IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JAMES L. FOX and RHONDA S. FOX, husband and wife,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. N12C-06-244 WCC
	)	
RC FABRICATORS, INC.	)	
	)	
Defendant.	)	

Submitted: September 18, 2013
Decided: December 20, 2013

Defendant's Motion for Summary Judgment – DENIED
Plaintiffs' Cross-Motion for Partial Summary Judgment – GRANTED

MEMORANDUM OPINION

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CARPENTER, J.

Before this Court is Defendant's Motion for Summary Judgment and Plaintiffs' Cross-Motion for Partial Summary Judgment. At issue is whether Plaintiffs' claim is barred because Plaintiffs' prior attorney, William Conour ("Conour") entered into a settlement agreement with Defendant and Defendant paid the agreed upon settlement amount. Although this issue appears to be standard accord and satisfaction, it is complicated by Conour's later admissions that: (1) the settlement was not approved by Plaintiffs; (2) the Plaintiffs' signatures thereto were forged; and (3) Conour never disbursed the funds to Plaintiffs.

For the foregoing reasons, the Court finds the settlement is not binding upon the Plaintiffs and the Defendant's Motion for Summary Judgment is hereby **DENIED**. Plaintiffs' Cross-Motion for Summary Judgment, seeking a determination that the settlement is not binding upon them, is hereby **GRANTED**.

FACTUAL BACKGROUND

Plaintiff James Fox ("Fox") was injured on or about July 17, 2010, while working at a construction site in Wilmington, Delaware. Plaintiffs allege that these injuries are attributable to Defendant, arguing that a crane operated by employees of Defendant dropped a steel diagonal brace weighing approximately 370 pounds, which struck Fox. Plaintiffs claim the incident resulted in crush-like injuries to

Fox's left leg and neck, necessitating numerous surgical procedures and medical care, and seek reimbursement for such.

Following this injury, Plaintiffs retained the law firm of Conour Devereux Hammond to represent them in connection with the personal injury claim.[1] Plaintiffs signed a retainer agreement with the firm on or about August 10, 2010, setting forth the relationship and authority granted to the firm (the "Retainer"). Beginning in November 2010, the firm engaged in settlement negotiations with Defendant and their liability insurer and had numerous communications through email, letter, phone, and facsimile.

Conour's involvement in the settlement negotiations began on or around September 2, 2011 and continued until October 6, 2011. On October 6, 2011, Conour agreed to resolve the claims on Plaintiffs' behalf for $450,000. Conour represented to Defendant that Plaintiffs agreed to the settlement and executed and forwarded a Release and Indemnification Agreement (the "Release") to Defendant's insurer. The Release stated that Plaintiffs released and forever discharged Defendant and their insurer for all claims arising from the July 17, 2010 incident in exchange for a payment of $450,000. Pursuant to the agreement,

[1] Plaintiffs also retained the law firm of Keller & Keller to act with Conour Devereux Hammond, however, the firm was not otherwise involved in the settlement of the case. Therefore, while the Court recognizes that Plaintiffs contracted with two firms for services, their relationship with Conour Devereux Hammond is the only relevant one for purposes of this Opinion.

Defendant and/or their insurer issued a payment for $450,000 on October 7, 2011, to "Jim Fox & Conour, Devereux, Hammond Attnys," which was endorsed and deposited into the IOLTA account for Conour Devereux Hammond on October 10, 2011. It is unclear what became of these specific funds but what is clear is that Conour never disbursed them to Plaintiffs.

Plaintiffs learned of the settlement between Conour and Defendant on February 24, 2012. Believing they were the victims of fraud, Plaintiffs then contacted the Federal Bureau of Investigation. Shortly thereafter, on April 27, 2012, a federal criminal complaint and supporting affidavit were filed against Conour in the U.S. District Court for the Southern District of Indiana. The criminal complaint summarized Conour's actions arising from his relationship with the parties to this suit as:

> The defendant [Conour] devised a scheme to defraud, and to obtain money by means of materially false statements and fraudulent pretenses from, clients of his legal practice and others, and on October 8, 2011 for the purpose of executing the scheme, the defendant caused to be transmitted by means of wire communication in interstate commerce a facsimile transmission from Indianapolis, Indiana to Zurich American Insurance [(Defendant's insurer)] in the State of New Jersey.[2]

[2] Pls.' Ex. 4.

In addition to the criminal charges, Conour faced disciplinary action by the Indiana Supreme Court's Disciplinary Commission. In response to both sets of charges, Conour acknowledged the truth of the allegations and admitted to his wrongdoing in full. The Court will quote the most pertinent pieces of Conour's admissions of guilt in the discussion section of this Memorandum Opinion.

PROCEDURAL BACKGROUND

Notwithstanding Defendant's belief that they had settled any potential claims, Plaintiffs filed the underlying Complaint on June 27, 2012. Defendant raised the affirmative defense of accord and satisfaction in the Answer and now seeks summary judgment on such basis. Plaintiffs, in their response to Defendant's Motion for Summary Judgment, filed a Cross-Motion for Summary Judgment seeking the Court's determination that the settlement is not binding upon them. Argument on both motions was heard on September 18, 2013, and this decision follows.

STANDARD OF REVIEW

The Court may only grant summary judgment when no material issues of fact exist.[3] Therefore, such is only appropriate when the Court can conclude that "pleadings, depositions, answers to interrogatories, and admission on file, together

[3] Super. Ct. Civ. R. 56(c). *Bryant v. Progressive N. Ins. Co.*, 2008 WL 4140686, at *1 (Del. Super. July 28, 2008).

with affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to summary judgment as a matter of law."[4] The moving party bears the burden of establishing the nonexistence of material issues of fact.[5] Further, all facts are viewed in a light most favorable to the nonmoving party.[6]

Additionally, the Court notes that where the parties have filed cross-motions for summary judgment, as here, "the standard for summary judgment 'is not altered.'"[7] "Moreover, the existence of cross motions for summary judgment does not act *per se* as a concession that there is an absence of factual issues."[8] "Rather, a party moving for summary judgment concedes the absence of a factual issue and the truth of the nonmoving party's allegations only for the purposes of its own motion, and does not waive its right to assert that there are disputed facts that preclude summary judgment in favor of the other party."[9] "Thus, the mere filing of a cross motion for summary judgment does not serve as a waiver of the movant's right to assert the existence of a factual dispute as to the other party's motion."[10]

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[4] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[5] *Bryant*, 2008 WL 4140686, at *1.
[6] *Id.*
[7] *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1050 (Del. Super. 2001) (citing *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)).
[8] *Id.* (internal citations omitted).
[9] *Id.*
[10] *Id.*

DISCUSSION

Defendant claims that Plaintiffs' action is barred by the doctrine of accord and satisfaction. This doctrine provides that when there is a bona fide dispute as to an amount owed based on mutual good faith, the debtor tenders an amount intending to pay in full, and the creditor accepts that amount as full satisfaction of the debt owed, the creditor relinquishes any right to pursue further payment from the debtor.[11] Defendant argues that Conour settled on Plaintiffs' behalf and, thus, Plaintiffs are bound by that settlement and cannot pursue an action against Defendant. Therefore, to determine if Plaintiffs are barred by accord and satisfaction, the Court must determine if they are bound by the settlement.

Under Delaware law,[12] "[a]n agreement entered into by an attorney is presumed to have been authorized by his client to enter into the settlement agreement."[13] However, this presumption may be rebutted if the client can prove that the "attorney consent[ed] to settlement of his client's cause without the actual consent of the client[.]"[14] Stated another way, "if the client can prove that the

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[11] *CitiSteel USA, Inc. v. Connell Ltd. Pshp.*, 758 A.2d 928, 931 (Del. 2000).

[12] Although Plaintiffs argue that Indiana law is applicable to this suit, the Court has decided to apply Delaware law in its analysis as it finds the outcome would be the same in both states. *See, e.g.*, *Zimmerman v. McColley*, 826 N.E. 2d 71, 79 (Ind. App. 2005) (holding that "a client was not bound to a settlement agreement negotiated by his attorney because the attorney did not first secure the client's consent to the terms of the agreement . . . ."). The choice of Delaware law in this opinion does not preclude Plaintiffs from arguing the application of Indiana law in later motions or at trial.

[13] *Shields v. Keystone Cogeneration Sys., Inc.*, 620 A.2d 1331, 1335 (Del. Super. Mar. 12, 1992) (citations omitted).

[14] *Joyner v. News Journal*, 1996 WL 659005, at *4 (Del. Super. Aug. 27, 1996) *aff'd*, 692 A.2d 413 (Del. 1997) (citing *Aiken v. Nat'l Fire Safety Counsellors*, 127 A.2d 473 (Del. Ch. 1956)).

attorney was not given authority to settle the matter, the settlement is not binding on the client."[15] "The burden is upon the party who challenges the authority of the attorney to overcome the presumption of authority."[16] Delaware courts have found that this rebuttable presumption is a sufficient "compromise between the practical necessity of according substantial weight to representations made by members of the Bar and the agency rule that attorneys have no implied or apparent power to compromise an action solely by virtue of their employment."[17] The record here establishes that Conour unequivocally purported to settle Plaintiffs' case and entered into such settlement with Defendant. Therefore, the presumption applies.

Attorneys are given a great deal of authority in litigating their client's case. "However, the general rule is that an attorney does not have the authority, solely on the basis of his retention as counsel, to act in a manner injurious to the rights of his client by purporting to make an unauthorized settlement in a claim."[18] Unlike other aspects of their representation, attorneys need express/actual authority to compromise their client's action.[19] Accordingly, the Court must determine if

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[15] *Nagyiski v. Smick*, 2009 WL 5511159, at *1 (Del. Com. Pl. Dec. 9, 2009).
[16] *Shields*, 620 A.2d at 1335.
[17] *Aiken v. Nat'l Fire Safety Counsellors*, 127 A.2d at 475-76.
[18] *Trans World Airlines, Inc. v. Summa Corp.*, 394 A.2d 241, 244-45 (Del. Ch. 1978)
[19] *Id. See also Aiken*, 127 A.2d at 475; *Corbesco, Inc. v. Local No. 542*, 620 F. Supp. 1239, 1243 (D. Del. 1985).

Plaintiffs have presented sufficient evidence to rebut the presumption that Conour had actual authority to enter into the settlement with Defendant.

The affidavit of Plaintiff James Fox states in pertinent part:

- "I did not and have never given permission to or authorized William Conour to settle my personal injury claim for any amount."
- "During that February 21, 2012 telephone conversation with William Conour, I advised him that I had not authorized him to settle my personal injury claim."
- "I specifically informed Mr. Conour that I had never heard of any such offer of $450,000.00 to settle my claim and that I did not wish to settle my claim for that amount as I was still receiving ongoing medical treatment for the injuries I sustained on July 17, 2010."
- "I have never signed any such RELEASE nor have I ever given William Conour or any other attorney the authority to settle my personal injury claim for $450,000 or any other amount."
- "I have never received any moneys whatsoever from William Conour in connection with alleged settlement of my personal injury claim nor have I ever given William Conour authority to settle my personal injury claim with Zurich Insurance or RC Fabricators."[20]

[20] James Fox Aff. ¶¶ 5, 7, 9, 12, 19.

Further, Plaintiffs have provided the Court with the stipulation of facts Conour signed in connection with his guilty plea for the criminal charges. Conour expressly admitted the stipulated facts when he pleaded guilty in open court, signed the stipulation, and attested to an affidavit of resignation setting forth similar admissions of guilt. The stipulation states in pertinent part:

- "On or about September 6, 2011, the defendant [Conour] called J.F. [James Fox] and asked how a settlement sounded to J.F. that would result in $250,000 net to J.F. J.F. stated that he was still accumulating medical bills and that he was not interested in settling the case until his full medical prognosis was determined."
- "On October 6, 2011, at 8:59 a.m., the defendant [Conour] left a voicemail for J.F. in which the defendant stated he believed he could put a 'quarter-million in [J.F.'s] pocket' and that this would be a 'wonderful result this early on in the case.' The defendant also stated, "I think we can get that done yet this year . . . maybe towards another month or so."
- "Later that day [October 6, 2011], at approximately 12:20 p.m., the defendant sent a fax, using interstate wires, from his office in Indianapolis, Indiana to Zurich American Insurance in New Jersey.

> The fax included a release and indemnification agreement settling J.F.'s case for $450,000. The agreement purported to be signed by J.F. and his wife, as witnessed by defendant. In reality, the defendant had cut and pasted the signatures of J.F. and his wife from the contract for legal services they had signed on August 10, 2010. Neither J.F. nor his wife was aware that the defendant had settled their case."[21]

The Court finds that these facts are sufficient to rebut the presumption that Conour had authority to settle Plaintiffs' claims.

Defendant attempts to counter these record facts by pointing the Court to the Retainer, arguing that it grants the right to enter into settlements in Conour, as Plaintiffs' attorney. Contrary to Defendant's assertion, the Retainer only grants Conour the authority "to enter into settlement negotiations on behalf of [Plaintiffs]."[22] More importantly, the agreement specifically states "LITIGATION TEAM shall neither settle nor compromise any claim without the final approval of [Plaintiffs]."[23] Therefore, the Retainer unequivocally required Conour to obtain Plaintiffs' express authority to settle their claim with Defendant. Further,

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[21] Pls.' Ex. 6 at ¶ 5-7.
[22] Def.'s Ex. A at 2.03.
[23] *Id.* As noted, the litigation team included a second firm in addition to the firm with which Conour was employed. *Supra* n.1.

Defendant's argument that Conour had apparent authority to settle the claims, as he was held out to Defendant as Plaintiffs' attorney, fails as a matter of law. As discussed above, attorneys need actual/express authority to compromise a client's claim.

Lastly, Defendant directs the Court's attention to an email from Conour to Plaintiff James Fox, on February 21, 2012, approximately four months after Conour settled on Plaintiffs' behalf. The email states:

> Jim,
>
> Your case is partially done but not totally. Under Delaware law the work comp carrier is obligated to continue paying for medical bills after a third party settlement if the treatment is related to the injury incident, but is entitled to a partial recovery of its payments. Thus, we do not yet know what the total work comp will be or the pay back, although it has denied any charges for the heart issue. As we have always discussed as our target goal, you will end up with at least $250K in your pocket when all is finally done and perhaps more as I think I may be able to negotiate the work comp lien down below 2/3's but I will know better once we know the final number. This is an excelled recovery for your injury and avoids 3 to 5 years of litigation in Delaware with all the time, costs and risks that entails and saves you at least $50K in litigation expenses. It maximizes what you will personally recover.
>
> I look forward to seeing the medical records and reports when you get them so I can deal further with the work comp carrier on these payments.[24]

Defendant contends that this email shows Plaintiffs' knowledge of Conour's settlement with Defendant. However, the email on its face is not

[24] Def.'s Ex. F.

sufficient to refute Conour and Plaintiff James Fox's representations, under oath, that Plaintiffs did not give authority for Conour's settlement with Defendant. Those types of documents are clearly appropriate ones to explore during discovery but, without more, they are not sufficient to overcome the declarations of Fox and his counsel. Further, although authority can be granted by subsequent ratification,[25] the Court notes that Plaintiffs never received any settlement proceeds or otherwise benefitted from Conour's actions such that would ratify his conduct. Again, discovery may provide information to the contrary, but the Court cannot, from the undisputed material facts, find a subsequent ratification.

The Court understands and appreciates that Defendant acted under the assumption that the settlement would be binding. However, were this Court to bind Plaintiffs to Conour's actions, the injustice is substantial and unjustifiable. A party's right to pursue their action, which the Court protects with the upmost care, cannot be compromised by the unilateral, fraudulent, and egregious actions of their attorney.

The Court, however, wants to be clear that it is not deciding by this decision the effect Defendant's previous payment of $450,000 would have

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[25] *Aiken*, 127 A.2d at 476.

on any subsequent damage award. It would seem equally unfair for the Plaintiffs to sit by and not pursue all alternative means of recovery of the monies provided to Conour in mitigation of any damages that may be appropriate. By doing so, the Court will not consider such effort as a ratification of the settlement but simply as a fair balancing of the injustices caused by the actions of their attorney.

CONCLUSION

For the aforementioned reasons, Defendant's Motion for Summary Judgment is hereby **DENIED** and Plaintiffs' Cross-Motion for Partial Summary Judgment is **GRANTED.**

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.