

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

RIZZO ENVIRONMENTAL
SERVICES, INC.,

Plaintiff,

vs.

Case No. 2014-335-CB

DUMPSTER BROKERS, LLC,
d/b/a DUMPSTER FOR LESS,
and WILLIAM TURNER,

Defendants.

OPINION AND ORDER

Plaintiff Rizzo Environmental Services, Inc. ("Plaintiff") has filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10) as to Count I- Breach of Contract, Count III- Account Stated, and Count IV- Quantum Meruit/Unjust Enrichment. Defendants have filed a response and requests that the motion be denied.

In addition, Defendant Dumpster Brokers, LLC has filed a motion for partial summary disposition of Count V- Fraud. Plaintiff has filed a response and requests that the motion be denied.

I. Factual and Procedural History

On November 19, 2012, Defendant Dumpster Broker, LLC d/b/a Dumpster For Less ("Defendant Dumpster") entered into a written contract with Plaintiff pursuant to which, *inter alia*, Plaintiff agreed to be Defendant's vendor for the purpose of providing, and later retrieving, dumpsters (the "Contract").

On November 3, 2014, Plaintiff filed its first amended complaint in this matter alleging that Defendant Dumpster breached the Contract (Count I), and that Defendant William Turner breached his personal guaranty under the Contract (Count II). Plaintiff's complaint also includes claims for account stated against Defendant Dumpster (Count III), unjust enrichment against Defendant Dumpster (Count IV), and fraud against all the Defendants (Count V).

On June 30, 2015, Plaintiff filed its instant motion for partial summary disposition as to Counts I, III and IV of its amended complaint pursuant to MCR 2.116(C)(10). On July 28, 2015, Defendants filed their response and request that the motion be denied. On July 30, 2015, Plaintiff filed a reply brief in support of its motion.

On July 13, 2015, Defendant Dumpster filed its instant motion for partial summary disposition as to Count V of the amended complaint pursuant to MCR 2.116(C)(8) and (10). On July 27, 2015, Plaintiff filed its response and requests that the motion be denied.

On August 3, 2015, the Court held a hearing in connection with the motions and took the matters under advisement.

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.

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III. Arguments and Analysis

A. Plaintiff's Motion for Summary Disposition of its Breach of Contract, Account Stated, and Unjust Enrichment Claims

In its motion, Plaintiff contends that Defendant Dumpster has breached the

terms of the Contract, that Defendant Dumpster owes \$11,091.81 in damages for unpaid services rendered through May 2014, \$5,000.00 in equipment restocking fees pursuant to Paragraph 12 of the Contract, liquidated damages pursuant to Paragraph 12 of the Contract, as well as attorney fees and costs pursuant to Paragraph 14 of the Agreement.

As a preliminary matter, Defendant Dumpster has not challenged that it owes \$11,091.18 to Plaintiff under the Contract. Moreover, Plaintiff has supported its request for \$11,091.18 with an affidavit of account stated executed by its agent Joan Romanow in which she testified that she is in charge of administering the account between the parties and that Defendant Dumpster owes Plaintiff \$11,091.18. (See Plaintiff's Exhibit H.) Based on Ms. Romanow's testimony, and Defendant Dumpster's failure to contest Plaintiff's position, the Court is convinced that Plaintiff is entitled to recover \$11,091.18 from Defendant Dumpster in connection with its claim for account stated.

While Defendants have not challenged the existence of the underlying debt, or that Defendant Dumpster breached the Contract, they do challenge Plaintiff's demand for liquidated damages and attorney fees in connection with Plaintiff's claim for breach of contract. In their response, Defendants first challenge the liquidated damages provision of the Contract. The liquidated damages provision is contained in Paragraph 12 of the Contract, which provides:

12. Early Termination: [Defendant Dumpster] acknowledges that [Plaintiff] and/or its vendor dedicated certain equipment, personnel and/or incurred other debts/commitments to service [Defendant Dumpster] and has a right to profit in good faith as a business during

its relationship with [Defendant Dumpster], in the event that [Defendant] breaches this Agreement, terminates the service prior to the expiration of the Initial Term or any Renewal Term, closes its business, or hauls its own waste, [Defendant Dumpster] shall be liable to [Plaintiff] for all damages suffered or incurred of whatever kind or nature including, without limitation, direct, incidental, and consequential damages (including lost revenue/profits and/or removal of equipment). [Defendant Dumpster] acknowledges that the actual damages to [Plaintiff] in the event of termination are difficult to fix or prove, and the following liquidated damages amount is reasonable and commensurate with the anticipated loss to [Plaintiff] resulting from such termination, and is an agreed upon estimate of and is not imposed as a penalty. This liquidated damages shall be an amount equal to fifty percent of the product obtained by multiplying the remaining number of months in the term of this Agreement, by the average monthly revenue generated by [Defendant Dumpster] from the performance state date until the last date of performance. In the event there are less than six months remaining in the term of this Agreement, an additional one thousand nine hundred dollars shall be added to the aforementioned amount if [Defendant Dumpster] averaged more than eight hundred dollars per month in revenue. This formula does not include costs for removing the equipment which a separate charge depending on the geographical region, along with restocking the inventory and refurbishing said inventory, as a removal and restocking costs not to exceed five thousand dollars at [Plaintiff's] sole discretion.

While Defendants concede that they have, in an October 21, 2014 stipulated Order, agreed that the liquidated damages provision within Paragraph 12 is not a penalty, Defendants contend that the liquidated damages provision does not apply in this case because it is alleged to have breached the contract for failure to pay for services rendered, not for termination of the Contract. In its reply, Plaintiff asserts that the liquidated damages provision does not require Defendant Dumpster to have terminated the Contract. However, the Court disagrees. The liquidated provision provides that damages are difficult to fix or prove in the event of Defendant Dumpster's termination. While the first sentence of Paragraph 12 lists

multiple types of damages that could be recovered in the event of a mere breach of Contract by Defendant Dumpster, liquidated damages are not provided, and are only mentioned in connection with an early termination on the part of Defendant Dumpster.

If contract language is unambiguous, courts must interpret and enforce the contract as written. *In re Smith Trust*, 273 Mich App 283, 285; 731 NW2d 810 (2007). In this matter, the Contract unambiguously limits an award of liquidated damages to situations in which Defendant Dumpster terminates the Contract early. In its complaint, Plaintiff alleges that Defendant Dumpster has breached the Contract; however, Plaintiff did not allege that Defendant Dumpster terminated the Contract. Consequently, Plaintiff has failed to plead facts which, if proven, would entitle it to liquidated damages under ¶12 of the Contract. As a result, Plaintiff's request for liquidate damages must be denied. In addition, Plaintiff's request for a \$5,000.00 restocking fee is based on the same contractual provision governing the types of damages Plaintiff can recover in the event Defendant Dumpster terminated the Contract early. Consequently, Plaintiff's request for a \$5,000.00 restocking fee is also denied.

In addition, Plaintiff requests its attorney fees and costs pursuant ¶14 of the Contract. In their pleadings, Defendants contend that Plaintiff is not entitled to attorney fees because the Contract was superseded when the parties entered into a second contract on August 30, 2013 ("Proposed Contract"). Specifically,

Defendant Dumpster asserts that the Proposed Contract acted as a novation of the Contract.

A novation is a modification to a contract, which requires: (1) parties capable of contracting; (2) a valid obligation to be displaced; (3) consent of all the parties to substitution based on sufficient consideration; and (4) the extinction of the old obligation and the creation of a valid new one. *In re Dissolution of F Yeager Bridge and Culvert Co*, 150 Mich App 386, 410; 389 NW2d 99 (1986). The question of whether a novation took place rests of the intention of the parties as it may be gathered from the surrounding and subsequent circumstances and conduct. *Gorman v Butzel*, 272 Mich 525, 529; 262 NW 302 (1935).

In this case, the only evidence before the Court with regards to whether the Proposed Contract actually formed a valid and binding contract is the testimony of Mr. Ramanauskas in which he testified that the Proposed Contract was given to Defendant as an offer to amend the terms of the Contract if Plaintiff paid the amount it was in arrears under the Contract. (See Exhibit C to Plaintiff's Reply.) Further, Mr. Ramanauskas testified that Defendant Dumpster failed to pay the amount that it was in arrears, thereby negating a condition precedent to Plaintiff's offer. Based on this uncontested evidence, the Court is convinced that the Proposed Contract did not act as a novation of the Contract.

While the Court is convinced that the Contract was not replaced by the Proposed Contract, it is not persuaded that Plaintiff has established that it is entitled to recover its attorney fees and costs under ¶14 of the Contract. While

Plaintiff has cited to a contractual provision that entitles it to attorney fees and costs in certain situations, Plaintiff has failed explain why the facts present in this case entitle it to such fees and costs, and has failed to provide the Court with any evidence establishing the amount of reasonable attorney fees and costs it has incurred in this matter. A party may not merely state a position and then leave it to the Court to rationalize and discover the basis for the claim, nor may he leave it to the Court to search for authority to sustain or reject his position. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Based on Plaintiff's failure to establish that it is entitled attorney fees and/or costs, and its failure to provide the Court any evidence as to the amount of attorney fees and costs it would be entitled to potentially recover, the Court is convinced that Plaintiff's request for those expenses must be denied without prejudice.

Finally, with regards to Plaintiff's unjust enrichment claim, the doctrine of unjust enrichment does not apply "if there is an express contract between the *same* parties on the same subject matter." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006). In this case, it is undisputed that the Contract is an express agreement between the same parties related to the same subject matter as Plaintiff's unjust enrichment claim. Consequently, Plaintiff's unjust enrichment claim must be dismissed.

B. Dumpster's Motion for Summary Disposition of Plaintiff's Fraud Claim

In its motion, Defendant Dumpster first contends that Plaintiff has failed to plead its fraud claim with the requisite particularity. MCR 2.112(B)(1) provides that

"[i]n allegations of fraud or mistake, the circumstances constituting fraud or mistake must be state with particularity." "Facts showing the time, place, contents of the misrepresentation or nature of the misleading act, facts misrepresented, and identification of what was obtained thereby, should be sufficient." Robert Dean & Ronald S. Longhofer, *Michigan Court Rules Practice* §2112.3, at 291 (4th ed 1998); 5 Charles A. Wright, *Federal Practice & Procedure* §1298 (2d ed 1990); *Churchhill v Palmer*, unpublished opinion of the Court of Appeals, decided December 5, 1975 (Docket No. 18663.)

In its amended complaint, Plaintiff specifically identifies three categories of representations made by Defendant Dumpster's agent that it alleges were false. (See Plaintiff's Exhibit C, Amended Complaint, at ¶¶ 41-47.) The allegations identify the individuals who made the statements, the individuals the statements were made to, where the statements were made, and when the statements were made. (Id.) After reviewing the Amended Complaint, the Court is convinced that Plaintiff's allegations are pleaded with the requisite particularity. Accordingly, the Court is satisfied that Defendant Dumpster's contention is without merit.

Defendant Dumpster also contends that the Contract's integration clause defeats Plaintiff's fraud claim. In response, Plaintiff contends that the Contract's integration clause does not bar its fraud claims because it claims sound in fraud in the inducement.

The ability of a plaintiff to bring a claim for fraud in the inducement where the contract it was allegedly induced into executing contains an integration clause

was addressed by the Michigan Court of Appeals in *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486; 579 NW2d 411 (1998). Specifically, the Court held:

While parol evidence is generally admissible to prove fraud, fraud that relates solely to an oral agreement that was nullified by a valid merger clause would have no effect on the validity of the contract. Thus, when a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that invalidate the merger clause itself, i.e. fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause.

Id. at 503, citing 3 Corbin, Contract, §578.

In *UAW-GM*, the plaintiff sought to bring a fraud claim based on a pre-contractual promise made by the defendant that it would utilize union employees for plaintiff's event. The Michigan Court of Appeals held that the merger clause nullified any such agreement, as that promise was not ultimately included in the contract containing the integration clause. *UAW-GM*, 228 Mich App at 504. Specifically, the Court held that claim for fraudulent misrepresentation, including fraud in the inducement, require plaintiff to have reasonably relied on the misrepresentation, and that the presence of the integration clause made it unreasonable for plaintiff to have relied on any representation not contained within the contract. *Id.* Finally, the Court held that because the plaintiff made no allegation that he was defrauded regarding the integration clause or defrauded into believing the contract included a provision requiring unionized employees, plaintiff's fraud claim could not be maintained in light of the integration clause. *Id.* at 505.

In this case, as in *UAW-GM*, the parties do not dispute the existence or validity of the integration clause. In addition, the alleged misrepresentation in this case involved the amount of work Defendant Dumpster would be providing, a term that, like the unionized employee requirement in *UAW-GM*, could have easily been included within the Contract, especially where the Contract was drafted by Plaintiff. The Court is convinced that to extent Plaintiff relied on Defendant Dumpster's representation regarding the amount of work it could provide, such reliance was unreasonable, particularly in light of the integration clause. For these reasons, the Court is convinced that Plaintiff's fraud claims are barred by the integration clause. As a result, Defendant Dumpster's motion for summary disposition of Plaintiff's fraud claim must be granted.

IV. Conclusion

For the reasons discussed above, Plaintiff's motion for partial summary disposition of Counts I, III and IV is GRANTED, IN PART, and DENIED, IN PART. Specifically,

- (1) Plaintiff's motion for summary disposition of its accounted stated claim (Count III) is GRANTED. Plaintiff is entitled to damages in connection with that claim in the amount of \$11,091.81;
- (2) Plaintiff's motion for summary disposition of its breach of contract claim (Count I) is GRANTED AS TO LIABILITY ONLY. The issue of damages REMAINS OPEN. Further, Plaintiff's request for liquidated damages and a restocking fee pursuant to ¶12 of the Contract is DENIED.

Plaintiff's request for attorney fees and costs is DENIED, WITHOUT PREJUDICE; and

(3) Plaintiff's unjust enrichment claim (Count IV) is DISMISSED WITH PREJUDICE.

In addition, Defendant Dumpster's motion for summary disposition of Plaintiff's fraud claim (Count IV) is GRANTED.

In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

Date: OCT 19 2015

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge