

STATE OF MICHIGAN
IN THE 14th CIRCUIT COURT FOR THE COUNTY OF MUSKEGON

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CONTRACTORS MARINE, LTD,
d/b/a THE HOUSE MOVERS,
Plaintiffs,

v

DAVID ZAINEA,
Defendant,

and

DAVID ZAINEA, *et al.*,
Counter- and Third-Party Plaintiffs,

v

CONTRACTORS MARINE, LTD, *et al.*,
Counter- and Third-Party Defendants.

No. 20-2212-CB

HON. WILLIAM C. MARIETTI

Harold M. Hermanson (P29727)
Hermanson Law, P.L.L.C.
Attorneys for Contractors Marine, Ltd.,
*David Jonassen, Jesse Jonassen, and
J. Jonassen, Inc.*
8 West Walton Avenue, Suite C
Muskegon, Michigan 49440
(231) 727-8058
halslawoffice@gmail.com

William R. Sikkel (P57953)
Sikkel & Associates, PLC
Attorney for Custom Concrete, Inc.
42 East Lakewood Boulevard
Holland, Michigan 49424
(616) 394-3025
bsikkel@sikkellaw.com

Don H. Passenger (P39384)
Howard Law Group
Attorneys for David Zainea
25 Ionia Avenue SW, Suite 230
Grand Rapids, Michigan 49503
(616) 235-6000
dpassenger@howardlawgr.com

Kevin J. Wistrom (P38235)
Wistrom Law, P.L.L.C.
*Attorney for W. Josephson and
Josephson Design, Inc.*
1 East Apple Avenue, Suite C
Muskegon, Michigan 49442
(231) 747-9663
wistromlaw@gmail.com

OPINION AND ORDER DENYING PARTIAL SUMMARY DISPOSITION

Defendant, David Zainea, hired Plaintiff, Contractor's Marine, Ltd. ("The Housemovers"), to move his home away from the eroding shores of Lake Michigan. Third-Party Defendant David Jonassen signed the contract on behalf of The Housemovers. Third-Party Defendant Custom Concrete, Inc., sub-contracted with The Housemovers to do the concrete work at the home's new location. Relations between Zainea and The Housemovers broke down and this suit followed.

The court dismissed The Housemovers' claim against Zainea because it did not have a license to do the work it had agreed to perform for him. Custom Concrete assigned its claim against The Housemovers to Zainea and was dismissed from this action on a stipulation between it and Zainea. Zainea now moves for summary judgement on Custom Concrete's claim under MCL 2.116(C)(9) and (C)(10).

The Housemovers contract with Zainea provided that it would put the house over "new excavations prepared by us" and would support the house "while new foundations and supports are run up there-under by us."

The Housemovers sub-contracted with Custom Concrete to pour the foundations. It admits that "work was completed by Custom Concrete," but does not admit to the extent or quality of that work. Both Zainea and The Housemovers deny that Custom Concrete performed all of its obligations and that it performed them satisfactorily. Zainea alleges in his own claim against Custom Concrete and affirmatively states in his answer to The Housemovers' claim that its performance was defective and unworkmanlike.

The Housemovers did not pay Custom Concrete for the sub-contracted work.

A motion for summary disposition under MCR 2.116(C)(9) is tested solely by reference to the parties' pleadings. *Nasser v Auto Club Ins Assn*, 435 Mich 33, 47; 457 NW2d 637 (1990). Summary disposition is improper when an opponent has categorically denied a material allegation of the complaint. *Id.*

A motion brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the claim. *Shinn v Mich Assigned Claims Facility*, 314 Mich App 765; 887 NW2d 635. The motion can be granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177; 665 NW2d 468 (2003). The moving party has the initial burden to support the claim with affidavits, depositions, admissions, or other documentary evidence. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684; 818 NW2d 410 (2012). The evidence is to be considered in the light most favorable to the nonmoving party. *Liparoto Constr Inc v Gen Shale Brick, Inc*, 284 Mich App 25; 772 NW2d 801 (2009). A genuine factual issue exists if the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might disagree. *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420; 864 NW2d 609 (2014).

The Housemovers argues that it is not liable on the contract that is the subject of this motion because it was acting in its capacity as Zainea's agent when it engaged Custom Concrete. It argues that Zainea controlled what it did and that anyone involved would believe that it was acting at Zainea's request and to benefit him. However, the only evidence The Housemovers offered in support of an agency is Zainea's

authorization for it to get house-moving permits for him. Clearly, the scope of the agency did not extend beyond obtaining permits. The Housemovers, therefore, did not establish that it contracted with Custom Concrete as Zainea's agent. Further, the court does not agree with The Housemovers that it somehow became Zainea's agent because he was a third-party beneficiary to the Custom Concrete agreement. All employers of contractors benefit from sub-contracts. Accepting The Housemovers' premise would make all contractors who let sub-contracts their employer's agent. There is no authority for that proposition.

Zainea is correct that his failure to pay The Homeowners is not a valid defense to Custom Contract's claim against it for breach of contract. Legal consideration is nonetheless an essential element of a contract claim. *Innovation Ventures v Liquid Manufacturing*, 499 Mich 491, 508; 885 NW2d 861 (2016). A failure of consideration (as opposed to a lack of consideration) is a seriously deficient contractual performance that causes a contract's basis to cease to exist or become worthless. *Innovation Ventures*, 499 Mich at 509. There is a failure of consideration when one party commits an initial substantial breach and then tries to enforce the contract against the other party for a subsequent failure to perform. Parties may rescind a contract when there is a failure to perform a substantial part of the contract or one of its essential terms. *Id.*

The Homeowners denied that Custom Contract completed its performance under their agreement. Zainea denied that as well and alleged that the performance was deficient and unworkmanlike. The material fact of performance is therefore in dispute and the motion fails under MCR 2.116(C)(9). See *Nasser*, 435 Mich at 47.

Since the essential element of Custom Contract's performance is disputed, Zainea has the burden of supporting its existence with affidavits, depositions, admissions, or other evidence. He has not done this. The only item he presented to support this motion is a Custom Concrete invoice to The Housemovers. The invoice does not indicate whether Custom Concrete had finished its work. On the other hand, Zainea has put evidence into the record supporting the fact that Custom Concrete's performance was substantially deficient. He included municipal inspection reports with his counter and third-party claims showing that Custom Concrete had improperly installed anchor straps in the foundation and had left the top of the foundation nearly a yard below grade. That condition is contrary to the local building code and left the basement windows, which were designed to be above grade, below grade as well. Zainea also included a copy of his lawyer's pre-suit letter to Custom Concrete's counsel describing these deficiencies.

Looked at in the light most favorable to The Housemovers, this evidence shows that material facts remain for the jury to decide on the question of whether there was a failure of consideration under the disputed contract. This motion is therefore DENIED.

IT IS SO ORDERED.

This order does not resolve the last pending claim and does not close the case.

Date: June 10, 2022

William C. Marietti (P17085)
Circuit Judge