

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

**DYNAMIC PROPERTY SOLUTIONS, LLC,**

**Plaintiff,**

**v**

**Case No. 2016-152349-CB**  
**Hon. Wendy Potts**

**PLYMOUTH PLUMBING, INC.,**

**Defendant.**

**OPINION AND ORDER RE: DEFENDANTS' MOTION FOR SUMMARY DISPOSITION**  
**UNDER MCR 2.116(C)(8) AND MCR 2.116(C)(10)**

At a session of Court  
Held in Pontiac, Michigan On  
NOV 02 2016

This matter is before the Court on Defendant's Motion for Summary Disposition Under MCR 2.116(C)(8) and MCR 2.116(C)(10). The Court dispenses with oral argument pursuant to MCR 2.119(E)(3) and as noted in the October 26, 2016 Order Regarding Motion.

By way of background, the parties entered into an agreement for plumbing services to be provided by Defendant at a property located on 7441 Coach Lane in West Bloomfield, Michigan. Thereafter, Defendant subcontracted a portion of the plumbing work to United Trades Mechanical Contractor ("UTMC"). Following the completion of the plumbing project, a water leak was discovered that caused significant water damage. Plaintiff has since demanded reimbursement from Defendant, however, Defendant has refused and is denying liability for the loss.

In its motion, Defendant is seeking summary disposition with regard to Counts I – VI<sup>1</sup> in Plaintiff's Complaint<sup>2</sup> pursuant to MCR 2.116(C)(8) and (C)(10).

When reviewing a summary disposition motion pursuant to MCR 2.116(C)(8), all well-pleaded factual allegations are accepted as true and are construed in a light most favorable to the non-movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The Court only considers the pleadings in a (C)(8) motion. *Id.* “A court may only grant a motion pursuant to MCR 2.116(C)(8) where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Wade v Dep't of Corr.*, 439 Mich 158, 163; 483 NW2d 26 (1992).

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties...in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Maiden, supra* at 120; *Quinto v Cross & Peters Co.*, 451 Mich 358, 362; 547 NW2d 314 (1996).

### **MCR 2.116(C)(8)**

#### *The Contract*

In this matter, Defendant is seeking summary disposition, primarily based upon the assertion that the subject document, entitled “Estimate Prepared for: Jesse Boyd,”<sup>3</sup> is not a binding contract

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<sup>1</sup> There is no Count V in the Complaint.

<sup>2</sup> Plaintiff filed a First Amended Complaint on July 15, 2016. The First Amended Complaint does not contain a Count V.

on the parties as alleged by Plaintiff. Defendant argues that the Estimate is not a binding contract because it contains a number of open terms as well as a stated willingness to amend the quote. As such, Defendant asserts that the Estimate is no more than a negotiation or discussion. Defendant also argues that the Estimate is not signed by a representative of Plaintiff or Defendant.<sup>4</sup> If a contract does not exist, then there has been no breach of contract.

In response, Plaintiff contends that the parties entered into an express written contract for plumbing services to the property. While Defendant omitted the second page of the Estimate in its motion for summary disposition, Plaintiff has offered the complete document in its Complaint, First Amended Complaint, and Response. Page two of the Estimate includes the signature of Jesse Boyd, on behalf of Plaintiff, following the language “[t]o accept this proposal please sign and return to our office via fax or mail at the address and/or number listed above.” As such, Plaintiff asserts – and the Court agrees - that the signature of Plaintiff clearly establishes that it accepted the contract terms that Defendant offered. The work was performed as set forth in the Estimate to further demonstrate that there was a meeting of the minds that a valid and enforceable contract was entered into by the parties.

Plaintiff moves for summary disposition pursuant to MCR 2.116(I)(2) by arguing that there is no genuine issue of material fact that the Estimate constitutes an express agreement that is binding on the parties. “Summary disposition may be granted in favor of an opposing party under MCR 2.116(I)(2) if there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law.” *City of Holland v Consumers Energy Co.*, 308 Mich App 675, 681–82; 866 NW2d 871 (2015).

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<sup>3</sup> The Estimate has been attached to Plaintiff’s original Complaint and First Amended Complaint as Exhibit A.

<sup>4</sup> See page 4 of Defendant’s summary disposition motion and brief.

The Court finds that there is no genuine issue of material fact concerning the validity and enforceability of the Estimate. As such, the Court finds in favor of Plaintiff under MCR 2.116(I)(2) that the Estimate constitutes a binding contract on the parties.

### *Breach of Contract*

With respect to Plaintiff's breach of contract claim, Defendant asserts that Plaintiff has failed to state a claim upon which relief may be granted pursuant to MCR 2.116(C)(8). "A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co. v Ahrens Const., Inc.*, 495 Mich 161, 177–79; 848 NW2d 95 (2014).

In consideration of the general allegations of the First Amended Complaint, the Court notes Plaintiff's assertion that "Defendant represented to Plaintiff at the time of contracting that it would be performing the work on the Property." [See Paragraph 10 of the First Amended Complaint.] Plaintiff's breach of contract claim includes the allegation that Defendant materially breached the parties' agreement by hiring a subcontractor and subsequently failing to perform the work. Plaintiff alleges further that Defendant failed to perform the work in a workmanlike manner and Defendant failed to perform the work properly. Finally, Plaintiff claims that it suffered substantial damages as a direct result of Defendant's breach of the parties' contract.

Here, Defendant argues that it was not required to personally perform the plumbing work under the terms of the Estimate whereas Plaintiff asserts in the First Amended Complaint that Defendant represented that it would be the one performing the plumbing services. Regardless of which entity actually performed the work, Defendant is the party to the contract with the ultimate contractual liability. Considering only the pleadings and accepting all well-pled factual allegations as true, the Court finds that Plaintiff has sufficiently pled its claim for breach of contract such that

the Court cannot conclude that the same is so clearly unenforceable as a matter of law that no factual development could justify a right of recovery. Accordingly, Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) is denied with respect to Count I of Plaintiff's First Amended Complaint. The Court shall not grant summary disposition in favor of Plaintiff pursuant to MCR 2.116(I)(2) without further factual development.

### *Fraudulent Misrepresentation*

With respect to Count II, fraudulent misrepresentation, Defendant maintains that this claim should be dismissed because Plaintiff has failed to allege any wrongdoing by Defendant independent of the breach of contract claim. In contrast, Plaintiff argues that it has properly pled a prima facie claim for fraudulent misrepresentation by alleging that Defendant misrepresented that it would perform the work under the Estimate, that the representation was material, and that the representation was false when it was made. Plaintiff asserts that it relied on Defendant's representation and ultimately suffered damages as a result.

To establish a claim of fraudulent misrepresentation, Plaintiff is required to prove that: (1) Defendant made a material representation; (2) the representation was false; (3) Defendant knew, or should have known, that the representation was false when making it; (4) Defendant made the representation with the intent that Plaintiff rely on it; (5) and Plaintiff acted on the representation, incurring damages as a result. Plaintiff must also show that any reliance on Defendant's representations was reasonable. *Hi-Way Motor Corp v Int'l Harvester Co*, 398 Mich. 330, 336; 247 N.W.2d 813 (1976). Further, "an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute fraud." *Hi-Way Motor*, 398 Mich at 336.

Here, Defendant allegedly represented at the time of contracting that it would be the one performing work on the property. This representation was based upon future contractual performance, not a past or existing promise.

Further, Plaintiff's claim is based entirely upon allegations that Defendant made false representations related to its performance under the contract. "[T]he threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004). The Court observes that Plaintiff has failed to identify a separate and distinct legal duty between the parties other than the Estimate. As a result, Plaintiff has failed to establish that Defendant had any other obligation to Plaintiff outside of the parties' contract. Thus, no tort liability arises for Defendant's alleged failure to perform under the contract in the absence of a separate and distinct duty to act. *Id.* at 470.

The Court is cognizant of Plaintiff's argument that the fraudulent misrepresentation involved inducement for the buyer to enter into the contract. Fraud in the inducement requires misrepresentations in character that relate to something other than promises concerning the performance of the contract. *Huron Tool & Eng'g Co v Precision Consulting Services, Inc*, 209 Mich App 365, 373; 532 NW2d 541 (1995).

Again, Plaintiff's fraudulent misrepresentation claim is founded on the allegation that Defendant misrepresented that it would be the one to perform the work under the contract. This allegation relates solely to performance under the contract. As such, it may serve as the basis of a breach of contract claim, but it cannot serve as the basis of a fraudulent misrepresentation claim. Therefore, Plaintiff has failed to adequately plead actionable fraud.

If the Court deems the pleadings deficient with respect to the claim of fraudulent misrepresentation, then Plaintiff requests the opportunity to amend the First Amended Complaint. Pursuant to MCR 2.116(I)(5), “if the grounds asserted [for summary disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.” The Court finds that an amendment would not be justified herein as the alleged fraud is based purely upon a future contractual promise.

Accordingly, the Court shall grant Defendant’s motion for summary disposition under MCR 2.116(C)(8) as it relates to Plaintiff’s fraudulent misrepresentation claim because the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.

#### *Innocent and Negligent Misrepresentation*

Regarding Count III, innocent and negligent misrepresentation, the Court notes that “[a] claim of innocent misrepresentation is shown where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation. It is unnecessary to prove that the party making the representation had knowledge that it was false.” *Roberts v Saffell*, 280 Mich App 397, 404–05; 760 NW2d 715 (2008). “[I]n order to prevail on an innocent misrepresentation claim, a plaintiff must also show that the plaintiff and defendant were in privity of contract.” *M&D, Inc. v W.B. McConkey*, 231 Mich App 22, 28; 585 NW3d 33 (1998).

“A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.” *Alfieri v Bertorelli*, 295 Mich App 189, 194; 813 NW2d 772 (2012).

In this case, Plaintiff contends that it has pled a prima facie claim for innocent and negligent misrepresentation. That is, Plaintiff has specifically pled in its First Amended Complaint that Defendant misrepresented that it would be the one to perform the plumbing services. However, Defendant subsequently delegated its obligations for financial gain. According to Plaintiff, it suffered damages based upon Defendant's misrepresentation.

Similar to a claim for fraudulent misrepresentation, "[a] promise regarding the future cannot form the basis of a misrepresentation claim." *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998). As stated previously, Defendant's representation that it would be performing work on the property was based upon future contractual performance. As such, the claim of innocent and negligent misrepresentation has not been adequately pled by Plaintiff.

Plaintiff has requested an opportunity to amend the First Amended Complaint pursuant to MCR 2.116(I)(5) if the Court finds that the pleading is insufficient with respect to the claim of innocent and negligent misrepresentation. However, the Court finds that an amendment would not be justified herein as the alleged misrepresentation is based solely upon a future contractual promise.

As a result, the Court finds that Plaintiff's innocent and negligent misrepresentation claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Therefore, the Court shall grant Defendant's motion for summary disposition under MCR 2.116(C)(8) with respect to Count III of the First Amended Complaint.

#### *Breach of Express and Implied Warranties*

In terms of Plaintiff's breach of express and implied warranties claim, Defendant asserts that Plaintiff has not pleaded, nor can it establish, the existence of warranties and that those warranties

were breached by Defendant. In opposition, Plaintiff contends that every contract includes implied warranties to perform the work skillfully, carefully, diligently, and in a workmanlike manner. In terms of express warranties, Plaintiff asserts that the Estimate includes the language “[a]ll work to be completed according to standard practices.” In the First Amended Complaint, Plaintiff alleges that Defendant “made certain express warranties and representations to Plaintiff, both orally and in writing, including, but not limited to, that the work at the Property would be done in a workmanlike manner, would be free from defects in material and workmanship, and that defects would be timely cured.” [See Paragraph 37 of the Amended Complaint.]

“[T]he existence of a contract or warranty...must be evaluated under the terms of the Uniform Commercial Code (UCC), MCL 440.1101 *et seq.* Article 2 of the UCC applies to ‘transactions in goods.’” MCL 440.2102; *Heritage Res, Inc v Caterpillar Fin Servs Corp*, 284 Mich App 617, 633; 774 NW2d 332 (2009).

The creation of express warranties is governed by MCL 440.2313 of Michigan’s Uniform Commercial Code. *Heritage, supra* at 635. As a provision within Article 2 of the UCC, MCL 440.2313 pertains to express warranties of goods and not services.

With regard to implied warranties, the Michigan Court of Appeals has held that implied warranties apply to the sale of goods under the UCC and to the sale of electricity where a dangerous force is involved. *Buckeye Union Fire Ins. Co. v Detroit Edison Co.*, 38 Mich App 325, 330; 196 NW2d 316 (1972); *Albion Coll. v Stockade Bldgs. Inc.*, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2016 (Docket No. No. 322917).

In this matter, Plaintiff is attempting to argue that Defendant breached certain express and implied warranties due to its provision of defective plumbing services, rather than goods as required

under the UCC. Since the provision of plumbing services is not governed by the UCC, Plaintiff's breach of express and implied warranties claim is inapplicable to the facts of this case.

The Court concludes that Plaintiff's breach of express and implied warranties claim is so clearly unenforceable as a matter of law that no factual development could justify a right of recovery. Accordingly, Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) is granted with respect to Count IV of Plaintiff's First Amended Complaint. In addition, Plaintiff shall not be granted an opportunity to amend Count IV as this claim is improper in relation to the provision of plumbing services.

### **MCR 2.116(C)(10)**

#### *Negligent Supervision*

With respect to Plaintiff's negligent supervision claim<sup>5</sup> in its First Amended Complaint, Plaintiff alleges that Defendant<sup>6</sup> breached its duty of care by negligently supervising the plumbing work at the property.

The Court of Appeals has determined that "a party may be liable for the negligence of an independent contractor if that party retains and exercises control over the contractor." *Oumedian v Bama Bar, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued January 20, 2015 (Docket No. 318587); see also *Reeves v Kmart Corp.*, 229 Mich App 466, 471; 582 NW2d 841 (1998).

It is Defendant's position that Plaintiff has not asserted a basis for negligence against Defendant, nor has Plaintiff pleaded that Defendant retained control over the work being performed

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<sup>5</sup> The First Amended Complaint amended Count VI from negligence to negligent supervision.

<sup>6</sup> In the First Amended Complaint, Plaintiff erroneously stated that "Plaintiff" (rather than Defendant) breached its duty of care related to the plumbing services.

by UTMC as an independent contractor. Defendant argues that it is entitled to judgment as a matter of law under MCR 2.116(C)(10) as there is no question of material fact and further discovery would not be likely to create a question of material fact.

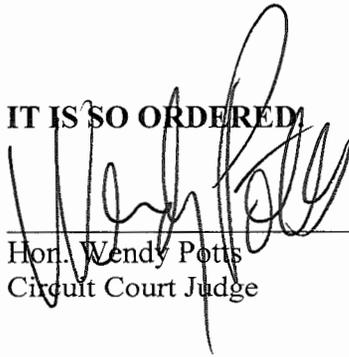
In response, Plaintiff argues that summary disposition cannot be granted under MCR 2.116(C)(10) because there are several issues of material fact in dispute. The parties are in dispute as to whether or not UTMC performed the rough plumbing work or the finish plumbing work. This factual dispute is apparent upon review of Jesse Boyd's Affidavit and Defendant's Notice of Responsible Non-Party Pursuant to MCR 2.112(K)(3). Determining the amount of control Defendant had over UTMC is also a question of material fact.

Plaintiff contends that Defendant has not provided any affidavits or documentary evidence to support its factual allegations. Plaintiff also asserts that Defendant has refused to engage in open discovery. Moreover, UTMC was recently added as a third-party defendant. The Court observes from the case file that UTMC filed an Answer to the Third Party Complaint on October 20, 2016.

The Court agrees with Plaintiff that it is premature to summarily dismiss the negligent supervision claim under MCR 2.116(C)(10) when there has been little discovery in this matter. The Court shall deny Defendant's motion for summary disposition under MCR 2.116(C)(10) as to Count VI without prejudice. Defendant shall have the opportunity to move for summary disposition of Count VI, if warranted, following further discovery.

Dated: **NOV 02 2016**

**IT IS SO ORDERED**

  
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Hon. Wendy Potts  
Circuit Court Judge