STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

METRO MOTOR COACH TRANSPORTATION GROUP, LLC,

Plaintiff/Counter-Defendant,

vs. Case No. 17-3644-CB

HARMONIE PONDER d/b/a PONDER CONSULTING & WEB DESIGN,

Defendant/Counter-Plaintiff.
_____/

OPINION AND ORDER

This matter comes before the Court on Defendant/Counter-Plaintiff Harmonie Ponder d/b/a/ Ponder Consulting & Web Design's ("Ms. Ponder") motion for judgment as a discovery sanction.

I. Factual and Procedural Background

Ms. Ponder designs websites and provides other webmaster services for clients. Answer ¶5. Metro Motor Coach Transportation Group, LLC ("Metro") retained Ms. Ponder, accepted and promised to pay for such services. *Id.* ¶6, 23. Ms. Ponder also provided "about $21,000" to Metro which Metro agreed to repay. *Id.* ¶8, 10, counterclaim answer ¶ 15.

On September 29, 2017, Metro filed a seven-count complaint against Ms. Ponder alleging that she wrongfully transferred Metro's domain name. Ms. Ponder filed a counterclaim alleging: count I, breach of contract (for website related activities); count II, account stated; count III, breach of contract (for loans to Metro); count IV, unjust enrichment; count V, promissory estoppel; count VI, fraudulent inducement; count VII, fraudulent misrepresentation; Count VIII,

innocent misrepresentation; count IX, silent fraud; count X, conspiracy to defame; count XI, conversion; count XII, and statutory conversion.

On June 11, 2018, the Court dismissed Metro's complaint with prejudice as a discovery sanction. Concerning her remaining counterclaims against Metro, Ms. Ponder served requests for admission, interrogatories, and requests for production on June 14, 2018. Metro failed to respond. Now Ms. Ponder moves for entry of judgment on the counterclaims as a sanction.

II. Law and Analysis

The Michigan Court Rules provide for sanctions where a party fails to respond to discovery requests. Under MCR 2.313(D)(1)(b), if a party fails to "serve answers or objections to interrogatories submitted under MCR 2.309 after proper service . . . the court . . . may order such sanctions as are just." Particularly, MCR 2.313(D)(1) authorizes the actions permitted under MCR 2.313(B)(2)(a-c) which include an order taking designated facts as established, an order prohibiting a party from introducing a matter into evidence or an order striking pleadings.

Further, MCR 2.313(B)(2)(c) authorizes a court to render judgment by default against a disobedient party. MCR 2.313(B)(2) does not require wrongful intent; rather, noncompliance need only be non-accidental. *Edge v Ramos*, 160 Mich App 231, 234; 407 NW2d 625 (1987) citation omitted.

Metro initiated the present litigation but then abandoned its prosecution. Metro's present failure to respond occurs in the context the Court's recent dismissal of Metro's Complaint as a discovery sanction for failure to participate in the discovery process and respond to a motion to compel. Consequently, given Metro's pattern of disobeying or disregarding discovery, the Court, in its discretion, will grant Ms. Ponder's motion to render judgment by default on her counterclaim. It is inequitable for Ms. Ponder to continue to shoulder the expense of engaging in

one-sided litigation. Moreover, Metro's repeated disregard of discovery in an action that it initiated cannot be said to be accidental.

Even if the Court were to merely take Ms. Ponder's requests to admit as established under MCR 2.313(B)(2)(a), the ultimate result would remain the same since the facts, once accepted, would establish Metro's liability. Specifically, Ms. Ponder served upon Metro requests for admission that Ms. Ponder provided $20,000 and $2,221 to Metro; that Metro promised to repay that amount; Metro has not repaid the funds, and Metro owes Ms. Ponder $2,400 for unpaid invoices. Ms. Ponder's Exhibits B. In fact, Metro admits in its Answer that it agreed to repay Ms. Ponder $22,221.00. Answer ¶8, 10, counterclaim answer ¶ 15. Therefore, in the interest of judicial economy, the Court will enter a default judgment as a sanction.

Additionally, under MCL 600.2145, Ms. Ponder's affidavit of account became prima facie evidence of indebtedness when Metro did not answer the affidavit in Metro's motion for partial summary disposition. Therefore, Ms. Ponder is entitled to a judgment of $2400. MCL 600.2145 provides that,

> In all actions . . . to recover the amount due on an open account or upon an account stated, if the plaintiff . . . makes an affidavit of the amount due, . . . 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 . . . such affidavit shall be deemed prima facie evidence of such indebtedness, unless the defendant with his answer . . . makes an affidavit and serves a copy thereof on the plaintiff or his attorney, denying the same. . .

Emphasis added. In order to prove the existence of an account stated, a plaintiff must present proof that the defendant either expressly accepted the bills by paying them or by failing to object within a reasonable time. *Keywell & Rosenfeld v Bithell,* 254 Mich App 300, 331; 657 NW2d 759 (2002).

Prima facie evidence is evidence which, if not rebutted, is sufficient by itself to establish the truth of a legal conclusion asserted by a party. *People v Licavoli,* 264 Mich 643, 653; 250 NW 520 (1933). Statutory language making proof of one fact prima facie evidence of another fact is analogous to a statutory rebuttable presumption. See, e.g., *Raptis v Safeguard Ins Co,* 13 Mich App 193, 199; 163 NW2d 835 (1968). In civil matters, a presumption operates to shift the burden of going forward with the evidence. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC,* 428 Mich 167, 180; 405 NW2d 88 (1987). Given that the affidavit of accounting shifts the burden of proof to Metro, the Court considers Ms. Ponder's prima facie evidence as conclusive as to the substance of the affidavit.

Therefore, Ms. Ponder's is entitled to a judgment in the amount of $2400 on Count II. For the other reasons stated above, the Court will enter judgment against Metro and in favor of Ms. Ponder on the outstanding loan balance of $22,221.00.

Given the Court's decision to grant default judgment in favor Ms. Ponder against Metro as a discovery sanction, the Court need not further address Ms. Ponder's pending Motion for Partial Summary Disposition.

III. Conclusion

For the reasons set forth above, Ms. Ponder's motion is GRANTED. It is hereby ordered and adjudged that Metro pay to Ms. Ponder $24,621 together with statutory interest. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* resolves the last pending claim and closes this case.

IT IS SO ORDERED.

RICHARD L. CARETTI
Circuit Court Judge

Dated: October 15, 2018

cc: James J. Kelly, Attorney for Plaintiff
Brian D. Wassom, Attorney for Defendants