IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR POLK COUNTY CIVIL DIVISION

LORETO PRODUCTS, INC.,

A Florida Corporation,

Plaintiff,

vs.

CASE NO.: 2005CA001162
DIVISION: 07

LEONARD MOUNTAIN, INC.,
A Oklahoma Corporation, and
FRED BERCKEFELDT,
an individual,

Defendants.
_____/

PLAINTIFF'S MOTION FOR SUMMARY FINAL JUDGMENT

LORETTO PRODUCTS, INC. (hereinafter, "Plaintiff"), through its undersigned attorneys, files this, Plaintiff's Motion for Summary Final Judgment against Defendants LEONARD MOUNTAIN, INC. and FRED BERCKEFLEDT (hereinafter, singularly, "Leonard" and "Berckefeldt" and collectively, "Defendants") and states as follows:

LEGAL ARGUMENTS

1. DEFENDANTS HAVE ADMITTED ALL ISSUES RAISED IN PLAINTIFF'S REQUEST FOR ADMISSIONS.

Plaintiff served Plaintiff's Request for Admissions on Defendants Leonard and Berckefeldt on June 10th and June 13th respectively. *See* Plaintiff's Request for Admissions from Leonard Mountain; *See* Plaintiff's Request for Admissions from Fred Berckefeldt. Defendants failed to serve upon Plaintiff any written answers or objections to the Request for Admissions within 30 days of service. *See* Plaintiff's Notice of Defendant Leonard Mountain's Failure to

Respond dated July 22, 2005; *See* Plaintiff's Notice of Defendant Fred Berckefeldt's Failure to Respond dated July 22, 2005. Under Fla. R. Civ. P. 1.370, "[t]he matter is admitted unless the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter within 30 days after service of the request…" Fla. R. Civ. P. 1.370(a). Defendants have not served Plaintiff a written answer or an objection to the matter. Accordingly, Defendants have admitted all matters raised in Plaintiff's Requests for Admissions from each Defendant.

2. SUMMARY JUDGMENT IS PROPER UNDER THE CIRCUMSTANCES.

A party seeking to recover upon a claim may move for summary judgment after the expiration of twenty (20) days from the commencement of the action. *See* Fla. R. Civ. P. 1.510(a). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law upon the facts. *See Deauville Operating Corp. v. Town & Beach Plumbing Co*. 123 So. 2d 353, 354 (Fla. 3d DCA 1960). Over twenty (20) days have passed since the commencement of this action. Defendants' admissions show that there is no genuine issue of material fact as to Plaintiff's claims and the facts admitted show that Plaintiff is entitled to judgment as a matter of law. Accordingly, summary judgment is proper.

PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT AGAINST DEFENDANTS LEONARD MOUNTAIN AND FRED BERCKEFELDT

1. COUNT I. DEFENDANT LEONARD IS LIABLE TO PLAINTIFF FOR BREACH OF CONTRACT.

Defendant Leonard has made several admissions with regards to the Agreement of Resolution (hereinafter "Agreement") which the parties entered into on or about October 1, 2003. Leonard admit the following facts: Exhibit "D" attached to the Plaintiff's Complaint is a

true and correct copy of the Agreement; Defendant Berckefeldt, CEO of Leonard, signed the Agreement; Leonard owed Plaintiff $286,500.85 at the time they entered into the Agreement; Leonard agreed to pay Plaintiff $286,500.85 under the Agreement; Plaintiff discounted $49,509.22 of Leonard's debt under the Agreement; Leonard agreed to repay Plaintiff in accordance with the schedule set forth in the Agreement; and, Leonard currently owes Plaintiff $131,389.28. *See* Plaintiff's Request for Admissions from Defendant Leonard Mountain, Inc., paragraphs 3-4.

To establish a prima facie case for a breach of contract action, a plaintiff must show (1) a valid contract, (2) a material breach, and (3) damages. *See J.J Gumberg Co. v. Janis Services, Inc.* 847 So. 2d 1048, 1049 (Fla. 4th DCA 2003). Exhibit D of the Complaint, which Defendant has admitted is a true and correct copy of the Agreement, establishes that a valid contract existed between the parties. *See* Plaintiff's Request for Admissions from Defendant Leonard Mountain, Inc., paragraph 3. Exhibit D of the Complaint establishes that Leonard was to re-pay all sums owed to Plaintiff according to a schedule, whereby the final payment would be due in February of 2004. *See* Complaint, Exhibit D. The admissions of Leonard show that Leonard still owes Plaintiff $131,389.28 under the terms of the Agreement. *See* Plaintiff's Request for Admissions from Defendant Leonard Mountain, Inc., paragraph 4.

These facts establish that (1) Plaintiff and Leonard entered into a valid contract, (2) Leonard commit a material breach of the contract by failing to make payment when due, and (3) that this breach caused Plaintiff $131,389.28 in damages. There is no dispute as to these facts. Thus, there is no genuine issue of material fact as to Plaintiff's claim for breach of contract against defendant Leonard. Accordingly, the court should grant Plaintiff's Motion for Summary Judgment with respect to Count I.

2. COUNT II. DEFENDANT LEONARD IS LIABLE TO PLAINTIFF FOR ACCOUNT STATED.

"Generally, an account stated is established where a debtor does not object to a bill from his creditor within a reasonable time." *Robert C. Malt & Co. v. Kelly Tractor Co.* 518 So. 2d 991, 992 (Fla. 4th DCA 1988), *citing* *Martin v. Arnold* 36 Fla. 446 (1895); *Dudas v Dade County* 385 So. 2d 1144 (Fla. 3d DCA 1980); *Rauzin v Kupper* 139 So. 2d 432 (Fla. 3d DCA 1962). Leonard admitted that Plaintiff provided a statement of its account (attached to the Complaint as Exhibit "F") and that Leonard did not object to this statement. *See* Answer to the Complaint on behalf of Defendants Leonard Mountain, Inc., an Oklahoma Corporation, and Fred Berckefeldt, an individual, Paragraph 18. Accordingly, there is no genuine issue of material fact that Plaintiff provided a statement of account to Defendant and that Defendant did not object to it. Thus, Plaintiff has established that Defendant Leonard is liable to Plaintiff on a theory of account stated. This court should grant Plaintiff's Motion for Summary Judgment against Defendant Leonard on this count.

3. COUNT III. DEFENDANT LEONARD IS LIABLE TO PLAINTIFF FOR OPEN ACCOUNT.

An open account is "…an unsettled debt arising from items of work and labor, goods sold and delivered, with the expectation of further transactions subject to future settlement and adjustment." *Robert W. Gottfried, Inc. v. Cole* 454 So. 2d 695 (Fla. 4th DCA 1984). Leonard admitted that Exhibit "D" to Plaintiff's Complaint is a true and accurate copy of the Agreement of Resolution entered into by the parties. *See* Plaintiff's Request for Admissions from Defendant Leonard Mountain, paragraph 3(b). The Agreement specifies that Plaintiff and Leonard agreed to "…continue their association and cooperation with future business ventures." *See* Complaint, Exhibit "D". The parties intended that the agreement establish a "guideline…for present and

future business associations." *Id*. Further, the parties established a repayment schedule under the terms of the Agreement. *See* Complaint, Exhibit "D". The Agreement established the delivery and price guidelines for shipment and delivery of goods from Plaintiff to Leonard in the future. *See id*. Finally, the Agreement notes "[i]t is our hope that Leonard Mountain and Loreto Products will have a lasting, and rewarding relationship for many years to come." *See id*. It is clear that Leonard and the Plaintiff intended by the Agreement to have further transactions subject to future settlement and adjustment.

Leonard has admitted that it currently owes Plaintiff $131,389.28 under the agreement. *See* Plaintiff's Request for Admissions from Defendant Leonard Mountain, paragraph 4. Thus, it is undisputed that there is an unsettled debt between Leonard and Plaintiff on this account. Further, the context and language of the agreement shows that the agreement relates to the delivery of products from Plaintiff to Leonard.

Plaintiff has shown that there is no genuine issue of material fact with respect to existence of an unsettled debt arising from goods sold and delivered to Leonard, with the expectation of further transactions subject to future settlement and adjustment. These are the elements for a prima facie case of liability on an open account. *See Robert W. Gottfried, Inc. v. Cole* 454 So. 2d 695. Accordingly, it is appropriate for the court to grant Plaintiff's Motion for Summary Judgment on this count.

4. COUNT IV. DEFENDANT LEONARD IS LIABLE TO PLAINTIFF FOR UNJUST ENRICHMENT.

The elements of a cause of action for unjust enrichment are: (1) plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value thereof to the plaintiff. *See Shands*

Teaching Hosp. & Clinic v. Beech St. Corp. 899 So. 2d 1222, 1227 (Fla. 1st DCA 2005), *citing* *Hillman Const. Corp. v Wainer* 636 So. 2d 576, 577 (Fla. 4th DCA 1994).

Leonard admits that it owed Plaintiff $286,500.85 prior to entering into the agreement. *See* Plaintiff's Request for Admissions from Defendant Leonard Mountain, paragraph 3(d). Leonard admits that it currently owes Plaintiff $131,389.28. *See id* at paragraph 4. Leonard admits that Plaintiff has conferred a benefit upon Leonard by providing it with $131,389.28 worth of product for which Leonard has not paid. *See* Answer to the Complaint on behalf of Defendants Leonard Mountain, Inc., an Oklahoma Corporation, and Fred Berckefeldt, an individual, Paragraph 22. Leonard states that the product could not be resold because it was defective. *See id*. However, under the Agreement, Plaintiff and Leonard agreed that Plaintiff would discount Leonard's debt by $49,509.22 to account for the alleged problems with the product. *See* Complaint, exhibit "D"; *See* Plaintiff's Request for Admissions from Defendant Leonard Mountain, Paragraph C. Thus, Plaintiff has accounted for these alleged defects and previously discounted them to arrive at the amount currently owed by Leonard to Plaintiff.

It is uncontested that Plaintiff has conferred a benefit upon Leonard for which Leonard has not paid. *See* Answer to the Complaint on behalf of Defendants Leonard Mountain, Inc., an Oklahoma Corporation, and Fred Berckefeldt, an individual, Paragraph 22. It is clear from the context of the Agreement that Leonard had accepted and retained the benefit of the products, even though Leonard alleged the products were defective. *See id*. Because Plaintiff has already provided a discount of $49,509.22, a sum which was agreed upon by contract, it would be inequitable to allow Leonard to retain the additional benefit of $131,389.28. Thus, the facts which are not in dispute support a claim by Plaintiff against Leonard for unjust enrichment. Specifically, (1) Plaintiff has conferred a benefit on Leonard, (2) Leonard voluntarily accepted

and retained the benefit of the products, and (3) it is inequitable for Defendant to retain said benefits without paying for them. Accordingly, the court should find Leonard liable to Plaintiff for unjust enrichment.

5. COUNT 5. DEFENDANT BERCKEFELDT IS LIABLE TO PLAINTIFF ON A PERSONAL GUARANTY.

Defendant Berckefeldt admit that, acting in his individual capacity, he entered into a personal guaranty whereby he guaranteed the payment under Leonard's account with Loreto. *See* Answer to the Complaint on behalf of Defendants Leonard Mountain, Inc., an Oklahoma Corporation, and Fred Berckefeldt, an individual, Paragraph 6. Under a personal guaranty, the liability of the guarantor is "…fixed only by the happening of the prescribed condition." *Dept. of Revenue, State of Fla. v. Sun Bank* 556 So. 2d 1154, 1155 (Fla. 5th DCA 1990). The personal guaranty states that it "guarantees unto seller and seller's successors and assigns, complete and timely performance and payment by the buyer under any agreements between seller and buyer." *See* Complaint, Exhibit "C." Thus, the prescribed condition in this context is Leonard's failure to perform or pay Plaintiff.

Berckefeldt admits that Leonard Mountain owes Plaintiff $131,389.28 on the Agreement. *See* Plaintiff's Request For Admissions From Defendant Fred Berckefeldt. Because the personal guaranty applies to "any agreements between seller and buyer," Leonard's failure to make payment under the Agreement triggers Berckefeldt's liability under the personal guaranty.

The personal guaranty contains a provision that entitles Plaintiff to recover any professional fees, including attorneys' fees, incurred in the connection of enforcement of the personal guaranty. *See* Complaint, Exhibit "C".

Berckefeldt's affirmative defense is that the personal guaranty does not cover the breach of the Agreement of Resolution. However, Berckefeldt admit that Exhibit "C" to the Complaint

was a true and correct copy of the personal guaranty. *See* Plaintiff's Request for Admissions From Defendant Fred Berckefeldt, paragraph 1(a). The guaranty clearly states that it applies to any agreements between Leonard and Plaintiff. *See* Complaint, Exhibit "C". Further, the personal guaranty states that it "…shall continue perpetually." *See id.* So, it is clear under the terms of the personal guaranty that it applies to all agreements between Plaintiff and Leonard and that it continues perpetually. Thus, it does apply to the Agreement in question. Accordingly, Berckefeldt's admissions of fact defeat his affirmative defense.

Because the prescribed condition, breach of an agreement between Plaintiff and Leonard, has occurred the personal guarantor, Berckefeldt, is liable for the debt. This court should grant Plaintiff's Motion for Summary Judgment against Defendant Berckefeldt.

CONCLUSION

Defendants' failure to answer Plaintiff's Request for Admissions within thirty (30) days of service constitutes an admission of all issues raised therein. These admissions, coupled with those admissions in Defendants' Answer, support the finding that there is no genuine issue of material fact with relation to Plaintiff's claims. Because there are no genuine issues of material fact, it is proper for this court to grant Plaintiff's Motion for Summary Judgment and find Defendant Leonard liable for breach of contract, account stated, open account, and unjust enrichment. Additionally, this court should find Defendant Berckefeldt liable for breach of his personal guaranty on the payment of Leonard's debts to Plaintiff under the Agreement.

WHEREFORE, Plaintiff requests that this court award Plaintiff:

a. $131,389.28 in damages;

b. $14,964.69 in prejudgment interest from February 2004 to the present;

c. $3,950.00 for reasonable attorney's fees

d. $355.00 for costs associated with bringing this action;

e. any additional amount that the court deems appropriate.

Dated _____, 2005.

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Order Compelling Discovery was sent via regular U.S. Mail to counsel for Defendants, David Del Vecchio, Esq. Del Vecchio & Associates, P.A. 111 2nd Avenue NE, Suite 1403, St Petersburg, Florida 33701 this ___ day of _____, 2005.

_____
KEVIN G. BRICK, ESQ.