

**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.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Defendant's motion for summary disposition. According to its 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. The cases ultimately resolved for approximately \$10.5 million, and Defendant received over \$3 million in fees.

Despite the referral-fee agreement, Plaintiff claims that Defendant now refuses to pay Plaintiff its percentage of the award. In response to Plaintiff's Complaint, Defendant filed the present motion for summary disposition, seeking dismissal of this case. Because there is clearly no basis to grant this motion, the Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

The Court will note that Defendant does not specify which Court Rule it relies on in support of his motion, but the Court finds that only MCR 2.116(C)(10) could apply. This is so because Defendant: (1) attaches evidence in support of his motion, and (2) challenges Plaintiff's version of

events. Both of these things are impermissible if considering a motion under (C)(8). See MCR 2.116(G)(5); and *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992).

A (C)(10) motion tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). 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 335 (1994).

Defendant argues that it is entitled to dismissal of Plaintiff's Complaint for four reasons. First, Defendant claims that Plaintiff lacks the legal capacity to sue because the law firm has been dissolved since July 15, 2013.<sup>1</sup> Second, Defendant claims that Plaintiff did not refer any of the clients to Defendant. Third, any claim of a contract between the parties violated MRPC 1.5(e). Finally, Plaintiff is not entitled to any fee from an Ohio case where he is not licensed to practice in Ohio.

### **1. Plaintiff's capacity to sue.**

Defendant first argues that Plaintiff lacks the legal capacity to sue because it has been dissolved since July 15, 2013.

In response to Defendant's motion, Plaintiff argues that it is a currently active professional corporation registered to do business in Michigan. In support, Plaintiff attaches a printout from

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<sup>1</sup> A motion under MCR 2.116(C)(5) challenges whether a plaintiff lacks the legal capacity to sue. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000).

Michigan's Department of Licensing and Regulatory Affairs. Indeed, it appears that Plaintiff is an active corporation, and therefore, the Court rejects Defendant's claim.

## **2. Plaintiff's referral of clients.**

Next, Defendant claims that Plaintiff did not actually refer any of the underlying clients, Dion Rice, Dorothy Dixon, Philip Hill, or Mervie Rice, to Defendant law firm. In support, Defendant attaches the affidavits of each of these clients and otherwise challenges Plaintiff's version of events.

In response, Plaintiff argues that it did refer Dion Rice, Dorothy Dixon, Philip Hill and Mervie Rice to Defendant law firm. In support, Plaintiff attaches the Affidavits of Jeffrey Sherbow and Jeffrey Danzig – a Defendant partner at the time of the alleged referral. Plaintiff also attaches several confirming letters from Defendant's office – acknowledging the referral fee owed to Plaintiff on the specific cases for each of the underlying clients.

In its Reply Brief, Defendant suggests that the Court ignore the affidavits attached to Plaintiff's response because they are "self-serving." In other words, Defendant challenges the affiants' credibility. Defendant also essentially ignores the confirming letters from his office acknowledging the fee-sharing agreement.

As a result, in addition to the parties presenting substantial competing evidence, Defendant appears to challenge Plaintiff's affiants' credibility. 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, supra* at 625, citing *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004); and *Foreman v*

*Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005).

Additionally, in *Vanguard Ins Co v Bolt*, 204 Mich App 271; 514 NW2d 525 (1994), the Court of Appeals held:

The granting of a motion for summary disposition is especially suspect where motive and intent are at issue or where a witness or deponent's credibility is crucial. Accordingly, where the truth of a material factual assertion of a moving party depends upon a deponent's credibility, there exists a genuine issue for the trier of fact and a motion for summary disposition should not be granted. *Vanguard Ins, supra* at 276 (internal citations omitted).

For the foregoing reasons, the Court finds that resolution of Plaintiff's claims is so substantially intertwined with fact-finding and credibility determinations as to render summary disposition wholly inappropriate.

Additionally, in its Response Brief, Plaintiff claims that Defendant failed to answer the Requests to Admit served on Defendant at the same time as the Summons and Complaint. As a result, each request to admit has been deemed admitted by operation of Court Rule. Therefore, Plaintiff claims that Defendant admitted to the existence of a 20% fee-sharing agreement and its liability thereunder.

Indeed, under MCR 2.312(B)(1), Defendant's failure to answer properly served Requests for Admission results in admissions of the same.

In its Reply Brief, Defendant claims that an unrelated Court Rule somehow altered its response deadline, citing MCR 2.108. But this Court Rule only deals with timeframes for "pleadings," which is a specifically defined term in the Court Rules. Under MCR 2.110:

The term "pleading" includes only:

- (1) a complaint,
- (2) a cross-claim,
- (3) a counterclaim,
- (4) a third-party complaint,

- (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and
  - (6) a reply to an answer.
- No other form of pleading is allowed.

Discovery responses are not included in the above definition and are not “pleadings” for purposes of the Court Rule, and MCR 2.108 has no application. As a result, by operation of Court Rule, Defendant’s failure to timely respond results in its admission of Plaintiff’s requests.

The Court, however, has broad discretion to craft appropriate remedies for discovery violations. In this case, the Court will exercise said discretion and accept as timely the responses filed with Defendant’s Reply Brief.

**3. Fee-sharing violates MRPC 1.5(e).**

Defendant next claims that the alleged referral-fee agreement violates MRPC 1.5(e). Under the cited Rule:

- (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 support of its argument that these requirements were not met, Defendant again cites to the affidavits of the underlying plaintiffs.

And, again, Plaintiff responds by citing to the Affidavits of Jeffrey Sherbow and Defendant’s former partner, Jeffrey Danzig, for the proposition that these requirements were met.

In other words, the parties again present competing evidence and challenge each other’s affidavits on this issue. As a result, summary disposition is wholly inappropriate.

#### **4. Ohio law prohibits the referral-fee arrangement.**

Finally, Defendant claims that the alleged referral-fee agreement must conform to both Michigan and Ohio law. And, Defendant claims, because Plaintiff is not licensed in Ohio, “Defendant is forbidden from sharing legal fees” with Plaintiff.

In support, Defendant cites Ohio Professional Conduct Rule (OPCR) 1.5(e) and OPCR 5.4(a). OPCR 1.5(e) provides:

Lawyers who are not in the same firm may divide fees only if all of the following apply:

(1) the division of fees is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the client;

(2) the client has given written consent after full disclosure of the identity of each lawyer, that the fees will be divided, and that the division of fees will be in proportion to the services to be performed by each lawyer or that each lawyer will assume joint responsibility for the representation;

(3) except where court approval of the fee division is obtained, the written closing statement in a case involving a contingent fee shall be signed by the client and each lawyer and shall comply with the terms of division (c)(2) of this rule;

(4) the total fee is reasonable.

And OPCR 5.4(a) provides that “A lawyer or law firm shall not share legal fees with a nonlawyer,” except in certain limited circumstances.

But Defendant fails to cite any caselaw for the proposition that two, licensed Michigan attorneys cannot enter into a referral-fee agreement in Michigan for a case to be litigated in another state. And further, Defendant fails to cite any caselaw for the proposition that, in the event this happens, both jurisdictions’ rules of professional conduct must then apply to said agreement.

Michigan law is clear that, “A party may not merely announce a position and leave it to [the]

Court to discover and rationalize the basis for the claim.” *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). Because Defendant fails to present any caselaw or meaningful analysis on this precise issue, its request for summary based on the same is DENIED.

**5. Discovery is incomplete.**

Finally, assuming arguendo that each party did not present competing evidence and otherwise challenge each other’s affidavits, it is well established that summary under (C)(10) is usually premature if granted before discovery on a disputed issue is complete. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

This case is new, and a scheduling order has yet to be entered. Because further discovery may reveal support for Plaintiff’s claims, summary disposition under (C)(10) is also premature.

(Remainder of this page intentionally left blank).

**6. Conclusion**

For all of the above reasons and viewing all evidence in the light most favorable to Plaintiff, the Court concludes that there are numerous material questions of fact in dispute, whereby Defendant is not entitled to judgment as a matter of law. As a result, Defendant's motion for summary disposition is DENIED.

Defendant must file its responsive pleadings on or before September 21, 2015.

Because the Court exercised its broad discretion to accept Defendant's answers to Plaintiff's requests to admit as timely, Plaintiff's request for summary under (I)(2) is also DENIED.

**IT IS SO ORDERED.**

August 31, 2015  
Date

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