IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARVIN H. SCHIFF, ESQ.	)	**CASE NO: CV 09 701734**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs	)	
	)	
BLAKE A. DICKSON, ESQ., *et al.*	)	**JOURNAL ENTRY**
	)	
Defendants.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Plaintiff Marvin H. Schiff filed this lawsuit against the defendants Blake A. Dickson and Dickson and Campbell, LLC, on August 18, 2009. The complaint alleges causes of action for breach of contract, unjust enrichment and *quantum meruit,* and conversion. The plaintiff also seeks an accounting.

On December 1, 2009, the defendants filed a motion for summary judgment. The plaintiff has filed a brief opposing that motion. The defendants have replied[1] to the opposition brief and the plaintiff then filed a sur-reply. This entry follows the court's consideration of those four filings.

[1] By way of a brief filed January 13, 2010, that is incorrectly captioned as "Defendants' Motion for Summary Judgment."

STATEMENT OF FACTS

Schiff and Dickson are both lawyers practicing in the Cleveland area and primarily representing plaintiffs in tort lawsuits. From 1998 until early 2005 they maintained a joint practice known as Schiff and Dickson, LLC. Each of the lawyers was a member of the LLC with a 50% membership interest.

In 2005, the plaintiff Schiff left the limited liability company. Because the assets of the company at the time of Schiff's departure were not easily ascertainable – many of the cases were handled for contingent fees, the amounts and timing of which are unpredictable – a redemption agreement was made that addressed, among other things, the distribution of fees received after Schiff left the firm but that were earned, at least in part, before he left.

The redemption agreement is attached as Exhibit A to the complaint. It provides, in pertinent part, as follows:

REDEMPTION AGREEMENT

> **THIS REDEMPTION AGREEMENT** (the "Agreement") is entered into as of February 4, 2005, by and among **SCHIFF & DICKSON, L.L.C.**, an Ohio limited liability company ("LLC"); **BLAKE DICKSON** ("Dickson"); and **MARVIN SCHIFF** ("Schiff").
>
> **RECITALS:**
>
> A. Schiff is the owner of 50% of the membership interests in LLC (the "Membership Interests").
>
> B. LLC desires to redeem, and Schiff desires to sell to LLC, all of Schiff's right, title and interest in and to the Membership Interests, pursuant to the terms and conditions contained in this Agreement.
>
> **NOW, THEREFORE,** . . .the parties hereto hereby agree as follows:
>
> ***
>
> 3. **Closing.** The closing . . . shall take place . . . on February 4, 2005

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9. **Covenants of the Parties following Closing.** As of and following the Closing:

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E. Upon receipt by LLC of fees generated by the cases and client matters listed on Exhibit D attached hereto and incorporated herein ("Work in Process"), the lead attorney on such Work in Process shall determine and set forth in writing (the "Percentage Certificate") the percentage (the "Shared Percentage") of the total fee that was earned with respect to such Work in Process through the Closing Date considering the totality of the circumstances, using reasonable and good faith judgment. If no member of LLC does any work on Work in Process after the Closing Date, the Shared Percentage shall be 100%. LLC shall pay to Schiff an amount equal to one-half of the Shared Percentage of net fees (i.e., less any co-counsel or similar fees and expenses) received with respect to Work in Process directly from LLC's IOLTA trust account on the same day that LLC receives its fees out of the IOLTA trust account and include with such payment an explanation of the payment in reasonable detail and a copy of the Percentage Certificate. Immediately upon receipt by the LLC of expense reimbursements with respect to Work in Process, LLC shall pay to Schiff an amount equal to 50% of such expenses that were incurred through the Closing Date. . .

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Q. As of and following the Closing, Schiff will be exclusively responsible for any and all claims of Weisman to the extent of funds paid to Schiff pursuant to Section 5(iii), which funds were being held in trust for Weisman. With respect to such funds, Schiff agrees to resolve all matters with Weisman and specifically agrees to defend, indemnify and hold Dickson and LLC harmless from any and all claims by Weisman relating to such funds. If Weisman is owed any funds beyond the funds so held in trust and paid to Schiff on the Closing Date, Schiff and Dickson agree to pay these amounts equally, each paying one-half.

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14. **Disputes.**

A. If Any party hereto (a "Disputing Party") questions or disputes the amount of any payment made to such party pursuant to this Agreement, such party shall deliver notice (a "Dispute Notice") to the party making such payment (the "Paying Party") within 30 days following receipt of such payment by the Disputing Party.

B. Upon receipt of a timely Dispute Notice, the Paying Party shall contact the Disputing Party and the parties shall make reasonable best efforts to resolve the dispute.

C. If the parties have not resolved the dispute within 30 days of receipt of the Dispute Notice by the Paying Party, then the Disputing Party and Paying Party shall promptly initiate a voluntary, non-binding mediation conducted by one of the following mediators: James Carrabine, Esq., Steven Keefe, Esq., Joseph Burke, Esq., Mark Barber, Esq., or Robert Housel, Esq., or another mediator mutually agreed upon by the parties. The parties shall bear all costs of mediation (exclusive of their own preparation and legal fees) equally.

D. If the parties cannot reach agreement within 30 days after initiation of mediation (the "Mediation Period") pursuant to Section 14(C), the dispute may be submitted for non-binding arbitration in Cleveland, Ohio conducted by one of the following arbitrators: James Carrabine, Esq., Steven Keefe, Esq., Joseph Burke, Esq., Mark Barber, Esq., or Robert Housel, Esq., or another arbitrator mutually agreed upon by the parties, but excluding the person or persons who mediated the dispute pursuant to Section 14(C). Either party can initiate arbitration by filing a written demand, provided however, that no such demand shall be made until after the expiration of the Mediation Period and any such demand made during the Mediation Period shall be deemed to have no effect. Upon such dispute being submitted for resolution, the arbitrator shall assume exclusive jurisdiction over the dispute. The arbitrator shall have no power to award any punitive or exemplary damages. The arbitrator shall have no power to alter, modify, ignore or otherwise deviate from the express terms of this Agreement, and the arbitrator shall be bound by controlling law; and unless agreed upon by the parties, the arbitrator shall not be empowered to impose equitable remedies. The arbitrator's decision shall be provided to the parties in writing and shall succinctly set forth the arbitrator's findings of fact, conclusions of law, and remedy, if any. The parties shall bear all costs of arbitration (exclusive of their own preparation and legal fees) equally. Unless a party gives notice (a "Arbitration Dispute Notice") to the other party within thirty (30) days following receipt by such party of the arbitrator's decision that such party disputes the decision of the arbitrator, the decision of the arbitrator shall be final and binding as a judgment and shall be enforceable in any court.

E. In the event a timely Arbitration Dispute Notice is given and the parties are unable to resolve any outstanding dispute, then such outstanding dispute shall be determined by litigation conducted in the Court of Common Pleas, Cuyahoga County, Ohio, in accordance with this Agreement. The parties agree that if a party disputes the decision of the arbitrator and pursues litigation, the decision of the arbitrator shall be admissible in the litigation. If the party losing arbitration pursues litigation and loses the litigation, then such party shall pay 100% of the arbitration fee in full.

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Included in Exhibit D to the redemption agreement as "work in process" were the cases of thirteen employees[2] of a ConAgra factory in Marion, Ohio. That factory produces microwave popcorn. The workers all had claims for injury as a result of exposure to a chemical used in the production of the popcorn. No fees had been paid on these cases before Schiff redeemed his membership interest in the LLC.

After Schiff's departure, the popcorn cases began to settle. With settlement came the payment of the contingent fees and the repayment of litigation costs advanced to the clients by Schiff and Dickson, LLC.

Each time a settlement was reached and a case was closed, Dickson, as required by Section 9.E of the redemption agreement, determined and set forth in a letter to Schiff the percentage of the total fee that was earned with respect to that case through February 4, 2005. With that letter, he included a check representing Schiff's share of the fee and reimbursed expenses.

All of these disbursements were made, and letters sent, on October 6, 2006, for each of the thirteen popcorn cases[3]. In the memo portion of each check Dickson included the plaintiff's name and the words "full and final payment." Schiff accepted and deposited all of the checks around October 13, 2006. However, on each of them he used a pen to scratch out the words "full and final payment" and write in the words "partial payment subject to buyout agreement of Feb. 05." He then initialed tate interlineation.

On October 12, 2006, the plaintiff, through attorney Richard S. Koblentz, sent a letter to Dickson disputing the calculation by Dickson of the shared percentage of the fees for the thirteen

[2] Catherine Blankley, Jacquelyn Austin, Zona Caskey, Brent Stevens, Reggie Wickliff, Rick Ratliff, Mark Caldwell, Beth Van Buskirk, Robert Williams, Angela Reynolds, Dianna Disbennett, Denny Miller, and Kimberly Breece.
[3] The checks were dated October 4, 2006, but the letters were dated October 6, 2006.

popcorn cases.[4] The letter includes a request for access to the case files so that Schiff may evaluate Dickson's calculation of the fee. The letter concludes with an expression of the plaintiff's desire to resolve the dispute between the parties but notes that "if that does not occur, we shall move forward under Subsection C of Section 14 to the next level of the dispute resolution process."

Dickson responded by correspondence to Koblentz the next day. In that letter he declined to discuss the substance of the dispute with Koblentz, claiming that Koblentz could not ethically represent Schiff because Koblentz had represented Dickson in the past. As to the substance of the dispute, Dickson's letter notes:

> If Marvin has a question about a division of fees, he can call me himself and talk with me about it, or he can come to my office and sit down with me in person, and discuss the issue with me. Our agreement requires us to use our reasonable best efforts to resolve the dispute. It is my position that our reasonable best efforts require an in person discussion between Marvin and I . . .
>
> I do not believe that it is in my interest, nor in Marvin's interest, to have you involved in any discussion that Marvin and I have regarding a division of fees. I do not believe that Marvin nor I would be using our reasonable best efforts to resolve any dispute over a division of fees by including you in the discussion . . . Your actions to date have been hostile and unprofessional and I have no intention of working with you further . . .
>
> Further, there is nothing in the agreement which provides that Marvin is entitled to access to my files regarding a dispute about a division of fees . . . Marvin is now my competitor as a personal injury lawyer . . . I have no intention of providing a competitor with access to my work product created after he left my firm . . .

[4] The fee on Kimberly Breece's case was not mentioned as subject to dispute until a separate letter dated November 2, 2006, but that notice was still within the 30 days required by Section 14.A of the redemption agreement.

> When Marvin contacts me, consistent with our agreement, I will need to know the basis for his claim that the division of fees is inaccurate. I have provided Marvin with a detailed explanation of the division of fees for each case. It is now incumbent upon Marvin, pursuant to our agreement, to explain why he is questioning these divisions.
>
> Please do not waste your time contacting me again. I will not work with you on this, nor any other matter.

After that letter, Koblentz and Dickson continued to exchange correspondence. Dickson maintained the position that the redemption agreement's dispute resolution process required Schiff to communicate with him directly and did not allow the use of lawyers. Dickson also continued in his insistence that Schiff had no right to review any of the case files to discover evidence supporting the claim that the fees paid were less than the fees owed.

Ultimately, Schiff's dispute of the shared percentage allocated him for the thirteen popcorn cases was never mediated or arbitrated and this lawsuit was filed.

Besides Schiff's dispute over the shared percentage of fees in the popcorn cases, this lawsuit also involves Schiff's claim against Dickson for reimbursement of money paid to Schiff's prior law firm. Before forming Schiff and Dickson, LLC, in 1998, Schiff practiced law with the firm of Weisman, Kennedy and Berris. The evidence suggests that Schiff brought to Schiff and Dickson, LLC, some of the cases he first handled while at the Weisman firm.

Because the Weisman firm apparently still claimed entitlement to fees earned by Schiff after he left Weisman, the redemption agreement between Schiff and Dickson included the distribution to Schiff of $14,363.08 that had been held in trust by Schiff and Dickson, LLC, to cover Weisman's claims. As detailed above, the redemption agreement, at Section 9.Q, allowed Schiff to "resolve all matters with Weisman" and provided that Schiff and Dickson each agreed to pay one-half of any amount owed to Weisman beyond the $14,363.08.

Schiff did not agree to a resolution of Weisman's claims until after the Weisman firm filed a lawsuit against him. On April 7, 2009, Schiff paid $45,000.00 to settle that lawsuit. Of that amount, Schiff alleges that Dickson owes him $15,318.46, *i.e.* one-half the $45,000.00 settlement after subtracting the $14,363.08 held in trust at redemption.

LAW AND ANALYSIS

Rule 56 of the Ohio Rules of Civil Procedure allows for the entry of summary judgment if the evidence in a case shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." However, a court may not enter summary judgment unless it appears from the evidence "that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

Dickson advances three reasons the defendants are entitled to summary judgment: accord and satisfaction; Schiff's breach of the redemption agreement; and that the shared percentage was correctly calculated. These arguments will be addressed in the order asserted.

A. Accord and Satisfaction.

Dickson claims that Schiff's acceptance of checks marked as full and final payment constitutes an accord and satisfaction. Accord and satisfaction is an affirmative defense and the burden of proving it rests on the defendant.[5] An accord and satisfaction may be reached either by satisfying the statute or the common law elements of an accord and satisfaction.

[5] See Civil Rule 8(C).

The applicable statute is Ohio Revised Code Section 1303.40. That section provides that where a negotiable instrument is tendered as full satisfaction of a claim that is "subject to a bona fide dispute" the claim is discharged. Moreover, O.R.C. § 1301.13 prevents the party receiving the negotiable instrument from preserving his rights to dispute the amount by cashing the check "under protest" or otherwise.

After construing the evidence in the light most favorable to the plaintiff, statutory accord and satisfaction does not apply to the facts here. By the terms of the redemption agreement, Dickson was empowered with calculating the amount of the shared percentage and was required to remit the amount calculated to Schiff with an explanation justifying the calculation. The shared percentage determined by Dickson represents the minimum amount that Schiff is owed. It may or may not represent the total amount that Schiff is owed, and the redemption agreement allows Schiff to dispute Dickson's calculation where there is a good faith basis to do so.

As a result, the amount remitted to Schiff by Dickson for the thirteen popcorn cases is not subject to bona fide dispute. What may be subject to a bona fide dispute is the amount over the remitted amount, if any, to which Schiff is entitled.

This conclusion is supported by the official comment to O.R.C. § 1303.40. The comment notes that "this section deals with an informal method of dispute resolution carried out by use of a negotiable instrument." There is no dispute that Dickson owed Schiff at least the amount he sent. The dispute is whether any more is owed, so the checks weren't sent as an "informal method of dispute resolution," they were sent as Schiff's right under the contract. Dickson cannot rely on the accord and satisfaction statute to force Schiff into either rejecting money that even Dickson agrees is Schiff's in the hope of collecting more in the future, or keeping the

money and waiving his contractual right to dispute Dickson's calculation. That result would render the contract meaningless.

Common law accord and satisfaction is similar to the statutory kind. Accord and satisfaction is a common law doctrine where there is a contract between a creditor and debtor for settlement of a claim by some performance other than that which is due.[6] Under the common law doctrine, four elements are required to have an accord and satisfaction: first, proper subject matter; second, competent parties; third, mutual assent; and fourth, consideration.[7]

In this case, no claims for other than what was due were settled by the checks Dickson sent. No claim existed when they were sent and the checks represent the amount Dickson believes is owed, not the amount Schiff believes may be owed, or some compromise amount in between. For that same reason, there is no mutual assent. Finally, since he was only paid what he was already owed, there is no consideration since Schiff did not receive anything in exchange for giving up his right to dispute the shared percentage.

The defendants have not met their burden of showing that no genuine issue of material fact exists on the affirmative defense of accord and satisfaction.[8]

B. Breach of Contract.

Dickson claims that Schiff's failure to abide by the redemption agreement's dispute resolution protocol bars him from asserting claims for additional payments.

Summary judgment for the defendants on this basis is not appropriate because it was not solely within Schiff's power to comply with the dispute resolution provisions. Those provisions, at Section 14 of the redemption agreement, first require that a disputing party deliver notice of a

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[6] *AFC Interiors v. DiCello* (1989), 46 Ohio St. 3d 1, 2.
[7] *Warner Storage v. Systemation* (1989), 64 Ohio App. 3d 1, 5.
[8] On the evidence here it appears the opposite is true: that the plaintiff is entitled to summary judgment on the affirmative defense. However, the plaintiff has not moved for summary judgment and the court will not rule on a motion that has not been made.

dispute within thirty (30) days of a payment. Schiff satisfied that step as to all thirteen popcorn cases.

The next step involves cooperation by both parties. The paying party (Dickson) is supposed to contact the disputing party (Schiff) and then both parties "shall make reasonable best efforts to resolve the dispute." Dickson interprets this section to mean that the estranged law partners are required to work personally with each other toward a resolution. Because of that belief, and because Dickson claimed that Koblentz should not represent Schiff, Dickson refused to address the substance of the dispute with Koblentz. On the state of the current evidence, a fact finder could reasonably conclude that reasonable best efforts were not used by Dickson.

The next step – mediation – is available without regard to whether "reasonable best efforts" have been used. The only time limitation in Section 14.C is that mediation may not be initiated unless a dispute has not been resolved within thirty (30) days of the notice of the dispute. The timing of mediation is not pegged to some number of days after reasonable best efforts have failed, nor is there a time limit after which mediation may not be demanded.

However, the initiation of a mediation requires the cooperation of both parties. The evidence here is sufficient to allow a fact finder to conclude that Schiff, through Koblentz, attempted to initiate mediation. As early as October 18, 2006, Dickson advised Schiff, by way of correspondence to Koblentz, that Schiff can either meet with him "in person, in accordance with our agreement, and thereby resolve any dispute, or he can sue me." Dickson's intention not to cooperate with initiating a mediation, much less an arbitration, was explicit. Since Schiff was unable to unilaterally trigger a mediation, much less an arbitration, the process stalled there because of Dickson's obstreperousness, not because of a breach by Schiff.

The motion for summary judgment cannot be granted on the basis that Schiff breached the dispute resolution provisions of the contract.[9]

C. Dickson's Claim for Summary Judgment on the Correct Amount of Fees Owed.

Dickson finally claims that, assuming the plaintiff can overcome the defense of accord and satisfaction and can show that he did not breach the agreement, summary judgment is appropriate because the shared percentage calculated by Dickson for each of the cases in dispute is correct.

This claim is premature in the absence of any discovery. Other than through Dickson's correspondence with each check, Schiff has no knowledge of exactly what work was done, and by whom, on the thirteen cases in dispute after February 4, 2005. Because evidence may exist to contradict the correctness of Dickson's calculation of the shared percentage, the motion for summary judgment cannot be granted on this basis.

For all of the foregoing reasons, the motion for summary judgment is denied in its entirety.

IT IS SO ORDERED:

_____ Date: _____

Judge John P. O'Donnell

[9] As with accord and satisfaction, the court will not enter summary judgment in the plaintiff's favor on this issue where summary judgment has not been sought.

SERVICE

A copy of this Journal Entry was sent by e- mail, this 23d day of April, 2010, to the following:

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