

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

MACOMB FASTENERS, INC.,

Plaintiff/Counter-Defendant,

vs.

Case No. 2015-1717-CB

STEEL PROCESSING COMPANY
a/k/a "SPC",

Defendant/Counter-Plaintiff.

FILED
2016 AUG -2 PM 2:20
CLERK OF COURT
MACOMB COUNTY
MICHIGAN

OPINION AND ORDER

Defendant/Counter-Plaintiff ("Defendant") has filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff/Counter-Defendant ("Plaintiff") has filed a response and requests that the motion be denied.

I. Factual and Procedural History

Plaintiff is in the business of manufacturing fastener and related products for the automobile industry. Plaintiff was retained by its customer, L&W Engineering ("L&W") to manufacture certain products via purchase order P1100006, Lot No. 4271-3891 ("Parts"). The Parts were required to be heat treated to certain tolerances. Plaintiff subcontracted the heat treating to Defendant.

After the Parts were ultimately delivered to the end user, General Motors, the Parts allegedly exhibited problems that caused them to need to be removed from the vehicles in which they had been installed. General Motors proceeded to back-charge its supplier, L&W, who then passed on those costs to Plaintiff.

On May 19, 2015, Plaintiff filed its complaint in this matter ("Complaint"). The

Complaint contains Plaintiff's claims for breach of contract (Count I) and negligence (Count II). On June 26, 2015, Defendant filed its counter-complaint ("Counter-Complaint"), which includes claims for account stated (Count I), breach of contract (Count II), unjust enrichment (Count III), and promissory estoppel (Count IV). On March 4, 2016, Defendant filed its instant motion for summary disposition. On March 29, 2016, Plaintiff filed its response. On June 20, 2016, the Court held a hearing in connection with the motion. At the hearing, Plaintiff stipulated the dismissal of its negligence claim. The Court took the remainder of the motion under advisement.

II. Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C) (10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

III. Arguments and Analysis

In its motion, Defendant contends that its liability for the Parts, if any, was

terminated at the time that Plaintiff shipped them to third parties. Specifically, Defendant avers that it sent a quote to Plaintiff that contained a term and condition providing that its liability to Plaintiff would cease once the Parts were sent for further processing, assembling or other work. In particular, Defendant relies on quote 6554 ("Quote"), which provides, in part:

It shall be customer's duty to inspect the merchandise immediately upon its return, and in any event, claims must be reported before the time that any further processing, assembly or work is done. Our liability to our customers shall cease once any further processing, assembling, or any other work has been undertaken on said material.

(See Defendant's Exhibit A.)

In response, Plaintiff asserts that it never received the Quote. In support of its position, Plaintiff relies on its representative's testimony that the parties' contract was verbal and that the only writing exchanged was a January 2015 letter Plaintiff received from Defendant. (See Plaintiff's Exhibit 4, at p.27.) Further, Plaintiff relies on Defendant's representative's testimony that he did not know whether the Quote was sent to, or received by, Plaintiff. (See Plaintiff's Exhibit 5, at p.17.)

Based on the testimony Plaintiff has relied upon, the Court is satisfied that a genuine issue of material fact exists as to whether Plaintiff received the Quote. In addition, in the event that it were to be found that Plaintiff did receive the Quote, neither party has presented any evidence whatsoever as to what the terms of the parties' contract were. For these reasons, the Court is convinced that Defendant's motion for summary disposition of Plaintiff's breach of contract claim must be denied.

Finally, Defendant seeks summary disposition of its own account stated and breach of contract claims. Defendant's account stated claim is based on MCL

600.2145, which provides:

In all actions brought in any of the courts of this state, to recover the amount due on an open account or upon an account stated, if the plaintiff or someone in his behalf makes an affidavit of the amount due, as near as he can estimate the same, over and above all legal counterclaims and annexes thereto a copy of said account, and cause a copy of said affidavit and account to be served upon the defendant, with a copy of the complaint filed in the cause or with the process by which such action is commenced, such affidavit shall be deemed prima facie evidence of such indebtedness, unless the defendant with his answer, by himself or agent, makes an affidavit and serves a copy thereof on the plaintiff or his attorney, denying the same.

The Counter-Complaint includes a copy of 7 invoices sent to Plaintiff as well as a summary of those invoices. (See Exhibit A to Counter-Complaint.) In addition, Defendant filed an affidavit with the Counter-Complaint in which its plant manager, Steven Rink, testified that Plaintiff is indebted to Defendant in the amount of \$3,269.31 over and above all legal setoffs and counterclaims. (See Exhibit B to Counter-Complaint.) While Plaintiff has denied Defendant's account stated allegations, it has not provided an affidavit denying the indebtedness addressed by Exhibits A and B to the Counter-Complaint. Because Plaintiff failed to submit a counter-affidavit as provided for in MCL 600.2145, Defendant's affidavit became prima facie evidence of Plaintiff's indebtedness. *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 435; 683 NW2d 171 (2004), rev'd in part on other grounds, 472 Mich 192 (2005).

While Plaintiff has acknowledged that it owes Defendant certain amounts in connection with other projects not related to the Parts, it asserts that those amounts should be applied as a setoff to its potential future judgment. Although it appears undisputed that Plaintiff owes Defendant under the parties' account, there remains a dispute as to whether Defendant is liable to Plaintiff for the allegedly defective Parts.

Consequently, the Court is satisfied that the appropriate way to proceed is to grant Defendant summary disposition on its counter-claims but to refrain from entering a judgment in connection with those claims until Plaintiff's claims have been litigated and resolved. Proceeding in this manner will prevent the possibility to entering multiple judgments in this case and to determine the overall liability of the parties before granting any relief. As a result, Defendant's motion for summary disposition of its counterclaims will be granted as to liability, but Defendant's request for a judgment will be denied without prejudice pending the resolution of Plaintiff's claims.

IV. Conclusion

For the reasons discussed above, Defendant's motion for summary disposition is GRANTED, IN PART and DENIED, IN PART. Specifically:

- (1) Defendant's motion for summary disposition of Plaintiff's breach of contract claim is DENIED;
- (2) Defendant's motion for summary disposition of Plaintiff's negligence claim is GRANTED based on the stipulation of the parties at the June 20, 2016 hearing; and
- (3) Defendant's motion for summary disposition of its counterclaims is GRANTED as to liability; However, Defendant's request for a judgment in connection with those claims is DENIED pending the resolution of Plaintiff's remaining claim.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

Date: AUG 02 2016

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge