

11-1233-cv

RICHARD WARE LEVITT, ESQ. V. DAVID H. BROOKS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Submitted: February 7, 2012 Decided: February 14, 2012)

Docket No. 11-1233

RICHARD WARE LEVITT, ESQ.,

Plaintiff-Appellee,

-v.-

DAVID H. BROOKS,

Defendant-Appellant.

Before:

PARKER, WESLEY, LOHIER, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Eastern District of New York (Seybert, J.), entered on March 15, 2011, granting Plaintiff-Appellee's motion to compel Defendant-Appellant's payment of outstanding legal fees owed to Plaintiff-Appellee for representation he provided to Defendant-Appellant in a federal criminal proceeding.

AFFIRMED.

1 ANDREW J. GOODMAN, Garvey Schubert Barer, New
2 York, NY, *for Plaintiff-Appellant*

3
4 DEAN M. SOLOMON (Richard Ware Levitt, *on the*
5 *brief*), Levitt & Kaizer, New York, NY., *for*
6 *Defendant-Appellant*.
7

8
9
10 PER CURIAM:

11 Appellant David H. Brooks appeals from a judgment of
12 the district court granting Richard Ware Levitt's motion to
13 compel outstanding attorneys' fees owed to Levitt by Brooks
14 in connection with Levitt's representation of Brooks in a
15 federal criminal proceeding. We hold that ancillary
16 jurisdiction existed over the fee dispute and that the
17 district court did not abuse its discretion in exercising
18 that jurisdiction. We also hold that Brooks forfeited many
19 of the issues he raises on appeal by not raising them below,
20 and we find no merit in his arguments based on the
21 Constitution. We therefore affirm the district court's
22 March 15, 2011 judgment.

23 **Background**

24 This appeal arises out of Brooks's retention of Levitt
25 to represent him in connection with charges of securities
26 fraud, insider trading, and other criminal offenses. These
27 charges resulted in an eight-month jury trial, after which

1 Brooks was found guilty. According to Levitt, at some point
2 prior to the close of trial, Brooks stopped paying Levitt's
3 bills. Eventually, Brooks owed Levitt \$224,956.16.

4 In September 2010, subsequent to the jury verdict,
5 Brooks moved for the release of certain restrained assets
6 that the government contended were subject to forfeiture.
7 In support of that motion, Brooks asserted that he had
8 "depleted all funds available to pay for his ongoing
9 defense," that given the unexpected length of his trial, he
10 had "outstanding bills of approximately \$1.5 million," and
11 that he anticipated significant costs for the post-trial
12 forfeiture hearing and other proceedings. In an attached
13 schedule of outstanding invoices, Brooks acknowledged that
14 he owed Levitt \$265,000. Levitt submitted an affidavit
15 alleging that when he informed Brooks that he would move to
16 withdraw if Brooks did not pay the outstanding fee, Brooks
17 became "belligerent," and "hissed or spit at [Levitt] and
18 screamed" a vulgar remark. The district court denied
19 Brooks's motion.

20 Brooks failed to pay Levitt the money and hired two
21 attorneys to assist in his post-trial defense. As a result,
22 Levitt moved: (1) to withdraw as counsel, and (2) for a

1 court order remitting to Levitt, from forfeited bail funds,
2 \$224,956.16 to satisfy the unpaid fees. Levitt also asked
3 for an accounting of how the bail funds previously released
4 to Brooks for litigation expenses were expended; or,
5 alternatively, that funds seized by the government for
6 forfeiture be released to him to satisfy his unpaid fees.
7 As a final alternative, Levitt asked that the district court
8 exercise its ancillary jurisdiction and enter an order
9 compelling Brooks to pay Levitt.

10 Brooks opposed Levitt's motion. He did not, however,
11 contest the amount he owed Levitt. Instead, he argued that
12 Levitt's motion to compel payment was premature and
13 prejudicial to his interests. He asserted the following
14 arguments as defenses: (1) Brooks was not attempting to
15 evade his obligation to Levitt and had "acknowledged his
16 debt to Levitt before th[e district c]ourt, and made every
17 attempt to satisfy it;" (2) Levitt should not be permitted
18 to "jump the line" over Brooks's other legal creditors who
19 provided services in connection with his case, or those
20 attorneys and staff who were currently working in
21 anticipation of (or would work on) Brooks's upcoming
22 forfeiture proceedings, sentencing, and appeal; and (3)

1 Levitt's conduct, in revealing the vulgar remark, violated
2 Rule 1.6 of the New York Rules of Professional Conduct
3 concerning the confidentiality of information. In March
4 2011, the district court directed the district clerk to open
5 a new civil docket number concerning the fee dispute.
6 Shortly thereafter, pursuant to its ancillary jurisdiction,
7 the district court granted Levitt's motion to compel
8 payment.

9 **Discussion**

10 On appeal, Brooks argues that: (1) the district court
11 erred by exercising ancillary jurisdiction over the fee
12 dispute; (2) the district court failed to abide by the
13 Federal Rules of Civil Procedure; (3) the lack of any
14 evidentiary hearing or trial violated his due process
15 rights; and (4) he was deprived of his right to a jury
16 trial. We find that the district court's exercise of
17 ancillary jurisdiction was proper, that Brooks waived his
18 claims regarding the Federal Rules of Civil Procedure by not
19 raising those issues below, and that his Due Process and
20 jury trial claims are without merit.

1 **I. The District Court's Exercise of Ancillary**
2 **Jurisdiction**¹

3 In this case, ancillary jurisdiction existed and the
4 district court did not abuse its discretion in exercising
5 that jurisdiction to resolve the fee dispute between Brooks
6 and Levitt. "It is well settled that a federal court may,
7 in its discretion, exercise ancillary jurisdiction to hear
8 fee disputes . . . between litigants and their attorneys
9 when the dispute relates to the main action." *Chesley v.*
10 *Union Carbide Corp.*, 927 F.2d 60, 64 (2d Cir. 1991)
11 (internal quotation marks and alteration omitted).
12 Ancillary jurisdiction over fee disputes is equally
13 available in criminal and civil cases. *Garcia v. Teitler*,
14 443 F.3d 202, 207 (2d Cir. 2006).

15 In *Garcia*, we explained that "[a]t its heart, ancillary
16 jurisdiction is aimed at enabling a court to administer
17 justice within the scope of its jurisdiction" and that
18 "[w]ithout the power to deal with issues ancillary or
19 incidental to the main action, courts would be unable to

¹We review questions of a court's subject-matter jurisdiction *de novo*. See *Bank Of India v. Trendi Sportswear, Inc.*, 239 F.3d 428, 436 (2d Cir. 2000). Once we determine that ancillary jurisdiction exists, we review a district court's exercise of that jurisdiction for abuse of discretion. See *Joseph Brenner Assocs., Inc. v. Starmaker Entm't, Inc.*, 82 F.3d 55, 58 (2d Cir. 1996).

1 effectively dispose of the principal case nor do complete
2 justice in the premises." *Id.* at 208 (internal quotation
3 marks omitted). Although *Garcia* dealt with a fee dispute
4 following an attorney's withdrawal after a *Curcio* hearing,
5 *Garcia* should not be viewed as limited to just that
6 situation. Rather, we held that "[i]n order to guarantee a
7 defendant's right to choose his own counsel where, as here,
8 his criminal case is ongoing, and to avoid the possibility
9 of defendants becoming indigent and requiring the
10 appointment of counsel, a district court must be able to
11 exercise ancillary jurisdiction to resolve a fee dispute."
12 *Id.* at 209; see also *Novinger v. E.I. DuPont de Nemours &*
13 *Co., Inc.*, 809 F.2d 212, 217 (3d Cir. 1987). In *Novinger*,
14 the Third Circuit explained that even though attorneys' fees
15 arrangements are primarily a matter of state law, "the
16 federal forum has a vital interest in those arrangements
17 because they bear directly upon the ability of the court to
18 dispose of cases before it in a fair manner." *Novinger*, 802
19 F.2d at 217.

20 Under *Garcia*, ancillary jurisdiction existed over the
21 fee dispute between Levitt and Brooks. *Stein v. KPMG, LLP*,
22 486 F.3d 753 (2d Cir. 2007), on which Appellant relies, is

1 not to the contrary. *Stein* distinguished *Garcia* on the
2 basis that *Stein* involved a contract dispute between
3 defendants and their non-party former employer. *Id.* at 760-
4 61. In *Stein*, we emphasized the fact that the fee dispute
5 involved a non-party and explained that:

6 While we do not exclude the possibility of a
7 legitimate ancillary proceeding involving a nonparty
8 to the primary litigation, we believe that the
9 requisite compelling circumstances will be rare, as
10 the need for such a proceeding generally will be far
11 less pressing than in cases involving parties
12 already before the court.

13
14 *Id.* at 761. Here, the parties to the fee dispute are both
15 involved in the underlying action. This case, therefore,
16 differs from *Stein* and is closer to *Garcia*. Specifically,
17 Brooks put his legal fees in controversy by moving for
18 release of restrained assets for the purpose of paying his
19 legal bills. And the underlying proceedings remained
20 ongoing (albeit post-trial), making defendant's legal fees
21 relevant to the district court's management of its case,
22 specifically its responsibility to ensure defendant does not
23 become indigent and that he has representation throughout
24 the proceedings. Like *Garcia*, ancillary jurisdiction was
25 appropriate because it "enable[d the] court to function
26 successfully, that is, to manage its proceedings, vindicate

1 its authority, and effectuate its decrees." *Id.* at 760
2 (internal quotation marks omitted).

3 Brooks claims that even if ancillary jurisdiction was
4 available, the district court abused its discretion in
5 deciding the fee dispute. We disagree. We have held that
6 several non-exhaustive factors can weigh in favor of
7 exercising ancillary jurisdiction. These include: (1)
8 familiarity with the subject matter of the suit, especially
9 with the amount and quality of work performed by the
10 attorneys; (2) a court's responsibility to protect officers
11 of the court in such matters as fee disputes; (3) the
12 convenience of the parties; and (4) judicial economy.
13 *Cluett, Peabody & Co., Inc. v. CPC Acquisition Co., Inc.*,
14 863 F.2d 251, 256 (2d Cir. 1988). All of these factors were
15 present here and weighed in favor of the court's exercise of
16 ancillary jurisdiction. Having presided over the criminal
17 proceedings, the district court was undoubtedly the most
18 familiar with the subject matter and the amount and quality
19 of work performed by Levitt. Thus, the court's deciding the
20 fee dispute promoted judicial economy.² The court's

²Brooks's assertion that judicial economy weighed against exercising ancillary jurisdiction because Levitt had commenced a proceeding in state court against Brooks's brother as a guarantor of legal fees is unpersuasive. The district court's resolution of the dispute between Levitt and Brooks did not resolve any issues of liability relating to Brooks's brother, and no

1 responsibility to officers of the court was also implicated.
2 Moreover, before the court, Brooks acknowledged his debt to
3 Levitt while contesting that it should be paid from funds
4 held by the government.

5 Brooks asserts that Levitt's alleged violation of New
6 York's Rules of Professional Conduct made the district
7 court's exercise of ancillary jurisdiction an abuse of
8 discretion. We see no basis for such an argument.
9 Furthermore, we disagree with Brooks's contention that
10 Levitt violated the Rules of Professional conduct. See
11 *Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 69 (1980). In
12 *Priest* the New York Court of Appeals held that "[a]
13 communication concerning the fee to be paid has no direct
14 relevance to the legal advice to be given. It is a
15 collateral matter which, unlike communications which relate
16 to the subject matter of the attorney's professional
17 employment, is not privileged." *Id.* Although Rule 6.1 of
18 the Rules of Professional Conduct protects information
19 broader than the attorney-client privilege, it only goes so
20 far as to protect "information gained during or relating to
21 the representation of a client," N.Y. Rules of Prof'l

judicial economy would have been gained by the court refusing to resolve the fee dispute before it.

1 Conduct R. 1.6(a), and Brooks's remark contained no material
2 *information* beyond the use of profanity directed at counsel.
3 We find no merit in Brooks's claim that ancillary
4 jurisdiction was improper, and we therefore affirm.

5 **II. Application of the Federal Rules of Civil Procedure**

6 Brooks contends that the district court failed to
7 comply with the Federal Rules of Civil Procedure in the
8 civil action because: (1) the court did not require the
9 filing of a complaint and service of process, (2) the
10 absence of any pleadings deprived Brooks of his ability to
11 assert affirmative defenses and counterclaims, and (3) the
12 court did not permit discovery. Brooks failed to raise any
13 of these arguments in opposition to Levitt's motion (which
14 expressly invoked the district court's ancillary
15 jurisdiction) or alert the district court to any potential
16 issues that warranted the need for discovery. Thus, they
17 are forfeited. See *Bogle-Assegai v. Connecticut*, 470 F.3d
18 498, 504 (2d Cir. 2006).

19 To the extent Brooks asserts that the district court
20 "never had jurisdiction" over the fee dispute because there
21 was no filing and service of a complaint, this argument is
22 also forfeited because it relates to personal jurisdiction,

1 a waiveable defect, and Brooks failed to raise the issue
2 below. See *Credit Lyonnais Secs. (USA), Inc. v. Alcantara*,
3 183 F.3d 151, 154 (2d Cir. 1999); see also *Miss. Pub. Corp.*
4 *v. Murphree*, 326 U.S. 438, 444-45 (1946); *In re DES Litig.*,
5 7 F.3d 20, 24 (2d Cir. 1993).

6 **III. Constitutional Arguments**

7 Brooks's argument that the district court violated his
8 due process rights is also without merit. He was not denied
9 a sufficient opportunity to be heard, and in fact filed
10 three responsive memoranda to Levitt's motion, none of which
11 requested (let alone established any need for) a hearing or
12 trial. See *United States v. Santiago*, 495 F.3d 27, 29-30
13 (2d Cir. 2007); cf. *Rein v. Socialist People's Libyan Arab*
14 *Jamahiriya*, 568 F.3d 345, 354 (2d Cir. 2009); *In re Thirteen*
15 *Appeals Arising Out of San Juan Dupont Plaza Hotel Fire*
16 *Litig.*, 56 F.3d 295, 303 (1st Cir. 1995). Furthermore,
17 Brooks failed to contest the amount owed to Levitt or raise
18 any contested factual issues below. Thus, there were no
19 facts to be tried; his asserted right to a jury trial was
20 not implicated.

Conclusion

The district court's judgment of March 15, 2011,
granting Plaintiff-Appellee's motion to compel Defendant-
Appellant payment of outstanding legal fees owed to
Plaintiff-Appellee is hereby AFFIRMED.