STATE OF MICHIGAN
BERRIEN COUNTY TRIAL COURT – BUSINESS COURT DOCKET
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VENOY Q. MCANDREW,

Plaintiff/Counter-Defendant,

-v-

Case No. 18-000235-CB
HON. DONNA B. HOWARD

MICHIANA SPINE, SPORTS, & OCCUPATIONAL REHAB, P.C.,

Defendants,

-and-

DREW HOLDINGS, LLC,

Defendant/Counter-Plaintiff.

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OPINION AND ORDER FOR JUDGMENT AFTER BENCH TRIAL

At a session of the Berrien County Trial Court,
On the 31st day of July, 2020, in the
City of St. Joseph, Berrien County, Michigan

PRESENT: HON. DONNA B. HOWARD, PRESIDING BUSINESS COURT JUDGE

On February 25 and 26, 2020, this Court conducted a non-jury trial in the above-named matter. The case involves claims over unpaid and disputed architecture service bills submitted by Plaintiff/Counter-Defendant Venoy Q. McAndrew, d/b/a Keystone Designs ("Keystone") to client,

Defendant Michiana Spine, Sports, & Occupational Rehab, PC ("Michiana Spine"), for work allegedly performed for real property owned by Defendant/Counter-Plaintiff Drew Holdings, LLC ("Drew Holdings"), in the City of St. Joseph, Berrien County, Michigan. On or about November 1, 2018, Keystone filed a verified complaint asserting claims for foreclosure of a construction lien (Count I), breach of contract (Count II), unjust enrichment (Count III), and account stated (Count IV). Drew Holdings counterclaimed for slander of title on or about December 21, 2018.

Upon stipulation of the parties, the following trial exhibits were deemed admitted at the start of trial: A-2 (unsigned agreement), A-12 (Invoice 2648), A-20 (Invoice 2656), A-31 (Invoice 2674), A-40 (Invoice 2681), and A-50 (Invoice 2685). Trial witness testimony was provided by: Venoy McAndrew, Dr. Arlyn Drew, Cecil Derringer, Kristen Gundersen, Barry Finkbeiner, and Dan Boswell. During trial the following additional trial exhibits were deemed admitted: A-1 (conditional use permit – blank forms), A-3 (email 1/22/18 with attachment), A-13 (drawing #1), A-14 (email 2/5/18), A-16 (signed agreement), A-17 (email 2/7/18), A-22 (letter 3/19/18), A-23 (email 4/2/18 with attachments), A-24 (email 4/9/18), A-25 (email 4/27/18), A-26 (checks with invoices), A-27 (drawing #2), A-28 (email 5/7/18 with drawing), A-30 (email 5/15/18), A-32 (drawing #3), A-33 (check with invoice), A-35 (email 6/12/18 with drawing), A-36 (email 6/11/18), A-41 (letter 6/21/18 with permit docs), A-43 (email 6/27/18), A-45 (email 7/3/18), A-49 (email 7/10/18 with invoices), A-51 (ATT records), A-52 (email 8/16/18 with invoices), A-53 (letter 8/20/18 with invoices), and A-55 (City records).

There was no request by the parties for opening or closing arguments at trial. After the close of proofs, the Court took the matter under advisement for preparation of a written opinion. Unfortunately, within a couple weeks of the conclusion of trial, the COVID-19 pandemic struck causing longer than expected delays to the Court in proceeding with its regular docket. However, now the Court, being fully advised in the premises, is prepared to proceed with issuance of written findings of fact and conclusions of law in this matter in conformity with MCR 2.517.

FINDINGS OF FACT

McAndrew is a licensed architect, who at all material times offered his professional services under the business name of Keystone Designs. Defendant Michiana Spine is owned by Drs. Kevin and Arlyn Drew ("the Doctors"), as the sole shareholders and members. Michiana Spine previously operated from leased medical office space located at 2500 Niles Road, St. Joseph Michigan. In 2017, Michiana Spine decided not to renew its lease at that location. Instead, Drew

Holdings, which is also owned by the Doctors, as the sole shareholders and members, purchased property located at 2946 Division Street, St. Joseph, Berrien County, Michigan ("the Building") to use as a new location for Michiana Spine's medical practice. Michiana Spine leased the building from Drew Holdings. However, before the Doctors could use the Building, it first needed to be remodeled from its prior use as a printing/copy shop, into a medical facility suitable for Michiana Spine's use.

The Building also needed a Conditional Use Permit from the City of St. Joseph ("the City") because the Building was not zoned for use as a medical facility, according to the testimony presented at trial by McAndrew and the City officials. As part of obtaining a Conditional Use Permit an architectural drawing called a site plan was required to be included with the application. It was undisputed from the evidence at trial that on or about January 10, 2018, Dan Boswell, who is the Head of Maintenance for Michiana Spine, contacted McAndrew to discuss the renovation project at the Building. McAndrew met with Boswell and Barry Finkbeiner, the Administrator and Chief Financial Officer for Michiana Spine, at the Building on or around January 12, 2018. McAndrew had David Nord, who is a Mechanical, Electrical, and Plumbing (MEP) engineer from North Muskegon join him at the site. McAndrew and Nord began to take measurements and pictures of the Building during this initial meeting.

On January 22, 2018, McAndrew emailed a written agreement to Michiana Spine. The written agreement stated "Keystone Designs proposes to provide needed and requested services for your project on an hourly basis of $75/hour." (Exh A-3). The contract went on to list a number of services that Keystone would provide to Michiana Spine related to the remodeling of the Building. The written agreement (Exh A-3) finally states:

> The above anticipated services are not intended to be all inclusive. Some service may, or may not be needed, or requested, others may not be listed.

Consistent with the testimony of McAndrew, Boswell and Finkbeiner, the general plan between the parties would be for Keystone to create necessary architectural drawings for the Building's remodeling project. McAndrew acknowledged that Boswell explained to him that Michiana Spine might be doing or managing some of the work, not McAndrew. Finkbeiner served as the main point of contact on behalf of Michiana Spine for McAndrew. McAndrew would present the drawings to Finkbeiner, who would then present the drawings to the Doctors for approval.

Finkbeiner would then communicate back to McAndrew on any changes the Doctors requested. Finkbeiner would typically communicate with McAndrew by phone.

Through McAndrew, Keystone began its work on the first design for the Building (Option #1) and submitted the first invoice for services provided in the amount of $4,275.00 dated February 2, 2018. The Keystone invoice contained a description of services provided during the billing period and who completed the services, which included McAndrew as the architect and Nord as the MEP Engineer. (Exh A-12). Finkbeiner testified that he believed the amount to be higher than expected and questioned McAndrew on the amount. Finkbeiner also testified that he questioned McAndrew on why Michiana Spine was charged for Nord's services, who was not an employee of McAndrew's firm. McAndrew testified that he needed Nord in order to complete the required preliminary architectural drawings for Option #1. McAndrew testified that he charged Michiana Spine the full $75 per hour for services Nord completed, but would pay Nord $50 per hour.

On February 5, 2018, McAndrew emailed Finkbeiner notifying him that Option #1 was complete and stated "[l]et me know if we are still on for the project. . . ." (Exh A-14). McAndrew met with Finkbeiner and Boswell at the Building to show Option #1 on February 7, 2018. McAndrew testified that Finkbeiner signed the written agreement during that meeting. However, the date was written "5/02/2018." (Exh A-16) Finkbeiner testified that the date formatted in the "European style," (*i.e.* day-month-year) rather than the more commonly used month-day-year format. Finkbeiner testified that he uses the European Style in the course of his work and he sometimes switches between the two formats.

McAndrew then submitted a second invoice to Michiana Spine for $1,068.75 dated February 15, 2018. The second invoice again described the services provided, but Nord's hours were no longer separately listed. (Exh A-16). McAndrew testified Finkbeiner instructed him to combine all of the hours together on one line. Finkbeiner testified that he never told McAndrew to combine the hours on one line.

Keystone did not immediately receive payment for the first two invoices and McAndrew wrote Michiana Spine a letter on March 19, 2018, demanding payment for the two invoices. (Exh A-22). McAndrew followed up with an email on April 2, 2018, again demanding payment for the invoices. (Exh A-23). Finkbeiner contacted McAndrew by phone on or about April 23, 2018, to inform him that Michiana Spine wanted to downsize Option #1. Finkbeiner requested that McAndrew create new drawings that would downsize the project. McAndrew confirmed this

discussion in an April 27, 2018, email. (Exh A-27). It is undisputed that Michiana Spine sent payment to McAndrew for the two February invoices on May 2nd and 3rd respectively. (Exh A-26).

McAndrew submitted a second revised plan (Option #2) to Michiana Spine on May 7, 2018. (Exh A-28). McAndrew did not immediately receive word back from Michiana Spine with approval of Option #2, and asked about the status of the project by email on May 15, 2018. The communication states, "[i]f you wish for us to proceed let me know. Thanks." (Exh A-30). Finkbeiner then contacted McAndrew some time shortly after the May 15th email and stated that the Doctors requested additional changes to Option #2. McAndrew submitted a third Keystone invoice on May 18, 2018 for $2,250.00. (Exh A-31).

McAndrew presented a third revised drawing (Option #3) on June 7, 2018, to Finkbeiner and received payment for the third invoice on June 8, 2018. (Exh A-33) McAndrew again emailed Finkbeiner on June 11, 2018, inquiring to "[l]et me know ASAP if the Option I dropped off last week is ok. If so, we can then proceed with construction drawings for the permits. Thanks." (Exh A-36). According to McAndrew's testimony, he continued working on the project by submitting a preliminary site plan drawing to Kristen Gundersen, the Community Development Director/Zoning Administrator for the City of St. Joseph, to verify what information may be needed for a Conditional Use Permit. (Exh A-35).

On or about June 13, 2018, Finkbeiner informed McAndrew that Option #3 was approved by the Doctors (but he was unsure about the date of the phone call). Finkbeiner further testified that he instructed McAndrew at that time not to continue any further work. McAndrew testified that he never received such instructions to hold off on work and continued working on construction drawings and preparing application forms for the Conditional Use Permit and Minor Site Option Review. McAndrew submitted the fourth invoice dated June 20, 2018 for $3,581.25 in consistent form with the previous invoices. (Exh A-40).

McAndrew sent Finkbeiner a partially filled out Conditional Use Permit and Minor Site Option Review applications on June 21, 2018. (Exh A-41). McAndrew submitted the applications to Michiana Spine and instructed Finkbeiner to "supply required information/signatures/ notarizations as appropriate." (Exh A-41). McAndrew followed up with additional emails to see if Finkbeiner received the applications on June 27 and July 3, 2018. (Exhs A-43 & A-44). There was no evidence presented at trial that any of these communications and attachments were returned or rejected by Michiana Spine.

On July 10, 2018, McAndrew emailed Finkbeiner informing him that the final construction drawing was complete and ready for submission to the City of St. Joseph. (Exh A-49). McAndrew further indicated that he had the stamped copy at his office and five additional drawings for the subcontractors available at his office. (Exh A-49). McAndrew attached the fifth invoice for $8,150.66 dated July 10, 2018, as well as a copy of the unpaid fourth invoice with this email. (Exh A-49). The fifth invoice again lumped Nord and McAndrew's hours of service together. McAndrew testified (from memory) that Nord provided 68 hours of service of the 110 hours billed on the final invoice. McAndrew did not receive a response to the July 10th email and did not receive payment for the fourth and fifth invoices (Exhs A-40 & A-49).

Phone records indicate that McAndrew called Michiana Spine and Finkbeiner numerous times between July 11, 2018 and August 31, 2018. (Exh A-51). Finkbeiner testified that he spoke with McAndrew in late July or early August, describing the conversation as a "collections call." Finkbeiner testified that he questioned McAndrew on why he had continued to do work when he was instructed not to continue anything else, but does not recall McAndrew's response to that question. McAndrew testified that Finkbeiner never instructed him to stop the work, but rather stated that Michiana Spine was looking to obtain loan financing in part to pay for the invoices and construction. Finkbeiner denied Michiana Spine was seeking to obtain loan financing at the time of that phone conversation.

McAndrew did not receive any additional communication from Michiana Spine after that phone call in late July or August, but continued to attempt to collect on invoices 4 and 5. McAndrew sent an email on August 16, 2018, and then a letter on August 20, 2018, stating that the invoices were past due. (Exh A-52, Exh A-53). The August 20, 2018 letter stated "[t]he last time we spoke (more than two weeks ago) you mentioned that you would have a check dropped off at my office for invoice #2681." (Exh A-53).

City of St. Joseph public records indicate that applications for the Conditional Use Permit and Minor Site Review were submitted to the City on or about July 30, 2018. (Exh A-55). Despite the applications being dated July 30, 2018, Michiana Spine did not have a conditional use permit on the building until December 21, 2018. Gunderson testified that she issued a formal letter ordering Michiana Spine to obtain a conditional use permit or cease operation after she drove by the Building and noticed that Michiana Spine was conducting business there. Gunderson testified this occurred sometime in November on 2018.

Boswell testified that he submitted the Conditional Use Permit application on behalf of Michiana Spine using the forms that Finkbeiner had in his office after the letter was issued. Boswell also testified that they did not submit the Conditional Use Permit application because he thought McAndrew was working on obtaining the permits. A site plan was also submitted with the Conditional Use Permit application. (Exh A-55). Finkbeiner testified that they did use the application documents McAndrew had prepared and provided to Michiana Spine to ultimately obtain the Conditional Use Permit from the City. However, Finkbeiner believed that they had already paid McAndrew for those documents from the prior paid invoices. Moreover, Finkbeiner testified that Michiana Spine did not use McAndrew's site plan with the application. Boswell and Finkbeiner testified that Michiana Spine hired a separate architectural service, Valiant Artistic Devotion (VAD), to create the site plan drawing for $580. The site plan submitted with the Permit application was admitted into evidence and has the VAD logo. (Exh A-55). The application was signed by Dr. Kevin Drew. Michiana Spine received the Conditional Use Permit on December 21, 2018. (Exh A-55).

It is undisputed that McAndrew recorded a construction lien against Defendants' property at 2946 Division Street, St. Joseph, on September 26, 2018, with the Berrien County Register of Deeds (Liber 3219, Page 0173) in response to the unpaid "contract amount, including extras" totaling $11,731.91, exclusive of charges, interest, costs and fees. (*See*, Counterclaim ¶ 8, p 3, and its attached Exh B).

CONCLUSIONS OF LAW

As an initial matter, it is noted that construction lien foreclosure actions are expressly excluded from the jurisdiction of this Business Court under MCL § 600.8031(3)(k). However, upon review of the Complaint as a whole, its plain reading asserts primarily breach of contract and account stated claims arising from architecture services provided for commercial/office space involving business entities. MCL § 600.8035(3) provides in pertinent part:

> An action must be assigned to a business court if all or part of the action includes a business or commercial dispute. An action that involves a business or commercial dispute that is filed in a court with a business docket must be maintained in a business court although it also involves claims that are not business or commercial disputes, including excluded claims under section 8031(3).

Consequently, having found the pleadings involve primarily a business or commercial dispute between business enterprises, with a construction lien foreclosure claim included to pursue

full recovery of allowable damages, this Court has jurisdiction of this matter and it is properly before this Court under MCL § 600.8031, *et seq.*

With that said, the Court will first address Plaintiff's claim for breach of contract (Count II), then unjust enrichment (Count III), account stated (Count IV) and construction lien foreclosure (Count I) from the primary complaint.

I. Breach of Contract

Michigan law states that "a party asserting a breach of contract must establish by a preponderance of the evidence that 1) there was a contract 2) that the other party breached 3) thereby resulting in damages to the party claiming the breach." *Miller-Davis co v. Ahrens Constr. Inc*., 495 Mich 161, 178; 848 NW2d 95 (2014). Here, both Keystone and Michiana Spine agree that there was a signed written agreement for Keystone, with McAndrew as the architect, to perform architectural services for the renovation of the Building. (Exh A-16). Michiana Spine, however, argues that although there was written agreement signed by both parties (Exh A-16), the agreement "lacks mutuality of obligation, is ambiguous, vague, overly broad and does not include the terms the Plaintiff is requesting this Court to enforce." (Def Trial Brf, p 4).

A. Validity of Written Contract

First, Defendants are correct that a lack of mutuality of obligation may invalidate a contract. *See, AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015)(valid contracts require competent parties, proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation). Michigan law holds that "where there is no mutuality of obligation or no mutuality of remedy, specific performance will be refused." *Harmon v Muirhead*, 247 Mich 614, 615; 226 NW 713, 713 (1929). "[M]utuality of obligation means that both parties to an agreement are bound or neither is bound. *Domas v. Rossi*, 52 Mich App 311, 315, 217 NW2d 75, 77 (1974). To determine whether there is mutual assent to a contract, the court considers the parties express words and visible acts, and not the parties' subjective states of mind. *Kloan v Domino's Pizza LLC,* 273 MichApp 449, 454; 733 NW2d 766 (2006).

In this case, the written agreement that Finkbeiner signed lists the services that Keystone would provide for Michiana Spine. The signed written agreement states underneath the list of services that "Keystone Designs proposes to provide needed and requested services for your project on an hourly basis of $75/hour." It is clear under the contract that Keystone would be obligated to provide certain architectural services, and in exchange Michiana Spine would be obligated to pay for those services at a rate of $75.00/hour. Further, at trial, Defendants did not

dispute that Keystone performed work under the contract, and in fact acknowledged that Michiana Spine made payments in full for the first three invoices Keystone issued under the contract. Consequently, sufficient evidence was presented at trial of mutuality of obligation existing between the parties. Defendants have not otherwise shown a lack of mutuality of obligation from the evidence or that the contract should be deemed invalid as a matter of law on that basis.

Second, Defendants' argument that the contract is invalid due to indefiniteness (*i.e.* ambiguity, vagueness, over broad, and beyond the terms) is without merit. "[J]udicial avoidance of contractual obligations because of indefiniteness is not favored under Michigan law, and so when the promises and performances of each party are set forth with reasonable certainty, the contract will not fail for indefiniteness." *Calhoun Co v Blue Cross Blue Shield of Mich,* 297 MichApp 1, 14; 824 NW2d 202 (2012). "This sound rule is premised in part on the principle that parties to contracts should not be readily able to evade their obligations using after-the-fact assertions of indefiniteness." *Id.* at 17. As discussed in more detail below, the Court finds the material obligations of the parties are stated within a reasonable certainty. Therefore, the Court declines to deem the contract invalid on the basis of indefiniteness.

B. Breached Terms/Conditions of Contract

Notwithstanding the above, Defendants' arguments related to indefiniteness must still be addressed in the context of whether the terms of the contract were breached. To do so, the Court starts with a determination of the terms of the contract entered by the parties. It is long established in Michigan law that "a contract must be construed so as to effectuate the intent of the parties when it was made; and, to ascertain the intent of the parties, a contract should be construed in the light of the circumstances existing at the time it was made." *Kunzie v. Nibbelink,* 199 Mich 308, 314; 165 NW 722 (1917); *Sobczak v Kotwicki*, 347 Mich 242, 249; 79 NW2d 471 (1956); *Klapp v United Ins. Group Agency*, 468 Mich 459, 473; 663 NW2d 447 (2003). The question of whether contract language is ambiguous is a question of law, and if contract language is clear and unambiguous, its meaning is also a question of law. *UAW–GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). However, once contractual language is found to be ambiguous, its meaning becomes a question of fact. *Coates v Bastian Brothers, Inc.*, 276 MichApp 498, 504; 741 NW2d 539 (2007). Then, courts are allowed to consider extrinsic evidence to determine the meaning and the intent of the actual parties. *Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005).

Words in a contract must be interpreted according to their common meanings, and their plain meaning may not be distorted. *Henderson v State Farm Fire & Cas Co.*, 460 Mich 348, 354–355; 596 NW2d 190 (1999). An ambiguity exists only where words in a contract may reasonably be understood in different ways, and courts may not create ambiguity where none exists. *Grosse Pointe Park, supra* at 198.

The alleged breach by Michiana Spine is the nonpayment of the fourth and fifth invoices that Keystone submitted for architectural services under the contract that were performed. Again, Michiana Spine argued that there was no breach because as noted above the contract is "ambiguous, overly broad, and does not include the terms the Plaintiff is requesting this Court to enforce." (Defs Trial Brf, p 4). Additionally, Michiana Spine claims that Keystone performed services after they instructed Keystone to cease further work. The written agreement in this case contained a list of architectural services that Keystone would provide for Michiana Spine. As to those listed services, the contract is clear and unambiguous that Keystone would provide such required services performed at a rate of $75.00 per hour.

However, the written agreement also states that the services are not intended to be "all inclusive" and that other services "may not be listed." In that regard, though, the Court finds such provisions are vague and ambiguous as to the scope of "other" work to be performed and how that "other" work not listed might get requested, approved or confirmed (eg. verbal approval, change order, amended contract etc). Likewise, the contract is void of the term or condition to give notice to Michiana Spine that Keystone would be utilizing independent contractors or subcontracting some of its work, or that Keystone would charge for those subcontractors at the Keystone rate of $75 per hour regardless of the actual cost.

Certainly, had the parties clearly and mutually intended there to be other services, albeit related services, provided by someone other than Keystone, they would and could have used language to that effect. They did not. The Court recognizes that "other" work and the listed services not being "all inclusive" could mean that necessary subcontracted work from an engineer (such as Nord) would be included, as asserted by Keystone. However, the plain reading of the contract as a whole indicates that Keystone, not a subcontractor, would perform the listed services. For instance, the letter agreement begins with, "Thank you for contacting Keystone Designs <u>for providing architectural services</u> for your project . . . The <u>anticipated architectural services include</u> the following (not all inclusive). . ." (Exh A-16)(underline added).

It was not demonstrated to the Court whether use of unspecified subcontractors is standard in the industry when hiring architects. Moreover, the Court finds that given the ambiguity of what "other" work might be performed, the use of subcontractors to provide the stated services would be reasonably unclear where (as in this instance) it was not addressed in the contract. In fact, it is undisputed from the trial testimony that Finkbeiner questioned McAndrew about the inclusion of Nord's charges in the first February Keystone invoice issued. Obviously, there were questions, and yet, despite all the other confirming emails and communications after issues were discussed, there is no documentary evidence that the contract was amended or clarified by the parties as to Nord's continued subcontracted services.

Considering the extrinsic evidence presented at trial, including the testimony of the parties, and considering the express words and actions of the parties, the Court finds that Keystone failed to sufficiently demonstrate that the subcontracted services of Nord or anyone other than Keystone was mutually intended by the parties at the time of contracting to be included in the subject contract for architectural services. Therefore, such outside services were not contracted for by Michiana Spine under the subject contract and there is no breach of contract for non-payment of those outside fees.

Likewise, the contract is completely void of any terms for the billing or reimbursement of other costs or expense items, such as copying. To the extent Keystone intended to be paid $75.00 per hour for services rendered, plus costs and expenses, such a term could and should have been specified in the contract. Clearly, Michiana Spine disputed those costs once it received Invoices 4 and 5.

Additionally, to the extent there are due dates, late fees, finance charges/interest, and/or attorney fee provisions included or referenced in Invoices 4 and 5, those also are not terms provided for in the contract, or mutually agreed to by the parties based upon the evidence presented at trial. They are merely conditions Keystone asserted in its invoices after the execution of the written agreement. Therefore, the non-payment of such fees and charges is not deemed a breach of contract for non-payment.

The fact that Michiana Spine paid the three prior Keystone invoices submitted and was told by McAndrew that invoices were past due is insufficient to alter the express terms of the agreement or to constitute an amendment to the agreement. Plainly, there was insufficient evidence presented at trial establishing even by a preponderance, if or when the parties mutually agreed to pay either

for Nord's outside services, any additional costs, such as copying charges, or that Michiana Spine would be subject to additional fees or charges if invoices were unpaid after 30 days, as included in the languages of Invoices 4 and 5. There is no breach of contract established for non-payment of these items as well.

Nevertheless, the Court finds that Invoices 4 and 5 for the most part contain services charged for McAndrew's activities directly listed under the contract. For example, Invoice 4 contains services for presenting Option 3 to the client, meeting with the building inspector, meeting with the zoning administrator, presenting site plan to zoning administrator, sending drawings to the client, and working on Construction drawings. Invoice 5 contains services for correspondence with client, communication with inspectors and the zoning administrator, filling out and sending the requisite permits to client to sign, completing the construction drawing, a COM check, and presenting copies of the drawings to requisite parties. As to the balance of Keystone's architectural services, so listed they should have been paid under the contract, within a reasonable time of issuance of the invoices. All those services mentioned above were unambiguously stated in the written agreement signed by Finkbeiner. For those reasons, the Court finds a breach of contract by Michiana Spine as to the non-payment for services provided by McAndrew so listed in the contract.

C. Damages

As indicated above, upon showing of a breach, the next element is for damages to be shown. Damages recoverable for breach of contract are those that arise naturally from the breach or those that were reasonably in the contemplation of the parties at the time the contract was made. *Kewin* v *Massachusetts Mut Life Ins Co*, 409 Mich 401, 414; 295 NW2d 50, 52–53 (1980). Damages must be proven with reasonable certainty and may not be based on speculation or conjecture. *Ensink v Mecosta County Gen Hosp*, 262 MichApp 518, 525; 687 NW2d 143 (2004).

In this case, Keystone met its burden of proving the damages with reasonable certainty in relation to the unpaid invoices. Keystone has demonstrated that the final two invoices were sent by mail and email to Michiana Spine. Michiana Spine acknowledges that they received the fourth and fifth invoice. Michiana Spine does not provide evidence demonstrating that they did anything to clearly communicate that they believed the invoices were improper or incorrect until filing the answer to Keystone's complaint. Invoices 4 (June 20th) and 5 (July 10th) contained the services provided and the concrete amounts of $3,581.25 and $8,150.66, totaling $11,731.91. (Exhs. 40 & 50) Lastly, the invoices were consistent in form with the previous three invoices that were paid by Michiana Spine.

However, as discussed above, Keystone cannot collect payment for the services of the MEP engineer, David Nord, when the written agreement did not indicate that an independent contractor or subcontractor would be a part of the agreement. McAndrew testified that in the fifth and final invoice Nord performed approximately 68 hours of work. In addition, the $238.16 charge for prints or copying added to Invoice 5 is also not part of the written contract for services. Therefore, Keystone has demonstrated and is entitled to contract damages of $3,581.25 from Invoice 4, and $2,812.50 from Invoice 5, totaling $6,393.75 in contract damages. On the breach of contract claim (Count II) verdict is entered for Plaintiff and against Defendant Michiana Spine in the damages amount of $6,393.75.

II. Unjust Enrichment

The Court now turns to Keystone's alternative claim for equitable relief under the principle of unjust enrichment. (Complaint Count III). To prevail on a claim for unjust enrichment, Keystone must establish by a preponderance of the evidence that there was a receipt of a benefit by a defendant from a plaintiff that would result in inequity were the defendant allowed to keep it. *Barber* v *SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). "If this is established, the law will imply a contract in order to prevent unjust enrichment," however "a contract will be implied only if there is no express contract covering the same subject matter." *Belle Isle Grill Corp v Detroit*, 256 MichApp 463, 478; 666 NW2d 271 (2003); *Barber*, *supra* at 375, citing *Martin v East Lansing School Dist*, 193 MichApp 166, 177; 483 NW2d 656 (1992).

In this case, there is clearly an expressed contract which, as opined above, covered the agreement of the parties. Thus, on the claim of unjust enrichment (Count III), verdict of no cause of action is entered in favor of Defendants.

III. Accounts Stated

"An account stated action is based on 'an agreement, between parties who have had previous transactions of a monetary character, that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of such balance.'" *Fisher Sand & Gravel Co v Neal A Sweebe, Inc,* 494 Mich 543, 554; 837 NW2d 244 (2013), quoting *Thomasma v Carpenter*, 175 Mich 428, 434; 141 NW 559 (1913). "'[W]here a plaintiff is able to show that the mutual dealings which have occurred between two parties have been adjusted, settled, and a balance struck, the law implies a promise to pay that balance.' . . . Proving an account stated 'must depend upon the facts. That it has taken place, may appear by evidence of an express understanding, or of words and acts, and the necessary

and proper inferences from them.'" *Keywell & Rosenfeld v Bithell*, 254 MichApp 300, 331; 657 NW2d 759 (2002)(citations omitted). Thus, a plaintiff is successful in asserting an account stated claim when the opposing party "expressly accepted the bills by paying them or failed to object to them within a reasonable time." *Id.* "[T]he failure of a debtor to object within a reasonable time to monthly statements rendered amounts to an admission of the correctness of the account. . . ." *Leonard Refineries, Inc v Gregory*, 295 Mich 432, 437; 295 NW 215 (1940).

Moreover, if a plaintiff to an account stated actions makes an affidavit of the amount due and attaches thereto a copy of the account stated which is included with the complaint served, the "affidavit shall be deemed prima facie evidence of [the] indebtedness," unless the opposing party makes a counter-affidavit denying the account stated and serves the opposing affidavit with its responsive pleading. MCL § 600.2145. Here, Michiana Spine did not submit a counter-affidavit with its responsive pleadings so McAndrew's affidavit is deemed prima facie evidence of the account stated. However, the review does not end there. The Court of Appeals has explained:

> Prima facie evidence is evidence which, if not rebutted, is sufficient by itself to establish the truth of a legal conclusion asserted by a party. Statutory language making proof of one fact prima facie evidence of another fact is analogous to a statutory rebuttable presumption.
>
> In civil matters, a presumption operates to shift the burden of going forward with the evidence. In *Widmayer v. Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985), our Supreme Court stated:
>
> > "It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption.
> >
> > "Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence."

Am Cas Co v Costello, 174 Mich App 1, 7; 435 NW2d 760 (1989)(citations omitted). Likewise, it still holds true that "[a]ccounts stated may be attacked upon the ground of fraud or mistake, but the burden in such cases is upon the attacking party." *Wilson v White*, 223 Mich 497, 509-510; 194 NW 593 (1923).

In this case, Keystone has established an account stated in the amount of $6,393.75, rather than the full amount claimed under McAndrew's affidavit. Taking into account the prima facie evidence on the account, for the reasons set forth above, Michiana Spine was able to rebut the account balance to exclude from the claim those stated charges for Nord's hours and the copying charges contained in Invoice 5. Also, there was admitted evidence that Michiana Spine disputed such charges of Invoices 4 and 5 within a reasonable time. Consequently, verdict on the claim of account stated (Count IV) is entered in favor of Plaintiff and against Michiana Spine in the same concurrent amount of $6,393.75.

IV. Foreclosure of Construction Lien

On Plaintiff's primary complaint, the Court lastly addresses Plaintiff's claim for foreclosure of its construction lien, including request for attorney fees (Count I). Plaintiff filed a construction lien in the amount of

The Michigan Construction Lien Act ("CLA"), MCL § 570.1101, *et seq.* provides in part:

> Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property shall have a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property. . . . A construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant's contract less payments made on the contract.

MCL § 570.1107(1).

Constructions liens are a form of equitable remedy. MCL 570.1118(1). The CLA allows for the lien to be a way of enforcing the payment of the debt arising from the performance of the underlying contract for an improvement to real property. Therefore, a party can attempt to enforce the lien while also seeking recovery based on the contract from which the lien arose, but there can only be one satisfaction. *Ronnisch Construction Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 886 NW2d 113 (2016). The Supreme Court explained:

> The CLA is "intended to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs." The fundamental purpose of the CLA with respect to contractors, workers, and suppliers is to provide a method to secure payment for their labor and materials. The Legislature has declared that the CLA is "a remedial statute . . . [that] shall be liberally construed to secure the beneficial results, intents, and purposes of th[e] act." Accordingly, when interpreting the CLA, we should always be mindful of the CLA's intended purpose.

Id at 552–53 (citations omitted). Accordingly, a construction lien is an encumbrance on the title to the property and encourages payment to resolve disputes regarding services performed on the property and acts as security for contractors who perform the services. *ER Zeiler Excavating, Inc v Valenti Trobec Chandler Inc*, 270 Mich App 639, 646, 717 NW2d 370, 374 (2006).

"Although the proceeding to foreclose on the construction lien originates from the contract, it is an action directed at the property rather than the person or entity who contracted for the services and is separate and distinct from an action for breach of contract." *Dane Constr., Inc. v. Royal's Wine & Deli,* 192 MichApp. 287, 292-293, 480 NW2d 343 (1991). The simultaneous filing of a construction lien and a breach of contract claim "merely gives [the plaintiff] a better chance of recovering what it is owed." *Old Kent Bank of Kalamazoo v Whitaker Constr Co,* 222 MichApp 436, 439; 566 NW2d 1 (1997). The CLA is also designed to protect the rights of property owners from paying twice for expenses. *Id.*

A lien claimant must prove by a preponderance of the evidence the amount claimed to be owing to a reasonable certainty. *R&T Sheet Metal, Inc v Hospitality Motor Inns, Inc*, 139 MichApp 249, 255; 361 NW2d 785 (1984). Once a plaintiff meets that burden, similar to the account stated claim discussed above, the burden then shifts to defendant to establish a defense to payment after evidence of the amount is presented. *Id* at 156. If the amount claimed is found to be excessive, the lien is only lost when bad faith is evident. *Tempo Inc v Rapid Electric Sales & Service Inc*, 132 MichApp 93, 104; 347 NW2d 728 (1984). Pursuant to MCL § 570.1118(2), "the court shall examine each claim and defense that is presented and determine the amount, if any, due to each lien claimant or to any mortgagee or holder of an encumbrance and their respective priorities."

A "contractor" under the CLA means "a person who, pursuant to a contract with the owner or lessee of real property, provides an improvement to real property. MCL § 570.1103(5). An "improvement" as used in the CLA is defined as "the result of labor or material provided by a contractor, subcontractor, supplier, or laborer, including, but not limited to, surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, and installing or affixing a fixture or material, pursuant to a contract." MCL § 570.1104(6). An architect is also included as a "design professional" under the CLA. MCL § 570.1104(2).

Here, it is sufficiently shown from the proofs and undisputed facts presented that Keystone, a licensed architect, provided architectural planning services under a written contract with Michiana Spine, and qualified under the CLA to record a construction lien for its contracted unpaid services. However, to the extent the Court has found that the amount owed to Keystone is $6,393.75, the construction lien Plaintiff recorded for $11,731.91 was excessive. Nevertheless, Defendants would have to demonstrate bad faith in the recorded lien to wholly invalidate Keystone's lien. There was no showing of bad faith. As such, the construction lien is deemed valid in the lesser amount of $6,393.75, only. The excess lien balance shall be discharged and released.

V. Slander of Title Counterclaim

Relatedly and alternatively to Keystone's primary complaint for foreclosure of its construction lien, Counter-Plaintiff Drew Holdings filed a counterclaim for slander of title. It is not clear from the pleading whether Counter-Plaintiff asserted slander of title under common law or under statute. MCL § 565.25 does provide relief for unlawful lien recordings against real property. Under subsection (3), a party who encumbers property shown to be "without lawful cause" and "with the intent to harass or intimidate" another party may be liable for penalities under MCL § 600.2907a, including attorney fees. Generally, a plaintiff must prove three essential elements to prevail regarding a claim of slander of title: (1) publication of a false statement that disparaged the plaintiff's right in property, (2) malice, and (3) special (or pecuniary) damages. *Wells Fargo Bank v Country Place Condo Ass'n,* 304 MichApp 582, 595; 848 NW2d 425 (2014). Malice is a "crucial element" that must be "express," and "may not be inferred merely from the filing of an invalid lien." *Id.* at 596 (quotation marks and citations omitted).

"To prove slander of title under the common law, a claimant 'must show falsity, malice, and special damages, *i.e.*, that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages.'" *Fed. Nat. Mortg Ass'n v Lagoons Forest Condo Ass'n*, 305 Mich App 258, 269–70; 852 NW2d 217, 223 (2014) quoting *B & B Investment Group v Gitler,* 229 MichApp 1, 8; 581 NW2d 17 (1998).

Counter-Plaintiff has not provided evidence that proves the elements needed to prevail on its slander of title claim. The preponderance of the evidence presented at trial demonstrates that Keystone timely recorded a construction lien based on unpaid invoices for architectural services. Although the amount of the lien recorded has been deemed excessive, Counter-Plaintiff has failed to establish the lien was recorded maliciously or in bad faith. Furthermore, Counter-Plaintiff does

not demonstrate what damage the construction lien or notice of *lis pendens* has caused it. Therefore, on Counter-Plaintiff's claim of slander of title, verdict is entered for no cause of action in favor of Counter-Defendant Keystone.

VI. Attorney Fees and Sanctions

Finally, the parties in their pleadings and supplemented in their trial briefs seek attorney fees and/or sanctions under several different theories. Initially, Keystone generally requested attorney fees under Count I for foreclosure of the construction lien, and Count II for breach of contract. Additionally, as to Defendants' defenses and through Keystone's response to the counterclaim, Keystone also sought to recover attorney fees and sanctions against Drew Holdings for such filings. More specifically, Keystone alleges that the defenses asserted in the primary complaint, as well as the filing of the counterclaim were frivolous in nature. (*See eg,* Pltf/Cntr-Def Trial Brief, pp 10-11). In the counterclaim, Drew Holdings also requests attorney fees as a result of the construction lien Keystone recorded against Drew Holdings' property.

In general, attorney fees are not awardable unless there is a statute, court rule, or common law exception applicable to the case that provides for them. *Kennedy v Robert Lee Auto Sales,* 313 Mich App 277, 285-286; 882 NW2d 563 (2015). First, the CLA does contain an attorney-fee provision, which states in pertinent part that:

> [T]he court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party. The court also may allow reasonable attorneys' fees to a prevailing defendant if the court determines the lien claimant's action to enforce a construction lien under this section was vexatious.

MCL § 570.1118(2). Understandably, none of the parties submitted evidence of their claimed attorney fees as part of the primary trial, and were presumably awaiting the instant Judgment before pursuing same. Therefore, the Court reserves on whether it should exercise its discretion to allow any of the parties attorney fees as the "prevailing" party pursuant to the CLA.

Next, Keystone's asserted claim for attorney fees under the contract is denied. While a contract term is one of those exceptions that may provide for an award of attorney fees, *see, Great Lakes Shore Inc v Bartley*, 311 Mich App 252, 255; 874 NW2d 416 (2015), in this case there is no provision in the relevant contract for attorney fees. The only place Keystone referenced a condition in writing for attorney fees is in its invoices, but those invoices were never made part of the contract terms mutually agreed to by the parties.

With respect to Keystone's additional basis asserted for attorney fees under MCR 1.109(E) and MCL § 600.2591, it is also without merit. Granted, "[u]nder Michigan law, a party that maintains a frivolous suit . . . is subject to sanctions under applicable statutes and court rules." *BJ's & Sons Constr. Co., Inc. v. Van Sickle,* 266 MichApp 400, 404, 700 NW2d 432 (2005). MCL § 600.2591(1) provides that "if a court finds that a civil action . . . was frivolous, the court . . . shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney." MCR 2.114(E)-(F). The costs and fees to be awarded include court costs and reasonable attorney fees. MCL § 600.2591(2). However, pursuant to MCL § 600.2591(3)(a):

> "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

Here, Keystone merely pointed to statutory authority for attorney fees and sanctions on the basis of a frivolous claim and made conclusory claims in their written submissions to the Court without substantiation by fact or authority. Keystone failed to demonstrate and the Court does not find Drew Holdings' counterclaim to be frivolous. For the reasons discussed above, including the finding of this Court that the construction lien amount Keystone recorded was excessive, Drew Holdings' defenses in this regard and its counterclaim for slander of title were not frivolous. Therefore, Keystone's claim for attorney fees and sanctions pursuant to MCR 1.109(E) and MCL § 600.2591 is also denied.

CONCLUSION

In light of the foregoing reasons, and the Court being otherwise advised in the premises, the Court concludes as follows:

IT IS HEREBY ORDERED that on Plaintiff's claim for foreclosure of the construction lien (Count I), Plaintiff is entitled to the construction lien, in part; that being more specifically the amount of contracted services of **$6,393.75**. Any amount of the recorded construction lien claimed above $6,393.75 is deemed excess and not owed to Plaintiff, and shall be promptly discharged in

writing and recorded by Plaintiff with the Berrien County Register of Deeds within 14 days of the date of this Judgment.

IT IS HEREBY FURTHER ORDERED that pursuant to MCL § 570.1121, to the extent the stated lien amount ($6,393.75) from the verdict in Count I remains unpaid to Plaintiff, in whole or part, after 21 days from the date of this Judgment, the Court will deem the updated construction lien foreclosed and additionally enter an Order for Foreclosure Sale as provided in the CLA.

IT IS HEREBY FURTHER ORDERED that on Plaintiff's claim for breach of contract (Count II) a verdict is entered for Plaintiff and against Defendant Michiana Spine. Damages are the same and equal to, not additional to, the above construction lien amount of $6,393.75.

IT IS HEREBY FURTHER ORDERED that on Plaintiff's claim for unjust enrichment (Count III), a verdict of no cause of action is entered for Defendants and against Plaintiff.

IT IS HEREBY FURTHER ORDERED that on Plaintiff's claim of account stated (Count IV), a verdict is entered for Plaintiff and against Defendant Michiana Spine. Damages are the same and equal to, not additional to, the above construction lien amount of $6,393.75.

IT IS HEREBY FURTHER ORDERED that on Counter-Plaintiff's counterclaim for slander of title, a verdict of no cause of action is entered for Counter-Defendant and against Counter-Plaintiff.

IT IS HEREBY FINALLY ORDERED that any claims for allowable costs and/or attorney fees to be added to this Judgment shall be submitted to this Court through proper motion filing within 21 days of the date of this Judgment, or shall be deemed waived.

SO ORDERED.

DATE: July 31, 2020

/s/ Donna B. Howard
HON. DONNA B. HOWARD (P57635)
Berrien County Trial Court – Business Court