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| DISTRICT COURT, DENVER COUNTY, COLORADODenver County Court DA1437 Bannock St., Room 256 FILIDenver, CO 80202 CAS(720) 865-8301 | E FILED: February 19, 2016 1:29 PM NG ID: A0248DF753572E NUMBER: 2015CV31709**▲ COURT USE ONLY ▲** |
| Plaintiffs: ROBERT ABRAMS and ABRAMS & ASSOCIATES, LLC, a Colorado limited liability company;v.Defendants: SHAWN BEESON |
| Attorneys for Plaintiff: |  |
|  | Case Number: 2015CV31709 |
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| **PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS BREACH OF CONTRACT CLAIM AGAINST DEFENDANT** |

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COMES NOW, Plaintiff Robert Abrams, through his attorneys at Elkus Sisson and Rosenstein, P.C. and Abrams & Associates, LLC, and hereby files his Response to Defendant’s Motion to Dismiss Breach of Contract Claim against Defendant Shawn Beeson. In support thereof, Plaintiff state and allege as follows:

# INTRODUCTION

1. On May 27, 2011, the parties entered into a contract for legal services on a contingent fee basis. Plaintiff proves defendant terminated his firm on December 7, 2012 thereby creating a debt owed under a *quantum meruit* claim articulated in the parties’ contract. *Exhibit 2 to Plaintiff’s Motion re: Summary Judgment.* Per contract, plaintiff is entitled to his attorney fees in the amount of $37,851.96, with a remaining unpaid balance of $20,930.46 for the early termination.
2. Defendant read, signed and agreed to the terms therein. The contract provided for the circumstance of termination and the amounts then owed thereunder. Defendant terminated Plaintiff’s representation, prior to completion of the parties’ matter. At no time thereto, had defendant executed acceptance of any settlement agreement and demanded in writing that plaintiff immediately withdraw from the case. Plaintiff complied.
3. Plaintiff seeks to recover fees under the legal theory of *quantum meruit* as contemplated within the parties’ attorney fee agreement for failure of defendant to pay amounts due thereunder. The fact Plaintiff refers to a “breach of contract” claim in his Complaint is irrelevant. What is relevant is, plaintiff sues for money owed under a contract, which is the breach and the amounts owed are determined by *quantum meruit.*

# LEGAL AUTHORITY

1. Defendant argues, breach of contract is not an available cause of action for the Plaintiff, which is incorrect. Plaintiff, through his Complaint, put defendant on notice of the legal theory of *quantum meruit¸* which is all that is required under Notice Pleading, in Colorado. Rule 8(e) provides “. . . No technical forms of pleading or motions are required. Pleadings otherwise meeting the requirements of these rules shall not be considered objectionable for failure to state ultimate facts as distinguished from conclusions of law.” “[i]f sufficient notice concerning the transaction involved is afforded the adverse party, the theory of the pleader is not important.” *Deny Construction v. Denver*, 170 P.3d 733 (Colo.App. 2007). “The chief function of a complaint is to give notice to the defendant of the transaction or occurrence that is the subject of the plaintiff's claims. Thus, motions to dismiss for failure to state a claim under

C.R.C.P. 12(b)(5) are ‘viewed with disfavor and are rarely granted under our ‘notice pleadings.’ *Grizzell v. Harman Enter*, 68 P.3d 551 (Colo.App. 2003). So, plaintiff put defendant on notice of his *quantum meruit* claim, through his *Third Amended Complaint, in ¶’s 34-41.*

1. Federal and Colorado Rule 8 are identical and provide, a pleading for relief shall contain: “a short and plain statement of the claim showing the pleader is entitled to relief.” Federal and Colorado case precedent developing the requirements under notice pleading are numerous and clear in establishing that defendants must be noticed as to the transaction or occurrence that is the basis of the complaint, not the theory of law relied upon. *Id.* Here, plaintiff’s Third Amended Complaint, well-pled the legal theory of *quantum meruit* thereby noticing defendant of plaintiff’s claim. Colorado's Rule 8 and the federal courts have ruled expressly that under the relaxed standards of notice pleading, a Complaint need not identify a legal theory or cause of action. *See Bennet, 153 F.3d at 519* (stating, the fundamental difference between notice pleading and the former code pleading is that notice pleading does not require the

pleader to state a specific cause of action). *Allocca v. Wachovia* (N.J. 6-12-2007). “In most cases it is sufficient if the pleader clearly identifies the transactions which form the basis of the claim for relief, and if upon any theory of the law relief is warranted by the evidence offered and received in support of the claim....” *Hemmann v. Mediacell,* 176 P.3d 856 (Colo.App. 2007). “[i]f sufficient notice concerning the transaction involved is afforded the adverse party, the theory of the pleader is not important.” *Denny Construction v. Denver,* 170 P.3d 733 (Colo.App. 2007). Because plaintiff well-articulated his claim, whether existing in breach of contract or *quantum meruit,* defendant has notice of the claim against him.

1. The validity of an attorney's contract with his client, including the terms of compensation for services to be rendered may, if the parties to that contract so choose, be litigated in the same manner as any other cause of action. *Cf. Tower v. Tower*, 147 Colo. 480, 364 P.2d 565 (Colo. 1961)*; Rupp v. Cool,* 147 Colo. 18, 362 P.2d 396 (Colo. 1961). Here, plaintiff sues defendant under their contract for failing to pay sums due thereunder.

# ARGUMENT

**A. The Court Should Dismiss Defendant’s Motion Because as Pled, Plaintiff Sues on a Valid Legal Theory**

1. There is little doubt that an attorney who withdraws from a case for justifiable reason, or is terminated by his client without cause, may recover compensation for his services. *Jenkins v. Dist. Court In & For Eighth Judicial Dist.,* 676 P.2d 1201, 1204 (Colo. 1984). Here, plaintiff withdraws as counsel because defendant demands same of plaintiff. Defendant offers no cause whatsoever to the termination, other than he wants a reduction of attorney fees. *Exhibit 6 to Plaintiff’s Reply on Summary Judgment issue. Jenkins* establishes that suits to recover legal fees are valid causes of action.
2. In *Elliott v. Joyce*, 889 P.2d 43, 46 (Colo. 1994), the court stated the required statement of the contingencies upon which the client is to be liable, as required by Rule 5(d). However, other than recovery for amounts collected by Elliott, the agreement otherwise only provides for client liability when the client terminates the agreement. This is the precise application of *Elliott* in this circumstance. *Elliott* expressly provided or was contemplated by the express terms of the parties’ fee agreement. It specifically provides that the client must pay the attorney fee based upon time and effort for services rendered if the *client* terminates the fee agreement. *Id.* Here defendant terminated plaintiff, in writing. *Plaintiff’s Exhibit 2.*
3. Under the fee agreement in question, Joyce only contracted to pay legal fees to Elliott in the event Joyce unilaterally terminated the contingent fee agreement. Although Rule 5(d) does not prohibit *per se quantum meruit* recovery, we hold that under our Rules 5(d) and 6 of chapter 23.3 of the Colorado Rules of Civil Procedure, limits recovery to situations in which the contingent fee agreement specifically sets forth circumstances under which the client will be liable. *Elliott v. Joyce*, 889 P.2d 43, 46 (Colo. 1994). *“*we do not disapprove of contingent fee arrangements permitting recovery by attorneys from clients in *quantum meruit.* However, in order to enforce such agreements, a client's liability must be expressly provided for within the written contingent fee agreement, as required by our rules. *Id. Paragraph 7 of the parties’ fee agreement* states, if client terminates Firm, plaintiff will be deemed working on *quantum meruit* basis.

Accordingly, the plain contract language is clear and defendant terminated plaintiff in writing on December 7, 2012. Therefore, *quantum meruit* is appropriately claimed owed by defendant to plaintiff in this action.

1. Defendant argues, plaintiff cannot sue defendant for breach of contract for terminating the attorney/client relation. Plaintiff is not suing defendant for failing to allow plaintiff to be his lawyer under their agreement, or any damages related thereto. Plaintiff sues defendant for failing to pay money for attorney fees earned under the parties’ fee agreement. “[a] client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.” *Olsen & Brown v. City of Englewood,* 889 P.2d 673, 676 (Colo. 1995). Here, plaintiff sues defendant precisely for this liability.
2. The technicality of naming plaintiff’s claim of *quantum meruit,* stated in plaintiff’s Complaint, breach of contract, is irrelevant. In order for the Plaintiff to recover from defendant he must plead a claim for relief available in law. C.R.C.P. Rule 8(e) provides “... No technical forms of pleading or motions are required. Pleadings otherwise meeting the requirements of these rules shall not be considered objectionable for failure to state ultimate facts as distinguished from conclusions of law.” *Pitman v. Hernandez*, 2009 WL 7586821 (Colo.Dist.Ct.); *Grizzell v. Harman Enter*, 68 P.3d 551 (Colo.App. 2003). “In most cases, it is sufficient if the pleader clearly identifies the transactions which form the basis of the claim for relief, and if upon any theory of the law relief is warranted by the evidence offered and received in support of the claim ” *Hemmann v. Mediacell,* 176 P.3d 856 (Colo.App. 2007).
3. Attorney fees earned, under *quantum meruit,* as pled in plaintiff’s complaint, are recoverable in this action. Defendant’s argument that the claim should be dismissed for calling it breach of contract misstates the law. “The chief function of a complaint is to give notice to the defendant of the transaction or occurrence that is the subject of the plaintiff's claims. Thus, motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are ‘viewed with disfavor and are rarely granted under our ‘notice pleadings.” *Grizzell v. Harman Enter*., 68 P.3d 551 (Colo.App. 2003). Because plaintiff well-articulated his claim, whether existing in breach of contract or *quantum meruit,* defendant has notice of the claim against him; and, in law plaintiff may recover under a *quantum meruit* theory.
4. A lawyer who sues to recover attorney's fees must show, *inter alia,* the fee agreement was fairly and openly made, and that he gave the client full knowledge of the facts and of his legal rights. [*Bryant,* 158 Colo. at 61, 404 P.2d at 523 (1965)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1965123847&amp;pubNum=661&amp;originatingDoc=Id9cf09f8f38311d98ac8f235252e36df&amp;refType=RP&amp;fi=co_pp_sp_661_523&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=%28sc.Search%29&amp;co_pp_sp_661_523); [*Rupp,* 147 Colo. at 22, 362 P.2d at 398 (1961)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1961124412&amp;pubNum=661&amp;originatingDoc=Id9cf09f8f38311d98ac8f235252e36df&amp;refType=RP&amp;fi=co_pp_sp_661_398&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=%28sc.Search%29&amp;co_pp_sp_661_398). “a lawyer who is suing for attorney's fees must show the contract was entered into fairly and the client was fully advised of all apposite facts.” [*Ross v. Wells,* 6 Ill.App.2d 304, 127 N.E.2d 519 (1955)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1955109479&amp;pubNum=578&amp;originatingDoc=Id9cf09f8f38311d98ac8f235252e36df&amp;refType=RP&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=%28sc.Search%29). *Bryant and Ross* acknowledge suits to recover attorney fees are valid causes of action. Finally, “we are constrained to note that contractual rights are property within the meaning of Art. II, s 25 the Colorado Constitution.” *Olin Mathieson Chemical Corp. v. Francis*, 134 Colo. 160, 301 P.2d 139 (Colo. 1956). Thus, in cases in which the attorney-client fee contract has been properly brought into question, due process requires, at the very least, that the attorney and the client thereafter be afforded an opportunity to present evidence for the court's consideration. Colo.Const. Art. II, s 25; *Woodson v. Ingram*, 173 Colo. 65, 477 P.2d 455. *Cf. Newey v. Newey*, 154 Colo. 461, 391 P.2d 378; *Pierce v. Nier,* 138 Colo.

402, 334 P.2d 440. Thus, after the trial court announced that it would determine an appropriate fee, its failure to hold such a hearing or to receive and consider evidence was sufficient in itself to have required reversal. *Id.* Here, plaintiff’s motion for summary judgment pled and presented evidence in support of his claim.

# CONCLUSION

The parties entered into a contract. Defendant failed to pay amounts due thereunder and plaintiff properly sues for same. Plaintiff does not sue defendant for breach of contract for terminating the attorney/client relation. Plaintiff sues for the *quantum meruit* amounts stated in the parties’ contract that defendant refuses to pay. It is the refusal to pay that is the breach not the termination of plaintiff as defendant’s lawyer. Pursuant to Rule 8 and Colorado law, plaintiff need not state the words *quantum meruit* in his Claim for Relief, to assert same against defendant. Plaintiff properly pled in his Third Amended Complaint a *quantum meruit* claim and articulated the basis for same therein. And, plaintiff raised same in his affirmative defenses to defendant’s counterclaim. Accordingly, that claim is properly noticed to defendant and rightfully before the court. Pursuant to *Elliott v. Joyce*, the courts recognize *quantum meruit* claims when the foundation for same is properly stated within the parties’ fee agreement. Here, this is the case. Defendant terminated plaintiff’s Firm and became liable for the damages stated within the parties’ contract. Under the *quantum meruit* clause in the contract, defendant Beeson became liable for attorney fees owed in that matter of $37,851.96, less amounts paid thereunder. To date, defendant’s outstanding balance at the Firm is $20,930.46, plus interest from the date of the termination and withdrawal of plaintiff from defendant’s case. All parties knew the terms of the fee agreement and all parties are bound by same. Defendant’s termination of plaintiff, prior to resolution of his case, obligated him for *quantum meruit* sums due thereunder the parties’ fee agreement. Thus, applying the standard for notice pleading, contract damages and the claim of *quantum meruit* asserted, the Court should deny defendant’s Motion.

WHEREFORE, Plaintiff Abrams & Associates, LLC, respectfully requests this Court deny defendant’s Motion to Dismiss, enter judgment against Defendant Shawn Beeson in the amount of $20,930.46, pre- and post-judgment interest as allowed by law; and, for such other and further relief as this Court deems just and appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 19th day of February, 2016.

ELKUS SISSON & ROSENSTEIN, P.C.

*/s/ Steven T. Mandelaris*

Steven T. Mandelaris, Attorney at Law

*(Original signature on file at Elkus Sisson & Rosenstein, pursuant to C.R.C.P. 121 § 1-26)*

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 19th day of February, 2016, a true and correct copy of the foregoing PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS BREACH

OF CONTRACT CLAIM AGAINST DEFENDANT was served via ICCES and/or United States mail upon:

Michael Boyce

Law Office of Michael P. Boyce, PC

3773 Cherry Creek Drive North, Suite 575 Denver, CO 80209 mike@boycelawoffice.com

*Attorney for Defendant*

*/s/ Nicole Parkin*

Nicole Parkin, Paralegal

*(Original signature on file at Abrams & Assoc. LLC pursuant to C.R.C.P. 121 § 1-26)*