

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

CHARGER WATER TREATMENT
PRODUCTS, LLC,

Plaintiff,

vs.

WELLER WATER, LLC; WELLER WATER
TREATMENT, LLC; EDWARD GERALD
WELLER II; and MATTHEW L. WELLER,

Defendants.

Case No. 20-03110-CBB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER DENYING WELLER WATER'S
RENEWED MOTION FOR SUMMARY DISPOSITION

What began as a simple collection action has morphed into an all-out war about usury. The parties entered into a commercial contract for the sale and purchase of water-conditioning equipment and related products on credit. Defendant Weller Water, LLC (“Weller Water”) executed a credit agreement in favor of Plaintiff Charger Water Treatment Products, LLC (“Charger”), and Defendant Edward Weller agreed to act as a guarantor for Weller Water’s financial obligations to Charger. In the fullness of time, Charger sent products to Defendant Weller Water Treatment, LLC (“WWT”), which was owned and operated by Edward Weller’s brother, Defendant Matthew Weller. And when nobody paid for those products, Charger sued both brothers and both entities in an effort to collect from somebody. Despite paying only a small fraction of the charges for the products, Weller Water has moved for summary disposition under MCR 2.116(C)(8) and (10) by arguing that Charger tried to collect interest at a usurious rate. Although Weller Water has earned style points for its creativity and chutzpah, Weller Water is not entitled to summary disposition.

I. Factual Background

Defendant Weller Water has sought summary disposition under MCR 2.116(C)(8) and (10), but the parties have directed the Court's attention to matters beyond the pleadings.¹ Thus, the Court shall apply the standards governing summary disposition under MCR 2.116(C)(10) in resolving the motion. See Cuddington v United Health Services, Inc, 298 Mich App 264, 270 (2012). The Court "must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." El-Khalil v Oakwood Healthcare, Inc, 504 Mich 152, 160 (2019).

Plaintiff Charger's third amended complaint includes as Exhibit C invoices sent to Defendant Weller Water in the aggregate amount of \$45,182.10. Specifically, the six invoices include charges for products shipped by Charger augmented by amounts for shipping and handling charges and sales tax. See Third Amended Complaint, Exhibit C. None of the invoices includes any interest charge, so the aggregate amount due to Charger reflects nothing more than routine charges that manifestly cannot be characterized as usurious. Beyond that, the prayer for relief accompanying each of the four counts in the third amended complaint requests the aggregate invoice amount of "\$45,182.10, plus costs, damages, allowable statutory interest, attorney fees and any additional relief this Court deems just." Therefore, the demands in Charger's current pleading cannot be deemed usurious. But Weller Water points to other demands and pleadings as violations of Michigan's usury laws.

Defendant Weller Water admits that Plaintiff Charger delivered goods sold on credit and then followed up with the invoices totaling \$45,182.10 that are attached to the third amended complaint as Exhibit C. But Weller Water notes that each invoice expressly states: "Past due invoices may be

¹ For example, Defendant Weller Water has attached to its motion and brief as Exhibit D an affidavit from Henry Bialik, a certified public accountant, in support of the argument that the interest rate imposed by Plaintiff Charger "is 37.726% per annum."

subject to 1.5% late charge.” See Third Amended Complaint, Exhibit C. Moreover, Weller Water points out that Charger’s initial complaint and its first amended complaint included as Exhibit B an “Affidavit of Account Stated” claiming an outstanding balance of \$49,150.05 and documenting that enhanced figure by attaching five invoices for “finance charges due on overdue balances” in the total amount of \$3,932.95 as well as \$35 for an insufficient-funds check.² See Complaint, Exhibit B; see also First Amended Complaint, Exhibit B. According to Weller Water, those finance charges in the amount of \$3,932.95 were imposed within the three-month period from December 1, 2019, through February 29, 2020, so those finance charges were assessed at an annualized interest rate that exceeds 37 percent.

After Plaintiff Charger filed its third amended complaint, which dropped the request for any specific amount beyond the core charges of \$45,182.10 and did not include the “Affidavit of Account Stated,” Defendant Weller Water moved for summary disposition under MCR 2.116(C)(8) and (10) on the usury issue. Now, the Court must decide whether Charger can be held responsible for usury and, if so, what the appropriate remedy is for that transgression.

II. Legal Analysis

Defendant Weller Water is entitled to summary disposition under MCR 2.116(C)(10) if, but only if, “there is no genuine issue of material fact.” El-Khalil, 504 Mich at 160. “A genuine issue of material fact exists when the record leaves open an issue upon which reasonably minds might differ.” Id. Weller Water insists that Plaintiff Charger pursued interest at a usurious rate. Our Court of Appeals has indicated that questions concerning usury can be resolved on summary disposition,

² The simple arithmetic is as follows: actual charges of \$45,182.10 plus finance charges of \$3,932.95 plus \$35 for an insufficient-funds check equals a total amount due of \$49,150.05.

e.g., Soaring Pine Capital Real Estate and Debt Fund II, LLC v Park Street Group Realty Services, LLC, No 349909, slip op at 4 (Mich App June 10, 2021) (**published** decision), so the Court must consider whether Weller Water is entitled to that form of relief on its usury theory. In doing so, the Court must consider a host of statutes defining the metes and bounds of usury in Michigan.

Michigan law establishes two thresholds for interest rates. First, the Usury Act provides that the “interest of money shall be at the rate of \$5.00 upon \$100.00 for a year,” but “it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding 7% per annum.” See MCL 438.31. Second, criminal usury occurs when a person “knowingly charges, takes or receives any money . . . as interest on the loan . . . at a rate exceeding 25% at simple interest per annum[.]” See MCL 438.41. “The Legislature did not define the term ‘interest,’ but caselaw has provided some guidance.” Soaring Pine, No 349909, slip op at 9. Both our Supreme Court and our Court of Appeals have held that interest ““is compensation allowed by law or fixed by the respective parties for the use or forbearance of money, a charge for the loan or forbearance of money, or a sum paid for the use of money, *or for the delay in payment of money.*”” Id., quoting Town & Country Dodge, Inc v Dep’t of Treasury, 420 Mich 226, 242 (1984). Accordingly, the finance charges in this case may constitute “interest” under Michigan law, so Defendant Weller Water can plausibly argue that, at least at some point, Plaintiff Charger attempted to collect \$3,932.95 in “interest” as finance charges from Weller Water on the outstanding balance of \$45,182.10. See Complaint, Exhibit B (“Affidavit of Account Stated” with invoices for “finance charges due on overdue balances”). In addition, each invoice that Charger sent to Weller Water stated: “Past due invoices may be subject to 1.5% late charge.” See Third Amended Complaint, Exhibit C. As a result, Weller Water has the makings of a usury theory.

Plaintiff Charger contests the motion for summary disposition under MCR 2.116(C)(10) on a host of grounds. First, Charger correctly points out that such relief is premature because discovery has not yet closed.³ Liparoto Construction, Inc v General Shale Brick, Inc, 284 Mich App 25, 33-34 (2009). Second, Charger accurately states that its third amended complaint, which is the controlling pleading at this point, seeks as damages only the outstanding balance of \$45,182.10 for products that were provided. Because all of the prior versions of the complaint that demanded interest have been superseded by the third amended complaint, see Progress Michigan v Attorney General, 506 Mich 74, 95 (2020), citing MCR 2.118(A)(4), this lawsuit now involves nothing that runs afoul of usury laws in Michigan. Third, Charger argues that this case presents a situation where “th[e] Court lacks sufficient information to determine whether the ‘finance charge’ is interest on a debt or a late fee, and thus cannot determine if the charge is in violation of MCL 438.31.” See Souden v Souden, 303 Mich App 406, 417 (2013). As our Court of Appeals has consistently held, “‘late payment charges ordinarily do not constitute interest.’” Id. at 418, quoting Barbour v Handlos Real Estate & Bldg Corp, 152 Mich App 174, 188 (1986). The Court finds each one of these three arguments sufficient on its own to fend off Defendant Weller Water’s motion for summary disposition at least until the discovery process has run its course. Indeed, if the Court were forced to finally resolve the issue of usury on the existing record, the Court almost certainly would grant Charger summary disposition under MCR 2.116(I)(2) on the strength of the statement from our Court of Appeals that late fees are not “interest,” but rather “are similar to liquidated damages, in that they are contractual obligations designed to cover expenses engendered by a breach of contract.” Souden, 303 Mich App at 419.

³The fact that no meaningful discovery has taken place yet matters because Defendant Weller Water has relied upon the affidavit of an accountant to establish the interest rate of 37.726 percent, but that accountant has not yet been deposed.

III. Conclusion

Because the Court ought not award summary disposition under MCR 2.116(C)(10) or MCR 2.116(I)(2) to either side on a half-baked record developed without the benefit of full discovery, the Court shall deny Defendant Weller Water's motion for such relief and also abstain for the time being from declaring Plaintiff Charger the winner under MCR 2.116(I)(2). After discovery is completed, the Court will be able to decide whether Weller Water has a viable theory of usury.⁴

IT IS SO ORDERED.

Dated: March 25, 2022



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

⁴ Because the Court cannot decide the usury issues before the completion of discovery, the Court need not finally resolve the applicability of the general principle that businesses entering into contractual relations with each other can agree to any interest rate they choose without running afoul of usury laws. See MCL 450.1275 & MCL 438.61; see also Kleanthous v First of Chelsea Corp, 201 Mich App 440, 441-442 (1993) (discussing both of those statutes). Similarly, the Court does not yet have to make sense of Plaintiff Charger's cryptic comment that the "parties recently entered into a stipulation that renders" moot Defendant Weller Water's argument that Charger's failure to file any reply to Weller Water's answer conclusively established the viability of the usury theory.