

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

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<b>JOHN I. GORDON, ESQUIRE</b>	:	<b>JUNE TERM, 2011</b>
	:	
<b>v.</b>	:	<b>NO. 02241</b>
	:	
<b>MICHAEL O. PANSINI, ESQUIRE,</b>	:	<b>Control No. 12092158</b>
<b>et al.</b>	:	
_____	:	

**ORDER**

**AND NOW**, this 31<sup>st</sup> day of October, 2012, upon consideration of plaintiff's Motion for Partial Summary Judgment, and any response thereto, it is hereby

**ORDERED**

that the said Motion is **GRANTED**. Defendants, Michael O. Pansini, Esq., et al., are in breach of contract and found liable to plaintiff; defendants' counterclaims are dismissed; and plaintiff's Unjust Enrichment claim is dismissed as moot. Plaintiff's conversion and fraud claims are to be tried before a jury. It is further

**ORDERED**

that judgment is entered in favor of plaintiff, John I. Gordon, Esq., in the amount of \$116,666.66, plus 6% per annum simple interest, beginning on August 17, 2010 and running through the date of full satisfaction of this judgment against defendants.

**BY THE COURT:**

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**GLAZER, J**

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

JOHN I. GORDON, ESQUIRE	:	JUNE TERM, 2011
v.	:	NO. 2241
MICHAEL O. PANSINI, ESQUIRE, et al.	:	Control No. 12092158

**OPINION**

GLAZER, J.

October 31, 2012

**STATEMENT OF FACTS**

Plaintiff, John I. Gordon, Esq. (“Gordon”), filed his First Amended Complaint in the current action against defendants Michael O. Pansini, Esq., et al. (“Pansini”), for Breach of Contract, Conversion, Fraud, and Unjust Enrichment. (See Plaintiff’s First Amended Complaint, ¶¶ 1- 92). Plaintiff is an attorney licensed to practice law in the Commonwealth of Pennsylvania, with his principal place of business located at 632 Germantown Pike, Lafayette Hill, Montgomery County, Pennsylvania. Id. at ¶ 1. Defendants (“Pansini”) Michael O. Pansini, Esquire and Steven M. Mezrow, Esquire are attorneys licensed to practice law in Pennsylvania. (See Defendants’ Answer to First Amended Complaint, ¶ 2). Defendant, Pansini Law Firm, P.C., is a Professional Corporation registered in Pennsylvania, which has a principal place of business at 1525 Locust Street, 15<sup>th</sup> Floor, Philadelphia, PA. Id. At all times relevant hereto, Michael O. Pansini, Esq. and Steven M. Mezrow, Esq. were employees of Pansini Law Firm, P.C. Id.

Plaintiff was retained by Ms. Gina Bennett following her November 29, 2006 automobile accident. (See Plaintiff’s Motion for Summary Judgment ¶ 4). On March 6, 2008, plaintiff

referred the case to defendants, and defendants agreed to pay plaintiffs a 1/3 referral fee. (See Defendants' Answer to Amended Complaint, ¶ 5). Defendants allege that at the March 6, 2008 meeting, Gordon made fraudulent misrepresentations solely to convince Pansini to pay a One-Third (1/3) referral fee and for them to represent the interest of Gina Bennett. Id. at ¶ 19. Further, they argue that Gordon knew that he could not win the case because both liability and disability were in dispute. Id. At the meeting, Gordon provided Pansini with the police report and extremely limited and scant medical records. Id. at ¶ 20. On March 8, 2008, plaintiff confirmed the Agreement via email. (See Plaintiff's Amended Complaint, Exhibit B). On November 19, 2008, defendants' filed suit on behalf of Gina Bennett in the Philadelphia Court of Common Pleas. (See Plaintiff Motion for Partial Summary Judgment, Exhibit E).

On or about May 14, 2010, defendants' allege that because of the weakness in Ms. Bennett's case, Pansini advised Gordon that they could not represent the interest of Gina Bennett any further with a One-Third (1/3) referral fee and would withdraw as counsel if there were not a revised fee agreement. (See Defendants' Answer to Amended Complaint, ¶ 37). Defendants state that they made "abundantly" clear that the only way Pansini would remain as counsel to Ms. Bennett is if the referral fee would be One-Third (1/3) of the fee up to a verdict or recovery of Two Hundred Fifty Thousand (\$250,000.00) with the referral fee being reduced to Ten Percent (10%) of the fee on any settlement or verdict in excess of Two Hundred Fifty Thousand (\$250,000.00). Id. Defendants allege that plaintiff orally agreed to this novation. Id.

In July 2010, after trial had begun but before a verdict was entered, the Bennett case settled for \$1,500,000.00. Id. at ¶ 35. The total amount of attorney's fees from the Bennett case was \$600,000.00. Id. at ¶ 36. On August 18, 2010, Pansini sent a letter to Gordon which included a check for \$83,333.34. (See Defendants' Answer to Amended Complaint, Exhibit C &

D). Subsequently, after receiving the check for \$83,333.34, Gordon sent a letter to Pansini requesting the original One-Third fee (1/3) and stating that he had never agreed to a revised referral fee. (See Plaintiff's Amended Complaint, Exhibit I).

Plaintiff filed the present motion for partial summary judgment on plaintiff's Breach of Contract claim and defendants' Counterclaims of Breach of Contract, Fraudulent Misrepresentation, Negligent Misrepresentation and Unjust Enrichment. (See Plaintiff's Motion for Summary Judgment). Plaintiff's claims of Fraud and Conversion are not the subject of this partial summary judgment. For the reasons stated below, this motion is granted.

### **DISCUSSION**

Summary judgment will be granted only when the pleadings, depositions and admissions show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. Boring v. Erie Insurance Group, 641 A.2d 1189, 1190 (Pa. Super. 1994) (quoting Pa.R.C.P. 1035 (b)). The court must examine the record in the light most favorable to the non-moving party, resolve doubts against the moving party and not decide issues of fact, but determine whether any exists. Id. at 1190-91 (citing Washington Federal Savings and Loan Association v. Stein, 357 Pa. Super. 286, 288-89 (1986). When considering a motion for summary judgment, "the court must accept as true all well pleaded facts in a non-moving party's pleadings, and give to him or her the benefit of all reasonable inferences to be drawn therefrom." Jefferson v. State Farm Insurance, 380 Pa. Super. 167, 170, 551 A.2d 1261, 1262 (1988).

### **Breach of Contract**

Defendants claim that there was a novation of the contract and thus rendering the original contract void. "The doctrine of novation or substituted contract applies where: (i) a prior

contract has been displaced, (ii) a new valid contract has been substituted in its place, (iii) there exists sufficient legal consideration for the new contract, and (iv) the parties consented to the extinction of the old and replacement of the new.” First Lehigh Bank v. Havilland Grille, 704 A.2d 135, 138 (Pa. Super. 1997) citing Buttonwood Farms, Inc. v. Carson, 478 A.2d 484, 486 (Pa. Super. 1984). The party asserting the defense of novation has the burden of proving that the parties intended to discharge the earlier contract. Melat v. Melat, 411 Pa. Super. 647, 602 A.2d 380 (1992). There is no doubt that the performance of an act which one party is legally bound to render to the other party is not legal consideration. Chatham Comms., Inc. v. General Press Corp., 344 A.2d 837, 840 (Pa. 1975). Defendants claim that the new consideration, not withdrawing from the case, supports the novation. Here, defendants did not adduce any evidence that it was legally possible to withdraw from the case. Defendants did not submit any evidence that they had found alternative counsel to represent Ms. Bennett, defendants did not submit an affidavit from Ms. Bennett that she would agree to the firm’s withdrawal, and furthermore defendants did not submit an expert report that they would have been allowed to be released from representing Ms. Bennett. Therefore, defendants’ claim that there was a novation fails for lack of consideration. Thus, defendants do not have a viable claim for Breach of Contract and are liable under the original contract.

### **Fraudulent Misrepresentation**

The elements of fraudulent misrepresentation are well settled. In order to void a contract due to a fraudulent misrepresentation, the party alleging fraud must prove the following elements, by clear and convincing evidence: “(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable

reliance on the misrepresentation; and (6) resulting injury proximately caused by the reliance.” Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999); Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994). “To be justifiable, reliance upon the representation must be reasonable.” Porreco v. Porreco, 811 A.2d 566, 571 (Pa. 2002). Further, while a relationship between the parties is taken into consideration, courts are hesitant to find the reliance element satisfied when the party claiming reliance had adequate opportunity to verify the statements. Id. In the instant case, defendants had the police report, limited medical records, and the client to consult. Plaintiff referred the client to defendants in March of 2008. However, defendants did not file a complaint in the matter until November of 2008, more than six months after the referral. Defendants had adequate time and documentation to verify the statements of the plaintiff. Without satisfying all of the elements of a claim for fraudulent misrepresentation, plaintiff does not have a viable cause of action against Gordon with respect to Counterclaim I and therefore it must be dismissed.

### **Negligent Misrepresentation**

The Pennsylvania Supreme Court set forth that a claim of “negligent misrepresentation requires proof of: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known of its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to the party acting in justifiable reliance on the misrepresentation.” Bilt-Rite Contractors, Inc. v. The Architect Studio, 866 A.2d 270 (Pa. 2005). As discussed above, defendants do not satisfy the justifiable reliance element and therefore their claim of negligent misrepresentation must be dismissed.

### **Unjust Enrichment**

To prove a claim for unjust enrichment, a plaintiff must plead and prove that the defendant: (1) received a benefit from plaintiff; (2) appreciated the benefit; and (3) accepted the benefit under such circumstances that it would amount to an inequity for defendant to retain the benefit without payment of value. Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa. Super. 1999). In Pennsylvania, the quasi contractual doctrine of unjust enrichment does not apply when a written agreement or an express contract exists between the parties. Lacker v. Glosser, 892 A.2d 34 (Pa. Super. 2006) (citing Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa. Super. 1999)). There is no dispute as to the intentions and agreement of the parties on March 6, 2008 when creating the One-Third (1/3) referral fee. Therefore, this is an express contract and the unjust enrichment does not apply.

### **Prejudgment Interest**

There is legal right to recover interest upon money owed under a contract. West Republic Mining Co. v. Jones & Laughlins, 108 Pa. 55 (1885). “The right to interest begins at the time payment is withheld after it has been the duty of the debtor to make such payments.” Fernandez v. Levin, 519 Pa. 375, 379 (Pa. 1988). If the parties have not contracted otherwise, simple interest is recoverable when the defendant breaches a contract to pay a definite sum of money. Penneys v. Pennsylvania R. Co., 408 Pa. 276, 279-80 (Pa. 1962). Plaintiff wrote the check for \$83,333.34 on August 17, 2010 when \$200,000.00 was actually due. Thus, simple interest began to accrue on August 17, 2010.

Based on the foregoing, partial summary judgment is granted in favor of plaintiff, John I. Gordon, Esquire.

**BY THE COURT:**

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**GLAZER, J.**