STATE OF MICHIGAN

COURT OF APPEALS

BEEDING LEGAL GROUP, INC.,

Plaintiff/Counter-Defendant/
Third Party Plaintiff-Appellant,

v

C & R MAINTENANCE, INC., d/b/a RIZZO SERVICES,

Defendant/Counter-Plaintiff-
Appellee,

and

BENJAMIN J. ALOIA,

Third Party Plaintiff/Defendant.

UNPUBLISHED
June 2, 2009

No. 284534
Macomb Circuit Court
LC No. 05-003140-CB

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendant C & R Maintenance, Inc.'s motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Beeding Legal Group, Inc., provided legal services to defendant C & R Maintenance, Inc. This controversy centers on an Engagement Agreement between the two parties, which became effective as of June 1, 2004, and terminated in June of 2005. Plaintiff maintained that it was entitled to payment for work performed prior to the effective date of the Engagement Agreement. Plaintiff also maintained that the Engagement Agreement did not cover two projects, "the Miodowski Matter" and "the Landfill Project". The trial court concluded plaintiff had admitted that payment for pre-engagement fees had been paid in full, and concluded that a novation of any agreement that these fees be paid had occurred. With respect to the Miodowski matter, the court concluded that it was litigation covered by the following provision of the contract:

> (1) Scope of Engagement. The engagement of the Firm shall be for the purpose of handling any and all general counsel and/or litigation matters.

The trial court did not address the nature of the Landfill Project, finding that a credit owing to defendant from the Miodowski matter would extinguish any amount owing to plaintiff.

We review an order granting summary disposition de novo. *Odom v Wayne County*, 482 Mich 459, 466; 760 NW2d 217 (2008). Regarding a motion under MCR 2.116(C)(10), we review "'the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.'" *Odom*, *supra* at 466-467 (citation omitted).

In opposing summary disposition, plaintiff submitted the affidavit of John M. Beeding, Jr., plaintiff's sole shareholder. In pertinent part to the issue regarding pre-engagement attorney fees, Beeding's affidavit indicated that plaintiff had accepted $1914.14 as "payment in full for the *costs* owed to plaintiff." Beeding referenced a document entitled "Beeding *Legal Services* Charges June 2004" ("Exhibit C"), which showed the "Total due to Beeding as of June 30, 2004" to be $1914.14. Beeding maintained that this document was prepared by defendant, *not plaintiff*, in an effort to clarify the money owed to plaintiff as of June 30, 2004, that it showed costs owed as being $1914.14, and that defendant paid plaintiff this amount "as payment in full for the *costs* then owed to BLG." The trial court found that this admission in the affidavit, coupled with Exhibit C, meant that $1914.14 was accepted as payment in full for all fees predating the Engagement Agreement, including outstanding attorney fees. However, the affidavit expressly speaks of "*costs*" being paid in full. Moreover, the reference to $1914.14 on Exhibit C is a reference to adjusted June *costs* (costs of $3067.28, minus a trade deficit of $1,153.14 that Beeding attested was for disposal charges owed to defendant relative to "build-out" of plaintiff's office suite, for a total of $1914.14). Thus, the trial court erred in relying on this statement in the affidavit as an admission that all pre-engagement attorney fees had been paid in full.

The trial court also found that the acceptance of the $1914.14 constituted a novation of the outstanding legal fees and costs. "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 the old obligation and the creation of a valid new one." *In re Dissolution of F Yeager Bridge & Culvert Co*, 150 Mich App 386, 410; 389 NW2d 99 (1986). For the reasons stated above, we find that there was a genuine issue of material fact regarding consent.

Defendant argues that the "engagement fee" term in the Engagement Agreement constituted a novation of the outstanding legal fees. This term provides:

> (5) Engagement Fee. In exchange for converting to monthly, blended, flat fee plus contingent fee arrangement, with costs being billed separately and paid monthly, [defendant] is hereby committing to payment of the outstanding balance which was due and owing to the firm as of May 31, 2004, as both an Engagement Fee and as full satisfaction of its outstanding invoices. Further, upon execution of this Agreement, [defendant] shall deliver the June 1, 2004 Flat Fee payment of $30,000 to the law firm.

Defendant maintains that this provision meant that plaintiff agreed to accept the first monthly flat fee payment as full satisfaction of outstanding invoices and the first engagement fee. In other

words, defendant construes the language to mean that it was paying the outstanding balance as part of the Engagement Fee and was thereby extinguishing the outstanding balance. This is a plausible but not the most obvious reading of the provision. As an alternative, the provision can be read to mean that defendant was to pay the outstanding balance plus the $30,000 flat fee as part of the Engagement Fee.

In *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469-470; 663 NW2d 447 (2003), our Supreme Court stated:

> It is well settled that the meaning of an ambiguous contract is a question of fact that must be decided by the jury. *Hewett Grocery Co v Biddle Purchasing Co*, 289 Mich 225, 236; 286 NW 221 (1939). "'Where a contract is to be construed by its terms alone, it is the duty of the court to interpret it; but where its meaning is obscure and its construction depends upon other and extrinsic facts in connection with what is written, the question of interpretation should be submitted to the jury, under proper instructions.'" *O'Connor v March Automatic Irrigation Co*, 242 Mich 204, 210; 218 NW 784 (1928) (citation omitted).
>
> Where a written contract is ambiguous, a factual question is presented as to the meaning of its provisions, requiring a factual determination as to the intent of the parties in entering the contract. Thus, the fact finder must interpret the contract's terms, in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning. [11 Williston, Contracts (4th ed), § 30:7, pp 87-91.]
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> In resolving such a question of fact, i.e., the interpretation of a contract whose language is ambiguous, the jury is to consider relevant extrinsic evidence. As this Court explained in *Penzien v Dielectric Products Engineering Co, Inc*, 374 Mich 444, 449; 132 NW2d 130 (1965):
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> "If the contract in question were ambiguous or 'doubtful,' extrinsic evidence, particularly evidence which would indicate the contemporaneous understanding of the parties, would be admissible as an aid in construction of the disputed terms."
>
> "The law is clear that where the language of the contract is ambiguous, the court can look to such extrinsic evidence as the parties' conduct, the statements of its representatives, and past practice to aid in interpretation." [Citations omitted.]

The *Klapp* Court indicated that the parole evidence rule is not implicated when a contract is ambiguous, and that a contract is to be interpreted against the drafter only "if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the jury unable to determine what the parties intended their contract to mean." *Id.* at 471.

Given the ambiguity in the contract, a jury must decide whether the Engagement Agreement extinguished outstanding fees, or provided that they must be paid in addition to the flat fee for the first month. Similarly, a jury must decide the import of Exhibit C to the Beeding Affidavit. Preliminary, a jury must decide the origin of this document, and must then decide its

import. In this regard, it is noted that Exhibit C is confusing with respect to attorney fees. It has a column for "Balance per Beeding" with a total of $206,424.74, adjustments for the $3067.28 in costs, and a final column entitled "Trade Final Balance June" of $201,205.87. Beeding attested that this document was prepared by defendant. However, the figure is close to the $204,500.40 that plaintiff claims defendant owed it in pre-engagement fees. Thus, the figure apparently is a reference to at least an estimate of the attorney fees. Another section of the document indicates a total balance due to Rizzo on trade of $202,359.01. Beeding indicated that he represented the interests of but had no interest in the Richmond Realty Limited Partnership ("RRLP"), which operated a shopping center, that defendant had performed snow removal and landscaping services for RRLP, that defendant had sued RRLP for payment for these services, and that plaintiff was not in any way obligated to pay these fees. These appear to be the fees that comprise the $202,359.01. At a minimum, there is a dispute as to whether, in addition to RRLP, plaintiff may also be responsible for them.

Plaintiff next argues that the trial court erred in finding no genuine issue of material fact regarding whether the Engagement Agreement covered the Miodowski matter and the Landfill matter. The court read the Agreement to mean that general counsel and litigation matters would be covered by the Agreement, whereas "other matters" would be subject to separate agreements. Since the Miodowski matter involved litigation, the court concluded that it was covered. The court stated that the nature of the Landfill matter was less clear, but determined that it did not matter since a credit to defendant for the Miodowski matter would extinguish the balance alleged to be owing on the Landfill matter.

We note that the Agreement did not provide that "other matters" would be subject to separate agreements but rather that "future matters" would be subject to separate agreements. Beeding attested that these two matters were the subjects of oral agreements by which they were to be billed separately. Defendant argues that there were no separate agreements governing the subject matters. The contract does not speak to whether a separate agreement must be in writing, and defendant has not presented any argument to show that an oral agreement would not suffice. Since the issue has not been raised, we do not decide whether there are any legal barriers to an oral agreement. However, we conclude that Beeding's affidavit creates a question of fact regarding whether such an agreement existed.

We vacate the trial court's order granting defendant's motion for summary disposition and remand this case to the trial court for further proceedings. We do not retain jurisdiction. Appellant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jane E. Markey