

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

SMS FINANCIAL, LLC,

Plaintiff,

**Case No. 20-185407-CB
Hon. Michael Warren**

v

**PLATINUM TREATS, LTD. and
CAROLE B. LAKIND,**

Defendants.

**OPINION AND ORDER GRANTING MOTION FOR SUMMARY DISPOSITION
UNDER MCR 2.116(C)(9) AND/OR (10) ON BEHALF OF SMS FINANCIAL, LLC**

**At a session of said Court, held in the
County of Oakland, State of Michigan
November 10, 2021**

PRESENT: HON. MICHAEL WARREN

OPINION

**I
Overview**

This cause of action arises out of Platinum Treats, Ltd's default of a Business Credit Line and Security Agreement (the "Credit Agreement"). Platinum Treats entered the Credit Agreement with PNC Bank ("PNC") and could borrow up to \$35,000.00 to be repaid with variable interest through monthly installments. Carol B. LaKind personally guaranteed repayment under the Credit Agreement pursuant to a written Guaranty (the

“Guaranty”). SMS Financial, LLC (“SMS”) alleges Platinum Treats made its last voluntary payment on April 18, 2016 and is indebted under the Credit Agreement in the amount of \$46,544.41 (as of June 1, 2021) consisting of the principal balance of \$30,296.59 plus accrued interest at the default rate of 7.250% per year pursuant to the Credit Agreement (plus \$6.02 per day after June 1, 2021).¹ SMS also alleges the Defendants are obligated to reimburse SMS for its reasonable attorneys’ fees, costs and the expenses of collection. In particular, SMS alleges Action to Enforce Credit Agreement and Action for Enforce Guaranty.

Before the Court is SMS’s Motion for Summary Disposition Under MCR 2.116(C)(9) and/or (C)(10). Oral argument is dispensed as it would not assist the Court in its decision-making process.²

At stake in the Motion is whether summary disposition is warranted under MCR 2.116(C)(9) and/or (C)(10)? Because the Defendants do not contest liability, the answer is “yes,” and SMS’s Motion is granted.

¹ PNC assigned the Credit Agreement to SMS Financial 30, LLC (“SMS 30”), which thereafter assigned it to SMS.

² MCR 2.119(E)(3) provides courts with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court’s Scheduling Order clearly and unambiguously set the time for asserting and raising arguments, and legal authorities to be in the briefing – not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties’ positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties’ have received the process due.

Also, at stake is whether the judgment requested by SMS in the amount of \$30,296.59 plus accrued interest and reasonable attorneys' fees, costs, and the expenses of collection should be entered? Because the Defendants do not refute the amount of alleged indebtedness or SMS's entitlement to attorney fees, costs and expenses of collection, the answer is "yes."

II The Credit Agreement and Default

The parties agree that Platinum Treats entered into the Credit Agreement of up to \$35,000.00 with PNC, that LaKind signed the Credit Agreement as President of Platinum Treats and that she personally guaranteed repayment under the Credit Agreement. [Exhibit 1 to First Amended Complaint; Answer, ¶15 and ¶23; Response, p 2.] The Guaranty requires payment immediately upon default and states that "Guarantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this guaranty." [Exhibit 1 to First Amended Complaint.] The parties further agree that Platinum Treats borrowed under the Credit Agreement and made its last voluntary payment on April 18, 2016. [Answer, ¶10 and ¶16; Response, p 3.]

III The Arguments

SMS seeks summary disposition pursuant to MCR 2.116(C)(9) and/or (10). SMS argues that the Defendants have failed to state a valid affirmative defense that is factually

or legally tenable and there is no genuine issue of material fact that SMS is entitled to judgment in its favor as a matter of law. SMS seeks entry of a judgment consisting of the principal balance of \$30,296.59 plus accrued interest at the default rate of 7.250% per year pursuant to the Credit Agreement (plus \$6.02 per day after June 1, 2021) and \$3,871.00 for SMS's reasonable attorneys' fees, costs and the expenses of collection.

The Defendants acknowledge that Platinum Treats incurred a debt which LaKind personally guaranteed. The Defendants argue that LaKind has no ability to repay the debt at this time and ask for the Court's forbearance. In particular, the Defendants ask the Court to stay its ruling on this matter

IV Standards of Review

MCR 2.116(C)(9) permits summary disposition when "the opposing party has failed to state a valid defense to the claim against him or her." A motion for summary disposition under MCR 2.116(C)(9) tests the sufficiency of the defendant's pleadings and is decided by the pleadings alone. *In re Smith Estate*, 226 Mich App 285, 288 (1997). All well-pled allegations must be accepted as true, and only if the non-moving party's defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery, should the motion be granted. *Grebner v Clinton Charter Twp*, 216 Mich App 736, 740 (1996).

Summary disposition under MCR 2.116(C)(9) is generally improper where a material allegation of the complaint is categorically denied. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 48 (1990); *Fancy v Egrin*, 177 Mich App 714, 724 (1989); *Heligman v Otto*, 161 Mich App 735, 738 (1987) (summary disposition for failure to state a valid defense held improper where defendants categorically denied some of plaintiff's material allegations). Under MCR 2.111(C)(3), a statement that the defendant lacks knowledge or information sufficient to form a belief as to the truth of an allegation has the effect of a denial. MCR 2.111(C)(3). Furthermore, "[t]he fact that the defense ultimately might be unsuccessful in whole or in part does not render it invalid for purposes of MCR 2.116(C)(9), nor does the fact that it ultimately might be found not to create a genuine issue of material fact to be resolved at trial, thus entitling plaintiff to summary disposition." *Nasser*, 435 Mich at 48.

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 (1999); MCR 2.116(C)(10); MCR 2.116(G)(4); *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 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

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.

V

Summary disposition is warranted where the Defendants admit liability

There is no triable issue of fact regarding the Defendants' liability for breach of the Credit Agreement. The parties agree the Defendants are in default of the Credit Agreement ("Plaintiff SMS Financial 30, L.L.C. ("SMS") is a debt collector suing LaKind for payment on a debt LaKind's business, Defendant Platinum Treats, LTD., incurred, and which LaKind personally guaranteed" "Platinum Treats' reduced revenue was not

sufficient to make the required loan payments” “LaKind has no ability to repay the debt at this time.”) [Response, pp 1-3].

The Defendants also do not refute their indebtedness to SMS in the amount of \$30,296.59 in principle plus accrued interest at the default rate of 7.250% per year (plus \$6.02 per day after June 1, 2021) pursuant to the Credit Agreement, and \$3,871.00 for SMS’s reasonable attorneys’ fees, costs and the expenses of collection.

Under MCR 2.116(G)(4), the party opposing a motion for summary disposition is required to “set forth specific facts showing that there is a genuine issue for trial” and if the party fails to do so, “judgment, if appropriate, shall be entered against him or her” (emphasis added). “If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.” *Smith v Globe Life Ins Co*, 460 Mich 446, 455; (1999) (internal quotation omitted). Because the Defendants concede liability and do not contest the amount of attorney fees and costs, summary disposition is warranted.

The Court acknowledges the Defendants’ representation that LaKind is essentially uncollectible and their request that the Court stay its ruling while LaKind awaits a purported inheritance from the estate of a close friend; however, such is not the role of the Court.

ORDER & JUDGEMENT

Based on the foregoing Opinion, SMS's Motion for Summary Disposition Under MCR 2.116(C)(9) and/or (10) is GRANTED, AND THE COURT HEREBY AWARDS A JUDGMENT OF \$30,296.59 plus accrued interest at the default rate of 7.250% per year (plus \$6.02 per day after June 1, 2021) pursuant to the Credit Agreement and \$3,871.00 for SMS's reasonable attorneys' fees, costs and the expenses of collection.

THIS ORDER & JUDGEMENT RESOLVES THE LAST PENDING CLAIM AND CLOSSES THE CASE.

