

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

LEE CONTRACTING, INC., a Michigan
corporation,

Plaintiff/Counter-Defendant,

vs.

ADVANCED TOOLING SYSTEMS, INC.,
a Michigan corporation,

Defendant/Counter-Plaintiff.

Case No. 13-04195-CZB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER RESOLVING CROSS-MOTIONS FOR
SUMMARY DISPOSITION UNDER MCR 2.116(C)(8) AND (10)

By all accounts, Plaintiff Lee Contracting, Inc. (“Lee Contracting”) and Defendant Advanced Tooling Systems, Inc. (“ATS”) signed an agreement in 2011 that spelled out terms of a “turn-key” engagement for the relocation of a clearing press from the General Motors Metal Center in Wyoming to an ATS facility in Grand Rapids. Lee Contracting agreed to move the press for \$804,600, but by the time Lee Contracting finished the project, it had run up additional charges of \$643,253.21, which it demanded from ATS. Although ATS paid \$34,084.03 in time-and-material charges billed by Lee Contracting, ATS balked at the rest of the demand, leaving an outstanding balance of \$609,169.18. In 2013, Lee Contracting sued ATS for that outstanding balance, setting forth claims for breach of contract, unjust enrichment, and fraudulent misrepresentation. ATS responded with counterclaims for breach of contract and promissory estoppel. Both sides have sought summary disposition, which enables the Court to prune some claims from the competing pleadings. But the parties’ core claims against each other for breach of contract must be resolved by a jury at trial.

I. Factual Background

Plaintiff Lee Contracting has requested summary disposition under MCR 2.116(C)(10), and Defendant ATS has moved for the entry of summary disposition pursuant to MCR 2.116(C)(8) and (10). A summary-disposition motion under MCR 2.116(C)(8) confines the Court to a review of the pleadings, see State of Michigan ex rel Gurganus v CVS Caremark Corp, 496 Mich 45, 63 (2014), while a demand for summary disposition under MCR 2.116(C)(10) enables the Court to consider the full range of materials, including “affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties[.]” See Maiden v Rozwood, 461 Mich 109, 120 (1999). Accordingly, the Court shall refer to the entire record in presenting the factual background, but the Court shall confine its analysis of each claim to conform to the governing standards prescribed by the specific subsection of MCR 2.116(C) at issue.

On January 14, 2011, Plaintiff Lee Contracting signed a contract with Defendant ATS that obligated Lee Contracting to relocate a clearing press. See Complaint, Exhibit A. The terms of the parties’ contract contemplated a “contract amount” of \$804,600, id. (Agreement, § 4), but included an “[a]dditional term[]” that “alterations or deviations from the above specifications involving extra costs will be done on a time and material basis, and will become an extra charge over and above the estimate.” Id. (Agreement, § 6(D)). Beyond that, the parties’ agreement stated that the “hourly rate is fixed at \$93.75” for such “alterations or deviations” from the contract specifications. Id.

Plaintiff Lee Contracting failed to meet the March 22, 2011, delivery deadline set forth in the parties’ contract. Defendant ATS insists that that tardiness caused consequential damages for which it seeks compensation in its counterclaims for breach of contract and promissory estoppel. On the other side of the ledger, Lee Contracting contends that an ATS representative approved each of the

alterations and deviations for which it billed ATS above the contract amount of \$804,600, so ATS must compensate Lee Contracting for each and every alteration and deviation at the hourly contract rate of \$93.75. After the completion of discovery, both sides moved for summary disposition under MCR 2.116(C)(10), and ATS also included a request for relief under MCR 2.116(C)(8). Thus, the Court must consider the viability of each claim and counterclaim advanced by the competing parties in this case.

II. Legal Analysis

Defendant ATS has requested summary disposition under MCR 2.116(C)(8), which requires the Court to accept as true the allegations in the complaint and furnish relief “only where the claims alleged are ‘so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.’” Maiden, 461 Mich at 119. In addition, both parties have moved for the entry of summary disposition pursuant to MCR 2.116(C)(10), which permits the Court to award relief if “the proffered evidence fails to establish a genuine issue regarding any material fact[.]” Id. at 120. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” West v General Motors Corp, 469 Mich 177, 183 (2003). Applying these standards, the Court must decide whether either side is entitled to relief on any of the various claims and counterclaims.

A. Competing Claims for Breach of Contract.

In the first instance, each party has resorted to the language of the contract, accusing the other party of breaching the contract’s terms. Plaintiff Lee Contracting asserts a right to recovery for all of the alterations and deviations on a time-and-material basis, whereas Defendant ATS contends that

Lee Contracting violated the agreement by “failing to timely deliver a turn-key clearing press, failing to adequately protect ATS’ parking lot, failing to perform the work it agreed to, and failing to invoice ATS according to the agreed upon contract amount.” See Counterclaim, ¶ 23. To prevail on a claim for breach of contract, a party “must establish ‘(1) that there was a contract, (2) that the other party breached the contract, and (3) that the party asserting breach of contract suffered damages as a result of the breach.’” Dunn v Bennett, 303 Mich App 767, 774 (2014). Because both parties agree that they entered into a contract, the outcome of their summary-disposition motions turns upon whether there was a breach of that contract that caused damages.

1. Plaintiff Lee Contracting’s Claim

At the heart of Plaintiff Lee Contracting’s breach-of-contract claim lies the contention that Bryan Dancer of Defendant ATS approved all of the alterations and deviations supporting the claims for time-and-material charges amounting to \$609,169.18. Dancer plainly took part in the installation of the clearing press at the ATS facility, and he described his role as “[p]roject manager/engineer.”¹ See Lee Contracting’s Brief in Support of Its Response to Motion for Summary Disposition, Exhibit X (Deposition of Bryan Dancer at 13). Moreover, Lee Contracting clearly spelled out its demands for time-and-material charges in a series of invoices. See id., Exhibits F-K. Lee Contracting claims that all of the alterations and deviations identified in the invoices were approved by Dancer and, in many instances, ratified by ATS’s principal officers.

¹ Drew Boersma, Defendant ATS’s chief executive officer, identified himself as the “point person” in charge of getting the clearing press from the General Motors plant to the ATS facility, but he explained that Bryan Dancer “worked directly for” him on the project. See Lee Contracting’s Brief in Support of Its Response to Motion for Summary Disposition, Exhibit B (Deposition of Drew Boersma at 24). Therefore, the scope of Dancer’s authority may be debatable, but his participation in the project on ATS’s behalf is beyond cavil.

As an on-site representative of Defendant ATS acting at the behest of the company's chief executive officer, Bryan Dancer apparently – and, in all likelihood, actually – had authority to direct the work of Plaintiff Lee Contracting at the ATS facility where the clearing press was installed. As a matter of law, when “the principal, by statements or conduct, places the agent in a position where he appears with reasonable certainty to be acting for the principal, or without interference suffers the agent to assume such a position, and thereby justifies those dealing with the agent in believing that he is acting within his mandate, an apparent authority results which replaces that actually conferred as the basis for determining rights and liabilities.” Central Wholesale Co v Sefa, 351 Mich 17, 25 (1957). And as a matter of fact, Dancer certainly seemed to have that type of apparent authority to act on behalf of ATS in giving directions to Lee Contracting workers and approving the alterations and deviations necessary to complete the project to ATS's satisfaction. As Drew Boersma testified, he assigned Dancer “[t]o be my eyes and ears and to basically help Lee wherever he could in – in just facilitating anything they may need” in the press reinstallation project at ATS. See Lee Contracting's Brief in Support of Its Response to Motion for Summary Disposition, Exhibit B (Deposition of Drew Boersma at 46). Accordingly, genuine issues of material fact about Dancer's authority prevent the Court from granting summary disposition to ATS on Lee Contracting's breach-of-contract claim.

Beyond the authorizations provided by Bryan Dancer, Plaintiff Lee Contracting can rely upon admissions by Defendant ATS's chief executive officer, Drew Boersma, that Lee Contracting could well have incurred “charges to ATS over and above the PO amount[,]” see Lee Contracting's Brief in Support of Its Response to Motion for Summary Disposition, Exhibit Q, as well as ATS's chief financial officer, Andrew Johnson, that Lee Contracting appropriately undertook some alterations and deviations to the contract. See id., Exhibit C (Deposition of Andrew Johnson at 78). In the final

analysis, ATS's objections to the alterations and deviations claimed by Lee Contracting concern the scope, rather than the mere existence, of authorized activities for which Lee Contracting may claim reimbursement on "a time and material basis" under section 6(D) of the parties' contract.² Thus, the Court has no basis to award summary disposition to ATS under MCR 2.116(C)(10) on the claim for breach of contract advanced by Lee Contracting.

2. Defendant ATS's Counterclaim

Defendant ATS's counterclaim for breach of contract rests primarily upon admitted failures on Plaintiff Lee Contracting's part, such as tardy delivery of the clearing press. But Lee Contracting insists that any delays or other shortcomings must be attributed entirely to "act[s] of God or specific action directed by" ATS, and therefore not the responsibility of Lee Contracting according to section 6(E) of the parties' agreement. See Complaint, Exhibit A (Agreement, § 6(E)). In Lee Contracting's view, seasonal weight restrictions – imposed under Michigan's "frost laws," see MCL 257.722(8) – caused unanticipated yet unavoidable delays in its delivery of clearing-press pieces. Michigan law and the parties' contract both contemplate an affirmative defense to a breach-of-contract claim based upon "any act of God." See Kaminsky v The Hertz Corp, 94 Mich App 356, 363 (1979); Complaint, Exhibit A (Agreement, § 6(E)). An act of God refers to "those events and accidents which proceed

² Defendant ATS's motion and brief essentially invite the Court to consider each component of each invoice presented by Plaintiff Lee Contracting. But the purpose of a summary-disposition motion under MCR 2.116(C)(10) is to "test[] the factual sufficiency of the complaint[.]" Maiden, 461 Mich at 120, rather than to ascertain whether the plaintiff is entitled to every dollar of damages requested. As MCR 2.116(C)(10) states, relief should be granted when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact[.]" Implicit in this statement is the notion that the appropriate extent of damages ought not be resolved on summary disposition. Thus, the Court need not get down in the weeds to provide detailed analysis of each and every component of Lee Contracting's demand for \$609,169.18 as its damages for breach of contract. That task of separating the wheat from the chaff must be left to a jury.

from natural causes and cannot be anticipated and provided against, such as unprecedented storms, or freshets, lightning, earthquakes, etc.” Fingerle v City of Ann Arbor, 308 Mich App 318, 322 n5 (2014), quoting Golden & Boter Transfer Co v Brown & Sehler Co, 209 Mich 503, 510 (1920). The existence of an act of God ordinarily is “a question of fact for the jury.” Smith v Bd of County Road Commissioners of Chippewa County, 381 Mich 363, 367 (1968). Thus, neither party is entitled to an award of summary disposition pursuant to MCR 2.116(C)(10) on ATS’s counterclaim against Lee Contracting for breach of contract.³ A jury must resolve that counterclaim.

Despite faulting Defendant ATS for quibbling with elements of damages in an effort to ward off Plaintiff Lee Contracting’s claim for breach of contract, Lee Contracting takes the very same tack by contesting aspects of damages in seeking summary disposition on ATS’s counterclaim for breach of contract. Specifically, Lee Contracting characterizes several elements of ATS’s damages request as impermissibly speculative. See Chelsea Investment Group LLC v City of Chelsea, 288 Mich App 239, 255 (2010). To be sure, any “party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach.” See Alan Custom Homes, Inc v Krol, 256 Mich App 505, 512 (2003). But “[w]hen a plaintiff proves injury, recovery is not precluded simply because proof of the amount of damages is not mathematically precise.” Severn v Sperry Corp, 212 Mich App 406, 415 (1995). As our Supreme Court recently noted, “a wrongdoer will not go scot-free because his victim cannot prove his loss exactly.” Hannay v Dep’t of Transportation, 497 Mich 45, 87 n127 (2014).

³ All other defenses interposed by Plaintiff Lee Contracting to Defendant ATS’s breach-of-contract counterclaim appear unavailing because the parties’ contract states: “Other than any act of God or specific action directed by [ATS], [Lee Contracting] is responsible for all other delays.” See Complaint, Exhibit A (Agreement, § 6(E)). With the wisdom of hindsight, Lee Contracting might now regret agreeing to that term, but the Court cannot rewrite the parties’ contract for them.

“Further, where reasonable minds could differ regarding the level of certainty to which damages have been proved,” the Court ought not invade the responsibility of the jury to make determinations about damages. See Severn, 212 Mich App at 415. Accordingly, the Court must decline Lee Contracting’s invitation to award summary disposition on the breach-of-contract counterclaim simply because of alleged flaws in elements of ATS’s request for damages. Neither MCR 2.116(C)(10) nor Michigan precedent affords the Court sufficient latitude to grant relief on such a theory.

B. Lee Contracting’s Claim for Unjust Enrichment.

Given the existence of an enforceable contract, the Court can make quick work of Plaintiff Lee Contracting’s claim for unjust enrichment. Under Michigan law, “a contract will be implied” in order to prevent unjust enrichment “only if there is no express contract covering the same subject matter.” Belle Isle Grill Corp v City of Detroit, 256 Mich App 463, 478 (2003). In its half-hearted argument, Plaintiff Lee Contracting suggests that its work outside the obligations of its contract with Defendant ATS can give rise to an extra-contractual right to recovery. That argument, however, runs headlong into the provision of the parties’ agreement providing that “alterations or deviations from the [contract’s] specifications involving extra costs will be done on a time and material basis, and will become an extra charge over and above the estimate. The hourly rate is fixed at \$93.75.” See Complaint, Exhibit A (Agreement, § 6(D)). With all due respect, the Court cannot imagine clearer contractual language on a subject that Lee Contracting characterizes as outside the parties’ contract. Thus, the Court must award summary disposition to ATS under MCR 2.116(C)(8) and (10) on the unjust-enrichment claim set forth as Count Two in Lee Contracting’s complaint. See Belle Isle Grill, 256 Mich App at 478.

C. Lee Contracting's Claim for Fraudulent Misrepresentation.

Plaintiff Lee Contracting's attempt to salvage its claim for fraudulent misrepresentation calls to mind the desperation of a drowning swimmer, whose actions take no account of the consequences resulting from such behavior. In responding to Defendant ATS's invocation of the economic-loss doctrine, which generally bars tort claims in contractual disputes, see, e.g., Neibarger v Universal Cooperatives, Inc, 439 Mich 512, 520 (1992), Lee Contracting cites "fraud in the inducement as the only kind of fraud claim not barred by the economic loss doctrine." Huron Tool & Engineering Co v Precision Consulting Services, Inc, 209 Mich App 365, 371 (1995). But fraud in the inducement simply "renders the contract voidable at the option of the defrauded party," see Rooyakker & Sitz, PLLC v Plante & Moran, PLLC, 276 Mich App 146, 162 (2013), and the exercise of that exclusive remedy would wipe out Lee Contracting's breach-of-contract claim. In any event, Lee Contracting's fraudulent-misrepresentation claim and its accompanying request for money damages in Count Three cannot withstand ATS's challenge based on the economic-loss doctrine, see Huron Tool, 209 Mich App at 371, so the Court must award summary disposition to ATS under MCR 2.116(C)(8) and (10) on that claim. If Lee Contracting wishes to plead a claim for fraud in the inducement, and thereby limit itself to the exclusive remedy of rendering the parties' contract voidable, the Court shall afford Lee Contracting 14 days' leave under MCR 2.116(I)(5) to amend its complaint in that manner.

D. ATS's Counterclaim for Promissory Estoppel.

Defendant ATS's promissory-estoppel counterclaim against Plaintiff Lee Contracting rests upon the allegation that, "[c]ontrary to its representations, Lee Contracting failed to deliver a clearing press for the amount agreed upon" in the parties' agreement and "now claims extra charges totaling

\$609,169.18[.]” See Counterclaim, ¶ 30. “Promissory estoppel is a judicially created doctrine that was developed as an equitable remedy applicable in common-law contract actions.” Crown Tech Park v D&N Bank, FSB, 242 Mich App 538, 548 n4 (2000). The Court must “exercise caution in evaluating an estoppel claim and should apply the doctrine only where the facts are unquestionable and the wrong to be prevented undoubted.” Novak v Nationwide Mutual Ins Co, 235 Mich App 675, 687 (1999). Moreover, promissory estoppel and breach-of-contract claims cannot coexist “when a court concludes that an enforceable contract exists and the performance that creates the consideration for the contract is the same performance that evidences detrimental reliance in a promissory estoppel claim.” Raby v Bd of Trustees of the Police and Fire Retirement System of the City of Detroit, No 293570, slip op at 5 (Mich App March 17, 2011) (unpublished decision).

Defendant ATS’s counterclaim for promissory estoppel is nothing more than its breach-of-contract counterclaim dressed in slightly different clothes, *i.e.*, the promissory-estoppel counterclaim accuses Plaintiff Lee Contracting of failing to abide by obligations contained in the parties’ contract.⁴ Thus, the Court shall award summary disposition to Lee Contracting pursuant to MCR 2.116(C)(10) on ATS’s promissory-estoppel counterclaim. Indeed, the counterclaims for breach of contract and promissory estoppel are completely redundant, so “the wrong to be prevented” on the promissory-estoppel theory is only “undoubted” if ATS prevails on its freestanding claim for breach of contract. See Novak, 235 Mich App at 687. Beyond that, the promissory-estoppel counterclaim plainly runs

⁴ The Court notes that Defendant ATS has recast its promissory-estoppel counterclaim in its brief opposing Plaintiff Lee Contracting’s motion for summary disposition by relying on alleged side agreements “that the electrical [work] would not exceed \$11,200, and that there would not be any additional cost for hanging the counterbalance tanks.” See Defendant/Counter-Plaintiff’s Response to Plaintiff/Counter-Defendant’s Motion for Summary Disposition at 14. Those allegations appear nowhere in the counterclaim, however, and the Court sees no justification to permit ATS to amend its counterclaim at this late date to overhaul its fundamentally flawed claim for promissory estoppel.

afoul of the rule set forth by our Court of Appeals in its unpublished decision in Raby, No 293570, slip op at 5. Therefore, ATS's counterclaim for promissory estoppel cannot survive the challenge from Lee Contracting predicated upon MCR 2.116(C)(10).

III. Conclusion

For the reasons stated in this opinion, the Court shall grant summary disposition to Defendant ATS on Plaintiff Lee Contracting's claims for unjust enrichment and fraudulent misrepresentation. Additionally, the Court shall award summary disposition to Lee Contracting with respect to ATS's counterclaim for promissory estoppel. But the Court must reject the parties' requests for summary disposition on the competing claims for breach of contract, which must be resolved by a jury.

IT IS SO ORDERED.

Dated: August 25, 2015



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge