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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

NORTHERN FROZEN FOODS, INC.
Plaintiff

JOHN R. CLIMACO, ET AL
Defendant

Case No: CV-18-905385

Judge: CASSANDRA COLLIER-WILLIAMS

JOURNAL ENTRY

96 DISP.OTHER - FINAL

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED 11/02/2018, IS GRANTED.

FINAL OPINION AND ORDER IS SIGNED AND ORDERED RECORDED. ORDER ATTACHED. FINAL. OSJ.

COURT COST ASSESSED TO THE PLAINTIFF(S).

PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Cassandra Collier-Williams 4/9/2019

Judge Signature Date

CLERK OF COURTS
CUYAHOGA COUNTY

2019 APR - 9 P 3:41

FILED

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

NORTHERN FROZEN FOODS, INC.)
D/B/A NORTHERN HASEROT,)

Plaintiff,)

vs.)

JOHN R. CLIMACO, et al.)

Defendants.)

Case No. CV-18-905385

JUDGE CASSANDRA COLLIER-WILLIAMS

FINAL OPINION AND ORDER

JUDGE C. COLLIER-WILLIAMS:

This cause came for consideration upon Defendants' John R. Climaco, Michael L. Climaco, Cleveland Restaurant Operation, LP, Cleveland Restaurant Operation, LP, II, Cleveland Restaurant Operation, LP, III, BP Green, LLC, BP Brooklyn, LLC, BP Stow, LLC and BP Elyria, LLC (hereinafter "Defendants") Motion to Dismiss filed on November 2, 2018. By its December 13, 2018 order, this Court converted the Motion to Dismiss into a Motion for Summary Judgment. Said Motion requests judgment, as a matter of law, on all of Plaintiff's claims against Defendants for breach of contract, account stated, unjust enrichment, fraud and declaratory judgment. For reasons set forth more fully below, this Court hereby GRANTS Defendants' Motion for Summary Judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On or around 1995, Plaintiff Northern Frozen Foods, Inc. (hereinafter "Plaintiff") began selling food products to the Defendants, who own and operate various Fridays restaurants. For

over a twelve (12) year period, Plaintiff sold various food products to the Defendants for use at the various restaurants. In or around 2008/2009, Defendants' business slowed and Defendants started to fall behind in their payments to Plaintiff, but continued to order product promising payment while insolvent. As a result of the large unpaid balance, Plaintiff stopped doing business with Defendants. At all times Defendants failed to inform Plaintiff of the proper legal ownership of any of their restaurants.

On or about May 29, 2012, Defendants acknowledged their outstanding balance founded on contract to Plaintiff in the amount of \$1,888,533.07 without interest, and signed a written plan promising to repay Plaintiff by making monthly payments in certain amounts over a period of years. Defendants made certain, voluntary payments on its account to Plaintiff, through at least March 30, 2016. Defendants' accounts remain unpaid to date in the approximate amount of \$1.4 Million, computed without interest.

Plaintiff filed its Complaint in this matter on October 15, 2018. Defendants filed a Motion to Dismiss Plaintiff's Complaint on November 2, 2018, which the Court converted to a Motion for Summary Judgment on December 13, 2018. Plaintiff filed its Brief in Opposition on January 2, 2019. Defendants filed their Reply Brief on January 3, 2019.

II. APPLICABLE LAW AND ANALYSIS

Summary Judgment is a procedural device engineered to expeditiously and economically dispose of legal claims with no factual foundation. *Celotex Corp. v. Catrett*, 477 U.S. 317. Underpinning this device is the belief that litigation should promptly be terminated where no issues remain to be tried. *Norris v. Ohio Standard Oil Co.*, 70 Ohio St.2d 1. Rule 56(C) of the

Ohio Rules of Civil Procedure governs summary judgment motions and provides in pertinent part:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In construing Civil Rule 56(C), the Supreme Court of Ohio has stated summary judgment may be granted when “(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317.

“The burden of showing no genuine issue as to any material fact exists falls upon the moving party in requesting summary judgment.” *Harless v. Willis Day Warehousing Co.*, 54 Ohio St. 2d 64. The party seeking summary judgment “bears the initial burden of informing the trial court of the basis of the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the non-moving party’s claims.” *Dresher v. Burt*, 75 Ohio St. 3d 280. If the moving party satisfies this initial burden, a non-moving party must set forth specific facts showing there exists a genuine issue of material fact for trial. *Id.* If the non-moving party fails to prove the existence of an element essential to that party’s case, there can be no genuine issue as to any material fact and all other facts are rendered immaterial. *Celotex, supra.*

How the relationship between these parties is to be governed pursuant to Ohio law is the controlling issue in this case. Defendants make several arguments. They argue that Plaintiff’s

breach of contract and account claims are barred by the Uniform Commercial Code's four-year statute of limitations for the sale of goods set forth in R.C. 1302.98. Defendants further argue that Plaintiff's unjust enrichment claim is also barred because a series of explicit written contracts exist between the parties. Lastly, Defendants argue that Plaintiff's claim for fraud must fail, because among other requirements, the claim was not pleaded with particularity and is barred by a four-year statute of limitation. Defendants assert that a claim for an order piercing the corporate veil would fail as a result of the dismissal of Plaintiff's substantive claims.

The Court finds the UCC as adopted in Ohio governs the contracts in this case and mandates a four-year statute of limitations for the sale of goods. R.C. § 1302.98 provides in pertinent part:

- (A) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitations to not less than one year but may extend it.
- (B) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

R.C. 1302.98(A) and (B).

At the inception of the relationship between the parties, Plaintiff agreed to a 30-day credit term. (Kern Depo., pp. 15-16). In this case Plaintiff's final invoice for the sale of any goods to any of the Defendant restaurants was dated June 15, 2012. Therefore, any cause of action would accrue on July 16, 2012, and, therefore, Plaintiff was required to file its lawsuit based on the final invoice on or before July 16, 2016. Plaintiff filed the Complaint in this matter on October 15, 2018, over six years from the date of accrual.

It is undisputed that partial payments were made after the invoice was sent, but that payment was not made in full. The law regarding these partial payments is paramount to whether Plaintiff may proceed with its claims. Plaintiff argues that Ohio law should be interpreted to include partial payment as tolling the statute of limitations for a claim of breach of contract for the sale of goods.

The tolling portion of Ohio's version of UCC § 2-725, R.C. § 1302.98, provides, in pertinent part, that "[t]his section does not alter sections 2305.15 and 2305.16 of the Revised Code on tolling of the statute of limitations." R.C. § 1302.98(D). The cited code sections relate to tolling when a person is out of state or incapacitated with no mention of partial payments or promises to pay. Ohio law specifically enumerates when the statute will toll, unlike the UCC section which merely states, "This section does not alter the law on tolling of the statute of limitations." UCC § 2-725(4). Therefore the Ohio section plainly does not incorporate all Ohio law on tolling.

While Plaintiff was only able to submit authority from other jurisdictions with an unchanged UCC text who have enforced this situation, the Defendants at page 4 of their Reply Brief cite to *Standard Alliance Industries v. Black Clawson Co.*, 587 F.2d 813 (6th Cir. 1978) for an interpretation of the Ohio amendment. The Court concluded, "An examination of these statutes reveals that the limitation period is tolled if a defendant has removed himself from the state, Ohio Rev. Code § 2305.15, or if a plaintiff has suffered from some type of disability. Ohio Rev. Code § 2305.15. Neither is applicable here." *Id.* At 822. Defendants also cite to the 1st District and 12th District Courts refusing to invoke tolling by an inapplicable means. Lastly, Defendants cited to the review of the Ohio statute and the same conclusion found by the Federal

District Court for the Southern District of Florida in *Allapattah Services, Inc. v. Exxon Corp.*, 188 F.R.D. 667 S.D. Fl. 1999).

This Court agrees with Defendants' conclusion that the Ohio Legislature chose not to make Ohio law on the issue of tolling the statute of limitations for the sale of goods as expansive as that of other state legislatures. This Ohio statute, R.C. 1302.98(D) is clear and unambiguous. "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation... An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312 (1944). A reading of R.C. 1302.98(D) also does not permit a finding of equitable estoppel tolling pursuant to *Beck v. Trane Co.*, 1990 Ohio App. LEXIS 5614.

On page 35 of Plaintiff's Brief Plaintiff submits that "the same four-year sale of goods statute of limitations that applies to its breach of contract claim, applies to its claims for an account stated and unjust enrichment arising from the sale of goods." It is undisputed that written agreements governed the relationship between these parties. Therefore this Court grants Defendants' Motion for Summary Judgment with regard to Plaintiff's claims for an account stated and unjust enrichment.

Plaintiff's only apparent rebuttal in its brief of Defendants' Motion for Summary Judgment on its claim of fraud are sparsely referenced in sections relating to equitable estoppel and piercing of the corporate veil. Plaintiff only twice references its blanket allegation that Defendants committed fraud on pages 37-38 of its brief. This court finds pursuant to Civ. R. 56(C) Plaintiff has not raised a genuine issue of material fact with regard to the elements of its claim for fraud.

As a final matter, this Court agrees with Defendants regarding Plaintiff's claim for a declaratory judgment to pierce the corporate veil. Piercing the corporate veil is not, in itself, a stand-alone claim under Ohio law. *RCO International Corp. v. Clevenger*, 180 Ohio App. 3d 211, 2008-Ohio-6823 (10th Dist.). Therefore this Court also grants Defendants' Motion for Summary Judgment as to Plaintiff's Count Five for declaratory judgment to pierce the corporate veil.

III. CONCLUSION

Pursuant to Civ. R. 56(C), the Court, having considered all of the evidence and having construed the evidence in a light most favorable to the non-moving party, determines that reasonable minds can come but to one conclusion, that there are no genuine issues of material fact and that Defendants are entitled to judgment as a matter of law.

Plaintiff's Motion for Summary Judgment is hereby GRANTED in full. Judgment is hereby entered in favor of Defendants John R. Climaco, Michael L. Climaco, Cleveland Restaurant Operation, LP, Cleveland Restaurant Operation, LP, II, Cleveland Restaurant Operation, LP, III, BP Green, LLC, BP Brooklyn, LLC, BP Stow, LLC and BP Elyria, LLC and against Plaintiff Northern Frozen Foods, Inc. D/B/A Northern Haserot. Plaintiff's Complaint is hereby dismissed. Final.

IT IS SO ORDERED.


JUDGE CASSANDRA COLLIER-WILLIAMS