

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

MALACE HR, LLC,
Plaintiff,

vs.

Case No. 2015-4523-CB

PRODUCT ASSEMBLY GROUP, LLC
Defendant.

OPINION AND ORDER

Defendant has filed a motion to strike Plaintiff's affidavit of account stated. Plaintiff has filed a response and requests that the motion be denied.

In addition, Plaintiff has filed a motion for summary disposition. Defendant has filed a response and requests that the motion be denied.

I. Facts and Procedural History

Plaintiff is a staffing company that provides laborers to various companies. From January 2015 through September 2015, the parties allegedly entered into a contractual relationship pursuant to which Plaintiff would provide various laborers to provide services on behalf of Defendant. This arrangement is memorialized by several separate Contract Service Agreements ("Agreements"). (See Plaintiff's Exhibit A.)

On December 18, 2015, Plaintiff filed its complaint in this matter ("Complaint"). In the Complaint, Plaintiff alleges that Defendant has breached the Agreements by failing to make the required payments (Count I). The Complaint also contains claims for implied contract (Count II), account stated (Count III), and promissory estoppel (Count IV).

On January 16, 2016, as its first responsive pleading, Defendant filed a motion to

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dismiss Counts I, III and IV of the Complaint, for a more definite statement, and to strike the affidavit of account stated filed with the Complaint. On January 22, 2016, Plaintiff filed its instant motion for summary disposition pursuant to MCR 2.116(C)(10). The parties have filed a responses to each other's motion. On February 16, 2016, the Court held a hearing in connection with the motions. At the conclusion of the hearing, the Court denied Defendant's motion to dismiss and for a more definite statement. In addition, the Court took Defendant's motion to strike Plaintiff's affidavit of account stated and Plaintiff's motion for summary disposition under advisement. On March 2, 2016, Defendant filed its Answer to Complaint, Affirmative Defenses and Counter-Affidavit.

II. Standard of Review

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Graves v Warner Bros*, 253 Mich App 486, 491; 656 NW2d 195 (2002). Under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.* However, the nonmoving party must produce evidence showing a material dispute of fact left for trial in order to survive a motion for summary disposition under this rule. MCR 2.116(G)(4); *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Wayne County Bd of Com'rs v Wayne County Airport Authority*, 253 Mich App 144, 161; 658 NW2d 804 (2002).

III. Arguments and Analysis

A. Defendant's Motion to Strike

Defendant avers that the affidavit in question did not include a copy of the account as required by MCL 600.2145, and was not executed by someone with personal knowledge of the facts testified to in the affidavit. MCL 600.2145 provides, in pertinent part:

In all actions brought in any of the courts of this state, to recover the amount due on an open account or upon an account stated, if the plaintiff or someone in his behalf makes an affidavit of the amount due, as near as he can estimate the same, over and above all legal counterclaims and annexes thereto a copy of said account, and cause a copy of said affidavit and account to be served upon the defendant, with a copy of the complaint filed in the cause or with the process by which such action is commenced, such affidavit shall be deemed prima facie evidence of such indebtedness, unless the defendant with his answer, by himself or agent, makes an affidavit and serves a copy thereof on the plaintiff or his attorney, denying the same.

A statute's clear and unambiguous language must be enforced as written. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007).

It is undisputed that the original affidavit in this case was not accompanied by the required copy of the account in question. Notwithstanding, Plaintiff argues among other things that it cured any potential deficiency in the original affidavit of account stated by filing an amended affidavit of account on January 22, 2015. Pursuant to MCR 2.118(A)(2), a party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading. It is undisputed that Defendant filed its motion to dismiss in response to Plaintiff's Complaint on January 16, 2016. Plaintiff filed the amended affidavit on January 22, 2016, well within the 14 day requirement. The Court is thus satisfied that Defendant's motion to strike Plaintiff's original affidavit of

account stated was rendered moot by the filing of the amended affidavit and must accordingly be denied. Additionally, the Court is satisfied that Plaintiff's motion for summary disposition of its account stated claim based on the original affidavit of account stated must be denied because its original affidavit was deficient under the statute. Furthermore, Defendant has filed its Answer along with a counter-affidavit on March 2, 2016.

B. Plaintiff's Motion for Partial Summary Disposition of its Breach of Contract Claim

In its motion, Plaintiff asserts that it is entitled to summary disposition of its breach of contract claim. With regards to breach of contract, a plaintiff must prove: (1) the existence of a contract, (2) a party's breach of that contract, and (3) damages suffered as a result of that breach. *Miller-Davis Co v Ahrens Const, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). In its response, Defendant contests whether there was a contract between the parties. The elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Thomas v Leja*, 187 Mich App 418, 422; 468 Nw2d 58 (1991).

In support of its breach of contract claim, Plaintiff relies on 9 of the Agreements (Exhibit A attached to Motion for Summary Disposition), invoices it allegedly submitted in connection with those Agreements (Exhibit B attached to Motion for Summary Disposition), affidavits of its CFO and President (Exhibit C attached to Motion for Summary Disposition), and several emails (Exhibit D attached to Motion for Summary Disposition). The documents included within Exhibit A are each described within the document themselves as a "quotation." (See Plaintiff's Exhibit A.) While each of the

documents set forth proposed terms, and although each of the documents is initialed on the first page and executed following the heading “[a]pproved by”, it is unclear who initialed and executed the documents. Specifically, it is unclear from the face of the documents whether Defendant accepted the terms of the documents.

With respect to exhibit B, the invoices and punch cards attached evidence that Plaintiff billed Defendant for the services provided by various individuals. However, the invoices and punch cards do not establish that Defendant had contracted to pay for those individuals services or otherwise establish that a valid and binding contract existed between the parties, or the terms of such contract.

Likewise, the affidavits encompassing Plaintiff's exhibit C do not evidence the terms of the parties' contract. Rather, the two individuals merely testify in conclusory statements that they have reviewed the relevant accounts and records and that the documents evidence that Defendant owes Plaintiff \$105,267.05 exclusive of interest, costs, incidental and consequential damages, and attorney fees. (See Plaintiff's Exhibit C.) Conclusory statements are insufficient to support a motion for summary disposition. *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996). Based on the affiants failure to detail the facts sufficient to support their conclusions, the Court is satisfied that their testimony is insufficient to form the basis for summary disposition in Plaintiff's favor.

Finally, Plaintiff's exhibit D consists of emails in which Defendant's president and counsel reference that Defendant has an account with Plaintiff. (See Plaintiff's Exhibit D.) However, the emails do not establish the terms of the contract at issue, if one exists, or even acknowledge the balance that is allegedly owed.

For the reasons discussed herein, Plaintiff's evidence is insufficient to establish as a matter of law that one or more contracts exist between the parties much less establish the terms of those contracts. Such proof is insufficient to warrant summary disposition on Plaintiff's breach of contract claim. Consequently, Plaintiff's motion must be denied.

IV. Conclusion

Based upon the reasons set forth above, Defendant's motion to strike Plaintiff's affidavit is DENIED. In addition, Plaintiff's motion for summary disposition is DENIED. 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: APR 27 2016

Kathryn A. Viviano
Hon. Kathryn A. Viviano