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

PEOPLE DRIVEN CREDIT UNION,
Plaintiff,

v.

Case No. 18-168291-CB
Hon. James M. Alexander

INNOVATIVE NETWORK SOLUTIONS, INC.,
Defendant.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition.

According to Plaintiff's Complaint, Plaintiff and Defendant entered into a service contract in 2015 whereby Defendant was to provide certain information technology services to Plaintiff. On April 10, 2017, the parties executed a second service contract. Plaintiff was required to prepay both contract prices. Pursuant to the contract, either party had the right to terminate the contract at any time with 30-days written notice. Further, if Plaintiff terminated the contract early, it was entitled to any unearned fees that it had prepaid. Plaintiff properly terminated the contract as of May 31, 2018. Plaintiff claims it is entitled to a refund of $43,670.60 on the service contracts.

In addition to the service contracts, Plaintiff and Defendant entered into contracts for laptops with Microsoft Office licensing, a storage area network (SAN) with 30 terabytes of storage space, a firewall system with licensing, and an upgrade to Microsoft Exchange. Plaintiff claims that the SAN was not delivered and installed pursuant to the contract terms, that it could not verify the licenses for the firewall and Microsoft Office products, and that Defendant failed to provide Microsoft Exchange.

Plaintiff also claims that it did not receive the warranty it bargained for.

On these general allegations, Plaintiff filed its Complaint on claims of (Count I) breach of contract (SAN); (Count II) breach of contract (firewall); (Count III) breach of contract (Microsoft license); (Count IV) breach of contract (Microsoft licenses); (Count V) breach of contract (Microsoft Exchange); (Count VI) breach of contract (service agreement); and (Count VII) unjust enrichment.

Plaintiff and Defendant both move for partial summary disposition under MCR 2.116(C)(10). A (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).[1] Defendant so moves under (I)(2).

I. Service Contract

In its motion, Plaintiff argues that since it properly terminated the contract, it is entitled to a refund of all unearned fees totaling $43,670.60.

In response, Defendants argue that the dispute is over the amount of credit Plaintiff is entitled to, the amount Plaintiff owes Defendant for services provided, and that Plaintiff did not pay an invoice for a SIP print recording device. Defendant argues that on these issues, it is entitled to judgment pursuant to MCR 2.116(I)(2).

Defendant argues that Plaintiff is not entitled to $43,670.60. Instead, Defendant claims Plaintiff is entitled to $19.404.88, and Defendant would agree to an order in that amount. (Response Exhibit A, ¶¶1-3). Beyond that, Defendant disputes Plaintiff's calculation of the refund due. Further, Defendant argues that Plaintiff owes Defendant $2,790.60 for the continuing vendor

1 In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden, 461 Mich* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the

management program.

The contract provides:

> Either party may terminate this Agreement or any Maintenance Service provided pursuant to this Agreement without cause upon thirty (30) days' written notice to the other party, unless otherwise specifically set fort (i) in any attached terms and conditions to this Agreement or (ii) in the Price Schedule at the end at the time that the applicable Maintenance Service is ordered by the Client. Should any party so terminate, any and all unearned fees will be refunded within a reasonable time.

Both Plaintiff and Defendant agree that Plaintiff is entitled to some refund of unearned fees. That, however, is where the agreement ends. The contract does not provide how the refund of unearned fees should be calculated. And, as previously stated, Plaintiff has calculated its refund to be $43,670.60, while Defendant has calculated it at $19.404.88. The main factor that the parties disagree over is whether the discounts Plaintiff received should be prorated over the life of the contract, or whether they are earned by remaining in the contract. Plaintiff and Defendant both argue different formulas to calculate the discount reflecting their respective position regarding the discounts. Again, the contract is silent as to this issue.

Since the contract is silent to how the refund of unearned fees is to be calculated and whether discounts have been earned, the Court would necessarily have to make a factual determination as to which party's mathematical calculations are correct.

It is well settled that credibility and factual disputes are issues that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, "courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion" *White, supra* at 625, citing *Burkhardt v Bailey,* 260 Mich

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moving party is entitled to judgment as a matter of law. *Id.* at 120.

App 636, 646-647; 680 NW2d 453 (2004); and *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005).

Based on the foregoing, the Court cannot determine the amount of the refund due to Plaintiff as it would have to make factual determinations to do the same. Based on the same, Plaintiff's motion for summary of the service contract is granted in part as to liability with the issue of damages remaining to be determined.

II. SAN

Next, Plaintiff argues that Defendant failed to perform in conformity with the contract for the SAN. Plaintiff argues that it was to receive 36 – 1.8 terabyte (TB) units with a RAID 10 configuration. Instead, Plaintiff claims it received 24 – 1.8 TB units with a RAID 10 configuration.

The quote states that Plaintiff was to receive a Dell, MD38201 Storage Appliance that includes 30 TB usable space (36 x 1.8TB 10K 2.5 SAS-RAID 10). (Plaintiff's Motion, Exhibit E). Plaintiff argues that it paid the quoted price for 36 hard drives and for a Dell warranty. Plaintiff argues that it was entitled to accept any portion of the nonconforming delivery and is still able to bring suit for the remaining hard drives pursuant to MCL 440.2601, the "perfect tender rule."

Defendant argues that Plaintiff was quoted for a storage network with an overall storage capacity of 30 TB. Defendant claims that there was a typo in the quote for the SAN indicating that Plaintiff would be receiving 36 individual storage unites, when they instead received 24. Defendant argues that Plaintiff was quoted for and received a 24-port server, so any additional units beyond the 24 it received, would have gone unused.

Defendant provides an affidavit from Robert Roche, its president. Roche states that the

contract was "priced globally" for 30 TB of usable storage. (Defendant's Response, Exhibit A). Roche further states that Plaintiff did received the storage space it contracted for, and had Plaintiff received 36 units, it would have provided nearly 40 TB of usable data, far more than what the contract provided for. *Id.* Defendant argues that based on the amount of data storage the parties contracted for, the inclusion of the number "36" was a typographical error. *Id.*

Further, Defendant claims that since Plaintiff inspected and accepted the goods and paid the invoice, Plaintiff can not now argue that the goods were nonconforming pursuant to MCL 440.2607.

MCL 440.2601 provides:

> Subject to the provisions of this article on breach in installment contracts (section 2612) and unless otherwise agreed under the sections on contractual limitations of remedy (sections 2718 and 2719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may
>
> (a) reject the whole; or
>
> (b) accept the whole; or
>
> (c) accept any commercial unit or units and reject the rest.

"An 'installment contract' is one which requires or authorizes the delivery of the goods in separate lots to be separately accepted, even though the contract contains a clause 'each delivery is a separate contract' or its equivalent." MCL 440.2612.

As it relates to the SAN quote, there is no indication or evidence that the contract was to be construed as an installment contract or delivered in separate lots, as such, Plaintiff's reliance on MCL 440.2601is misplaced.

MCL 440.2607 provides (in relevant part):

> (1) The buyer must pay at the contract rate for any goods accepted.

> (2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this article for nonconformity.
>
> (3) Where a tender has been accepted
>
> (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and
>
> (b) if the claim is one for infringement or the like (subsection (3) of section 2312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.
>
> (4) The burden is on the buyer to establish any breach with respect to the goods accepted.

Jay Szimanski, Plaintiff's Chief Information Officer, admits that at the time of delivery, Defendant only delivered 24 hard drives. (Defendant's Response Exhibit B, at 63). Szimanski further admitted that after he saw the unit that only contained 24 hard drives, he did not send it back or question the number. *Id.* at 75. Szimanski also stated that he did not remember if he sent written communication to Defendant regarding the nonconformity. *Id.* at 76. In fact, he did not recall if he communicated with Defendant at all regarding the 24 hard drives. *Id.* Further, Plaintiff paid for the SAN system.

Pursuant to MCL 400.2607, since tender has been made, Plaintiff was required to notify Defendant of the breach within a reasonable time after it discovered or should have discovered the breach or be barred from recovery. Further, it is Plaintiff's burden to establish any breach as it related to the goods accepted. Finally, MCL 440.4714 provides that, " [w]here the buyer has accepted goods and given notification (subsection (3) of section 2607) he may recover as damages

for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable."

Here, as previously stated, Plaintiff discovered the nonconformity at or near the time of installation. There is no evidence that Plaintiff provided any notification to Defendant regarding the nonconformity. Again, as more fully discussed above, Plaintiff did not recall any communication with Defendant regarding the number of hard drives. In this case, tender had been accepted. Plaintiff was in possession of the SAN system and paid for the same. MCL 440.2607 provides that it is Plaintiff's burden to establish a breach. Plaintiff has failed to do the same.

Although in its reply, Plaintiff argues that "MCL 440.2714 does not preclude recovery because INS admits that Jay Szimanski provided notice," Plaintiff provides no evidence supporting its assertion. As such, Plaintiff has failed to provide evidence establishing that it gave to Defendant regarding any nonconformity with the SAN system. Based on the same, Plaintiff's claim for recovery is barred pursuant to MCL 440.2607(3) and MCL 440.2714.

Finally, as it related to the SAN, Plaintiff argues that Defendant did not provide the Dell warranty pursuant to the quote. The quote provides that the SAN is to include a "3 Year Onsite Warranty" (Plaintiff's Motion Exhibit E). There is no requirement in the quote that the warranty was to be provided through Dell. A letter from Defendant to Plaintiff dated January 11, 2018, states that SAN "carries a 3-year onsite warranty," and includes the warranty, which was typed on INS letterhead (Plaintiff's Motion Exhibit G). Further, Defendant stands by its warranty (Defendant Response Exhibit A).

Plaintiff does not dispute that it received a warranty for the SAN, rather, it argues that it did not receive a Dell warranty. However, there was not contractual requirement that Plaintiff was to

receive a Dell warranty. Again, Plaintiff received a warranty through Defendant that Defendant will honor. Based on the same, Defendant could not have breached any warranty claim Plaintiff now asserts.

Based on the foregoing, Plaintiff's claim for damages related to the SAN are barred pursuant to MCL 440.2607(3) and MCL 440.2714, and its warranty claim fails as there was no requirement that Plaintiff receive a Dell warranty. As such, Plaintiff's motion for summary regarding the SAN is DENIED. Defendant's motion under (I)(2) is GRANTED, and Plaintiff's claim for the same is dismissed.

III. Licensing

Next, Plaintiff argues that it purchased a firewall and laptops with Microsoft Office from Defendant. Both the firewall and Microsoft Office were to come with software activation licenses. Plaintiff claims it did not receive the full licensing for the firewall, and as a result, was not able to access certain features of the firewall program. Plaintiff also claims that although it did receive an activation licenses for the Microsoft Office, it was unable to verify that Plaintiff was the owner of the licenses.

In response, Defendant argues that Plaintiff did receive the license with both the firewall and Microsoft Office. Defendant argues Plaintiff would not be able to use the products without the licenses. Since Plaintiff is using the products, it necessarily has the appropriate licenses.

In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

As it related to the firewall, Plaintiff maintains that it is not able to access certain features of the firewall program. Plaintiff also claims that it paid for full access to the program. As such, Plaintiff argues Defendant breached the contract as it did not provide the license and access that Plaintiff paid for. Defendant, on the other hand, maintains that the firewall is properly licensed as evidenced by Plaintiff using the program. Both parties have provided sworn statements supporting their respective position. As such, a question of fact exists as to whether Plaintiff received the license it contracted for and purchased.

In its reply, regarding Microsoft Office, Plaintiff's "argument is that it cannot confirm that the product activation keys it received are legitimate." Plaintiff does, however, admit that Defendant provided product activation codes for Microsoft Office. Since Plaintiff admits that it has product activation licenses for Microsoft Office, it cannot establish that Defendant breached the contract for the same. Further, since Plaintiff admits that it has the licenses and has been successfully using the product, Plaintiff cannot establish damages resulting from any alleged breach. As such, Plaintiff cannot maintain a breach of contract claim for the Microsoft Office licenses.

Based on the foregoing, both Plaintiff and Defendant's motion for summary as to the firewall is DENIED as a genuine issue of material fact exists as to whether Plaintiff has full access to the product.

Further, Plaintiff's motion regarding the licenses for Microsoft Office is DENIED. Defendant's motion regarding the same is GRANTED, and Plaintiff's claims for the Microsoft Office licenses are DISMISSED.

IV. Microsoft Exchange

Finally, Plaintiff argues that Defendant misrepresented that Plaintiff needed to upgrade to a current version of Microsoft Exchange. After Plaintiff hired a new Chief Information Officer, Plaintiff determined that would instead transition to Microsoft Office 365. On January 31, 2018, Plaintiff claims it asked Defendant not to purchase the license for Microsoft Exchange. Plaintiff claims that Defendant purchased the license the next day. As a result, Plaintiff argues it incurred unnecessary expenses.

Defendant argues that it was not in a position to cancel the licenses because Plaintiff would have been using Microsoft Exchange without a license. Further, Defendant agues that Plaintiff admitted it received the value of what it paid for the Microsoft Exchange license.

Indeed, Plaintiff admits that the purchase of the Microsoft Exchange license was beneficial to Plaintiff. (Defendant's Response Exhibit B, at 31). Further, Plaintiff admits that it used Microsoft Exchange for at least a year, and Plaintiff utilize the license purchased by Defendant to do the same. *Id.* Based on Plaintiff's own admissions, it received the benefit of the Microsoft Exchange license. Plaintiff cannot now argue, after using the license for over a year, that it suffered damages after Defendant purchased the same.

Based on the foregoing, Plaintiff's motion for summary regarding the Microsoft Exchange license is DENIED. Defendant's motion for the same is GRANTED, and Plaintiff's breach of contract claim for the Microsoft Exchange license is DISMISSED.

V. SIP Print Recording Device

Defendant argues that it is entitled to summary judgment because Plaintiff admitted that it has not paid an invoice for a SIP print recording device. In response, Plaintiff argues that this issue is not properly before the Court. Defendant's response to Plaintiff's motion for summary disposition included its own motion pursuant to (I)(2). Plaintiff, however, argues that the issue of the SIP was not at issue in Plaintiff's motion. Further, Plaintiff argues that pursuant to the Court's Scheduling Order, summary dispositions were to be filed by May 31, 2019. Defendant's motion was not filed until July 24, 2019, and as such, was not timely.

The Michigan Supreme Court has held that a trial court may enforce its summary disposition scheduling order and enter judgment against a party who fails to follow the same. *Edi Holdings v Lear Corp,* 469 Mich 1021; 678 NW2d 440 (Table) (2004).

The Court will uphold its Scheduling Order. The issue of the SIP device is not properly before the Court, Plaintiff did not raise the issue in its initial motion, and Defendant's motion for the same is untimely. As such, Defendant's motion for summary regarding the SIP device is DENIED.

VI. Summary

In summary, the Court finds that Plaintiff's motion regarding unearned fees under the service contract is GRANTED IN PART as to liability only with the issue of damages remaining open. Plaintiff's motion regarding the firewall, Microsoft Office, and Microsoft Exchange is DENIED.

Defendant's motion under (I)(2) for the service contract, the firewall, and the SIP Print Recording Device is DENIED. Defendant's motion for summary of the SAN, Microsoft Office, and Microsoft Exchange is GRANTED, and the same are DISMISSED.

IT IS SO ORDERED.

August 14, 2019____ /s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge