

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

**FEDELE GENNARO,
Plaintiff,**

v.

**Case No. 14-142802-CK
Hon. James M. Alexander**

**TIMOTHY SMITH and
OSIRIUS GROUP, LLC,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

Plaintiff is the former CFO of Defendant Osirius Group, and Defendant Timothy Smith is the owner and CEO of Osirius. In his First Amended Complaint, Plaintiff claims that he worked for Osirius from June 2010 until September 2013. Plaintiff alleges that he was to be paid \$25,000 per month, and in total, he earned \$369,000 for his CFO services. Plaintiff claims, however, that he has only been paid \$175,000 of this amount – leaving a balance due of \$194,000.

On these allegations, Plaintiff filed his Amended Complaint on claims of breach of contract and veil-piercing theories. In support of the latter, Plaintiff alleges that Osirius was a “mere instrumentality” of Defendant Smith, who commingled and treated Osirius’s funds as his own personal funds.

In response, Defendants dispute that there was an agreement to pay Plaintiff \$25,000 per month. Instead, Defendants claim that the parties agreed that Plaintiff's pay depended on Osirius's resources for each month. And when Plaintiff resigned, Osirius intended to pay Plaintiff a \$150,000 "thank you" for staying with the company when there was little to no revenue coming into the company."

Osirius also filed a Counterclaim for unjust enrichment – alleging that it mistakenly overpaid Plaintiff by \$25,000 (hence the \$175,000 payment referred to in Plaintiff's pleadings), which Plaintiff has refused to return.

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)(8) and (C)(10) and Defendant under (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 a 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).

1. Plaintiff's Motion for Summary Disposition.

With respect to Plaintiff's motion seeking dismissal of Osirius's Counterclaim for unjust enrichment, Plaintiff argues that refusal to return an admitted "gift" cannot serve as the basis for an unjust enrichment claim.

Generally, "in order to sustain a claim of . . . unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006); citing *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993).

In response to Plaintiff's motion, Osirius claims that it paid Plaintiff its intended \$150,000 "thank you" in several installments. But it alleges that it forgot that it made a December installment payment. As a result, when it paid Plaintiff the final \$50,000 in August 2014, Osirius alleges that it had actually overpaid Plaintiff by \$25,000 (thereby totaling \$175,000 in payments, instead of the intended \$150,000). In support of these allegations, Osirius attaches deposition testimony and other documentary evidence.

Osirius also cites *Couper v Metropolitan Life Ins Co*, 250 Mich 540; 230 NW 929 (1930) for the proposition that "[i]t is well settled law that a payment, although voluntarily made, if made under a mistake of a material fact, may be recovered, even if the mistake be due to a lack of investigation." *Couper*, 250 Mich at 544.

Further discussing this concept, the Court of Appeals has reasoned "[t]he mistake of fact rule in Michigan is based on the principle of restitution, as well as the goal of avoiding unjust enrichment

to the payee.” *Sentry Ins v Claimsco Int’l, Inc*, 239 Mich App 443, 452; 608 NW2d 519 (2000).¹

Based on the foregoing authority, Osirius argues that Plaintiff’s motion is appropriately denied because Michigan recognizes a claim for unjust enrichment when a mistake of fact results in an overpayment. The Court agrees.

Because the trier of fact could reasonably conclude that Osirius mistakenly overpaid Plaintiff by \$25,000, Plaintiff’s motion for summary disposition of Osirius’s Counterclaim under (C)(8) and (C)(10) is DENIED.

2. Defendants’ Motion for Summary Disposition.

Next, Defendants move for summary disposition of Plaintiff’s First Amended Complaint. In support of their request, Defendants argue (emphasis added): “[t]here is no evidence at all, **save Fedele’s self-serving testimony**, that there was ever an agreement to pay Fedele back pay.” In other words, except for the evidence that Defendants don’t like, there is no evidence. This simply isn’t a case that can be resolved on summary motions.

In their motion and response, both parties cite volumes of testimony and documentary evidence in support of their respective positions. Plaintiff has presented ample evidence that could support a finding that the parties contracted for him to be paid \$25,000 monthly. The reverse is also true. The trier-of-fact could just as easily conclude that there was no such agreement.

A factual dispute also exists as to whether the parties agreed to some accord and satisfaction of the amount owed. And on this issue, both parties (again) present substantial evidence in support

¹ The Court notes that the *Morris Pumps* Court also reasoned that wrongful retention may serve as the basis for an unjust enrichment claim. See *Morris Pumps*, 273 Mich App at 196-197.

of their positions.²

Generally, both parties challenge the other's version of events and claim that opposing deponent's testimony is incredible. 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 these claims is so substantially intertwined with fact-finding and credibility determinations as to render summary disposition wholly inappropriate. As a result, Defendants' motion for summary disposition under (C)(10) is also DENIED.

IT IS SO ORDERED.

September 29, 2015
Date

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

² Defendants present evidence that the August 22, 2014 constituted a final payment, but Plaintiff points to Mr. Smith's August 23, 2014 (the next day) email, where he stated that he'd pay Plaintiff another \$50,000.