

**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 case is on remand from the Court of Appeals following the Court's prior decision that granted Plaintiff's motion for summary disposition and denied Defendants'. The Court of Appeals remanded to the Court finding that (1) PNC Bank has a claimed interest relating to the property that is subject of this lawsuit, and therefore, is entitled to intervene under MCR 2.209(A), and (2) summary disposition was not warranted because genuine issues of material fact exist.

Following this remand, the parties filed or renewed motions for summary disposition and Plaintiff filed a motion to dismiss PNC Bank. The Court previously summarized this case as follows:

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.

The Court will note that since this quoted, prior Opinion, Plaintiff amended its Complaint to also allege a claim for tortious interference with a contract (Count V).

I. Plaintiff's Motion to Dismiss PNC Bank

First, Plaintiff argues that PNC Bank should be dismissed because it has failed to file a complaint. Plaintiff contends that the Court instructed PNC to file a complaint at the February 22, 2019 pretrial, but PNC has failed to do the same. As such, Plaintiff argues that PNC must be dismissed as an intervening party.

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

In response, PNC argues that the February 22, 2019 Scheduling Order did not order PNC to file a complaint. Regardless, PNC argues that it complied with the requirements of MCR 2.209(C)(2) by including a pleading with its motion to intervene. As such, PNC argues that Plaintiff is, and has been, made aware of its pending claims against Plaintiff, and Plaintiff's motion should be denied.

MCR 2.209(C) provides:

A person seeking to intervene must apply to the court by motion and give notice in writing to all parties under MCR 2.107. The motion must

- (1) state the grounds for intervention, and
- (2) be accompanied by a pleading stating the claim or defense for which intervention is sought.

As PNC states, the Court speaks through its written orders. *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). The Court does not dispute that it likely discussed PNC filing a complaint at the pretrial conference. This, however, was not reduced to writing in the Court's February 22, 2019 Scheduling Order. Since there is no order requiring PNC to file a complaint, the Court cannot conclude that it was in violation of the Scheduling Order.

Further, PNC filed their original Motion to Intervene on September 28, 2016. Included with the motion, PNC included its complaint against Plaintiff in their pending action in federal court. The Court ultimately denied PNC's motion. Following the denial, on November 7, 2016, PNC filed a Motion for Reconsideration. Again, PNC included the same complaint with the

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).

motion. As such, PNC argues that it did file a pleading with its motion, and therefore, is in compliance with MCR 2.209(C). The Court agrees.

The complaint PNC filed with its Motion to Intervene certainly puts Plaintiff on notice of “the claim or defense for which intervention is sought” pursuant to MCR 2.209(C). Further, as PNC argues, the federal action between PNC and Plaintiff was filed in 2016. Since that time, the parties have engaged in extensive discovery, exchanging thousands of documents and taking depositions. Certainly, Plaintiff is aware of the claim that PNC is asserting in the present action.

Assuming arguendo the Court found that PNC did not comply with MCR 2.209(C) and failed to state a claim, whenever the Court is inclined to grant a (C)(8) motion, the Court Rules require that a plaintiff be provided an opportunity to amend to properly allege sufficient facts to support its claim. MCR 2.116(I)(5). The Court would have provided PNC such an opportunity.

With its response to Plaintiff’s Motion to Dismiss, PNC filed a Complaint in Intervention. As such, PNC has fully complied with both MCR 2.209(C) and has stated a claim. Based on the same, Plaintiff’s Motion to Dismiss PNC is DENIED.

II. Cross Motions

As previously stated, following the Court of Appeals remand, both Plaintiff and Defendants filed competing motions for summary disposition. Both parties argue (for different reasons) that there are no genuine issues of material fact and, therefore, are entitled to judgement as a matter of law.

Both parties have now filed the present motions for summary disposition under MCR 2.116(C)(10), which tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).²

In its motions, Plaintiff argues that (1) Defendants admit that they are holding money that rightfully belongs to Plaintiff; (2) Defendants unilaterally sold the bankruptcy claim prior to the alleged oral agreement to sign the release; and (3) Defendants tried to leverage Plaintiff's money. Plaintiff argues that since the record supports its position, the Court should grant its motion for summary disposition.

Defendants seem to acknowledge that there are facts in dispute. Defendants dispute (1) that Plaintiff is entitled to the remaining \$459,866 under the agreement; (2) Plaintiffs' assertion that Defendants have \$234,531.66 belonging to Plaintiff; and (3) that Defendants are holding the funds in violation of the Michigan Rules of Professional Conduct.

Instead, Defendants argue that the doctrine of frustration of purpose and supervening impracticability discharge Spinello and Defendants' obligation to perform under the agreement. Defendants argue the agreement provided for quarterly payments to be made through the bankruptcy proceeding to Plaintiff as a contingency payee. Defendant claims that when the bankruptcy was converted from a Chapter 11 to Chapter 7, the payments stopped. Therefore, Defendants argue, they are not able to perform under the agreement as written. Further, Defendants argue that Plaintiff released any claim it may have had by failing to object to the sale and mitigating his damages.

² In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden*, 461 Mich 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.

In response, Plaintiff argues that it was not a contingency payee, and that payments were not dependent on the bankruptcy. Plaintiff contends that the agreement merely took into consideration that Spinello would be receiving funds through the bankruptcy proceeding. It did not indicate that Plaintiff's sole source of collection would be from the bankruptcy. Further, Plaintiff argues that the possibility of conversion of Chapter 11 bankruptcy was a risk reasonably assumed by Spinello and Plaintiff since roughly 35% of Chapter 11 bankruptcies are converted.

This Court has previously recognized that the central issue in this case "whether Plaintiff and Defendants agreed to the sale or that the release of the money was conditioned on Plaintiff's signing a release." The Court of Appeals agreed.

The Court of Appeals reasoned that

the resolution of ownership of the funds in question hinges on two separate issues of material fact. The first is whether plaintiff, represented by Potts, and Spinello, represented by defendants, reached an oral agreement in which plaintiff would release its claim against Spinello in exchange for the \$234,531.86 now held by defendants. The second disputed factual issue is whether plaintiff is entitled to the funds in the first place under its 2014 settlement agreement with Spinello. Because a genuine issue of material fact exists as to both questions, summary disposition under MRC 2.116(C)(10) was not warranted. *Norman Yatooma & Associates, PC v Cohen, Lerner & Rabinovitz, PC*, unpublished per curiam opinion of the Court of Appeals, issued Oct. 18, 2018 (Docket No. 33368), p 7.

As it relates to Plaintiff's motion, Plaintiff does not support their motion with any newly discovered evidence. Instead, Plaintiff relies on the same evidence this Court and the Court of Appeals considered previously. As a result, Plaintiff has not established that the questions of fact the Court of Appeals identified have been resolved. Based on the same, the Court must DENY Plaintiff's motion for summary disposition. As previously discussed, factual issues exist that precludes summary disposition.

Defendants' main argument is that since the purpose of the agreement was frustrated, Defendants are not able to perform under the terms. This assumes, however, that Plaintiff is

entitled to funds under the agreement in the first place. And as previously stated, the Court of Appeals held that a question of fact exists as to whether Plaintiff is entitled to funds under the agreement. This Court cannot determine if the purpose of the contract was frustrated without first determining if Plaintiff was entitled to funds. In making said determination, the Court would necessarily have to make factual determinations, which is inappropriate on a motion for summary disposition. Defendants remaining arguments also require the Court to make factual determinations.

Based on the foregoing, Defendants' motion under (C)(10) is also DENIED.

III. Summary

To summarize, Plaintiff's motion to dismiss PNC Bank is DENIED. Plaintiff's motion for summary disposition against Defendants is DENIED. And Defendants' motion for summary disposition against Plaintiff is DENIED.

IT IS SO ORDERED.

June 26, 2019
Date

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