STATE OF MICHIGAN

COURT OF APPEALS

NINA DODGE ABRAMS,

Plaintiff-Appellee,

v

SUSAN FELDSTEIN, P.C., AND SUSAN FELDSTEIN, individually and d/b/a JOHNSON & FELDSTEIN,

Defendants-Appellants.

UNPUBLISHED
September 24, 1996

No. 170288
LC No. 92-441591-CK

Before: Griffin, P.J., and Smolenski and L.P. Borrello,* JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order that denied her motion for summary disposition, granted plaintiff's motion for summary disposition and entered judgment in favor of plaintiff for $30,600. We affirm.

Plaintiff and defendant are attorneys. In 1987, plaintiff was handling a probate matter for a client whose husband had recently died. After discovering that the client might have a possible wrongful death daim as a result of medical malpractice, plaintiff referred the client to defendant. Defendant agreed to represent the client pursuant to a contingency fee agreement. In a 1987 letter that defendant conceded below was a contract, defendant agreed to pay plaintiff "a one-third (1/3) co-advisory fee."

Plaintiff continued to represent the client in the opening of the client's husband's estate. It was understood that plaintiff's fee for this work would be a separate and independent cost and not part of the contingent fee. However, this representation ended when plaintiff and the client had a disagreement. In an affidavit, the client claimed that she was forced to discharge plaintiff "because of her inadequate and incompetent representation which deprived me of the opportunity to defend a fraudulent claim against my husband's estate." Plaintiff contends that she was not discharged by the client but rather voluntarily withdrew from the representation pursuant to an agreement with the client. There appears to be no dispute that plaintiff was paid in full for these services.

* Circuit judge, sitting on the Court of Appeals by assignment.

The malpractice case ultimately was settled. At some point, defendant and the client engaged in a discussion concerning the dispersal of the proceeds of the settlement. During this discussion, defendant indicated that part of her fee would go to plaintiff pursuant to the fee-splitting agreement, to which the client indicated that she had not known of this agreement. The client's affidavit states that plaintiff never advised her of the agreement, that had she been so advised she would have withheld her consent to the agreement , that she continued to withhold her consent to the agreement, and that she had instructed defendant concerning "my complete and total opposition to a division of attorney fees" with plaintiff. Defendant thereafter refused to pay plaintiff the agreed-upon one-third of defendant's fee for the malpractice case.

In September 1992, plaintiff brought suit to enforce the contract. Defendant moved for summary disposition, contending that the contract was unenforceable as against public policy. Specifically, defendant contended that the contract violated the ambiguously titled "Michigan Code of Professional Conduct" because plaintiff had not disclosed or obtained the client's consent to the referral fee, plaintiff had not performed any work or assumed any responsibility on the wrongful death case, and the client did not consent to the division of the fee. We term defendant's reference to the ethical rules as ambiguous because the Michigan *Rules* of Professional Conduct were adopted effective October 1, 1988 whereas before this date the Michigan *Code* of Professional *Responsibility* was in effect.

Plaintiff likewise moved for summary disposition. Plaintiff contended that the current Michigan Rules of Professional Conduct could not be used as a ground to refuse to enforce the contract where MRPC 1.0 expressly provides that the rules do not give rise to a civil cause of action for enforcement of the rules.

At the hearing on the parties' motions for summary disposition, defendant clarified that a violation of former DR 2-107 of the Michigan Code of Professional Responsibility, which was in effect in 1987 when the parties entered into the contract, was the basis of her motion. The trial court concluded that the ethical rules were not a basis to refuse to enforce the contract in this case:

> Recognizing that the underlying client in the malpractice case had a falling out with Mrs. Abrams and doesn't want her to receive any more fees than she wanted, I don't find that to be a basis to preclude Ms. Abrams from recovering that which she's entitled to under an enforceable contract.
>
> As to the matter of the requirement of the referring lawyer, as opposed to the lawyer who receives, advising the client of the agreements that they made between themselves, I do not find that failure of either of them to notify them should bar the Plaintiff from recovering her share of the fees and allowing the Defendant to keep it all to herself.
>
> And I recognize the client's position in this regard, but I don't find that to be a basis in this lawsuit to bar the recovery.

So the summary judgment on the C-10 would be granted to the Plaintiff attorney and the amount has been determined by the terms of the agreement so that a judgment may enter accordingly.

On appeal, defendant reiterates her arguments made below. We agree that DR 2-107(A), which provides as follows, is the ethical rule at issue in this case:[1]

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonably compensation for all legal services they rendered the client.

We assume that plaintiff did not disclose the referral fee to the client.[2]

Generally, parties are free to enter into any contract at their will. *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 383-384; 528 NW2d 891 (1994). However, courts will refuse to enforce contracts against public policy. *Id*. at 387. If an attorney's conduct violates the spirit of the lawyer's code of ethics, it also runs contrary to the public policy of this state. *In re Karabatian's Estate*, 17 Mich App 541, 546-547; 170 NW2d 166 (1969); see also *Cashin v Pliter*, 168 Mich 386, 390-391; 134 NW 482 (1912) (In determining whether a contract made in violation of a statute is void, a court should ascertain the "object for which it was enacted and the intent of its makers, to the end that such intent may be rendered effectual and the indicated purpose accomplished."). "DR 2-107 was formulated to prohibit brokering; to protect a client from clandestine payment and employment; to prevent aggrandizement of fees." *Krajewski v Klawon*, 84 Mich App 532, 537; 270 NW2d 9 (1978); see also *McCroskey, Feldman, Cochrane & Brock, PC v Waters*, 197 Mich App 282, 286-287; 494 NW2d 826 (1992).[3]

We conclude that the contract in this case does not so violate the spirit of DR 2-107 as to render it unenforceable. Cf. *McCroskey, supra*; *Krajewski, supra*. The client was well aware that she was being referred to defendant to pursue what plaintiff had discerned was a potential wrongful death claim. Thus, the malpractice case was not being secretly "brokered" and there was no clandestine employment of unknown lawyers. Even assuming that the fee arrangement was not disclosed to the client, there is simply no indication in the record that plaintiff or defendant, either together or individually, intentionally kept the fee arrangement a secret for the purpose of deception or subversion. There was no aggrandizement of fees where plaintiff's recovery was to come out of defendant's fee. And, we are not prepared to say that the agreed-upon division of the fee was not proportionate to the services performed where the client might never have recovered anything but for

plaintiff's initial efforts. The public will be adequately protected by any disciplinary proceedings that arise out of this matter. *State Bar Grievance Administrator v Baun*, 395 Mich 28, 36; 232 NW2d 621 (1975), after remand 396 Mich 421 (1976). Accordingly, the trial court did not err in granting summary disposition in favor of plaintiff where the contract did not violate public policy and was, therefore, enforceable. *Quinto v Cross and Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

Affirmed.

/s/ Michael R. Smolenski
/s/ Leopold P. Borrello

[1] Accordingly, we need not consider the effect of MRPC 1.0 on this case.

[2] We note on this record, however, that a disputed question of fact exists concerning this assumption.

[3] In light of these principles of Michigan law, we find it unnecessary to consider the numerous cases from other jurisdictions that have been cited by the parties.