as required. Brison also breached this duty when he intentionally and knowingly manipulated his removal from the Managing Attorney position in an attempt to avoid payment of the early departure penalty. Upon further information and belief, Brison used his book of business, built during his tenure with FNB and A/N to obtain new employment. Moreover, upon further information and belief, Brison negotiated an agreement with his new employer that included as consideration increased pay and/or additional monies in anticipation of his potential obligation to pay the early departure penalty. Despite his duties and obligations to Nelson, Brison intentionally orchestrated his status at A/N in an attempt to avoid his financial responsibilities. Brison further knew that his failure to pay the departure fee would result in A/N's refusal to pay the outstanding line of credit, to the detriment of both Nelson and Francis.

23. As a result of the breach of fiduciary duty, Brison proximately caused plaintiff to suffer severe monetary damages as well as great annoyance and inconvenience.

COUNT III UNJUST ENRICHMENT

24. Plaintiff hereby references and incorporates paragraphs 1 through 23 of the Complaint as if they were set forth fully herein.

25. The conduct detailed herein against Brison resulted in Brison's unjust enrichment, and to the financial detriment of plaintiff Nelson, who is utterly without fault in relation to Brison's acts or omissions.

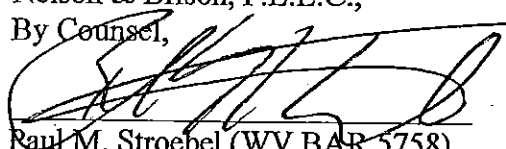
26. As a result of Brison's conduct or refusal to act, i.e., failing to meet or fulfill financial responsibilities to Nelson and FNB, Nelson has been financially harmed by Brison and entitled to be made whole.

PRAYER

WHEREFORE, the Plaintiff demands judgment against the Defendant Brison for compensatory damages and all other damages allowed by law in an amount to be determined, together with pre-judgment interest, post-judgment interest, costs and attorneys' fees and all other relief deemed appropriate by this Court.

PLAINTIFF DEMANDS A TRIAL BY JURY.

DAVID F. NELSON, SR.,
individually and as member of Francis,
Nelson & Brison, P.L.L.C.,
By Counsel,



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