

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

**AUNT ZAN,  
Plaintiff,**

v.

**Case No. 13-137659-CK  
Hon. James M. Alexander**

**STEWART TITLE GUARANTY CO,  
Defendant.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on cross motions for summary disposition. In its Complaint, Plaintiff claims that it is in the business of purchasing real property to redevelop and rent. On November 11, 2009, Plaintiff acquired a certain parcel of real property commonly known as 3995 Lakeland in Bloomfield Hills after the prior owner, Gloria Tactac, was unable to meet her financial obligations for the property. The Court will note that Plaintiff's sole member is Joanne Safie – Ms. Tactac's sister-in-law, and Plaintiff's manager is Steve Safie – Ms. Safie's son (and Ms. Tactac's nephew).

Plaintiff acquired the property by way of deed in lieu of foreclosure after paying the redemption amount after foreclosure proceedings were concluded. At the time it acquired the property, Plaintiff admits that it was aware that the property was encumbered by a roughly \$90,000 federal tax lien. After acquiring the property, Plaintiff leased the property back to Ms. Tactac through her niece, Teresa Pavone.

In early 2011, Plaintiff decided to sell the property. This is the point that the parties begin to

disagree about everything.

Plaintiff claims that Ms. Tactac assured it that she would pay the tax lien. In his deposition, Mr. Safie testified that his aunt led him to believe that the tax lien was taken off the property by early 2011, but he didn't necessarily believe her. Plaintiff then contacted Capital Title (Defendant's claimed agent) to check the status of the title and insure against any title defects. Plaintiff claims that Capital's title search came back clean, which meant that the IRS lien had been satisfied. With a March 1, 2011 title insurance policy in hand, Plaintiff began to market the property.

About nine months later, Plaintiff found a buyer and scheduled a closing for December 6, 2011. At closing, Plaintiff claims that it was informed for the first time that Capital Title made a critical error and the IRS lien had never been discharged. Plaintiff claims that it "was left with no real choice" but to pay the IRS lien and proceed with closing.

Plaintiff then filed a claim based on the title insurance policy, but Defendant denied said claim. As a result, Plaintiff filed the present suit on claims of breach of contract, unjust enrichment, and promissory estoppel.

Defendant's theory of this case, in stark contrast, is that Plaintiff always knew that the tax lien was not satisfied. Essentially, Defendant claims that Plaintiff fraudulently hid its knowledge of the tax lien from Defendant and now seeks a "windfall profit" based on its intentional misconduct. In other words, Plaintiff purchased property with a known tax lien, then contracted for title insurance without disclosing the lien. When Defendant finally discovered the lien, Plaintiff still went through closing, paid the lien, and now demands that Defendant reimburse Plaintiff for profits lost due to payment of said lien – that it always knew existed.

In any event and despite the parties' wildly differing accounts of this case, the parties filed

the present cross motions for summary disposition – Plaintiff seeking the same under MCR 2.116(C)(10) and Defendant under (C)(8) and (C)(10).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. A motion under this subrule 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. *Wade v Dept of Corrections*, 439 Mich 158; 483 NW2d 26 (1992).

A motion under (C)(10) tests the factual support for Plaintiff’s claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Under (C)(10), “In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

With respect to Plaintiff’s breach of contract claim, the Court finds that the parties completely disagree about what Plaintiff’s knowledge of the tax lien at the time that Plaintiff contracted for the title insurance policy. Repeatedly, Mr. Safie claims that he believed the tax lien to be satisfied and contracted with Defendant for insurance to that effect. And repeatedly, Defendant claims that Mr. Safie not only knew that the tax lien still existed – but he hid its existence from Defendant. In other words, the parties make credibility and intent specific issues.

It is well settled, however, that credibility is an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, “courts may not resolve factual disputes or determine credibility in ruling

on a summary disposition motion” *White, supra* at 625, citing *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004); and *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005).

Additionally, in *Vanguard Ins Co v Bolt*, 204 Mich App 271; 514 NW2d 525 (1994), the Court of Appeals held:

The granting of a motion for summary disposition is especially suspect where motive and intent are at issue or where a witness or deponent’s credibility is crucial. Accordingly, where the truth of a material factual assertion of a moving party depends upon a deponent’s credibility, there exists a genuine issue for the trier of fact and a motion for summary disposition should not be granted. *Vanguard Ins, supra* at 276 (internal citations omitted).

The Court finds that resolution of this issue is so substantially intertwined with fact-finding and credibility determinations as to render summary disposition on Plaintiff’s breach of contract claim wholly inappropriate. As a result, both parties motions for summary on this claim under (C)(10) are DENIED.

Defendant next claims that Plaintiff’s unjust enrichment (Count II) and promissory estoppel (Count III) claims must be dismissed because an express contract exists between the parties. Indeed, it is well settled that an unjust enrichment or promissory estoppel claim cannot be maintained when there is an express contract covering the disputed subject matter. See, e.g., *Campbell v Troy*, 42 Mich App 534, 537; 202 NW2d 547 (1972); *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992); and *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

And in its Response, Plaintiff ignores this issue – thereby conceding Defendant’s entitlement to summary disposition. As a result, Defendant’s motion for summary disposition of Plaintiff’s unjust enrichment (Count II) and promissory estoppel (Count III) claims is GRANTED, and the same are DISMISSED.

**IT IS SO ORDERED.**

September 24, 2014  
Date

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