IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

AL CARRANZA, a married man, *Plaintiff/Cross-Defendant/Appellant*,

v.

MARIO A. MADRIGAL an individual; MARTHA C. MADRIGAL,
Defendants/Cross-Defendants/Appellees,

and

BRYANT C. MADRIGAL, *Defendant/Cross-Claimant/Appellee,*

INVESTIGATION SERVICES, INC., *Intervenor/Appellee.*

No. 1 CA-CV 12-0359
No. 1 CA-CV 12-0643
(Consolidated)
FILED 3-18-2014

Appeal from the Superior Court in Maricopa County
No. CV2010-092356
No. CV 2011-004777
The Honorable Emmet J. Ronan, Judge

AFFIRMED IN PART; REVERSED IN PART

COUNSEL

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Mario A. Madrigal *In Propia Persona*
Defendant/Cross-Defendant/Appellee

MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Patricia A. Orozco and Judge Samuel A. Thumma joined.

J O N E S, Judge:

¶1 The myriad disputes giving rise to this appeal began with a wrongful death action filed by Martha Madrigal and Mario Madrigal, Sr., following the death of their son, Mario Madrigal, Jr., more than a decade ago. The wrongful death case was initially brought as a State court action but was later removed to federal court; it was followed by an action to collect attorneys' fees, a related interpleader action, a marital dissolution and an attorney disciplinary proceeding. Given that history, assignee, Al Carranza (Carranza), appeals from two superior court decisions in the fee collection action: (1) granting summary judgment in favor of Martha, and (2) denying Carranza's motion to substitute Edward Fitzhugh (Fitzhugh) as the real party in interest. For the reasons stated below, we affirm the grant of summary judgment for Martha, but reverse the denial of Carranza's motion to substitute and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 In considering the summary judgment ruling, we view "the evidence and reasonable inferences in the light most favorable to" Cararanza as the non-moving party. *See Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003).

A. The Wrongful Death Action.

¶3 In August 2003, Mario Madrigal, Jr. was shot and killed by Mesa police officers. In August 2004, Martha and Mario, Sr., then husband and wife, filed a wrongful death action against the City of Mesa. They retained Fitzhugh to represent them as counsel for a period of time but then terminated the engagement, apparently before the wrongful death action was filed.

¶4 Eventually, the Madrigals returned to and retained Fitzhugh for representation in the wrongful death claim, and in February 2005, Fitzhugh and the Madrigals entered into a written fee agreement that included two distinct contingent fee provisions. The first contingent provision provided, in part, that the Madrigals pay Fitzhugh 35% of the "total amount recovered as to any claim" as payment for Fitzhugh's services rendered. The second contingent provision provided: (1) Fitzhugh had already invested an "extensive amount of time" in the case; (2) the complexity of the case would require him to forego accepting new cases; and (3) if Fitzhugh "at any time and for any reason" did not "continue representation" of the Madrigals, the Madrigals "agree[d] to pay [Fitzhugh] twenty-five percent (25%) of all monies received by them in this case" plus costs.

¶5 In December 2005, approximately 10 months into this second period of representation, Fitzhugh filed a motion to withdraw as counsel. Fitzhugh asserted, following this second period of representation, his billing rate was $400 per hour and that he had expended 2,500-3,500 hours on the case (later Fitzhugh reduced his hourly claim to 1,500-2,000 hours).

¶6 Following Fitzhugh's withdrawal, the Madrigals hired attorney Raymond Slomski (Slomski) to represent them; the case was removed to federal court, and eventually settled. Fitzhugh then sought payment of $71,000 in costs and $680,000 in attorneys' fees; the greater sum representing 25% of the settlement he had contracted with the Madrigals to receive from the proceeds of the settlement even if he were not representing them at the time the matter resolved. On behalf of the Madrigals, Slomski paid to Fitzhugh $58,000 of the $71,000 Fitzhugh sought for costs; Slomski, however, rejected the demand for $680,000 in attorneys' fees, and properly retained in his trust account the disputed settlement proceeds, totaling approximately $695,000, pending resolution of the matter.

B. The Fee Collection Action.

¶7 In March 2010, Fitzhugh assigned to Carranza, his "long-time friend," his right to payment under the fee agreement for attorneys' fees and costs in the Madrigals' wrongful death action. Fitzhugh subsequently indicated he made the assignment to avoid having to sue former clients in his own name. Later that month, Carranza filed an action against the Madrigals to collect those attorneys' fees and costs. Carranza's suit sought to enforce the assignment of Fitzhugh's rights under the fee agreement. His complaint alleged breach of contract, breach of the implied covenant of good faith and fair dealing, and, in the event the fee agreement was not enforceable, equitable claims of unjust enrichment and *quantum meruit*.

C. The Madrigals' Divorce Action.

¶8 The Madrigals had filed for divorce in 2009 and the Decree of Dissolution issued in June 2010. Given the pendency of the fee collection action, and in that Slomski then held the disputed funds in his trust account, the Decree expressly addressed how any proceeds awarded to the Madrigals were to be allocated:

> The parties have a contingency asset of settlement funds currently being retained by an attorney. Any net sum of the settlement funds received after costs and attorneys [sic] fees are paid shall be divided 33.3 percent to [Martha], 33.3 percent to [Mario Sr.] and 33.3 percent to the minor child [Bryant].

D. The Carranza-Mario Sr. Settlement Agreement and Interpleader Action.

¶9 On February 25, 2011, Carranza and Mario Sr., in his individual capacity, entered into a settlement agreement in the fee collection action whereby Slomski was directed to release $300,000 to Carranza and Mario Sr. The Joint Notice of Settlement, however, erroneously stated that the Decree did not allocate or divide proceeds in the fee collection action. The Joint Notice of Settlement further stated, erroneously, that the Decree did not change or re-characterize the settlement funds as anything other than community property, and that, as community property, Mario Sr. had the legal right to commit his one-half interest in the settlement monies to settle with Carranza. On March 3, 2011, the trial court approved the Carranza-Mario Sr. settlement agreement.

¶10 Given the unresolved dispute over the funds then held in his trust account and the Carranza-Mario Sr. settlement agreement, on March 4, 2011, Slomski filed an interpleader action seeking resolution of the competing claims to the $695,000 he held in trust. In October 2011, the superior court consolidated the interpleader action with the fee collection action.

¶11 The fee collection action was subsequently reassigned to another judge, and in July 2011, the newly-assigned judge vacated the March 3, 2011 order approving the Carranza-Mario Sr. settlement agreement, noting the prior order potentially affected the rights of other parties, and that the court had not been fully informed of the surrounding facts and circumstances at the time of the March 3, 2011 order.

E. Intervention of Investigation Services Inc. as a Plaintiff in the Fee Collection Action.

¶12 In April 2011, Investigation Services Inc. (ISI), asserting it had provided services to the Madrigals during the pendency of the wrongful death action, filed a motion to intervene as a plaintiff in the fee collection action. ISI claimed entitlement to a share of the settlement funds in satisfaction of liens and assignments conferred to the Madrigals in exchange for services and financial support.[1] The lien agreements between ISI and the Madrigals stipulated ISI was due payment from the settlement proceeds after the claim for attorneys' fees filed by Carranza had been satisfied. In July 2011, the superior court granted ISI's motion to intervene as a plaintiff.

F. The Motion Practice Leading to this Appeal.

1. The Grant of Summary Judgment for Martha.

¶13 In July 2011, Martha, joined by ISI, moved for summary judgment against Carranza. Within her motion, Martha alleged Fitzhugh had revealed confidential client information regarding the Madrigals to Carranza, which Carranza then used against the Madrigals in a previously unsuccessful motion for summary judgment. Martha also alleged the fee agreement providing Fitzhugh 25% of the settlement of the wrongful death claim was unenforceable as it violated public policy and created a

[1] According to ISI, the lien documents indicated that both Mario Sr. and Martha agreed to pay ISI $147,000 and $55,000, respectively, from the settlement funds.

conflict of interest between Fitzhugh and the Madrigals. Carranza countered by enumerating the efforts expended by Fitzhugh on the Madrigal's behalf**.**

¶14 Following oral argument, in a January 2012 minute entry, the trial court found the fee agreement violated Fitzhugh's ethical obligations and public policy as it restricted the Madrigal's ability to discharge their lawyer and created a conflict of interest "by providing an incentive for Fitzhugh to withdraw from representation for any reason." The trial court also found the Fitzhugh-Carranza assignment was unethical and a violation of public policy. Accordingly, the trial court granted Martha's motion for summary judgment. In doing so, however, the trial court did not squarely address Carranza's equitable claims for unjust enrichment and *quantum meruit*.

2. Carranza's Motion for Substitution of Real Party in Interest.

¶15 After the filing of Martha's motion for summary judgment but prior to the trial court's ruling thereon, Carranza moved to substitute Fitzhugh as the real party in interest under Arizona Rule of Civil Procedure 17(a). In September 2011, the trial court granted Carranza's motion to substitute Fitzhugh as the real party in interest.

¶16 Martha then filed a motion for reconsideration regarding the grant of Carranza's Rule 17(a) motion. Upon reconsideration, and in the same minute entry that granted Martha's motion for summary judgment, the trial court vacated its previous order approving the substitution, finding the failure to name Fitzhugh the real party in interest was the result of a conscious decision on the part of Fitzhugh rather than an "understandable mistake."

¶17 Carranza then filed a motion for reconsideration, arguing all parties and the superior court had known Fitzhugh was the "owner of the case**,**" and that Carranza was only a "straw-man." The trial court summarily denied his motion for reconsideration. Carranza then requested a status conference and moved for a hearing pursuant to Arizona Rule of Civil Procedure 56(d), intending to discuss how the case would proceed forward and determine remaining material facts and legal issues not ruled upon by the superior court in granting summary judgment against him and pertinent to the unjust enrichment and *quantum meruit* counts. The trial court denied Carranza's motion for a Rule 56(d) hearing.

¶18 Following the trial court's entry of two separate orders addressing disbursement of the settlement monies held by Slomski, and entry of judgment resolving all claims by all parties, Carranza filed this timely appeal.

G. The State Bar Consent Agreement.

¶19 After Carranza filed his notice of appeal, the State Bar of Arizona issued a Consent Agreement that was entered into by Fitzhugh in January 2013. That Consent Agreement was the culmination of disciplinary proceedings against Fitzhugh's representation of certain clients, which included his representation of the Madrigals in their wrongful death action.[2] In exchange for sanctions,[3] Fitzhugh conditionally admitted the 25% contingent fee agreement was an unreasonable fee in violation of Arizona Rule of the Supreme Court 42, ER 1.5(a). Fitzhugh further admitted revealing confidential information related to the representation of the Madrigals without their informed consent in violation of ER 1.6.[4]

ISSUES ON APPEAL

¶20 Carranza asserts the trial court erred in several respects: (1) by granting summary judgment for Martha; and (2) by denying Carranza's request to substitute Fitzhugh as the real party in interest. We

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[2] See *In re* a Member of the State Bar of Arizona, Edward D. Fitzhugh, Nos. 11-1877, 11-2635 (Ariz. Sup. Ct., Jan. 11, 2013).

[3] The sanctions imposed included a six month suspension from the practice of law and a six month period of probation, subject to early termination.

[4] Although we take judicial notice of the Consent Agreement as it forms a part of the public record, Arizona Rule of Evidence 201, we further note that such disciplinary action pursuant to the Ethical Rules "does not give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." Ariz. R. Sup. Ct. 42, Preamble. As a result, on appeal we address the issue of the enforceability of the fee agreement through application of legal and equitable principles applicable to civil disputes, rather than a *fait accompli* premised upon the agreement between Fitzhugh and the Arizona State Bar addressing standards of conduct under the Ethical Rules.

have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (2014).[5]

DISCUSSION

I. The Enforceability of the Fee Agreement.

¶21 We review the entry of summary judgment *de novo*, "viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion." *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). In reviewing summary judgment, we determine "whether there are any genuine issues of material fact and whether the trial court erred in its application of the law." *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). "We will affirm if the trial court's [entry of summary judgment] is correct for any reason." *Hawkins v. State*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995).

¶22 In its grant of summary judgment in favor of Martha, the superior court found the fee agreement unenforceable as violating both the Ethical Rules governing attorneys and public policy. Contracts in writing must be supported by consideration, defined as a bargained for performance or return promise. Restatement (Second) of Contracts § 71(1) (1981). An illusory promise of performance fails as consideration because one party lacks mutuality of obligation. *Allen D. Shadron, Inc. v. Cole*, 101 Ariz. 122, 123, 416 P.2d 555, 556 (1966), *opinion supplemented on reh'g*, 101 Ariz. 341, 419 P.2d 520 (1966).

¶23 As applied, the portion of the 25% fee agreement provision between Fitzhugh and the Madrigals, on which Carranza relies, lacked mutuality of obligation. *Carroll v. Lee*, 148 Ariz. 10, 13, 712 P.2d 923, 926 (1986) ("Mutuality of obligation is a requirement for a valid contract; however, mutuality is absent when only one of the contracting parties is bound to perform."). The Madrigal's promise of performance, thereunder, was to pay Fitzhugh 25% of any settlement monies received in their wrongful death case. In exchange for the Madrigal's promise to pay, Fitzhugh promised nothing. No matter what happened at any time, the Madrigals remained obligated to pay him 25% of the settlement monies and Fitzhugh was not obligated to do anything. The 25% contingent fee

[5] In the absence of material revisions after the relevant date, we cite to the current version of the statute.

provision, therefore, was unenforceable. *Shattuck v. Precision-Toyota, Inc.*, 115 Ariz. 586, 588, 566 P.2d 1332, 1334 (1977) ("[A]n illusory contract is unenforceable for lack of mutuality. . . . '[A] contract must have mutuality of obligation, and an agreement which permits one party to withdraw at his pleasure is void.'") (quoting *Naify v. Pac. Indem. Co.*, 76 P.2d 663, 667 (Cal. 1938)).

¶24 Furthermore, the contingent fee agreement violates public policy. The purpose of a contingent fee agreement is to shift the client's risk of paying attorneys' fees to the attorney who then "bears the risk of receiving no pay if the client loses." *Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 571 (Colo. Ct. App. 2010) (quoting Restatement (Third) of the Law Governing Lawyers § 35 cmt. c (2000)); *see* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 389, at 11 (1994) ("The contingent fee system essentially shifts the risk of litigation or other legal endeavor from a risk averse client to the lawyer who may be more risk neutral . . . .").

¶25 The Fitzhugh-Madrigal 25% contingent fee provision insulated Fitzhugh from the risk of performing without compensation as he was not required to perform, but nonetheless stood to receive 25% of any settlement proceeds obtained by the attorney who actually represented the Madrigals. As a result, summary judgment was appropriately entered in favor of Martha, as the 25% contingent fee provision was unenforceable as a matter of law.

II. Carranza's Motion for Substitution of the Real Party in Interest Pursuant to Rule 17(a), Arizona Rules of Civil Procedure.

¶26 Although the judgment appealed from failed to address Carranza's assertion of his right to pursue claims of unjust enrichment or *quantum meruit*, Carranza asserts on appeal the right to make these claims. In that regard, the unenforceability of a fee agreement does not preclude the possibility of entitlement to equitable remedies. *W. Corr. Group, Inc. v. Tierney*, 208 Ariz. 583, 590, ¶ 27, 96 P.3d 1070, 1077 (App. 2004) ("Quantum meruit damages are available when services are performed under an unenforceable contract or when they are rendered in the absence of a contract.") (citation omitted). A party may recover *quantum meruit* damages when it prevails on a claim of unjust enrichment. *Id.*; *Landi v. Arkules*, 172 Ariz. 126, 135, 835 P.2d 458, 467 (App. 1992) (stating to recover *quantum meruit* damages "a claimant must prove (1) . . . the other party was unjustly enriched at the expense of the claimant; (2) that he rendered services which benefitted the other party; and (3) that he

conferred this benefit under circumstances which would render the other party's retention of the value without payment inequitable").

¶27 *Quantum meruit* damages equal the reasonable value of services rendered. In assessing the "reasonable value" of the attorney's services, the court considers various factors to determine the benefit provided by those services. *Schwartz v. Schwerin*, 85 Ariz. 242, 245-46, 336 P.2d 144, 146 (1959). These factors fall under four general headings: (1) the qualities of the advocate; (2) the character of the work to be done; (3) the work actually performed by the advocate; and (4) the result of the advocate's services. *Id.*

¶28 As applicable here, the equitable claims are being pursued by Carranza, an assignee. To determine if Carranza may pursue such claims, we must first address the terms of the purported assignment. The assignment from Fitzhugh to Carranza specifically provided for an assignment of "all rights, title and interest" to the "Contingent Fee Agreement" between Fitzhugh and the Madrigals. The terms of the assignment, therefore, limit what Carranza is entitled to pursue to such causes of action that arise from the contractual provisions of the contingent fee agreement. Consequently, Carranza is excluded from pursuing claims allowing for equitable remedies. *Nuhome Inv. LLC v. Weller*, 81 P.3d 940, 948, ¶ 23 (Wyo. 2003) ("The assignment from Massey to NuHome provided for an assignment of 'all right, title and interest . . . to that certain contract'. . . . Had Massey wished to assign rights other than his contract rights, he simply could have assigned all his rights, claims, or causes . . . . Accordingly, NuHome has no right to make an unjust enrichment claim in this case.").

¶29 Stated otherwise, while Carranza, as assignee, had standing to pursue legal claims brought upon the unenforceable contingent fee provision, Carranza was not assigned, and therefore does not have standing to pursue, Fitzhugh's equitable claim to *quantum meruit* damages. *Rogovin v. Bach Realty, Inc.*, 147 A.D.2d 364, 365-66 (N.Y. App. Div. 1989) (distinguishing the assignment of contract rights and noting that "[*Q]uantum meruit* and unjust enrichment[] . . . do not flow from the contract but instead are essentially equitable claims") (emphasis omitted); 6A C.J.S. *Assignments* § 93 (2014) ("[T]he assignment of a contract does not automatically transfer related tort claims, although such claims may be transferred if they are specifically included in the assignment. Nor does the assignment of contract rights include the right to sue the debtor under a theory of unjust enrichment.") (internal citations omitted). Accordingly,

Fitzhugh (not Carranza) is the holder of and real party in interest for the potential equitable claims that remain.

¶30 That having been addressed, authority is legion for the requirement that "[e]very action shall be prosecuted in the name of the real party in interest." Ariz. R. Civ. P. 17(a). "The purpose of Rule 17(a) is to enable the defendant to avail himself of the evidence and defenses that he has against the real party in interest and to assure the finality of the results in the application of res judicata." *Cruz v. Lusk Collection Agency*, 119 Ariz. 356, 358, 580 P.2d 1210, 1212 (App. 1978).

¶31 In denying Carranza's Rule 17(a) motion, the trial court found his failure to name Fitzhugh as the real party in interest was not the result of an "understandable mistake or difficulty determining the proper party," but upon Fitzhugh's conscious decision to make Carranza the plaintiff. Substitution of a real party in interest, however, "does not require a plaintiff to show that an initial failure to name the real party in interest resulted from an understandable mistake or difficulty in identifying the proper party." *Preston v. Kindred Hosps. W. L.L.C.*, 226 Ariz. 391, 392, ¶ 1, 249 P.3d 771, 772 (2011). Thus, Fitzhugh's decision to initially assign his claim against the Madrigals to Carranza in order to avoid filing suit in his own name against former clients does not preclude Fitzhugh from pursing the equitable claims as the real party in interest, pursuant to Rule 17(a).[6]

CONCLUSION

¶32 Based upon the foregoing, we affirm the trial court's grant of summary judgment for Martha as to the unenforceability of the 25% contingent fee agreement provision. But we reverse the trial court's order denying the motion to substitute Fitzhugh as the real party in interest and remand this matter to the trial court for all further proceedings consistent with this Decision.

[6] Given this conclusion, we need not address the trial court's denial of Carranza's Rule 56(d) motion.