

STATE OF MICHIGAN
IN THE 36th CIRCUIT COURT FOR VAN BUREN COUNTY

REMINGTON CONSTRUCTION
COMPANY,

Plaintiff,

vs.

DEPENDABLE CONCRETE, INC.;
and MATTHEW STAFFORD,

Defendants.

Case No. 11-61-638-CZ

HON. CHRISTOPHER P. YATES

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR
PAYMENT OR DISGORGEMENT OF SETTLEMENT PROCEEDS

As Ambassador Clare Boothe Luce famously observed: “No good deed goes unpunished.” The Court agreed to adopt this orphan case from the Van Buren County Circuit Court, believing that it was a simple postjudgment collection proceeding involving a routine default judgment.¹ Instead, this matter has produced hand-to-hand combat between the competing attorneys, as well as judgment debtors whose assets disappear into thin air as soon as they are identified. Among other matters, the two sides have fought ferociously over a settlement paid to the attorneys for Defendants Dependable Concrete, Inc. (“Dependable”) and Matthew Stafford to resolve a lawsuit against the property owner and general contractor on a building project for which Plaintiff Remington Construction Company (“Remington”) and the defendants furnished labor and materials. Because the Court concludes that Remington has no basis to dispossess the defendants’ attorneys of the settlement proceeds, the Court must deny the plaintiff’s motion for payment or disgorgement of those proceeds.

¹ Everything – everything! – about this case is vexing, including whether “postjudgment” is a word that should be hyphenated. As it turns out, MCR 3.101(B) indicates that it should not be.

I. Factual Background

Years ago, as part of the construction of a Wal-Mart store in Pittsfield Township, Defendant Dependable and its principal, Defendant Stafford, hired Plaintiff Remington to provide materials and labor for that job. See Remington Construction Co v Dependable Concrete, Inc, No 312101, slip op at 2 (Mich App Dec 19, 2013) (unpublished decision). Apparently, as the job progressed, Wal-Mart and the general contractor, The LaSalle Group, Inc. (“LaSalle”), changed the job specifications and required “a significant increase in concrete work[,]” which Remington performed for the added cost of \$80,654.50. Id. Because Remington did not receive an additional payment to cover that cost, it filed suit against Wal-Mart, LaSalle, Dependable, Stafford, and others. Then, in the fullness of time, “Remington secured a default judgment against Dependable and Stafford” for \$242,860.32, which comprised the base amount of \$80,654.50 as well as treble damages for statutory conversion under MCL 600.2919a(1), taxable costs of \$821.82, and attorney fees of \$75. See Hearing Exhibit 4.

Having obtained the default judgment against Defendants Dependable and Stafford, Plaintiff Remington turned its attention to Wal-Mart and LaSalle. That collection effort was thwarted in the first instance by our Court of Appeals, which ruled “that Remington had a relationship and contacts only with Dependable, the subcontractor with which it contracted,” see Remington Construction, No 312101, slip op at 3, so “the circuit court did not err in dismissing Remington’s claims” against Wal-Mart and LaSalle. Id. In the wake of that defeat, Remington started collection efforts on the default judgment against Dependable and Stafford, who responded by suggesting that Dependable could file suit against Wal-Mart and La Salle for breach of contract.²

² As a subcontractor on the Wal-Mart project, Defendant Dependable had privity of contract with the general contractor, LaSalle, so Dependable had a more viable claim than Remington in the pursuit of recovery from LaSalle and even Wal-Mart.

In 2014, Defendant Dependable filed suit against Wal-Mart and LaSalle in the Washtenaw County Circuit Court, but later dismissed that lawsuit and then refiled it in the Wayne County Circuit Court on December 16, 2014.³ No doubt intrigued by the potential for a recovery flowing from that action by Dependable (under Matthew Stafford's guidance) against Wal-Mart and LaSalle, Plaintiff Remington allowed Stafford to stand in the pocket long enough to pursue relief in the Wayne County Circuit Court without being sacked in postjudgment proceedings in the instant case. Remington may have lionized Stafford and his plan at first, but that season of hope gave way to disappointment when Dependable and Stafford settled the Wayne County case on August 11, 2016. That resolution in the Wayne County case yielded \$20,000 for Dependable's attorneys, *i.e.*, Rodenhouse Kuipers, P.C., see Hearing Tr (9/27/16) at 29, but nothing that Remington could obtain from Dependable and Stafford. See id. at 33-38.

In the wake of the Wayne County settlement, Plaintiff Remington filed an emergency motion in the instant matter on August 15, 2016, requesting that the defendants' attorneys disgorge all of the proceeds they received as part of the settlement in the Wayne County case. At an evidentiary hearing on September 27, 2016, Attorney Andrew Rodenhouse stated that all of the settlement proceeds went directly from Wal-Mart and LaSalle to his law firm in one check, see Hearing Tr (9/27/16) at 33-38, and that neither Defendant Dependable nor Defendant Stafford received any share of the settlement proceeds. See id. at 33. Incensed, the attorney for Remington confronted Attorney Rodenhouse with an oral statement from a tape-recorded telephone conversation on March 21, 2016, in which Attorney Rodenhouse assured Remington's attorney, with respect to the Wayne County case, that "[w]hatever

³ Remarkably, this litigation and its offshoots have required attention from the circuit courts in Kalamazoo County, Kent County, Van Buren County, Washtenaw County, and Wayne County. Needless to say, this litigation has spun completely out of control.

we get, we're going to turn over to you anyway. . . . We recognize we owe you money.”⁴ See id. at 46-48. In response, Attorney Rodenhouse testified that the defendants never reached any agreement with Remington and its attorney about any proceeds from the Wayne County case, so the settlement proceeds belonged to their recipient, *i.e.*, Rodenhouse Kuipers, P.C. As a result, the Court now must decide whether Remington has an enforceable claim to those proceeds in its capacity as the judgment creditor of Dependable and Stafford, under an oral contract, or by dint of an attorney's charging lien. The Court shall address those three theories *seriatim*.⁵

II. The Judgment-Creditor Theory

The Michigan Court Rules treat judgment creditors generously by empowering them to take a range of actions aimed at collecting on judgment obligations, see MCR 2.621, even when recovery is sought from third parties. See MCR 3.101. Therefore, the Court has assisted Plaintiff Remington not only in its attempt to obtain satisfaction of its default judgment from the defendants, but also in its pursuit of the defendants' assets through garnishments. Nevertheless, Remington's legal rights as a judgment creditor are not boundless, and the property it may pursue is limited to that which the defendants themselves own or control. Accordingly, Remington's status as a judgment creditor does not, in and of itself, justify a court order directing the defendants' attorneys to disgorge the funds that they received in the settlement of the Wayne County action. Instead, Remington must point to some

⁴ The development of that evidence bespeaks the level of animosity in this case. The attorney for Plaintiff Remington surreptitiously recorded a telephone conversation with his opposing counsel, and then his opposing counsel refused to have his recollection of that conversation refreshed when that tape was played in open court, so the Court had to admit the manifestly audible statement under MRE 803(5) as a past recollection recorded.

⁵ Although the motion and briefs filed by the parties did not fully develop those three issues, the closing arguments presented on December 2, 2016, filled out each of those three theories.

authority requiring the transfer of settlement proceeds from the defendants' attorneys to Remington. Although neither Remington's original motion nor its response filed on November 15, 2016, asserts a theory of recovery based on the "Settlement Agreement and Mutual Release" that ended the Wayne County case, Remington presented an oral argument on December 2, 2016, that the Wayne County settlement agreement provided for the payment of the settlement proceeds to Defendant Dependable, but Dependable's attorneys impermissibly redirected the settlement proceeds to themselves in order to thwart Remington's receipt of those settlement proceeds as a judgment creditor. The Court finds this argument unavailing.

Section 2 of the "Settlement Agreement and Mutual Release" that ended the Wayne County action states "that all consideration for this agreement has been provided and received." See Hearing Exhibit 1. The only consideration that had been provided and received was the one check issued to Defendant Dependable's attorneys. Indeed, the record contains no evidence whatsoever that a check was issued to Dependable or Defendant Stafford before, during, or after the signing of the settlement agreement. Moreover, the check issued to Dependable's attorneys contained no notation that it was payable to, or for the benefit of, Dependable or Stafford. Beyond that, the "Settlement Agreement and Mutual Release" expressly disclaims all third-party-beneficiary rights by stating in section 6 that "no third party has now acquired or will acquire rights to present or pursue any claims arising from or based upon the claims that have been released herein." ⁶ See Hearing Exhibit 1.

⁶ Michigan contract law affords rights to third-party beneficiaries, see MCL 600.1405, but the status of a third-party beneficiary is only conferred if the "promisor . . . ha[s] undertaken to give or to do or refrain from doing something directly to or for" the person who claims to be a third-party beneficiary of a contract. See MCL 600.1405(1); see also Shay v Aldrich, 487 Mich 648, 662-663 (2010). Here, the operative contract, *i.e.*, the "Settlement Agreement and Mutual Release," not only fails to identify Plaintiff Remington as a third-party beneficiary, but also disclaims in section 6 the existence of any third-party beneficiaries to that contract. See Hearing Exhibit 1.

Despite the import of the “Settlement Agreement and Mutual Release,” Plaintiff Remington contends that section 9 of that agreement vitiates the legitimacy of any direct payment of settlement proceeds to Defendant Dependable’s attorneys. Pursuant to section 9, entitled “Costs, Expenses and Attorneys’ Fees,” the parties to the Wayne County lawsuit agreed that “[e]ach of the parties will bear its own costs, expenses, and attorneys’ fees incurred in connection with this Litigation.” See Hearing Exhibit 1. Remington’s reliance upon section 9 suffers from two fundamental flaws. First, payment of settlement proceeds to Dependable’s attorneys had already occurred, so section 9 can be naturally interpreted as a governing principle from that point forward. Thus, from the point of the settlement forward, neither side had any right to seek or claim attorney fees from any other party. Second, even if the language of section 9 could be extended to reach the settlement payment made to Dependable’s attorneys, only the parties to the “Settlement Agreement and Mutual Release,” such as Wal-Mart and LaSalle, could invoke the language of section 9 in an effort to compel Dependable’s attorneys to give the settlement proceeds to Dependable. Brunsell v City of Zeeland, 467 Mich 293, 298-299 (2002). In sum, Remington cannot rely upon the “Settlement Agreement and Mutual Release” to compel the disgorgement of proceeds that Dependable’s attorneys received from Wal-Mart and LaSalle as part of the settlement in the Wayne County case.

III. The Oral-Contract Theory

Without a doubt, the attorney for Plaintiff Remington engaged in settlement discussions with the defendants’ attorneys. After our Court of Appeals issued the decision that foreclosed Remington from proceeding against Wal-Mart and LaSalle, Remington’s collection efforts against Defendants Dependable and Stafford led to an exchange of correspondence between the parties’ attorneys about

Dependable filing a lawsuit against Wal-Mart and LaSalle. See, e.g., Hearing Exhibit 2. According to Remington’s attorney, that correspondence eventually ripened into an oral contract that comprised the following terms:

[Remington] would not take any attempts to garnish Mr. Stafford or Dependable. We’d leave him alone while the lawsuit in Wayne County was pending. And that the agreement was that if we did that, if we didn’t bother him or harass him with any collection action through garnishments or attempts to take any of his property, that on conclusion of that Wayne County case, any funds that were payable to Stafford would be paid to Remington.

See Hearing Tr (9/27/16) at 86-87. To reinforce the existence of an oral contract with those terms, Remington’s attorney played a recorded telephone conversation with Attorney Andrew Rodenhouse from March 21, 2016, in which Attorney Rodenhouse acknowledged on behalf of the defendants that “Whatever we get, we’re going to turn over to you anyway. . . . We recognize we owe you money.” See id. at 46-48.

Michigan law recognizes oral contracts as enforceable agreements, see Hague v DeLong, 282 Mich 330, 332-333 (1937), but like any other contract, a “valid [oral] contract requires mutual assent on all essential terms.” Eerdmans v Maki, 226 Mich App 360, 364 (1997). “Mere discussions and negotiation cannot be a substitute for the formal requirements of a contract.” Id. Here, according to Plaintiff Remington’s attorney, Attorney Rodenhouse made offers to Remington about proceeds from the Wayne County case. But “[a]ny offers that were made that included any and all funds from the Wayne County case . . . included several different contingencies” that Remington was unwilling to accept. See Hearing Tr (9/27/16) at 91-92. Because Remington did not accept those terms, the record does not establish the existence of an oral contract between Remington and the defendants concerning any proceeds resulting from the Wayne County case.

Even assuming, *arguendo*, that the testimony of Plaintiff Remington's attorney provides the terms of an enforceable oral contract, the Court cannot find that the settlement in the Wayne County case constituted a breach of that oral contract. The testimony of Remington's attorney includes the following explanation of the benefit Remington would receive in exchange for its forbearance in its collection efforts pending the resolution of the Wayne County case: "[O]n conclusion of that Wayne County case, any funds that were *payable to Stafford* would be paid to Remington."⁷ See Hearing Tr (9/27/16) at 87 (emphasis added). Of course, the settlement proceeds in the Wayne County case were payable to Dependable's attorneys, rather than to Dependable or Stafford, so Remington cannot assert any right to those proceeds under the oral contract described in the testimony of Remington's attorney. Thus, the Court must reject Remington's claim to the settlement proceeds under the oral-contract theory.

IV. The Charging-Lien Theory

Plaintiff Remington's final argument relies upon the theory that its attorney had the right to the settlement proceeds because of an attorney's charging lien. Simply stated, an attorney's charging lien has no application whatsoever in this context. "Michigan recognizes a common-law attorney's lien on a judgment or fund resulting from the attorney's services." Bennett v Weitz, 220 Mich App 295, 297 (1996). "A special or charging lien is an attorney's equitable right to have the fees due for services secured from the judgment in a particular suit." Id. Remington's attorney did not perform legal work in connection with the Wayne County action by Defendant Dependable against Wal-Mart

⁷ Plaintiff Remington's attorney cannot plausibly contend that he was confused or misled by the question that prompted his explanation of the terms of the oral contract. After all, he posed that question during his direct examination of himself. See Hearing Tr (9/27/16) at 86-87.

and LaSalle, so neither Remington nor its attorney can rely upon an attorney's charging lien to seek recovery from the settlement proceeds in the Wayne County case.⁸ See *id.*; see also *Mahesh v Mills*, 237 Mich App 359, 361 (1999). Our Court of Appeals has recently ruled – albeit in an unpublished decision – that a trial court could not enforce an attorney's charging lien because the attorney “failed to establish that the settlement recovery in the case was the result of [the attorney]’s services.” *Toma v St Peter Medical Center*, No 330585, slip op at 3 (Mich App April 20, 2017). Because precisely the same can be said about Remington's attorney's lack of involvement in obtaining the settlement in the Wayne County case, the Court has no basis to enforce the attorney's charging lien here.

V. Conclusion

For the reasons stated in this opinion, the Court must deny the motion by Plaintiff Remington to require the defendants' attorneys to pay or disgorge the settlement proceeds that they received in the Wayne County case brought by Defendant Dependable against Wal-Mart and LaSalle. Thus, the Court authorizes the defendants' attorneys, Rodenhouse Kuipers, P.C., to withdraw those settlement proceeds from the law firm's trust account and treat those proceeds as the law firm's own money.

IT IS SO ORDERED.

Dated: July 18, 2017



HON. CHRISTOPHER P. YATES (P41017)
Circuit Court Judge

⁸ If anyone has an attorney's charging lien applicable to the settlement proceeds in the Wayne County action, it is the law firm that represented Defendant Dependable in that case. That law firm spent time and effort representing the party on the winning side of the settlement. The Court need not expand upon that theory, however, because the settlement proceeds went directly to the law firm that served as counsel for Dependable in the Wayne County case.