

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

MOTOR CITY REMODELING, LLC,

Plaintiff,

Case No. 2014-2878-CK

vs.

RICCON DEVELOPMENT, INC. and
RCC ASSOCIATES, INC.,

Defendants.

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OPINION AND ORDER

Defendant RCC Associates, Inc. (“RCC”) has filed a motion for summary disposition pursuant to MCR 2.116(C)(1), (8) and (10). Plaintiff has filed a response and requests that the motion be denied.

Factual and Procedural History

This lawsuit stems from the building of a Cheddar’s Casual Café restaurant in Camden, Delaware (the “Project”). Prior to the Project, Defendant Riccon Development, LLC (“Riccon”) had constructed two other restaurants for RCC. After contracting with RCC in connection with the Project, Riccon contracted with Plaintiff to handle the day-to-day operations of the Project (“Plaintiff-Riccon Contract”). An addendum to the Plaintiff-Riccon Contract includes a forum selection clause (the “Selection Clause”) which provides that:

[A]ny dispute between the parties in whatever capacity may be brought in the Macomb County Circuit Court in the County of Macomb, State of Michigan and that all the parties to the October 25, 2012, in their individual and agency capacities agree that venue is proper in said Macomb County Circuit Court for the adjudication of any dispute between the parties and all of that parties in all of their respective capacities consent to personal jurisdiction being proper in Macomb County Circuit Court located in Macomb County, State of Michigan to determine

the rights and liabilities of those parties, in whatever capacity they come before said Macomb County Circuit Court. Any objection thereto with respect to any issue of venue and/or personal jurisdiction is waived.

On July 22, 2014, Plaintiff filed its complaint in this matter asserting claims against RCC and Riccon arising out of the Project. On September 23, 2011, RCC filed its instant motion for summary disposition in lieu of filing an answer.

On November 17, 2014, the Court held a hearing in connection with the motion and took the matter under advisement. The Court has reviewed the materials submitted by the parties, as well as the arguments advanced at the hearing and is now prepared to make its decision.

Standard of Review

In reviewing a motion for summary disposition brought under MCR 2.116(C)(1), the court considers the pleadings and documentary evidence submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5). *WH Froh, Inc v Domanski*, 252 Mich App 220, 225-226; 651 NW2d 470 (2002). The plaintiff bears the burden of establishing jurisdiction over a defendant, but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition. *Id.*

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.

Arguments and Analysis

In its motion, RCC asserts that it is not bound by the Selection Clause because it was not a party to the Plaintiff-Riccon Contract or the addendum containing the Selection Clause, and that the Court otherwise lacks jurisdiction under its long-arm statute.

In its response, while Plaintiff appears to concede that there is no long arm jurisdiction over RCC, it contends that RCC is bound by the terms of the Selection Clause. Specifically, Plaintiff contends that Riccon was RCC's agent and that as a result RCC is bound by Riccon's agreement to the terms of the Selection Clause. In particular, Plaintiff asserts that Riccon had the apparent authority to bind RCC to the terms of the Selection Clause.

The authority of an agent to bind a principal may be either actual or apparent. *Meretta v Peach*, 195 Mich App 685, 698; 491 NW2d 278 (1992). Apparent authority may arise when acts and appearances lead a third party reasonably to believe that an agency relationship exists. *Id.* at 698-699. Specifically, the Court in *Meretta* explained apparent authority as follows:

Apparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent. *Smith v. Saginaw Savings & Loan Assn*, 94 Mich App 263, 271, 288 NW2d 613 (1979). In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances. *Id.*

Meretta, 195 Mich App at 699.

In support of Plaintiff's contention that Riccon had the apparent authority to bind RCC to the Selection Clause, Plaintiff relies on the affidavit of its president, John Lafata, in which he testified that Riccon's employee represented that she had the authority to contract from RCC. *See*

Plaintiff's Exhibit A. However, apparent authority may not be established by the acts of the agent alone. *Meretta*, 195 Mich App at 699; *Smith*, 94 Mich App at 271. In this case, Plaintiff has failed to allege in its complaint, or refer to in its response, that RCC engaged in any activity(ies) that could lead a reasonably third party to believe that an agency relationship existed between Riccon and RCC. Consequently, Plaintiff's position is without merit and RCC's motion for summary disposition must be granted.

Conclusion

Based on the foregoing, Defendant RCC Associates, Inc.'s motion for summary disposition is GRANTED. Plaintiff's claims against Defendant RCC Associates, Inc. are DISMISSED based on the Court's lack of personal jurisdiction over the defendant. The Court states this Opinion and Order neither resolves all pending matters nor closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: December 4, 2014

JCF/sr

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