CV15849836 97138694

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY
GENERAL DIVISION

Noel Cummings,	**CASE NO.: CV-15-849836**
Plaintiff,	**Judge Pamela Barker**
v.	**FINDINGS OF FACT & CONCLUSIONS OF LAW**
Harvey Abens Iosue Co., LPA	
Defendant.	

In Plaintiff's Complaint, seeking declaratory judgment and injunctive relief, Plaintiff asks this Court to determine and construe the rights and obligations of Plaintiff and Defendant under a contract for legal services entered into by and between the parties on September 16, 2012 whereby Defendant would represent Plaintiff relative to her claims against her then-employer, GCRTA. Specifically, Plaintiff alleges that Defendant is not entitled to a $45,000 payment issued by GCRTA as part of the settlement of her claims against GCRTA, but only a percentage thereof.

Defendant's Counterclaim alleges that during the course of a federal court mediation where Plaintiff's claims against GCRTA were settled, Plaintiff and Defendant entered into an oral modification of the contract or a new oral agreement whereby Defendant would receive or take the entire $45,000 check as compensation for legal services rendered to Plaintiff. Alternatively, Defendant alleges that under the terms of the contract, it would receive more than $45,000 in fees or it is entitled to a lien and garnishment on every payment Plaintiff has received or will receive from GCRTA pursuant to the terms of the Settlement Agreement; and/or that under the doctrine of *quantum meruit*, it is entitled to fees for legal services performed. Defendant also asserts a claim for punitive damages based upon allegations that Plaintiff acted in

bad faith in refusing to endorse the $45,000 check and allowing Defendant to deposit it in its IOLTA account pending resolution of the fee dispute.

This matter came on for trial before the Court on October 11, 2016. Based upon the evidence adduced at the trial, to include the testimonies of witnesses and exhibits, the Court hereby issues its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On September 16, 2012 Plaintiff signed an engagement letter thereby retaining Defendant "to provide the necessary legal services surrounding her [Civil Action-Wage Discrimination Case against RTA]." Plaintiff's Exhibit 1.

2. The engagement letter provided for the payment of attorneys' fees as follows:

   a. 35% of the total proceeds collected from RTA, its agents, successors or assigns, its insurance companies or any other third party answering for the legal liability of RTA ("RTA") if the matter was settled without a trial or arbitration taking place;

   b. 40% of the total proceeds collected from RTA if the matter settled within 30 days of, or at, arbitration, mediation, or trial; or

   c. if the matter was fully tried or arbitrated, and a court or panel awarded attorney fees to Plaintiff, then Defendant would only be entitled to the legal fees RTA was ordered to pay.

3. On at least one occasion during the course of Defendant's representation of Plaintiff, and with Plaintiff's consent, a settlement demand was submitted to the Greater Cleveland Regional Transit Authority ("GCRTA") wherein attorneys' fees would be paid as a

lump-sum rather than based upon a contingency fee. Plaintiff's Exhibit 2; Transcript at p. 175:18-22.

4. GCRTA placed Plaintiff on a crisis suspension for the period January 22 through January 30, 2015. Defendant's Exhibit J; Transcript at p.140:1-7.

5. By letter dated January 28, 2015, GCRTA notified Plaintiff of a pre-termination hearing scheduled for February 2, 2015. Defendant's Exhibit J.

6. On January 29, 2015, Defendant was notified of this hearing by GCRTA's attorney, Kathleen Minahan. Defendant's Exhibit K.

7. As a result, attorney David Harvey asked Mr. Hartzell of Defendant's office to attend, and Mr. Hartzell did attend the hearing with Plaintiff. Mr. Hartzell could not technically represent Plaintiff or participate at the hearing, but could be a witness as to what transpired at the hearing. Transcript at p. 144:1-10, 18-25, 145:1-25. *See* Defendant's Exhibit K.

8. Defendant, through Mr. Harvey, notified Ms. Minahan of GCRTA that someone from Defendant's office would be in attendance for or with Plaintiff at the pre-termination hearing. Defendant's Exhibit L at p.3.

9. Through correspondence from Ms. Minahan dated January 30, 2015, attorney Harvey learned that if GCRTA terminated Plaintiff, then "the potential service credit associated with her accrued time off disappears, along with the $50K value of her sick time." Defendant's Exhibit J at p. 4.

10. Also, according to Ms. Minahan, if GCRTA terminated Plaintiff, then Plaintiff "would have been permitted to continue on the [health] plan through the end of the month in which she was terminated, and thereafter she would be offered COBRA rights[,] [b]ut she would

have to pay the premium for that," and she would have lost her personal holidays. Transcript at p. 245:18-25, p. 246:1-5.

12. On February 2, 2015 GCRTA terminated Plaintiff. Transcript at p. 123:13-14.

13. As a result of Plaintiff's firing, Defendant filed a status report with the federal court on February 3, the day before the parties were due in court for a status conference, in order to inform the court of this recent turn of events which included Plaintiff's recent termination. Defendant's Exhibit N.

14. The status conference began with a discussion between the federal court and Mr. Harvey as to whether the current complaint would be amended to include termination-related claims or whether a new separate suit was to be filed, and the timing of such actions. Transcript at p. 148:21:25, p. 149:1-2. *See* Defendant's Exhibit JJ, Interrogatory Response #38.

15. After this discussion the federal court proceeded to inquire about any potential settlement, and Judge Gwin separated the parties and proceeded to engage in efforts to effectuate a settlement of the case. According to Attorney Harvey, although the court appearance was scheduled on the docket as a status conference, anytime an appearance is made before Judge Gwin, settlement is discussed. Transcript at p. 296:13-16, p. 298:19-24, p. 246:18-24, p. 156:5-10, p. 336:1-9.

16. At no time during this proceeding did Plaintiff ever state vocally that Defendant was not representing her with respect to any potential claim for retaliation she may have had against GCRTA. Ms. Minahan's understanding was that Defendant was representing Plaintiff on her retaliation claim against GCRTA. Transcript at p. 297:12-16, p 247:14-20.

17. The first issue addressed during the settlement discussions was fashioning a manner by which Plaintiff could reach her full retirement under conditions acceptable to Plaintiff and GCRTA. Transcript at p. 298:17-25, 299:1-4.

18. As it related to this first issue, a settlement was eventually reached, which included GCRTA restoring Plaintiff's employment, which had been terminated just two days earlier; placing Plaintiff on a six-month suspension during which time she would be paid $600 per month or the minimum wage necessary to accrue OPERS credit; allowing Plaintiff to exhaust her vacation and sick time while accruing OPERS credit; and then placing Plaintiff on a final six-month suspension during which she would again receive the $600 per month minimum wage required to earn OPERS credit. Plaintiff's Exhibit 5. According to Plaintiff, she entered into the settlement agreement partly because she thought it would enable her to receive full-time service credit and obtain a pension amount equivalent to thirty years of service with GCRTA and she understood that the settlement agreement she executed on February 23, 2015 would allow her to obtain her full retirement through OPERS. Plaintiff's Exhibit 6; Transcript p. 122:12-25, p. 123:1-25.

20. According to Plaintiff, before the settlement she did not have enough OPERS credit to obtain her full retirement, and she did not have sick time, holiday time, or health care benefits since she had been terminated so she received those benefits as part of the agreed upon settlement. Transcript at p. 192:14-23.

21. Having reached this settlement framework, the issue left to be resolved at the settlement conference was Defendant's attorneys' fees. Attorney Harvey did explain to Plaintiff the difficulty of figuring out a contingency fee based on the settlement. Transcript at p.248:1-10, p.299:11-14, p. 165: 6-8. It was explained to Plaintiff that because the settlement fully vested

Plaintiff in OPERS and maintained her health insurance for approximately two years, arguably the value thereof could also be construed as "proceeds", but to avoid a complex "proceeds" determination and payment based upon future lifetime earnings, the $45,000 payment would be paid to Defendant. *See* Defendant's Exhibit A.

22. Ultimately an agreement was effectuated through Judge Gwin whereby GCRTA would pay a lump sum of $45,000 for attorneys' fees. Transcript at p. 299: 20-25, p. 300: 1-4, p. 256:25, p. 257:1-25, p. 258:4-5. Judge Gwin had presented a lump sum amount to pay for attorneys' fees and after an initial $20,000 lump sum amount had been offered and refused, Ms. Minahan had the impression that the amount had to be around $45,000 to "get it done." Ms. Minahan absolutely understood that this sum was being used to pay Defendant attorneys' fees. Transcript at p. 299: 20-25, p. 300: 1-4, p. 256:25, p. 257:12-25, p. 258:4-5. According to Ms. Minahan, if GCRTA had believed that Plaintiff was going to receive any portion of this $45,000.00, it would have been a "tough sell" for GCRTA. Transcript at p. 258:6-16.

23. Attorney Harvey told Plaintiff that he would take the $45,000 check because it would be difficult to calculate his attorney fees based upon Plaintiff's sick time and vacation. Transcript at p. 158:6-13. Attorney Harvey reiterated before Judge Gwin and at the court house that a contingency fee on the full amount of proceeds collected would be difficult to ascertain and likely a much higher amount than the $45,000 agreed to. *See* Defendant's Exhibit A.

24. Plaintiff's witness, OSBA Employment Law Specialist/Attorney Dennis Niermann, settled a case with similar facts that included his client returning to work and Mr. Niermann receiving a lump-sum attorney fee award from his client's employer. Transcript at p. 89:13-16.

25. Plaintiff did not voice any objections when Mr. Harvey told her and reiterated to her that he would take the check. Transcript at p.159:2-7; *See* Plaintiff's Exhibit 2, and Defendant's Exhibit A.

26. During the negotiations that took place in Judge Gwin's chambers and when placing the terms of the settlement agreement with GCRTA on the record, Plaintiff never expressed any concerns with the $45,000.00 payment going to Defendant as its attorney fees. *See* Plaintiff's Exhibit 5 and Transcript at p.301:22-25, p.159:2-7, p.165:11-12.

27. During the February 4, 2015 hearing when the settlement terms were placed on the record, Judge Gwin stated that as part of the settlement GCRTA would pay to the Plaintiff the lump sum of $45,000. Ms. Minahan agreed that at this hearing Judge Gwin did not mention or discuss the distribution of the proceeds or attorneys' fees, but according to her, they were resolving issues as between GCRTA and Plaintiff and not as between Plaintiff and Defendant, and they were focused upon or trying to ensure that the two adverse parties, i.e., Plaintiff and GCRTA, understood as between them what the settlement was. Plaintiff's Exhibit 5; Transcript at p. 263:13-25, p. 264:1-18, p. 265:20-25, p. 266:1-21, p. 267:25-268:1-12.

28. The parties did seek and make clarifications on the record regarding the settlement and had opportunities to do so, but no mention was made on the record regarding the $45,000 lump sum being for attorneys' fees. Plaintiff's Exhibit 5; Transcript at p. 267:7-25, p. 268:1-8. Attorney Harvey acknowledged that it is better to have modifications of an agreement in writing, in certain circumstances, but in this matter "given the circumstances of what was going on this situation, [he] believe[d] that [the modification] was clear. Transcript at p. 351:13-21, p. 352:6-15.

29. Plaintiff did not voice any objections to Defendant receiving the entire $45,000.00 despite her acknowledgement that attorney Harvey told Plaintiff that Defendant would be taking the entire check before the settlement was even finalized. See Transcript at p.301:22-25, p.159:2-7, p.165:11-12, p.167:9-13, p.162:17-19.

30. Plaintiff testified that she was not under any duress on February 4, 2015. P.171:2-16.

31. Plaintiff further testified that she did not feel that Attorney Harvey misled her in any way as it relates to the contract formation occurring on February 4, 2015. Id.

32. After the settlement had been reached, Plaintiff had a further conversation with attorney Harvey as they were walking out of the courthouse and in the parking lot. See Transcript at p.303:6-25, p.304:1-13. In response to Plaintiff's question to the effect of "so the check goes to you" or "so you'll take the check" Attorney Harvey stated "yes" and again explained that a contingency on the full amount of the proceeds collected would be difficult to ascertain and likely a much higher amount than the $45,000 agreed to, and Plaintiff did not disagree with his statement. *See* Defendant's Exhibit A.

33. Again, Plaintiff did not voice any objections or concerns with Defendant receiving the entire $45,000.00. Transcript at p. 301:22-25, p. 159:2-7, p. 167:9-13, p. 162:17-19.

34. Plaintiff actually hugged attorney Harvey in the parking lot following the status conference. See Exhibit JJ at Responses to Request for Admissions Nos. 26 & 27; see also Transcript at p. 304:11.

35. The next day, February 5, 2015, Plaintiff contacted attorney Harvey and proceeded to tell him that she disagreed with Defendant's receipt of the $45,000.00. See Transcript at p.307:4-21; see also Defendant's Exhibits A & B.

36. After the phone call, attorney Harvey then wrote to Plaintiff and explained in detail what he had stated and reiterated during the conference and immediately thereafter, i.e, that the $45,000.00 was a fair sum under either the contingency fee agreement Plaintiff had signed with Defendant or the oral agreement Plaintiff had agreed to with Defendant a day before because arguably under the contingency fee agreement Plaintiff would owe Defendant more than $45,000 in attorney fees. See Defendant's Exhibit A.

37. Specifically and in detail, attorney Harvey explained to Plaintiff his position that the "proceeds" of the settlement agreement included all benefits that she would receive under the settlement to include: "Direct cash proceeds" delineated as suspension pay, payout with service credit of accrue sick time, vacation, and personal time, and the $45,000 payment; and potentially or arguably "Indirect non-cash proceeds" to include the value of or payments made by GCRTA to continue Plaintiff's health insurance for about 2 years, and an "[i]ndeterminable proceed amount equaling the value of having th[e] entire two-year settlement period count as OPERS" so as to allow Plaintiff to fully 30 year vest into OPERS. Under his calculations, Attorney Harvey estimated that discounting the value of Plaintiff fully vesting in OPERS, the actual monetary payments to be made by GCRTA under the settlement agreement would total approximately $128,499. *See* Defendant's Exhibit A.

38. Attorney Harvey explained that because GCRTA had terminated Plaintiff, but for the settlement agreement, Plaintiff would not receive sick pay that she had accumulated; the suspension payments she would be receiving; personal holiday/vacation pay; and GCRTA's

payments or contributions to maintain her health care benefits. Defendant's Exhibit A; Defendant's Exhibit L; Transcript at p.179:7-25, p.180, p.181:1-13, p.245:18-25, p.246:1-5.

39. Attorney Harvey further advised Plaintiff that, in light of the fee dispute, that she should endorse the check and allow Defendant to hold the disputed funds in Defendant's IOLTA account. Defendant's Exhibit A

40. Plaintiff interpreted the terms of the engagement letter to mean that she was entitled to 60% of the $45,000 check and Defendant was entitled to 40% of the $45,000 check; in other words, the $45,000 check constituted the "total proceeds" of the settlement and the contingency fee agreement applied thereto. Defendant's Exhibit B.

41. On May 27, 2015 Plaintiff wrote to Judge Gwin asking him to clarify the Court's intention with respect to settlement proceeds within the context of the agreement reached on February 4, 2015. Plaintiff's Exhibit 7.

43. When by July 4, 2015, Plaintiff had not complied with Defendant's requests that she endorse the check, Defendant moved the federal court for an order compelling Plaintiff to co-endorse the check from GCRTA and upon the granting of that motion, Plaintiff endorsed the check. Defendant's Exhibit V; Transcript at p. 319:22-25, p. 320:1, 9-14. Defendant's Exhibit JJ, Response to Request for Admission No. 31.

44. The value or dollar amount of the benefits Plaintiff received pursuant to the settlement agreement Plaintiff reached with GCRTA actually total $114,099.00, computed as follows: $48,001.75 of sick pay; $870.78 attributed to "Personal Holiday Pay"; $7,200.00 attributed as suspension payments; $12,937.46 in contributions made by GCRTA for Plaintiff's health care benefits; and the disputed $45,000.00 lump-sum payment. Transcript at p.214:14-22, p.221:17-24, p. 222:1-2, p. 231:13-25, p.232:1-12, p. 260:14-25: p.261:1-20, p.179:11-23; p.

180:9-25, p. 181:1-7. Plaintiff's Exhibit 6; Defendant's Exhibits MM, QQ. Any monetary value associated with Plaintiff being able to obtain or vest in her full 30 year retirement is not included in this calculation and at trial, Defendant did not assert or present any evidence that it should be.

45. These benefits would not have been received by Plaintiff but for the settlement agreement with GCRTA. Transcript at p.179:11-25, p. 180:22-25, p. 181:1-7.

46. Plaintiff admitted to receiving all payments due from GCRTA under the Settlement Agreement. *See* Defendant's Exhibit JJ, Response to Requests for Admissions Nos. 39, 40 and 42.

47. All payments already received by Plaintiff and required to be made to Plaintiff by GCRTA pursuant to the Settlement Agreement total $114,099.99 and 40% thereof is $45,603.99.

48. On August 5, 2015, Plaintiff filed a motion in federal court asking it to review the Settlement Agreement, and arguing that the terms conflicted with the definition of "earnable salary" under R.C. 145.01(R)(2)(h). *See* Opinion and Order dated September 28, 2016, a copy of which was filed with this Court.

49. It was pursuant to written inquiries made to, and information provided by, Plaintiff's current counsel, Lawrence Mays, by letters dated July 15, 2016 and August 1, 2016, that OPERS advised him and ultimately, Plaintiff, that "the monthly amount of $600.00 paid to Ms. Cummings per the terms of the Settlement Agreement and Release and the payments for accrued personal leave, sick leave, and vacation are made other than in the year that the leave accrued do not meet the definition of earnable salary and any employee and employer contributions remitted to OPERS on these payments are unauthorized." Plaintiff's Exhibits 8, 9 and 11.

50. Based upon this information from OPERS, Plaintiff filed with the federal court a Motion to Vacate the February 4, 2015 dismissal order, asking it to rescind the Settlement Agreement and reinstate her Complaint. Judge Gwin denied the motion as untimely and for the additional reason that Plaintiff had made a unilateral mistake in entering into the Agreement, despite having retained her own counsel, Lawrence Mays, specifically to review it and thereby confirm what constituted "earnable salary." *See* copy of the September 28, 2016 Opinion and Order filed with this Court. *See, also,* Defendant's Exhibit JJ, Response to Request for Admission No. 19.

II. CONCLUSIONS OF LAW

A. The meaning of the terms "proceeds" and "mediation" as used in contract.

The terms "proceeds" and "mediation" are not defined in the contract or fee agreement. Therefore, the Court must give those terms their plain and ordinary meaning. *Point East Condo v. Cedar House Assn.* (Cuyahoga Cty. 1995), 104 Ohio App.3d 704, 663 N.E.2d 343, 1995 Ohio App.3d 2145; *Saydell v. Geppetto's Pizza & Ribs* (Cuyahoga Cty. 1994), 100 Ohio App.3d 111, 652 N.E.2d 218; *Statler Arms, Inc. v. APCOA, Inc.*, 92 Ohio Misc.2d 45, 700 N.E.2d 415, 1997 Ohio Misc. LEXIS 324). "It is common practice to resort to dictionaries as the best source for establishing the ordinary meaning of contractual terms." *Statler Arms, Inc. v. APCOA, Inc.*, 92 Ohio Misc.2d 45, 61, citing *Rite Aid of Ohio v. Marc's Variety Store* (1994), 93 Ohio App.3d 407, 638 N.E.2d 1056 and *Andrews v. Tax Comm.* (1939), 135 Ohio St. 374, 21 N.E.2d 106.

Webster's Dictionary, 2d Ed. defines the term "proceeds" to mean "something that results or accrues". The *Merriam-Webster Dictionary* defines it as "the total amount or profit derived from a sale or transaction." *West's Encyclopedia of American Law, 2d Ed., Copyright 2008* defines the term "proceeds" to include "the yield, income, money or anything of value produced

from a particular transaction." According to the *Merriam-Webster Dictionary,* synonyms of the term "proceeds" include gains, earnings, income, and the total amount brought in. The term "proceeds" has been judicially defined as the equivalent of income. *Willis v. Holcomb*, 83 Ohio St. 254, 94 N.E.486, 1911 Ohio LEXIS 132.

The Court finds that the money or payments that Plaintiff has received from GCRTA for sick pay, holiday pay, and suspension pay, as well as the health insurance premiums or contributions paid by GCRTA, constitute "proceeds" as that term is used in the contract or fee agreement, since this income or money received/paid resulted from a transaction, i.e., the settlement agreement. But for the settlement on February 4, 2015, Plaintiff would have lost or would not have received these payments.[1]

Defendant has not argued that any monetary value of Plaintiff being able to obtain full retirement status/benefits under the settlement agreement is part of the "proceeds" and did not produce any evidence of any such monetary value. Indeed, any such value is not being considered by this Court as part of the "proceeds" as that term is used in the contingency fee agreement. Since it is not being considered as "proceeds", the fact that one of the purposes of the settlement, i.e., Plaintiff obtaining her full 30-year retirement through OPERS, has been frustrated, albeit by Plaintiff/her counsel, is not relevant.

Black's Law Dictionary, 2d Ed., defines the term "mediation" to mean: "Intervention; interposition; the act of a third person who interferes between two contending parties with a view

[1] Attorney Dennis J. Niermann testified on behalf of Plaintiff that contingency fee agreements that he has prepared or reviewed have never been interpreted to include what he termed non-monetary benefits and should not be so construed because such benefits are earned by the employee or client and not by the lawyer. This opinion testimony was offered on one of the ultimate issues or conclusions to be made by this Court. Plaintiff offered Attorney Niermann's testimony as expert testimony. However, his testimony did not assist the Court as the trier of fact or in deciding this ultimate issue. While fee agreements that Attorney Niermann has prepared or reviewed may not have been interpreted to include what he described as "non-monetary benefits", the following remains. First, those other contingency fee agreements and the specific terms thereof are not before this Court. And, more importantly, the facts and circumstances to which the terms of those contingency fee agreements were applied are not before this Court.

to reconcile them or persuade them to adjust or settle their dispute." The Court finds that the February 4, 2015 conference wherein Judge Gwin, as the third person or neutral who effectuated the settlement by persuading the parties to resolve their dispute, constituted a "mediation" as that term is used in the contract or fee agreement.

B. An oral agreement regarding the $45,000.00 existed between the parties.

Plaintiff's Complaint for declaratory judgment and injunctive relief and Defendant's claims set forth in Counts II and III are predicated on the parties' contingency fee agreement. Before the Court potentially reaches that issue, the Court must first consider Defendant's first cause of action set forth in its Counterclaim,, which is that a binding, oral modification of the fee agreement or a new oral agreement between Plaintiff and Defendant occurred on February 4, 2015, pursuant to which Defendant would receive the entire $45,000 now in dispute.

Defendant has the burden of proving the existence of the oral agreement by a preponderance of the evidence. In determining whether or not an oral modification of the contingency fee agreement or a new oral agreement was entered into by and between Plaintiff and Defendant on February 4, 2015, this Court is guided by the following.

> A contract cannot be modified unilaterally, but rather must be mutually consented to by both parties. *Fraher Transit, Inc. v. Aldi, Inc.*, 9th Dist. Summit No. 24133, 2009-Ohio-336, ¶12, quoting *Nagle Heating & Air Conditioning Co. v. Heskett*, 66 Ohio App.3d 547, 550, 585 N.E.2d 866 (4th Dist. 1990). A written contract may be amended if the oral amendment has the essential elements of a binding contract. *Fraher* at ¶12. Verbal modification of an existing contract must rest on new consideration "or must have been so far executed or acted upon by the parties that a refusal to carry it out would operate as a fraud upon one of the parties." *Id.*
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> ***Consideration is a bargained for exchange between parties. [Citations omitted.] Consideration can either be a detriment to the promise or a benefit to the promisor. *Id.* A promise to do what one is already bound to do is not sufficient consideration for a new contract. *Shannon v. Univeral Mtge. & Discount Co.*, 116 Ohio St. 609, 621, 157 N.E. 478, 5 Ohio Law Abs. 366 (1927). ***

> ***
> A contract is a promise or a set of promises that can be enforced when one person fails to fulfill the promise. *Kostelnik v. Hellper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, citing *Pawlowski v. Pawlowski*, 83 Ohio App.3d 794, 798-799, 615 N.E.2d 1071 (10th Dist. 1992). A contract consists of an offer, acceptance, and consideration. *Id.*, citing *Perimuter Printing Co. v. Strome, Inc*, 436 F.Supp. 409, 411 (N.D.Ohio 1976). Consideration is bargained for legal benefit or detriment. *Id.* "A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." *Id.*, citing *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369, 575 N.E.2d 134 (1991). "Terms of an oral contract may be determined from words, deeds, acts, and silence of the parties." *Id.* at ¶15, citing *Rutledge v. Hoffman*, 81 Ohio App. 85, 49 Ohio Law Abs. 129, 75 N.E.2d 608 (1st Dist. 1947), paragraph one of the syllabus.

Cupside Props. v. Earl Mech. Servs (6th Dist. No. L-14-1253, Lucas Cty.), 2015-Ohio-5019, ¶¶45-47, 53 N.E.3d 818, 2015 Ohio App. LEXIS 4847. *See, also, Depompei v. Santabarbara*, (Cuyahoga App. No. 101163), 2015-Ohio-18, ¶21, 2015 Ohio App. LEXIS 10.[2]

Having considered the evidence, to include the credibility of the witnesses, the Court concludes that the preponderance of the evidence does establish:

1.) an offer by attorney Harvey to Plaintiff occurred whereby Defendant would receive the $45,000.00 as its attorneys' fees due to what he advised Plaintiff would be the difficulties in calculating the "proceeds" to include not only monetary payments to or on Plaintiff's behalf, but also arguably or perhaps the value of Plaintiff's full retirement, and a hearing or proceeding associated therewith, so as to apply the percentage pursuant to the agreement;

2.) Plaintiff's acceptance of attorney Harvey's offer since she was fully aware of Defendant's offer or proposal and acquiesced to it by never voicing any objection on February 4, 2015, despite the fact that all issues related to Plaintiff's claims against GCRTA were being

[2] In *Depompei v. Santabarbara*, at ¶21, the Court explained: "A contract is defined as a promise, or a set of promises, that is actionable upon breach. [Citations omitted.] A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract. [Citation omitted.] The existence and the terms of an oral contract are issues for the trier of fact, and an appellate court will not reverse the trial court's decision when it is supported by some competent, credible evidence. [Citation omitted.] These terms may be determined from the parties' words, deeds, and acts, as well as their silence. [Citation omitted.]

resolved that day and even after attorney Harvey confirmed to her that he "would take the check" and the fees owed pursuant to the fee agreement were likely to be much higher than the $45,000 agreed to. See e.g., *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.*, 54 Ohio St. 2d 147, 153 (1978), which held that silence can indicate acceptance ("It is clear that Ohio Bell was justified in believing that the offeree had accepted the terms and conditions of the * * * agreement. Not only did the doctor not notify Ohio Bell of any proposed changes, through his silence he demonstrated a willingness to accept the service * * *. As set forth in Corbin on Contracts, *supra,* at page 321: 'Frequently, services are rendered under circumstances such that the party benefited thereby knows the terms on which they are being offered. If he receives the benefit of the services in silence, when he had a reasonable opportunity to express his rejection of the offer, he is assenting to the terms proposed and thus accepts the offer.'"); and

3.) consideration in the form $639.99, or the difference between the $45,000 lump-sum attorneys' fees payment and the amount of $45,639,99 that would otherwise be owed under the fee agreement, or stated differently, a benefit to Plaintiff as she does not have to pay any more attorneys' fees to Defendant out-of-pocket and a detriment to Defendant, which actually receives less than what Defendant would otherwise be entitled to under the parties' contingency agreement. Cf. *Cuspide Props., Ltd. v. Earl Mech. Servs., Inc.*, *supra*, at ¶46, wherein the court noted that consideration also consists of "either [] a detriment to the promisee or a benefit to the promisor."

Indeed, the following evidence demonstrates to this Court that there was a meeting of the minds whereby, or it was understood by Plaintiff, attorney Harvey and Ms. Minahan that, the $45,000 check was being issued to pay attorneys' fees:

1.) Ms. Minahan's testimony that if GCRTA believed that any portion of those funds would be received directly by Plaintiff, then it would have been a "tough sell" for GCRTA to agree to pay the $45,000;

2.) prior to February 4 2015, Plaintiff had issued a settlement demand whereby Defendant's attorneys' fees were not contingent on the proceeds Plaintiff would receive pursuant to that demand;

3.) Plaintiff's own actions following the conclusion of the proceedings on February 4, 2015, including hugging attorney Harvey in the parking lot, all of which demonstrate that Plaintiff was satisfied on February 4, 2015, with the settlement, including Defendant taking the check or receiving the entire $45,000.00;

4.) the testimony of Plaintiff's own expert, who testified to settling a case in circumstances similar to the one *sub judice*, wherein his client's termination was rescinded and the expert received a lump-sum attorney fee amount in lieu of a prior-agreed upon contingency fee; and

5.) Plaintiff's attempted unilateral repudiation of the contract the next day, which not only establishes the existence of a binding oral agreement but a breach of that agreement.[3] Cf. *Int'l Union of Operating Eng'rs, Local 18 v. CNR Trucking*, 8th Dist. No. 98935, 2013-Ohio-2094, ¶16.

The Court, therefore, concludes and declares that the preponderance of the evidence shows a meeting of the minds sufficient to constitute a valid, binding contract between Plaintiff and Defendant regarding the disposition of the $45,000.00. Cf. *Depompei v. Santabarbara*, 8th Dist. No. 101163, 2015-Ohio-18.

[3] The Court notes that during the course of the proceedings, Plaintiff previously had raised an affirmative defense of duress, but at trial she testified that she was not under duress.

The Court further concludes and declares that Defendant is entitled to the full $45,000.00 pursuant to the agreement reached between the parties on February 4, 2015.

The Court further finds that Defendant is entitled to prejudgment interest at the statutory rate of 3% from February 24, 2015, through August 10, 2015, upon the full $45,000.00, which totals $617.67.

In addition, the Court finds that Defendant is entitled to prejudgment interest at the statutory rate of 3% from August 11, 2015, through the date of judgment on the $27,000.00, which Plaintiff continued to deny Defendant's right to access.

In so ruling, the Court finds and declares that Plaintiff is not entitled to relief on her claims against Defendant as the contingency agreement between the parties does not control the disposition of the disputed funds.

The Court's ruling on this issue makes moot Counts II and III set forth in Defendant's Counterclaim.

C. Defendant has not established that Plaintiff acted in bad faith and therefore, Defendant is not entitled to punitive damages

In order to prevail on its claim for bad faith against Plaintiff, Defendant must establish the merit of its claim by a preponderance of the evidence. Under Ohio law, bad faith is the lack of good faith and encompasses, among other things, a dishonest purpose or a conscious wrongdoing; and/or breach of a duty through an ulterior motive or ill will. *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 276 (1983). "The issue as to whether an act was done in good faith or in bad faith is primarily a question of fact. It involves the question of intent and may require a determination of a state of mind. Motive may be highly important. Circumstantial, as well as direct, evidence is to be considered. Inferences may, of course, be drawn by the finder of factual

issues and credibility questions may be of great importance." *Cole v. Puritan Life Ins. Co.*, 1st Dist. No. C-75024, 1976 Ohio App. LEXIS 7224, at *9 (February 2, 1976).

The evidence does demonstrate that Plaintiff, despite repeated requests from Defendant to do so, did not endorse the check until she was ordered to do so by Judge Gwin, and despite her belief or interpretation of the fee agreement to mean that Defendant was entitled to at least $18,000.00 of the disputed $45,000.00. However, Plaintiff did make some effort to evaluate the situation by writing to Judge Gwin. And, although Defendant asserts that Plaintiff failed to testify or provide any evidence for why she refused to endorse it, the record does not support this assertion. Accordingly, the Court finds or concludes that the evidence does not support a finding of bad faith or an award of punitive damages.

D. Conclusion

The Court, therefore, enters judgment in Defendant's favor and against Plaintiff. In doing so, the Court declares that the parties entered into an oral agreement on February 4, 2015, regarding the disposition of the $45,000.00 lump-sum portion of Plaintiff's settlement with GCRTA. The Court, therefore, declares and finds that Defendant is entitled to receipt of the full $45,000.00. The Court's finding, therefore, makes moot Defendant's alternative claims for relief.

In addition, the Court enters judgment in Defendant's favor and against Plaintiff on Plaintiff's Complaint, finding that the September 16, 2012, engagement letter between the parties was superseded by the parties' oral agreement on February 4, 2015.

The Court further finds that Defendant is entitled to prejudgment interest in the amount of $617.67 on the full $45,000.00 from February 24, 2015, through August 10, 2015, and

prejudgment interest at the statutory rate of 3% from August 11, 2015, through the date of this entry.

Finally, the Court enters judgment in Plaintiff's favor and against Defendant on Defendant's claim of bad faith against Plaintiff.

IT IS SO ORDERED.

Pamela A. Barker 1-9-2017

Judge Pamela A. Barker **Dated**