

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**SYSTEMS TECHNOLOGY GROUP, INC,
Plaintiff,**

v.

**Case No. 13-134488-CK
Hon. James M. Alexander**

**ATEM CORP,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant’s Motion for Summary Disposition. Plaintiff is a computer programming and consulting company that provides IT workers for its customers. At times, Plaintiff needs additional personnel and turns to subcontractors to fill staffing needs. Our Defendant is one such subcontractor. The present suit revolves around allegations that Defendant removed an employee, George Jojo, contrary to the parties’ agreement, and placed him with another employer.

Plaintiff then sued on claims of breach of contract and quantum meruit. Defendant responded by counter-suing, claiming that it did not remove Mr. Jojo, and Plaintiff failed to pay for all work done by Mr. Jojo.

On September 2, 2010, the parties entered into a “Software Service Supplier’s Agreement.” Under its terms, Defendant was required to hire and supply employees to work on a long-term project for Plaintiff’s customer – TD Auto Finance – and Defendant placed Mr. Jojo on the project.

According to the Supplier's Agreement, Defendant agreed "not to remove any personnel servicing [Plaintiff] under this agreement unless [Defendant] personnel voluntarily terminates employment relationship with [Defendant]." In its Complaint, Plaintiff alleges that Defendant breached this provision by "transferr[ing] [Mr. Jojo] from the TDAF project to another project."

At the time, Mr. Jojo was a non-US citizen who was permitted to be in the United States on an H-1B visa. Plaintiff argues that Mr. Jojo's visa status proves that he could not leave his sponsoring employer (Defendant) without their consent or he would "be thrown out of the country." In other words, Plaintiff argues that Defendant "owned" Mr. Jojo "and could place him wherever it wanted." As a result, Plaintiff argues that Mr. Jojo was unable to work anywhere that Defendant did not assign him, and this establishes Defendant's breach.

Defendant, on the other hand, argues that Mr. Jojo's visa status was the reason that **he decided** to leave his placement at TD. In support, Defendant provides numerous emails between Mr. Jojo and representatives of Plaintiff and Defendant. Defendant also attaches Mr. Jojo's affidavit. All of these attachments establish that it was solely his decision to leave his placement with TD.

The reason for his decision was that TD would not provide him with a necessary letter establishing his employment status in order to extend his visa. In fact, in one email, Mr. Jojo stated that he would reconsider his resignation if TD would provide the necessary employment status letter to support his visa extension. Because TD would not do so, however, Mr. Jojo decided to leave the project.

Because the decision to leave was solely Mr. Jojo's, Defendant argues that it could not have breached the Supplier Agreement – which requires that it not "remove" an employee. As a result, Defendant seeks summary disposition under MCR 2.116(C)(8) and (C)(10) on Plaintiff's Complaint and its own Counter-Claim for the amount Plaintiff owes for Mr. Jojo's work at TD.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). In response to Defendant's motion, Plaintiff moves for summary disposition under MCR 2.116(I)(2).

Both parties argue that they are entitled to summary disposition based on language found in the parties' written agreement. In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

Michigan law is well-established that “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

This Court has previously interpreted this same provision in a Systems Technology Supplier Agreement. In *Systems Technology v Devcare* (Case No. 13-131931-CK), the Court issued a June 19, 2013 Opinion and Order re: Summary Disposition and held (in relevant part):

Under the terms of the parties' contract, Defendant claims that it was only liable if it “removed” [the employee]. The Court agrees.

Plaintiff's entire argument operates from the standpoint that Defendant's act of removal is unnecessary for there to be a breach. Again and again Plaintiff argues that Defendant admitted its breach, but that is not the case. Defendant only admitted that [the employee] **left** the State project, but never admitted that it “**removed**” him from the project. If the parties wished that Defendant be liable

for any personnel leaving the project for any reason, the same could have easily been provided in the parties' agreement.

The question before this Court becomes whether Defendant's actions amount to "removal." "Remove" is not defined in the contract, but our Supreme Court has defined the term as "to move or shift from a place or position; to eliminate; do away with or put an end to." *DaimlerChrysler Corp v State Tax Comm'n*, 482 Mich 220, 228; 753 NW2d 605 (2008), quoting Random House Webster's College Dictionary (1997).

It appears that this definition inherently involves some type of affirmative action by Defendant.

As a result, without Defendant's act of removal, the provision relied upon by Plaintiff is left untriggered. As stated, the provision provides that Defendant agreed "not to remove any personnel servicing [Plaintiff] under this agreement unless [Defendant] personnel voluntarily terminates employment relationship with [Defendant]." But whether or not Mr. Jojo terminated his employment with Defendant is of no consequence because that only matters if Defendant "removed" Mr. Jojo from his placement at TD. This provision does not address what happens if the employee removes himself from the placement – as in the present case.

It now appears that Plaintiff wishes the agreement to provide that 'Defendant is liable for damages if any personnel leave their Systems Tech placement for any reason and remain employed with Defendant.' The parties certainly could have contracted for such a provision, but they did not. Instead, they agreed that Defendant was prohibited from removing personnel. As a result, an employee's sole decision to leave cannot amount to a breach of this provision by Defendant.

The only evidence before the Court establishes that it was Mr. Jojo's sole decision to leave his placement at TD. Plaintiff has presented no evidence that Defendant "removed" Mr. Jojo. Instead, Plaintiff only offers mere speculation that Mr. Jojo must have had Defendant's blessing. This speculation, however, is insufficient to create a question of fact.

For all of the foregoing reasons and viewing the evidence in the light most favorable to Plaintiff, the Court finds that there are no material questions of fact in dispute, and Defendant is entitled to Judgment as a matter of law. Therefore the Court GRANTS Defendant's motion under (C)(10), and Plaintiff's Complaint is DISMISSED in its entirety.¹ For the same reasons, Plaintiff's motion for summary under (I)(2) is DENIED.

On its Counter-Claim, Defendant claims that Plaintiff admitted in its answer to Defendant's interrogatory that it owes Defendant \$20,448 for services attributable to Mr. Jojo on the TD project. As a result, Defendant argues that it is entitled to a judgment for that amount.

Plaintiff's only response is that Defendant's prior breach means that Plaintiff "is excused from paying." The Court, however, has ruled that Defendant did not breach the parties' agreement because Plaintiff did not present any evidence that Defendant removed Mr. Jojo from the TD project.

As a result, the Court finds that Defendant is entitled to summary disposition on its Counter-Claim under MCR 2.116(C)(8) and (C)(10), and Defendant is entitled to a money judgment in the amount of \$20,448.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

January 29, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

¹ Plaintiff's unjust enrichment claim cannot be maintained when there is an express contract covering the disputed subject matter. *Campbell v Troy*, 42 Mich App 534, 537; 202 NW2d 547 (1972). Further, because the Court has determined that Defendant did not breach the parties' agreement, it is unnecessary to address Defendant's right to cure argument.