Komatsu Equip. Co. v. Ravyn & Robyn Constr., LLC

United States District Court for the Eastern District of New York

August 8, 2018, Decided; August 8, 2018, Filed

CV 17-2010 (SJF)(AYS)

Reporter
2018 U.S. Dist. LEXIS 134809 *

KOMATSU EQUIPMENT COMPANY, Plaintiff, -against- RAVYN & ROBYN CONSTRUCTION, LLC d/b/a TOTALINE, INC. and CHRISTINA SINA, Defendants.TOTALINE INC. and RAVYN & ROBYN CONSTRUCTION, LLC, Defendants/Third-Party Plaintiffs, -against- INDUSTRIAL WATER SOLUTIONS, LLC, JOHN DOES 1-10, and ABC CORPS 1-10, Third-Party Defendants.

Prior History: Komatsu Equip. Co. v. Ravyn & Robyn Constr., LLC, 2018 U.S. Dist. LEXIS 127280 (E.D.N.Y., July 27, 2018)

Core Terms

invoices, Guaranty, parties, attorney's fees, rental, summary judgment motion, rental contract, summary judgment, material fact, recommends, charges, damages, rented, venue, obligations, Reply, report and recommendation, model number, attachments, genuine, breach of contract, account stated, monthly rental, demonstrates, respectfully, attorney['s, pertain, modify, waived, terms of the contract

Counsel: [*1] For Komatsu Equipment Company, Plaintiff: Daniel A. Fass, LEAD ATTORNEY, Klapper & Fass, White Plains, NY.

For Ravyn & Robyn Construction, LLC, doing business as Totaline Inc., Christine Sina, Defendants: Kevin Hugh Bell, LEAD ATTORNEY, Matsikoudis & Fanciullo, LLC., Jersey City, NJ.

For Christine Sina, Ravyn & Robyn Construction, LLC, ThirdParty Plaintiffs: Kevin Hugh Bell, LEAD ATTORNEY, Matsikoudis & Fanciullo, LLC., Jersey City, NJ.

For INDUSTRIAL WATER SOLUTIONS, LLC, ThirdParty Defendant: Jeffrey V. Basso, Meghan McGuire Dolan, Patrick McCormick, LEAD ATTORNEYS, Campolo Middleton & McCormick, LLP, Ronkonkoma, NY.

Judges: ANNE Y. SHIELDS, United States Magistrate Judge.

Opinion by: ANNE Y. SHIELDS

Opinion

REPORT AND RECOMMENDATION

ANNE Y. SHIELDS, United States Magistrate Judge:

Before the Court, on referral from the Honorable Sandra J. Feuerstein for report and recommendation, is Plaintiff's motion for summary judgment, pursuant to Federal Rule of Civil Procedure 56. Defendants oppose the motion in its entirety. For the following reasons, this Court respectfully recommends that Plaintiff's motion be granted.

BACKGROUND

I. Facts: Admission of All Facts in Plaintiff's Rule 56.1 Statement

This is a diversity breach of contract action arising out of an agreement **[*2]** between the parties for the rental of certain heavy equipment for use on a construction excavation project. The relevant facts, as set forth below, are taken solely from Plaintiff's Local Civil Rule 56.1 Statement of undisputed material facts. As an initial matter, the Court notes that Defendants failed to file a counter-statement, as required by Local Civil Rule 56.1(b). Pursuant to Local Civil Rule 56.1, where the party opposing summary judgment fails to file the

required Local Civil Rule 56.1 counter-statement, "[e]ach numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed admitted for purposes of the motion [for summary judgment] unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party." Loc. Civ. R. 56.1(c). While Defendants submitted an affidavit from one of its owners, and a named defendant herein, Christina Sina, that affidavit does not correspond in any way to Plaintiff's Local Civil Rule 56.1 Statement.

Accordingly, the Court finds Plaintiff's Rule 56.1 Statement to be proper since it contains citations to admissible evidence to support each asserted material fact, see Giannullo v. City of New York, 322 F.3d 139, 140 (2d Cir. 2003), and, based on Defendants' failure to comply with Local Civil Rule 56.1, deems the facts set forth in **[*3]** Plaintiff's 56.1 Statement admitted. See Nassar Family Irrevocable Trust v. United States, Nos. 13 Civ. 5680, 13 Civ. 8174, 2016 U.S. Dist. LEXIS 136954, 2016 WL 5793737, at *1 n.2 (S.D.N.Y. Sept. 30, 2016) ("Because Nassar has failed to file a response [to Defendant's Rule 56.1 Statement], all facts set forth in the Government's statement are deemed admitted in deciding the instant motion."); Luizzi v. Sanchez, No. 02 CV 5388, 2009 U.S. Dist. LEXIS 7076, 2009 WL 252076, at * 2 (E.D.N.Y. Feb. 2, 2009) ("Where the party opposing a motion for summary judgment fails to submit a proper counter-statement of material facts, controverting the moving party's statement, courts have deemed the moving party's statement of facts to be admitted and have granted summary judgment in favor of the moving party on the basis of the uncontroverted facts.").

II. Terms of the Parties' Business Relationship

On or about August 28, 2014, Defendant Ravyn & Robyn Construtction, LLC d/b/a Totaline Inc. ("Totaline") entered into an Application for Credit and Contract (the "Contract") with Plaintiff, Komatsu Equipment Company ("Plaintiff" or "Komatsu"), whereby Komatsu agreed to establish an open account for Totaline to facilitate Totaline's rental of certain heavy construction machines and equipment for use in excavation and earth removal. (Pl. Local Civil R. 56.1 Statement ("Pl. 56.1") ¶¶ 1, 10.) As part of the Contract, Defendant **[*4]** Christine Sina ("Sina") executed a Personal Continuing Guaranty Agreement (the "Guaranty"), which unconditionally guaranteed the full and prompt payment when due of all of Totaline's payment obligations to Komatsu. (Pl. 56.1 ¶ 2.)

Pursuant to the Contract, payment was due by Totaline on the date of receipt of each invoice. (Pl. 56.1 ¶ 4.) If Totaline disputed any statement or invoice it received, it was required to notify Komatsu, in writing, within sixty days of the date of the statement or invoice. (Pl. 56.1 ¶ 7.) Any dispute not brought to Komatsu's attention within the sixty day period was expressly waived by Totaline. (Id.) The Contract also provided for a service charge of 1.5% per month for all past due balances, as well as attorney's fees and court costs incurred in any action commenced by Komatsu to collect on past due balances. (Pl. 56.1 ¶¶ 5-6.)

III. The Rental Contracts

Between August 2014 and March 2015, Totaline rented five pieces of construction equipment from Komatsu. (Pl. 56.1 ¶¶ 8-9.) For each piece of equipment rented by Totaline, and any attachments to the equipment also rented, Komatsu and Totaline entered into a separate rental contract. (Pl. 56.1 ¶ 9.) All of the **[*5]** rental contracts provided for monthly rental rates based on a four week, or 28 day, period. (Pl. 56.1 ¶ 12.) All of the rental contracts also provided for daily and weekly rental rates in the event Totaline exceeded one month's usage. (Pl. 56.1 ¶¶ 12, 22, 31, 44, 57.) In addition, all of the equipment rented to Totaline by Komatsu was tracked and monitored by Komatsu's proprietary satellite tracking system known as KOMTRAX, which provides Komatsu with the exact geographic location of the equipment on any specific day, as well as information concerning the hours per day the equipment is being used at a site. (Pl. 56.1 ¶ 15.) Finally, all of the invoices rendered to Totaline provided that Totaline was responsible for fuel, tires, and routine maintenance of the equipment rented, as well as all damage to the equipment incurred during the rental. (Pl. 56.1 ¶ 18.)

A. Rental Contract #008357 ("RC-1")

On or about August 28, 2014, Komatsu and Totaline entered into RC-1 for certain equipment known as model number PC390LC-10 and two attachments known as model numbers PC360-66 and PC 360-QC (collectively referred to as "EQ-1"). (Pl. 56.1 ¶ 11.) RC-1 provided for a monthly rental rate of $9,200 for **[*6]** the equipment and $300 per month for the attachments. (Pl. 56.1 ¶ 12.) RC-1 also provided for a delivery fee of $2,000. (Pl. 56.1 ¶ 13.)

On August 28, 2014, Komatsu delivered EQ-1 to a location designated by Totaline. (Pl. 56.1 ¶ 14.) From the data provided by KOMTRAX, EQ-1 was first used on August 28, 2014 and last used on November 17, 2014. (Pl. 56.1 ¶ 17.) During this time, Komatsu rendered

monthly invoices to Totaline, three of which remain unpaid — Invoices R00330, R00418, and R06398 — which pertain to one month's rental charges, including insurance and applicable taxes, a pickup fee, and damage to the equipment. (Pl. 56.1 ¶¶ 19-20.)

B. Rental Contract #008386 ("RC-2")

On or about September 24, 2014, Komatsu and Totaline entered into RC-2 for certain equipment identified as model number HM300-3 ("EQ-2").[1] (Pl. 56.1 ¶ 21.) RC-2 provided for a monthly rental rate of $10,200 for EQ-2. (Pl. 56.1 ¶ 22.) EQ-2 was picked up by Totaline on September 24, 2014. (Pl. 56.1 ¶ 23.)

Based on the KOMTRAX data, EQ-2 was first used by Totaline on September 24, 2014 and last used on January 10, 2015.[2] (Pl. 56.1 ¶ 24.) Again, Komatsu rendered monthly invoices to Totaline for the rental of EQ-2, four of **[*7]** which remain unpaid — Invoices R00328, R00406, R00486, and R06702 — which pertain to rental charges from October 22, 2014 to January 14, 2015, including insurance and applicable taxes, and damage to the equipment. (Pl. 56.1 ¶¶ 25-26, 28-29.) During this time, Komatsu also rendered Invoice R00623, which was a credit of $5,899.49 against the amount due on a prior invoice. (Pl. 56.1 ¶ 27.)

C. Rental Contract #008408 ("RC-3")

On or about October 17, 2014, Komatsu and Totaline entered into RC-3 for the rental of certain equipment known as model number HM400-4 ("EQ-3"). (Pl. 56.1 ¶ 30.) RC-3 provided for a monthly rental rate of $14,500. (Pl. 56.1 ¶ 31.) EQ-3 was delivered to a location designated by Totaline on October 18, 2014. (Pl. 56.1 ¶ 32.)

Based on the KOMTRAX data, EQ-3 was first used on October 18, 2014 and last used on January 10, 2015. (Pl. 56.1 ¶ 33.) EQ-3 was picked up by Komatsu on January 11, 2015. (Pl. 56.1 ¶ 34.) Komatsu rendered monthly invoices to Totaline for its rental of EQ-3, four or which remain unpaid — Invoices R00316, R00380, R00457, and R00528 — which include the rental charges for the entire rental period, including insurance and applicable taxes, extra usage, and **[*8]** a pickup fee. (Pl. 56.1 ¶¶ 36-41.)

D. Rental Contract #008409 ("RC-4")

On or about October 17, 2014, Komatsu and Totaline entered into RC-4 for the rental of certain equipment identified as model number PC360LC-10 and three attachments identified as model numbers PC360-54, PC300-24, and PC340-QC (collectively referred to as "EQ-4"). (Pl. 56.1 ¶ 42.) RC-4 provided for a monthly rental rate for the equipment of $9,500 and $550 per month for the attachments. (Pl. 56.1 ¶ 43.) RC-4 also provided for a delivery fee of $1,750. (Pl. 56.1 ¶ 47.)

Komatsu delivered EQ-4 to a location designated by Totaline on October 17, 2014. (Pl. 56.1 ¶ 48.) Pursuant to the KOMTRAX data, EQ-4 was first used on October 17, 2014 and last used on January 10, 2015, when it was picked up by Komatsu. (Pl. 56.1 ¶¶ 49-50.) During this time, Komatsu rendered monthly invoices to Totaline, five of which remain unpaid — Invoices R00317, R00381, R00458, R00518, and R00529 — which pertain to rental charges for the entire period, including insurance and applicable taxes, a pickup fee, extra usage hours and damage incurred to the equipment. (Pl. 56.1 ¶¶ 51-55.)

E. Rental Contract #008410 ("RC-5")

Also on or about October 17, 2014, **[*9]** Komatsu and Totaline entered into the final of the five rental contracts for certain equipment known as model number D61EX ("EQ-5"). (Pl. 56.1 ¶ 56.) RC-5 provided for a monthly rental rate of $7,400 and an expected return date of October 24, 2017, with overtime rates specified based upon a day, week and month's overtime usage. (Pl. 56.1 ¶¶ 57, 59-60.) RC-5 also provided for a delivery fee of $1,750. (Pl. 56.1 ¶ 61.)

On October 18, 2014, Komatsu delivered EQ-5 to a location designated by Totaline. (Pl. 56.1 ¶ 62.) Pursuant to the KOMTRAX data, EQ-5 was first used on October 18, 2014 and last used on January 10, 2015, when it was picked up by Komatsu.[3] (Pl. 56.1 ¶¶ 63-64.) During this time, Komatsu rendered monthly invoices to

[1] Plaintiff's Rule 56.1 Statement incorrectly states the date of RC-2 as October 1, 2014. (Pl. 56.1 ¶ 21.) However, the rental contract itself contains a date of September 24, 2014, although it does not appear to have been signed for until October 1, 2014. (Gladden Aff., Ex. E.)

[2] Again, Plaintiff's Rule 56.1 Statement appears to have an incorrect date, stating that EQ-2 was first used on August 24, 2014. (Pl. 56.1 ¶ 24.) However, the KOMTRAX data provided states the date of September 24, 2014. (Gladden Aff., Ex. F.)

[3] Plaintiff's Rule 56.1 Statement appears to incorrectly state that EQ-5 was first used on October 17, 2014. (Pl. 56.1 ¶ 63.) However, this seems impossible given that the machine was not delivered until the following day. (Pl. 56.1 ¶ 62) Moreover, the KOMTRAX data demonstrates that EQ-5 was not used until October 18, 2014. (Gladden Aff., Ex. O.)

Totaline, four of which remain unpaid — Invoices R00318, R00382, R00459, R00530 — which pertain to the rental charges incurred for the entire period of time, including insurance and applicable taxes, a pickup fee, excess usage, an overtime charge and a fuel charge. (Pl. 56.1 ¶¶ 65-69.)

IV. Totaline's Failure to Make Required Payments

Komatsu and Totaline were in communication with one another between October 16, 2014 and January 7, 2016, when all communication ceased. **[*10]** (Pl. 56.1 ¶ 70.) However, during the entire business relationship, Totaline was behind on payments, requiring Komatsu to make numerous collection calls to Totaline. (Pl. 56.1 ¶ 71.) On December 12, 2014, Komatsu contacted Bobbi Sina, one of the owners of Totaline, who advised that he would try to make a partial payment to Komatsu before the end of the month and a final payment in January 2015. (Pl. 56.1 ¶ 72.) As of January 8, 2015, Totaline's account was still past due and Totaline was advised, via an email from Komatsu to Totaline's bookkeeper, that a payment of $119,399.14 was required in order to maintain the rental arrangements. (Pl. 56.1 ¶ 73.)

On January 9, 2015, Komatsu emailed Totaline all of the open invoices and a spreadsheet of the account. (Pl. 56.1 ¶ 74.) Despite repeated telephone calls to Totaline, and repeated reassurances of payment by Bobbi Sina, Totaline's account was still past due as of January 27, 2015. (Pl. 56.1 ¶¶ 75-76.) On or about February 28, 2015, Komatsu sent Totaline a Finance Invoice and Statement of Account, demonstrating a balance due of $225,605.89. (Pl. 56.1 ¶ 77.) On or about March 3, 2015, Komatsu sent Defendant Christine Sina a demand letter on **[*11]** the Guaranty, advising that $225,605.89 was due and owing by Totaline, which had to be paid by March 17, 2015 to avoid legal action. (Pl. 56.1 ¶ 78.) Despite these demands, Defendants failed to pay any of the invoices set forth above. (Pl. 56.1 ¶ 80.)

PROCEDURAL HISTORY

I. The Complaint, Third Party Action and Recommendation as to Dismissal Thereof

Komatsu commenced the within diversity action in April 2017 for breach of contract, breach of the Guaranty, and an account stated, seeking $229,110.91 in damages, which represent the unpaid rental charges and late charges. (Pl. 56.1 ¶ 81-83.) Komatsu also seeks attorney's fees, pursuant to the Contract and the Guaranty, in the amount of $20,425. (Pl. 56.1 ¶¶ 84-85.) Totaline answered the Complaint on August 17, 2017 and, on September 22, 2017, filed a Third-Party Complaint against Third-Party Defendant Industrial Water Solutions ("IWS"), alleging four causes of action: (1) indemnification; (2) breach of contract; (3) unjust enrichment; and (4) breach of the covenant of good faith and fair dealing. IWS moved to dismiss the Third-Party Complaint. In a Report and Recommendation dated July 27, 2018, this Court recommended that IWS's motion be granted **[*12]** and that Totaline's Third-Party Complaint be dismissed in its entirety, with prejudice. That Report and Recommendation is currently pending before District Judge Feuerstein.

II. The Present Motion for Summary Judgment

Komatsu now moves for summary judgment, despite the fact that no discovery has been conducted in this action. Totaline opposes the motion, arguing that discovery is necessary to resolve numerous factual issues that exist. Both parties agree that, pursuant to the Contract, Utah law governs this action.

DISCUSSION

I. Legal Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The burden is on the moving party to establish the lack of any factual issues. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The very language of this standard dictates that an otherwise properly supported motion for summary judgment will not be defeated because of the mere existence of some alleged factual dispute between the parties. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Rather, the requirement is that there be no "genuine issue of material fact." Id. at 248.

The inferences to be drawn from the underlying facts are to be viewed in the light most favorable to the non-moving party. **[*13]** See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). When the moving party has carried its burden, the party opposing summary judgment must do more than simply show that "there is some metaphysical doubt as to the material facts." Id. at 586. In addition, the party opposing the motion "may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing there is a genuine issue for trial." Anderson, 477 U.S. at 248.

When considering a motion for summary judgment, the district court "must also be 'mindful of the underlying standards and burdens of proof' . . . because the evidentiary burdens that the respective parties will bear at trial guide the district courts in their determination of summary judgment motions." SEC v. Meltzer, 440 F. Supp. 2d 179, 187 (E.D.N.Y. 2006) (quoting Brady v. Town of Colchester, 863 F.2d 205, 211 (2d Cir. 1988)) (internal citations omitted). "Where the non-moving party would bear the ultimate burden of proof on an issue at trial, the burden on the moving party is satisfied if he can point to an absence of evidence to support an essential element of the non-movant's claim." Meltzer, 440 F. Supp. 2d at 187.

II. Breach of Contract

To succeed on a claim for breach of contract under Utah law, Komatsu must prove the following elements: (1) a contract; (2) that it performed its obligations under the contract; (3) breach of the contract by Totaline; **[*14]** and, (4) damages. See Northern Regal Homes, Inc. v. RoundPoint Mortg. Serv. Corp., No. 1:15-CV-0035, 2016 U.S. Dist. LEXIS 178980, 2016 WL 7441634, at *3 (D. Utah Dec. 27, 2016) (citing Bair v. Axiom Design, LLC, 2001 UT 20, 20 P.3d 388, 392 (Utah 2001)). There is no dispute here that a contract existed between the parties, Komatsu performed its obligations by renting the heavy machinery to Totaline, and that Totaline failed to pay numerous invoices rendered by Komatsu for the use of that machinery, which resulted in damages to Komatsu. Rather, in an attempt to avoid the imposition of liability in what appears to be a clear breach of contract, Totaline posits several arguments as to why it should not be held liable: (1) it was not Totaline's obligation to pay the invoices, but rather the obligation belonged to the general contractor on the project, PATE Environmental Technology Ventures Operating Inc. ("PATE Operating"); (2) the invoices rendered by Komatsu constitute modifications of the underlying Contract; (3) venue is not proper here; and, (4) the KOMTRAX data is inadmissible to establish damages.

A. The Obligation to Pay the Invoices

In its opposition to the within motion, Totaline argues that at some point during the construction project, it was agreed that PATE Operating would assume responsibility for the payments owed **[*15]** to Komatsu. (Def. Mem. of Law in Opp'n 4; Sina Aff. ¶ 10.) While Totaline attaches as an exhibit emails it exchanged with PATE Operating that it claims support this point, a review of the emails does not find any promise on PATE Operating's part to take over Totaline's payment obligations for the equipment rented. Moreover, for any such purported promise to be legally binding, and to void Totaline's payment obligation, Totaline would have to prove, or at the very least raise an issue of fact, that it assigned its rights and obligations under the Contract to PATE Operating, and that Komatsu consented to such an assignment. See Tech Ctr. 2000, LLC v. Zrii, LLC, 2015 UT App 281, 363 P.3d 566, 571 (Utah Ct. App. 2015) ("A valid modification of a contract . . . requires a meeting of the minds of the parties . . . ."). Totaline has failed to submit any evidence from which the Court could find that a genuine issue of material fact exists to support a claim that PATE Operating was actually responsible for the payments owed to Komatsu. Accordingly, the Court finds this argument to be insufficient to defeat Komatsu's motion for summary judgment.

B. The Invoices Modified the Terms of the Contract

Next, Totaline argues that each time Komatsu rendered an invoice, it voided and modified **[*16]** the terms of the original Contract. According to Totaline, the terms and conditions listed on each of the invoices are inconsistent with the Contract's terms, thereby creating a new contract every time an invoice was rendered. (Def. Mem. of Law in Opp'n 11-15.) This argument is simply illogical.

The Contract initially entered into by the parties states, under the heading "Entire Agreement," in clear and express language, that "[t]he terms of this Agreement will not be waived, altered, modified, amended, supplemented or terminated in any manner whatsoever except by a written instrument signed by Komatsu Equipment." (Gladden Reply Aff., Ex. W at 2.) In addition, each of the invoices rendered to Totaline states, under the heading "General," that "Komatsu Equipment Company (the "Company") sales transactions are based on these terms, and (i) this document, together with any additional writings signed by the Company, represent a final, complete and exclusive statement of the Agreement between the parties . . . ." (Sina Aff., Ex. C (emphasis added).) It is clear that the terms and conditions listed on the invoices expressly incorporate the underlying Contract, rather than void or modify it. **[*17]** Contrary to Totaline's assertions, there is nothing ambiguous about the language contained in either the invoices or the Contract.

Moreover, in order to modify a contract under Utah law, there must be mutual assent, "which must be spelled

out, either expressly or impliedly, with sufficient definiteness." Tech Ctr., 363 P.3d at 571 (citing Richard Barton Enters., Inc. v. Tsern, 928 P.2d 368, 373 (Utah 1996)). "The party claiming the modification bears the burden of showing that a meeting of the minds occurred." Tech Ctr., 363 P.3d at 571 (citing Richard Barton Enters., 928 P.2d at 373). Totaline has wholly failed to meet this burden. It offers nothing from which the Court can find that Komatsu agreed to modify the Contract. Rather, it is clear from the facts and evidence presented that the invoices rendered to Totaline were intended to be statements of amounts due and owing under the original Contract executed by the parties. Nothing in the record supports a finding that the invoices represent new contracts entered into by the parties. Totaline's arguments to the contrary are nothing more than smoke and mirrors in an attempt to misdirect the Court from the obvious determination here that Totaline breached its contract with Komatsu.

C. Venue

Totaline argues that venue is not proper here because the terms and conditions listed on the invoices state **[*18]** that "if legal action is brought to enforce this Agreement, . . . Salt Lake County, Utah, shall be the exclusive jurisdiction and legal venue for said action." (Sina Aff., Ex. C.) However, the Contract states that jurisdiction and venue is within Komatsu's "sole discretion," which shall include Utah. (Gladden Reply Aff., Ex. W at 1.) Even if the Court were to find these venue provisions inconsistent or were to agree with Totaline that Utah is the proper venue for this action under the terms of the Contract, improper venue is a defense that "is waived if it is not raised in a 12(b) motion [or] in a responsive pleading . . . ." Miller v. Batesville Casket Co., 219 F.R.D. 56, 58 (E.D.N.Y. 2003) (citing cases); see also Fed. R. Civ. P. 12(h)(1). Since Totaline did not object to venue in its Answer, it has waived its right to do so.

D. The KOMTRAX Data

Totaline's final argument with respect to Komatsu's breach of contract claim is that the KOMTRAX data pertaining to damages is inadmissible because it is scientific or technical evidence that has not been validated or explained by an expert report. (Def. Mem. of Law in Opp'n at 8-9.) Totaline seems to confuse the Court's role on a motion for summary judgment. It is not the Court's duty at this point to "weigh the evidence and determine **[*19]** the truth of the matter." Anderson, 477 U.S. at 249. Rather, the Court's function is solely to "determine whether there is a genuine issue for trial" in that "there is sufficient evidence favoring [Totaline] for a jury to return a verdict" in its favor. Id.

As set forth above, Totaline failed to provide a counter-statement of material facts as required by Local Civil Rule 56.1. As a result, all of the facts contained in Komatsu's Rule 56.1 Statement have been deemed admitted, including those pertaining to the KOMTRAX data. Nor has Totaline offered any other evidence, other than sheer speculation, to create a genuine issue of fact with respect to the KOMTRAX data and how Komatsu has calculated its damages. Accordingly, this argument is insufficient to defeat Komatsu's motion for summary judgment.

Based on the foregoing, this Court respectfully recommends that Komatsu's motion for summary judgment be granted with respect to its breach of contract claim.

III. Breach of the Guaranty

Under Utah law, the elements of a breach of a guaranty are the same as for a breach of contract: (1) a contract; (2) performance by the party seeking recovery; (3) a breach by the other party; and, (4) damages. See Best Vinyl, LLC v. Homeland Vinyl Prods., Inc., No. 2:10-cv-1158, 2012 U.S. Dist. LEXIS 164282, 2012 WL 5844906, at *2 (D. Utah 2012) **[*20]** (citing Bair, 20 P.3d at 392). Komatsu moves for summary judgment with respect to Defendant Christine Sina's breach of the Guaranty on the same grounds as its breach of contract claim.

In what appears to be a blatant misrepresentation to the Court, Totaline opposes the motion on the grounds that the Guaranty is invalid because Sina never signed it. (Def. Mem. of Law in Opp'n 9-10; Sina Aff. ¶ 7.) While Komatsu's counsel admits in his reply affirmation that an unsigned copy of the parties' Contract and the Guaranty was inadvertently attached as an exhibit to Komatsu's moving papers, he further states that upon realizing his mistake, he immediately emailed Totaline's counsel advising them of the error and attaching the signed copy of the parties' Contract and the Guaranty. (Fass Reply Aff. ¶¶ 3-5.) Komatsu's counsel further advised counsel for Totaline that it would not object to Totaline submitting a supplemental affidavit to correct the argument posited in its opposition papers. (Id. ¶ 5; Fass Reply Aff., Ex. Y.) To date, Totaline has not submitted any supplemental affidavit, nor has it sought to withdraw that portion of its opposition that asserts the Guaranty is invalid, instead choosing **[*21]** to perpetuate an argument it knows to be false. In addition, Defendant

Sina has submitted an affidavit, under penalty of perjury, affirming that she did not sign the Guaranty. (Sina Aff. ¶ 7.) No attempt to withdraw that affidavit has been made either.

For the same reasons set forth above in connection with Komatsu's breach of contract claim, this Court respectfully recommends that Komatsu is entitled to summary judgment on its breach of the Guaranty claim as well. It is clear from the evidence submitted that Sina executed the Guaranty in connection with Totaline's contract with Komatsu. Komatsu performed its obligations by extending credit to Totaline and renting the heavy equipment requested. Sina breached the Guaranty by failing to pay Totaline's outstanding payment obligations, despite demand for her to do so, resulting in damages to Komatsu. (Gladden Aff., Ex. S.) Totaline offers no other reasons why summary judgment is inappropriate here other than its dishonest claim that the Guaranty is invalid because it is unsigned, which is wholly belied by the documentary evidence submitted.

IV. Account Stated

Under Utah law, "the essential elements of an account stated include previous transactions **[*22]** between the parties giving rise to an indebtedness from one to another, an agreement between the parties as to the amount due and the correctness of that amount, and an express or implied promise by the debtor to pay the creditor the amount owing." UBS Bank USA v. Mullins, No. 2:08-CV-814, 2011 U.S. Dist. LEXIS 77889, 2011 WL 2912805, at *5 (D. Utah July 18, 2018) (quoting DeMentas v. Estate of Tallas, 764 P.2d 628, 634 (Utah Ct. App. 1988)). "A party who receives an account is bound to examine it, and if that party admits that the account is correct, it becomes a stated account binding on both parties." Lantec, Inc. v. Novell, Inc., No. 2:95-CV-97, 2001 U.S. Dist. LEXIS 7911, 2001 WL 1916256, at *9 (D. Utah May 8, 2001) (citation omitted). "Express assent to the account is not necessary; assent may be inferred by silence when an account rendered remains unquestioned a reasonable time after receipt." Lantec, 2001 U.S. Dist. LEXIS 7911, 2001 WL 1916256, at *9 (citing In re Rockefeller Ctr. Properties, 241 B.R. 804 (Bankr. S.D.N.Y. 1999) and Hurd v. Central Water Co., 99 Utah 355, 106 P.2d 775, 777 (Utah 1940)).

Here, the undisputed evidence demonstrates that Komatsu and Totaline entered into the Contract by which Komatsu would rent heavy machinery to Totaline, for which Totaline owed Komatsu payment. Komatsu repeatedly rendered invoices to Totaline demonstrating the amounts due and owing, to which Totaline never objected. Pursuant to the terms of the Contract, Totaline was required to notify Komatsu, in writing within sixty days, if it disputed any of the invoices rendered. (Gladden Reply **[*23]** Aff., Ex. W ¶ 16.) Any dispute not brought to Komatsu's attention within that sixty-day period was "expressly waived." (Id.) Komatsu has tendered evidence demonstrating that Totaline never objected to any of the invoices it received. Totaline has failed to offer any evidence to rebut this finding. Moreover, the evidence demonstrates that Totaline made several payments to Komatsu prior to ceasing all payments whatsoever and that representatives of Totaline promised to make payments to Komatsu on several occasions. (Gladden Aff., Exs. Q, T.) Accordingly, there is no genuine issue of fact with respect to Komatsu's claim for an account stated. Totaline's arguments to the contrary, which are largely the same as those set forth above concerning modifications to the Conract, are without merit.

For the foregoing reasons, the Court respectfully recommends that Komatsu's motion for summary judgment with respect to its claim for an account stated be granted.

V. Attorney's Fees

Komatsu also seeks an award of its reasonable attorney's fees in connection with this action. Pursuant to the Contract, "[i]t is agreed that on any account placed in the hands of an attorney for collection or if collected **[*24]** through suit, probate, bankruptcy proceeding or by collection agency, there will be paid, in addition to all other charges, the actual collection and attorney['s] fees and court costs incurred in collecting said account." (Gladden Reply Aff., Ex. W ¶ 2.) In addition, the Guaranty provides that Sina will be liable "for all indebtedness, ***leases*** and obligations of [Totaline] to Komatsu ***Equipment*** Company, including interest, service charges, attorney['s] fees, and collection costs, now existing or hereafter arising pursuant to the [Contract]." (Gladden Reply Aff., Ex. W at 2.) Based on these two provisions, Komatsu seeks attorney's fees in the amount of $20,425, the actual amount of fees and costs incurred, which Komatsu asserts are reasonable. (Fass Aff. ¶¶ 14-15.) Totaline does not dispute that the Contract and the Guaranty provide for attorney's fees, but objects only to state that the Court must engage in a more detailed analysis of whether Komatsu's requested fees are reasonable. (Def. Mem. of Law in Opp'n 15 n.6.)

"[U]nder Erie principles, attorney's fees are considered substantive and are controlled by state law in diversity

cases." Vista Outdoor Inc. v. Reeves Family Trust, No. 16 Civ. 5766, 2018 U.S. Dist. LEXIS 102224, 2018 WL 3104631, at *2 n.1 (S.D.N.Y. May 24, 2018) (quoting Antidote Int'l Films, Inc. v. Bloomsbury Publ'g, PLC, 496 F. Supp. 2d 362, 364 (S.D.N.Y. 2007)) (alteration in original); see also Grand Union Co. v. Cord Meyer Dev. Co., 761 F.2d 141, 147 (2d Cir. 1985) **[*25]** ("The awarding of attorneys' fees in diversity cases . . . is governed by state law."). Accordingly, Utah law applies to Komatsu's request for attorney's fees.

"In Utah, attorney['s] fees are awardable only if authorized by statute or contract." Global Fitness Holdings, LLC v. Federal Recovery Acceptance, Inc., No. 2:13-cv-0204, 2017 U.S. Dist. LEXIS 123490, 2017 WL 3382066, at *4 (D. Utah Aug. 4, 2017) (quoting R.T. Nielson Co. v. Cook, 2002 UT 11, 40 P.3d 1119, 1125 (Utah 2002)) (alteration in original). Where, as here, attorney's fees are awarded pursuant to a contract, "a trial court does not possess the same degree of equitable discretion to deny such fees as it has when applying a statute providing for a discretionary award." Wells Fargo Bank v. M.T.G. Props., LLC, No. 2:14-CV-570, 2015 U.S. Dist. LEXIS 168392, 2015 WL 9165900, at *4 (D. Utah Dec. 16, 2015) (quoting U.S. for Use of C.J.C., Inc. v. W. States Mech. Contractors, Inc., 834 F.2d 1533, 1549 (10th Cir. 1987)); see also Bank of the West v. Milennia Inv. Corp., No. 2:11-CV-465, 2012 U.S. Dist. LEXIS 83705, 2012 WL 2256926, at *2 (D. Utah June 15, 2012) ("Attorney's fees awarded pursuant to a contract should not be given scrutiny to the same degree as fees awarded in a statutory context, but should be awarded consistent with the contractual purpose of giving the parties the benefit of their bargain."). Rather, "[i]f the legal right to attorney['s] fees is established by contract, Utah law clearly requires the court to apply the contractual attorney['s] fee provision and to do so strictly in accordance with the **[*26]** contract's terms." Global Fitness, 2017 U.S. Dist. LEXIS 123490, 2017 WL 3382066, at *4 (quoting Foote v. Clark, 962 P.2d 52, 54-55 (Utah 1998)) (alteration in original).

Nevertheless, a court may reduce the contractual attorney's fees claimed if such an award would be "inequitable or unreasonable." U.S. for Use of C.J.C., 834 F.2d at 1548. If it so finds, a court "has discretion to deny or reduce the fee award." Federal Deposit Ins. Corp. v. Heaton, No. 2:13-CV-219, 2014 U.S. Dist. LEXIS 128834, 2014 WL 4415936, at *1 (D. Utah Sept. 8, 2014) (quoting U.S. for Use of C.J.C., 834 F.2d at 1549). "However, the trial court is not responsible for independently calculating a 'reasonable' fee." Heaton, 2014 U.S. Dist. LEXIS 128834, 2014 WL 4415936, at *1 (quoting U.S. for Use of C.J.C., 834 F.2d at 1549).

Under Utah law, the Court considers the following factors in determining whether the requested attorney's fees are reasonable: "(1) What legal work was actually done? (2) How much of the work performed was reasonably necessary to adequately prosecute the matter? (3) Is the attorney's billing rate consistent with the rate customarily charged in the locality for similar services? (4) Are there circumstances which require consideration of additional factors?" Bank of the West, 2012 U.S. Dist. LEXIS 83705, 2012 WL 2256926, at *2 (citing Dixie State Bank v. Bracken, 764 P.2d 985, 990 (Utah 1988)). Here, counsel for Komatsu spent forty-three hours in connection with this action, performing numerous tasks necessary for the prosecution of this matter, at a rate of $475 per hour. (Fass Aff. ¶¶ 13-14.) Applying the factors set forth above, this Court finds the time expended and the hourly **[*27]** rate charged to be reasonable, and finds no basis to reduce the attorney's fees requested by Komatsu. Accordingly, the Court respectfully recommends that Komatsu's motion with respect to its request for attorney's fees be granted and that Komatsu be awarded $20,425 in attorney's fees.

RECOMMENDATION

For the foregoing reasons, the Court respectfully recommends that Plaintiff's motion for summary judgment, appearing at Docket Entry 28 herein, be GRANTED in its entirety and that Plaintiff be awarded damages in the amount of $229,110.91, as well as attorney's fees in the amount of $20,425, for a total award of $249,535.91.

OBJECTIONS

A copy of this Report and Recommendation is being provided to all counsel via ECF. Any written objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of filing of this report. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 72(b). Any requests for an extension of time for filing objections must be directed to the District Judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. Failure to file objections within fourteen (14) days will preclude further review of this report and recommendation either by **[*28]** the District Court or Court of Appeals. Thomas v. Arn, 474 U.S. 140, 145, 106 S. Ct. 466, 88 L. Ed. 2d

435 (1985) ("[A] party shall file objections with the district court or else waive right to appeal."); Caidor v. Onondaga Cnty., 517 F.3d 601, 604 (2d Cir. 2008) ("[F]ailure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision").

SO ORDERED:

Dated: Central Islip, New York

August 8, 2018

/s/ Anne. Y. Shield

ANNE Y. SHIELDS

United States Magistrate Judge

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