STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

WILLIAM P. LYSHAK,

Plaintiff/Counter-Defendant,

Case No. 20-179100-CB

v.

Hon. Martha D. Anderson

CHELI LYSHAK & POHL and
RONALD P. CHELI,

Defendants/Counter-Plaintiffs.
_____/

OPINION AND ORDER GRANTING IN PART & DENYING IN PART
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION
AS TO PLAINTIFF'S COMPLAINT

This matter is before the Court on Defendants' Motion for Summary Disposition under MCR 2.116(C)(10). The Court, having reviewed the parties' respective submissions as well as the court record, dispenses with oral argument, pursuant to MCR 2.119(E)(3).

I.

Plaintiff William P. Lyshak ("Lyshak") and Defendant Ronald P. Cheli ("Cheli") are former law partners of Defendant law firm, Cheli, Lyshak & Pohl (the "Firm"). The Firm is a Michigan professional limited liability company founded by Cheli in 1995. In 2001, Lyshak joined the Firm, and since 2006, Cheli has been the Firm's manager.[1]

By 2006 Lyshak had a negative capital account with the Firm in the amount of $169,237.[2] As a result, the parties entered into an agreement titled "Terms Concerning Membership and Compensation" changing the terms of Lyshak's compensation (the "2007 Agreement").[3] Under the 2007 Agreement Lyshak became an "income only" member of the Firm. In 2016, both Lyshak and Cheli left the Firm to join another law practice. The Firm remains in existence to the extent that it continues to process receipts and pay expenses attributable to the Firm.[4]

[1] Defs' Motion, Exh 2, Management Agreement.
[2] Pl's Resp, Exh B, Lyshak Deposition, pp 15-16.
[3] Defs' Motion, Exh 3, Agreement.
[4] Pl's Response, Exh C, Cheli Deposition, pp 14-15.

In January 2020, Lyshak filed this action against Defendants alleging Breach of Contract (Count I), Unjust Enrichment (Count II), and Conversion (Count III). Although not specifically referenced in the Complaint, the contract at issue in this case is the 2007 Agreement.[5] Plaintiff argues that his income was reduced because of improper chargebacks and that Defendants improperly wrote off receivables. Plaintiff also contends that he is entitled to his portion of receivables the Firm continued to collect after he left the Firm.

Defendants answered the Complaint and asserted affirmative defenses, including the defenses of accord and satisfaction and statute of limitations. Defendants filed a one-count Counter-Complaint (entitled "counterclaim") for breach of contract alleging that Lyshak breached the 2007 Agreement by making unauthorized reductions to clients' bills and failing to disclose costs.

Defendants now bring the pending Motion for Summary Disposition seeking dismissal of Plaintiff's Complaint under MCR 2.116(C)(10).

II.

The factual support for a claim is tested in a motion for summary disposition under MCR 2.116(C)(10). *Universal Underwriters Group v Allstate Ins Co,* 246 Mich App 713, 720; 635 NW2d 52 (2001). The court, in reviewing a motion under MCR 2.116(C)(10), "considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citation omitted). The motion may be granted "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

III.

First and foremost, the Court notes that, in response to Defendants' motion, Plaintiff agrees to dismiss all claims against Defendant Cheli, individually, as well as Counts II (Unjust Enrichment) and III (Conversion) against Defendant Firm.[6] Consequently, the Court's analysis shall be limited to Count I (Breach of Contract) relative to Defendant Firm only.

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[5] See Pl's Response, p 2.
[6] Pl's Response, p 10.

Count I – Breach of Contract

Defendants argue that summary disposition should be granted on Lyshak's breach of contract claim for several reasons.

Accord and Satisfaction

First, Defendants assert that Plaintiff's breach of contract claim based upon the allegedly improper chargebacks is barred by the doctrine of accord and satisfaction.[7]

An accord and satisfaction is an affirmative defense. "An accord is a contract and requires a meeting of the minds of those who enter into it. A satisfaction is the discharge of the debt occurring after acceptance of the accord." *Hoerstman General Contracting, Inc v Hahn*, 474 Mich 66, 70-71; 711 NW2d 340 (2006) (citations omitted).

The parties agree that this matter is governed by MCL 440.3311.[8] The statute sets forth three requirements for the applicability of the defense of accord and satisfaction.

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[7] At deposition, Cheli testified that the chargebacks were related to costs that had been advanced and not paid back to the Firm, receivables and expenses related to Plaintiff's spouse. Pl's Response, Exh C, pp 27-28.

[8] MCL 440.3311 provides:

> (1) If a person against whom a claim is asserted proves that (*i*) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (*ii*) the amount of the claim was unliquidated or subject to a bona fide dispute, and (*iii*) the claimant obtained payment of the instrument, the following subsections apply.
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> (2) Unless subsection (3) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.
>
> (3) Subject to subsection (4), a claim is not discharged under subsection (2) if either of the following applies:
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> (a) The claimant, if an organization, proves that (*i*) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (*ii*) the instrument or accompanying communication was not received by that designated person, office, or place.
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> (b) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This subdivision does not apply if the claimant is an organization that sent a statement complying with subdivision (a)(*i*).
>
> (4) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent

"The first requirement of an accord and satisfaction is a good-faith tender to the claimant as full satisfaction of the claim." *Hoerstman,* 474 Mich at 76 citing MCL 440.3311(1)(i). The second requirement of an accord and satisfaction "is that the claim be unliquidated or subject to a bona fide dispute." *Hoerstman*, 474 Mich at 76 citing MCL 440.3311(1)(ii). The third requirement is that "the claimant must obtain payment." *Hoerstman*, 474 Mich at 77. "Once the first three requirements are satisfied, the question becomes whether the claim was discharged." *Id.* at 78.

> [T]here are two ways to discharge a claim. According to MCL 440.3311(2), a claim is discharged if the instrument, or an accompanying written communication, contains a conspicuous statement that the tender is in full satisfaction of the claim. The second, under MCL 440.3311(4), a claim is discharged if the claimant, or claimant's agent knew that the defendant tendered the instrument in full satisfaction of the claim. [*Hoerstman*, 474 Mich at 78.]

"The existence of an accord and satisfaction may be decided as a question of law if the facts of the case are undisputed and not open to opposing inferences." *Hoerstman*, 474 Mich at 70.

Plaintiff argues that the defense of accord and satisfaction fails because the debt at issue is not "unliquidated." An "unliquidated claim" is defined as "a claim in which the liability of the party or the amount of the claim is in dispute." *Id.* at 76-77. Plaintiff contends that the amount owed to him is capable of calculation under the terms of the contract. However, merely because there was a contract regarding Plaintiff's compensation does not mean the debt was unliquidated. According to Plaintiff, he "constantly complained" that Defendants improperly made chargebacks and Defendants' position was that the chargebacks would not be changed.[9] Thus, there was a dispute between the parties regarding the chargebacks and, therefore, the claim is unliquidated. See *Faith Reformed Church of Traverse City, Mich v Thompson*, 248 Mich App 487, 493; 639 NW2d 831 (2001) wherein the court, rejecting the Plaintiff's argument that a written lease for a fixed term and fixed amount meant the claim under the lease was liquidated, stated "[b]ecause there existed a good-faith dispute

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> of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

[9] See Pl's Response, Exh C, Lyshak's Deposition, pp 38-39.

regarding the amount of rent due, we conclude that the plaintiff's claim was disputed and unliquidated."[10]

In any event, as Defendants point out, under MCL 440.3311(1)(ii), the second element of an accord and satisfaction requires that the claim be "unliquidated *or* subject to a bona fide dispute." *Hoerstman*, 474 Mich at 76 (emphasis added). Here, as was noted above, there is a bona fide dispute over the chargebacks.[11] Accordingly, Defendants have established the second element under the statute.

Next, Plaintiff argues that, even if the elements of an accord and satisfaction are established, questions of fact exist as to whether the claim was discharged because there was no clear intention expressed that payments made to him were intended to be in full satisfaction of his claim. As noted above, under MCL 440.3311(4), "a claim is discharged if the claimant, or claimant's agent, knew that the defendant tendered the instrument in full satisfaction of the claim."[12] *Hoerstman*, 474 Mich at 78.

Defendants claim that Plaintiff knew that the amount tendered to him was in full satisfaction of his claim. Defendants rely on Plaintiff's deposition testimony that he complained about the chargebacks and was told by Cheli that they would not be changed.[13]

Plaintiff argues that yearly Income Allocation sheets provided to him contain notations which indicated that the compensation amounts were subject to discussion. Plaintiff attaches to his response documents titled "WPL Income Allocation" for the years 2013, 2015, and 2016.[14] The document for 2014 is titled "2014 Final Allocation."[15] These documents calculated amounts due to Plaintiff, after chargebacks and draws. The documents also included a chargeback schedule. Plaintiff relies on notations made on some of the income allocation documents to support his assertion that he believed that the amounts

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[10] In *Faith Reformed*, plaintiff landlord alleged that defendant tenants owed rent for the entire contractual period while the tenants, who had vacated the premises before the expiration of the lease, argued that they did not owe rent for the entire period because of constructive possession of the premises by the landlord. *Faith Reformed Church of Traverse City Mich v Thompson*, 248 Mich App 487, 493; 639 NW2d 831 (2001).

[11] Plaintiff does not address the "bona fide" dispute portion of MCL 440.3311(1)(ii).

[12] A claim is also discharged under MCL 440.3311(2) where the instrument, or an accompanying written communication, contains a conspicuous statement that the tender is in full satisfaction of the claim. However, that situation is not at issue here.

[13] Pl's Response, Exh B, Pl's Deposition, pp 38-39.

[14] See Pl's Response, Exh E.

[15] *Id.*

were subject to adjustment. For example, the "WPL Income Allocation" for 2013 has a notation stating: "Bill-Here are the 2013 results for you and a check for the amount due shown below. We'll talk. Ron 3/2/14."[16] The "2014 WPL Final Allocation" has a notation stating: "Bill-Here are your 2014 Alloca-tion Materials and Schedule K-1 (for 2014). Let's discuss. Ron."[17] The "WPL Income Allocation" for 2015 has a notation stating, "Bill- Here are your 2015 Financial Results. Ron 2/15/16."[18] The "WPL Income Allocation" for 2016 has no notation.[19]

The Court rejects the argument that the notations on the Income Allocation documents create a genuine issue of material fact as to whether Plaintiff knew that the payments were "tendered in full satisfaction of his claim."[20] First, the sheet for 2015 merely states "here are your 2015 Financial Results."[21] Therefore, there is nothing in those documents to indicate that the results were not final.

Furthermore, Plaintiff's deposition testimony indicates that notations did not lead him to believe that the chargeback amounts would be reduced. Regarding the 2013 statement, Plaintiff testified that he saw the note from Cheli indicating that "we'll talk" and that he [Plaintiff] talked with Cheli and "objected to the – all the write offs. You know, I complained about the receivables. That cost me money."[22] Plaintiff testified that Cheli stated he was not going to change it and "[h]e was just adamant that he wouldn't change it."[23] Plaintiff also testified that he complained about the 2014 and 2015 Income Allocation documents.[24] When asked if Cheli's responses to the complaints were consistent, Plaintiff stated "Yes, He refused to change it."[25]

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[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Plaintiff also references his deposition testimony that post-2016 he indicated to Cheli, in passing, that he was still owed money for 2016 and that Cheli responded that "he knew." Pl's Response, Exh B, p 54. However, the Court fails to see how a passing statement made at an undetermined time after the amounts were tendered is relevant.
[21] Plaintiff also asserts that notations on the 2015 Income Allocation documents state: "Charged backs do not include WPL expenses, amounts for hold time and amounts for non approved significant credits/write-offs" indicating that the schedules are not final. However, these notations do not create any impression that chargebacks will be reduced.
[22] Pl's Response, Exh B, p 47.
[23] *Id.*
[24] *Id.* at 50.
[25] *Id.*

Based on the foregoing analysis, the Court concludes that the elements of an accord and satisfaction have been established and that Plaintiff's claims for chargeback amounts for the period of 2013-2015 have been discharged under MCL 440.3311.[26]

Good Faith Argument

In a separate argument, Plaintiff asserts that Cheli, by writing off receivables, deviated from the Firm's practice of sending demand letters to clients with outstanding balances which, in Plaintiff's experience, resulted in a 90% return on collections. According to Plaintiff, the deviation from the Firm's practice demonstrates Cheli's lack of good faith in exercising his management functions. In support, Plaintiff cites MCL 450.4404(1), which states the manager of a limited liability company "shall discharge the duties of a manager in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the manager reasonably believes to be in the best interests of the limited liability company."

The Court agrees with Defendants that his argument is subject to the accord and satisfaction defense as Plaintiff's claims of invalid chargebacks are based, in part, on his assertion that receivables were improperly written off.

Moreover, the Complaint does not include a claim for a violation of MCL 450.4404 and, as Defendants note, the duty owed under the statute is owed to the company, not the individual members. See *Frank v Linkner*, 310 Mich App 169, 180-181; 871 NW2d 363 (2015), aff'd in part and rev'd in part on other grounds, 500 Mich 133 (2017). Accordingly, the Court rejects Plaintiff's argument that any lack of good faith by Cheli in exercising his managerial functions defeats the motion for summary disposition.[27]

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[26] Defendants acknowledge that Plaintiff did not receive a check for 2016 that the defense is not asserted as to amounts owed for 2016. See Defs' Motion, p 4 and Defs' Reply at p 3.

[27] Given this conclusion, it is not necessary for the Court to address Defendants' argument that the damages claimed by Plaintiff in the write-off of receivables are speculative. The Court will also not address Defendants' argument that Plaintiff is not entitled to receive any amounts for 2013 because of the expiration of the statute of limitations. This is because given the Court's ruling it is unnecessary to do so but also because Defendants have cited no authority for its argument. Defendants merely state that the limitations period is six years without citing statutory authority or any authority regarding when a cause of action for breach of contract accrues. "This Court will not search for authority either to sustain or reject a party's position. Where a party fails to cite any supporting legal authority for its position, the issue is effectively abandoned." *Schellenberg v Rochester Mich Lodge No 2225*, 228 Mich App 20, 49; 577 NW2d 163 (1998).

Amounts due for 2016

Plaintiff claims that he is entitled to be compensated for amounts that accrued and were owed to him prior to October 21, 2016, the date he left the Firm. Defendants argue that, pursuant to the plain language of the 2007 Agreement, once Plaintiff left the firm, he was not entitled to be paid any amounts. The Income Allocation sheet for the period January 1, 2016 to October 31, 2016 indicates income of $91,110 less draws of $76,432 for a total amount due to Plaintiff for that period of $14,678.[28] Defendants acknowledge that the "remaining draw" of $14,678 was not paid to Plaintiff because he was no longer a member of the Firm.[29]

The provision of the 2007 Agreement relied on by Defendants in support of their argument is included in a section of the 2007 Agreement titled "Disability or Death"[30] and states:

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[28] Pl's Response, Exh E. The Income Allocation Sheet for 2016 appears to be dated 3/28/2017.
[29] Defs' Motion, p 4.
[30] Section 4 of the 2007 Agreement states:

> 4. Disability and Death. In the event WPL becomes "Disabled" (as defined below) or dies, WPL's Membership in C&L shall then terminate. In either such event, C&L will, for a period five (5) years after the date WPL becomes Disabled or dies, in a manner consistent with the provisions of Section 1 above: continue to calculate WPL Income and WPL Draws hereunder; and pay over to WPL or his designated beneficiary, those amounts of WPL Income which are in excess of WPL Draws and other amounts chargeable against WPL hereunder.
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> A. For purposes of this Section, WPL shall be deemed to be "Disabled" if he suffers a "Disability", and continues to suffer from a Disability for a period of at least six (6) months after the first day that he begins suffering from a "Disability".
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> B. WPL shall be deemed to be suffering from a "Disability" if:
>
> (i) A court of competent jurisdiction appoints a guardian or conservator to handle the affairs of WPL.
> (ii) WPL is incapable of meeting the requirements of the work or management responsibilities he had been performing for C&L when such Disability commenced.
> (iii) WPL receives a payment under any disability insurance policy or income contract paid for by him or C&L for any purported Disability.
>
> (iv) WPL becomes eligible to receive Social Security disability benefit payments.
>
> C. If WPL, after having recovered from a period of Disability, shall again become Disabled as determined in the manner set forth above, less than six (6) months after the end of the previous period of Disability, the previous period of Disability shall be included for purposes of computing the six (6) month period of Disability described above.

> Except as otherwise provided herein, WPL [Plaintiff] shall not be entitled to any further payments from C & L [The Firm], its affiliates, employees and/or Members if he ceases to devote his full time efforts to providing legal services for C & L [the Firm] and, in that event, his Membership in C & L shall then be terminated.[31]

The "main goal in the interpretation of contracts is to honor the intent of the parties" and the best evidence of the parties' intent is the language used in the contract. *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 446; 886 NW2d 445 (2015) (citation omitted). Contracts are "read and construed as a whole" and all parts must be harmonized as much as possible. *Smith v Smith*, 292 Mich App 699, 702; 823 NW2d 114 (2011). Courts "avoid interpreting contracts in a manner that would impose unreasonable conditions or absurd results." *Bodnar v St John Providence, Inc*, 327 Mich App 203, 223-24; 933 NW2d 363 (2019).

Here the Court concludes that there is a question of fact as to the meaning of the paragraph relied upon by Defendant Firm. The provision states that Plaintiff is not entitled to further payments "if he ceases to devote his full time efforts to providing legal services for C & L." It is not clear whether term "further payments" includes amounts owed to Plaintiff at the time he left the Firm in October 2016. The paragraph links "further payments" to the time when Plaintiff ceases to provide full time legal services implying that payment is tied to services rendered by Plaintiff.[32]

> D. If a disagreement arises between C&L and WPL as to whether WPL is suffering from a Disability for purposes of the provisions of this Section 4, a conclusive determination, binding upon all parties hereto, shall be made by a majority of three physicians, one of whom shall be selected by WPL, one of whom shall be selected by C&L and the third of whom shall be selected by the other two physicians first selected. Such determination of Disability for that purpose shall be binding upon all parties to this Agreement.
>
> Except as otherwise provided herein, WPL shall not be entitled to any further payments from C&L, its affiliates, employees and/or Members if he ceases to devote his full time efforts to providing legal services for C&L and, in that event, his Membership in C & L shall be terminated. [Exhibit A to Plaintiff's Response at pp 6-7.]

[31] *Id.* at p 7.

[32] The Court also notes that denying payment for amounts owed to Plaintiff merely because he left the Firm (as did Cheli) before the distribution was made appears to impose an unreasonable condition.

Based on the foregoing, the Court concludes that summary disposition is inappropriate on Plaintiff's breach of contract claim as to amounts due to Plaintiff for the period January 1, 2016 to October 31, 2016, but not paid.

IV.

THEREFORE, IT IS HEREBY ORDERED that Defendants' Motion for Summary Disposition relative to Count I (Breach of Contract) of Plaintiff's Complaint against Defendant Cheli Lyshak & Pohl is **GRANTED IN PART AND DENIED IN PART**, pursuant to MCR 2.116(C)(10), as follows:

- **GRANTED** as it relates to payments made to Plaintiff from 2013 to 2015; and
- **DENIED** as it relates to payments allegedly owed for 2016.

IT IS FURTHER ORDERED that Plaintiff's Complaint against Defendant Ronald P. Cheli is **DISMISSED WITH PREJUDICE** based upon Plaintiff's stipulation as set forth herein.

IT IS FURTHER ORDERED that Plaintiff's Complaint against Defendant Cheli Lyshak & Pohl is **DISMISSED WITH PREJUDICE** as it relates to Count II (Unjust Enrichment) and Count III (Conversion) based upon Plaintiff's stipulation as set forth herein.

IT IS SO ORDERED.

This Order does NOT resolve the last pending matter and does NOT close the case.

/s/ Martha Anderson
September 21, 2021
HON. MARTHA D. ANDERSON
CIRCUIT COURT JUDGE

Dated: 9/21/2021.