



This is the Court's decision granting in part and denying in part the Defendant's Motion to Stay this civil action.

### *Facts*

The defendant, Ms. Cheryl Taylor, hired the law firm of Biggs and Battaglia to represent her in a personal injury matter due to an incident which occurred on May 10, 2008. A Contingent Fee Agreement was entered into between Ms. Taylor as "Client" and Biggs and Battaglia as "Attorneys" on July 18, 2008. The following terms were set forth for payment of services: 1) Client would pay to Attorneys twenty five percent of any recovery from a settlement agreement made prior to the filing of a complaint; 2) Client would pay to Attorneys thirty three and one third percent of any recovery from a settlement or resolution after the filing of a suit; 3) Appeals or subsequent trials were not part of the agreement; 4) Recovery would be considered the full amount awarded; 5) Client would pay costs and expenses as they were submitted by Attorneys; 6) If there was no recovery, Attorneys would only receive payment of costs and expenses; 7) Either party could withdraw from representation; 8) If either Client or Attorneys withdrew prior to any recovery, it was agreed that Attorneys would be entitled to a reasonable value of their services performed plus repayment of any expenses incurred on Client's behalf.<sup>1</sup>

On December 1, 2008, an action was filed in Superior Court, New Castle County, entitled *Cheryl Taylor v. General Electric, et al.* by Biggs and Battaglia.<sup>2</sup> As part of the lawsuit, Ms. Taylor's deposition was taken in June of 2009. Ms. Taylor declined to pay the costs of the deposition. Biggs and Battaglia withdrew as her attorneys and Gary Nitsche, Esquire of Weik, Nitsche & Dougherty, entered his appearance on her behalf.

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<sup>1</sup> *Exhibit A to Complaint, Contingent Fee Agreement.*

<sup>2</sup> *C.A. No. 08C-12-005 RRC.*

### *Procedural Posture*

Plaintiff, Biggs and Battaglia, through counsel, Robert D. Goldberg, Esquire, of Biggs and Battaglia, filed this action against Ms. Taylor in the Court of Common Pleas on December 7, 2009. The Complaint alleges that, as a result of a breach of contract, Ms. Taylor owes Plaintiff \$20,020.25 in attorney's fees and \$673.00 in unpaid costs for a total claimed amount of \$20,693.25, plus court costs.<sup>3</sup>

Ms. Taylor, through counsel, Marc D. Ippoliti, Esquire, of Weik, Nitsche & Dougherty, filed an Answer to the Complaint and a Motion to Stay on February 3, 2010. Defendant essentially claims, in both filings, that the agreement between Ms. Taylor and Biggs and Battaglia was a contingency agreement which provided for no attorney's fees, only costs, if there was no recovery by settlement or suit. Since the matter has not settled or resolved, the claim for attorney's fees is premature until a resolution occurs. Upon a resolution, Defendant contends a claim for attorney's fees under a theory of *quantum meriut* could be asserted.<sup>4</sup>

In Plaintiff's Response to the Motion to Stay, it asserts that the claim for attorney's fees is not based upon the contingency clauses of the agreement as suggested by Defendant. Rather, Plaintiff asserts that its claim is for two non-contingency portions of the Agreement. First, paragraph five of the agreement provides for costs to be paid upon submission to the client. Second, paragraph 8 of the agreement provides for the reasonable value of services performed in the event that the Attorneys withdrew prior to a recovery.<sup>5</sup>

On March 4, 2010, the Court heard oral arguments by Mr. Ippoliti and Mr. Goldberg. On March 11, 2010, Mr. Goldberg filed a letter with additional comment.

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<sup>3</sup> *Complaint for Breach of Contract, filed 12/7/09.*

<sup>4</sup> *Defendant Cheryl Taylor's Answer to Complaint and Defendant's Motion to Stay Proceedings, both filed 2/3/10.*

<sup>5</sup> *Plaintiff's Response to Defendant's Motion to Stay Proceedings, filed 2/18/10.*

### *Discussion*

Plaintiff filed a Complaint, in this Court, against Defendant for costs and attorney's fees. The question presented in the Motion is whether the action can proceed or must be stayed pending the outcome of the underlying personal injury case in Superior Court.

### *Costs*

Plaintiff asserts that is it entitled to \$673.00 in costs from Defendant based upon the terms of the contract that Defendant pay costs as presented to her. Defendant does not contest these costs and there is no assertion of any grounds to stay this portion of Plaintiff's claim. Therefore, this portion of the complaint may proceed. Since there is no factual dispute, the matter is ripe for settlement or summary judgment.

### *Attorney's Fees*

Plaintiff asserts that became entitled to attorney's fees from Ms. Taylor immediately upon its termination of its representation of her. Defendant contends attorney's fees cannot be determined until the underlying personal injury case is resolved by settlement or trial.

The case of *Webb v. Harleysville Insurance Company*, 1995 WL716757 (Del. Super., 1995) is controlling on this issue. In *Webb*, there was an underlying personal injury case with an anticipated recovery. Counsel, who initially represented the client, filed a lien to any recovery by their former client in the personal injury action to collect their claimed attorney's fees. Once the recovery was determined, the attorneys sought the contingency fee agreed upon in their initial contract with the client. The Court declined to award attorney's fees on the contingency fee amount, holding that contingent fee awards were not appropriate in a case where an attorney was discharged. Rather, the Court held the recovery for attorney's fees was limited to *quantum*

*meriut*.<sup>6</sup> The Court further held that “the lawyer’s recovery is limited to *quantum meruit* in an amount not to exceed the contingency fee.” *Webb at 3 (citations omitted)*.

Although Biggs and Battaglia has filed suit for attorney’s fees in the Court of Common Pleas, rather than a lien in the Superior Court personal injury case, the ultimate issue is the same and this Court must still engage in the analysis set forth by *Webb*. In *Ramunno & Ramunno v. Nitsche, 2009 WL 395224 (Del. Super.)*, the Court was asked to address the appropriate measure of compensation in fee disputes between initial and subsequent counsel in several personal injury cases. It cited *Webb* as determinative on the issue. *Ramunno & Ramunno at 2*.

Plaintiff is not seeking a contingency fee in this case. Rather, Plaintiff seeks the reasonable value of the services performed at the time Ms. Taylor’s representation ended, which is a claim based upon a *quantum meriut* theory. It seems logical that this Court could proceed immediately on a *quantum meriut* theory of recovery for attorney’s fees by hearing evidence on the services performed by Plaintiff for Defendant. However, Plaintiff’s claim that it is proceeding only for reasonable services and not for a contingency fee does not vitiate the calculation of a contingency fee as part of the court’s analysis when an agreement for a contingency fee was part of the initial contract.

In *Webb*, the court set forth ten factors to be considered when determining an award of reasonable attorney’s fees under a *quantum meriut* theory. They are:

- (1) The time and labor required, the novelty and difficult of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the substance of the particular employment will preclude other employment by the lawyer;
- (3) The fees customarily charged in the locality for similar legal services;

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<sup>6</sup> *Quantum meruit* literally means “as much as he deserves” and stands for the theory of recovery for a fair value of services performed. *Heiman, Aber & Goldlust v. Ingram, 1999 WL 1240904 (Del. Super.)*

- (4) *The amount involved and the results obtained;*
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers to perform the services;
- (8) Whether the fee is fixed or contingent;
- (9) *The employer's ability to pay;* and
- (10) Whether claimant's counsel has received or expects to receive compensation from any other source.

*Webb at 3 (emphasis added).* The Court noted that additional compensation could be further added due to the contingency nature of the case if the matter involved novel questions, the outcome was doubtful or the result was significant. *Webb at 3.*

It is impossible to proceed on the issue of attorney's fees prior to the resolution of the underlying case. The total amount of recoverable attorney's fees is limited under the specific language of *Webb* to the calculable contingency fee unless an additional fee is warranted for exceptional circumstances. In this case, the fee cannot be calculated because the outcome is unknown.

Further, under *Webb*, the Court must consider item number four which requires a consideration of "the amount involved and the results obtained" and item number nine which requires a consideration of "the employer's ability to pay." *Webb at 3.* Both of these items require the recovery in the underlying action to be known in order for them to properly be considered. First, the Court must know if Ms. Taylor recovered an award in her Superior Court case and if so, the amount of the award. Second, the Court could consider Ms. Taylor's ability to pay attorney's fees more accurately if it was known that she was given an award.

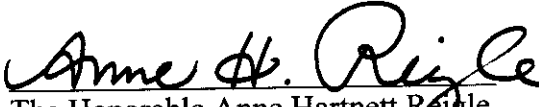
Finally, without knowing the resolution of the Superior Court case, this Court cannot evaluate whether additional compensation is warranted above the calculable contingency fee due to exceptional circumstances.

This Court cannot make a decision regarding an award of reasonable attorney's fees until the issue of recovery for Ms. Taylor has been resolved in her Superior Court case. Only then will this Court have the necessary facts to make a ruling on the factors set forth in *Webb*. For this reason, the claim in the Court of Common Pleas for attorney's fees must be stayed.

***Decision***

The Motion to Stay is granted in part and denied in part. Plaintiff may proceed on its claim for costs. Plaintiff may not proceed on its claim for attorney's fees and that claim is stayed until the Superior Court civil action, *Cheryl Taylor v. General Electric, et. al*, C.A. No. 08C-12-005 RRC has been resolved.

IT IS SO ORDERED.

  
The Honorable Anne Hartnett Reigle