STATE OF MICHIGAN

COURT OF APPEALS

MARGARETTE KOSINSKI, Personal Representative of the Estate of Raymond A. Kosinski, Deceased,

Plaintiff-Appellant,

v

JOHN W. MASON, *et al*,

Defendants-Appellees.

UNPUBLISHED
November 27, 2001

No. 224658
Wayne Circuit Court
LC No. 98-831587-CK

Before: Zahra, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant in this matter concerning a dispute over an alleged owing referral fee between attorneys who operated out of neighboring office space.[1] We affirm.

At the heart of this controversy is Nancy Camilleri, who lost her father, Alfred Vezina, in a 1992 bus accident. Camilleri arrived in plaintiff's office the week after her father's death and sought his assistance in probating the estate. Plaintiff claims that he recognized a potential wrongful death claim, offered to refer Camilleri to defendant, called defendant to apprise him of the situation, and subsequently walked Camilleri across the hall and introduced her to defendant. Camilleri, meanwhile, states that she became aware of both plaintiff and defendant, and the type of work they performed, during discussions with coworkers. She claims that she went to their office space intending to see both men, and that after she mentioned to plaintiff that she was next going to speak with defendant, she merely agreed to plaintiff's offer of an introduction.

The wrongful death claim defendant litigated on behalf of Camilleri settled for $500,000. Plaintiff and defendant subsequently disputed plaintiff's entitlement to a share of defendant's one-third contingency fee as a referral fee. Pursuant to MCR 2.116(C)(10), the trial court granted defendant's motion for summary disposition on plaintiff's claims of breach of implied contract, quantum meruit and unjust enrichment.

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[1] For the sake of simplicity references to the opposing parties are limited to the principals, Raymond Kosinski (plaintiff) and John Mason (defendant).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). The moving party has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Id.* We review de novo the grant or denial of summary disposition. *Spiek, supra*.

Regardless of the potential questions of fact that remained with respect either to the parties' course of dealing regarding referrals and plaintiff's entitlement to a share in this case, or to who first directed Camilleri to defendant—whether it was personal friends who identified and recommended defendant or plaintiff who "referred" her and walked her across the hall to defendant's office—there is no question of material fact on the issue of Camilleri's lack of awareness of or agreement to the alleged division of fees arrangement. Thus, summary disposition was appropriate.

MRPC 1.5(e) directs that a:

> division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the client is advised of and does not object to the participation of all the lawyers involved; and
>
> (2) the total fee is reasonable.

The comment to Rule 1.5 explains simply that "[p]aragraph (e) permits the lawyers to divide a fee on agreement between the participating lawyers if the client is advised and does not object." Camilleri, however, both by affidavit and during her deposition outright denied awareness of or agreement to a referral and fee-splitting arrangement. This satisfied defendant's initial burden of supporting his position, and the burden then shifted to plaintiff to show by evidentiary materials that a genuine issue of disputed fact existed. *Smith, supra.*

Plaintiff admitted that he never discussed an hourly rate with Camilleri nor had her sign a writing establishing a fee arrangement. His only evidence countering Camilleri's position, therefore, was the following testimonial excerpt of his deposition:

> *Q.* What did you tell Mrs. Camilleri would be the fee involved in your probate work?

> *A.* As we were discussing a possible wrongful death, I told her that if there was going to be some kind of payment for the wrongful death, that I will get paid my fees out of the referral fee.

Plaintiff contended that because he only charged Camilleri for the costs associated with probating the estate, and because she never questioned the fact that she was not otherwise billed for his services, this question and answer proved that she was sufficiently apprised of and in agreement with the attorneys' unspoken referral and fee-splitting arrangement.

We do not agree that this minimal evidence, and the contemporaneous argument regarding the circumstances, equates to a showing of Camilleri's understanding of and agreement to an otherwise unspoken division of fees arrangement. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, ___ Mich App ___; ___ NW2d ___ (#216324, rel'd 7/31/01) slip op p 4. Speculation and conjecture are insufficient. *Detroit v GMC*, 233 Mich App 132, 139; 592 NW2d 732 (1998). Here, plaintiff has presented no more than his conjecture that Camilleri understood the arrangement he claims to have proposed. This is simply not sufficient to survive a summary disposition motion.[2]

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[2] See RI-234. This informal advisory ethics opinion of the Michigan State Bar provides attorneys with guidance as to how to comply with MRPC 1.5(e). In relevant part, the opinion provides:

> Prior to the division of a fee between lawyers who are not in the same law firm, the client must be advised of the identity of the lawyers who will divide the fee, which lawyer the client should contact for information on the case, what services each lawyer will be providing on the case, and which lawyer or lawyers will be responsible for the matter.
>
> *Both the referring lawyer and the receiving lawyer are responsible to see that the client is properly advised and does not object to the participation of the lawyers.*
>
> [Emphasis added.]

Even viewing the proffered evidence in the light most favorable to plaintiff, the nonmoving party, it is readily apparent that Camilleri did not receive advice of sufficient clarity to justify even the conclusion that there may have remained a question of fact as to her understanding of the alleged arrangement.

Because no material question of fact exists regarding compliance with the requirement of Rule 1.5(e) that the client knowingly approve of a division of fees arrangement, plaintiff's claim is unenforceable and summary disposition was appropriate. Given this resolution, we need not reach the remaining issues.

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ William B. Murphy