

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

WILLIAM P. HAYDEN,

Plaintiff/Counter-Defendant,

vs.

Case No. 2013-1909-CK

MARK T. SCHULTE,

Defendant/Counter-Plaintiff/
Third-Party Plaintiff,

vs.

DATAMAIL SERVICES, INC., a Michigan
corporation,

Third-party Defendant.

_____ /

OPINION AND ORDER

Defendant/Counter-Plaintiff/Third-Party Plaintiff Mark T. Schulte (“Defendant”) has filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). In addition, Plaintiff/Counter-Defendant William P. Hayden and Third-Party Defendant Datamail Services, Inc. have filed their own motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). The parties have also filed a response in connection with each other’s motion.

Factual and Procedural History

Plaintiff is the principal of Third-Party Defendant Datamail Services, Inc. (“Datamail”). In February 2011, Plaintiff hired Defendant to act as Datamail’s President. In November 2011, Plaintiff became aware that Defendant was facing state/federal tax liability and that Defendant did not have the means to pay the tax bill. Plaintiff then offered to pay the tax bill from his personal funds. Defendant ultimately drafted a promissory note in connection with the loan

("Note"). After both parties executed the Note, Plaintiff paid \$99,641.00 to the taxing agencies on Defendant's behalf.

On October 12, 2012, Defendant's employment with Datamail was terminated. On March 7, 2013, Plaintiff filed his complaint in this matter alleging claims against Defendant for: Count I- Breach of Promissory Note, Count II- Breach of Contract, and Count III- Unjust Enrichment. Plaintiff's claims are based on Defendant's failure/refusal to repay the money Plaintiff paid to the taxing authorities. The parties have since filed cross-motions for summary disposition.

Standards of Review

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id.*

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on

the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, 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. *Id.* 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. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

In support of his motion, and in response to Plaintiff's and Datamail's motion, Defendant contends that pursuant to section 2 of the Note his obligation to make payment(s) was contingent on him receiving bonuses in connection with his employment at Datamail. Section 2 of the Note provides:

2. Payments

- a. This Note may be paid in full without penalty.
- b. 5 Annual payments to be made through a separate bonus arrangement.
- c. All payments hereunder shall be made to such address as may from time to time be designated.

Defendant contends that payments under the Note were to be made pursuant to a separate bonus arrangement. However, it is undisputed that a separate bonus arrangement was not drafted or executed. It is also undisputed that Plaintiff paid \$99,641.00 to the taxing authorities pursuant to the Note. Moreover, section 1 of the Note provides, in pertinent part: "FOR VALUE RECEIVED, [Defendant] hereby jointly and severally promises to pay to the order of [Plaintiff] the sum of \$99,641.00 together with interest thereon at a rate of 1.19% per annum on the unpaid

balance.” While the parties may have anticipated applying any bonuses Defendant received from Datamail towards the balance he owed to Plaintiff, the Note does not provide that receiving one or more bonuses from Datamail was a condition precedent to his obligation to pay under the Note. Unless the contract language itself makes clear that the parties intended a term to be a condition precedent, Courts will not read such a requirement into a contract. *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006). In this case there is no clear contractual language providing that one or more bonus payment was a condition precedent on Defendant’s obligations under the Note. Under these circumstances the Court is convinced that Defendant remains liable for the principal and interest due under the Note. Accordingly, Plaintiff’s and Datamail’s motion for summary disposition of Plaintiff’s breach of promissory note claims must be granted.

Defendant also contends that an oral employment contract exists in which Plaintiff and/or Datamail agreed to hire him for a five year period and that he was not terminated for good cause in violation of the contract. However, even if Defendant establishes that a 5 year employment contract was formed, that contract is barred by the statute of frauds. MCL 566.132 establishes the statute of frauds, and provides, in pertinent part:

(1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:

(a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.

In this case, the alleged 5 year contract clearly could not have been performed within 1 year. Further, it is undisputed that the contract, if indeed there was one, was not reduced to writing and signed by the parties. The Michigan Court of Appeals, in *Konovaliv v Brown*, unpublished per curium opinion of the Court of Appeals, decided September 4, 2008, (Docket

Number 278559), held that a five year employment contract falls within the statute of frauds and is void when not reduced to writing. The Court is persuaded by the holding in *Konovaliv* and is convinced that under the holding of *Konovaliv* the alleged employment contract is void if it even existed. Accordingly, Plaintiff and Datamail are entitled to summary disposition of Defendant's breach of employment contract claims.

Conclusion

For the reasons set forth above, Plaintiff/Counter-Defendant William P. Hayden's motion for summary disposition of its breach of promissory note claim is GRANTED. Plaintiff's and Third-Party Defendants' joint motion for summary disposition of Defendant's counter and third-party complaint is GRANTED. Defendant's motion for summary disposition is DENIED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* resolves the last pending claim and closes this case.

IT IS SO ORDERED.

John C. Foster

JOHN C. FOSTER, Circuit Judge

Dated: March 10, 2014

JCF/sr

Cc: *via e-mail only*

Frank J. LaRocca, Attorney at Law, fjl@iglawfirm.com

Elizabeth M. Malone, Attorney at Law, emalone@driggerschultz.com

William C. Schaefer, Attorney at Law, wschaefer@driggerschultz.com