

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

**RIVER STAR PROFESSIONAL GROUP, LLC,
Plaintiff,**

v.

**Case No. 16-152909-CB
Hon. James M. Alexander**

**KOBA HOLDINGS, INC, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant Michael Bayoff’s motion for summary disposition. Plaintiff is suing to recover \$70,438, which it claims that it is owed for strategic planning and other services. To recover the alleged amount owing, Plaintiff sued on claims of breach of contract and account stated.

In support of its breach of contract claim, Plaintiff’s Complaint alleges that Defendant Jim Hammet is liable for the balance pursuant to a June 5, 2013 “Chief of Staff Services Agreement.” Just three weeks later, Plaintiff claims that Defendants Hammet, John Kousa, and Djembe Holdings entered into a June 26, 2013 written Addendum to the Agreement, “adding John Kousa and Djembe Holdings as parties to the Agreement.”

But with respect to Bayoff, Plaintiff alleges (Complaint, ¶ 10), “Although Michael Bayoff is not a signatory to the Agreement, he expressly agreed or agreed by implication to also be bound by the terms of the Agreement.”

And in support of its account stated claim, Plaintiff alleges that it sent invoices to all Defendants, “who received and retained the invoices without properly objecting within a

reasonable time.” Plaintiff also attaches an affidavit verifying the balance due on Defendants’ account pursuant to MCL 600.2145.¹

Bayoff now seeks dismissal from this lawsuit under MCR 2.116(C)(8) – arguing that he never executed any written agreement to be liable on Plaintiff’s alleged debt. A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Initially, the Court notes that both Bayoff’s motion and Plaintiff’s Response include affidavits in support. But the present motion is one brought under (C)(8). When analyzing such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). A (C)(8) motion may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* And, when deciding such a motion, **the court considers only the pleadings**. MCR 2.116(G)(5).² As a result, it is improper to consider either side’s affidavit.

Bayoff first argues that he is entitled to summary disposition because he is not a party to any of the contracts attached to Plaintiff’s Complaint.

¹ MCL 600.2145 provides, in relevant part:

[I]f the plaintiff or someone in his behalf makes an affidavit of the amount due, as near as he can estimate the same, over and above all legal counterclaims and annexes thereto a copy of said account, and cause a copy of said affidavit and account to be served upon the defendant, with a copy of the complaint filed in the cause or with the process by which such action is commenced, such affidavit shall be deemed prima facie evidence of such indebtedness, unless the defendant with his answer, by himself or agent, makes an affidavit and serves a copy thereof on the plaintiff or his attorney, denying the same.

² “When an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8).” *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

Indeed, “[i]t goes without saying that a contract cannot bind a nonparty.” *AFSCME Council 25 v County of Wayne*, 292 Mich App 68, 80; 811 NW2d 4 (2011); quoting *Equal Employment Opportunity Comm v Waffle House, Inc*, 534 US 279, 294; 122 S Ct 754; 151 L Ed 2d 755 (2002).

Bayoff also argues that Plaintiff’s claim actually seeks to enforce a promise to answer for the debt of another (KoBa Holdings, f/k/a Djembe Holdings), which is barred if it is not in writing under MCL 566.132(1)(b). The cited statute provides:

In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:

...

(b) A special promise to answer for the debt, default, or misdoings of another person.

In its Response, Plaintiff alleges that Bayoff **verbally** agreed to accept and pay for Plaintiff’s services under the June 2013 Agreement and Addendum. And, Plaintiff argues, its claims “arise from [Bayoff’s] failure to pay for services **that [it] provided directly to him**, as well as the other principals of KoBa Holdings.” (emphasis added).

Plaintiff’s argument also implicates the timing of Bayoff’s alleged promise. Plaintiff claims that Bayoff joined the Djembe Holdings in July 2013 – the month **after** the Agreement and Addendum was executed. In fact, Bayoff joining was the reason that the company name was changed to KoBa Holdings.³

³ The Addendum references Djembe Holdings because its name was not changed to KoBa until after its execution.

But to the extent that Plaintiff claims that an alleged verbal agreement with Bayoff was a modification of an existing contract (to include his personal guaranty of performance), the same must also have been in writing to be enforceable under MCL 566.1. This statute provides:

An agreement . . . changing, modifying, or discharging [a] contract, [or] obligation . . . shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge.

It is important to note that the Court of Appeals also acknowledged, in the context of personal guarantees on business debts:

As a general rule, “an individual stockholder or officer is not liable for his corporation’s engagements unless **he signs** individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice--once as an officer and again as an individual.” *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 523-524; 742 NW2d 140 (2007) (emphasis added), quoting *Salzman Sign Co v Beck*, 176 NE2d 74, 76 (NY 1961).

And Plaintiff admits that Bayoff never executed any writing agreeing to be personally liable on the business’s debts. As a result, to the extent that Plaintiff seeks to impose liability on Bayoff for the business’s debts, such claims would fail as a matter of law.

But, as stated, Plaintiff appears to claim that Bayoff verbally agreed to pay for services provided **directly to him**. There is a difference between Plaintiff providing services **directly to Bayoff** (for Bayoff’s benefit) and providing services to the company, which benefits Bayoff as a principal of that company. The former may serve as the basis for an enforceable oral agreement, but the latter cannot (the lack of a writing is fatal).

Further, while Plaintiff claims that it provided services directly to Bayoff, the total amount sought in the Complaint is \$70,438.30 – which matches the amount owing on KoBa’s account statement. In other words, despite Plaintiff’s claim otherwise, it appears that Plaintiff only seeks the outstanding monies owed for services **provided to KoBa**. And, to get around the

lack of a writing with respect to Bayoff, it appears that Plaintiff plays semantics to allege this debt was one arising from serviced provided to Bayoff directly.

The Court will be clear. Plaintiff may not pursue Bayoff for any outstanding balance owed by KoBa without a writing clearly indicating his intent to guaranty the debt.⁴ And a careful reading of Plaintiff's claims and its summary response establishes that it intends to do just that.

As a result, the Court finds that Plaintiff's claims against Bayoff are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Therefore, Plaintiff's Complaint (against Bayoff only) is DISMISSED under (C)(8).

IT IS SO ORDERED.

August 31, 2016
Date

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

4 This is true of both Plaintiff's breach of contract and account stated claims. The Court of Appeals has reasoned: an account stated [is] "a balance struck between the parties on a settlement" "Where a plaintiff is able to show that the mutual dealings which have occurred between two parties have been adjusted, settled, and a balance struck, the law implies a promise to pay that balance." *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 331; 657 NW2d 759 (2002); quoting *Watkins v Ford*, 69 Mich 357, 361; 37 NW 300 (1888).

In order to establish an account stated, a plaintiff must prove that the defendant "either expressly accepted the bills by paying them or failed to object to them within a reasonable time." *Keywell*, supra at 331. Further, "[p]roving an account stated 'must depend upon the facts. That it has taken place, may appear by evidence of an express understanding, or of words and acts, and the necessary and proper inferences from them.'" *Id.* at 331; quoting *Kaunitz v Wheeler*, 344 Mich 181, 185; 73 NW2d 263 (1955).

The KoBa account statement attached to the Complaint does not establish that **Bayoff** was ever billed in his individual name.