

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

**FAURECIA INTERIOR SYSTEMS INC.,**

**Plaintiff,**

**Case No. 2019-175450-CB**

**v.**

**Hon. Martha D. Anderson**

**CRW PLASTICS USA,  
And 12FIVE CAPITAL, LLC,**

**Defendants.**

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**OPINION AND ORDER RE: DEFENDANT 12FIVE CAPITAL, LLC'S  
MOTION FOR PARTIAL SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)**

This matter is before the Court on Defendant 12Five Capital, LLC's Motion for Partial Summary Disposition as to Count Two of Plaintiff's First Amended Complaint. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

By way of background, Plaintiff and Defendant CRW Plastics USA ("CRW") entered into a supply agreement wherein Defendant CRW provided Plaintiff with plastic component parts to be utilized in interior assemblies for FCA and General Motors vehicles. Pursuant to the parties' agreements, Plaintiff lent Defendant CRW specialized and custom tooling to produce the plastic component parts. Plaintiff asserts that it also began purchasing raw materials for Defendant CRW so that the plastic component parts could be produced. When Defendant CRW allegedly defaulted on its supply obligations, Plaintiff terminated its purchase orders and contracts with Defendant CRW.

Plaintiff subsequently initiated litigation when Defendant CRW failed or refused to relinquish possession of Plaintiff's tooling and inventory. Defendant CRW responded to the lawsuit by filing a Counter-Complaint in which it alleges, in part, that Plaintiff has refused to pay Defendant CRW the full amount of its accounts receivable. As of the filing of the Counter-Complaint, Defendant CRW estimated that Plaintiff owes CRW at least \$1,570,872.77.

Apart from its contractual relationship with Plaintiff, Defendant CRW had entered into a lending relationship with 12Five Capital, LLC ("12five"), a commercial financial company and lender, in August 2018. Specifically, CRW and 12five executed a Loan and Security Agreement and a Revolving Note, which granted 12five a security interest<sup>1</sup> in substantially all of Defendant CRW's assets, including its accounts receivable.

On August 23, 2019, 12five sent a demand letter to Plaintiff to seek remittance of the amounts owed. Thereafter, Plaintiff filed its First Amended Complaint in which 12five was added as a defendant. One day later, 12five issued a Notice of Assignment and Change of Payee to Plaintiff to provide notice that all present and future accounts receivable should be paid to 12five.

In its Motion for Partial Summary Disposition, Defendant 12five is seeking summary disposition pursuant to MCR 2.116(C)(8) in order to dismiss Plaintiff's Breach of Contract claim or Count Two of the First Amended Complaint. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When analyzing such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). A (C)(8) motion may be granted only where the

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<sup>1</sup> On August 17, 2018, 12five purportedly perfected that security interest.

claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* And, when deciding such a motion, the Court considers only the pleadings. MCR 2.116(G)(5).

With respect to Count Two of the First Amended Complaint, Defendant 12five maintains that Plaintiff has not provided factual allegations to support its Breach of Contract claim. “A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach.” *Miller-Davis Co. v Ahrens Const., Inc.*, 495 Mich 161, 178; 848 NW2d 95 (2014).

In this matter, Defendant 12five asserts that there is no contract between Plaintiff and 12five. Rather, the factual pleadings in the First Amended Complaint only establish that Plaintiff and Defendant CRW entered into certain written agreements, including a supply agreement, tool lending contracts, and consignment agreements. Defendant 12five contends that it cannot be held liable for Defendant CRW’s alleged breaches of contract when 12five is not a party to those contracts.

Additionally, Defendant 12five argues that Plaintiff has failed to establish the existence of a contract between itself and 12five. “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.” *Bank of Am., NA v First Am. Title Ins. Co.*, 499 Mich 74, 101; 878 NW2d 816 (2016). According to Defendant 12five, Plaintiff’s pleadings do not demonstrate there was legal consideration, mutuality of agreement, or mutuality of obligation to hold 12five liable under the contracts at issue in this matter. Thus, Plaintiff has not satisfied the first element of its Breach of Contract claim against Defendant 12five.

Defendant 12five also maintains that Plaintiff cannot prove the remaining elements of a Breach of Contract claim. Specifically, none of the damages that Plaintiff alleges resulted from Defendant 12five's conduct.

In response, Plaintiff argues that Defendant's partial summary disposition motion should be denied for the reason that its First Amended Complaint does allege that there was a contractual relationship between Plaintiff and Defendant 12five due to Defendant CRW's assignment of its accounts receivable to 12five. If an assignment did occur, then Plaintiff and Defendant 12five do have a contractual relationship. It is Plaintiff's position that 12five, as the assignee, stands in the shoes of Defendant CRW as the assignor. See *First of Am. Bank v Thompson*, 217 Mich App 581, 587; 552 NW2d 516 (1996); citations omitted. Plaintiff also notes that its contract with Defendant CRW contains an anti-assignment clause that requires assignees to be liable for any set-offs that Plaintiff asserts.

Next, Plaintiff relies on the Uniform Commercial Code to argue that assignees are subject to the terms of an assigned agreement between the debtor and assignor. Pursuant to MCL 440.9404(1)(a), "the rights of an assignee are subject to...[a]ll terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract." Thus, Plaintiff argues that 12five accepted CRW's contractual obligations, including the obligations for set-offs and more under Plaintiff's Terms and Conditions, when it accepted the assignment. Plaintiff alleges in Paragraph 63 of the First Amended Complaint that the Breach of Contract claims which Plaintiff may enforce against 12five are the same claims which Plaintiff may otherwise have against CRW. Plaintiff maintains that Defendant 12five has breached the parties' agreements and as a consequence, Defendant 12five has damaged Plaintiff.

In reply, Defendant 12five asserts that Plaintiff is confusing the concepts of assigning contracts versus receivables. Defendant argues further that a full reading of MCL 440.9404 of the UCC expressly limits Plaintiff's rights against 12five. Pursuant to MCL 440.9404(b)(2), "the claim of an account debtor against an assignor may be asserted against an assignee under subsection (1) only to reduce the amount the account debtor owes." That is, Plaintiff's claim against Defendant CRW may be asserted against Defendant 12five only to reduce the amount that Plaintiff owes.

Defendant 12five also refers to the Uniform Commercial Code Comment section, which provides:

**3. Limitation on Affirmative Claims.** Subsection (b) is new. It limits the claim that the account debtor may assert against an assignee. Borrowing from Section 3-305(a)(3) and cases construing former Section 9-318, subsection (b) generally does not afford the account debtor the right to an affirmative recovery from an assignee.

Comments to Mich. Comp. Laws Ann. § 440.9404 (West).

Since Plaintiff's recovery is limited by MCL 440.9404(b)(2), Defendant 12five argues that Plaintiff cannot make an affirmative Breach of Contract claim against Defendant 12five.

Upon review of the factual allegations set forth in Count Two of the First Amended Complaint, the Court finds that Plaintiff cannot establish that Defendant 12five entered into the subject contracts with Plaintiff or that Defendant 12five provided any consideration or mutuality of obligation or agreement to prove the existence of a contract. Therefore, the Court finds that Plaintiff has failed to satisfy the first element of its Breach of Contract claim against Defendant 12five.

The Court agrees with Defendant 12five that Plaintiff blurs the line of distinction between the concepts of assigning contracts and assigning receivables. The assignment of accounts receivable to Defendant 12five under the Defendants' lending relationship does not

correspond to an assignment of CRW's contractual obligations under the subject contracts. Stated otherwise, Defendant 12five does not step into the shoes of Defendant CRW with regard to the subject contracts because 12five is not assuming CRW's contractual obligations. As such, Plaintiff cannot demonstrate that its damages were caused by Defendant 12five's conduct when the alleged damages resulted from a breach of contractual obligations, of which 12five had none.

What is more, MCL 440.9404(b)(2) provides that "the claim of an account debtor against an assignor may be asserted against an assignee under subsection (1) only to reduce the amount the account debtor owes." As noted by Defendant, the UCC does not provide Plaintiff with the right to an affirmative Breach of Contract claim, but rather it provides Plaintiff with limited rights as an account debtor. The Court observes from Count Three of the First Amended Complaint that Plaintiff is seeking a declaratory judgment regarding Plaintiff's right to assert set-offs against both Defendants.

Based upon the foregoing analysis, the Court finds that Plaintiff has not pled adequate factual allegations to sufficiently support its Breach of Contract claim against Defendant 12five. Furthermore, Plaintiff's Breach of Contract claim against Defendant 12five is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Wade, supra*. Accordingly, Defendant 12five's Motion for Partial Summary Disposition is GRANTED pursuant to MCR 2.116(C)(8) and Plaintiff's Count Two of the First Amended Complaint is DISMISSED with prejudice.

The Court is cognizant of Plaintiff's request to file an amended Complaint pursuant to MCR 2.116(I)(5), should the Court grant Defendant 12five's Motion for Partial Summary Disposition. However, the Court agrees with Defendant 12five that Plaintiff cannot provide sufficient facts to support a Breach of Contract claim against it. In addition, Count Three of

the First Amended Complaint already seeks a declaration of the parties' rights, including any right to assert set-offs that Plaintiff may have against CRW or 12five.

Therefore, Plaintiff's request to amend the First Amended Complaint under MCR 2.116(I)(5) is DENIED as an amendment would not be justified.

Further, Defendant 12five's request for costs and attorneys' fees is DENIED.

**IT IS SO ORDERED.**



HON. MARTHA D. ANDERSON  
Business Court Judge

Dated: 1/14/2020.