STATE OF MICHIGAN

COURT OF APPEALS

SHELTON & ASSOCIATES, P.C., Plaintiff/Counterdefendant-Appellant,	UNPUBLISHED June 12, 2001
v	No. 217456 Oakland Circuit Court
PHILIP J. MAYER, M.D., Defendant/Counterplaintiff-Appellee.	LC No. 97-001983-CK

Before: Hood, P.J., and Doctoroff and K. F. Kelly, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's order granting defendant's motion for summary disposition on plaintiff's amended complaint and awarding judgment in favor of defendant on defendant's counterclaim. We affirm.

I. Basic Facts and Procedural History

Plaintiff was retained to represent defendant in post-judgment divorce proceedings. On September 9, 1994, plaintiff and defendant signed a retainer agreement that provided for a $5,000 initial retainer and further specified that the plaintiff's services would be rendered at a rate of $150 per hour. Plaintiff successfully represented defendant over the next three years.

On July 24, 1997, plaintiff and defendant discussed and negotiated the terms of further representation. Ivie Shelton, the attorney handling the defendant's case, incorporated the discussion into a written offer on August 11, 1997. This letter provided that defendant was to pay plaintiff $5,000 upon receipt and signing of the agreement and additional $5,000 thereafter. In exchange, no further hourly rates would be charged. On August 20, 1997, defendant responded to the written offer, in which he requested clarification of certain terms before signing the agreement. The parties exchanged further correspondence and the relationship soured. Finally, when defendant audited his billings and payment, he discovered he overpaid on the account. Defendant demanded a return of monies overpaid and sought new counsel.

Plaintiff filed an amended complaint alleging breach of contract, libel, slander, and fraudulent misrepresentation. In response, defendant[1] filed a counter-complaint alleging conversion resulting from an the overpayment on his account, intentional infliction of emotional distress, and slander. The trial court determined that defendant overpaid plaintiff by $3,928.45 and dismissed plaintiff's breach of contract count pursuant to MCR 2.117(C)(7). The remaining counts were dismissed pursuant to MCR 2.117(C)(10). The trial court held that when plaintiff failed to return the unearned portion of the fees already paid by defendant in accord with the canons of professional ethics, plaintiff wrongfully converted defendant's funds thereby entitling defendant to summary disposition on his counter-claim for conversion. The trial court awarded defendant treble damages together with $8,000 in attorney fees pursuant to MCL 600.2919a. A judgment was entered in favor of defendant for a total of $19,785.35[2]. Plaintiff appeals from the order granting summary disposition on the breach of contract and conversion claims.

[1] When we refer to "defendant," we acknowledge that defendant is also a counter-plaintiff.

[2] This amount represents: 1) $3,928.45 of converted funds multiplied by three as provided by MCL 600.2919a; MSA 27A.2919(1); and 2) $8,000 in attorney fees.

II. Breach of Contract Claim

First, plaintiff argues that the trial court erred by granting defendant's motion for summary disposition on plaintiff's claim for breach of contract. We disagree. This court reviews de novo a trial court's grant or denial of summary disposition. *Citizens Ins Co, v Osmose Wood Preserving, Inc*, 231 Mich App 40; 585 NW2d 314 (1998). When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7), this court accepts the plaintiff's well-pleaded allegations as true and construes them in a light most favorable to plaintiff. *Id*. Along with the pleadings, this court considers affidavits, depositions, admissions, and other documentary evidence filed or submitted by the parties. A motion for summary disposition under MCR 2.116(C)(7) is properly granted where no factual development could provide a basis for recovery. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996).

To form a valid, binding contract, the parties must have a "meeting of the minds" on all essential terms of the agreement. *Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538; 619 NW2d 66 (2000). In other words, the parties must mutually assent to all material facts. *Kamalnath v Mercy Hosp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). Discussions and negotiations between the parties are not a substitute for the "[f]ormal requirements of a contract." *Kamalnath*, *supra*, at 549.

In the case at bar, plaintiff relies upon the letter of August 11, 1997 for its claim that defendant breached a contract obligating defendant to pay $10,000. In this letter, plaintiff ostensibly reduced to writing the substance of the parties' "agreement" and requested that defendant sign the document. In the correspondence dated August 20, 1997, defendant acknowledged the July 24, 1997 meeting, but instead of signing the agreement manifesting his assent to the terms outlined by plaintiff, defendant requested further clarification on the terms and length of further representation. Although defendant acknowledges that a meeting did occur between the parties and that a "new agreement" was contemplated, defendant's August 20, 1997 letter did not constitute a valid acceptance. A valid contract is created when both parties "[h]ave executed or accepted it, and not before." *Kamalnath*, at 549. Thus, the original retainer agreement of September 24 , 1994 was the only valid contract entered into between the parties.

At best, defendant's August 20, 1997 response letter contains a counterproposition which is not a sufficient acceptance to make the agreement binding. See *Id*. at 549 (stating, "[a] counterposition is not an acceptance.") In this case, the parties did not have a sufficient "meeting of the minds" on all essential terms of the contract allegedly formed by virtue of the July 24, 1997 meeting, nor did defendant clearly and unambiguously accept[3] the offer set forth in plaintiff's August 11, 1997 correspondence as required to elevate that arrangement to a valid, binding contract. As our Supreme Court once observed, "[r]egardless of the equities in a case, the court cannot make a contract for the parties when none exist." *Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960). Since a valid contract providing for a "lump sum" agreement

[3] For an acceptance to be valid and an enforceable contact created, the acceptance must be unambiguous and strictly conform to the terms of the offer. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997).

did not result from the parties' July 24, 1997 meeting, defendant cannot be held liable for its breach .

A. Novation

Plaintiff also argues that the agreement providing for the lump-sum $10,000 payment constituted a novation of the September 9, 1994 retainer agreement. We disagree. A novation requires: 1) parties capable of contracting; 2) a valid obligation to be displaced; 3) consent of all parties to the substitution based upon sufficient consideration; and 4) the extinction of an old obligation and the creation of a new one. *In re Yeager Bridge Co*, 150 Mich App 386, 410; 389 NW2d 99 (1986).

Plaintiff did not come forth with any evidence to establish a novation of the retainer agreement. First, plaintiff cannot establish the requisite "[c]onsent of all parties to the substitution" as plaintiff cannot establish a valid acceptance. Second, when the parties were contemplating a new arrangement, defendant paid a total of $45,298.50 on his account when his final billing statement reflected only $34,049.55 in fees. Thus, defendant did not have an outstanding obligation to plaintiff to be displaced by a new agreement. Any contractual obligation that defendant owed to plaintiff pursuant to the September 9, 1994 retainer agreement, was extinguished by defendant's $3,928.45 overpayment. Accordingly, the trial court correctly determined that a novation did not occur. A review of the entire record reveals that no factual development could possibly provide plaintiff with a basis for recovery premised on breach of contract where none existed.

Accordingly, the trial court did not commit error requiring reversal when it granted defendant judgment as a matter of law pursuant to MCR 2.116(C)(7).

III. Conversion

Next, plaintiff argues that the trial court erred by granting summary disposition on defendant's claim for conversion. Summary disposition is appropriate where there "is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." MCR 2.116(C)(10). Incumbent upon this Court when reviewing a motion brought pursuant to this court rule, is to consider the pleadings, affidavits, depositions, admissions and other documentary evidence, in a light most favorable to the non-moving party and determine whether there is a genuine factual issue upon which reasonable minds could differ. See *Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). To survive a motion brought pursuant to this court rule, the non-moving party must come forth with evidence establishing a material factual dispute justifying a trial. *Id*.

Conversion is "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Conversion is an intentional tort which constitutes an injury to property. *Id.* See also *Blue Cross and Blue Shield of Michigan v Folkema*, 174 Mich App 476; 436 NW2d 670 (1988) (characterizing conversion as an injury to property). Further, the intent necessary to constitute conversion is the intent merely to do the general act. Consequently, one can commit the tort "[u]nwittingly if unaware of the plaintiff's outstanding

property interest." *Id*. To maintain an action for conversion of money, the defendant, "[m]ust have an obligation to return the specific money entrusted to his care." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999). Statutory conversion consists of knowingly "buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property." MCL 600.2919a; MSA 27A.2919(1). An action for conversion exists where an individual cashes a check and retains the full amount while only entitled to a portion. *Citizens Ins Co of America v Delcamp Truck Center, Inc,* 178 Mich App 570, 576; 444 NW2d 210 (1989).

Pursuant to the parties' September 9, 1994 retainer agreement, defendant had to pay $150 per hour for plaintiff's legal services. Plaintiff's legal fees were $58,870.75. Defendant paid $62,798.50 on his account, resulting in an overpayment in the amount of $3,928.45. According to the Rules of Professional Conduct[4], an attorney has an affirmative obligation to return any unearned portion of an advance payment made by the client for legal services.

When defendant apprised Shelton of the overpayment, Shelton denied that defendant had overpaid and instead asserted that defendant owed an additional $14,075.05. Although plaintiff was aware of defendant's outstanding property interest in the $3,928.45, such awareness was not necessary for common law conversion. *Foremost, supra* at 391; *Delcamp, supra* at 575. Plaintiff violated § 2919a by aiding in the concealment of converted property when Shelton knew that the property was converted.

When plaintiff retained and refused to refund the $3,928.45, he did so wrongfully. Accordingly, the trial court did not err by granting summary disposition on defendant's counter-claim for conversion.

IV. Attorney Fees

Plaintiff finally contends that the trial court erred by awarding defendant costs and attorney fees. We review a trial court's decision to award attorney fees for an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). Within the context of attorney fees, "[a]n abuse of discretion exists only when the result so violates fact and logic that it constitutes perversity of will, defiance of judgment, or the exercise of passion or bias." *Model Laundries & Dry Cleaners v Amoco Corp*, 216 Mich App 1, 4; 548 NW2d 242 (1996).

Generally, attorney fees and costs are not recoverable unless specifically authorized by statute, court rule, or judicial exception. *Raferty v Markovitz,* 461 Mich 265, 270; 602 NW2d 367 (1999); *Phinney, supra* at 560. Because plaintiff was properly held liable for conversion pursuant to § 2919a, and attorney fees and costs are specifically authorized by the statute, the

[4] See MRPC 1.6(d) stating that, "[u]pon termination of representation, a lawyer shall take reasonable steps to protect a client's interests such as giving reasonable notice to the client, allowing time for employment of other ocunsel, surrendering papers and property to which the client is entitled, and **refunding any advance payment of fee that has not been earned**." [Emphasis added.] See also Comment to MRPC 1.5 stating that, "[a] lawyer may require advance payment of a fee, but is obligated to return any unearned portion."

trial court did not err by awarding the attorney fees and costs to defendant. *Rafferty*, *supra* at 270; *Phinney*, *supra* at 560. While defendant argues that the trial court erred by refusing to award the full amount of the attorney fees requested, he did not file a cross-appeal. Consequently, his argument is not properly before this Court for review. *Michigan State Employees Association v Civil Service Comm*, 220 Mich App 220, 225; 559 NW2d 65 (1996). Therefore, the trial court's award of attorneys fees was not an abuse of discretion.

Affirmed.

/s/ Harold Hood
/s/ Martin M. Doctoroff
/s/ Kirsten Frank Kelly