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

THE MILLER LAW FIRM,
Plaintiff/Counter-Defendant,

v.

Case No. 19-172459-CB
Hon. James M. Alexander

ONPOINT ANALYTICS, INC.,
Defendant/Counter-Plaintiff

_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant/Counter-Plaintiff's motion for summary disposition.

According to Plaintiff's Complaint, in 2018, Plaintiff arranged for Defendant to provide expert witness services for Plaintiff's client with respect to a commercial litigation action. Plaintiff signed a letter drafted by Defendant for the services, but the parties agreed that Plaintiff's client would be solely responsible for payment of Defendant's invoices. Plaintiff requested Defendants agree to a budget, but Defendant exceeded the budget without approval. Despite that, throughout the course of the litigation, Plaintiff's client made substantial payments to Defendant. And Defendant contacted Plaintiff's client directly for payment.

Plaintiff's client has failed to pay certain invoices. Although Plaintiff alleges that the parties understood that Plaintiff's client was responsible for payment, Defendant has demanded that Plaintiff pay the invoices. Defendant is demanding Plaintiff pay over $100,000. On these

general allegations, Plaintiff filed its Complaint on for declaratory relief requesting that the Court declare that Plaintiff is not liable to Defendant for any damages.

In response, Defendant filed a Counterclaim alleging that its services were requested by Plaintiff. Defendant claims that it had a contract with Plaintiff directly, not with Plaintiff's client. Defendant further alleges that the contract outlined Defendant's hourly rate and specified that Plaintiff was responsible for payment. Defendant allege that it regularly sent invoices to Plaintiff for payment, but Plaintiff stopped paying the same. As of June 21, 2019, Defendant claims it is owed $164,032.30.

On these general allegations, Defendant filed its Counterclaim on claims titled: (Count I) breach of contract; (Count II) account stated; (Count III) promissory estoppel; (Count IV) unjust enrichment; and (Count V) quantum meruit.

As stated, Defendant now moves for summary disposition of its Counterclaim and Plaintiff's Complaint under MCR 2.116(C)(10). A (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden*, 461 Mich at 120.[1]

Defendant argues that it is undisputed that the agreement was between Plaintiff and Defendant, and that the agreement did not purport to obligate any other party. As such, Defendant argues that this is a simple case of breach of contract and failure to pay on an open account. Defendant argues that there is no evidence that could change Plaintiff's obligations under the contract. Defendant argues that the contract is clear and unambiguous, so therefore, the Court cannot look to extrinsic evidence that contradicts the writing.

[1] 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 the engagement letter did not contain the final expression of the parties. Specifically, Plaintiff argues that the parties agreed that Plaintiff's client would be responsible for payment. (Plaintiff's Response, Exhibit A). Plaintiff argues that this was evidenced by the fact that Defendant went directly to Plaintiff's client for payment. (Plaintiff's Response, Exhibit D). Plaintiff argues that the contract was modified when the parties made it clear that Plaintiff's clients was solely responsible for payment. Based on the same, Plaintiff argues that the Court can consider extrinsic evidence.

In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

Michigan law is also well-established that "a court must construe and apply unambiguous contract provisions as written." *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). Generally, extrinsic evidence is not admissible to vary the terms of an unambiguous contract. However, when the parties did not express an intention that the agreement was the complete expression of the parties, extrinsic evidence is admissible. *NAG Enterprises, Inc v All State Industries, Inc*, 407 Mich 407, 410; 285 NW2d 233 (2006).

Here, the engagement letter provides (in relevant part):

> This letter, when signed by you, will evidence our agreement relating to the provision of consulting services to your firm in the above referenced matter.
>
> Invoices are due upon receipt and any invoices that remain unpaid for more than 30 days after due will bear interest at the highest rate permitted by law. . .. You have the right to terminate this engagement at any time upon payment in full of the outstanding invoices.

> To proceed with this work we will need to receive a retainer from your firm in the amount of $10,000. This retainer will be applied against your invoices as the become due and any unused balance will be promptly refunded to you at the end of the engagement. (Defendant's Exhibit A).

As Plaintiff argues, extrinsic evidence is always permissible to show a subsequent oral or written modification. "It is a well-established principle that the parties bound by an agreement, be it written or oral, may always change the agreement by a mutual consent of those involved. Such a modification may be effected either orally or through a writing." *Rasch v National Steel Corp,* 22 Mich App 257, 260; 177 NW2d 428 (1970) (finding that an allegation of a subsequent contractual modification created a fact issue preventing summary disposition).

Here, Plaintiff has alleged that it was always the parties understanding that the client would be solely responsible for paying Defendant. (Plaintiff's Response, Exhibit A). Indeed, Defendant contacted Plaintiff's client directly for payment, and asked Plaintiff if they had heard from their clients regarding payment. (Plaintiff's Response, Exhibit G). Additionally, Plaintiff alleges that the Engagement Letter was modified.

Plaintiff argues that the evidence regarding the parties' initial understanding, their course of conduct, and subsequent modifications to the agreement regarding payment creates numerous genuine issues of material fact that make summary disposition unwarranted. The Court agrees.

Plaintiff's Complaint and Defendant's Counterclaim both turn on who was responsible for payment under the Engagement Letter. Since there is a question of fact as to who was responsible pursuant to the Engagement Letter, the Court cannot address the parties' remaining claims without first resolving the parties' obligations. As such, summary disposition is not warranted.

Based on the foregoing, Defendant's motion pursuant to (C)((10) is DENIED, and Plaintiff's motion pursuant to (I)(2) is DENIED.

IT IS SO ORDERED.

November 20, 2019
Date

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