

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JOHN STEWART ASSOCIATES, LLC,  
a Michigan limited liability company,

Plaintiff/Counter-Defendant,

v

Case No. 2023-200887-CB  
Hon. Victoria Valentine

MILFORD ENTERTAINMENT GROUP, LLC  
a Michigan limited liability company,

Defendant/Counter-Plaintiff,

HURON VALLEY INVESTMENTS, LLC,  
a Michigan limited liability company,

Defendant,

and JOHN STEWART, an individual,

Counter-Defendant.

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**OPINION AND ORDER REGARDING PLAINTIFF/COUNTER-DEFENDANT  
JOHN STEWART ASSOCIATES, LLC'S MOTION FOR SUMMARY  
DISPOSITION**

At a session of said Court held on the  
13<sup>th</sup> day of August 2024 in the County of  
Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

The matter before the Court is on Plaintiff/Counter-Defendant's Motion for Summary Disposition under MCR 2.116(C)(8), (9) and (10). The Court has reviewed the file, briefs, responses, and exhibits. This Order is entered without oral argument. MCR 2.119(E)(3). For the reasons set forth below, Plaintiff/Counter-Defendant's Motion is DENIED in part and GRANTED in part.

### OVERVIEW

Plaintiff John Stewart Associates, LLC ("Stewart") is a general contractor in the business of construction management.<sup>1</sup> Defendant Milford Entertainment Group, LLC ("MEG") is a developer and operator of restaurants and entertainment/hospitality venues.<sup>2</sup> Defendant Huron Valley Investments, LLC's ("HVI") owns real property located in the Village of Milford, Michigan (the "Property"). On or about November 4, 2021, HVI and MEG entered into a commercial lease agreement whereby MEG leased the Property from HVI to operate a restaurant and entertainment/hospitality venue (the "Lease Agreement").<sup>3</sup>

Stewart alleges that in December 2021, Stewart and MEG entered into a contract<sup>4</sup> for renovations to the Property.<sup>5</sup> Stewart was to provide construction management services to MEG for a restaurant located on the Property, commonly known as "The Milford House,"<sup>6</sup> for which "MEG would pay [Stewart] a total contract amount of \$752,117.28 for the work specified in the contract."<sup>7</sup>

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<sup>1</sup> Complaint, ¶8.

<sup>2</sup> Complaint, ¶19.

<sup>3</sup> Defendant's MSD Ex 1.

<sup>4</sup> Stewart's Complaint does not reference nor attach a written contract and does not reference the exceptions set forth in MCR 2.113(C). MEG does not dispute that the parties entered into an oral agreement.

<sup>5</sup> Complaint, ¶10.

<sup>6</sup> Complaint, ¶11.

<sup>7</sup> Complaint, ¶12. The Complaint, however, fails to specify the particular work to be performed by Stewart for the renovations.

Stewart claims that MEG only paid \$519,033.53 of the total invoiced amount, leaving a balance owed of \$233,083.75.<sup>8</sup> Consequently, on April 7, 2023, Stewart recorded a Construction Lien and on April 20, 2023, Stewart recorded an Amended Construction Lien against HVI's interests in the Property.<sup>9</sup> Thereafter, Stewart filed this 2-count Complaint, alleging breach of contract against MEG<sup>10</sup> and foreclosure of the lien against HVI.<sup>11</sup>

MEG, in turn filed a 5-Count Counterclaim. While MEG's counterclaim fails to identify the specific causes of action, it appears to allege breach of contract, fraud/misrepresentation,<sup>12</sup> unjust enrichment and implied contract. Such claims are based on MEG's allegations that the parties agreed to a \$1 million cap for the Project;<sup>13</sup> that Stewart's performed services were unnecessary<sup>14</sup> and untimely;<sup>15</sup> and that the Contract included a cost plus 10% cap, where Stewart was to charge MEG cost plus 10% of the actual amount Stewart paid workers and for supplies.<sup>16</sup>

Stewart now files this Motion for Summary Disposition under MCR 2.116(C)(8), (9) and (10) to which it attaches Exhibits, including a list of delineated renovation work;<sup>17</sup> and invoices evidencing the architectural services performed that include hourly rates for services.<sup>18</sup> Stewart argues that there is no defense and no question that a valid contract exists between the parties,

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<sup>8</sup> Complaint, ¶17.

<sup>9</sup> Complaint ¶¶ 19 and 20.

<sup>10</sup> While Stewart's Motion for Summary Disposition argues that MEG has been unjustly enrichment, Stewart's Complaint fails to allege such a claim. See MCR 2.116(B), which provides "[a] party may move for dismissal of or judgment on all or part of a claim in accordance with this rule." As a result, because there was no claim of unjust enrichment alleged in the Complaint, the issue of unjust enrichment will not be addressed.

<sup>11</sup> HVI filed a Motion for Summary Disposition, which was addressed in an Opinion and Order dated 8/7/2024.

<sup>12</sup> MEG's Counts II and III essentially allege the same allegations regarding fraud/misrepresentation.

<sup>13</sup> Counterclaim ¶ 9.

<sup>14</sup> Counterclaim ¶ 5.

<sup>15</sup> Counterclaim ¶ 5.

<sup>16</sup> Counterclaim ¶¶ 3 and 9.

<sup>17</sup> Stewart's MSD Exhibit B.

<sup>18</sup> Stewart's MSD Exhibits C and D.

which MEG breached by refusing to remit payments for services provided in an amount less than MEG's claim of a \$1 million cap. Stewart also claims that MEG initially paid on invoices that included an hourly rate for services; it was, however, not until the end of the project that MEG began to question the invoices. Stewart further argues that MEG has been unjustly enriched. Lastly, Stewart argues that MEG's claims of fraud/misrepresentation alleged in its counterclaim must be dismissed because they are not pled with the required specificity and that MEG has not alleged nor can it prove any statement or promise was made in bad faith without the intention of performance.

MEG responds and argues that while the parties entered into an oral contract that was not memorialized in writing, the terms of the oral contract are in dispute and that, therefore, Stewart's Motion should be denied. In support, MEG attaches an affidavit of its Member, Mr. Horvath who avers, *inter alia*, that:<sup>19</sup>

- Stewart billed its labor at \$70/hour in violation of the cost plus 10% term of the contract.
- Stewart failed to timely perform its work and never completed the work.
- Stewart performed unnecessary work, hired overpriced subcontractors, overbilled for work and labor in excess to the cost plus 10% agreement in the contract.

MEG fails to address Stewart's argument regarding the claim of fraud/misrepresentation alleged in MEG's Counterclaim.

## STANDARD OF REVIEW

### *MCR 2.116(C)(8)*

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil v Oakwood*

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<sup>19</sup> Defendant's MSD Exhibit D.

*Healthcare, Inc*, 504 Mich 152, 159-160 (2019); *Pawlak v Redox Corp*, 182 Mich App 758, 763 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 360 (1991).

“All well-pleaded factual allegations are accepted as a true and construed in a light most favorable to the nonmovant.” *Maiden v Rozwood*, 461 Mich 109, 119 (1999); *Wade v Dep’t of Corrections*, 439 Mich 158, 162 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App at 360; *Spiek v Dep’t of Transportation*, 456 Mich 331, 337 (1998).

*MCR 2.116(C)(9)*

Summary disposition under MCR 2.116(C)(9) may be granted where “[t]he opposing party has failed to state a valid defense to the claim asserted against him or her.” This motion tests the legal sufficiency of a pleaded defense to determine whether the defense is “so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff’s right to recovery.” *Vayda v Lake Co*, 321 Mich App 686, 693 (2017), quoting *Abela v Gen Motors Corp*, 257 Mich App 513, 518 (2003). When deciding a motion on this ground, “the trial court may only consider the pleadings, which include complaints, answers, and replies, but not the motion for summary disposition itself.” *Ingham Co v Mich Co Rd Comm Self-Ins Pool*, 321 Mich App 574, 579 (2017); MCR 2.116(G)(5). Summary disposition is inappropriate on this ground when a material allegation of the complaint is categorically denied and the nonmoving party has stated a legally cognizable defense. *Dimondale v Grable*, 240 Mich App 553, 564-565 (2000).

*MCR 2.116(C)(10)*

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). Accordingly, “[i]n evaluating a motion for summary disposition brought 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.” *Maiden*, 461 Mich at 119-120; *Quinto*, 451 Mich at 358. The moving party “must specifically identify the issues” as to which it “believes there is no genuine issue” of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim. *Quinto*, 451 Mich at 361. If the moving party properly supports its motion, the burden “then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Id.* at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond, and the trial court should deny the motion. MCR 2.116(G)(4). See also *Meyer v City of Center Line*, 242 Mich App 560, 575; 619 NW2d 182 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116(C)(10)).

In all cases, MCR 2.116(G)(4) squarely places the burden on the parties, not the trial court, to support their positions. A reviewing court may not employ a standard citing mere possibility or promise in granting or denying the motion. *Maiden*, 461 Mich at 120-121 (citations omitted), and may not weigh credibility or resolve a material factual dispute in deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, summary disposition pursuant

to MCR 2.116(C)(10) is appropriate if, and only if, the evidence, viewed most favorably to the non-moving party fails to establish any genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362, citing MCR 2.116(C)(10) and (G)(4); *Maiden*, 461 Mich at 119-120. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *El-Khalil*, 504 Mich at 160 (citation omitted). Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

## ANALYSIS

### *Stewart's Claim of Breach of Contract*

“A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.” *AFT Mich v State of Michigan*, 497 Mich 197, 235 (2015). Mutuality of agreement entails a meeting of the minds on all the essential terms. *Burkhardt v Bailey*, 260 Mich App 636, 655 (2004). A meeting of the minds is judged objectively, considering “the express words of the parties and their visible acts, not their subjective states of mind.” *Calhoun County v Blue Cross Blue Shield of Michigan*, 297 Mich App 1, 13 (2012)

Stewart alleges that a valid contract exists between these parties, which MEG breached by refusing to remit to Stewart the invoiced balance of \$233,083.75 for services Stewart performed. In support, Stewart attaches a list of “Milford House Renovations,”<sup>20</sup> invoices sent to MEG that include hourly labor rates,<sup>21</sup> and its letter to Mr. Horvath, MEG’s member, that disputes Mr.

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<sup>20</sup> Stewart’s MSD Exhibit A.

<sup>21</sup> Stewart’s MSD Exhibit B.

Horvath's claim that costs for the project were to be billed at cost plus 10%.<sup>22</sup> It argues that these numerous prior invoices, which include certain labor line items, were paid without objection. Stewart, however, fails to attach an affidavit attesting to this fact as well as to what it contends constitute the terms of the Contract, including the form of remuneration for its services.

MEG agrees that there is an oral contract. It argues that the terms of the contract are in dispute and attaches an affidavit of Mr. Horvath, its member, who avers that the hourly billing for labor was in violation of the cost plus 10% term of the Contract.<sup>23</sup>

This Court agrees with MEG. When viewing the evidence presented most favorably to the MEG, non-moving party, there is a genuine issue in dispute as to the terms of the Contract. In fact, besides the fact that Stewart was to renovate the Property and was to be paid, the Court is unaware of any other the terms of the Contract to which the parties agreed, i.e. when was the Project to be completed, what specific services under Contract were to be performed by Stewart, or the agreed upon terms for payment of services performed. Mutuality of agreement entails a meeting of the minds on all the essential terms. *Burkhardt v Bailey*, 260 Mich App at 655. Based on the above, Stewart's motion under MCR 2.116(C)(10) is DENIED.

Summary Disposition under MCR 2.116(C)(9) is also not appropriate. MEG has denied allegations in the Complaint and put forth defenses to the Complaint.

*MEG's Counterclaim for Misrepresentation*

A common-law claim of fraudulent misrepresentation requires the plaintiff to show that:

1. the defendant made a material representation;
2. the representation was false;
3. the defendant knew it was false when it was made or made it recklessly, without knowledge of its truth and as a positive assertion;
4. the representation was made with the intention to induce reliance by the plaintiff;

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<sup>22</sup> Stewart's MSD Exhibits C and D.

<sup>23</sup> Defendant's MSD Exhibit D.



5. the plaintiff acted in reliance on it; and
6. the plaintiff suffered injury.

*Hord v Environmental Research Inst*, 463 Mich 399, 404 (2000).

Stewart argues that MEG's claim of fraud/misrepresentation (Counts II and III) alleged in the counterclaim must be dismissed because they are not pled with the required specificity and that MEG has not alleged nor can it prove that there was any statement or promise made in bad faith without the intention of performance. MEG, however, fails to address this issue in its response. "If a party fails to adequately brief a position, or support a claim with authority, it is abandoned." *Moses, Inc v Southeast Mich Council of Governments*, 270 Mich App 401, 417 (2006). Because MEG abandoned this issue, Stewart's Motion for Summary Disposition as to Counts II and III of MEG's Counterclaim is GRANTED.

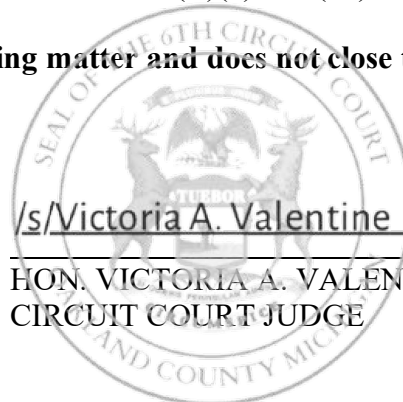
### **ORDER**

Based upon the foregoing Opinion:

**IT IS HEREBY ORDERED** that Stewart's motion for summary disposition as to its Breach of Contract Count is DENIED under MCR 2.116(C)(9) and (10).<sup>24</sup>

**IT IS FURTHER ORDERED** that Stewart's motion for summary disposition of Count II and III of MEG's Counterclaim is GRANTED under MCR 2.116(C)(8) and (10).

**This Order does not resolve the last pending matter and does not close the case.**

  
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/s/Victoria A. Valentine  
HON. VICTORIA A. VALENTINE  
CIRCUIT COURT JUDGE

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<sup>24</sup> As previously stated, while Stewart's Motion for Summary Disposition argues that MEG has been unjustly enrichment, Stewart's Complaint fails to allege such a claim. As a result, the issue of unjust enrichment will not be addressed.