STATE OF MICHIGAN

COURT OF APPEALS

PAYNE BRODER & FOSSEE, P.C.,

Plaintiff/Counterdefendant-Appellee,

v

STEPHEN SHEFMAN,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
July 22, 2014

No. 312659
Oakland Circuit Court
LC No. 2012-124985-CK

Before: MURPHY, C.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant[1] appeals by right the judgment in favor of plaintiff. We affirm.

This litigation arises from legal representation by a member of plaintiff law firm, Andrew J. Broder, in a probate matter involving defendant. Specifically, defendant's brother accused defendant of undue influence and sought to have the trust of their mother declared invalid.[2] Although defendant initially represented himself in the probate case, he entered into an engagement agreement with plaintiff because the matter was proceeding to trial before a jury. This agreement provided, in relevant part:

> In determining our fees for the services described above [the challenge to the trust by defendant's brother], we will take into account the time spent by our personnel. My billing rate is $275 per hour (which is a discounted rate as an accommodation to you). Rates for other lawyers in this firm range from $190 per hour to the hourly rate which I have described for my time. The rates of our lawyers are subject to change. If and when such a change occurs, we will advise you of our new rates, which will apply to all subsequent undertakings. I have

---

[1] Although defendant filed a countercomplaint, for ease of reference, we will use the terms "defendant" and "plaintiff."

[2] It is unclear if defendant's brother sought to invalidate the entire trust or merely an amendment to the trust. We do not have the benefit of the probate court record.

kept track of my time since you and I first met to discuss this matter a couple of weeks ago, and I will prepare a bill at the end of the month covering that time.

> You are also responsible for all expenses that we incur in the course of our representation. Costs include travel, copying, messenger services, long distance phone calls, computer research services, filing fees and other out-of-pocket expenses.
>
> We will send a monthly invoice showing the amount of our fees and expenses. Unless you have made written arrangements to the contrary, each invoice is payable upon receipt. In the event that payment of any of our statements is not received by us promptly and, in any event, within 30 days after the date of the statement, we reserve the right to discontinue providing further legal services. To be clear, our representation will be of you, individually, and not in any representative capacity. That means, of course, that the obligation to pay our fees will be yours individually, rather than that of the trust or estate of your mother.
>
> It is further agreed that, in the event litigation is necessary to collect the fees owed for services we render to you, the cost of that litigation, including attorney fees and out-of-pocket expenses, will be recoverable.

Defendant signed and accepted the terms of the engagement agreement.

With only three weeks until the scheduled trial date, plaintiff's staff began to develop the case, and attorney Broder set aside work on other cases to prepare for the trial. Although defendant submitted research and documentation to utilize at trial, Broder found it to be insufficient and performed his own research and writing. Ultimately, Broder successfully defended defendant in the probate matter. However, defendant only paid $5,000, of the amount owed for attorney fees, leaving a balance of $32,295.07. In light of the unpaid balance, plaintiff filed a complaint alleging breach of contract and account stated. Defendant denied the allegations of the complaint and filed a countercomplaint, seeking a declaration that an attorney's lien "against the interest of Defendant in and under the Trust" was invalid and unenforceable. Plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(10), and defendant opposed the motion, alleging that there were genuine issues of material fact regarding the reasonableness of the services and fees. The trial court granted plaintiff's motion, ruling as follows:

> The Court finds that summary disposition is appropriate because the parties had a Retainer Agreement in which they mutually agreed to the hourly rates, therefore there is no justification for the court to examine the reasonableness of those rates. Defendant has failed to indicate which time entries are inaccurate and has submitted no documentation that would create a genuine issue of material fact regarding liability for the amount sought. The Court finds that Counter-Defendant is entitled to summary disposition because the Claim of Attorney Lien is valid and enforceable. Finally, since the Agreement provides that in the event litigation is necessary to collect the fees owed for services, the

cost of that litigation, including attorney fees and out-of-pocket expenses will be recoverable, the Court will allow Plaintiff to submit a detailed summary of its time and expenses with its Judgment.

The trial court entered a judgment in accordance with the summary disposition ruling. Defendant now appeals.

First, defendant alleges that plaintiff's motion for summary disposition did not conform to the court rules, and therefore, the trial court erred by ruling on the dispositive motion. We disagree. "The proper interpretation and application of a court rule is a question of law, which [the appellate court] reviews de novo." *Haliw v City of Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005). The interpretation and application of a court rule is governed by the principles of statutory construction, commencing with an examination of the plain language of the court rule. *Id*. at 704-705. "The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Id*. at 706. "[I]t is a settled rule of statutory construction that where a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls." *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006). This rule of construction is utilized to construe our court rules. *Id*.

Defendant contends that plaintiff's motion was deficient because it did not delineate the arguments in separate numbered paragraphs pursuant to MCR 2.113(E)(1) and (2), and it failed to specifically identify the issues for which there claimed to be no material issue pursuant to MCR 2.116(G)(4). MCR 2.113 governs the form of pleadings and other papers and applies to pleadings, including "motions, affidavits, and other papers," MCR 2.113(A), and allegations must be made in numbered paragraphs, MCR 2.113(E). However, MCR 2.119 expressly governs motion practice and provides in relevant part:

(A) Form of Motions.

(1) An application to the court for an order in a pending action must be by motion. Unless made during a hearing or trial, a motion must

(a) be in writing,

(b) state with particularity the grounds and authority on which it is based,

(c) state the relief or order sought, and

(d) be signed by the party or attorney as provided in MCR 2.114.

(2) A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based. . . .

(3) A motion and notice of the hearing on it may be combined in the same document.

The motion practice court rule delineates the form of the motions, and it contains no express requirement that the motion be stated in numbered paragraphs. MCR 2.119(A)(1). It requires that a motion presenting an issue of law must be submitted with a brief with citation to authority. MCR 2.119(A)(2). Further, MCR 1.103 sets forth the applicability of the court rules and states, in relevant part, "Rules stated to be applicable only in a specific court or only to a specific type of proceeding apply only to that court or to that type of proceeding and control over general rules." In light of this authority, MCR 2.119, the specific rule of motion practice and the form of motions, controls over the court rule governing the general form of pleadings, MCR 2.113. See MCR 1.103; *Haley*, 476 Mich at 198. Therefore, plaintiff was not required to present the motion in numbered paragraphs as a precursor to obtaining the requested relief. Additionally, a review of plaintiff's motion indicates that the requirements of MCR 2.116(G)(4), were satisfied because it identified the issues as a contract action for legal services, the contract was unambiguous, plaintiff performed the contract, but defendant breached the agreement. This claim of error does not entitle defendant to appellate relief.

Next, defendant submits that the trial court erred by granting summary disposition prior to the close of discovery. We disagree. Summary disposition pursuant to MCR 2.116(C)(10) is generally premature if granted before discovery on a disputed issue is complete. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). However, an open period of discovery does not signify that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate, *id*., because further discovery may not present a reasonable chance of uncovering factual support for the nonmoving party's position. *Oliver v Smith*, 269 Mich App 560, 567; 715 NW2d 314 (2006). "In addition, a party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence." *Marilyn Froling Revocable Living Trust*, 283 Mich App at 292. Rather, the opposing party must submit affidavits in accordance with MCR 2.116(H) presenting probable testimony to support its position. *Id*. at 292-293.

In the present case, defendant noted that there was six weeks remaining prior to the close of discovery. Defendant further alleged that *plaintiff* failed to demonstrate that further discovery would not develop support for the defense. However, the burden does not rest upon plaintiff, as the moving party, but rather, defendant bears the burden of establishing that further discovery will present factual support in support of his position. *Id*. Additionally, defendant failed to identify the disputed issue and evidence that would be presented during the discovery period to support his position. *Id*. Accordingly, this claim of error also fails.

Defendant contends that the trial court erred by granting plaintiff's motion for summary disposition because genuine issues of material fact existed. We disagree. A trial court's ruling regarding a motion for summary disposition presents a question of law subject to de novo review. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). Initially, the moving party must support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Once satisfied, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id*. "The nonmoving party may not rely on mere allegations or denials in the pleadings." *Id*. The documentation offered in support of and in opposition to the dispositive motion must be admissible as evidence. *Maiden v*

Rozwood, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Mere conclusory allegations that are devoid of detail are insufficient to create a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362, 371-372; 547 NW2d 314 (1996). When an opposing party provides mere conclusions without supporting its position with underlying foundation, summary disposition in favor of the moving party is proper. See *Rose v National Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002).

Defendant argues that the court erred in granting summary disposition of the full sum of requested attorney fees because the charged services exceeded the scope of the agreement. We disagree. The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Indus, Inc v Hobbs Int'l Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). "The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation." *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). To form a contract, the acceptance must be unambiguous and in strict compliance with the offer. *Pakideh v Franklin Commercial Mtg Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). "[C]ontracting parties are at liberty to design their own guidelines for modification or waiver of the rights and duties established by the contract.[.]" *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003). Michigan law presumes that one who signs a contract knows its nature and understands its contents. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 184; 405 NW2d 88 (1987). The purpose of this rule is "to preserve the integrity and stability of written instruments." *Id*. The failure to read the contract is not a defense to enforcement of the contract terms. *Watts v Polaczyk*, 242 Mich App 600, 604; 619 NW2d 714 (2000). The Michigan Rules of Professional Conduct (MRPC) provide that a lawyer shall not handle a legal matter "without preparation adequate in the circumstances," MRPC 1.1(b), and further indicate that a lawyer "shall exercise independent professional judgment," MRPC 2.1. The attorney has the duty to determine trial strategy and to use reasonable skill, care, and discretion in representing the client. See *Simko v Blake*, 448 Mich 648, 660; 532 NW2d 842 (1995).

The engagement agreement in the present case expressly provided that plaintiff's lawyers would charge an established fee rate, albeit discounted as a professional courtesy, for the time expended on the case, and that defendant was responsible for all expenses incurred in the course of the representation. Defendant, a licensed attorney, signed the engagement agreement without qualification. Although defendant contends that plaintiff exceeded the scope of the engagement agreement by performing additional research and writing, the contract did not contain any such language of limitation. Moreover, such a limitation on plaintiff's services would conflict with the rules of professional conduct governing preparation and the exercise of professional judgment. See MRPC 1.1(b), 2.1; *Simko*, 448 Mich at 660.

In his deposition, defendant was presented with the bills submitted by plaintiff law firm and acknowledged that he had "no reason to believe that they did not do what is represented on these various entries." Defendant further testified that he failed to advise "Mr. Broder not to do further research," although he felt it was outside the scope of the engagement. However, defendant failed to identify contractual language to support his position of limited representation and failed to dispute the accuracy of the billings for time expended. Defendant's subjective expectations regarding the services rendered and their reasonableness failed to create a genuine

issue of material fact when he had the ability to identify and limit the permissible services in the contract, particularly in light of his experience as a licensed attorney. Accordingly, the trial court did not err by granting plaintiff's motion for summary disposition where the nature of the representation and attorney fees were delineated in the contract. *Bandit Indus, Inc*, 463 Mich at 511.

Next, defendant contends that plaintiff could not recover attorney fees and costs expended in the trial court to collect fees from the underlying probate litigation. We disagree. Generally, attorney fees are not recoverable as an element of costs or damages unless an express legal exception exists. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). An exception exists when attorney fees are governed by the contract executed between the parties. *Id*. The courts will enforce a contractual provision for payment of attorney fees, which are considered *damages*. *Id*. Stated otherwise, "a contractual clause providing that in the event of a dispute the prevailing party is entitled to recover attorney fees is valid." *Id*. In the present case, the contract expressly provided that attorney fees and out-of-pocket expenses were recoverable to enforce the terms of the engagement agreement, and therefore, are valid.

Defendant submits that, irrespective of the contract, plaintiff cannot recover attorney fees because it did not incur attorney fees for the appearance of its attorneys in court. As noted, Michigan follows the "American rule" which prohibits an award of attorney fees unless a statute, rule, or contractual provision expressly provides to the contrary. *Watkins v Manchester*, 220 Mich App 337, 342; 559 NW2d 81 (1996). An additional exception to this rule also occurs when a party seeks to recover attorney fees as damages for having to expend money to defend because of the wrongful acts of another. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 639 n 7; 607 NW2d 100 (1999). Attorneys may not recover mediation sanctions because the purpose of the rule is to encourage settlement and place the burden of the costs of litigation upon the party who insists upon trial. *Watkins*, 220 Mich App at 344. The rule is best served when a party hires an objective attorney instead of serving as both litigant and advocate. *Id*. "[T]o allow litigant-attorneys to recover compensation for time spent in their own behalf, while not extending such a rule to nonattorneys would most likely contribute to the widespread public perception that the courts exist primarily for the benefit of the legal profession." *Id*.

The holding of *Watkins* is not applicable to the present case. First, this case falls within the exception to the American rule; the engagement agreement specifically provides that attorney fees are recoverable in the event of a breach. Second, the purpose of the rule, to avoid disparate treatment between attorneys and nonattorneys is inapplicable because the parties to the engagement agreement were attorneys. Further, a contractual provision for attorney fees represents *damages*, the measure of which, in this case, is the attorney fees and out-of-pocket expenses incurred. See *Fleet Business Credit, LLC*, 274 Mich App at 589.[3] Therefore, the trial court did not err in the award of attorney fees and costs in this context.

---

[3] Recent case law addressing attorney fees has analyzed whether an agency relationship exists. In *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423, 424; 733 NW2d 380 (2007), a pro se litigant,

Lastly, defendant asserts that plaintiff had no right to assert an attorney charging lien for services rendered to defendant in the probate action. "The charging lien 'creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services.'" *Souden v Souden*, 303 Mich App 406, 411; 844 NW2d 151 (2013) (citation omitted). Through the charging lien, the court has the inherent power to monitor the relationship between attorneys and the clients. The lien allows the attorney to secure payment for services and expenses on behalf of the client, but "it is subject to the control of the court for the protection of the client and third parties as well[.]" *Id.* at 411 (citation omitted).

In the present case, defendant challenged the propriety of the validity of the charging lien, contending that he obtained nothing of monetary value as a result of plaintiff's services. The trial court properly granted summary disposition of the lien claim raised in defendant's countercomplaint. First, as defendant acknowledged, the lien was not filed in the present case, but was sent to the successor trustee in the probate action. Thus, the appropriate forum to challenge the lien was in the probate action.[4] Second, plaintiff made a blanket assertion regarding the lack of a recovery obtained in the probate action and failed to support the assertion

---

who was also an attorney, was denied court costs and actual attorney fees for a successful action pursuant to the Open Meetings Act, MCL 15.271(4), "because an attorney is defined as an agent of another person, there must be separate identities between the attorney and the client before the litigant may recover actual attorney fees." In *Fraser Trebilock Davis & Dunlap, PC v Boyce Trust 2350*, 304 Mich App 174, 199; ___ NW2d ___ (2014), the defendants objected to the plaintiff's motion for case evaluation sanctions, contending that a law firm that represents itself is not entitled to receive an award of attorney fees pursuant to MCR 2.403(O). The *Fraser* majority examined the nature of the relationship, the language of the court rules, and the policy considerations underlying the relevant court rules before concluding that "a law firm represented by its own attorneys is not a pro se litigant for purposes of entitlement to attorney-fee sanctions under MCR 2.403(O)." *Id.* at 199-213. Those cases are not controlling here. Here, the contract expressly provided that the cost of litigation, "including attorney fees and out-of-pocket expenses" was recoverable. This term was unambiguous, and defendant accepted this offer, without qualification. See *Quality Prods & Concepts Co*, 469 Mich at 372; *Pakideh*, 213 Mich App at 640. We are not asked to construe the phrase "attorney fees" in the context of a statute or court rule with regard to a pro se litigant. Rather, the contract at issue provided that the cost of litigation was recoverable in the event litigation was necessary to collect, and the *measure* of the cost of litigation included attorney fees and out-of-pocket expenses. Indeed, contractual provisions agreeing to payment of attorney fees are deemed damages. *Fleet Business Credit, LLC*, 274 Mich App at 589. Accordingly, although defendant relied predominantly on the *Watkins* decisions, recent authority addressing this issue with regard to statutory authority or the court rules does not entitle him to appellate relief.

[4] We note that plaintiff submitted documentary evidence indicating that the probate court ordered the successor trustee to pay plaintiff for its services. Although this order was not contained in our lower court file and would normally constitute an improper expansion of the record on appeal, the information was relevant to the disposition of defendant's motion for peremptory reversal and the issue of an appeal bond. Accordingly, we may consider it, MCR 7.216(A)(4), and it further demonstrates that the lien should have been challenged in the probate case.

with documentary evidence. *Rose*, 466 Mich 470; *McCoig Materials, LLC*, 295 Mich App at 693. Although defendant prevailed in the probate proceeding, we do not have the probate court file to determine the benefits derived from plaintiff's successful representation. In light of these deficiencies, we cannot conclude that the trial court erred.

Affirmed. Plaintiff, the prevailing party, may tax costs. MCR 7.219.

/s/ Karen M. Fort Hood

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PAYNE BRODER & FOSSEE, P.C., Plaintiff-Counterdefendant-Appellee,	UNPUBLISHED July 22, 2014
v	No. 312659 Oakland Circuit Court
STEPHEN SHEFMAN, Defendant-Counterplaintiff-Appellant.	LC No. 2012-124985-CK

Before: MURPHY, C.J., and DONOFRIO and FORT HOOD, JJ.

MURPHY, C.J. (*concurring*).

I write this short concurrence simply to make clear that my position in this case is not at odds or in conflict with my partial dissent in *Fraser Trebilcock Davis & Dunlap, PC v Boyce Trust 2350*, 304 Mich App 174, 224-231; ___ NW2d ___ (2014). In *Fraser Trebilcock*, I expressed my view that a law firm was not entitled to an "attorney fee" under MCR 2.403(O)(6)(b) as a case-evaluation sanction when the firm appears pro se in the litigation, given the absence of a true attorney-client relationship as necessary to accurately characterize a fee as an "attorney" fee.

As aptly noted in the majority opinion, the so-called "attorney fees" at issue here are in the nature of damages, considering that the basis for the award was contractual. See *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). The contract language provided that, "in the event litigation is necessary to collect the fees owed for services we render to you, the cost of that litigation, including attorney fees and out-of-pocket expenses, will be recoverable." "The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). Plaintiff does not place its reliance on the attorney-fee language in the contract in order to recover the amount at issue; rather, plaintiff, which sought to recover for the time lost by its attorneys in handling the collection action, cites and relies on "the cost of . . . litigation" language. This provision is sufficiently broad to capture what have been deemed "attorney fees" attributable to the time lost by plaintiff's own attorneys in working on the collection litigation. Accordingly, my partial dissent in *Fraser Trebilcock* has no bearing on my position in this case. I respectfully concur.

/s/ William B. Murphy

STATE OF MICHIGAN

COURT OF APPEALS

PAYNE BRODER & FOSSEE, P.C., Plaintiff-Counterdefendant- Appellee,	UNPUBLISHED July 22, 2014
v	No. 312659
STEPHEN SHEFMAN, Defendant-Counterplainitff- Appellant.	Oakland Circuit Court LC No. 2012-124985-CK

Before: MURPHY, C.J., and DONOFRIO and FORT HOOD, JJ.

Donofrio, J., (concurring)

I concur in majority and agree with Judge Murphy's concurrence.

/s/ Pat M. Donofrio