

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

XPERT TECHNOLOGIES, INC.,

Plaintiff/Counter-Defendant,

v

Case No. 15-147137-CK

Hon. Wendy Potts

LEGACY GROUP LIGHTING, LLC,
d/b/a Creative Lighting Solutions,

Defendant/Counter-Plaintiff.

OPINION AND ORDER RE: PLAINTIFF/COUNTER-DEFENDANT XPERT
TECHNOLOGIES, INC.'s MOTION FOR SUMMARY DISPOSITION

At a session of Court
Held in Pontiac, Michigan

On

~~MAR 24 2016~~

This matter is before the Court on Plaintiff Xpert Technologies, Inc.'s Motion for Summary Disposition pursuant to MCR 2.116(C)(10). By way of background information, Plaintiff Xpert sells computer hardware and software products and a variety of computer related services. Defendant Legacy does business as Creative Lighting Solutions and manufactures and sells various lighting products primarily for the automotive industry. On May 1, 2014, Creative Lighting entered into an Agreement to purchase various computer services from Xpert. Xpert alleges that the monthly services were to continue for an initial term of three years. Legacy contends that once the upgrade operations were complete, the initial term was over. Xpert alleges that on April 30, 2015, Legacy sent Xpert an email stating that it was terminating the Agreement effective May 1, 2015.

Plaintiff now brings its motion for summary disposition arguing that Legacy breached the fixed term, three year Agreement. A motion under MCR 2.116(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).

In support of its motion for summary disposition, Xpert argues that the language of the Agreement clearly states that it was executed on May 1, 2014 and was effective for an Initial Term of 3 years, expiring May 1, 2017. Xpert argues that any termination of the Agreement by Legacy before May 1, 2017 is a breach of contract. Xpert further argues that the Initial Term is unambiguous and the Court has no choice but to enforce the term as written. In response to Xpert's arguments, Legacy argues that the Agreement's general statement of a 3 year initial term is overridden by more specific provisions appearing later in the Agreement. Legacy argues that it did not breach the Agreement because § 3.1 defines the Term and states: "3.1 Term. This Agreement will become effective on the Effective Date and shall continue until Xpert has complied with its duties and obligations identified on Schedule A (the 'Initial Term'), or a triggering event causing termination of the Agreement under section 3.2, below."

Under MCR 2.116(C)(10), "[i]n 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*, 451 Mich at 362, citing *Neubacher*, 205 Mich App at 420.

Resolution of the motion requires the Court to address the rules of contract interpretation. “The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties.” *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 197; 702 NW2d 106 (2005), quoting *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). Where the contract language is unambiguous, the Court should effectuate the intent of the parties by applying the plain and ordinary meaning of the contract’s terms. *City of Grosse Pointe Park*, 473 Mich at 197-198.

The Agreement provides, as an introductory paragraph, “This *Master Service Agreement* (this ‘Agreement’) is entered into on May, 1, 2014 (‘Effective Date’) by and between Xpert Technologies, Inc., doing business at 38765 Mound Rd., Suite 102 in Sterling Heights, Michigan 48310 (‘Xpert’), and Creative Lighting Solutions doing business at 33533 W. 12 Mile Rd, Suite 375 located in Farmington Hills, MI 48331 (‘Client’) and shall be effective for an Initial Term of 3 years. Xpert and Client are collectively referred to herein as ‘Parties.’”

Article 3 of the Agreement pertains to Term and Termination and provides under § 3.1: “Term. This Agreement will become effective on the Effective Date and shall continue until Xpert has complied with its duties and obligations identified on Schedule A (the ‘Initial Term’), or a triggering event causing termination of the Agreement under section 3.2, below. This Agreement shall automatically renew for a one year period after the Initial Term unless terminated by mutual consent upon thirty (30) days written notice, prior to the end of the Initial Term (the ‘Renewal Term’). All provisions of this Agreement shall apply to all Services and all periods of time in which Xpert renders Services for Client.

3.2 Terminating the Agreement. This Agreement shall terminate automatically within thirty (30) days upon the occurrence of any of the following events:

(a) Xpert committing a material breach of this Agreement and such breach is not cured to the satisfaction of Client within thirty (30) days of Xpert giving written notice to Client of the material breach;

(b) Xpert's actions or omissions expose Client to liability to third parties, and Xpert fails to cure or indemnify to Client's satisfaction the potential or actual liability within thirty (30) days of Client giving written notice to Xpert;

(c) Client committing a material breach of this Agreement, and such breach is not cured to the satisfaction of Xpert within thirty (30) days of Xpert giving written notice to Client of the material breach;

(d) Either party giving written notice of its intention to terminate this Agreement provided that such notice is given no earlier than thirty (30) days from the expiration of the Initial Term in paragraph 3.1, above. Basis of termination can only be due to a material breach of this Agreement that has not been cured by the defaulting party after an agreed upon 'period of cure' has been met and all reasonable attempts to cure have been exhausted."

"In interpreting a contract, our obligation is to determine the intent of the contracting parties. *Sobczak v Kotwicki*, 347 Mich. 242, 249; 79 N.W.2d 471 (1956). If the language of the contract is unambiguous, we construe and enforce the contract as written. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich. 558, 570; 596 NW2d 915 (1999). Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy. *Id.*" *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251

(2003). When interpreting an agreement, the Court reads the agreement as a whole and gives effect to all of the words and phrases. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). Reading the Agreement as a whole, and giving effect to all of the words and phrases, the Court finds that the language of the contract is not unambiguous.

A contract is ambiguous if its language is reasonably susceptible to more than one interpretation. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). The interpretation of an ambiguous contract is a question for the trier of fact. *Klapp*, 468 Mich at 469. In the instant matter, the language is reasonably susceptible to more than one interpretation. An interpretation of the Agreement pursuant to the introductory paragraph would mean the term of the contract was from May 1, 2014 from May 1, 2017. If the contract is interpreted pursuant to the Term and Termination clause, the Agreement would become effective on the Effective Date and continue until Xpert has complied with its duties and obligations on Schedule A. These two contract clauses are reasonably susceptible to more than one interpretation. Therefore, the interpretation of the Agreement is a question for the trier of fact. Accordingly, Xpert's motion for summary disposition on its claim for breach of contract and on Legacy's counterclaim for breach of contract is denied.

Xpert next argues that the early termination fee provided in §3.3 is enforceable. Section 3.3 of the Agreement provides "3.3 Early Termination. In the event Client terminates this Agreement during the Initial Term or Renewal Term, Client shall be liable for an early termination penalty fee ('Penalty Fee'). The Penalty Fee shall equal the sum of Client's current monthly fee (as described in the attached, Schedule A) multiplied by the remaining months left under the Initial Term. The Penalty Fee shall be payable to Xpert within thirty (30) days of termination."

The Agreement refers to this early termination fee as a penalty fee. In support of its argument that the drafter of the Agreement chose to label the early termination fee as a penalty fee, but that it is actually a liquidated damages provision, Xpert cites to *Edoff v Hecht*, 270 Mich 689, 697; 260 NW93 (1935), which provides that “[t]he general rule is . . . ‘A penalty, in contradistinction to liquidated damages, is a sum inserted in a contract, not as the measure of compensation for its breach, but rather as a punishment for default, or by way of security for actual damages which may be sustained by reason of nonperformance, and involves the idea of punishment. It has been held that where liquidated damages are claims for the nonpayment of a sum of money, and such damages exceed the lawful rate of interest, they are necessarily in violation of the law of usury, and will not be allowed.’ Mere use of the term ‘penalty,’ ‘forfeiture,’ ‘liquidated damages,’ or ‘stipulated damages’ is not conclusive as to whether a contract provides for liquidated damages or a penalty.” *Id.*, (internal citations omitted).

Accordingly, the reference to a “penalty fee” is not outcome determinative that the method for calculating damages in the event of a breach is invalid. Mere use of the term penalty is not conclusive whether paragraph 3.3 provides for liquidated damages or a penalty. *Id.* “A liquidated damages provision is simply an agreement by the parties fixing the amount of damages in case of a breach. Whether such a provision is valid and enforceable or invalid as a penalty is a question of law. The courts are to sustain such provisions if the amount is ‘reasonable with relation to the possible injury suffered’ and not ‘unconscionable or excessive.’” *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 411 (1998), (internal citations omitted).

Damages for breach of a contract are those that “may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract

itself,” or those that “may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract.” *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401, 430; 295 NW2d 50 (1980). The Court finds that the “penalty fee” is actually a liquidated damages clause and is not invalid as a penalty.

Xpert next moves for summary disposition on Legacy’s claim for unjust enrichment. Legacy claims that Xpert has been unjustly enriched and seeks recovery of additional funds paid to Xpert in an amount in excess of \$100,000. Xpert argues that Legacy’s claim for unjust enrichment is barred because the parties have an enforceable contract. In Legacy’s counterclaim, it alleged that “[d]uring the period from February 22, 2014 through July 7, 2014, Xpert received approximately \$103,677.80 (the “Overpayment”) from CLS for services never received by CLS and, upon information and belief, performed by Xpert for someone other than CLS. The Overpayments were in addition to the amount paid by CLS to Xpert under the terms of the parties’ Agreements.” (See Legacy’s counterclaim, para. 18.)

In response to Xpert’s argument that its unjust enrichment claim fails, Legacy argues that the bulk of the sums subject to the unjust enrichment claim were paid to Xpert before May 1, 2014, and thus cannot be subject to the Agreement. In support of its response, Legacy attaches the affidavit of Daniel Czarnik, who attests that the last full system backup was done prior to March 2014. A claim for unjust enrichment asks the Court to recognize an implied contract. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). But the Court will not imply a contract where an express contract exists. *Id.* Therefore, Plaintiff’s claims for unjust enrichment after May 1, 2014, the date the contract was entered into fail; however, Plaintiff’s claims for unjust enrichment prior to the date the contract was entered into are not barred.

Accordingly, Plaintiff's motion for summary disposition as to Count II of Legacy's counterclaim for unjust enrichment is granted in part and denied in part.

The Court finds that factual development is necessary to resolve the claims pending in this action. Summary disposition is not appropriate where factual development is required to resolve discrepancies in the parties' arguments and evidence. Thus, Plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) on its Complaint and on Defendant's Counterclaim for breach of contract is denied.

IT IS SO ORDERED.

Dated:

MAR 24 2016

Hon. Wendy Potts