

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

PHILIP M. FINESTRAUSS, )  
 )  
Defendant Below, Appellant, )  
 )  
v. )  
 )  
WOLOSHIN, LYNCH, NATALIE & )  
GAGNE, P.A. )  
 )  
Plaintiff Below, Appellee. )

C.A. No. N10A-07-008 JAP

Submitted: April 6, 2011  
Decided: July 21, 2011

*On Appeal from the Court of Common Pleas of the State of Delaware  
in and For New Castle County*  
**Decision AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

**MEMORANDUM OPINION**

*Appearances:*

Philip M. Finestrauss, Esquire, Pro Se

William L. O'Day, Jr., Esquire, Wilmington, Delaware  
Attorney for Appellee

**JOHN A. PARKINS, Jr., JUDGE**

## INTRODUCTION

Before the Court is an appeal from Philip M. Finestrauss, Esquire, (“Finestrauss”), of a decision of the Court of Common Pleas granting summary judgment to Woloshin, Lynch, Natalie & Gagne, P.A., (the “Law Firm”), in an appeal from a trial on the merits in Justice of the Peace Court No. 12 rendering judgment in favor of the Law Firm in the amount of \$7,500 on its action to recover attorneys’ fees pursuant to a fee-splitting agreement. The Court of Common Pleas found that there was a meeting of the minds between the parties and that a contract was formed.<sup>1</sup> That court further found that Finestrauss was in breach of said contract and failed to raise any genuine issue of material fact defeating contract formation.<sup>2</sup> The Court agrees. The Court disagrees, however, with the denial of prejudgment interest to the Law Firm.

## FACTUAL AND PROCEDURAL BACKGROUND

Michele Fields-Shaw suffered a personal injury and retained the Law Firm to represent her interests. At some point she discharged the Law Firm and retained Finestrauss instead. By letter dated January 24, 2005 to the Law Firm Finestrauss requested the client’s file and indicated that he wished to discuss the splitting of

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<sup>1</sup> *Finestrauss v. Woloshin, Lynch, Natalie & Gagne, P.A.*, 2010 WL 2921597, \*4-6 (Del. Com. Pl. July 2, 2010).

<sup>2</sup> *Finestrauss*, 2010 WL 2921597 at \*4-6.

attorneys' fees. Upon receipt of the letter, James Natalie, a partner at the Law Firm, telephoned Finestrauss and offered a 50 percent split of attorneys' fees for resolution of the case prior to trial. Finestrauss agreed. On February 4, 2005, Natalie sent a letter to Finestrauss stating that Finestrauss was to pay the Law Firm 50 percent of any recovery for the Law Firm's "effort-to-date." Enclosed with the letter was the client's file. Finestrauss accepted the file and filed a substitution of counsel with the court.<sup>3</sup> Upon review of the file, Finestrauss learned that little work had been done on the case by attorneys and that the bulk of the work performed by the Law Firm was actually performed by one of its paralegals.<sup>4</sup>

The client's case eventually settled prior to trial for \$75,207 generating attorneys' fees in the amount of \$15,000. In lieu of sending the agreed upon 50 percent of attorneys' fees, Finestrauss forwarded a check to the Law Firm in the amount of only \$1,500—the amount which Finestrauss unilaterally determined would be appropriate considering that the bulk of the work performed by the Law Firm was not attorney work. The Law Firm did not cash the check and thereafter filed a complaint in the Justice of the Peace Court, which held in favor of the Law

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<sup>3</sup> *Finestrauss*, 2010 WL 2921597 at \*2.

<sup>4</sup> The Office of Disciplinary Counsel conducted an investigation which was resolved when the paralegal provided Disciplinary Counsel with an affidavit that he would not engage in the unauthorized practice of law in the future.

Firm, finding it was entitled to half of the attorneys fees generated by Ms. Fields-Shaw's personal injury case.<sup>5</sup>

Upon appeal, the Court of Common Pleas found that the letter from the Law Firm was a memorialization of the oral contract between the parties. Notably it concluded that accepted the file, filed a substitution of counsel with the court, and did not repudiate any language contained in the letter.<sup>6</sup> The court-below determined that Finestrauss's conduct objectively demonstrated mutual assent.<sup>7</sup> The court further found that the Law Firm did not misrepresent the nature of the work it performed on the case.<sup>8</sup> The court below found in favor of the Law Firm for \$7,500 plus post-judgment interest at the legal rate and costs. Pre-judgment interest, however, was denied.<sup>9</sup>

### **CONTENTIONS OF THE PARTIES**

In this appeal, Finestrauss contends that the Law Firm's letter was not a memorialization of the oral agreement but instead was a counter-offer because the Law Firm changed the material term "attorneys' fees" to "the office's effort to date." Finestrauss further argues that this Court should reverse because the Law Firm's failure to disclose the unauthorized practice of law by Snyder was a

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<sup>5</sup> *Finestrauss*, 2010 WL 2921597 at \*1.

<sup>6</sup> *Finestrauss*, 2010 WL 2921597 at \*4.

<sup>7</sup> *Finestrauss*, 2010 WL 2921597 at \*4.

<sup>8</sup> *Finestrauss*, 2010 WL 2921597 at \*5.

<sup>9</sup> *Finestrauss*, 2010 WL 2921597 at \*6.

material misrepresentation. Finestrauss avers that he would never have consented to the fee-splitting agreement if he had known of Snyder's conduct and the lack of attorney work on the case.

The Law Firm asserts that a valid contract exists, and, therefore, they are entitled to 50 percent of the attorneys' fees, post-judgment interest, and pre-judgment interest.

## **DISCUSSION**

### ***Standard of Review***

Upon an appeal of a decision from the Court of Common Pleas, the Superior Court is limited to correcting legal errors and determining whether any factual findings are supported by the record and based on logical reasoning.<sup>10</sup> Factual findings supported by the record shall be upheld even if the Superior Court would have decided differently acting on its own right.<sup>11</sup> However, any questions of law receive *de novo* review.<sup>12</sup>

### ***Contract Formation***

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<sup>10</sup> *Hicklin v. Onyx Acceptance Corp.*, 970 A.2d 244, 248 (Del. 2009), reargument denied (Apr. 22, 2009); 10 *Del. C.* § 1326(c) (stating that “[t]he appeal shall be reviewed on the record and shall not be tried de novo”).

<sup>11</sup> *Hicklin*, 970 A.2d at 248.

<sup>12</sup> *Robert J. Smith Companies, Inc. v. Thomas*, 2001 WL 1729143, \*2, Ridgely, J. (Del. Super. Dec. 10, 2001).

In a well reasoned analysis, the Court of Common Pleas concluded that there was a contract between the Law Firm and Finestrauss in which each would retain an equal share of the fees generated by the underlying personal injury case. The lower court's opinion in this regard is affirmed on the basis of that analysis.

### ***Misrepresentation***

The Court agrees with the Court of Common Pleas' conclusion that Finestrauss cannot void his agreement with the Law Firm on the basis of fraud. This Court reaches that conclusion, however, by a somewhat different analysis than that employed in the court-below. The Court of Common Pleas found that the Law Firm made no misrepresentations to Finestrauss and rejected the fraud claim. It is unnecessary to determine whether the Law Firm misrepresented facts to Finestrauss because he has failed to adduce any evidence the the alleged misrepresentations were material.

It is hornbook law that “[a] contract may be voidable on the basis of misrepresentation . . . .”<sup>13</sup> The defense of misrepresentation must include the following elements:

- (1) that there was a misrepresentation;
- (2) that the misrepresentation was material;
- (3) that the misrepresentation induced the recipient to enter into the contract; and
- (4) that the recipient's reliance on the misrepresentation was

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<sup>13</sup> *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. Super. 1990).

reasonable.<sup>14</sup>

Here, Finestrauss avers that the Law Firm failed to disclose that the large bulk of the work at the Law Firm was performed by a paralegal. He has not pointed, however, to any evidence demonstrating that this omission was material to his decision to enter into the agreement with the Law Firm. Finestrauss did not inquire as to who worked on the file before agreeing to the 50 percent fee split, he did not examine the file before entering into the agreement and he waited until after the underlying case was resolved—presumably long after learning of the paralegal’s heavy involvement—before seeking to repudiate the agreement. In contrast, there is no evidence to indicate that the identity of the person at the Law Firm working on the case was important, much less material, to Finestrauss when he entered into the agreement. The Court, therefore, finds that the agreement is not voidable on the grounds of misrepresentation.

### *Pre-Judgment Interest*

“Interest is awarded in Delaware as a matter of right and not of judicial discretion.”<sup>15</sup> Generally, interest begins to accrue from the day payment is due to the plaintiff.<sup>16</sup> Having no reason to stray from the rule of law as to the award of interest on contract matters, the Court awards pre-judgment interest to the Law Firm.

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<sup>14</sup> *Alabi*, 583 A.2d at 1361-2.

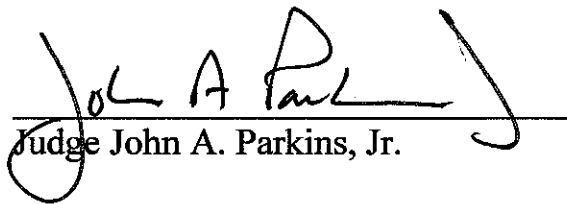
<sup>15</sup> *Moskowitz v. Mayor & Council of Wilmington*, 391 A.2d 209, 210 (Del. 1978).

<sup>16</sup> *Moskowitz*, 391 A.2d at 210.

**CONCLUSION**

Accordingly, the Court hereby *AFFIRMS* the well-reasoned decision of the Court below as to the denial of Finestrauss's motion for summary judgment and as to the granting of the Law Firm's motion for summary judgment as to a valid contract. However, the Court *REVERSES and REMANDS* this case back to the Court of Common Pleas for determination of pre-judgment interest in accord with this opinion.

***IT IS SO ORDERED.***

  
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Judge John A. Parkins, Jr.