

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

**DETROIT INDUSTRIAL SYSTEMS, INC, ET AL,
Plaintiffs,**

v.

**Case No. 14-142091-PD
Hon. James M. Alexander**

**HICKS TAX CONSULTING, INC and
LOREN K. HICKS,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant Loren K. Hicks Motion for Summary Disposition.

The Court notes that both Defendants (Loren Hicks, individually, and Hicks Tax Consulting, Inc) were previously represented by counsel, who withdrew on April 8, 2015. Since that time, no Appearance has been filed on behalf of Defendant Hicks Tax Consulting, Inc. But Defendant Hicks did attach an Appearance to her Motion for Summary Disposition, whereby she purports to represent both herself and the corporation.

While Defendant Loren Hicks may represent herself, she is unable to represent a corporation under well-established Michigan law. See, e.g., *Peters Prod v Desnick Broadcasting Co*, 171 Mich App. 283, 287; 429 NW2d 654 (1988) (holding “An individual may appear in propria persona; a corporation, however, **can appear only by attorney** regardless of whether it is interested in its own corporate capacity or in a fiduciary capacity.”), and *Detroit Bar Ass’n v Union Guardian Trust Co*, 282 Mich 707, 711; 281 NW 432 (1938). As a result, Defendant Hicks Tax Consulting, Inc. is

currently without counsel, and the present motion does not apply to it.

According to their Complaint, Plaintiffs claim that Defendants performed tax preparation, payroll, and business planning services for Plaintiffs between 2005 and 2013. Plaintiffs claim that Defendants “still have custody of the client records provided by Plaintiffs” and refuse to return the same. Plaintiffs further claim that they have been assessed and fined some \$149,868.40 to-date by the IRS for deficiencies in their tax documents. Specifically, the IRS indicated not receiving twelve 940 and 941 forms for ten quarters in 2009 through 2012. Plaintiffs claim that they would like to contest the IRS assessments but cannot do so without copies of the records in Defendants’ possession. On these general allegations, Plaintiffs brought a multi-count Complaint (originally filed on July 29, 2014).

On September 8, 2014, Defendants filed their Answer, Affirmative Defenses, and a Counter-Complaint (apparently based on breach of contract for non-payment of fees).

Defendant Loren Hicks, in pro per, now moves for summary disposition of Plaintiffs’ Complaint. In her motion, Defendant mentions that Plaintiffs’ claims are barred by a two-year statute of limitations for claims of professional malpractice under MCL 600.5805(6). Indeed, under the cited statute, “[e]xcept as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.”

Defendant also argues that, with her motion, she has “come forward with sufficient evidence, to defend all of the elements of Plaintiffs’ claims” by “a preponderance of evidence.” But this is not a standard for any of the myriad of summary standards cited by Defendant Hicks.¹ Further, aside from providing her own version of events, Defendant does not recite any of the “elements” of any of

¹ Defendant purports to move for summary under MCR 2.116(C)(7), (C)(8), (C)(9), and (C)(10). And Defendant attaches sparse evidence in support of the allegations contained in his motion (Defendant’s motion is not verified or

Plaintiffs' claims.

And Michigan law is clear that, "A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim." *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). This is precisely what Defendant attempts in the current motion. She simply gives her unsupported version of events and concludes that all of Plaintiff's claims fail.

Further, Defendant appears to challenge Plaintiffs' version of events (in other words, credibility). But 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).

Under the Court's May 27, 2015 Order, Plaintiffs were required to file a response brief by July 1, 2015. Plaintiffs, however, did not attempt to file the same until July 2 (one day late). And Plaintiffs now move for leave to accept the late filing.

Generally, it is within a Court's discretion to set deadlines for summary responses or to accept late responses. The Court will exercise its discretion and consider Plaintiffs' response.

Plaintiffs first argue that Defendant's statute of limitations defense was waived when she failed to raise the same in her first responsive pleading. Indeed, our Court of Appeals has held:

Under MCR 2.111(F)(2), . . . a defense is waived if not pleaded or raised by motion. MCR 2.116(D) sets forth the timetable to raise particular issues by motion. . . . Issues

supported by affidavit).

related to capacity to sue, other action pending, and affirmative defenses must be raised not later than the first responsive pleading. MCR 2.116(D)(2). *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 319; 503 NW2d 758 (1993).

Further, under MCR 2.116(D)(2) (emphasis added), “[t]he grounds listed in subrule (C) . . . (7) [including a “statute of limitations” defense] . . . **must be raised in a party’s responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party’s first responsive pleading.**”

Under MCR 2.110(A): “The term “pleading” includes only: (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer. No other form of pleading is allowed.”

A review of Defendants’ first responsive pleading, their Answer to First Amended Complaint and Affirmative Defenses (filed on September 8, 2014), reveals that Defendants did not raise the defense that Plaintiffs’ claims are barred by a statute of limitations.

Because Defendant Hicks failed to raise the defense that Plaintiffs claim was time-barred in her first responsive pleading, she waived the defense, and Defendant’s motion for summary on this basis is DENIED.

Defendant’s summary request under (C)(8), (C)(9), or (C)(10) are similarly DENIED. Defendant has failed to meet her burden establishing her entitlement to summary under any of these standards.

IT IS SO ORDERED.

July 22, 2015
Date

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