STATE OF MICHIGAN

COURT OF APPEALS

LORI SHARKEY,

Plaintiff,

v

PATRICK SHARKEY,

Defendant,

and

BARBARA CUNNINGHAM, Assignee of PATRICK SHARKEY,

Appellant,

and

Estate of ROBERT E. STOUT,

Interested Party-Appellee,

and

STEPHAN A. MANKO,

Interested Party-Appellee.

UNPUBLISHED
October 14, 2010

No. 293339
Genesee Circuit Court
Family Division
LC No. 06-268700-DM

Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

This dispute over attorney fees arises out of a divorce action between plaintiff, Lori Sharkey, and defendant, Patrick Sharkey. Pursuant to a contingency fee agreement, defendant retained attorney Robert E. Stout to seek recovery for injuries sustained in an automobile accident. Defendant initially retained attorney Stephan Manko for his divorce action. Following the death of Robert Stout, defendant retained Manko to pursue claims related to criminal matters, as well as his divorce, an overpayment of insurance benefits and the automobile accident for

which he had previously retained Robert Stout. Defendant entered into a contingency fee agreement with Manko on these matters. A receiver was assigned by the trial court in the underlying divorce action to "marshal all assets of the parties," apportion the debt, and then distribute the assets 50 percent to plaintiff and 50 percent to defendant. When the automobile accident was settled for $340,000, the receiver filed a petition for final report and request for relief, stating in relevant part, that "pursuant to correspondence with Manko and Stout both attorneys are claiming a 25% lien. Therefore the sum of $85,000 has been segregated." Defendant assigned his rights to this sum of escrowed attorney fees to Barbara Cunningham ("defendant's assignee" or "Cunningham"). Cunningham appeals as of right from an order granting a 25 percent contingent attorney fee, and summary disposition, to interested parties-appellees Estate of Robert E. Stout ("the Estate" when referring to appellee, "Stout" when referring to the individual attorney) and Stephan A. Manko ("Manko"). For the reasons set forth in this opinion, we affirm.

Cunningham argues on appeal that the trial court committed error requiring reversal when it awarded fees to attorney Manko based only on a fee agreement between Stout, plaintiff, and defendant, because Manko was neither a party to nor a third-party beneficiary of the agreement.

Cunningham brought her motion for summary disposition (with respect to the Estate's claim) pursuant to MCR 2.116(C)(10) and the Estate argued in turn that the court should grant it summary disposition pursuant to MCR 2.116(I)(2)[1]. "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In reviewing a motion pursuant to this rule, this Court considers "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). 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." *Id*. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

In addition, the proper interpretation of a contract is a question of law subject to de novo review. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). Finally, "[t]he decision whether to impose an attorney's lien lies within the trial court's discretion . . . and such decisions are reviewed for abuse of discretion." *Reynolds v Polen*, 222 Mich App 20, 24; 564 NW2d 467 (1997). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

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[1] MCR 2.116(I)(2) provides, "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

The agreement between plaintiff, defendant, and Stout, entered into on September 17, 2004, was as follows:

> We, Patrick V. Sharkey and Lori A. Sharkey, do hereby authorize Robert E. Stout to act as our attorney in prosecuting to a final determination a certain right of action against Travis Taylor, Teresa Taylor and possible others, and or any other responsible parties, *including uninsured and underinsured motorist claims*, for personal injuries, damages and loss of consortium damages sustained by us on or about August 1, 2004, in Lapeer County, Michigan.
>
> *We hereby agree to pay for services in the above matter Twenty-Five (25%) Percent of the entire amount recovered*. It is further understood that costs may be advanced in prosecuting said claim and we hereby agree to pay to said attorney all costs sustained. Said attorney shall be reimbursed the advanced costs from the gross amount of any recovery. All costs shall be itemized. In no event shall attorney fees conflict with the schedule set out in Michigan General Court Rule 2.2.
>
> We further agree that *said attorney shall have a lien on any and all sums collected by or on our behalf in said matter*. We further understand and agree that the above cited fee arrangement does not include the filing of any appeal . . . . [Emphasis added.]

Pursuant to this agreement, the Estate asserted a claim to the escrowed attorney fees ($85,000), which resulted from the recovery of $340,000 in the underinsured matter.[2] Manko was also asserting that pursuant to his contingency fee agreement with plaintiff he was entitled to receive 25 percent of the $340,000. However, during the period of time when the trial court was considering various motions for summary disposition in this matter, the Estate entered into an agreement to share the fees with Manko, according to a letter written by Manko to the Estate's attorney on March 12, 2009, and as stated by the parties in their pleadings. That letter stated:

> After considerable research and reflection, I will accept your proposed settlement of the division of attorney fees in this matter. Accordingly, from the $85,000.00 attorney fee award, I will be paid $63,750.00 and your father's estate will receive $21,250.00 to finally resolve this matter. I will forward a copy of this acceptance to [the court-appointed receiver] so that he can commence the payout.

Cunningham argues that the trial court erred by awarding funds to Manko based on the Stout fee agreement, to which Manko was neither a party nor a third-party beneficiary. According to Cunningham, Manko could not have been a third-party beneficiary to the Stout agreement because there is no expressed promise to act for the benefit of Manko nor was it at that time conceivable that Manko would be involved in representing the Sharkeys in any way.

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[2] Prior to his death, attorney Stout received 25 percent of a $100,000 settlement from a third-party claim.

We agree that Manko was not a third-party beneficiary to the Stout agreement; however we also rule that a third-party beneficiary analysis is not applicable.

> Pursuant to MCL 600.1405:
>
> [a]ny person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

Further, our Supreme Court has explained that "the plain language of this statute reflects that not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise. Thus, only intended, not incidental, third-party beneficiaries may sue for a breach of a contractual promise in their favor." *Schmalfeldt v N Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003) (internal citations and punctuation omitted).

Nevertheless, nowhere in the proceedings below or in the trial court's order is there a reference to, or argument premised on, a third-party beneficiary theory. Instead, the trial court based its decision to award the attorney fees on Stout's agreement with plaintiff and defendant. The court stated, "[t]his recovery emanates as a matter of law from the Attorney-Client Fee Agreement entered into between Attorney Robert E. Stout and [defendant] and [plaintiff] . . . ." Thus, the issue presented to the trial court and this Court is one of contract interpretation. "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties . . . ." *Klapp*, 468 Mich at 473. When interpreting a contract:

> [I]f contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning. [*Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997) (internal citations omitted).]

In addition, "a contract is to be construed as a whole . . . all its parts are to be harmonized so far as reasonably possible . . . every word in it is to be given effect, if possible; and . . . no part is to be taken as eliminated or stricken by some other part unless such a result is fairly inescapable." *Roberts v Titan Ins Co*, 282 Mich App 339, 358; 764 NW2d 304 (2009).

With respect to the aforementioned agreements, "[a]s a general matter, courts presume the legality, validity, and enforceability of contracts." *Coates v Bastian Bros, Inc*, 276 Mich App 498, 507; 741 NW2d 539 (2007), and Cunningham has not challenged the validity of either the initial Stout agreement or Stout's agreement with Manko. Further, pursuant to MCR 8.121, Allowable Contingent Fee Agreements:

> (A) In any claim or action for personal injury or wrongful death based upon the alleged conduct of another, in which an attorney enters into an agreement, expressed or implied, whereby the attorney's compensation is dependent or contingent in whole or in part upon successful prosecution or settlement or upon the amount of recovery, the receipt, retention, or *sharing by such attorney, pursuant to agreement or otherwise*, of compensation which is equal to or less than the fee stated in subrule (B) is deemed to be fair and reasonable. The receipt, retention, or sharing of compensation which is in excess of such a fee shall be deemed to be the charging of a "clearly excessive fee" in violation of MRPC 1.5(a).
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> (B) Maximum Fee. The maximum allowable fee for the claims and actions referred to in subrule (A) is one-third of the amount recovered. [Emphasis added.]

See also *Reed v Breton*, 279 Mich App 239, 242-243; 756 NW2d 89 (2008). Thus, by the plain language of the initial contract, plaintiff and defendant agreed that Stout would get 25 percent of the entire amount recovered in the "*uninsured and underinsured motorist claim*," and they further agreed that Stout would "have a lien on any and all sums collected by or on [their] behalf in said matter." Because the Stout fee agreement was for only 25 percent of the recovery, it was proper pursuant to MCR 8.121, as was the Estate's agreement to share the fee with Manko. Therefore, the trial court properly granted summary disposition to Manko and the Estate pursuant to MCR 2.116(C)(10) and awarded them 25 percent of recovery of underinsured benefits.

The remainder of Cunningham's arguments on appeal relate to Manko's agreement with defendant. We need not address any of those issues raised as the trial court's decision was premised on the contracts between plaintiff, defendant and Stout, and the Estate and Manko. Again, based on the lack of argument on the part of Cunningham that any of the aforementioned contracts were not legally enforceable, we need not address the remaining issues on appeal.

Affirmed. Appellee Estate of Robert Stout having prevailed in full may access costs. MCR 7.219(A). Appellee Stephan Manko is not entitled to costs. MCR 7.219.

/s/ Stephen L. Borrello
/s/ Mark J. Cavanagh
/s/ Donald S. Owens