STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

STILLWATER PUBLICATIONS, LLC,

Plaintiff,

v

Case No. 2013-136691-CB
Hon. Wendy Potts

WYNNESTONE COMMUNITIES CORP,

Defendant.
_____/

OPINION AND ORDER RE: PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

At a session of Court
Held in Pontiac, Michigan
On
AUG 20 2014

This dispute arises from an advertising agreement for Defendant Wynnestone Communities Corporation's low-income housing. Plaintiff Stillwater Publications LLC publishes a housing guide titled "Affordable Housing Solutions" four times per year that is distributed free of charge to potential tenants. In June 2011, Defendant agreed in writing to pay Plaintiff a $1,282.12 per month "Approved Rate" for the advertising, which Plaintiff claims is a substantially discounted rate over what it usually charges. According to Plaintiff, Defendant began to miss payments shortly after the contract was entered and paid only sporadically through the term of the agreement. Plaintiff claims it attempted to resolve this issue by working with Defendant's staff for months without success. Plaintiff further claims that, despite Defendant's failure to pay, Plaintiff fulfilled all of its obligations under the agreement by publishing Defendant's advertising through the spring of 2013. When Defendant failed or refused to pay the past-due balance, Plaintiff brought this action to collect in October 2013. Defendant did not

timely answer the complaint and the Clerk's office entered a sum certain default judgment in November 2013. However, Defendant moved to set aside the default judgment, which the Court granted.

Plaintiff now moves the Court to grant it summary disposition and enter judgment in its favor. Plaintiff's motion is brought under MCR 2.116(C)(9), which tests the legal sufficiency of the answer, *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000), and (C)(10), which tests the factual support for the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Defendant opposes the motion and seeks partial summary disposition under MCR 2.116(I)(2), which gives the Court authority to grant summary disposition to the opposing party if it, rather than the moving party, is entitled to judgment as a matter of law. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

The parties do not dispute that the advertising agreement is valid or that Defendant breached the agreement by failing to make most of the monthly payments. Thus, Plaintiff is entitled to summary disposition of Defendant's liability for its breach of contract claim. However, the parties dispute the amount Defendant owes and whether the "default clause" of the agreement is enforceable. The agreement states "[i]n the event the Advertiser [Defendant] does not fulfill the terms and conditions of this agreement or it becomes necessary for the publisher (Stillwater Publications, LLC) to enforce its rights herein, the Advertiser agrees to pay the Regular Rate and not the Approved Rate that is in effect during this agreement . . ." Plaintiff asserts that the default provision is a liquidated damages clause, which is permissible under Michigan. Indeed, parties to an agreement may stipulate to the amount to be paid in compensation for loss or injury resulting from a breach of the agreement. *Moore v St Clair*

County, 120 Mich App 335, 340; 328 NW2d 47 (1982). The amount of liquidated damages must be "reasonable with relation to the possible injury suffered" and cannot be unconscionable or excessive or impose a penalty. *Moore*, *supra*. Whether a liquidated damages clause is enforceable is a question of law. *Id* at 339.

On its face, there is nothing unconscionable or excessive about the provision. It simply states that Defendant must pay the "Regular Rate" instead of the discounted for "Approved Rate." Plaintiff gave Defendant a discounted rate based on the assumption that Defendant would purchase a substantial amount of advertising space and pay for that advertising. Plaintiff lost the benefit of the bargain when Defendant failed to timely and fully pay. The advertising space that Plaintiff reserved for Defendant could have been sold to other advertisers that paid a higher rate, or at least paid on time. Plaintiff's demand that Defendant pay a higher rate in the event of a default is a reasonable liquidated damages term and does not constitute an impermissible penalty.

Although the Regular Rate provision is an allowable liquidated damages provision, Plaintiff fails to demonstrate as a matter of law what the "Regular Rate" was. Plaintiff claims in its motion that the Regular Rate was $3,500 per month, however, the agreement does not state what the "Regular Rate" is and Plaintiff did not provide an affidavit or other admissible evidence with its motion that it charged $3,500 per month as its Regular Rate or that the parties to this agreement understood and agreed that Plaintiff would charge Defendant $3,500 per month as the Regular Rate. In order for this provision to be a valid and enforceable liquidated damages provision, the parties have to agree to the amount to be paid. *Moore*, *supra*. Because Plaintiff fails to show that the parties agreed to liquidated damages of $3,500 per month, the Court cannot conclude as a matter of law that Plaintiff is entitled to the damages it seeks. Thus, Plaintiff's request for summary disposition of its damages is denied.

Defendant also appears to be asserting that Plaintiff did not publish the advertising after June 2012. Although Defendant is correct that the agreement expired twelve months after it was executed on June 20, 2011, Plaintiff notes that the agreement allowed the advertising to continue on an "issue-to-issue basis" after the expiration date unless one of the parties provides written notice of its intent not to continue. Plaintiff presents evidence that it published Defendant's advertising through the Spring 2013 issue, and Defendant presents no evidence that it gave Plaintiff written notice of termination before that issue. Thus, Defendant fails to raise an issue of fact on its claim that the advertising ceased, or should have ceased, in June 2012.

Defendant further asserts that Plaintiff's account stated claim fails because there is no evidence that Defendant assented to payment of the Regular Rate. However, Plaintiff presents evidence that it invoiced Defendant, and there is no evidence that Defendant timely objected to the invoices, which is sufficient to support an account stated claim. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 331; 657 NW2d 759 (2002). Therefore, Plaintiff is entitled to summary disposition of Defendant's liability for its account stated claim. However, for the reasons stated above, the Court denies summary disposition of Plaintiff's damages.

Defendant next argues that Plaintiff cannot assert a claim that Defendant breached an implied covenant of good faith and fair dealing. Plaintiff could bring a claim for breach of this implied covenant if the contract made the manner of Defendant's performance a matter of its own discretion. *Burkhardt v City National Bank*, 57 Mich App 649, 652; 226 NW2d 678 (1975). Because Defendant's performance under this agreement was not discretionary, the implied covenant is inapplicable and Defendant is entitled to summary disposition of this claim.

In its final argument, Defendant asserts, and the Court agrees, that Plaintiff's unjust enrichment claim fails as a matter of law. The Court cannot imply a contract where an

enforceable express contract between the parties covers the same subject matter. *HJ Tucker & Assoc, Inc v Allied Chucker & Engineering Co,* 234 Mich App 550, 573; 595 NW2d 176 (1999). Because there is an enforceable agreement covering the advertising, Defendant is entitled to summary disposition of Plaintiff's unjust enrichment claim.

For all of these reasons, the Court grants Plaintiff summary disposition of Defendant's liability for its breach of contract and account stated claims. The Court further grants Defendant summary disposition of Plaintiff's implied covenant and unjust enrichment claims. The Court denies Plaintiff's request for summary disposition of its damages.

IT IS SO ORDERED

Dated: AUG 20 2014

Hon. Wendy Potts