

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

**NORMAN YATOOMA & ASSOCIATES, PC,
Plaintiff,**

v.

**Case No. 16-153017-CB
Hon. James M. Alexander**

**COHEN LERNER & RABINOVITZ, PC,
and STEVEN Z. COHEN,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition. Plaintiff brought this case based on the claim that Defendants are improperly holding money in Cohen’s client trust account that belongs to Plaintiff. The source of the money is the settlement of an underlying fee-dispute with a former-Plaintiff client that was subsequently represented by Defendants. Plaintiff claims that Defendants improperly (and without its permission) negotiated down Plaintiff’s right to collect \$837,500 from its former client. And Plaintiff now seeks the portion of \$550,000 Plaintiff’s former client received that is still remaining in Defendants’ client trust account – some \$234,531.66 – to apply toward the debt.

Defendants, for their part, argue that Plaintiff agreed to the sale of the underlying claim (and corresponding reduction in recovery) and previously agreed to sign a release as a condition of receiving said funds, but Plaintiff refuses to do so.

Plaintiff filed the present suit on claims of (Counts I and II) conversion, (Count III) unjust enrichment, and (Count IV) declaratory relief. In lieu of filing an Answer, Defendants

responded with its present motion for summary disposition – arguing that Plaintiff’s Complaint fails because Plaintiff has done nothing wrong based on the parties’ agreement that the funds will be turned over when Plaintiff signs the release.

Plaintiff then filed its present motion – seeking a judgment for \$234,531.66 (the amount held by Defendants that is owed to Plaintiff). To their respective ends, the parties move for summary disposition under MCR 2.116(C)(8) and/or (C)(10).

A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Such a motion may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).¹

A (C)(10) motion tests the factual support for a plaintiff’s claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Id.* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

¹ “When an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8).” *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

The Court first notes its frustration with both sides ignoring an issue that precludes summary in either's favor. The parties disagree whether Plaintiff and Defendants agreed to the sale or that the release of the money was conditioned on Plaintiff's signing a release.

Plaintiff claims that it made no such agreements with Defendants. In support, Plaintiff cites to the affidavits of Norman Yatooma and David Potts – as well as other documentary evidence.

Defendants, on the other hand, claim that Plaintiff agreed to the sale and that the forwarding of funds was conditioned on its signing a release. In support, Defendants cite to the affidavit of Defendant Steven Z. Cohen – as well as other documentary evidence.

In other words, the parties have material disputes (supported by evidence) that are relevant to each of Plaintiff's claims.

Further, not only is there a question of fact about whether the parties agreed to the sale or that the release of funds was conditioned on Plaintiff's signing a release, both parties have also made credibility an issue by challenging the other's factual assertions. But credibility 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'" *Id.* 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).

Resolution of the agreement dispute is necessary to decide each of Plaintiff's claims for the following reasons.

1. Conversion (Counts I and II)

As stated, Plaintiff's Counts I and II are for common-law and statutory conversion. Michigan law provides that "[t]he tort of conversion is 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

"Statutory conversion, by contrast, consists of knowingly "buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property." *Head*, 234 Mich App at 111; quoting MCL 600.2919a.

In this case, Plaintiff claims that Defendants converted money belonging to Plaintiff. In *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004), the Court of Appeals reasoned, "[t]o support an action for conversion of money, **the defendant must have obtained the money without the owner's consent** to the creation of a debtor-creditor relationship and must have had an obligation to return the specific money entrusted to his care." *Lawsuit Fin*, 261 Mich App at 591 (internal quotations and citations omitted).²

In other words, in order to establish that Defendants converted Plaintiff's money, Plaintiff must establish that Defendants obtained said money without Plaintiff's consent and had an obligation to return the specific money held in their client trust account. Plaintiff claims that, when Defendants received the money, they knew the same belonged to Plaintiff and only "received funds for the purpose of distributing . . . said funds to Plaintiff." (Complaint, at ¶¶ 11, 14). Despite this, Plaintiff claims that Defendants refuse to forward the money.

² Plaintiff further cites *Munro v Munro*, 168 Mich App 138, 141–42; 424 NW2d 16, 18 (1988) for the proposition that "Attorneys with knowledge of another's lien on settlement proceeds have an obligation to disburse lien funds to the lienholder."

But there is a dispute whether there was an agreement that Defendants would only hold the funds until Plaintiff signed a release. Until this issues is decided, the Court finds it wholly inappropriate to rule on Plaintiff's conversion claims. As a result, both parties' motions on Plaintiff's conversion claims under both (C)(8) and (C)(10) are DENIED.

2. Unjust Enrichment (Count III)

Plaintiff's next claim is one for unjust enrichment. Generally, "in order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006); citing *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993).

But, again, the Court cannot decide whether Defendants' retention of the money is unjust until the trier-of-fact determines whether the parties agreed that Defendants would only release the same upon Plaintiff's execution of a release. If execution of a release was a specific agreement, it cannot be said that Defendants' retention until that time is unjust. In any event, since the parties dispute this issue, both sides' motions for summary of this claim under (C)(8) and (C)(10) are appropriately DENIED.

3. Declaratory Relief (Count IV)

Finally, Plaintiff's Count IV is one for declaratory relief. Specifically, Plaintiff asks the Court to declare "that the funds held by Defendants are the property of Plaintiff."

Although **Plaintiff's Count IV** does not seek any ruling that Defendants immediately **release** all such funds to Plaintiff, Plaintiff's motion on its declaratory relief claim so asks.

The parties do not appear to dispute that the roughly \$234,000 held in Defendants' client trust account belongs to Plaintiff. In fact, Defendants' entire position in this case is that the money will be forwarded to Plaintiff upon execution of a release. Rather, the parties dispute whether Plaintiff is required to sign a release before Defendants turn over said funds. But because Plaintiff's declaratory relief claim does not seek relief in the form of a declaration that Defendants must actually turn over the funds, it is inappropriate for the Court to so rule.

Assuming arguendo that Plaintiff did request such relief, because the parties dispute the release agreement, and the same is an alleged precondition to disbursement, the Court is unconvinced that summary on this claim would be appropriate until the trier-of-fact resolves the release agreement issue.³

For the foregoing reasons, both parties' motions under (C)(8) and (C)(10) are DENIED.

IT IS SO ORDERED.

September 28, 2016
Date

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

³ The Court notes that Defendants make confused arguments that the Court can reform the underlying Settlement Agreement between Plaintiff and non-party Spinello based on frustration of purpose or impossibility. But these arguments miss the mark. First, Defendants are not parties to the Settlement Agreement. It's unclear why Defendants believe that they, as non-parties to the agreement, can argue that the Court should reform the same. Additionally, this case is about specific money found in Defendants' client trust account, and both parties' exhibits evidence that said money belongs to Plaintiff.