

STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

FRASER ENGINE REBUILDER, INC., and
ENGINE & TRANSMISSIONS INCORPORATED,

Plaintiffs,

vs.

Case No. 2017-1424-CB

MPO, INC., and LANCASTER
ADVERTISING & MARKETING,

Defendants.

OPINION AND ORDER

Defendants have filed a motion for summary disposition pursuant to MCR 2.116(C)(7). Plaintiffs have filed a response and request that the motion be denied.

I. Factual and Procedural History

This matter arises out of a business relationship between the parties whereby Defendants agreed to develop and provide continual management of an integrated marketing system for Plaintiff Fraser Engine Rebuilder, Inc. ("Plaintiff FER"), which subsequently became Plaintiff Engine & Transmission Incorporated ("Plaintiff E&T"). Plaintiffs' principal is Kenneth Lancaster and Defendants' principal is Ricco Ramaci.

On August 26, 2014, Plaintiff FER and Defendant Lancaster Advertising & Marketing ("Defendant LAM") executed an Integrated Management System Agreement ("IMS Agreement") (See Defendants' Exhibit 1.).

In or around January 2016, Mr. Ramaci and Mr. Lancaster allegedly desired to operate their businesses as Plaintiff E&T and Defendant MPO Inc. ("Defendant MPO"), respectively. As a result, Mr. Lancaster sent a new IMS Agreement ("Second IMS

Agreement”) to reflect that the new entities would be operating under the terms of the agreement. (See Defendants’ Exhibit 3, p.2) Further, the Second IMS Agreement has allegedly be revised multiple times between January 2016 and early 2017. (See Defendants’ Exhibit 3, Complaint at ¶¶ 26-33.)

In addition, in or around January 2016 Mr. Lancaster sent a licensing agreement to Mr. Ramaci (“Licensing Agreement”). It is undisputed that both Mr. Lancaster and Mr. Ramaci executed the IMS Agreement and Second IMS Agreement (hereinafter collectively referred to as the “IMS Agreements”). However, the parties dispute whether Mr. Ramaci signed the Licensing Agreement.

On April 19, 2017, Plaintiffs filed their complaint in this matter (“Complaint”). Count I of the Complaint states a breach of contract claim based on the IMS Agreement by Plaintiff FER against Defendant LAM. Count II is a breach of contract claim brought by Plaintiff E&T against Defendant MPO. It is unclear from the face of the Complaint which version(s) of the IMS Agreement it is based upon, and/or whether it is based on the Licensing Agreement. Count III appears to state a claim by Plaintiffs against Defendants for claim and delivery. Count IV is a claim for defamation brought by Plaintiff E&T against Defendant MPO. Count V is a claim for unfair competition asserted by Plaintiffs against Defendants. Finally, Count VI purports to state a claim for tortious interference brought by Plaintiffs against Defendants.

On October 17, 2017, Defendants filed their instant motion for summary disposition pursuant to MCR 2.116(C)(7). Plaintiffs have since filed a response to the motion and request that it be denied. On December 18, 2017, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Arguments

Defendants argue that a choice of venue provision within the Licensing Agreement requires that this matter be brought in the State of Texas. In addition, Defendants aver that Plaintiffs' claims are barred by a release within the IMS Agreements.

In response, Plaintiffs maintain that the choice of law provision does not apply because Mr. Ramaci did not execute the Licensing Agreement. Further, Plaintiff assert that the release provision renders the IMS Agreements illusory and therefore unenforceable.

III. Standard of Review

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id*

IV. Law and Analysis

Defendants' motion seeks summary disposition based on the choice of law provision within the Licensing Agreement and a release found in at least some versions of the IMS Agreement.¹ The only claims based upon one or more of the IMS Agreements and/or the Licensing Agreement are Counts I and II. As a result, Defendants' motion is in actually a motion for partial summary disposition.

Defendants' first argument is that Plaintiffs' claim based on the License Agreement must be brought in the State of Texas pursuant to a choice of law provision in that agreement. In their response, Plaintiffs aver that the choice of law provision within the Licensing Agreement does not require that this matter be brought in Texas. Specifically, Plaintiffs maintain they are not bound to the terms of the Licensing Agreement because Mr. Ramaci, nor anyone else, signed the Licensing Agreement on behalf of Plaintiffs. In support of their position, Plaintiffs rely on Mr. Ramaci's affidavit in which he states, *inter alia*: "I did not sign the purported Licensing Agreement and I did not authorize anyone to place my signature on it." See Plaintiffs' Exhibit A, at ¶¶6. However, the Licensing Agreement itself does include what appears to be Mr. Ramaci's signature. (See Defendants' Exhibit 2, at ¶¶7.4.) Based on this conflicting evidence, the Court is convinced that a genuine issue of material fact exists with respect to Mr. Ramaci, or any other authorized individual, executed the Licensing Agreement on Plaintiffs' behalf. As a result, Defendants are not entitled to summary disposition based on the forum selection clause within the Licensing Agreement.

¹ Three versions of the IMS Agreement have been attached to Defendants' motion; however, additional revisions are referenced in ¶¶ 27-33 of the Complaint. Accordingly, it is unclear whether the release in question was a party of those revisions, if such revisions were made.

Defendants' second asserted basis for summary disposition is that the IMS Agreements contain release provisions which bar Plaintiffs from bring any claims in connection with those agreements. In their response, Plaintiffs argue that the release provision in question renders Defendants obligations under the IMS Agreements illusory, thereby rendering any consideration Plaintiffs were to receive under those agreements worthless. The provision in question provides:

In consideration of the right to conduct the above-referenced activities, client agrees to release, indemnify and hold harmless [Defendant MPO/Defendant Lam], and/or assigns (for the purposes of this agreement shall include without limitation, their officers, agents, employees and volunteers) from and against any and all claims, demands, losses, damages, defense costs or liability of any kind which may arise out of, or are in any manner connected with, the above described activity. This agreement will also be administered in accordance with the terms and conditions listed on the IMS website that pertains to this campaign.

("Release")(See Defendants' Exhibits 1 and 3.)(Emphasis added)

Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Meagher v. Wayne State Univ.*, 222 Mich App 700, 721, 565 N.W.2d 401 (1997). "If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate." *Id.* at 722. Further, contracts must be interpreted in a way that does not render any provisions illusory or meaningless. *Nat'l Pride at Work, Inc. v Governor of Michigan*, 481 Mich 56, 70; 748 NW2d 524 (2008). In *Mastaw v Naiukow*, 105 Mich App 25; 306 NW2d 378 (1981), the Michigan Court of Appeals adopted the definition of "illusory promise" set forth in Corbin, *Contracts* (one vol. ed.) s 16, p. 24, which provides:

There are certain forms of expression that have been described as 'illusory promises.' As this term itself implies, an illusory promise is not a

promise at all as that term has been herein defined. If the expression appears to have the form of a promise, this appearance is an illusion. Suppose, for example, that X guarantees payment of P's note in return for C's written promise to forbear from suing P as long as C wishes to forbear. In this case C's words may create the illusion of a promise, but, in fact, he has made no promise. The fundamental element of promise seems to be an expression of intention by the promisor that his future conduct shall be in accordance with his present expression, irrespective of what his will may be when the time for performance arrives. In the supposed case, the words used by C are not such as may reasonably be relied upon by P. The clear meaning of C's expression is that his future conduct is to be in accordance with his own future will, just as it would have been, had he said nothing at all.

In this case, Defendants' proposed interpretation of the Release would render their obligations under the IMS Agreement illusory. Pursuant to the IMS Agreements, Plaintiffs were required to pre-pay Defendants for services on a monthly basis. (See Defendants' Exhibits 1 and 3.) Put another way the IMS Agreements required Plaintiffs to pay for services they had not received at the time of payment. Accordingly, if the release is interpreted to bar Plaintiffs from bringing a claim in connection with the contract it would have the effect of requiring Plaintiffs to pay for services that Defendants had no obligation to perform as any failure to perform such services would have no consequences. As a result, the Defendants' proposed interpretation of the release would renders their obligations under the IMS Agreements illusory. Such a construction violates the rules of statutory construction. See *Nat'l Pride*, 481 Mich at 70. Consequently, the Court is convinced that Defendants' interpretation is misplaced and that their request for summary disposition based on their misguided interpretation must be denied.

Conclusion

For the reasons set forth above, Defendants' motion for summary disposition is DENIED. 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: FEB 06 2018

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