SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHELLE MCCRAE, et al.,	*	
	*	
Plaintiffs,	*	Civil Case No. 2013 CA 004758 B
	*	Calendar II
v.	*	Judge John M. Mott
	*	
DISTRICT OF COLUMBIA,	*	
	*	
Defendant.	*	

ORDER

This attorney's fee dispute is before the court on defendant the District of Columbia's ("the District's") Motion to Dismiss, plaintiffs McCrae and Taylor's opposition, and the District's reply. Also before the court are plaintiffs' Motion for Summary Judgment, the District's Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment, plaintiffs' Opposition to Defendant's Cross-Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment, and the District's reply.

The District argues in its motion to dismiss that plaintiffs lack standing because their counsel, Pierre Bergeron, was court appointed and, therefore, they incurred no attorney's fees. As a result, Bergeron, not the plaintiffs, was injured. The District also argues that Bergeron was entitled to no more than the statutory fees set out in the Criminal Justice Act ("CJA"), D.C. Code §§ 11-2601–2609, which the District of Columbia Public Schools ("DCPS") paid. In response, plaintiffs argue that standing exists because the District has breached its contract for failure to pay attorney's fees pursuant to the settlement agreements between the plaintiffs and DCPS. For the reasons stated below, the court denies the District's Motion to Dismiss.

Plaintiffs' Motion and the District's Cross-Motion for Summary Judgment both center on the interpretation of the settlement agreements. Plaintiffs argue that the settlement agreements

unambiguously incorporate the DCPS attorney fee guidelines ("the Guidelines"), under which the $250 hourly rate for Bergeron's services would be reasonable, and that the Educational Attorney Appointment Order ("EAAO") further instructs that the $90 hourly rate should only apply if plaintiffs were unable to obtain payment from DCPS. The District asserts that, because the CJA statutorily provides a $90 hourly rate for CJA-appointed attorneys, this was the only reasonable interpretation of the settlement agreement. It further argues that, even if the Guidelines do control, they dictate the use of prevailing market rates for similar services, which, they assert, is the $90 hourly rate applied to other court appointed attorneys. For the following reasons, the court grants plaintiffs' Motion for Summary Judgment and denies the District's Cross-Motion for Summary Judgment.

Background

Plaintiffs are parents of children with disabilities covered under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq*. Under IDEA, the children are eligible for special education and related services from DCPS. Plaintiffs filed separate administrative due process complaints against DCPS in 2011, and each plaintiff subsequently entered into settlement agreements with DCPS. Bergeron represented both plaintiffs in the matters pursuant to the court's EAAO. Bergeron has been a member of the District of Columbia bar since 1981, and he has practiced special education law since 1995.

In the EAAO, Judge Goldfrank "[ordered] that the District of Columbia courts will compensate the Educational Attorney[, Bergeron,] pursuant to the Criminal Justice Act … if he is not compensated by the District of Columbia Public Schools." Under the CJA, "[a]ny attorney appointed pursuant to this chapter shall, at the conclusion of the representation or any segment thereof, be compensated at a fixed rate of $90 per hour. Such attorney shall be reimbursed for

expenses reasonably incurred." D.C. Code § 11-2604(a). The parties' settlement agreements, however, each contain the following agreed-upon language:

> Parent agrees to accept reasonable and documented attorney fees, as full and final payment of any attorney fees and related costs incurred, or to be incurred, in this matter. Payment of the specified amount is contingent upon submission of the following: a) a certified invoice conforming to the DCPS attorney fee guidelines, issued October 1, 2006, and itemizing all costs incurred to date relating to the pending hearing request; and b) signature by the parent below or written authorization by the parent for the attorney to enter into this Settlement Agreement on the parent's behalf.

Pursuant to the settlement agreements and the Guidelines, plaintiffs filed invoices seeking $250 per hour for Bergeron's services. For attorneys admitted to the bar for more than eight years, the highest experience level in the Guidelines, the rate was $200–275 per hour. DCPS paid $90 per hour for each invoice. Plaintiffs filed this action on July 12, 2013 alleging breach of contract and requesting the difference between what DCPS paid out and Bergeron's $250 hourly rate.

Standards of Review

When addressing a Rule 12(b)(6) motion to dismiss, the facts must be viewed in the light most favorable to the non-moving party. *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 62 (D.C. 2005). To survive a motion to dismiss, a complaint must state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The court must be able to infer the defendant's plausible liability based on the complaint alone. *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543–44 (D.C. 2011) (expressly adopting the standard set forth in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), in the District of Columbia). A formulaic recitation of the elements of a cause of action followed by a legal conclusion is not sufficient. *Murray v. Motorola, Inc.*, 982 A.2d 764, 783 (DC 2009) (citing *Twombly*, 550 U.S. at 555 (2009)).

To prevail on a motion for summary judgment, the moving party must demonstrate, based upon the pleadings, discovery, and any affidavits or other materials submitted, that there is no genuine issue as to any material fact in dispute and that the movant is therefore entitled to judgment as a matter of law. *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001); Super. Ct. Civ. R. 56(c). A trial court considering a defendant's motion for summary judgment must view the pleadings, discovery materials and affidavits or other materials in the light most favorable to the plaintiff and may grant the motion only if a reasonable jury could not find for the plaintiff as a matter of law. *Grant*, 786 A.2d at 583 (citing *Nader v. De Toledano*, 408 A.2d 31, 42 (D.C. 1979)); *Bailey v. District of Columbia*, 668 A.2d 817, 819 (D.C. 1995).

The party moving for summary judgment has the initial burden of proving that there is no genuine issue of material fact in dispute. If the moving party carries its initial burden, then the non-moving party assumes the burden of establishing that there is a genuine issue of material fact in dispute. *Grant*, 786 A.2d at 583 (citing *O'Donnell v. Associated Gen. Contractors of Am., Inc.*, 645 A.2d 1084, 1086 (D.C. 1994)). The non-moving party may not simply rest on conclusory allegations or denials of the movant's pleadings to establish that a genuine issue of material fact is in dispute. *Boulton v. Inst. of Int'l Educ.*, 808 A.2d 499, 502 (D.C. 2002); Super. Ct. Civ. R. 56(e). Rather, to avoid conceding a fact, the non-moving party must come forward with a response showing that there is a genuine issue for trial. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970). Moreover, general hearsay assertions of others cannot create a factual dispute that survives a motion for summary judgment. *See, e.g.*, *Burleson v. Burleson*, 277 A.2d 647, 649 (D.C. 1971); *Stewart v. Ashcroft*, 352 F.3d 422, 431 (D.C. Cir. 2003); *Tsehaye v. William C. Smith & Co., Inc.*, 402 F. Supp. 2d 185, 195 (D.D.C. 2005); *Hussain v. Principi*, 344 F. Supp. 2d 86, 100 (D.D.C. 2004). "Rule 56(c) mandates the entry of summary judgment …

against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see Boulton*, 808 A.2d at 502; *Adickes*, 398 U.S. at 160–61.

Analysis

I. Motion to Dismiss

A. Standing

Plaintiffs have standing. On the facts, plaintiffs and DCPS entered into two settlement agreements with the agreed upon language quoted above. As parties to that contract, and pursuant to the contract terms, the plaintiffs may bring claims for any breach. The District cited a single case for the proposition that "the individual be injured in fact by the conduct of the other party." *Burleson v. United Title & Escrow Co.*, 484 A.2d 535, 537 (D.C. 1983). The District does not provide, however, any support that contradicts an individual's right to bring a claim for an alleged breach of contract to which it is a party.

B. Breach of Contract

Plaintiffs have stated a plausible breach of contract claim. A breach of contract claim consists of the following elements: "(1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach." *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009). Viewing the pleadings and motions in the light most favorable to plaintiffs, the court finds that plaintiffs have alleged a plausible claim for relief to survive the motion to dismiss. The parties dispute, among other things, the language of the attorney's fee portion of the contract referenced above. The District alleges that DCPS has satisfied its obligation under both the CJA and the contract. Plaintiffs

argue that, pursuant to the settlement agreements, DCPS owes Bergeron attorney's fees at $250 per hour, not $90 per hour. Essentially, the parties dispute the breach and resultant damages. Plaintiffs have stated a plausible claim for relief, however, and so the motion to dismiss is denied.

II. Plaintiffs' Motion and the District's Cross-Motion for Summary Judgment

Plaintiffs argue that the $250 hourly rate—within the Guidelines' range for Bergeron's services—should apply under the settlement agreement. They assert that, as in *Adams v. District of Columbia*,[1] the contract itself controls, and, therefore, the explicitly incorporated Guidelines should apply. Plaintiffs further cite the EAAOs as ordering that "the District of Columbia Courts will compensate the Educational Attorney pursuant to the [CJA] … if he is not compensated by the [DCPS]." Plaintiffs assert that because they were recovering fees from DCPS pursuant to the settlement agreements, the CJA's $90 hourly rate would not apply under the EAAOs.

The District argues that, because Bergeron was appointed counsel under the CJA, the statute controls any interpretation of the settlement agreements. The District asserts that his appointment engages the following CJA provision: "Any attorney appointed pursuant to [the CJA] shall, at the conclusion of the representation or any segment thereof, be compensated at a fixed rate of $90 per hour." D.C. Code § 11-2604(a). The District argues that, in light of this rate for CJA-appointed attorneys, the settlements' provision granting "reasonable … attorney fees" necessarily incorporates the CJA's rate of $90 per hour. It further avers that paragraph four of the guidelines provides for "prevailing market rates in the community for similar services by lawyers," which set Bergeron's rate at those of other CJA-appointed lawyers—$90 per hour.

This dispute is fundamentally one of contractual interpretation. "[I]t is well established that settlement agreements are entitled to enforcement under general principles of contract law

[1] No. 2012-SC2-002301 (D.C. Super. Ct. July 11, 2012).

...." *Goozh v. Capitol Souvenir Co., Inc.*, 462 A.2d 1140, 1142 (D.C. 1983) (quoting *Brown v. Brown*, 343 A.2d 59, 61 (D.C. 1975) (per curiam)). The District of Columbia follows an objective interpretation of contracts: "In construing a contract, the court must determine what a reasonable person in the position of the parties would have thought the disputed language meant." *Unfoldment, Inc. v. District of Columbia Contract Appeals Bd.*, 909 A.2d 204, 209 (D.C. 2006) (internal citation omitted). This "court must honor the intentions of the parties as reflected in the settled usage of the terms they accepted in the contract ... and will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity." *Id.* (internal citation omitted).

The court finds no ambiguity in the settlement agreements regarding attorneys' fees. Paragraph twelve requires the District to pay "reasonable and documented attorney fees … contingent upon submission of … a certified invoice conforming to the DCPS attorney fee guidelines." Paragraph four of the Guidelines contains a scale of hourly rates DCPS would pay as reasonable attorneys' fees in special education cases. The rate commensurate with Bergeron's experience was $200–275 per hour. The settlement agreements explicitly require adherence to the entirety of the guidelines, and make no reservations as to any sections. Paragraph twelve does not reference any other sources for determining attorneys' fees. The parties presumably could have agreed only to reference certain procedural provisions of the Guidelines and to exempt the substantive pay-scale provision. Alternatively, the parties could have incorporated other sources in the provision on attorneys' fees. The settlements contain no such reference, however, but rather incorporate the Guidelines solely and in their entirety.[2]

[2] Judge Wright and Judge Bartnoff ruled on an identical DCPS settlement agreement in *Adams*. Judge Wright and Judge Bartnoff, the Presiding Judge and Deputy Presiding Judge of the Civil Division, respectively, decided *Adams* in conjunction with over 170 similar cases concerning identical DCPS settlement agreements. In interpreting the settlement agreement, the court found no ambiguity concerning the Guidelines' applicability as to attorneys' fees.

The District urges this court to interpret the settlement agreements in light of the CJA's $90 hourly rate. Certainly, Bergeron was appointed to the case from a group of CJA attorneys, but in making the appointment, Judge Goldfrank specifically noted "the District of Columbia courts will compensate the Educational Attorney[, Bergeron,] pursuant to the Criminal Justice Act … *if he is not compensated by the District of Columbia Public Schools*." (Emphasis added.)

In addition, the defendant's position would have this court read "reasonable and documented attorney fees" out of context and not in light of the explicitly referenced Guidelines. This court finds no support for the District's position to read the first sentence of paragraph twelve in isolation from the rest of the fee provision. The District has not demonstrated that this provision is ambiguous such that this court should look to outside sources, such as the CJA, to divine the parties' intentions concerning reasonableness of attorneys' fees. Indeed, this court refuses to "torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity" by reading select portions of paragraph twelve in isolation. *See Unfoldment, Inc.*, 909 A.2d at 209.

The court further finds no basis in the District's alternative argument that Bergeron should only receive $90 per hour because the Guidelines "tak[e] into account … prevailing market rates in the community for similar services by lawyers," and that here, similar services means those provided by $90 per hour CJA-appointed attorneys. This strained reading ignores surrounding material that determinations should "tak[e] into account … the attorney's experience, skill[,] … and the complexity of the issues raised …." The Guidelines' emphasis on the substantive nature of the legal work and the attorney's qualifications such as experience and

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See Adams, at 8–9. The court determined that DCPS correctly paid plaintiff's attorney's fees pursuant to the Guidelines, and did not award plaintiffs additional fees. *See id.* In that case an attorney for plaintiff had sought an hourly rate of $410, which DCPS reduced to $250, in accordance with the Guidelines. The court notes that while the settlement agreements in this case and *Adams* are identical, two significant distinctions exist: (1) *Adams* addressed the payment of additional fees over the Guidelines; and (2) Bergeron was appointed pursuant to the CJA.

skill does not consider the particular procedure through which that attorney came to represent his client. Indeed, paragraph four's pay scale is experience-dependent, and does not contemplate derogations for specific procedural anomalies. Such an interpretation would distort the plain language of the Guidelines.

The court finds that the plain terms of the settlement agreements are unambiguous and explicitly incorporate the Guidelines. Pursuant to the settlement agreement, the hourly rate scale set forth in paragraph four of the Guidelines provides a reasonable hourly rate for Bergeron's services.[3] The court further finds that the plain language of the Guidelines contemplates the holistic consideration of the substantive nature of the attorney's work, and that procedural specifics of the attorney's appointment should not supersede this determination. Bergeron had approximately thirty years of experience as a member of the D.C. bar and almost fifteen years' experience in special education law when he represented plaintiffs. The Guidelines provide that, for attorneys admitted to the bar for more than eight years, a reasonable hourly rate is $200–275. Plaintiffs' request of $250 constitutes a reasonable request in conformance with the Guidelines. Accordingly, the court finds that the District breached the settlement agreements when, in the face of plaintiffs' reasonable request complaint with the settlement agreement, it paid only $90 per hour for Bergeron's services.

Conclusion

Plaintiff's complaint states a plausible claim to relief; therefore, the court denies the District's Motion to Dismiss. Further, the court grants plaintiffs' Motion for Summary Judgment and denies the District's Cross-Motion for Summary Judgment. The court finds that the

[3] Given this court's determination that the settlement agreements are unambiguous and incorporate the Guidelines, it need not consider plaintiffs' alternative argument that, even if the court had to look outside the agreement, that the EAAO would provide for an arrangement between the parties and DCPS first, and that the $90 hourly rate would apply only as a last resort.

settlement agreement controls, and that it unambiguously mandates determination of reasonable attorneys' fees in accordance with the Guidelines. The court further finds that the District breached the agreements when it only paid $90 per hour on the submitted invoices. Accordingly, the court orders the District to pay plaintiffs an additional $160 per hour for Bergeron's services.

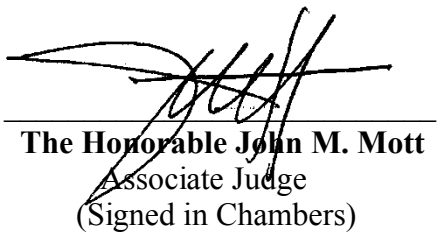
For the foregoing reasons, it is this **9th** day of **September, 2014** hereby

ORDERED that defendant's Motion to Dismiss is **DENIED**; and it is further

ORDERED that plaintiffs' Motion for Summary Judgment is **GRANTED**; and it is further

ORDERED that defendant's Cross-Motion for Summary Judgment is **DENIED**; and it is further

ORDERED that this case is **CLOSED**.



The Honorable John M. Mott
Associate Judge
(Signed in Chambers)

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