

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

INVESTMENT RETRIEVERS, INC.,

Plaintiff,

vs.

Case No. 2015-3121-CB

ROBERT K. DENHA and
ROBERT DENHA AGENCY, INC.,

Defendant.

OPINION AND ORDER

Plaintiff has filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and (10). Defendants have filed a response and request that the motion be denied. Plaintiff has also filed a reply brief in support of its motion.

I. Facts and Procedural History

This matter arises out of a commercial line of credit plaintiff's predecessor in interest, Wells Fargo, issued to Defendants ("Account"). On July 28, 2015 Plaintiff filed its complaint in this matter with the Oakland County Circuit Court ("Complaint"). In the Complaint, Plaintiff alleges that Defendants breached the Account by failing to make the required payments. The Complaint contains claims for: Common Law Account Stated (Count I), Statutory Account Stated (Count II), and Breach of Contract (Count III). On August 26, 2015, the parties stipulated to transfer the case to this Court.

On September 18, 2015, Defendant Robert Denha ("Defendant Denha") filed his counter-complaint, which contains claims for: Violation of the Michigan Fair Debt

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Collection Practices Act (Count I), Abuse of Process (Count II), and Malicious Prosecution (Count III).

On June 2, 2016, Plaintiff filed its instant motion for summary disposition pursuant to MCR 2.116(C)(9) and (10). On June 10, 2016, Defendants filed their response. On June 14, 2016, Plaintiff filed a reply brief in support of its motion. On June 20, 2016, 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)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Id.* If the defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, then summary disposition under this rule is proper. *Id.* Further, a court may look only to the parties' pleadings in deciding a motion under MCR 2.116(C)(9). *Id.*

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

As a preliminary matter both sides have stipulated that South Dakota law is to apply to their dispute pursuant to the terms of the Account. In their response, Defendants contend that Plaintiff's claims are barred by the statute of limitations and statute of frauds. The Court will begin with the statute of limitations issue.

Under South Dakota law, claims for breach of contract and/or open account are governed by a six year statute of limitations. See SDCL 15-2-13. The limitations period begin at the date of accrual, which takes place when a party has actual notice of the cause of the action or is charged with notice. *In re Estate of Cullum*, 2015 SD 85; 871 NW2d 655. In their response, Defendant aver that Plaintiff knew about the cause of action when they defaulted on their payment obligations in May 2009, but failed to timely file the Complaint where it was filed on July 28, 2015, more than 6 years after the date of default.

In their reply, Plaintiff contends that its claims does not accrue until the date of the last payment. In support of its position, Plaintiff relies on 15-2-4 of the South Dakota Codified Law, which provides:

In an action brought to recover a balance due upon a mutual, open, and current account where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

The South Dakota Supreme Court has explained the impact a partial payment has on the statute of limitations as follows:

It is the settled law of this state that a part payment to be effectual to interrupt the statute must have been voluntary and must have been made and accepted under circumstances consistent with an intent to pay the balance. *McCarthy Bros. Co. v. Hanskutt*, 29 SD 535, 137 NW 286; *Wangsness v. Berdahl*, SD, 13 NW2d 293; *F. M. Slagle & Co. v. Bushnell*,

SD, 16 NW2d 914. Payments made by a joint debtor bind only the person making the payments and do not operate to interrupt the running of the statute as to the other debtors not participating or acquiescing in the payments. *McKeon v. Ewert*, 55 SD 545, 226 NW 754; *McNamee v. Graese*, 61 SD 46, 245 NW 924. The principle on which a part payment operates to take a debt without the statute is that the debtor by the payment intends to acknowledge the continued existence of the debt.

Nilsson v Kielman, 70 SD 390, 392; 17 NW2d 918 (1945).

In this case, it is undisputed that Defendants made a phone payment in connection with the Account on July 31, 2009 in the amount of \$350.00. While that payment did not cure the default, the principal underlying the part payment doctrine is that the limitations period renews if the debtor acknowledges the debt by making a payment towards to balance owed. Accordingly, although the July 31, 2009 payment did not cure the outstanding default it nevertheless operated to renew the limitations period. Consequently, the 6 years limitations period did not begin to run until July 31, 2009. Since the Complaint was filed on July 28, 2015, it was filed within the 6 year limitations period. As a result, Defendants' statute of limitations defense is without merit.

Defendants also argue that Plaintiff's claim against Defendant Denha individually is barred by the statute of frauds. SDCL 56-1-4 requires a guaranty to be in writing to be enforceable. However, SDCL 56-1-6 provides the following exception:

A promise to answer for the obligation of another is deemed an original obligation of the promiser and need not be in writing where the creditor parts with value or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made his surety.

The key inquiry in determining whether the above-referenced exception applies is whether the defendant in question became primarily obligated by promising "to be paymaster" or is only collaterally obligated by promising "to see [the plaintiff] paid."

Atlas Lumber and Coral Co v Flint, 20 SD 118, 120; 104 NW 1046 (1905). An oral promise to pay for things “furnished to a third party is not valid if the transaction is wholly or partly upon the credit of the third person so as to create a debt against him to which the oral promise is merely collateral” *Wood v Dodge*, 23 SD 95, 120 NW 774, 775 (1909).

In this case, the Court is convinced that Defendant Denha was clearly not the paymaster, but rather someone who was to see that the Plaintiff was paid. The Account was obtained via a telephone call placed by Defendant Denha, on behalf of Defendant Robert Denha Agency, Inc. (“Defendant Agency”). (See Plaintiff’s Exhibit 2.) During the conversation, the agent read Defendant Denha the legal disclosures applicable to the Account. One such disclosure was that: “You personally guarantee to pay Wells Fargo upon demand of all that you owe on the Business Line. As guarantor, you authorize Wells Fargo without notice or prior consent to change any of the terms of the amount of your company’s Business Line. (Id. at 15.) The agent also explained that the disclosures would be sent in writing once the Account was opened. (Id. at 14.) The Accounts’ most recent terms and conditions provide that they govern the “Businessline Account” that Wells Fargo established “for use of your business enterprise”. (See Plaintiff’s Exhibit 4.) Further, the terms and conditions provide the business agrees to pay, when due, the total of all purchased and advances made on the Account. (Id.) Additionally, the terms and conditions provide that the “Account Guarantor is an individual who signed as a personal guarantor at the time of Account opening and is personally liable for the debt incurred on the Account by [the business].” (Id.)

Based on the agent's use of the word guarantor, as well as the clear and unambiguous terms and conditions, it is clear that Defendant Denha was merely promising to promise to pay for the balance incurred by Defendant Agency if Defendant Agency did not make the required payments. Moreover, Defendant Agency was clearly liable to repay the amounts it incurred. Consequently, the facts presented in this case do not fit within the exception set forth by SDCL 56-1-6. As a result, because Defendant Denha's guaranty was not reduced to writing it does not satisfy the statute of frauds. Accordingly, Plaintiff's claims against Defendant Denha individually must be dismissed.

With respect to the merits of Plaintiff's claims against Defendant Agency, Plaintiff has presented an affidavit of Alexia Knight, its chief compliance officer and custodian of records, in which she testified that Defendant Agency defaulted on the Account in 2009 and that as of May 26, 2016 Defendant Agency owes \$39,829.59 in principal and \$19,728.01 in interest in connection with the Account. (See Plaintiff's Exhibit 1.) Defendants have not produced any evidence contradicting Ms. Knight's testimony. Consequently, the Court is convinced that no genuine issue of material fact exists that Plaintiff is entitled to summary disposition of its claims against Defendant Agency.

The final issue before the Court is Plaintiff's request for attorney fees. While Defendants concede that Defendant Agency is liable for Plaintiff's reasonable attorney fees pursuant to the terms and conditions of the Account, they request that the Court hold a hearing on the reasonableness of Plaintiff's requested fees. The Court is satisfied that such a request is reasonable and appropriate. Consequently, Plaintiff's request for costs and attorney fees will be set for an evidentiary hearing.

IV. Conclusion

Based upon the reasons set forth above, Plaintiff's motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Plaintiff's motion for summary disposition of its claims against Defendant Denha is DENIED, and Defendants' request for summary disposition pursuant to MCR 2.116(I)(2) is GRANTED as to those claims. Plaintiff's motion for summary disposition of its claims against Defendant Agency is GRANTED. Further, Plaintiff's request for costs and attorney fees is GRANTED, but the issue of reasonableness of the requested fees is hereby set for an evidentiary hearing on August 25, 2016 at 1:30 p.m.

This Opinion and Order does not resolve the last claim and does not close the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: AUG 09 2016

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