[Cite as *Mailfinance, Inc. v. Ohio Dept. of Rehab. & Corr.*, 2020-Ohio-610.]

MAILFINANCE, INC. Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2019-00139JD Judge Patrick M. McGrath Magistrate Robert Van Schoyck ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On April 11, 2019, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On April 25, 2019, plaintiff filed a memorandum in opposition. On May 2, 2019, defendant filed a motion for leave to file a reply memorandum pursuant to L.C.C.R. 4(C). Upon consideration, defendant's motion for leave is hereby GRANTED. Defendant's motion for summary judgment is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D). For the reasons set forth below, defendant's motion for summary judgment shall be granted.

{¶2} Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C), which states, in part, as follows:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

When a moving party makes a properly supported motion for summary judgment, the adverse party may not rest upon the mere allegations or denials in the pleadings but "by affidavit or as otherwise provided in [Civ.R. 56] must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). When ruling on a motion for summary judgment, the court may only consider the evidence properly before it pursuant to Civ.R. 56(C) and 56(E). *CitiMortgage, Inc. v. Wiley*, 10th Dist. Franklin No. 15AP-642, 2016-Ohio-5902, ¶ 10. The court must resolve all doubts and construe the evidence in favor of the nonmoving party. *Pilz v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 04AP-240, 2004-Ohio-4040, ¶ 8.

{¶3} Plaintiff filed its complaint on February 12, 2019, alleging breach of contract. (Form Complaint, ¶ 12; Complaint, ¶ 3.) Plaintiff alleges it entered into ten lease agreements with defendant beginning on or about January 24, 2014. (Id.) Plaintiff attached the lease agreements to the complaint which are labeled "Product Lease Agreement with Meter Rental Agreement." (Id., Ex. A.) Plaintiff contends that defendant breached each of the lease agreements by failing to make timely payments due and attempting to unilaterally terminate the contracts outside of the terms and conditions contained in the contract. (Form Complaint, ¶ 12; Complaint, ¶ 5.)

{¶4} To prove a claim for breach of contract, a plaintiff must establish: (1) a contract existed; (2) performance by the plaintiff; (3) the defendant breached the contract; and (4) plaintiff suffered damages or loss due to the breach. *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, 878 N.E.2d 66, ¶ 18 (10th Dist.). "Under contract law, a breach occurs when a party fails, without legal excuse, to perform a promise that forms a whole or part of a contract." *Landis v. William Fannin Builders, Inc.*, 193 Ohio App.3d 318, 2011-Ohio-1489, 951 N.E.2d 1078, ¶ 26 (10th Dist.).

{¶5} In defendant's motion for summary judgment, defendant argues that plaintiff's claim for breach of contract is barred by the two-year statute of limitations

governing claims against the state in the Court of Claims, R.C. 2743.16(A). (Motion for Summary Judgment, p. 2.) Defendant contends that plaintiff's claim accrued on January 13, 2017, when defendant unilaterally cancelled the lease agreements. (Id.) Defendant argues that plaintiff was required to file its claim on or before January 14, 2019. (Id.)

{¶6} In support of its motion, defendant submitted the affidavit of its Procurement Manager, Danny Yates. Yates oversees and administers contracts between defendant and third-party contractors. (Yates Affidavit, ¶ 2.) According to email correspondence authenticated by Yates, after defendant received inquiries from Neopost (plaintiff's parent company, according to the contracts attached to the complaint) about defendant failing to make payments on invoices, Yates notified Neopost via email on December 7, 2016, that defendant was no longer using the Neopost machines at its Adult Parole Authority locations or the meters associated with each machine, and he further stated that defendant was "in the process of issuing the cancelation letter * * *." (Id., Ex. B.) Two days earlier, on December 5, 2016, Yates had been instructed by a Neopost employee on how to "begin the cancellation process," including where to "send [the] cancellation letter." (Id., Ex. A.) Yates authenticates a January 13, 2017 email that he sent to Neopost which states, in relevant part:

> Attached is a notice of cancellation of selected leases, rentals, and maintenance with Neopost and MailFinance by the Ohio Department of Rehabilitation and Correction, Adult Parole Authority.

The attachment referred to by Yates is a letter, dated January 12, 2017, which states in relevant part:

> The Ohio Department of Rehabilitation (ODRC) does hereby terminate service, effective on the above date, for the meter rentals, equipment leases or maintenance of owned equipment listed in the Attachment A.

> Neopost shall prorate any future invoices for such service to the date of this notice in order for payment to be approved.

{¶7} In response to defendant's motion for summary judgment, plaintiff argues that the contracts referenced in the cancellation letter and Yates' email "are actually rental contracts as opposed to the Lease Agreements the Plaintiff has filed suit on." (Response, p. 1.) In support, plaintiff submitted an affidavit from Loutissa Perry, plaintiff's Director of Credit and Collections. Perry states, in part, that "the rental contracts listed in 'Attachment A' to the January 12, 2017 letter are not the same Leases that are included in this present suit and attached to Plaintiff's Complaint as Exhibit 'A'" and "[t]hat the Leases included in this present suit were not cancelled by Defendant's January 12, 2017 letter." (Perry Affidavit, ¶ 5-6.)

{¶8} Perry's affidavit provides little explanation for these statements, however, other than asserting that the contracts at issue in this matter "could not be unilaterally cancelled by Defendant according to the terms of each Lease." (Id., ¶ 7.) Perry's averment that the cancellation letter did not pertain to the contracts at issue in this matter stands in contrast with plaintiff's own complaint, which describes defendant as "attempting to unilaterally cancel the contracts," even if plaintiff claims that defendant was not permitted to do so. (Form Complaint, ¶ 12.) A "party's unsupported and self-serving assertions, offered by way of affidavit, standing alone and without corroborating materials under Civ.R. 56, will not be sufficient to demonstrate material issues of fact." *White v. Sears, Roebuck & Co.*, 10th Dist. Franklin No. 10AP-294, 2011-Ohio-204, ¶ 8. "Nor may a party create a material issue of fact in opposition to summary judgment by means of internally contradictory evidence that merely contradicts prior evidence submitted by the party." *Wolf v. Big Lots Stores, Inc.*, 10th Dist. Franklin No. 07AP-511, 2008-Ohio-1837, ¶ 12. Furthermore, each contract attached to the complaint states on its face that it is a "Lease Agreement with Meter Rental Agreement," and the January 12, 2017 letter plainly states that defendant was terminating both "meter

rentals" and "equipment leases." In response to plaintiff's differentiation of meter rentals and equipment leases, defendant also submitted a second affidavit from Yates authenticating an email exchange in which plaintiff, on January 30, 2017, sent Yates "your requested termination/buyout quote for your lease"; Yates replied the following day as follows:

> Vince,
>
> We received this buyout notice which we will not agree to. The ODRC sales representative prior to you put in machines in locations and mislead the office staffs at those office will false information. We were being overcharged for the size of machines at these locations. We feel the intent was sales driven to gain compensation for selling these leases and not in the best interest of the state of Ohio. We are also prepared to review the use of Neopost machine at all other ODRC prisons and the removal of these mail machines if these compensation requests for buyouts are not withdrawn.
>
> There will be no compensation for a buyout and we are prepared for litigation through the Ohio Attorney General's office if a reasonable solution of just returning the machines is not agree to.

(Yates Aff., Ex. C.) This email exchange is further evidence that, rather than merely terminating rental contracts as plaintiff contends, defendant had also terminated lease agreements. Making all reasonable inferences in plaintiff's favor, there can be no doubt that defendant terminated lease agreements as well as rental contracts by way of Yates' January 13, 2017 email and attached cancellation letter.

{¶9} Next, plaintiff argues that "the terms of the parties' Lease Agreements do not permit unilateral cancellation rendering Defendant's purported cancellation letter ineffective and moot as it applies to any contract with Plaintiff." In fact, this argument goes to the essence of the complaint, i.e. the allegation that defendant's "attempting to

unilaterally cancel the contracts outside of the terms and conditions contained therein" was a breach of contract. The issue raised by the motion for summary judgment, though, is whether plaintiff timely filed suit for the alleged breach of contract. The applicable statute of limitations, R.C. 2743.16(A), provides:

> Subject to division (B) of this section, civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties.

"A cause of action does not ordinarily accrue until actual damage occurs; 'when one's conduct becomes presently injurious, the statute of limitations begins to run.'" *Columbus Green Bldg. Forum v. State*, 2012-Ohio-4244, 980 N.E.2d 1, ¶ 27 (10th Dist.), quoting *Children's Hosp. v. Ohio Dept. of Pub. Welfare*, 69 Ohio St.2d 523, 526, 433 N.E.2d 187 (1982). "A cause of action for breach of contract accrues when the breach occurs or when the complaining party suffers actual damages." *Bell v. Ohio State Bd. of Trustees*, 10th Dist. Franklin No. 06AP-1174, 2007-Ohio-2790, ¶ 27.

{¶10} Accepting as true the allegation that defendant's termination of the contracts contravened the terms and conditions of the contracts, it follows that the alleged breach occurred when defendant terminated the contracts by way of Yates' January 13, 2017 email and attached cancellation letter. In terms of when actual damage occurred, the cancellation letter provided, in part, that plaintiff "shall prorate any future invoices for such service to the date of this notice in order for payment to be approved." The letter therefore establishes that defendant would make no payments beyond what it owed up through the point of contract termination. Defendant similarly told plaintiff later in January 2017, after plaintiff sought to negotiate a buyout, that there would be no such compensation. (Yates Affidavit, Ex. C.) Plaintiff, asserting in its response that "Defendant continued making payment to Plaintiff on several of the

unexpired Lease Agreements after the 01/12/2017 letter," argues that "Ohio Courts have recognized the tolling for partial payments applies when a defendant made a payment towards a contractual indebtedness." (Response, p. 2.) The sole legal authority that plaintiff points to in support—indeed, the only legal authority identified anywhere in the response—is the Eleventh District Court of Appeals' decision in *Slack v. Cropper*, 143 Ohio App.3d 74, 757 N.E.2d 404, 411 (11th Dist.2001), applying R.C. 2305.08. R.C. 2305.08 provides as follows:

> If payment has been made upon any demand founded on a contract, or a written acknowledgment thereof, or a promise to pay it has been made and signed by the party to be charged, an action may be brought thereon within the time limited by sections 2305.06 and 2305.07 of the Revised Code, after such payment, acknowledgment, or promise.

As defendant notes in its reply, plaintiff identifies no authority for applying the tolling provision from R.C. 2305.08 to the two-year limitation on actions set forth in R.C. 2743.16(A), but, in any event, plaintiff has failed to present permissible evidence of defendant making any payments after cancelling the contracts. While plaintiff submitted a document (Perry Affidavit, Ex. B) that it represents to be evidence of payments made after delivery of the cancellation letter, the document has not been properly authenticated pursuant to Civ.R. 56 and, therefore, is not properly before the court. *See Capital One Bank v. Branch*, 10th Dist. Franklin No. 05AP-441, 2005-Ohio-5994, ¶ 12.

{¶11} Thus, the permissible evidence before the court shows that the alleged breach occurred no later than January 13, 2017, and that actual damage occurred at that time since no payments would be made for contract sums owed thereafter. Accordingly, the only reasonable conclusion to be drawn is that plaintiff's claims accrued no later than January 13, 2017. Because plaintiff commenced this action more than two years later, on February 12, 2019, the complaint is barred by the two-year statute of limitations, R.C. 2743.16(A).

{¶12} Based upon the foregoing, the court concludes that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. As a result, defendant's motion for summary judgment is GRANTED and judgment is hereby rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

Filed January 13, 2020
Sent to S.C. Reporter 2/21/20