

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**LAW OFFICES OF JEFFREY SHERBOW, PC,
Plaintiff,**

v.

**Case No. 15-147488-CB
Hon. James M. Alexander**

**FIEGER & FIEGER, PC,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition. This is a referral-fee dispute. According to the Complaint, Plaintiff referred Defendant clients involved in multiple personal-injury and wrongful-death lawsuits related to an automobile accident in Ohio. In return for the referral, Plaintiff claims that it was promised a percentage of Defendant's attorney fee award.

In its motion, Plaintiff seeks a ruling that it has established that a prima facie enforceable contract exists, and the only remaining issue is whether the clients were advised of the fee-sharing agreement. Defendant, on the other hand, seeks dismissal of Plaintiff's Complaint.

Both parties move for summary under MCR 2.116(C)(10), which tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).¹

Although the parties agree on little, the following appears to be undisputed. In July 2012, a

¹ Under (C)(10), "In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d

vehicle driven by Charles Rice was involved in an accident on I-75 in Ohio. The accident killed Mr. Rice and seriously injured his three passengers, Mervie Rice, Philip Hill, and Dorthy Dixon. Plaintiff represented Mr. Rice or his business on several matters prior to his death.

At the time, Jeffrey Danzig was an attorney at Defendant's office. On July 26, 2012, a meeting was held at Defendant's office. The following people were present for the meeting – Plaintiff, Dion Rice (on behalf of Mr. Rice's estate), Mervie Rice, her daughter Nya Keller, attorney Jody Lipton, and Mr. Danzig.

Following this meeting and within two months of the accident, Dion Rice (on behalf of Mr. Rice's estate), Ms. Rice, Mr. Hill, and Ms. Dixon all signed retainer agreements with Defendant to pursue claims relating to the same.

On August 2, 2012, Mr. Danzig wrote Plaintiff a letter on Defendant letterhead acknowledging Plaintiff's entitlement to a one-third referral fee on the Mervie Rice case. Two weeks later, on August 15, 2012, Mr. Danzig wrote another letter on Defendant letterhead confirming the same referral fee for the other three clients (estate of Charles Rice, Ms. Dixon, and Mr. Hill).

Because the underlying lawsuits were to be brought in Ohio, local counsel was needed. This allegedly resulted in a split of fees as follows – 60% net to Defendant, 20% net to Ohio counsel, and 20% to Plaintiff. This split was acknowledged in a final Danzig letter on Defendant letterhead dated January 2, 2014. This letter was addressed to both Plaintiff and Ohio counsel. After acknowledging the attorney fee split, the letter provided that "Geoff Fieger approved on 11/11/13 and as such, I am formally notifying you both of our mutual understanding and agreement."

The parties don't agree on much else. And, although the parties don't dispute that Danzig sent the three letters, Defendant disputes that he had the authority to do so. And the parties dispute whether each client was advised on the fee-sharing agreement and did not object – as required under MRPC 1.5(e).

In its motion, Plaintiff seeks a ruling that Danzig had apparent authority to bind Defendant, which resulted in an enforceable contract as outlined in the letters.² Plaintiff argues that the burden then shifts to Defendant to establish the affirmative defense of illegality of contract – based on a violation of the Michigan Rules of Professional Conduct.

Defendant, on the other hand, seeks a ruling that the alleged contract violates MRPC 1.5(e), which renders it unenforceable. In the alternative, Defendant argues that Danzig was not authorized to, and was specifically forbidden from, agreeing to pay any referral fee without the express approval of Geoffrey Fieger. And Defendant seeks a ruling that Plaintiff cannot recover non-economic damages in this breach of contract case.

1. Defendant's cursory arguments.

The Court notes that Defendant raises two other challenges to the alleged fee-sharing agreement. First, the same is not supported by consideration. Second, Plaintiff could not refer the underlying clients because they were never his "clients." But Defendant's cursory arguments on these issues are unconvincing.

Initially, with respect to Defendant's "client" argument, Defendant fails to cite any authority for the proposition that the referring attorney must have a written agreement with the client in order

² Although only arguing apparent authority in its principal motion and brief, Plaintiff includes an actual authority argument for the first time in its Reply Brief. Because this issue was not raised in its principal brief so that

to refer the same to another attorney. Had our Supreme Court so wished, it could have easily included the same in the Rules.

Next, with respect to Defendant's consideration argument, it is well established that the existence of a valid contract requires an offer, acceptance, consideration, and mutual agreement to all of the contract's essential terms. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452-453; 733 NW2d 766 (2006).

Further, "[t]o have consideration there must be a bargained-for exchange." *Gen Motors Corp v Dep't of Treasury, Revenue Div*, 466 Mich 231, 238; 644 NW2d 734 (2002). But "Courts do not generally inquire into the sufficiency of consideration." *Id.* at 239.

In this case, if Plaintiff establishes its version of events, it performed the service of bringing the clients to Defendant, who received the benefit of representing four valuable tort cases. This is adequate consideration, and Defendant's motion on this issue is DENIED.

2. Apparent Authority.

The Court next turns to the alleged fee-sharing agreement. Plaintiff first argues that Mr. Danzig had the apparent authority to bind Defendant to the alleged agreement. The following elements are necessary to establish apparent or ostensible agency:

(1) the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one, (2) the belief must be generated by some act or neglect on the part of the principal sought to be charged, and (3) the person relying on the agent's authority must not be guilty of negligence. *VanStelle v Macaskill*, 255 Mich App 1, 10; 662 NW2d 41 (2003); quoting *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991).

Defendant had an opportunity to respond, the Court will not address the same.

Long ago, our Supreme Court reasoned:

it may be stated as a general rule that whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in that capacity, or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity-whether it be in a single transaction or in a series of transactions-his authority to such other to so act for him in that capacity will be conclusively presumed to have been given, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do, provided that such act was within the real or apparent scope of the presumed authority.’ *Plankinton Packing Co v Berry*, 199 Mich 212, 217; 165 NW 676 (1917).

Inherent in this analysis is a careful analysis of (among other things) evidence, course of dealing, and reasonable belief. Defendant even appears to acknowledge that Danzig’s apparent authority is properly a jury question, arguing that none of the cases cited by Plaintiff ruled on apparent authority as a matter of law.

Indeed, it is well-settled that ““When there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes a question of fact....”” *St Clair Intermediate Sch Dist v Intermediate Ed Assn/Michigan Ed Ass’n*, 458 Mich 540, 556-557; 581 NW2d 707 (1998); quoting *Miskiewicz v Smolenski*, 249 Mich 63, 70; 227 NW 789 (1929).

In this case, Plaintiff points to the following evidence tending to establish agency: (1) Defendant’s own letterhead names Danzig in the firm’s name; (2) Defendant assigned Danzig to the supervise the intake department; (3) Danzig handled the underlying cases for Defendant’s firm until his departure; and (4) Plaintiff referred other cases to Defendant through Danzig, and Defendant paid referral fees on said cases.

Because agency is disputed and Plaintiff has presented some evidence tending to establish

Danzig's authority to bind Defendant, the same is properly a question of fact for the jury. As such, Plaintiff's motion for summary disposition on this issue is DENIED.

3. Does the fee-sharing agreement violate MRPC 1.5(e)?

If Plaintiff can establish that Danzig had authority to bind Defendant to the fee-sharing agreement, the next issue is whether the same is unenforceable for violating MRPC 1.5(e).

Under Michigan law, an alleged contract is unethical if it violates the Michigan Rules of Professional Conduct, and such "unethical contracts violate our public policy and therefore are unenforceable." *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 189; 650 NW2d 364 (2002).

Under MRPC 1.5(e):

A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the client is advised of and does not object to the participation of all the lawyers involved; and
- (2) the total fee is reasonable.

In other words, in order to be an enforceable fee-sharing agreement, the underlying client must have been "advised of" and "not object to" the participation of both Plaintiff and Defendant. Besides the fee being reasonable, there are no other requirements.³

Plaintiff argues that Defendant carries the burden to establish the affirmative defense that the contract is void or unenforceable as against public policy (and therefore illegal). Indeed, the Court of Appeals in *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 60; 672 NW2d 884 (2003) concluded that a referral fee contract that contradicts the Michigan Rules of Professional Conduct "is void ab initio." And, under MCR 2.119(F)(3)(a) the defense that "that an instrument or transaction is

³ Defendant makes much of the allegation that Plaintiff had no prior contact with three of the four clients. But there is no requirement for prior contact in MRPC 1.5(e).

void” constitutes an affirmative defense.⁴

In response, Defendant argues that Plaintiff actually carries the burden to establish that its claim is based on a legal contract, citing *Am Trust Co v Michigan Trust Co*, 263 Mich 337, 339-340; 248 NW 829 (1933) for the proposition that:

A contract made in violation of a statute is void and unenforceable. When plaintiff cannot establish its cause of action without relying upon an illegal contract, it cannot recover. The contract was of no force, effect, or efficacy. It was invalid, null, and void.

The general rule of law is that a contract made in violation of a statute is void, and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. (internal citations and quotations omitted).

But in *American Trust*, the burden of proof was not an issue. Based on the plain language of the Court Rule, the Court finds that Defendant’s claim that the fee-sharing agreement is void as a matter of public policy is an affirmative defense, on which, Defendant carries the burden.⁵

This ruling is consistent with other states addressing the issue as cited in Plaintiff’s Motion.⁶

4 Plaintiff also cites *Metro Services Organization v City of Detroit*, an unpublished opinion per curiam of the Court of Appeals, issued February 1, 2011 (Docket Nos. 292052, 292588), which concluded that a defendant’s position that a contract was void constitutes an affirmative defense, on which, the asserting party carries the burden.

5 The Court notes, however, that while Defendant did not plead the affirmative defense that Plaintiff’s claim is void based on an illegal contract in his affirmative defenses, it did raise the issue in its initial motion for summary disposition filed in lieu of an Answer on June 30, 2015 as permitted under MCR 2.111(F)(2).

6 California’s District Court of Appeal considered an interesting, well-reasoned approach to the burden problem in *Eaton v Brock*, 124 Cal App 2d 10, 13; 268 P2d 58 (1954):

Where the illegality of a contract does not appear from the face of the complaint it becomes a matter of affirmative defense that must be specially pleaded. And in such case the burden of proof is on the defendant. (*Hamilton v. Abadjian*, 30 Cal.2d 49 [179 P.2d 804]; *Gelb v. Benjamin*, 78 Cal.App.2d 881 [178 P.2d 476]; *Vagim v. Brown*, 63 Cal.App.2d 504 [146 P.2d 923]; 12 Cal.Jur.2d p. 508; 17 C.J.S. p. 1226.) Such is the case here. There is nothing on the face of the complaint, nor the contract attached thereto, that discloses any invalidity. The trial court therefore properly required the defendant to assume the burden of proving illegality.

See also *Cantleberry v Holbrook*, No. 12CA75, 2013 WL 3280023, at *4 (Ohio Ct App June 25, 2013), which reasoned: Appellant argues the trial court erred as a matter of law in determining appellee met his burden of proof on the issue of illegality of contract. We agree. A defense alleging illegality of contract is an affirmative defense. *McCabe/Marra Co. v. Dover*, 100 Ohio App.3d 139, 652 N.E.2d 236 (8th Dist.1995); *Arthur Young & Co. v. Kelly*, 88 Ohio App.3d 343, 623 N.E.2d 1303 (10th Dist.1993). When challenging a contract’s enforceability based on illegality, one does not challenge the terms to the agreement; “[i]n short, asserting that defense does not contest the existence of an offer, acceptance,

Next, the parties dispute the timeframe for a client’s objection to any fee sharing. As stated, MRPC 1.5(e) only permits a fee-sharing agreement between lawyers not in the same firm if “the client is advised of and **does not object to** the participation of all the lawyers involved.”

Plaintiff claims that any such objection must have been raised before said client signed his or her retainer agreement with Defendant.

Defendant, on the other hand, argues that “it makes the most sense to look at the client’s agreement or objection to payment **at the time of payment.**”

Initially, the Court notes that there is no explicit temporal element to MRPC 1.5(e). But if the Court were to accept Defendant’s approach, then the representing attorney could use his or her months- or years-long relationship with the client to influence said client to object at the last moment – thereby avoiding paying any agreed referral fee long after the referring attorney lived up to his or her end of the bargain. This doesn’t make sense.

Rather, the Court finds that any objection must be raised by the time the referring attorney completes his or her bargained-for exchange – bringing the client to the representing attorney. This is complete when the client executes the retainer agreement with the representing attorney.⁷

With this ruling in mind, the Court now turns to the **overwhelming** competing evidence on the issue of whether each client was advised of or objecting to the fee-sharing agreement.

It is worth noting that both parties appear to argue from the perspective that, if the alleged contract is enforceable (or unenforceable) as to one client, then it is enforceable (or unenforceable) as

consideration, and/or a material breach of the terms of the contract.” *McCabe/Marra Co.*, 100 Ohio App.3d at 148, 652 N.E.2d at 241. The burden of proving the contract's illegality is upon the party seeking to avoid the obligation *Charles Melbourne & Sons, Inc. v. Jesset*, 110 Ohio App. 502, 505, 163 N.E.2d 773, 775 (8th Dist.1960).

⁷ The same is true for the other requirement of MRPC 1.5(e) – that the client was “advised of” the participation of all lawyers involved.

to all. This is not the case. There are four underlying clients. Each client must be separately analyzed to determine the enforceability of the purported agreement with respect to that client.

In other words, if the jury finds that Client A was advised of and did not object to the fee-sharing agreement, then said agreement is enforceable as to Client A alone. But it does not mean that Plaintiff is automatically entitled to the same with respect to Clients B, C, and D (should the jury determine that they were not advised of or objected to the fee-sharing agreement).

And the reverse is also true. Should Defendant succeed on establishing that Clients A and B were not advised of (and/or objected to) the purported fee-sharing agreement, it does not mean that the same is necessarily true for Clients C and D.

In support of its position that each client was advised of and did not object to the fee-sharing agreement, Plaintiff cites to the deposition testimony of Danzig and its principal, Jeffrey Sherbow. Danzig testified that, at the time each client signed his or her retainer agreement, they discussed the referral fee and the clients had no objections. Likewise, Sherbow testified that, at the July 26, 2012 meeting, the referral fee was discussed.

Defendant, on the other hand, cites to the deposition testimony of each underlying client, who all claim that the fee split was not discussed at the July 26 meeting.

Each side also attacks the credibility of the other's deponents. In other words, the parties specifically make credibility an issue. It is well settled, however, that credibility is an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, "courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion" *White*, 275 Mich App at 625.

As a result, summary disposition is wholly inappropriate and DENIED.

4. Non-Economic Damages

Finally, Defendant next argues that Plaintiff cannot recover for non-economic damages in a breach of contract case, citing *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401, 419-421; 295 NW2d 50 (1980) (holding “absent allegation and proof of tortious conduct existing independent of the breach, . . . exemplary damages may not be awarded in common-law actions brought for breach of a commercial contract); *Manley v Detroit Auto Inter-Ins Exch*, 425 Mich 140, 149; 388 NW2d 216, 220 (1986); and *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 17; 527 NW2d 13, 17 (1994) (holding “Damages for mental distress are not recoverable in a breach of contract action absent allegation and proof of tortious conduct existing independently of the breach of contract.”).

In response, Plaintiff argues that he sustained “a real damage” when Defendant refused to pay the promised referral fee because. While this may be true, Plaintiff can be made whole if he succeeds on his breach of contract claim, which measures damages based what Plaintiff was supposed to receive vs. what he actually received.

But Plaintiff has entirely failed to allege any tortious conduct existing independently of the alleged breach of contract. As a result, Defendant’s motion on this issue is GRANTED. Plaintiff may not pursue or recover for non-economic damages in this case.

5. Summary/Conclusion

To summarize, Defendant’s motion is GRANTED, but only with respect to Plaintiff’s inability to recover any non-economic damages.

In all other respects, for all of the foregoing reasons, and viewing all evidence in the light most favorable to the nonmovant, the Court finds that there remain numerous questions of fact in dispute that precludes summary disposition under (C)(10). As a result, both parties' motions are otherwise DENIED.⁸

IT IS SO ORDERED.

August 17, 2016
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

⁸ The Court also declines Plaintiff's request to rule that Defendant has violated MCR 8.121(C)(1) when it deducted fees from the gross (rather than net) recovery. This is not properly an issue addressed by this Court.