

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

KLEHR, HARRISON, HARVEY, )  
BRANSBURG & ELLERS, LLP, )  
a Delaware Limited Liability )  
Partnership, )  
919 Market St., Suite 1000 )  
Wilmington, DE 19801, )

C.A. No. 07C-08-227-JEB

Plaintiff, )

v. )

MOSAICA EDUCATION, INC. )  
a Delaware Corporation, )  
1013 Centre Road )  
Wilmington, DE 19805 )

Defendant. )

Submitted: August 14, 2009  
Decided: December 14, 2009

*Decision Following Bench Trial  
Judgment for Plaintiff*

**MEMORANDUM OPINION**

*Appearances:*

Kelly A. Green, Esquire, Wilmington Delaware  
Attorney for Plaintiff Klehr, Harrison, Harvey, Branzburg & Ellers, LLP

Paul E. Kerson, Esquire, New York, NY  
Attorney for Defendant Mosaica Education, Inc.

**JOHN E. BABIARZ, JR., JUDGE**

### **Procedural and Factual Background**

Klehr, Harrison, Harvey, Bransburg & Ellers, LLP, (“Klehr Harrison”), a law firm in Wilmington, Delaware, filed an action for damages against Mosaica, Education, Inc., (“Mosaica”), a management company for public charter schools, claiming breach of a legal services contract. The Complaint alleges that Klehr Harrison provided competent representation to Mosaica in various legal matters from May 2001 to June 2007 at which time Klehr Harrison ended its representation of Mosaica. The Complaint further avers that Mosaica ceased making payments to Klehr Harrison in December 2005 and currently owes \$320,783.25. Mosaica denies that it owes money on the contract claiming that it did not benefit from all of the legal services performed and that the attorneys’ fees are unreasonable.

Following oral argument at which Mosaica conceded the existence of an hourly rate contract and its own liability on the contract, the Court granted partial summary judgment finding Mosaica liable to Klehr Harrison for attorneys’ fees but reserving any decision on the amount of damages. Mosaica further stated at oral argument that, in its view, Klehr Harrison was owed approximately half of its claim for \$320,783.25.<sup>1</sup>

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<sup>1</sup> Hearing T. 18.

Consequently, the Court further ordered Mosaica to pay to Klehr Harrison within 15 days of entry of the order the amount of attorneys' fees on the contract that Mosaica determined to be reasonable and undisputed. Mosaica did not pay any amount and, in a response to order, asserted that the entire amount claimed to be due is unreasonable and excessive.

Mosaica further asserted that since there was no signed, written agreement between the parties, the doctrine of *quantum meruit* should apply in order to determine damages. Mosaica also claimed that since it is a private company depending on tax dollars to manage charter public schools, Klehr Harrison should have only charged Mosaica an hourly rate equal to what a public agency attorney charges.

Klehr Harrison produced accounts receivable reports demonstrating an amount due of \$320,783.25. The evidence at trial demonstrated a significant amount of work completed by Klehr Harrison by various attorneys on six different legal matters encompassing the defense of employment law matters, appeals, arbitrations, and contract disputes. The work on the cases at issue involved taking a multitude of depositions, defending claims of hundreds of thousands of dollars in damages, defending claims with multiple defendants, litigating against large corporations with unlimited resources, preparing a vast

array of pleadings, investigating claims, participating in discovery, attending proceedings, and preparing extensively for trial.

Klehr Harrison further showed that Mosaica received detailed monthly bills, stopped paying those bills in December of 2005, continued to receive detailed bills for all of 2006, and never during that time questioned the amount of the bills or raised any concerns regarding the specifics of the bills received.<sup>2</sup>

On the other hand, in an attempt to demonstrate their claim of excessive billing, Mosaica showed that one of Klehr Harrison's partners attended a deposition along with an associate.<sup>3</sup> Mosaica also showed that several Klehr Harrison attorneys worked on its various legal matters. Yet, Mosaica was not able to prove that estimated budgets provided by Klehr Harrison were ignored.

## Discussion

### *A Meeting of the Minds*

For recovery of damages in an action for breach of contract, a plaintiff must demonstrate that the parties thereto came to a meeting of the minds regarding the terms of the contract.<sup>4</sup> The contract may exist as either an express contract or an implied-in-fact contract because they are legal equivalents—the first being arrived at by language and the second by actions that demonstrate a

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<sup>2</sup> T. 142-147.

<sup>3</sup> T. 161.

<sup>4</sup> *Heiman, Aber & Goldlust v. Ingram*, 1999 WL 1240904, \*1 (Del. Super.).

meeting of the minds.<sup>5</sup> However, where no meeting of the minds can be established, recovery of damages may still be available under the principle of *quantum meruit*—“a principle of restitution arising from a cause of action in quasi-contract.”<sup>6</sup>

In this matter, the Court previously found that a contract exists between the parties and that Mosaica is liable to Klehr Harrison on the contract. So, whether the contract is express and embodied in the retainer letter or implied-in-fact by the actions of Mosaica in making regular payments until December 2005, a meeting of the minds is shown to have occurred.

### ***The Principle of Quantum Meruit***

While a written agreement for legal services based on an hourly rate is beneficial, it is not required.<sup>7</sup> As long as the parties to an agreement have demonstrated assent, a plaintiff may recover on the contract.<sup>8</sup> In *Heiman, Aber & Goldlust*, where there was no evidence of a written retainer for legal services, where no bills for legal services were provided to the defendant, and where

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<sup>5</sup> *Lawrence v. Dibiase*, 2001 WL 1456656, \*5 (Del. Super.) (citing *In re Phillips Petroleum Sec. Litig.*, D. Del., 697 F.Supp. 1344, 1356 (1988), rev'd on other grounds, 3d Cir., 881 F.2d 1236 (1989)); *Heiman, Aber, & Goldlust*, 1999 WL 1240904 at \*1.

<sup>6</sup> *Hynansky v. 1492 Hospitality Group, Inc.*, 2007 WL 2319191, \*2 (Del. Super. 2007); *Nepa v. Marta*, Del Supr., 415 A.2d 470, 472 (1980); *Heiman, Aber & Goldlust*, 1999 WL 1240904 at \*1,2.

<sup>7</sup> *Heiman, Aber & Goldlust*, 1999 WL 1240904 at \*2.

<sup>8</sup> *Heiman, Aber & Goldlust*, 1999 WL 1240904 at 1.

evidence did exist that the defendant would exchange referrals for legal representation, the Court found that no enforceable contract was formed and provided an award based on *quantum meruit*.<sup>9</sup> In addition, in *Stull v. Thomas S. Neuberger, P.A.*, this Court upheld a lower court's reliance on the principle of *quantum meruit* to determine damages in a legal services contract dispute where the attorney was unable to provide any clear documentation of time spent on a case.<sup>10</sup>

Here, despite the Court's finding of a meeting of the minds, Mosaica continues to argue for an award based on *quantum meruit* due to the lack of a signed retainer agreement between the parties. However, unlike the facts in *Heiman, Aber & Goldlust*, here, we do have a written retainer agreement. And, despite the lack of a signature on the copy produced, the retainer agreement outlines that customary hourly rates will be charged and indicates that Klehr Harrison will determine which lawyers are to be assigned to cases.<sup>11</sup> And, unlike *Heiman, Aber & Goldlust*, here, Klehr Harrison has produced clear documentation in the way of accounts receivables and invoices demonstrating

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<sup>9</sup> 1999 WL 1240904 at \*1-2.

<sup>10</sup> 2003 WL 21481016, \*4 (noting that although the written agreement was unsigned, its validity was not disputed).

<sup>11</sup> See Exhibit A, Ercole Aff. Exhibit 1, of Plaintiff's Motion for Summary Judgment.

the hours spent on Mosaica's various legal matters.<sup>12</sup> Moreover, Mosaica acted in accord with the agreement for many years by paying the detailed bills from Klehr Harrison which it received on a regular basis.<sup>13</sup>

Therefore, since a meeting of the minds existed between the parties, clear documentation has been shown as to hours spent by Klehr Harrison on Mosaica's legal matters, and an agreement has been produced and acted on by the parties, the Court does not resort to an analysis of the factors for *quantum meruit*, or quasi-contract, in order to determine damages.<sup>14</sup>

### ***Amount of Recovery***

#### Modification

In order to determine the reasonable expectation of the parties, the Court must first consider whether the initial contract was modified in any way by subsequent events. An enforceable oral or written modification to any contract must be based on assent and consideration.<sup>15</sup> Consideration consists of a "benefit to a promisor or a detriment to a promisee pursuant to the promisor's

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<sup>12</sup> See Exhibit B of Plaintiff's Motion for Summary Judgment.

<sup>13</sup> Hearing T. 4.

<sup>14</sup> See *Hynansky*, 2007 WL 2319191 at \*2.

<sup>15</sup> *Continental Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1232 (Del.Ch.,2000); *De Cecchis v. Evers*, 54 Del. 99, 101, 174 A.2d 463, 464 (Del.Super.1961).

request.<sup>16</sup> However, reliance on past consideration is not sufficient to create an enforceable modification.<sup>17</sup>

In this matter, Mosaica seemingly attempted to modify the contract when it wrote to Ms. Halfpenny, a senior associate with Klehr Harrison, in June 2006 and asked only her to work on the Renaissance matter (an arbitration consisting of significant documentation exchanges, briefing and at least eight days of hearings and depositions) and requested her to “go easy on . . . the billing.”<sup>18</sup> This contrasts with the written retainer letter which indicated that it was a Klehr Harrison partner who would decide which attorneys would work on Mosaica’s legal matters and that the customary rates would apply.<sup>19</sup> Furthermore, Mosaica’s request for easy billing attempts to limit the amount of work Klehr Harrison would do on the Renaissance matter. Yet, Ms. Halfpenny responded by stating that she usually did go easy on the billing.<sup>20</sup>

Therefore, since Ms. Halfpenny responded to Mosaica’s attempt to modify the contract by stating that she would do the same as she had always done, the Court does not find any assent to a contract modification.

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<sup>16</sup> *Continental Ins. Co.*, 750 A.2d at 1232.

<sup>17</sup> *Continental Ins. Co.*, 750 A.2d at 1232.

<sup>18</sup> See Exhibit D of Plaintiff’s Motion for Summary Judgment.

<sup>19</sup> See Exhibit A, Ercole Aff. Exhibit 1, of Plaintiff’s Motion for Summary Judgment.

<sup>20</sup> See Exhibit D of Plaintiff’s Motion for Summary Judgment.



Furthermore, Mosaica has not shown that any additional consideration was offered to Klehr Harrison in exchange for Mosaica's request for a specific attorney or special billing. Perhaps, if Mosaica had offered to promptly pay its overdue bill and provide an additional retainer in exchange for special billing on the Renaissance matter, the Court could find such a detriment to Mosaica to be new consideration. However, that is not the case, here, and, therefore, no enforceable modification is in place. As a result, the fact that a senior partner attended a deposition along with Ms. Halfpenny does not signify unreasonable fees.

Furthermore, the amount of the difference between Ms. Halfpenny's charge on the Renaissance matter and the senior partner's charge only amounts to approximately \$4,800 and is, consequently, de minimus.<sup>21</sup>

#### The Reasonable Expectation of the Parties

The traditional method of deciding the amount of damages in a breach of contract case is to determine the reasonable expectation of the parties or the amount that would put the non-breaching party in the same position as if performance on the contract had occurred.<sup>22</sup> Furthermore, with regard to a

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<sup>21</sup> See T. 136.

<sup>22</sup> *Duncan v. Theratx*, 775 A.2d 1019, 1022 (Del. 2001).

legal services contract, an argument claiming that attorneys' fees should be reduced because the outcome of the matter is not successful is without merit.<sup>23</sup>

In this matter, Klehr Harrison has produced documentation by way of accounts receivables and invoices demonstrating that it is owed \$320,783.25 in legal fees by Mosaica.

While Mosaica consistently emphasized at trial the number of Klehr Harrison attorneys working on any one of its various legal matters, it did not connect this fact to its allegation of unreasonable billing. It is well known that some law firms use various associate attorneys to do work on various legal matters. Whether Klehr Harrison used two attorneys or ten attorneys does not signify unreasonableness. Junior associates bill at a lower hourly rate than more senior lawyers. So, if Klehr Harrison assigned junior associates to do some of the legal work at a lower rate than senior lawyers would charge if they were to do the work, then using these junior associates results in a lower bill for Mosaica. Thus, the Court does not equate evidence regarding the number of attorneys doing non-duplicative work with unreasonable fees.

Mosaica did not present any evidence to show that Klehr Harrison's fees were unreasonable or excessive or present any legal authority that Klehr Harrison should charge a rate lower than the customary hourly rate referred to

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<sup>23</sup> See *Stull*, 2003 WL 21481016 at \*5.

in the agreement. So, in order to put Klehr Harrison in the position it would have been in had the breach not occurred, Mosaica would have to pay to Klehr Harrison the full amount owed plus interest due. Therefore, the Court finds for Klehr Harrison in the amount of \$320,783.25 plus interest.

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Judge John E. Babiarz, Jr.

JEB, Jr./LB/bjw  
Original to Prothonotary