

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

VINCENT PICCICHE,

Plaintiff,

vs.

Case No. 2015-202-CB

LORENZO GARRISI and  
VIKING INVESTMENT, LLC,

Defendants.

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OPINION AND ORDER

Plaintiff has filed a motion for summary disposition of Count I of his complaint. Defendants have filed a response and request that the motion be denied. Plaintiff has also filed a reply brief in support of his motion.

I. Factual and Procedural History

Plaintiff and Defendant Lorenzo Garrisi ("Defendant Garrisi") are members of Defendant Viking Investment, LLC ("Viking"). Viking was engaged in the ownership and operation of office buildings.

On August 3, 2012, Plaintiff filed his complaint with this Court in case no. 2012-3553-CB ("First Matter"). On October 8, 2012, the parties executed a settlement agreement ("Settlement Agreement") resolving the First Matter. On May 17, 2012, Plaintiff filed its complaint in the instant matter against Defendants in which he seeks to specifically enforce the Settlement Agreement (Count I), rescind the Settlement Agreement (Count II), liquidate Viking (Count III), and wind-up Viking's affairs (Count IV).

On September 10, 2015, Plaintiff filed his instant motion for summary disposition of Count I. On October 26, 2015, Defendants filed their response to the motion, requesting that the motion be denied. On October 29, 2015, Plaintiff filed his reply brief in support of his motion. On November 2, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

## II. Standard of Review

A motion under MCR 2.116(C)(10) 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 his motion, Plaintiff requests that the Court order Defendant Garrisi to pay 50% of a CPA's \$2,500.00 retainer in order to perform an accounting of Viking's finances. Specifically, Plaintiff asserts that Defendant Garrisi is required to pay 50% of the accounting fee pursuant to paragraph 4 of the Settlement Agreement, which provides:

4. In addition, Viking, [Plaintiff] and [Defendant Garrisi] agree to wind-up and dissolve Viking pursuant to MCL 450.4801. As a part of this wind-up, the following is agree to occur:

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b. An accounting of the distributions received and/or owed to [Defendant] Garrisi and [Plaintiff] for only the years of 2008, 2009, 2010, 2011, and 2012 shall be conducted within 60 days of the date of this Agreement by Certified Public Accountant ("CPA"). The parties agree that the CPA suggested by Mr. Viviano, Michael Lotito, will conduct the accounting.....

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e. Viking shall be responsible for and pay the fees of the CPA and Mr. Viviano. In the event Viking lacks sufficient funds, then the fees shall be paid equally by [Defendant Garrisi] and [Plaintiff].

(See Plaintiff's Exhibit 2.)

In his response, Defendant Garrisi concedes that Viking is insolvent, and that the Settlement Agreement provides that the cost of the accounting was to be split between himself and Plaintiff if Viking is insolvent. Nevertheless, Defendant Garrisi contends that the Court cannot order him to pay 50% of the CPA's retainer. Specifically, Defendant Garrisi contends that a court may not order specific performance for the payment of money.

Specific performance is an equitable remedy which may not be claimed as a matter of right. *Goldman v. Cohen*, 123 Mich App. 224, 228, 333 NW2d 228 (1983). "Specific performance of contracts must always rest in the sound discretion of the court, to be decreed or not, as shall seem just and equitable under the peculiar circumstances of each case." *Derosia v Austin*, 115 Mich App 647, 652, 321 NW2d 760 (1982). Specific performance will not be decreed where enforcement of the decree would require continuous judicial supervision, or where there is an adequate remedy at law. *Goldman*, 123 Mich App, at 230.

While Plaintiff does not dispute that specific performance is generally unavailable where a legal remedy, i.e. monetary damages, is available, Plaintiff contends that a

legal remedy is impracticable in this matter. In support of his position, Plaintiff relies on the Michigan Court of Appeals decision in *Ruegseggar v Bangor Township Relief Drain*, 127 Mich App 28; 338 NW2d 410 (1983). In *Ruegseggar*, the Court, in holding that the trial court possessed the discretion to grant specific performance, held that “the equitable remedy of specific performance may be awarded where the legal remedy of damages is impracticable.” *Id.* at 30-31. The Court went on to define “impracticability” as:

Where, from some special and practicable features or incidents of the contract inhering either in its subject-matter, or its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty, so that no real compensation can be obtained by means of an action at law; or in other words, where damages are impracticable.

*Id.* at 31 [Internal citation omitted]

In this case, Plaintiff contends that a legal remedy is impracticable because there is no way to know what the final accounting fee will total. However, it is undisputed that the CPA’s retainer is \$2,500.00, that his hourly fee is \$260.00, and that his staff’s hourly fees range from \$90-\$195.00 per hour. (See Plaintiff’s Exhibit 3.) While the Court recognizes that the exact cost of the accounting will not be finalized until the accounting is completed, the measure of damages is certain, i.e. the hours worked X the CPA and/or his staff’s hourly fees. The Court is satisfied that this formula provides Plaintiff with an adequate legal remedy in the event that Defendant Garrisi refuses to pay 50% of the fees and Plaintiff establishes that Defendant Garrisi is liable for 50% of the fees. Consequently, Plaintiff’s motion for summary disposition of his claim for specific performance must be denied, and Defendant Garrisi’s request for summary disposition pursuant to MCR 2.116(1)(2) must be granted.

#### IV. Conclusion

For the reasons discussed above, Plaintiff's motion for summary disposition of Count I- Specific Performance is DENIED. Further, Defendant Garrisi's request for summary disposition of Count I pursuant to MCR 2.116(1)(2) is GRANTED. Pursuant to MCR 2.602(A)(3), the Court states that this Opinion and Order neither resolves the last pending claim, nor closes the case.

IT IS SO ORDERED.

Date: JAN 15 2016

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