

I. INTRODUCTION

Defendants Kimberly I. Gaylord, Lisa M. Gaylord, Lori I. Gaylord and Robert M. Gaylord, Jr. (“the Gaylords”) have filed a Motion to Dismiss. Upon consideration of the evidence presented at oral argument and a review of the Gaylords’ motion and plaintiffs’ response, this court concludes the Gaylords’ motion should be DENIED.

II. BACKGROUND

In December 2000, plaintiff Bouchard Margules & Friedlander (“BM&F”) was contacted by the Washington, DC law firm of Baise Miller & Freer P.C. (“Baise”) concerning local counsel representation of the Gaylords in a dispute with Ingersol International, Inc. Attorneys from BM&F met with the Gaylords in Illinois during December. BM&F contends an oral agreement was made between the Gaylords and BM&F whereby BM&F would provide representation in lawsuits to be filed in Delaware Chancery Court. No written representation agreement was formalized. There was a draft agreement between the Gaylords and Baise regarding payments. Under this payment agreement, the various law firms providing representation to the Gaylords in related lawsuits would submit bills to Baise. Baise would then rebill the Gaylords after exhausting a retainer to be funded by the Gaylords. Pursuant to these agreed-upon arrangements, BM&F provided legal services and representation in Delaware Chancery Court at a

preliminary injunction hearing on January 2, 2001. The Gaylords sent \$125,000 to Baise in January 2001. The Gaylords sent an additional \$125,000 to Baise some time prior to March 2001. BM&F has rendered invoices totaling \$195,032.46 to Baise for professional services and expenses rendered on behalf of the Gaylords. According to BM&F, Baise has paid a total of \$134,205.13 to BM&F leaving an unpaid balance of \$60,827.33. BM&F's motion to withdraw from representation of the Gaylords in Delaware Chancery Court was granted August 10, 2001.

The Gaylords have moved to dismiss the amended complaint. The Gaylords submit they have already fully asserted their Motion to Dismiss the Amended Complaint before the arbitrator. The Gaylords believe the arbitrator granted their Motion and this matter was closed when BM&F failed to demand a trial *de novo* for seven and a half months.

The Gaylords' previous counsel indicates, in his affidavit, that he appeared and presented the merits of the Gaylords' Motion to Dismiss the Amended Complaint as well as defended the Gaylords on the merits of BM&F's claims at the arbitrator's hearing.

The arbitrator, in her affidavit, says that she agreed with the position of the Gaylords that the matter should be dismissed for failure to join an indispensable party. Her affidavit is silent on the Motion to Dismiss the Amended Complaint.

Motions to Dismiss an Amended Complaint and Failure to Join an Indispensable Party are case dispositive motions. This court's understanding of the interpretation of Rule 16.1 is that it always meant that arbitrators were not to decide case dispositive motions, although court practice was not uniform. In fact, the Rule was clarified in 2002 to reflect that understanding:

(10) The ADR Practitioner shall hear and decide all motions filed by the parties related to the case except:

(A) All case dispositive motions.¹

In this case, the application of Rule 16.1 is moot because this court granted BM&F's application to enlarge the time period for requesting a trial *de novo*. The court found excusable neglect existed because the arbitrator indicated, in her affidavit, she never realized she had not signed the order until April 7, 2003. There is no indication that the order was ever sent to the parties.

The parties have stipulated that BM&F may amend its complaint to include Baise as a defendant. The parties have also stipulated to withdraw BM&F's Motion for Default Judgment. Finally, the parties have stipulated that the Gaylords' Motion to Dismiss is withdrawn to the extent that it seeks dismissal of

¹ Super. Ct. Civ. R. 16.1(k)(10)(A) (the court recognizes the arbitrator's hearing in this case was held before the amendment of Rule 16.1 in 2002).

the complaint on the grounds that BM&F failed to join an indispensable party.

Oral argument on the motion was held October 10, 2003.

III. STANDARD OF REVIEW

Delaware has clear standards for granting a Rule 12(b)(6) Motion to Dismiss. The court must accept all well-pled allegations as true.² The court must then apply a broad sufficiency test: whether a plaintiff may recover under any “reasonable conceivable set of circumstances susceptible of proof under the complaint.”³ Dismissal will not be granted if the complaint “gives general notice as to the nature of the claim asserted against the defendant.”⁴ Further, a complaint “will not be dismissed unless it is clearly without merit, which may be either a matter of law or fact.”⁵ “Vagueness or lack of detail,” standing alone, is insufficient to dismiss a claim.⁶ If there is a basis upon which the plaintiff may recover, the motion is denied.⁷

² *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

³ *Id.* (internal citation omitted).

⁴ *Diamond State Tel. Co. v. University of Delaware*, 269 A.2d 52, 58 (Del. 1970).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*, see also *Spence v. Funk*, 396 A.2d at 968.

IV. DISCUSSION

The Gaylords argue that the Second Amended Complaint fails to establish the existence of a contract between themselves and BM&F, and thus, there is no obligation on their part to pay any monies directly to BM&F. BM&F counters there is evidence of an oral contract to provide legal services to the Gaylords and the fee arrangement is a separate contract incorporated into the representation agreement. Alternatively, BM&F argues they are a third party beneficiary of the contract between Baise and the Gaylords and, therefore, BM&F may bring a claim of unjust enrichment and/or quantum meruit against the Gaylords for the legal services provided but not paid for.

A. Whether an oral contract existed between BM&F and the Gaylords.

The court finds the Second Amended Complaint contains statements of meetings between BM&F and the Gaylords concerning representation. While Rule 1.5(b) of the Delaware Rules of Professional Conduct prefers that the basis of the fee be communicated to the client in writing, there is no requirement that these terms be in writing. The averments in ¶¶ 3, 4, 6, 7, 11, and 12 of the Second Amended Complaint clearly indicate the Gaylords knew BM&F would be representing them in various lawsuits. As noted above, in considering a motion to dismiss, the court must take as true all well-pled allegations. The court finds these statements are sufficient to support a reasonable inference of an oral contract. The

payment arrangements requiring the Gaylords to make payments solely to Baise is a separate issue from whether an oral contract existed between the Gaylords and BM&F.

B. Whether genuine issues of material fact are present.

At oral argument on the Motion to Dismiss, counsel for the Gaylords argued that payment for legal services was capped at \$250,000. BM&F alleges that the \$250,000 was merely a retainer and additional legal fees would be presented to Baise who would then bill the Gaylords for these additional amounts. The court finds this presents a genuine issue of material fact to be decided by the fact finder at trial.

V. CONCLUSION

For the above reasons, the court finds BM&F has alleged sufficient facts to allow an inference of the existence of an oral contract between BM&F and the Gaylords. In addition, the court finds there are also genuine issues of material fact regarding the total financial obligation of the Gaylords for legal services which appears to have first been raised at oral argument. Therefore, the Gaylords' Motion to Dismiss is **DENIED**.

Calvin L. Scott, Jr.
Superior Court Judge