

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

RONALD C. COLCERNIAN TRUST,
u/a/d 4/28/2006, by RONALD C.
COLCERNIAN, TRUSTEE,

Plaintiff,

vs.

Case No. 2014-1811-CB

IGUANA WEB DESIGN, LLC,
OXIMETRY CO., LLC, PHI-TECH,
LLC, NIGHT HAWK SLEEP SYSTEMS,
INC., NEWCO HOLDINGS, LLC, and
ROBERT RUDOWSKI,

Defendants.

OPINION AND ORDER

Defendant Night Hawk Sleep Systems, Inc. ("Defendant Hawk") has filed a motion for summary disposition. Plaintiff has filed a response and requests that the motion be denied. Defendant Hawk has also filed a reply brief in support of its motion.

I. Facts and Procedural History

Defendant Robert Rudowski ("Defendant Rudowski") and Ronald C. Colcernian were the remaining two members of the four following limited liability companies: Iguana Web Design, LLC, Oximetry, Co., LLC, Phi-Tech, LLC and Newco Holdings, LLC (collectively, the "Defendant Companies"). Defendant Rudowski ultimately desired to become the sole member of the Defendant Companies. As a result, the parties negotiated a purchase agreement pursuant to which the Defendant Companies would redeem Mr. Colcernian's interests for \$467,200.00. In addition, the Defendant

Companies allegedly agreed to pay Mr. Colcernian royalties on their use of certain intellectual property ("Royalty Agreement").

In 2010, Defendant Rudowski filed dissolution certificates for the Defendant Companies other than Oximetry Co., LLC. On April 27, 2010, Defendant Rudowski incorporated Defendant Hawk.

On May 20, 2014, Plaintiff, Mr. Colcernian's Trust, filed its complaint in this matter. On December 9, 2015, a consent judgment was entered against the Defendant Companies and Defendant Rudowski which resolved all of Plaintiff's claims other than its claim against Defendant Hawk entitled "Night Hawk Software" in which Plaintiff alleges that Defendant Rudowski transferred software to Defendant Hawk, that the software was subject to the Royalty Agreement, that Defendant Hawk sells, licenses and services the software, and that the transfer has deprived Plaintiff of the royalties it is entitled to under the Royalty Agreement.

On February 8, 2016, Defendant Hawk filed its instant motion for summary disposition. On February 25, 2016, Plaintiff filed its response to the motion. Defendant Hawk has since filed a reply brief in support of its motion. The parties have since stipulated to waive oral argument in connection with the motion.

II. Standard of Review

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.

III. Arguments and Analysis

In its motion, Defendant Hawk contends that the software at issue (“Nighthawk Software”) was not transferred. Specifically, Defendant Hawk asserts that the Nighthawk Software became obsolete while Defendant Rudowski was operating under Oximetry, that the Nighthawk Software was not transferred, and that it uses free software instead of the Nighthawk Software. In support of its position, Defendant Hawk relies on Defendant Rudowski’s deposition during which he testified that by 2008 Oximetry stopped using the Nighthawk Software, and that it instead used free software. (See Defendant Hawk’s Exhibit B.)

In response, Plaintiff does not provide any evidence to contradict Defendant Rudowski’s testimony. Instead, Plaintiff states that Defendant Hawk is liable under the contracts between Mr. Colcernian and the Defendant Companies under the doctrine of successor liability. However, Plaintiff has not plead a claim for successor liability and it has also not provided any evidence whatsoever that Defendant Hawk would be liable under the doctrine. Indeed, the only evidence cited by Plaintiff is to its exhibit 3. However, Plaintiff has not attached an exhibit 3 to its motion or brief. As a result,

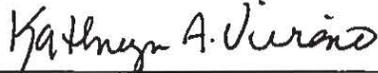
Plaintiff's theory is improperly pled and not properly supported. Further, due to Plaintiff's failure to contest Defendant Hawk's properly supported position that the Nighthawk Software was not transferred, the Court is convinced that Defendant Hawk's motion for summary disposition must be granted.

IV. Conclusion

Based upon the reasons set forth above, Defendant Night Hawk Sleep Systems, Inc.'s motion for summary disposition is GRANTED. This Opinion and Order resolves the last claim and CLOSES the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: _____



Hon. Kathryn A. Viviano, Circuit Court Judge