

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

MY URGENT DENTISTRY, PLLC,

Plaintiff,

-v-

TEL SYSTEMS, THALNER,
ELECTRONIC LABS, INC,

Defendant.

Case No. 14-001870-CK

14-001870-CK

Hon. Daniel P. Ryan FILED IN MY OFFICE
WAYNE COUNTY CLERK
6/24/2015 10:26:28 AM
CATHY M. GARRETT

OPINION

/s/ Michelle Howard

This matter is before the Court on two motions for summary disposition pursuant to MCR 2.116(C)(8) and (10) filed by Defendant Tel Systems, Thalner Electronic Labs, Inc (Tel Systems). For the reasons stated below, the Court will deny the motions under MCR 2.116(C)(8) and will grant in part and deny in part the motions under MCR 2.116(C)(10).

1. Facts and Procedural History

Plaintiff My Urgent Dentistry (MUD) operates a mobile dental office. In 2012, MUD sought an audio/video telecommunications system to be installed in its offices in Woodhaven, Michigan. On May 12, 2012, MUD accepted a bid by Tel Systems for a telecommunications system, which included a one-year parts and labor warranty. The warranty period was to begin after “installation completion”. The original bid was for \$45,690. The system was installed in June of 2012 and was under warranty until October of 2013. Tel Systems made several service calls until the warranty period ended in October of 2013.

MUD filed the instant suit in February of 2014, alleging that the telecommunications system did not meet its requirements, including “the ability to record, video conference with

multiple parties, conduct seminars, presentations, and conferences with multiple parties, present materials during conferences and conduct business meetings.” (MUD’S Third Amended Complaint, ¶ 4). In its Complaint, MUD asserts claims of Count 1: Breach of Express and Implied Warranties, Count 2: Revocation of Acceptance, and Count 3: Breach of Contract. MUD seeks damages in excess of \$700,000 including damages for lost revenue for current and new clients, the cost of the system itself, and the time staff spent on training and working on other aspects of the system.

Presently before the Court is Tel Systems’ Motion for Summary Disposition as to Plaintiffs’ Breach of Contract Claim and Related Damages, and Tel Systems’ Renewed Motion for Summary Disposition as to Plaintiff’s Breach of Express and Implied Warranties and Revocation of Acceptance Claims.

2. Standard of Review

Tel Systems brings its motions pursuant to MCR 2.116(C)(8) and (10). “A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. Summary disposition under subrule (C)(8) is appropriate if no factual development could justify the plaintiffs claim for relief.” *Stone v Auto-Owners Ins Co*, 307 Mich App 169, 173; 858 NW2d 765 (2014).

In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corely v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

“A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

3. Breach of Contract Claim

The Court will first address Tel Systems’ motion for summary disposition as to the breach of contract claim and damages. In its motion, Tel Systems argues that the breach of contract claim must be dismissed because MUD cannot establish that Tel Systems breached the contract, or that any damages resulted from the alleged breach.

The elements of breach of contract are: “(1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach.” *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012).

A. Breach

MUD claims that Tel Systems breached the contract when it delivered a telecommunications system that was defective. Tel Systems argues that MUD has not identified how the system malfunctioned or was otherwise defective. However, MUD does claim, in part, that Tel Systems breached the contract when it did not provide a system that could accommodate ten end-point users and record for up to eight hours. Tel Systems asserts that MUD never requested a system that could accommodate ten end-users and record for up to eight hours.

Notably, MUD does not address this issue in its response to Tel System’s motion for summary disposition. Looking first to the contract between Tel Systems and MUD, there is nothing in the contract requiring Tel Systems to install a system that would accommodate ten

end-users and eight hours of recording. Further, none of the testimony from MUD's witnesses supports that MUD ever requested a system to support ten end-users and eight hours of recording time. In fact, Lynne Pitre, a former MUD employee who worked with Tel Systems on the bid and contract, testified that she never told anyone at Tel Systems that MUD wanted a system that would be able to incorporate up to ten end-users and record up to eight hours. Accordingly, the Court will grant Tel Systems summary disposition on MUD's claim that Tel System breached its contract with MUD when it failed to deliver a system that could accommodate ten end-users and up to eight hours of recording time.

However, Tel Systems has not established that it is entitled to summary disposition on the remainder of the breach of contract claim. In its Complaint, MUD also alleges that the contract was breached where there was no ability to teleconference in both video and audio formats from the board room to multiple end-users on both an individual and simultaneous basis, no ability of end-users to conference with MUD via the system in the board room from a variety of devices such as laptops, smart phones, and tablets, no ability to record audio and visual data from conferences, training systems, and other meetings in the board room without interruption and/or malfunction, no ability to conference by phone with both LAN line and cell phones, and no ability to display laptop content on-screen for sharing and presentations while still recording the audio and video data of the far-point and in the board room.

In its response to Tel System's motion for summary disposition, MUD has documented numerous issues and problems with the system. Installation of the system was to be completed during the last week of June. However, it was discovered that a part was missing during installation and would not be available to be installed until July 13, 2012. On July 3, 2012, it was also discovered that the system could not dial numbers and needed an additional phone line.

Despite repeated requests, the phone line was not installed until October 2, 2012. According to MUD, without the phone line, the system would not allow audio conferencing. There were numerous other issues with the system documented by MUD including, for example, a faulty HDMI cable, issues with the touch-pad interface, the camera turning itself off, recording issues, poor resolution, and dialogue skipping. The problems continued until at least September of 2013. The one-year warranty expired in October 2013. According to MUD, the system was still not working properly after the expiration of the warranty, and Tel Systems would not come out to look at the system without additional payment.

Given the above evidence provided by MUD, the Court finds that there remains a genuine issue of material fact concerning whether Tel Systems breached the agreement by failing to provide a system that worked. Accordingly, the Court finds that Tel System is not entitled to summary disposition on MUD's breach of contract claim that the system never functioned appropriately.

B. Damages

Tel Systems next argues that MUD's damages are based on speculation and conjecture and are not, therefore, recoverable. MUD's alleged damages are broken down as follows:

1. Estimated Net Revenue Capture-Current Clients	\$255, 646
2. Estimated Net Revenue Capture- New Clients	\$330,495
3. Cost of System	\$48, 150
4. Staff Time Spent on Tel Systems	\$70,000
5. Staff Sales Training Cost	\$41, 600
Total	\$745,891

“The party asserting the breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach.” *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). A party’s “remedy for breach of contract is limited to damages that arise naturally from the breach or those that were in contemplation of the parties at the time the contract was made.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 426 n 3; 751 NW2d 8 (2008). While “damages that are speculative or based on conjecture are not recoverable. . . it is not necessary that damages be determined with mathematical certainty; rather, it is sufficient if a reasonable basis for computation exists.” *Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239, 255; 792 NW2d 781 (2010); See also *Alien v Michigan Bell Telephone Co*, 61 Mich App 62, 68-69; 232 NW2d 302 (1975) (restating the longstanding principle of contract law that although damages for lost profits are awardable in breach of contract cases, it is necessary to prove the calculation of the profits loss with a reasonable degree of certainty, and such damages are not awardable if they are conjectural and speculative).

The Court will first address MUD’s claims of lost profits for both current clients and prospective clients. MUD asserts that the system purchased from Tel Systems was going to increase business. However, it appears that MUD’s calculation of over \$600,000 in lost profits is based on conjecture and the amount of profit loss cannot be proven with a reasonable degree of certainty. As Tel Systems points out, MUD has not identified a single business that refused to do business with MUD based on the alleged inability to perform video-conferencing services, or explained how they would have had more business from current clients had the system been working appropriately. MUD’s principal, Dr. Arestea Kakaris, could not identify any company whom MUD could not solicit due to the inoperability of the videoconferencing system, or

identify any company that would make its employees available to MUD through video conferencing. Further, it is speculative that any company with which MUD wished to do business would even have a videoconferencing system that was compatible with the one requested by MUD and installed by Tel Systems.

Moreover, MUD's calculation of damages based on lost profits from current clients assumes that it would have had 20% more clients had the teleconferencing system been operable. However, MUD does not explain how the 20% figure was arrived at, and the figure is based on pure speculation that the videoconferencing system would bring in more patients. MUD's calculation of damages based on lost profits from potential clients is also speculative. Its calculation assumes that the system would have "resulted in an additional 135 dental days generating additional net revenue," but does not explain how it came up with the 135 day figure. Accordingly, the Court finds that the damages for lost profits alleged by MUD are speculative and cannot be proven with a reasonable degree of certainty, and will grant Tel Systems summary disposition as to this issue.

Next, Tel Systems challenges the damages calculation for time spent by MUD staff on the issues with Tel Systems. MUD claims \$70,000 in staff costs associated with the communications system. However, MUD has failed to present any documentation or other evidence to back this claim up.¹ Because MUD has presented no evidence to establish that it

¹

MUD asserts in its response that "[t]he documents in this case, including those attached as exhibits, show extensive activities by the staff at MUD. MUD should be allowed to seek reimbursement for the unnecessary time spent with regard to the system." However, MUD fails to indicate what exhibits support the \$70,000 in damages, and this court will not search for authority to support a party's position. See *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002).

sustained \$70,000 in damages for staff costs spent on the videoconferencing system, the Court will grant Tel Systems summary disposition as to this issue.

Finally, Tel Systems challenges the damages for sales staff training costs in the amount of \$41,600. According to MUD, these costs were incurred when MUD retained BNP Company, LLC to train employees to address the company's objectives without the use of the videoconferencing system. Because MUD has provided documentary evidence of the \$41,600 in costs, there remains a genuine issue of material fact regarding whether these damages were caused by Tel Systems' alleged breach of the contract, and the Court will deny summary disposition as to this issue.²

4. Breach of Express and Implied Warranty

A. Express Warranty

Tel Systems next argues that MUD's claim for breach of an express warranty should be dismissed because the terms of the express warranty were honored. The bid offered by Tel Systems and accepted by MUD provided that "[t]his proposal includes a one year, on-site parts and labor warranty against defective workmanship on the installation and on the products included in the system." A second express warranty was executed on October 5, 2012 and provided:

Tel Systems will warrant the system against defective workmanship from the *installation* (i.e. bad cable connection, improperly fastened hardware, etc.) for a period of one year from the date of *installation completion*.

Tel Systems (at their option) will repair or replace *equipment* found defective within the system for a period of one year from the date of *installation completion*.

²

Tel Systems does not challenge the damages claim for the \$48,150 cost of the system.

“An express warranty may be created only between a buyer and a seller, and any such express warranty becomes a term of the contract itself.” *Heritage Resources, Inc v Caterpillar Financial Services Corp*, 284 Mich App 617, 634; 774 NW2d 223 (2009). In order to prevail on its breach of express warranty claim, MUD must show that Tel Systems was notified, during the warranty period, of a defect that it failed to repair. *American Bumper & Mfg Co v Transtechnology Corp*, 252 Mich App 340, 345; 652 NW2d 252 (2002).

MUD has failed to present evidence that Tel Systems violated the express warranty. Although MUD maintains that the system was continuously breaking down, it is undisputed that Tel Systems responded to each warranty call made by MUD during the warranty period and fixed the issues that arose. Accordingly, the Court will grant Tel Systems summary disposition on the express warranty claim.

B. Implied Warranty

Tel Systems also argues that MUD cannot establish that Tel Systems breached implied warranties of merchantability, MCL 440.2314, and fitness, MCL 440.2315. MCL 440.2314 provides in pertinent part:

- (1) Unless excluded or modified(section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.
- (2) Goods to be merchantable must be at least such as
 - (a) pass without objection in the trade under the contract description; and
 - (b) in the case of fungible goods, are of fair average quality within the description; and
 - (c) are fit for the ordinary purpose for which such goods are used[.]

MCL 440.2315 provides:

Where the seller at the time of contracting has reason to know any particular purpose for which goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

As outlined above in the discussion on the breach of contract claim, MUD has presented evidence that there were consistent issues with the system and that the system was unable to perform as intended. Evidence of multiple calls for service over a relatively short period of time constitutes circumstantial evidence that the system was not reasonably fit for its intended use when it left Tel System's possession. See *Computer Network, Inc v AM General Corp*, 265 Mich App 309, 317; 696 NW2d 49 (2005). Accordingly, the Court finds that there is a genuine issue of material fact as to whether Tel Systems breached the implied warranties of merchantability and fitness and the Court will deny the motion for summary disposition as to that claim.

5. Revocation of Acceptance

Finally, Tel Systems argues that MUD's revocation of acceptance claim should be dismissed because the alleged revocation was untimely. In its response to Tel System's motion for summary disposition, MUD indicates that "to narrow the issues at trial, MUD will not pursue the claim of [revocation of acceptance]." Accordingly, the Court will dismiss the revocation of acceptance claim.

6. Conclusion

For the foregoing reasons, the Court finds that Tel Systems' motion for summary disposition under (C)(8) is DENIED. Additionally, the Court finds that Tel System is entitled to

summary disposition pursuant to MCR 2.116(C)(10) on MUD's claim that it breached the contract when it failed to deliver a system that could accommodate ten far-point users and up to eight hours of recording time. However, Tel System is not entitled to summary disposition under MCR 2.116(C)(10) on the remaining breach of contract claims.

The Court also finds that MUD's claimed damages for lost profits in the amount of \$586,141 are purely speculative and therefore not recoverable. Further, MUD's claims for \$70,000 in damages associated with "Staff Time Spent on Tel Systems" is not supported by the record and is also not recoverable. However, MUD may go forward with its damage claims of \$41,600 in "Staff Sales Training Cost," and \$48,150 for the "Cost of the System."

The Court further finds that Tel Systems is entitled to summary disposition pursuant to MCR 2.116(C)(10) on the breach of express warranty claim, but is not entitled to summary disposition on the breach of implied warranty claim. Finally, the Court will dismiss the revocation of acceptance claim based on MUD's indication that they will not pursue the claim at trial.

/s/ Daniel P. Ryan

Circuit Judge

DATED: 6/24/2015