

STATE OF MICHIGAN
SAGINAW COUNTY CIRCUIT COURT
BUSINESS COURT

HELP RESTORATION, LLC,

Plaintiff,

v.

MERITAGE MANAGEMENT, LLC,
a Michigan limited liability company,
FRANKENMUTH BELLS OF BAVARIA,
LLC, a Michigan limited liability company,
and LORI PROCTOR, individually and
as authorized agent for Meritage
Management, LLC, and Frankenmuth Bells
of Bavaria, LLC, jointly and severally,

Defendants.

Case No. 22-046722-CB

Judge: M. Randall Jurens (P27637)

**OPINION AND ORDER GRANTING
IN PART AND DENYING IN PART
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY DISPOSITION, AND
GRANTING IN PART AND DENYING
IN PART DEFENDANTS' MOTION
FOR SUMMARY DISPOSITION**

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Plaintiff's complaint seeks to collect for unpaid services rendered pursuant to a purported contract; specifically, a written work authorization. Defendants' answer denies a contract exists.

Hoping to expedite resolution of this threshold issue, plaintiff requests the court summarily declare the work authorization to be a valid and enforceable contract. Defendants have countered with a motion to dismiss plaintiff's complaint in its entirety.

For the reasons stated in this opinion, the court concludes the work authorization does constitute a valid contract with one defendant, but that the complaint should be dismissed against the other defendants.

Background

Frankenmuth Bells of Bavaria, LLC (Bells) owns an apartment building at 435 W. Schleier in Frankenmuth (the Property). Bells engages Meritage Management, LLC (Meritage) to manage the Property. In turn, Meritage employs Lori Proctor (Proctor) as an area manager that includes responsibility for the Property.

HELP Restoration LLC (HELP) provides loss control and remediation services for properties experiencing fire, water, or wind casualty.

On January 10, 2022, the Property suffered a boiler line failure that released water into living space. Proctor contacted HELP for emergency services. HELP responded to the Property with personnel and equipment. Proctor, acting as Bells' agent, signed a work authorization form authorizing HELP "to perform any and all loss control and remediation services to the [P]roperty". HELP immediately began conducting water mitigation. In short order, however, three additional water pipes burst, which HELP attended to also. To one degree or another, HELP serviced the Property from January 10 through 17. For its services HELP billed \$32,522.16.

When requests for payment went unsatisfied, HELP commenced the present action asserting a single breach of contract claim against Bells, Meritage, and Proctor. Their answer asserted the work authorization "fails to list any terms and/or conditions of any type of work and thus, there is simply no bargained-for exchange, and same is not a contract" (Answer, ¶ 5).

HELP filed a motion for partial summary disposition under MCR 2.116(C)(9) and (10) with the limited request that the court declare the signed work authorization to be a valid and enforceable contract.¹

In turn Bells, Meritage, and Proctor filed a motion under MCR 2.116(C)(8) to dismiss HELP's complaint in its entirety.²

The competing motions were heard on July 19, 2022, and the court took the matter under advisement.

Summary Disposition Standards

MCR 2.116(C)(8) authorizes summary dismissal of complaints that "fail[] to state a claim on which relief can be granted". Such motions test the claim's *legal* sufficiency. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). When deciding a motion under this subrule, courts consider only the pleadings. MCR 2.116(G)(5); *Maiden*, at 119-120. When an action arises from a contract, the contract attached to the complaint is considered part of the pleadings. MCR 2.113(C); *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 163; 934 NW2d 665 (2019). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts and are construed in the light most favorable to the nonmoving party. *Gorman v American Honda Motor Co.*, 302 Mich App 113, 131; 839 NW2d 223 (2013). A motion under MCR 2.116(C)(8) should be granted only when the claim is so clearly

¹ HELP supported its motion with a brief and attached documentary evidence, including an affidavit by its manager, Luke Showerman; and HELP subsequently filed a supplemental brief that attached additional documentary evidence, including the transcript of a deposition of Lori Proctor. Defendants did not file a response or a brief in opposition to plaintiff's motion, or submit contrary documentary evidence.

² HELP filed a response (combined with a supplement to its own motion, accompanied by documentary evidence) that predominantly contained fact-intensive arguments beyond a defense of the sufficiency of its complaint.

unenforceable as a matter of law that no factual development could possibly justify recovery. *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012).

Summary disposition is appropriate under MCR 2.116(C)(9) where “[t]he opposing party has failed to state a valid defense to the claim asserted against him or her.” A plaintiff’s motion brought under this rule similarly tests the *legal* sufficiency of a defendant’s pleadings. *Nasser v Auto Club Ins. Ass’n*, 435 Mich 33 (1990). In reviewing such motions, courts consider the pleadings alone, accepting all well-pleaded allegations as true. *Hackel v Macomb Co Comm*, 298 Mich App 311, 315-316; 826 NW2d 753 (2012). Summary disposition is appropriate under MCR 2.116(C)(9) when a party’s defenses are so untenable as a matter of law that no factual development could possibly deny the plaintiff’s right to recover, the motion is properly granted. *Id.* at 316.

Summary disposition under MCR 2.116(C)(10) is appropriate if “there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law”. A motion under this subrule tests the *factual* sufficiency of a claim. *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). In reviewing such motions, courts consider the pleadings, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). The moving party has the initial burden of supporting its position with documentary evidence. *Id.* Once the moving party meets its burden, the burden shifts to the nonmoving party to establish that a genuine issue of disputed fact exists. *Id.* “If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.” *Id.* at 363; MCR 2.116(G)(4). “There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most

favorable to the nonmoving party.” *Allison v AEW Capital Management, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Finally, there is no absolute rule that precludes relief under MCR 2.116(C)(10) until discovery has been completed. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009).

Analysis

HELP’s breach of contract claim is premised on a written work authorization. Although Bells acknowledges Proctor’s authority and signature³, it denies the work authorization constitutes a valid contract.

There are five elements of a valid contract: (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. Most of the elements listed above reflect the fact that the parties to a contract must have “a meeting of the minds on all essential terms of a contract. Where mutual assent does not exist, a contract does not exist. A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. [*Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 13; 824 NW2d 202 (2012) cleaned up]

Here, Bells challenges the elements of consideration and mutuality of agreement (Answer, ¶ 5⁴; Defendants’ MSD Brief, p 4),

“To have consideration there must be a bargained-for exchange; there must be a benefit on one side, or a detriment suffered, or service done on the other.” *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 508; 885 NW2d 861 (2016) (cleaned up). “Typically, consideration will, at least

³ Bells stipulated that Proctor has authority to enter into contracts on its behalf (Defendant’s MSD Brief, p 2 n 1).

⁴ Denying the existence of elements of the breach of contract claim is a tenable defense that, depending on factual development, could theoretically deny HELP’s right to recover. Accordingly, HELP’s challenge to the legal sufficiency of Bells’ answer under MCR 2.116(C)(9) is unavailing. *Hackel*, 298 Mich App at 316. Thus, if relief is to be granted here, it must be based on HELP’s assertion that the defense is factually deficient under MCR 2.116(C)(10).

for one side of the contract, take the form of the payment of legal tender.” *Calhoun Co*, 297 Mich App at 14. Generally, whether consideration exists is a question for the trier of fact. *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 87-88; 492 NW2d 460 (1992). The burden of proving that the contract lacked consideration is on the party asserting its absence. *Adell Broadcasting v Apex Media Sales*, 269 Mich App 6, 12; 708 NW2d 778 (2005).

Here, the work authorization, on its face, documents HELP’s agreement to perform [] loss control and remediation services” in exchange for payment of “invoices [] within 30 days of issuance”. Moreover, Bells’ authorized agent acknowledges the quid pro quo of services for monetary remuneration (Plaintiffs’ Supplemental Brief, Ex A, Deposition of Lori Proctor, p 62). In the absence of contrary evidence, there is no genuine dispute regarding the existence of contractual consideration.

Mutuality of agreement means that there is mutual assent, or a meeting of the minds, on all material and essential terms of the contract. *Sanchez v Eagle Alloy Inc*, 254 Mich App 651, 665; 658 NW2d 510 (2003). A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.” *Kamalnath v Mercer Mem Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992).

Here, Bells observes, in passing, that “there is no execution” of the work authorization by HELP (Defendants’ MSD Brief, p 2). However, mutuality of agreement can be manifested in different ways: expressly (either orally or in writing) or impliedly (by conduct consistent with acceptance of an offer, such as performance and prior course of dealing). *Rood v General Dynamics Corp*, 444 Mich 107, 118 n 17; 507 NW2d 591 (1993); Restatement (Second) of Contracts, § 69(1). Importantly, a contract need not be signed by the party asserting the validity of the contract in order to be valid. *Hall v Small*, 267 Mich App 33, 333; 705 NW2d 741 (2005);

Ehresman v Bultynck & Co, PC, 203 Mich App 350, 354; 511 NW2d 724 (1994). Here, it is undisputed that, consistent with acceptance of the work authorization, HELP proceeded to perform mitigation services over several days.⁵ With or without a signature, by its conduct, HELP's agreement is manifest. *Ludowici-Celadon Co v McKinley*, 307 Mich 149, 153; 11 NW2d 839 (1943).

Bells also disputes mutuality of agreement on price (Defendants' MSD Brief, pp 4-5). Admittedly, the work authorization is silent on the cost of HELP's services. But this is not necessarily fatal to contract formation. "[C]ourts do not look favorably on arguments that a contract cannot be enforced because of the indefiniteness of a term. This sound rule is premised in part on the principal that parties to contracts should not be readily able to evade their obligations using after-the-fact assertions of indefiniteness." *Calhoun Co*, 297 Mich App at 17 (cleaned up). Accordingly,

In an appropriate case an agreement may be enforced as a contract even though incomplete or indefinite in the expression of some terms, if it is established that the parties intended to be bound by the agreement, particularly where one or another of the parties has rendered part or full performance. Where the price is indefinite, the purchaser may be required to pay and the seller to accept a reasonable price. [*J W Knapp Co v Sinas*, 19 Mich App 427, 431; 172 NW2d 867 (1969)]

In the present case, Bells claims that there is no contract because the work authorization does not identify the cost of services and it never agreed to HELP's purportedly inflated charges. But Bells' objection bears on the reasonableness of the price to be paid; it does not undermine the existence of a contract (particularly one that Bells initiated and HELP performed). The argument

⁵ Defendants' answer does not seriously dispute the complaint's allegation that plaintiff performed services but, rather, contests the reasonableness of what plaintiff charged for those services (Complaint/Answer ¶ 6). Moreover, outside of the pleadings, undisputed documentary evidence confirms plaintiff performed services (Plaintiffs' Supplemental Brief, Ex A, Deposition of Lori Proctor, pp 18-32).

that HELP has overbilled Bells is one that can be presented to the finder of fact to determine what the reasonable amount owed under the contract is.

Therefore, on the threshold question of whether a contract exists with Bells, the court concludes that HELP is entitled to summary disposition on that limited issue.⁶

⁶ Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete. However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position. In addition, a party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence. The party opposing summary disposition must offer the required MCR 2.116(H) affidavits, with the probable testimony to support its contentions. [*Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292 (2009) (footnotes omitted)]

Here, although the court's May 23, 2022 Case Management Order generally suspended discovery (pending resolution of the present motions, and the possible early referral of the case to facilitative mediation), Bells has already stipulated that Proctor had authority to enter into contracts for Bells, the Work Authorization contradicts Bells' assertion of lack of consideration and mutuality of agreement, and Proctor testified at deposition (by agreement of counsel) that HELP performed services in expectation of remuneration. While other facts remain in dispute and appropriate subjects for discovery (e.g. the reasonableness of HELP's charges for its services), facts relevant to determining contract formation do not. So, while defense counsel correctly notes the general incompleteness of discovery (Defendants' MSD Brief, p 4 n 2), the court does not believe it premature to resolve the limited issue before it.

On the other hand, having determined the existence of a contract between HELP and Bells, it follows that HELP has no contract with Meritage⁷ or Proctor⁸. *Huizenga v Withey Sheppard Assoc*, 15 Mich App 628, 633; 167 NW2d 120 (1969) (“It is a well accepted rule that where the principal is disclosed and the agent is known to be acting as such, the agent cannot be made personally liable unless he agreed to become personally liable”). Accordingly, Meritage and Proctor are entitled to dismissal of the breach of contract claim against them.⁹

Conclusion

HELP has filed a breach of contract claim premised on a work authorization signed on behalf of Bells. Notwithstanding assertions of lack of consideration and mutuality of agreement, the court finds a valid contract exists between HELP and Bells, but finds no evidence of a contract with Meritage or Proctor.

Accordingly, HELP’s motion for partial summary disposition against Bells is granted¹⁰, but denied as to Meritage and Proctor. Conversely, Bell’s motion for summary disposition is denied, but Meritage’s and Proctor’s motion for summary disposition is granted.

⁷ HELP asserts Proctor “intended to include [Meritage] as well when she signed and committed her principals to the contract” (Plaintiff’s Response to Defendants’ MSD, p 9). However, on its face, the work authorization names Bells, alone, as the responsible party, without mention of Meritage. HELP’s assertion of Proctor’s intent notwithstanding, contract formation “is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.” *Calhoun Co*, 297 Mich App at 13 (cleaned up).

⁸ Acknowledging Proctor’s authority to bind Bells, HELP agrees its claim against Proctor should be dismissed (Plaintiff’s Response to Defendants’ MSD, p 9).

⁹ Notwithstanding defendants’ characterization of their motion as one under MCR 2116(C)(8), to the extent matter beyond the pleadings has been considered, the court is treating the motion as having been brought under MCR 2.116(C)(10). See *Kefgen v Davison*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

¹⁰ To be clear, the court is only recognizing the formation of a contract. The extent of Bell’s contractual liability must await further development.

IT IS SO ORDERED.

Date: July 22, 2022

_____/s/_____(P27637)
M. Randall Jurrens, Business Court Judge