

STATE OF MICHIGAN
COURT OF APPEALS

BRIAN LAVAN & ASSOCIATES, P.C. and
ELMER L. ROLLER, P.C.,

UNPUBLISHED
October 19, 2010

Plaintiffs/Counter-Defendants-
Appellees/Cross-Appellants,

v

No. 293052
Washtenaw Circuit Court
LC No. 08-000174-CZ

LIVINGSTON COUNTY CIRCUIT COURT
CLERK and LIVINGSTON COUNTY
TREASURER,

Defendants,

and

RAYMOND F. CLEVINGER, P.C. and
RAYMOND F. CLEVINGER,

Defendants/Counter-Plaintiffs-
Appellants/Cross-Appellees.

Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

Defendants, Raymond F. Clevenger, P.C. and Raymond F. Clevenger,¹ appeal by right a judgment entered in plaintiffs' favor in this dispute over the payment of plaintiffs' attorney fees. We affirm.

Plaintiffs provided legal services to defendant with regard to his legal disputes involving Green Oak Township. Before those matters were settled, their relationship was terminated and, on November 22, 2000, plaintiffs asserted a charging lien of \$341,330.86 for their legal services. When the underlying litigation was settled, plaintiffs were listed as payees, along with defendant, on the settlement check that was issued by Green Oak Township on December 22, 2000. Defendant, however, refused to negotiate the check. Eventually Green Oak Township filed a

¹ These defendants will be referred to in the singular, as "defendant," for purposes of this opinion.

complaint requesting that the court take control over the funds and declare that it had no further payment obligation to defendant. After the township moved for summary disposition, the trial court ordered, on May 18, 2004, that the disputed funds be held in escrow by the court “until such time as [these parties] submit a written agreement, signed by all [parties], with instructions as to the distribution of the funds or until the further order of this court or another court of competent jurisdiction.” That case was then closed.

On November 20, 2007, plaintiffs filed this lawsuit seeking a declaratory judgment and disbursement of the funds held in escrow. Defendant moved for summary disposition, arguing that this contract claim for attorney fees was barred by the six-year statute of limitations. Plaintiffs responded that, when the court ordered the disputed funds held in escrow, the court provided equitable relief in the form of a constructive trust regarding the funds; thus, that statute of limitations period did not apply or, if it did, the period began to run on May 18, 2004.

The court agreed with plaintiffs, holding that the May 18, 2004 order provided for an equitable remedy of all pending claims and did not contain a deadline or reference a statute of limitations. That is, the previous court created a constructive trust, holding the funds in escrow until the parties complied with the terms of the order which was to submit a signed, written agreement regarding distribution of the funds. Because the parties did not reach such agreement, the court ordered an evidentiary hearing to determine the distribution of the funds and denied defendant’s motion for summary disposition. Defendant filed an application for leave to appeal with this Court which was denied. *Brian Lavan & Assoc, PC v Livingston Co Circuit Court Clerk*, unpublished order of the Court of Appeals, entered April 10, 2009 (Docket No. 289238). Thereafter, an evidentiary hearing was conducted over the course of several days, culminating in a judgment in plaintiffs’ favor and against defendant. The escrowed funds were distributed between the two plaintiffs. This appeal and cross-appeal followed.

Defendant argues that the trial court erroneously denied his motion for summary disposition because plaintiffs’ contract claim for attorney fees was barred by the six-year statute of limitations. We disagree. The grant or denial of a motion for summary disposition is reviewed de novo on appeal. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Absent disputed questions of fact, the issue whether a cause of action is barred by a statute of limitations is also reviewed de novo on appeal. *Hudick v Hastings Mut Ins Co*, 247 Mich App 602, 605-606; 637 NW2d 521 (2001).

It is undisputed that plaintiffs provided legal services to defendant with regard to litigation involving defendant and Green Oak Township. Before the matters were settled, plaintiffs asserted a charging lien for the legal services they provided to defendant. Accordingly, when the litigation was settled, plaintiffs were listed as payees on the settlement check issued by Green Oak Township. However, defendant refused to negotiate the check. Defendant did not, however, move to set aside the charging lien or in any way challenge the charging lien. Michigan law has long-recognized that attorneys’ charging liens “automatically attach to funds or a money judgment recovered through the attorney’s services.” *George v Sandor M Gelman, PC*, 201 Mich App 474, 477; 506 NW2d 583 (1993). A charging lien

is an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit. The attorney’s charging lien creates a

lien on a judgment, settlement, or other money recovered as a result of the attorney's services. [*Id.* at 476 (citations omitted).]

As this Court noted in *Mahesh v Mills*, 237 Mich App 359, 361 n 1; 602 NW2d 618 (1999), an attorney's charging lien is an equitable right inherent in the judgment. However, in this case, plaintiffs did not move to enforce their lien on the judgment, defendant did not move to challenge the lien on the judgment, and the settlement check in payment of the judgment was not negotiated. Thus, Green Oak Township filed a complaint requesting that the court take control over the settlement funds. On May 18, 2004, the court ordered that Green Oak Township stop payment on the previously issued check and issue another check made payable to the court which would be held in escrow "until such time as [these parties] submit a written agreement, signed by all [the parties], with instructions as to the distribution of the funds or until the further order of this court or another court of competent jurisdiction." Apparently, the parties could not reach agreement and, on November 20, 2007, plaintiffs filed this lawsuit seeking a declaratory judgment and disbursement of the funds held in escrow.

Defendant argues that the six-year period of limitations applicable to breach of contract actions, MCL 600.5807(8), applies to bar plaintiffs' claim premised on their charging lien. We do not agree. MCL 600.5807(8) provides that an action to recover damages or sums due for breach of contract must be commenced within six years. But plaintiffs filed a declaratory judgment action with regard to their charging lien, not a breach of contract action. That is, plaintiffs sought to have their rights related to their charging lien—that automatically attached to and was inherent in the judgment—enforced. Defendant's reliance on *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345; 771 NW2d 411 (2009), in support of his argument is not persuasive. In that case, the plaintiff law firm brought a breach of contract action against a former client to collect unpaid legal fees; however, neither a charging lien nor judgment in favor of the former client existed. Here, the trial court properly denied defendant's motion for summary disposition premised on the argument that MCL 600.5807(8) barred plaintiffs' claim.

Next, defendant argues that his motion for summary disposition was improperly denied after the trial court erroneously concluded that the May 18, 2004 order created a constructive trust with regard to the settlement proceeds from the underlying case. Further, defendant argues, if a constructive trust was imposed, it was improper. We disagree. Decisions whether to grant or deny a motion for summary disposition are reviewed de novo on appeal. *Spiek*, 456 Mich at 337. We also review de novo a trial court's equitable decisions, including whether to impose a constructive trust. *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 496; 739 NW2d 656 (2007).

Defendant argues that the doctrine of constructive trusts does not apply under the facts of this case because (1) he did not acquire property belonging to plaintiffs, (2) he did not possess property in dispute, (3) he did not owe fiduciary duties to plaintiffs, and (4) the court's order does not explicitly impose a constructive trust, the funds were merely placed in escrow.

A constructive trust is an equitable remedy. *In re Swantek Estate*, 172 Mich App 509, 517; 432 NW2d 307 (1988). Constructive trusts arise by operation of law and the holder of the legal title is a trustee for the benefit of another who in good conscience is entitled to the beneficial interest. *Arndt v Vos*, 83 Mich App 484, 487; 268 NW2d 693 (1978). Our Supreme

Court in *Nelson v Woodworth*, 363 Mich 244; 109 NW2d 861 (1961), explained the doctrine of constructive trusts as follows:

As we have recently held with respect to the constructive trust, ‘Fraud in the inception we do not require, nor deceit, nor chicanery in any of its varied guises, for it is not necessary that property be wrongfully acquired. It is enough that it be unconscionably withheld.’ The constructive trust is purely a remedial device, ‘the formula through which the conscience of equity finds expression.’ [*Id.* at 250 (citations omitted).]

Further, in *Bruso v Pinquet*, 321 Mich 630, 639; 33 NW2d 100 (1948), the Court explained:

[W]henver the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one’s weakness or necessities, or through any other similar means, or under any other similar circumstances, which render it unconscionable for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same [*Id.* (citations omitted).]

Property need not be wrongfully acquired for the imposition of a constructive trust, it need merely be unconscionably withheld or unjustly enrich a person. *Kent v Klein*, 352 Mich 652, 657; 91 NW2d 11 (1958). A defendant is unjustly enriched when he received a benefit from the plaintiff, and it would be inequitable to the plaintiff if the defendant retained the benefit. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

In this case, defendant received and refused to negotiate the settlement check from Green Oak Township that was in his possession. Plaintiffs were included on that settlement check as payees because they were lienholders to whom defendant was indebted for the rendering of legal services. Accordingly, on May 18, 2004, the trial court ordered that Green Oak Township stop payment on that settlement check and reissue a check made payable to the court. The court also ordered that the disputed funds be held in escrow. A subsequent court declared that this previous court order imposed a constructive trust with regard to the settlement funds. We agree. Defendant’s claim that the previous court order did not impose a constructive trust is without merit. Clearly, the court became the trustee of the settlement funds after defendant refused to negotiate the settlement check to which plaintiffs were payees.

We likewise reject defendant’s argument that the doctrine of constructive trusts should not have been applied under the facts of this case. Plaintiffs held a charging lien—an equitable right to have their fees and costs secured out of the judgment and subsequent recovery. Defendant received the settlement check which included his name as well as plaintiffs’ names as payees and refused for years to negotiate the check or reach a distribution agreement with plaintiffs. Instead, defendant held on to the check, keeping it in his possession and control for years, i.e., the check was “unconscionably withheld.” See *Nelson*, 363 Mich at 250. “A court of equity, in decreeing a constructive trust, is bound by no unyielding formula as the equity of the

transaction must shape the measure of relief.” *Olitkowski v St Casimir’s Saving & Loan Ass’n*, 302 Mich 303, 309; 4 NW2d 664 (1942). On these facts, we cannot conclude that this equitable remedy was improper. The court merely secured the settlement proceeds so that the proper distribution could be determined and accomplished. Thus, even if a constructive trust was improperly impressed with regard to the settlement funds, error warranting relief has not been shown. See MCR 2.613(A). Accordingly, defendant’s motion for summary disposition premised on these grounds was properly denied.

Finally, defendant argues that the trial court “failed to provide a sufficient explanation as to [its] award of attorney fees.” Defendant claims that the court did not satisfy the requirements of MCR 2.517(A) because the court “did not indicate why a party on whose behalf two lawyers obtained a settlement of \$135,000.00 should be entitled to no recovery at all from the underlying lawsuits, giving everything to his lawyers.” This argument is without merit.

The trial court conducted an evidentiary hearing to determine the proper distribution of the settlement funds which totaled \$125,988.30. The hearing commenced on January 16, 2009, and continued on February 13, 2009, March 13, 2009, March 20, 2009, and May 26, 2009. Extensive testimony was received by the court, as well as numerous exhibits in support of plaintiffs’ claims for attorney fees and costs. In its findings of fact, the trial court referenced two billings, which spanned the course of several years, from plaintiff Roller, one for \$85,000 and one for \$36,000, which were admitted as exhibits. The court noted defendant’s claim that the bills were excessive, but concluded that plaintiff Roller was entitled to at least \$100,000. The court then concluded that plaintiff Lavan was entitled to the remainder, \$25,988.30. Lavan’s billings were also admitted as exhibits. The court then specifically found defendant’s testimony not credible “with respect to his claims that he did not realize that the defendants were working on an hourly basis on his behalf; that Mr. Lavan was going to provide his services for free and that he, for other reasons . . . believes that he is not obligated to pay the plaintiffs for their services other than what they may have already received.” The trial court clearly articulated its findings and conclusions as to the contested matter, i.e., the distribution of the escrowed funds. See MCR 2.517(A).

Further,

an attorney’s lien is paramount to the rights of the client and his creditors, even a creditor in whose favor execution has been levied, or who has acquired a lien in supplementary proceedings or in garnishment proceedings. Moreover an attorney’s lien upon the fund or property recovered is superior to the rights of the heirs of plaintiff, or to the rights of a surety for the adverse party. [*Kysor Indus Corp v DM Liquidating Co*, 11 Mich App 438, 445; 161 NW2d 452 (1968), quoting 7 CJS, Attorney and Client, § 229, pp 1176-1178.]

In light of the prevailing law, as well as the amount of the settlement compared to the fees and costs associated with the provision of plaintiffs’ legal services, it is clear why defendant received “no recovery at all from the underlying lawsuits, giving everything to his lawyers;” thus, the court fulfilled its obligations. See *Kemerko Clawson, LLC v RXIV Inc*, 269 Mich App 347, 355; 711 NW2d 801 (2005). Accordingly, this argument is without merit.

On cross-appeal, plaintiffs set forth as issue nine in their “Statement of Questions Presented,” MCR 7.212(C)(5), the claim that defendant should be required to reimburse the constructive trust for “personal debts and for monetary sanctions levied by the Livingston Circuit Court.” However, this issue was not set forth in the argument section of plaintiffs’ brief on appeal. See MCR 7.212(C)(7). Further, the issue whether and where this issue was preserved for appeal was not addressed in plaintiffs’ appeal brief. See *id.* And, after review of the record, it appears that this issue was not raised before or addressed by the lower court. Moreover, plaintiffs have not set forth the specific facts in support of this claim. A party may not leave it to this Court to search for the factual basis to sustain or reject his position, but must support factual statements with specific references to the record. See *id.*; *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). And, further, plaintiffs have failed to present any argument, supported by legal authority, addressing this issue. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Therefore, this issue was not properly preserved or presented for appellate review and is deemed abandoned on appeal. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008); *Yee v Shiawassee Co Bd of Comm’rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Next, plaintiffs argue on cross-appeal that defendant should be sanctioned for “filing and pursuing vexatious and frivolous defenses and claims.” However, to the extent that plaintiffs are referring to the lower court proceedings, again, plaintiffs have not set forth in the record whether and where this issue was preserved for appellate review. See MCR 7.212(C)(7). After review of the record, it appears that this issue was not raised before or addressed by the lower court. Therefore, the issue whether defendant should be sanctioned for “filing and pursuing vexatious and frivolous defenses and claims” in the trial court is not preserved and is deemed waived on appeal. See *Napier v Jacobs*, 429 Mich 222, 227-228; 414 NW2d 862 (1987).

Plaintiffs also argue that sanctions should be assessed by this Court against defendant for a “vexatious appeal” because defendant’s “appeal was brought with the purpose of hindering or delaying Plaintiffs without any reasonable basis to believe that there was a meritorious issue to be determined on appeal” See MCR 7.216(C). However, MCR 7.211(C)(8) provides that a request for damages under MCR 7.216(C) must be made in an appropriate motion and a brief on appeal does not constitute such a motion. See *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 78; 755 NW2d 563 (2008). Thus, this request is denied.

Affirmed. Plaintiffs are entitled to tax costs as the prevailing parties on appeal. See MCR 7.219(A).

/s/ Stephen L. Borrello

/s/ Mark J. Cavanagh

/s/ Donald S. Owens