IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 12/06/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

WILLIAM W. BLACK,	)	1 CA-CV 11-0738
	)	
Plaintiff/Appellant,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
SOLOMON & RELIHAN, P.C.,	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
Defendant/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-005464

The Honorable Andrew G. Klein, Judge

REVERSED AND REMANDED

Tidmore Law Offices LLP — Phoenix
By Mick Levin
Attorneys for Plaintiff/Appellant

Osborn Maledon PA — Phoenix
By Geoffrey M. T. Sturr
and Mark Hummels
Attorneys for Defendant/Appellee

G O U L D, Judge

¶1 In this appeal, we review the summary judgment granted in favor of a law firm against the claims of one of the firm's former staff attorneys for part of the attorney fees the firm

received due to a case the staff attorney referred to the firm. Finding several disputed issues of material fact, we reverse and remand.

Facts and Procedural Background[1]

¶2 William W. Black ("Plaintiff") worked for Solomon & Relihan, P.C. (the "Firm") as a staff attorney from February 2003 until July 2006. When Plaintiff was hired, the partners of the Firm were Martin Solomon ("Solomon"), John Relihan ("Relihan") and Ralph Blake ("Blake").

¶3 Although Plaintiff had no pre-existing duty to bring cases to the Firm, Plaintiff brought a personal injury case (the "Walton case") to the Firm in September 2003. Plaintiff worked on the Walton case under the supervision of partner Relihan.

¶4 Prior to Plaintiff's departure, partner Blake announced that he would be leaving the Firm in December 2005. In connection with his departure, several spreadsheets were prepared setting forth a number of terms of a proposed agreement between the Firm and Blake. These spreadsheets addressed, among other terms, Blake's compensation for cases such as the Walton case that were to remain with the Firm.

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[1] We view the facts in the light most favorable to the party against whom summary judgment was granted, in this case, Black. *Nelson v. Phx. Resort Corp.*, 181 Ariz. 188, 191, 888 P.2d 1375, 1378 (App. 1994).

¶5 According to Blake, the spreadsheets indicated that Plaintiff would receive an $11,111 bonus or referral fee for the Walton case.[2] According to the Firm's Second Supplemental Disclosure Statement, one of the individuals who prepared the spreadsheets, Mr. Debus, "recalls Mr. Relihan telling him to insert in the spreadsheet the number 11,111 in the row for the Walton matter followed by a '(B)', but does not recall Mr. Relihan telling him anything other than to insert that information." Blake recalls noting on his copy of the spreadsheet that "Bill" (meaning Plaintiff) would receive the $11,111. In addition, an exhibit to a letter written by Blake's lawyer in 2007 contained a footnote that stated, in reference to the estimated fee for the Walton case, that it did not include payment due to a former employee of the Firm; the individual who prepared the footnote at Relihan's direction believed that the footnote referred to Plaintiff.

¶6 After Blake announced his departure from the Firm, Relihan told Plaintiff that "the future of the Firm wasn't certain," that "there were changes going on," and that "Plaintiff needed to look out for himself." In fact, at the time, the Firm

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[2] Defendant objects to this and the following evidence in this paragraph as inadmissible pursuant to Rule of Evidence 408. Because the trial court has not yet ruled on the admissibility of the spreadsheets under Rule 408, we decline to address this issue. Further, we do not consider the spreadsheets in determining whether a triable issue exists in this case.

was in a good amount of upheaval, had a large amount of debt, and there were concerns of cutbacks at the Firm.

¶7 In June 2006, Plaintiff secured another position and announced his departure from the Firm. Plaintiff testified that before he left, he had a conversation with Relihan in which he understood that Relihan had promised to compensate him out of the attorney fees the Firm earned on the Walton case.

¶8 In order to assist with the transition, Plaintiff agreed to continue to work for the Firm for one week longer than he had originally planned. Also, after Plaintiff left the Firm, a Firm employee scheduled meetings for Plaintiff to attend regarding the Walton case; in preparation for these meetings, Plaintiff reviewed his case notes and some medical records. After Plaintiff left the Firm, he met with the Walton family and the Firm on two occasions. He also responded to Relihan's questions regarding the Walton case in five or six conversations. Plaintiff also called the Firm on several occasions checking on the status of the case and offering any assistance he could render on it.

¶9 Relihan died in June 2007.

¶10 In 2009, the Firm obtained $704,000 in attorneys' fees for the Walton case. Plaintiff contacted Solomon, the only remaining original partner of the Firm, and requested his portion of the fees. This request was refused, and Plaintiff eventually

filed a complaint seeking his share of the fees based on theories of breach of contract, unjust enrichment, and unpaid wages. The trial court granted the Firm's motion for summary judgment. In the same order, the court granted judgment to the Firm and awarded the Firm its attorneys' fees. Plaintiff then moved for a new trial, which the court denied. Plaintiff timely appeals.

Discussion

¶11 Plaintiff argues that the trial court erred in granting summary judgment in favor of the Firm on his contract, unjust enrichment, and wage claims, and that the court also erred in awarding the Firm its attorneys' fees without allowing Plaintiff to be heard on the matter.

¶12 We review a trial court's ruling on cross-motions for summary judgment de novo. *Nelson v. Phx. Resort Corp.*, 181 Ariz. 188, 191, 888 P.2d 1375, 1378 (App. 1994). We view the facts in the light most favorable to the party against whom summary judgment was granted. *Id.* On appeal, we will affirm the grant of summary judgment if there are no genuine issues of material fact and the prevailing party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c); *Orme School v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990).

A. Breach of Contract

¶13 The trial court granted judgment in favor of the Firm on the ground "there was no contract because there was no mutual assent to the amount to be paid to plaintiff."

¶14 However, Plaintiff testified as follows:

> He [Relihan] asked what I intended to do with the Walton case. And my understanding, based upon our conversation, was that if I agreed to leave the Walton case with [the Firm] and assist in the transition of that case over to them, I would be compensated.

¶15 When pressed for the specific words used by Relihan, Plaintiff replied, "I don't remember specifically. My understanding, again, was that if I left the case, agreed to assist them in taking over representation, I would be compensated." Plaintiff was asked three more times for specific words used by Relihan, and each time, he affirmed that he did not remember Relihan's specific words because the conversation occurred "almost four years ago[.]" Plaintiff also stated that "he [Relihan] indicated that if I left the Walton case and agreed to help transition it, I would be compensated. Those are not exact words. It's my understanding." Plaintiff testified that he accepted Relihan's offer.

¶16 Plaintiff's deposition testimony is evidence of mutual assent, however strong or weak. Based on Plaintiff's testimony, because Relihan was the offeror, it may be inferred that Relihan

assented to the bargain he presented to Plaintiff. In the face of such evidence, the question of whether an oral contract in fact existed may be resolved only by evaluating the credibility of Plaintiff.

¶17 However, credibility determinations are inappropriate for resolution by way of summary judgment. *Braillard v. Maricopa County*, 224 Ariz. 481, ¶ 19, 232 P.3d 1263, 1271 (App. 2010) (explaining that "we will reverse an order granting summary judgment which necessarily required the trial court to assess 'the credibility of witnesses with differing versions of material facts, . . . to weigh the quality of documentary or other evidence, . . . [or] to choose among competing or conflicting inferences'") (quoting *Orme Sch. v. Reeves*, 166 Ariz. 301, 311, 802 P.2d 1000, 1010 (1990)).

¶18 While it is true that unilateral understanding cannot create mutual assent, the record in this case is not limited to Plaintiff's one-sided impression that the Firm would compensate him for leaving the Walton case at the Firm. Here, Plaintiff's understanding is based on Relihan's alleged promise to compensate him if he left the Walton case at the Firm and assisted in the transition of the case to the new attorneys. Thus, if Plaintiff's testimony is credible, there was mutual assent.

¶19 In addition, the conduct of Plaintiff and Relihan after the alleged agreement supports an inference of mutual assent.

Schade v. Diethrich, 158 Ariz. 1, 9, 760 P.2d 1050, 1058 (1988); Restatement (Second) of Contracts § 33 cmt. a (1981). For example, after Plaintiff left the Firm, Relihan continued to consult with Plaintiff about the Walton case. In addition, a Firm employee scheduled a couple of meetings for Plaintiff to attend regarding the Walton case.

¶20 It is possible, of course, that the meetings and consultations would have occurred even without such an agreement; however, this question is for the jury to determine. As we explained in *Schade*, the fact that one party has begun performance "with the knowledge and approval of the other" is "nearly always evidence that they regard the contract as consummated and intend to be bound thereby." *Schade*, 158 Ariz. at 10, 760 P.2d at 1059.

¶21 Defendant also argues that Plaintiff's contract claim must fail for indefiniteness. While it is true that the precise amount of Plaintiff's compensation was not specified, "where the parties intend to conclude a contract for the rendition of services and the price is left to be agreed by the parties and they fail to agree, the price is a reasonable price." *Schade*, 158 Ariz. at 10, 760 P.2d at 1059.

¶22 In *Schade,* an employer promised to provide a fair and equitable severance agreement if an employee resigned but continued to work on a special project; however, the parties

never specified what a "fair and equitable severance agreement" would be. *Schade*, 158 Ariz. 1, 760 P.2d 1050. The parties' failure to specify an exact price was not fatal to the agreement; instead, the issue became determining what was "fair and equitable." The court ultimately found a committee's recommendation of a severance package would serve as a reasonable approximation of what was "fair and equitable." *Id.* at 11, 760 P.2d at 1060.

¶23 Here, it is disputed whether the parties intended to conclude a contract, and this question may be resolved only by the trier of fact. However, if a jury were to find that the parties intended to create a contract, the fact that the amount of compensation was never fixed would not prevent Plaintiff from recovery, but would become a separate issue of proof (regarding what was reasonable) that would itself also need to be determined by the jury.

¶24 Defendant suggests that *Schade* is inapplicable because it involved both written and oral promises; however, we find no such limitation contained therein. In *Schade*, the contract was based on oral assurances by the defendant that if plaintiff resigned from his employment, the parties would work out "a fair and equitable separation agreement." *Schade*, 158 Ariz. at 3-4, 760 P.2d at 1052-53. At times, these oral promises were followed up with letters confirming that such a deal would be completed.

Id. Relying on defendant's oral assurances, plaintiff continued to work for defendant on a special project before he finally resigned. However, no written agreement was provided to plaintiff until after he had completed the project and resigned from his job. *Id.* at 5, 760 P.2d at 1054. Moreover, when defendant eventually offered plaintiff a written separation agreement, plaintiff rejected the agreement because it did not comply with the parties' prior oral agreement for a "fair and equitable separation agreement." *Id.* Nonetheless, under these circumstances our supreme court held the terms of the oral contract were definite enough to create an enforceable contract. *Id.* at 11, 760 P.2d at 1060.

¶25 As the Restatement (Second) of Contracts makes clear, "[w]here the parties have intended to make a contract and there is a reasonably certain basis for granting a remedy, . . . policy supports the granting of the remedy." Rest. 2d Contracts § 33, cmt b (West 2012). Comment a to this section confirms that "uncertainty as to incidental or collateral matters is seldom fatal to the existence of the contract[,]" provided that "the parties have intended to conclude a bargain." *See also Schade,* 158 Ariz. at 10-11, 760 P.2d at 1159-60 (explaining that when the parties' agreement did not specify a particular amount of compensation, the trial court properly determined and awarded compensation based on the recommendation of experts).

¶26 This case is not, as the Firm contends, similar to *Edwards v. Hauff*, 140 Ariz. 373, 682 P.2d 1 (App. 1984). In *Hauff*, the court held that plaintiff's alleged oral contract was too indefinite to be enforceable and there was insufficient evidence to show any meeting of the minds. *Hauff*, 140 Ariz. at 376, 682 P.2d at 4. However, unlike the present case, plaintiff never offered any evidence of a promise or agreement by the defendant; rather, plaintiff based the existence of the alleged contract on his impressions concerning the pre-contract negotiations. *Id.* at 375, 682 P.2d at 3. Moreover, plaintiff's unilateral "understanding" of these negotiations differed from the terms of the parties' written contract, which included an integration clause. *Id.*

¶27 The Firm argues alternatively that the alleged oral agreement was not supported by valid consideration. The Firm attempts to steer this argument into a Catch-22 scenario by contending that if Plaintiff recommended that the case remain at the Firm solely based on his bargain with Relihan, the agreement would violate Plaintiff's ethical duty to give objective legal advice and be void as against public policy. Ariz. R. Sup. Ct. 42, ER 1.16(d)(duty of a lawyer when terminating representation of a client to take steps "reasonably practicable to protect the client's interests"); Ariz. Ethics Op. 10-02 (Mar. 2010) (duty of a lawyer upon leaving a firm to ensure client will be competently

and diligently represented). On the other hand, if Plaintiff's recommendation was in fact based on his objective legal opinion (and independent of his deal with Relihan), the fulfillment of his preexisting ethical duties would not be consideration for the bargain.

¶28 This argument fails, however, to account for a third possibility. Plaintiff's objective legal opinion may have been that the Waltons' legal needs could be met equally well at the Firm or at any of several alternative law firms. Stated another way, there is no evidence that the *only* way for Plaintiff to satisfy his ethical obligations to the Waltons was to recommend that their case remain with the Firm; it is reasonable to conclude that other law firms could have handled the Walton's case in a professional and competent manner. Moreover, a jury could reasonably infer that Plaintiff's assistance with the transition was greater than that which he was ethically obligated to offer. This additional assistance may also provide consideration for the parties' bargain. In short, it would be impossible to resolve the question of consideration without weighing the facts and evaluating credibility, which means that it is inappropriate for summary judgment.[3] *Orme Sch. v. Reeves*, 166 Ariz. 301, 311, 802 P.2d 1000, 1010 (1990).

[3] During oral argument, the Firm also argued for the first time that any referral fee would be barred by ER 1.5(e). Ariz.

B. Wage Claim

¶29 Both parties appear to agree that Plaintiff's wage claim based on A.R.S. § 23-355 rises or falls with the contract claim. If there was no contract, Plaintiff's wage claim must fail. *See Schade*, 158 Ariz. 12-13, 760 P.2d at 1061-62 (holding plaintiff was entitled to recover treble damages on wage claim based on oral contract for "fair and equitable separation agreement"). Given that the contract claim must be decided by a jury, it was error to grant judgment in favor of Defendants on Plaintiff's wage claim. We therefore reverse as to this claim as well.

C. Unjust Enrichment

¶30 An unjust enrichment claim may not be used to circumvent the recovery available under a breach of contract theory. *Trustmark Ins. Co. v. Bank One, Arizona, NA*, 202 Ariz.

R. Sup. Ct. 42, ER 1.5. This argument is not only untimely-raised (and thus, arguably waived), it also misapplies the rule. As comment 9 makes clear, "[p]aragraph (e) [to ER 1.5] does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm." ER 1.5(e), cmt. 9. Thus, ER 1.5(e) is inapplicable to Plaintiff's alleged referral fee. For similar reasons, we reject the Firm's reliance on *Peterson v. Anderson*, 155 Ariz. 108, 745 P.2d 166 (App. 1987). *Peterson* dealt with a fee-splitting agreement between an in-state and out-of-state lawyer, and specifically explained that its reasoning did not apply to cases "involv[ing] fee-splitting arrangements between lawyers of the same state." 155 Ariz. at 112, 745 P.2d at 170. Here, there is no allegation that any of the parties involved were not licensed to practice in the State of Arizona, making *Peterson* inapplicable.

535, 542-543, ¶¶ 35-37, 48 P.3d 485, 492-493 (App. 2002) (explaining that unjust enrichment is not allowed when appellants are seeking to relieve themselves of an express contract). However, when the existence of a contract is disputed, it is often permitted to argue an alternative theory of unjust enrichment, subject to a single recovery. *Id.* at 542-543, ¶¶ 35-37, 48 P.3d 492-493; *see also Adelman v. Christy*, 90 F. Supp. 2d 1034, 1045-46 (D. Ariz. 2000) (explaining that when it was not clear whether a particular agreement applied, plaintiff could pursue as alternative theories of both unjust enrichment and breach of contract, subject to only one recovery).

¶31 Here, the existence of the alleged contract is disputed, and Plaintiff's unjust enrichment claim is not an attempt to escape the consequences of an express contract, but simply an alternative theory of recovery should the jury find that no contract exists. It is thus more similar to *Adelman* than to *Trustmark*. *Id.* at 537, ¶ 7, 48 P.3d 487. It also resembles *Pyeatte v. Pyeatte*, 135 Ariz. 346, 661 P.3d 196 (App. 1982), where we allowed recovery for one spouse's unjust enrichment at having had a free education at the expense of the other despite having found that no binding contract existed.

¶32 If a jury were to find that no agreement existed, it might nevertheless find that Plaintiff is entitled to compensation for forbearing from referring the Walton case to

another Firm and to compensation for some of the work he provided to the Firm after his departure. For the reasons explained above, it is not clear whether Plaintiff had a contractual entitlement to a portion of the Walton fees, and this question may be resolved only by the trier of fact. Thus, we must reverse the trial court's ruling that any enrichment the Firm obtained from the fees was not unjust because Plaintiff had no contractual entitlement to any portion of the fee.

D. Cross-Motion for Summary Judgment

¶33 Because there are triable issues regarding Plaintiff's wage claim and breach of contract claim, summary judgment in favor of Plaintiff on these terms is not warranted. We therefore affirm the trial court's denial of Plaintiff's cross-motion for summary judgment on these claims.

E. Attorneys' Fees

¶35 Because the Firm is no longer the prevailing party, we vacate the trial court's award of $40,000 in fees to the Firm and need not reach Plaintiff's due process arguments regarding them. For the same reason, we deny the Firm's request for fees on appeal.

¶36 We also deny Plaintiff's request for attorneys' fees on appeal. Plaintiff's request is premature, given the fact it remains undetermined whether Plaintiff or the Firm will ultimately be the prevailing party. At the end of trial, if

Plaintiff prevails, the trial court may consider the issue of fees, including the fees incurred on appeal. However, because Plaintiff has successfully reversed the trial court's grant of summary judgment in favor of the Firm, we award Plaintiff his costs on appeal.

Conclusion

¶37 For the foregoing reasons, we reverse and remand this case to the trial court for further proceedings in accordance with our decision.

/S/_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/_____
MICHAEL J. BROWN, Presiding Judge

/S/_____
DONN KESSLER, Judge