

STATE OF MICHIGAN
COURT OF APPEALS

ISHBIA & GAGLEARD, P.C.,

Plaintiff-Appellant,

v

NIEMANN BROTHERS GREENHOUSE, INC.,

Defendant-Appellee.

UNPUBLISHED

May 8, 2008

No. 278019

Wayne Circuit Court

LC No. 06-627287-CK

Before: White, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Plaintiff law firm (the “firm”) appeals as of right from a circuit court order that granted summary disposition to defendant corporation (the “corporation”) in this action brought to recover \$122,346.63 in legal fees. We reverse and remand for further proceedings.

The firm provided legal representation for John L. Niemann, his wife Mary A. Niemann, and the corporation in a prior action brought by John’s brother, Mark W. Niemann. Several of the claims advanced by Mark were dismissed as a result of motions for partial summary disposition filed by the firm on behalf of the defendants. In May 2006, the court determined that Mary Niemann had no ownership interest in the corporation and that John and Mark each owned 50 percent of the corporation. In an order dated August 29, 2006, the court granted the firm’s motion to withdraw as counsel for the defendants.

In the present collection action for legal fees, filed on September 26, 2006, the firm sought to recover fees for legal services provided between April 2005 and August 2006. The complaint included counts for breach of contract, account stated, quantum meruit, and unjust enrichment.

The parties settled the prior action. In an order dated November 22, 2006, the circuit court ordered the dismissal of the complaint and counterclaim, the sale of the corporation’s assets with the sale proceeds to be applied in a specified order of priority, and the remaining proceeds divided equally between Mark and John Niemann. The order also stated “that each party shall pay their own attorney fees and costs associated with this litigation.” The court retained jurisdiction with respect to “All issues relating to the claims of Ishbia & Gagleard, P.C.’s [sic] for attorney fees against the Corporation, Niemann Brothers Greenhouse, Inc., in C.A. No.: 06-627-287-CK and all defenses thereto.” The order stated that its entry resolves the last pending claims between the parties and closes the case.

In the present action, the corporation moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). With respect to the breach of contract claim, it argued that it was incompetent to contract because neither John nor Mary Niemann had authority to bind the corporation and a majority of shareholders did not agree to the retention of the firm. With respect to the claims for unjust enrichment and quantum meruit, the corporation argued that the firm had conferred no benefit to the corporation, only detriment, and that the firm had “unclean hands.”

At the hearing on the corporation’s motion, the circuit court determined that the corporation was entitled to summary disposition because the November 22, 2006, order in the prior action stated that the parties were required to pay their own attorney fees.

On appeal, the firm argues that the circuit court improperly granted summary disposition for a reason not argued by the corporation, and that the November 22, 2006, order on which the court relied did not preclude its collection action.

This Court reviews a trial court’s decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

We agree with the firm that the November 22, 2006, order in the underlying action did not preclude the firm’s collection action against the corporation for legal fees. The order stated, in pertinent part, that “each party shall pay their own attorney fees and costs associated with this litigation.” The corporation was a party in the underlying action. Although differentiation of fees for representation of John and Mary Niemann from those of the corporation may be necessary, the joint representation was not a basis for disregarding the corporation’s existence as a separate entity and party to that action.

Further, the firm was not a party to the underlying litigation and the parties’ agreement regarding attorney fees could have no effect on the corporation’s contract with the firm.

The corporation asserts that the firm’s rights were adequately preserved because the circuit court retained jurisdiction in the prior action with respect to “[a]ll issues relating to the claims of Ishbia & Gagleard, P.C.’s [sic] for attorney fees against the Corporation, Niemann Brothers Greenhouse, Inc., in C.A. No.: 06-627-287-CK and all defenses thereto.” It is not clear that the prior action was pending when the circuit court dismissed the claims in the present case. The November 22, 2006, order also stated, “THE ENTRY OF THIS ORDER RESOLVES THE LAST PENDING CLAIMS BETWEEN THE PARTIES AND CLOSES THE CASE.” Assuming that the action was pending, it may have been appropriate to consolidate the cases. MCR 2.505. However, the court’s announcement in the prior action of its retention of jurisdiction concerning the litigation of fees in the present action was not a legal ground for involuntary dismissal of the present action.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski