

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

WILLIAM A. WHITMIRE,

Plaintiff,

vs.

STEVEN J. HUMMEL; ORLANDO
W. STEPHENSON, III; and JAMES
D. MATTHEWS,

Defendants.

Case No. 16-09186-CBB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER RESOLVING ATTORNEY-FEE DISPUTE

What began as a pitched battle for control of a limited liability company, Yourareacode, LLC (“YAC”), has devolved into yet another dispute about attorney fees. But this fight over attorney fees has a twist – the combatants are Plaintiff William A. Whitmire and his own attorney, David Szostek. On February 8, 2018, the Court entered an order of dismissal resolving the suit among the members of YAC, but Whitmire and Szostek then implored the Court to resolve their dispute about the amount of money Whitmire still owes Szostek under their fee agreement. As a result, on February 20, 2018, the Court conducted a hearing to consider the competing positions of Whitmire and his attorney. On the basis of the evidence adduced at that hearing, the Court shall order Whitmire to pay his attorney, David Szostek, and Szostek’s law firm \$19,877.05 in outstanding attorney fees.

On September 15, 2016, Attorney Szostek and Plaintiff Whitmire both executed a document entitled “Engagement Agreement” that spelled out the financial terms of their relationship as attorney and client. See Hearing Exhibit 1. That agreement defined Whitmire’s fee obligation “on a mixed hourly and contingency basis[.]” with the rates set at “\$175.00 per hour for all legal work performed

by attorneys and \$125 per hour for all legal work performed by support staff and/or paralegals.” See id. (Engagement Agreement, § 2). The contingent-fee provision starts with the straightforward rule that “[w]e will be entitled to 10% of any Recovery that exceeds the value/amount of \$150,000.” See id. (Engagement Agreement, § 3). So far, so good. But then the provision gets complicated, stating as follows:

This contingency fee will apply to any money, property, or anything of value that you receive that is related to the resolution of this matter (the “Recovery”), or as a result of our legal work. The contingency fee will apply regardless of whether the Recovery is the result of a settlement, mediation, arbitration, judgment, compromise, settlement, appeal, or otherwise. The term “Net Recovery” is the total amount of any Recovery, minus any out-of-pocket expenses that we have incurred in the matter, whether or not you have already reimbursed us for those out-of-pocket expenses[.] Our contingency fee will be based on any Recovery, not Net Recovery.

See Hearing Exhibit 1 (Engagement Agreement, § 3). This language plainly establishes the right to a contingent fee of ten percent of the gross recovery in excess of \$150,000 that results from the legal services performed by Attorney Szostek and his law firm for Whitmire in the instant case. With the fee arrangement established as a matter of contract,¹ the Court must turn to the billing records.

Attorney Szostek submitted a statement of account and four invoices for the Court’s review. See Hearing Exhibits 2-6. The statement of account reveals that Plaintiff Whitmire paid \$9,610 for legal services,² see Hearing Exhibit 2, while he was billed \$29,812.30 in the form of nine invoices. See Hearing Exhibit 2. Unfortunately, the record contains only the final four invoices, see Hearing

¹ Under Michigan law, “[a] fee or retainer agreement is a contract and is subject to the law of contracts.” Estate of Ronald Kalisek v Durfee, No 333943, slip op at 4 (Mich App Nov 28, 2017) (**published** opinion). Therefore, the Court must “interpret the parties’ retainer agreement according to its plain and ordinary meaning.” Island Lake Arbors Condominium Ass’n v Mesiner & Associates PC, 301 Mich App 384, 393 (2013).

² Plaintiff Whitmire made payments totaling \$4,110, see Hearing Exhibit 2, and had credits applied in the total amount of \$5,500. See id.

Exhibits 3-6, so the Court cannot see the full billing picture. Nevertheless, the statement of account establishes an unpaid balance of \$20,202.30. See Hearing Exhibit 2. Augmenting that figure by the one-time interest charge of \$5.62 billed on January 28, 2018, see Hearing Exhibit 2, the Court finds that the outstanding balance Whitmire owes (according to law-firm records) is \$20,207.92. See id. Accordingly, the Court must review the invoices to decide whether Attorney Szostek arrived at that figure for the outstanding balance in an appropriate manner.

Most of the billing was assessed on an hourly basis, so the invoices are largely unremarkable. Similarly, the expenses included on the invoices appear to be routine and appropriate. But the two entries concerning the contingent fee have caused a significant debate between Attorney Szostek and his client, Plaintiff Whitmire, about the extent of Whitmire's outstanding obligation to Szostek and his law firm. Specifically, on October 18, 2017, Szostek entered a \$10,000 charge as a contingent fee, but Szostek reduced that one-time charge by 70 percent to account for a "landlord-tenant portal" that Whitmire was supposed to provide to Szostek's law firm, yielding a single charge for \$3,000.00. See Hearing Exhibit 3. In a subsequent invoice issued on December 27, 2017, Szostek reversed the 70-percent reduction, see Hearing Exhibit 4, thereby enhancing the contingent-fee charge from the original reduced figure of \$3,000 to the original unreduced figure of \$10,000 by imposing a charge of \$7,000 to account for the difference. See id. Whitmire characterizes that \$10,000 contingent fee as inappropriate in its entirety. The Court disagrees.

As a result of the instant case, which Attorney Szostek settled for Plaintiff Whitmire so that Whitmire could return to his job with YAC and ultimately sell his interest in the company, Whitmire realized two substantial benefits. First, Whitmire received an annual salary of \$100,000 from YAC. Second, Whitmire obtained \$148,000 as the proceeds of the sale of his interest in the company. The

“Engagement Agreement” broadly defines the “Recovery” for contingent-fee purposes to encompass both of those benefits, see Hearing Exhibit 1 (Engagement Agreement, § 3), so Szostek and his firm had the authority to collect a ten-percent contingent fee on the total amount of financial benefits that exceeded \$150,000 under the terms of the “Engagement Agreement.” Id. Subtracting the threshold amount of \$150,000 from the total recovery of \$248,000 yields a contingent fee of ten percent of that difference, *i.e.*, \$9,800. Consequently, the Court concludes that Whitmire remains obligated to pay a contingent fee of \$9,800, rather than the \$10,000 figure identified in the invoices, so the Court shall merely reduce the outstanding balance by \$200, *i.e.*, from \$20,207.92 to \$20,007.92, to account for the difference between the billed contingent fee of \$10,000 and the actual contingent fee of \$9,800, as calculated under the terms of the “Engagement Agreement.”

The Court also must make a downward adjustment to account for hourly billing by Attorney Szostek at an hourly rate in excess of the \$175 rate prescribed by the “Engagement Agreement.” See Hearing Exhibit 1 (Engagement Agreement, § 2). That is, in every billing entry by Szostek included in the invoice dated February 8, 2018, see Hearing Exhibit 6, Szostek billed at the unapproved rate of \$187.25, id., so the Court must deduct the difference between the inappropriate billing at the rate of \$187.25 from the appropriate billing at the rate of \$175. Szostek billed 6.6 hours at the \$187.25 rate, so the Court must reduce the outstanding balance by \$80.85 to account for the improper billing of 6.6 hours at an hourly rate of \$187.25, rather than \$175. That change reduces Plaintiff Whitmire’s outstanding balance from \$20,007.92 to \$19,927.05.

Having arrived at the outstanding balance of \$19,927.05, the Court concludes that one further downward adjustment is warranted. Attorney Szostek charged Plaintiff Whitmire interest of nearly \$2,500, see Hearing Exhibit 5 (“Service” entry of \$2,448.85 for “Interest Accrued to Date . . . only

on the YAC business matter”), but the “Engagement Agreement” has language stating that Szostek’s firm “will charge interest on past-due balances at the maximum rate allowed by law.” See Hearing Exhibit 1 (Engagement Agreement, § 5). Accordingly, the bulk of the interest charged to Whitmire was appropriate under the express terms of the “Engagement Agreement.” But because the billing included interest at the rate of 25 percent on a contingent fee of \$10,000, as opposed to \$9,800, the Court must deduct \$50 in charged interest from the outstanding balance, thereby reducing the unpaid balance from \$19,927.05 to \$19,877.05.


The Court need not make any further adjustments to the outstanding balance, notwithstanding the competing arguments for additional relief. Plaintiff Whitmire’s contention that he and Szostek entered into an oral modification of their fee agreement finds no support in the record. Michigan law permits parties to modify their contracts, Quality Products and Concepts Co v Nagel Precision, Inc., 469 Mich 362, 372 (2003), but the record contains no evidence that Whitmire and Szostek mutually agreed to reduce the outstanding fee obligation to four payments of \$2,500 each (for a total amount of \$10,000). Therefore, the mutuality requirement for modification of the “Engagement Agreement” has not been satisfied. See id. at 373. The Court also sees no need to adjust the outstanding balance to account for some purported payment of \$1,250.19 for some unrelated domestic-relations matter. This fee dispute suffers from a paucity of evidence, and the disagreement about payment for services in a domestic-relations matter is a classic example of a problem that the Court simply cannot resolve due to a lack of evidence.

Having completed its analysis of every scrap of evidence and each argument concerning the fee arrangement in this case, the Court finds that Plaintiff Whitmire owes Attorney Szostek and his law firm \$19,877.05 under the terms of their “Engagement Agreement.” Accordingly, Szostek and

his firm are entitled to the sum of \$7,319.13 currently held in an IOLTA trust account, as well as the remaining balance of \$12,557.92, *i.e.*, \$19,877.05 minus \$7,319.13, as fees for services. Szostek and his firm are entitled to collect that much, and no more, from Whitmire.

IT IS SO ORDERED.

Dated: March 13, 2018



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