

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

**PRECISION SLITTING SERVICE, CO,
Plaintiff,**

v.

**Case No. 14-140854-CB
Hon. James M. Alexander**

**MILANO INDUSTRIES, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff’s Motion to Strike the Answer and for Partial Summary Disposition. Plaintiff alleges that it sold Defendant Milano scrap steel on an open account. Plaintiff claims that Milano fell behind on its payments and its account “ballooned to over \$400,000 which was over a year delinquent.” The parties attempted to negotiate a settlement for many months, but were unable to come to terms.

Plaintiff claims that Milano owes \$342,615 and filed the present Complaint on an account stated claim. In an affidavit attached to its motion, Plaintiff admits that Milano paid \$5,000 on the debt since the filing of the Complaint – leaving a balance of \$337,615. Plaintiff also alleges that “Defendants Alan J. Bossio and Eugenio Pallisco both agreed to personally guarantee the payment of the account thru various email correspondence.” Bossio and Pallisco are Milano’s principals.

To its end, Plaintiff now asks the Court to strike Defendants’ Answer and grant its motion for summary disposition under MCR 2.116(C)(9) or (C)(10). MCR 2.116(C)(9) tests whether the

defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery. *Lepp v Cheboygan Area Schools*, 190 Mich App 726 (1991). MCR 2.116(C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Plaintiff first argues that the Court should strike Defendants' Answer because it doesn't believe that Defendants' denials were particular enough and Defendant did not file a counter affidavit of account stated. The Court disagrees.

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).

As stated, Plaintiff argues that Defendants failed to attach an affidavit of the amount due to its Answer. The Court agrees. But, contrary to Plaintiff's claim, MCL 600.2145 does not **require** an affidavit to be filed with the Answer. Rather, because Plaintiff filed one, it simply creates a prima facie case if unanswered by Defendants.¹

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

Defendants do file a counter affidavit with their Response to Plaintiff's motion. In it, Defendant admits that Milano owes \$303,619.71 on its open account. While Plaintiff's affidavit creates prima facie evidence of the \$337,615 debt, it is not dispositive in and of itself.

Based on Defendants' admission in its counter-affidavit, the Court finds that there are no material facts in dispute and Plaintiff is entitled to judgment as a matter of law on Milano's liability and for at least \$303,619.71 in damages. To the extent that Plaintiff seeks \$337,615 (as claimed), however, the \$33,995.29 difference is properly decided at trial – with Plaintiff's affidavit establishing prima facie evidence of its entitlement to the same.

The Court also finds that only Milano is liable on the above debt. While Plaintiff claims that the individual defendants agreed to answer for the debt, there is insufficient evidence of the same to grant summary disposition on this issue.

Finally, Plaintiff seeks summary disposition of Defendants' Counter-Claim – which essentially alleges that the parties agreed on terms to settle Milano's preexisting debt. On this basis, Defendants filed a Counter-Complaint on claims of breach of contract, promissory estoppel, and respondeat superior.

The Court will note that Defendants offer no support that an actual agreement was reached. Rather, Defendants simply establish that the parties were involved in negotiations on the debt. Defendants' novel argument, therefore, is – when negotiations on a preexisting debt fail (meaning that no agreement is reached), the Court should imply and enforce a contract that was

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.

never agreed to.² The Court disagrees. If such a rule were adopted, parties would be reluctant to engage in settlement discussions. The Court rejects Defendants' attempts to bring contract and quasi-contract claims in an attempt to enforce terms of an unreachd settlement of a preexisting debt.

Summary

To summarize, Plaintiff's Motion is GRANTED IN PART.

Plaintiff's motion to strike Defendants' Answer is DENIED.

Plaintiff's motion for summary as to Defendant Milano is GRANTED – and Plaintiff is entitled to judgment as a matter of law in the amount of at least \$303,619.71 (only against Milano). Whether Plaintiff is entitled to the remaining \$33,995.29 is an issue properly decided at trial.

As to Defendants Bossio and Pallisco, however, Plaintiff's motion is DENIED.

Finally, Plaintiff's motion for summary of Defendants' Counter-Complaint is GRANTED, and the same is DISMISSED.

IT IS SO ORDERED.

November 5, 2014
Date

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

² Without a separate, executed contract, Milano's \$5,000 payments offer nothing to establish any separate agreement because Milano was already indebted to Plaintiff for over \$300,000. Said payments simply reduce the amount of the preexisting debt.