

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MEISNER & ASSOCIATES, P.C.

Plaintiff-Appellant,

V

DONALD A. KRISPIN and ISLAND LAKE  
NORTH BAY ASSOCIATION,

Defendants-Appellees.

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UNPUBLISHED

June 24, 2014

No. 312051

Oakland Circuit Court

LC No. 2011-116247-CZ

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's opinion and order granting defendants' motion for partial summary disposition in this action to recover attorney fees. We reverse and remand.

**I. UNDERLYING FACTS**

This is an action to recover attorney fees pursuant to a litigation retainer agreement between plaintiff law firm and defendant Island Lake North Bay Association (defendant). Codefendant Donald A. Krispin (Krispin) is an attorney and president of defendant Association.

The parties entered into a general retainer agreement in April 2007, which included a provision that a separate fee arrangement would be established should a major claim on behalf of or against defendant arise. In April 2008, plaintiff prepared a litigation retainer agreement for plaintiff's representation of defendant in construction defect litigation against defendant's developer, Toll Brothers. Pursuant to its agreements with defendant, plaintiff filed a construction defect lawsuit against Toll Brothers. Plaintiff represented defendant in the litigation through June 4, 2010. Plaintiff alleges that on April 5, 2010, defendant retained the law firm of Kerr, Russell & Weber (KRW) to replace plaintiff and represent defendant in the Toll Brothers litigation.

Plaintiff filed this action to collect legal fees against defendant and codefendant Krispin, alleging breach of contract, account stated, quantum meruit/unjust enrichment, tortious interference, deceit and defamation claims. Plaintiff sought damages of \$375,000 based upon its expected recovery in the underlying action. Alternatively, plaintiff sought the greater of 10 percent of the value of any recovery defendant obtained in the litigation, as set forth in the

litigation retainer agreement, or \$99,360 for approximately 994 hours of legal work, plus interest, attorney fees, and costs.

The parties' litigation retainer agreement included provisions for both hourly rate fees and a contingent fee.

2. **HOURLY RATE FEES**: In addition to the contingent fee stated below, [defendant] shall pay to [plaintiff] for services rendered with regard to the prosecution of its claims against the developer, et al, collectively referred to as the "litigation", the following hourly rate fees which are less than what [plaintiff] would otherwise seek for its services for such complex and unusual litigation, and which shall remain unchanged through the duration of the litigation:

\* \*

3. **CONTINGENT FEE**: In addition to the hourly rates stated above, [plaintiff] shall pay the following contingency fee with respect to the claims asserted by it for all or whatever services are rendered commencing upon the execution of this Agreement, to wit: ten (10%) percent of all actual money, cash equivalents, and "in kind" property, services, values, savings, and/or benefits of any kind realized, paid to, and/or received by [defendant] whether by way of settlement, agreement, case evaluation award, arbitration award, judgment, alternative dispute resolution, or otherwise (hereinafter referred to as the "recovery"). The present value of all future "in kind" property, services, values, savings, and/or benefits shall be deemed realized, paid to, and/or received at the time of recovery (hereinafter referred to as "recovery date").

\* \* \*

4. **ADDITIONAL PROVISIONS APPLICABLE TO A CONTINGENT FEE**: The following shall also apply to the contingent fee payable under this Agreement:

\* \* \*

B. [Defendant] will be obligated to pay all hourly fees incurred, regardless of the total amount of same. If the hourly fees charged are less than fifty (50%) percent of the recovery, the combined hourly fees charged and contingent fee, exclusive of costs, shall not exceed fifty (50%) percent of the recovery. The contingent fee shall be reduced proportionately, if necessary, so as not to exceed the aforementioned cap. For example, if the hourly fees (exclusive of costs) exceed fifty (50%) percent of the recovery, [plaintiff] would not be entitled to the contingent fee.

Defendants moved for partial summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), seeking a ruling that plaintiff was not entitled to a contingent fee under the parties' litigation retainer agreement. Defendants asserted that the phrase "all hourly fees incurred" in Paragraph 4.B of the agreement refers to *all* hourly fees incurred by defendant, whether charged

by plaintiff or another law firm, and thus plaintiff's recovery of a contingent fee was precluded because all the hourly fees incurred by defendant exceeded 50 percent of the total recovery. Plaintiff responded that the phrase at issue refers just to the fees for plaintiff's services, and does not include the fees from any other counsel. The trial court granted defendants' motion, holding:

Defendants have established that the amount of all attorney fees it incurred was more than 50% of the total recovery. Therefore, pursuant to the clear and unambiguous language of Paragraph 4.B. of the Litigation Retainer Agreement, Plaintiff is not entitled to a contingent fee.

The trial court also denied plaintiff's motion for reconsideration of the grant of defendants' motion for partial summary disposition. This appeal ensued.

## II. ANALYSIS

Plaintiff first argues that the trial court erred by including the legal fees charged by plaintiff's successor counsel, KRW, when calculating whether the cap had been exceeded under the contingency fee provision of the parties' litigation retainer agreement. We agree.

A trial court's decision on a motion for summary disposition will be reviewed de novo by this Court. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). We review "a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Moreover, this Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

The issues raised in this appeal involve the interpretation of a contract. This Court reviews de novo the interpretation of a contract. *Johnson v QFD, Inc*, 292 Mich App 359, 364; 807 NW2d 719 (2011). Where the language of a contract is clear, its construction is a question of law for the court. *Comerica Bank v Cohen*, 291 Mich App 40, 46; 805 NW2d 544 (2010) (citation omitted). The language used in the contract should be construed according to its ordinary and plain meaning. *Id.* When reviewing a contract to determine its meaning, the court must read it as a whole to determine the parties' intent, harmonizing all of its parts as far as reasonably possible. *Id.* The court must give effect to every word, if possible. *Id.* "The law presumes that a contract has been executed for the benefit of the contracting parties[.]" *Schmalfeldt v North Pointe Ins Co*, 252 Mich App 556, 562; 652 NW2d 683 (2002).

For purposes of the issues presented here, it appears undisputed that defendant paid plaintiff legal fees of \$259,196.54 and KRW legal fees of \$258,370.75. Thus, defendant's total legal fees for the Toll Brothers litigation were \$517,567.29.

Plaintiff asserts that in determining its right to a contingency fee, the agreement does not contemplate the inclusion of the fees that defendant paid to successor counsel KRW. Plaintiff argues that the use of "hourly fees" in the agreement pertains only to those hourly fees associated with plaintiff's legal services. The litigation retainer agreement states that it is intended to "set forth [plaintiff's] fee arrangement . . . in connection with [its] representation of the . . .

Association regarding the . . . [Toll Brothers] lawsuit[.]” The agreement is between these two specific parties for this specific purpose.

The contract states that plaintiff will be charging defendant both hourly fees and a potential contingency fee and sets forth the plaintiff’s, not anyone else’s, hourly fees. Paragraph 4.B commences by expressly acknowledging that it pertains “to the contingent fee payable under this Agreement” and states:

[Defendant] will be obligated to pay all hourly fees incurred, regardless of the total amount of same. If the hourly fees charged are less than fifty (50%) percent of the recovery, the combined hourly fees charged and contingent fee, exclusive of costs, shall not exceed fifty (50%) percent of the recovery.

Paragraph 6 of the litigation retainer agreement provides that plaintiff shall invoice defendant for the hourly billings. Clearly, the only “billings” that plaintiff would or could invoice would be plaintiff’s own fees. Finally, paragraph 9 of the agreement states that defendant will still have to pay plaintiff all amounts it is owed for its work even if successor counsel should be obtained. Although the agreement does not specifically exclude the hourly fees that may be charged by a successor law firm when determining whether plaintiff may collect a contingent fee, when reading the agreement as a whole, it is clear that references to “hourly fees charged” pertain only to hourly fees charged by plaintiff for its representation of defendant in the lawsuit covered by the agreement.<sup>1</sup>

Defendant argues that, at best, the agreement is ambiguous and thus must be construed against its drafter, plaintiff. A contract is ambiguous if it can reasonably be interpreted in two or more ways. *Woodington v Shokoohi*, 288 Mich App 352, 374; 792 NW2d 63 (2010). “If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous.” *Id.* Here, the trial court did not find the parties’ agreement to be ambiguous. Instead, the trial court found that all of the legal fees incurred by defendant must be considered in determining whether plaintiff is entitled to a contingent fee because the agreement does not specifically state that the term “hourly fees” refers only to those fees charged by plaintiff. However, the trial court examined the sentence at issue in isolation and not in accordance with the terms of the contract as a whole. Applying the principles of contract construction to this litigation retainer agreement, it is not ambiguous, and therefore, need not be construed against plaintiff as the drafter.

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<sup>1</sup> We note that the agreement to sue the developer provided that defendant was obligated “to pay all hourly fees incurred, regardless of the total amount of same.” However, the contract was executed to benefit the contracting parties. *Schmalfeldt*, 252 Mich App at 562. This contract did not allow plaintiff to direct the payment and hourly retainer agreement between defendant and successor counsel, a non-party. We cannot conclude that plaintiff was obligated to provide that the fees at issue were limited to its fees and exclude fees of non-parties who were not bound by the terms of the contract. See *id.*

Furthermore, Paragraph 4.B must be interpreted in accordance with this Court's ruling in *Island Lake Arbors Condo Ass'n v Meisner & Assoc*, 301 Mich App 384; 837 NW2d 439 (2013), which interpreted an almost identically worded retainer agreement involving plaintiff and the Toll Brothers litigation. In that case, this Court found that plaintiff was entitled to recover both its attorney fees and a contingent share of defendant's recovery under the terms of the fee agreement. There, this Court noted how the agreement incorporated "Attachment A," *id.* at 388-389, which is identical to the "Attachment A" appended to the litigation retainer agreement in this case. Attachment A provides how the "hourly fees" negotiated in the contract are an integral part of the bargain for the contingency agreed upon by the parties. *Id.* at 389. This Court reasoned that "[t]he retainer agreement clearly requires Island Lake to pay Meisner an hourly rate in addition to a contingency fee. The parties stipulated that the hourly rate was 'less than what [Meisner] would otherwise seek . . . .'" *Id.* at 393. These statements clearly reflect this Court's prior determination that the agreement's phrase "hourly fees" only refers to those fees charged by plaintiff and not by anyone else.

Finally, the Court noted, with regard to the agreement's termination clause:

Construed in the context of the entire fee agreement, this paragraph lends itself to only one reasonable interpretation: termination of Meisner's employment would occasion *additional* fees. Nothing in the paragraph supports that the additional fees would thereby nullify Meisner's contractual right to claim a fee contingent upon Island Lake's recovery. [*Id.* at 395 (emphasis in original; footnote omitted).]

Similarly, in this case, the litigation retainer agreement, when read as a whole, lends itself to only one interpretation: when determining whether plaintiff is entitled to a contingent fee, only plaintiff's hourly fees are to be considered. Additional fees by a successor counsel would not apply to limit or nullify plaintiff's right to collect a contingent fee by being included in the determination of whether plaintiff's legal fees exceeded the cap. Therefore, we conclude that the trial court erred in its interpretation of the provision at issue. The trial court erred by including KRW's legal fees when determining whether the cap was exceeded under the contingent fee provision of the litigation retainer agreement. Accordingly, we reverse the trial court's grant of partial summary disposition in favor of defendants and remand for proceedings consistent with this opinion.<sup>2</sup>

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<sup>2</sup> We note that plaintiff also raised issues regarding the reasonableness of the attorney fees and the amount of the total recovery. At oral argument, the parties discussed the amount of the total recovery, whether discovery was permissible on the issue, and whether disposition of the issue was premature. The trial court did not address this argument. Consequently, it is not preserved for appellate review, *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 330 n 1; 802 NW2d 353 (2010), and should be addressed on remand.

Reversed and remanded. We do not retain jurisdiction. Plaintiff, the prevailing party, may tax costs.

/s/ David H. Sawyer

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood