2012 IL App (2d) 111308-U
No. 2-11-1308
Order filed October 22, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MULLER-PINEHURST DAIRY, INC., Successor to Hawthorn Mellody, Inc.,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 09-L-65
CHARLES K. IZZO, d/b/a P & M Dairy,	)	Honorable John T. Elsner,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's order granting summary judgment in plaintiff's favor is reversed and the cause is remanded.

¶ 2 Plaintiff, Muller-Pinehurst Dairy, Inc., sued defendant, Charles K. Izzo, for breach of an alleged oral contract. In an amended complaint, plaintiff specified that it was suing as the successor to Hawthorn Mellody, Inc. Further, defendant was sued in a personal capacity as having done business as P & M Dairy. The parties filed cross-motions for summary judgment; the trial court denied defendant's motion, but granted plaintiff's motion. Defendant does not appeal the court's

denial of his summary judgment motion. He does, however, appeal the court's order granting plaintiff summary judgment, arguing that genuine issues of material fact regarding plaintiff's standing, the proper party defendant, the terms of the alleged oral contract, and the amount of alleged damages require reversal. We agree that there are questions of fact regarding Muller-Pinehurst's standing, whether defendant acted in a personal capacity, and as to damages. Accordingly, we reverse.[1]

¶ 3 I. BACKGROUND

¶ 4 A. Complaint Allegations

¶ 5 The original plaintiff of the complaint at issue was Hawthorn Mellody, Inc., an Illinois corporation. In an amended complaint, the plaintiff was identified as Muller-Pinehurst Dairy, Inc., an Illinois corporation, successor to Hawthorn Mellody, Inc. The amended complaint alleged that defendant, Charles Izzo, is an individual doing business as P & M Dairy.

¶ 6 In addition, the amended complaint alleged that, prior to November 2002, defendant and Hawthorn Mellody, Inc. entered into an oral agreement whereby Hawthorn Mellody, Inc. agreed to provide defendant with milk products and defendant agreed to pay for those products. In November 2002, after Hawthorn Mellody, Inc. allegedly became a subsidiary of Prairie Farms Dairy, Inc., "the

[1]The entities involved in this case have similar names and complicated relationships. We strive in this decision to be as specific as possible regarding the entity that is the subject of testimony or evidence, particularly given that the proper identities of the plaintiff and defendant are at issue. Unfortunately, the record is often unclear, resulting, at times, in our being unable to more specifically identify which entity is involved without inserting our own speculation or supposition. Accordingly, we regret that there may be instances where the identity of the subject is unclear.

parties" agreed to continue their oral agreement as before. Plaintiff alleged that it continued to invoice defendant for dairy products. The invoices attached to the complaint were addressed to "P&M Dairy" from "Hawthorn Mellody."

¶ 7 The complaint further alleged that plaintiff performed as required under the oral agreement but that, since February 2006, defendant has only partially paid on outstanding invoices. According to the complaint, as of November 26, 2008, defendant owed $493,830.44 for dairy products and, despite due demand, had refused to pay that amount to plaintiff.

¶ 8 Defendant's answer admitted only that he is an individual. It denied all other complaint allegations, and pleaded various affirmative defenses, including that: (1) Muller-Pinehurst Dairy, Inc. is not the successor to Hawthorn Mellody, Inc.; and (2) Hawthorn Mellody, Inc. is not, and has never been, a subsidiary of Prairie Farms Dairy, Inc. The affirmative defenses were ultimately stricken for lacking specific facts; defendant was granted leave to file amended affirmative defenses, but did not do so.

¶ 9 B. Evidence Submitted at Summary Judgment

¶ 10 Joseph McMahon testified that, in 1997, he founded Hawthorn Mellody, Inc., a company in the milk and dairy product distribution business. McMahon served as Hawthorn Mellody, Inc.'s president, sole director, and sole shareholder. Hawthorn Mellody, Inc. conducted its operations from a building located at 4201 West Chicago Avenue.

¶ 11 Defendant testified that, in 1998, he formed P & M Distributors, Inc., which supplies dairy products to schools, institutions, stores, and restaurants. In the articles of incorporation, defendant was listed as P & M Distributors, Inc.'s secretary and treasurer, and his sons, Patrick and Michael, served as its president and vice president, respectively. McMahon testified that Hawthorn Mellody,

Inc. had a supplier-customer relationship with either defendant or his corporation. "So Hawthorn Mellody [Inc.] would supply milk to Charles Izzo's company, and Charles Izzo's company would sell it to customers, and then pay Hawthorn Mellody for the milk?" McMahon answered, "correct." Defendant and/or P & M Distributors, Inc. operated out of the same building as Hawthorn Mellody, Inc. When McMahon was asked whether Hawthorn Mellody, Inc.'s relationship with defendant was in defendant's personal capacity or with a corporation that defendant owned, McMahon replied, "I don't know."[2]

¶ 12 On November 1, 2002, Prairie Farms Dairy, Inc., and Hawthorn Mellody, Inc. entered into an asset purchase agreement. According to McMahon, he sold the "business" and the trade name "Hawthorn Mellody." McMahon did *not* sell any of Hawthorn Mellody, Inc.'s stock, and he remains the president and secretary of that entity. McMahon testified that Hawthorn Mellody, Inc. continues to exist as an inactive corporation, and that it stopped conducting business on November 1, 2002. Defense counsel confirmed with McMahon, "so this is a case where you are just keeping Hawthorn Mellody, [Inc.] as an in[-]good[-]standing corporation, but it's not [since 2002] conducting, actively conducting any business?" McMahon agreed. McMahon explained that, after the sale of the Hawthorn Mellody trade name, Hawthorn Mellody, LLC, which is owned by Prairie Farms Dairy, was formed; McMahon became an employee and manager of Hawthorn Mellody, LLC. McMahon, who has no ownership interest in Hawthorn Mellody, LLC, draws his salary from Prairie Farms Dairy. Accordingly, plaintiff's counsel interjected during McMahon's deposition, "[it] looks like we are going to be substituting a party Plaintiff." Plaintiff's counsel later reiterated, "I want to make

[2]McMahon and Izzo were related as brothers-in-law. Izzo was married to McMahon's sister until she passed away.

it clear that we are going to have to substitute the plaintiff. I mean *** I think it's clear by his testimony *** that Hawthorn Mellody, LLC after November of 2002 is the proper party Plaintiff. *** We are going to have to substitute."

¶ 13 Thereafter, the complaint was amended; however, Hawthorn Mellody, LLC was *not* added as the party plaintiff. Rather, the plaintiff was now identified as "Muller-Pinehurst Dairy, Inc., an Illinois corporation, successor to Hawthorn Mellody, Inc." In response to the amendment, defendant requested the production of all documents that supported the contentions in paragraphs 1and 3 of the amended complaint that: (1) Muller-Pinehurst is the successor to Hawthorn Mellody, Inc.; and (2) Hawthorn Mellody, Inc. became a subsidiary of Prairie Farms Dairy, Inc. The documents produced that relate to the sale of Hawthorn Mellody, Inc.'s assets reflect as follows:

- A November 1, 2002, document entitled "Closing Agreement" reflects that Hawthorn Mellody, Inc., sold to Prairie Farms Dairy assets and the trademark name Hawthorn Mellody. Prairie Farms was one of two members (the other being "Prairie Farms Dairy, Supply") that formed Hawmell, LLC, and the agreement stated that Hawmell, LLC wished to change its name to Hawthorn Mellody, LLC. Accordingly, the agreement provided that Hawthorn Mellody, Inc. would, by November 10, 2002, file with the Secretary of State a name change "not confusingly similar to Hawthorn Mellody."[3]

- The produced trademark assignment provides that Hawthorn Mellody, Inc. assigned its right, title, and interest in and to the trademark " 'Hawthorn Mellody' in all iterations and forms of use" to Prairie Farms Dairy and Hawmell, LLC.

[3]Apparently, this was not done.

- The asset purchase agreement provides that "certain assets" would be sold and purchased, specified as "vehicles, equipment and business records, intellectual property including trademarks and customer lists, sales records for preceding two years, described in Exhibit A, defined hereafter as 'Assets.'" Exhibit A, entitled "Fixed Assets" includes office equipment and computers, coolers, milk dispensers and cabinets, and 23 vehicles.

- The asset purchase agreement included as subsection entitled "Accounts Receiveable," wherein Prairie Farms agreed to utilize its best efforts for 90 days following the transaction to collect receivables on Hawthorn Mellody, Inc.'s behalf. Thereafter, however, Prairie Farms agreed to assume full responsibility to collect its own outstanding receivables.

¶ 14 The produced documents further reflect that a second sales transaction occurred in 2008. Specifically, on March 1, 2008, Hawmell, LLC, sold certain assets to Muller-Pinehurst Dairy, Inc. The asset purchase agreement provided that "certain assets" used in the operation of a milk and dairy product distribution business were the subject of the sale. It provided that Hawmell, LLC was selling "only the distribution business assets, which are more specifically described in Exhibit A (collectively, the "Assets"). Exhibit A to the asset purchase agreement defined the assets as: (1) "business literature, information, and records owned by seller relating only to the distribution business from Hawmell, LLC's Chicago location, including customer lists and records;" (2) marketing rights, records and information relating only to the distribution business from Hawmell, LLC's Chicago location; and (3) business vehicles. The asset purchase agreement did not specifically list contracts as assets. Moreover, unlike the 2002 transaction, the 2008 asset purchase agreement did not have an "accounts receivable" subsection. Further, the 2008 asset purchase

agreement does not mention Prairie Farms Dairy or Hawthorn Mellody, LLC (or Hawthorn Mellody, Inc.). After the sale, on March 13, 2008, Prairie Farms Dairy and Prairie Farms Dairy, Supply (again, the two members that formed Hawmell, LLC) dissolved Hawmell, LLC.

¶ 15 Neal Rosinsky, CEO at Muller-Pinehurst Dairy, testified in his deposition that Muller-Pinehurst is a joint venture of Prairie Farms, that, in the 1980s, Prairie Farms Dairy purchased stock from Muller-Pinehurst, and he agreed that, currently, "Muller-Pinehurst owns Hawthorn Mellody, LLC, and Muller Pinehurst, in turn, is owned 50 percent—its stock is owned 50 percent by Prairie Farms." He agreed that Muller-Pinehurst paid money to Prairie Farms, the "then-owner of Hawthorn Mellody, LLC," to acquire Hawthorn Mellody, LLC. Muller-Pinehurst sells directly to its own customers and does not sell through Prairie Farms.

¶ 16 Returning to McMahon's testimony concerning the events that occurred following the 2002 sales transaction, McMahon explained that, in his new role with Hawthorn Mellody, LLC, he continued to service those customers he had served through Hawthorn Mellody, Inc. In that regard, McMahon testified that, in November 2002, after Hawthorn Mellody, LLC was formed, he met with defendant and Bill Wilberding (of Prairie Farms) at Hawthorn Mellody, LLC's offices at either 4043 or 4135 West 52nd Place. There, the three men entered into the oral agreement alleged in the amended complaint; specifically, they discussed "terms and office use and price list." When pressed to explain what each person said in the meeting, McMahon stated that, by "terms," he meant terms for payment and that they discussed "terms, price list[,] and office parking for the trucks."

¶ 17 When McMahon was asked whether, at the November 2002 meeting where the oral agreement allegedly was formed, defendant participated as an individual, or whether defendant was there on behalf of his corporation, P & M Distributors, Inc., McMahon stated that he did not know.

McMahon testified that he has heard of a company by the name of P & M Distributors, Inc., but that he did not know defendant's full relationship with that company. According to McMahon, at the 2002 meeting, defendant did not state whether he was appearing as an officer or representative of a corporation, nor did he present a business card showing himself to be the president of a corporation.

¶ 18 Finally, McMahon testified that it was his understanding that the purpose of the 2002 meeting and the oral agreement was to substitute Hawthorn Mellody, LLC for Hawthorn Mellody, Inc. in the business relationship that already existed, prior to November 2002, with defendant and/or defendant's company. After November 2002, McMahon had no role in the business relationship between Hawthorn Mellody, LLC, and either defendant or P & M Distributors, Inc. However, McMahon stated that he saw milk being loaded onto trucks and, so, he claimed personal knowledge that, after November 2002, milk was sold by Hawthorn Mellody, LLC to either defendant or P & M Distributors, Inc. He estimated that, on a weekly basis, defendant purchased from Hawthorn Mellody, LLC approximately $25,000 worth of milk products. McMahon had no knowledge regarding whether defendant or P & M Distributors, Inc. owed money to Hawthorn Mellody, LLC, although he was aware, generally, that there was an alleged indebtedness that formed the basis of the litigation.

¶ 19 Defendant testified that he is the sole shareholder of P & M Distributors, Inc. From 1998 to 2007, P & M Distributors, Inc. purchased milk and dairy products from "Hawthorn Mellody" and then redistributed them. Defendant testified that "P & M Dairy" is a name by which many customers know P & M Distributors, Inc., but that it was not the official corporate name. To the extent defendant references "P & M Dairy," he means P & M Distributors, Inc. "It was just easier for

[customers] when they would call and order in, you know, saying I'm calling my order in for P & M Dairy." Defendant testified that, since 1998, he has not done business under any name other than P & M Distributors, Inc. Further, defendant explained that "P & M Dairy Distribution, Inc.," is another name for P & M Distributors, Inc. Defendant testified that the P & M Dairy Distribution, Inc. and P & M Distributors, Inc. share a federal tax identification number, conduct the same business, and share the same bank account; however, P & M Distributors, Inc. is an Illinois corporation, whereas P & M Dairy Distribution, Inc. is not. Indeed, various bank records, all showing the same account number, reflect that the account was tied: (1) on one document, to P & M Dairy Distribution, Inc.; (2) on another document, P & M Distributors, Inc.; and (3) on a corporate authorization resolution form, it was represented that P & M Distributors, Inc. engaged in business under the trade name of P & M Dairy. Defendant explained that, at one point, P & M Dairy was added to the bank account to make cashing checks easier when customers wrote their checks to P & M Dairy. The checks in the record that were signed by defendant and written out to Hawthorn Mellody are issued from the account of P & M Dairy Distribution, Inc.

¶ 20 Defendant testified that he did not personally represent himself as doing business as P & M Dairy, although his corporation did to customers for the sake of brevity. Defendant's business cards reflected the name P & M Dairy, showing an address of 4135 West 52nd Place (defendant's business was located in the same building as Hawthorn Mellody). While defendant did not have business cards for P & M Distributors, Inc., photographs in the record reflect that the name "P & M Distributors" appears on the side of defendant's company's trucks. Finally, copies of invoices issued to clients identified the biller as P & M Dairy, with an address of 4043 West 52nd Place. Defendant

explained that the different address reflected that, when Hawthorn Mellody moved its offices in 2004, defendant's company moved with it.

¶ 21 Defendant agreed that, prior to November 2002, there was an oral agreement between Hawthorn Mellody, Inc., and his business. He agreed that there was no written agreement that formalized the milk delivery and pricing, but that, over the course of the relationship, Hawthorn Mellody issued invoices and defendant paid them. Specifically, defendant and/or his company would place an order with Hawthorn Mellody, Inc., Hawthorn Mellody would then produce a weekly invoice, and defendant would pay the full invoice amount on a weekly basis (although the weekly invoice might not get paid in the same week in which it was issued). Defendant testified that McMahon knew that defendant's business was P & M Distributors, Inc., and cited as an example the fact that he had once issued a bid, in the name of P & M Distributors, Inc., for work in Cook County. McMahon became upset and exchanged words with defendant because McMahon's brother delivered milk in the area where P & M Distributors, Inc. had offered a bid.

¶ 22 Defendant recalled that, in 2001 or 2002, Hawthorn Mellody, Inc., sold its business to Prairie Farms. He agreed that, after Prairie Farms acquired Hawthorn Mellody, there was no change in the business relationship between his company and Hawthorn Mellody. However, defendant denied being present at a 2002 meeting where an oral agreement, as alleged in the complaint, was created. Specifically, defendant was asked:

> "PLAINTIFF'S COUNSEL: Do you recall Joe and Bill Wilberding talking about a meeting with you in 2002?
>
> DEFENDANT: Yes.
>
> PLAINTIFF'S COUNSEL: And were you present for that meeting?

DEFENDANT: No.

PLAINTIFF'S COUNSEL: Was there ever a meeting between you, Joe, and Bill?

DEFENDANT: Not for the three of us, between the three of us, no."

Defendant testified that he did not meet Wilberding until 2005 or 2006. At that time, he met with Wilberding because "we wanted to get a better price on our products, and they wanted us to start making extra payments." Defendant's son, Patrick, was also present for that meeting; McMahon was not present. Defendant testified that, in 2005 and 2006, his company was behind in its payments to Hawthorn Mellody, but he did not recall how far behind. Defendant testified that he agreed to make extra payments in the amount of $1,250 per week to catch up.

¶ 23 Defendant stopped doing business with Hawthorn Mellody in approximately late September or the first week of October 2007. At that time, January through October 2007, he was ordering approximately $25,000 to $32,000 worth of products per week. For approximately one year after his business with Hawthorn Mellody ceased, defendant continued making weekly $1,250 payments. In 2008, defendant stopped making payments because "I thought I was paid up. I never got a statement, kept requesting one, never received one." Defendant testified that, prior to the filing of the lawsuit, he never received a demand for payment or was contacted by anyone at Hawthorn Mellody or any of its related entities for any unpaid balance. After the lawsuit was filed, defendant and Patrick conducted an analysis and concluded that all amounts due to Hawthorn Mellody had been fully paid. Defendant explained that his company performed cartage services for Hawthorn Mellody, whereby it would deliver products to Hawthorn Mellody's clients on Hawthorn Mellody's behalf. However, defendant recalled that Patrick, when reviewing the account summaries attached to the complaint, noticed that Hawthorn Mellody did not properly credit defendant's accounts for

the cartage services performed and that there were other discrepancies, including shortages. Defendant testified that the claim that he owed around $490,000 is necessarily erroneous because it suggests that his company did not pay an invoice for six months. Defendant did not know if anyone other than he and Patrick (such as an accountant) performed any type of assessment to analyze (on defendant's behalf) the alleged amount owed.

¶ 24 Patrick Izzo recalled that, at the time that P & M Distributors, Inc., ceased doing business with Hawthorn Mellody, it was ordering approximately $30,000 worth of products per week. Patrick recalled that, in 2006 or 2007, he was present at a meeting with Wilberding about a check that bounced. The check represented a weekly payment and was likely around $30,000. Patrick believed that, in addition to himself and Wilberding, defendant was present at the meeting, which took place at either 4043 or 4135 West 52nd Place. The parties agreed that, with respect to the bounced check, an extra $1,250 payment would be added to the weekly bill to make up the balance. Accordingly, Patrick testified that, even after the business relationship ceased, P & M continued to make payments of $5,000 per month until it received a reconciliation statement of what was owed and with which it disagreed. Patrick testified that the "terms" were that they would pay weekly, but that the practice was that each weekly statement would be paid one at a time. Therefore, when the business relationship ended, Patrick knew that there were probably a couple of unpaid statements, but he anticipated that the correct amount owed would equal two or three weekly invoices, which would be around $60,000 to $90,000, and they had paid $5,000 per month to make up that balance.

¶ 25 With respect to the amount of money owed, plaintiff, in its summary judgment motion, attached an affidavit from Judy Rosinsky, plaintiff's credit manager. Rosinsky attested that, in 2007, "Muller-Pinehurst Dairy, Inc. purchased Hawthorn Mellody, Inc." She attested that, as credit

manager, she was familiar with the books and records of Muller-Pinehurst Dairy and Hawthorn Mellody, and that she "participated in the preparation of invoices, statements, and other accounting documents used to monitor the account of defendant as well as the payments that were made by him." Rosinksy attested that attached to the complaint were true and accurate account summary statements for defendant showing: (1) the purchases he made from June 18, to October 5, 2007; and (2) the payments he made to plaintiff from June 18, 2007 to November 12, 2008, as well as three additional payments on December 9, 2008, December 23, 2008, and January 13, 2009. Rosinsky attested that she reviewed the copies of checks that defendant produced, conducted a full accounting of the amount due and owing, the payments made, and the amount of set-offs and credits that defendant was entitled to receive, and that she "determined that the payment records of defendant reconcile with the payments that plaintiff has credited to defendant's account in arriving at the unpaid balance." Accordingly, based on her accounting and defendant's payment records, "and after all set offs and credits, there is due and owing Plaintiff the sum of $490,078.52 for dairy products that were purchased and delivered to defendant."

¶ 26 In her deposition that preceded the affidavit, however, Rosinsky testified that she did not prepare the invoices for Hawthorn Mellody, and that her role in preparing the statements attached to amended complaint was limited to entering defendant's account number into the accounting system and printing the statement. Rosinsky did not know what the account numbers listed on the statements stood for, other than that they had P & M Dairy attached to them, and, on one invoice, she acknowledged that the invoice showed that defendant was charged for milk that was delivered to a White Hen Pantry, which was plaintiff's customer. Accordingly, she agreed that the delivery was likely cartage that defendant performed on Muller-Pinehurst's behalf, as opposed to milk that

defendant purchased from plaintiff. Thus, she agreed, it should not have been included on the statement of amounts due to Hawthorn Mellody by defendant. Rosinsky did not know which, if any, of the other invoices listed under that same account number represented products that defendant delivered for plaintiff, rather than milk that defendant purchased. She also did not know why Hawthorn Mellody would invoice defendant for products that defendant delivered to plaintiff's customers on its behalf. However, at one point in her testimony (and in her husband, Neal Rosinsky's, testimony) she explained that, even for cartage services, defendant was billed for the milk and then, once it was delivered, he would receive a credit. Rosinsky pointed to other figures in the documents that represented credits to defendant for cartage charges. When asked how she could tell that those figures were credits for cartage, she said "I just know that" based on how the credits were applied on a weekly basis.

¶ 27 C. Court's Ruling

¶ 28 The court held two hearings on the summary judgment motions. At the first hearing, on June 30, 2011, the court heard argument, but then requested additional evidence and argument regarding: (1) whether evidence existed supporting defendant's general denial that it owed plaintiff money; (2) whether defendant was a disclosed or undisclosed agent of a corporation; and (3) what assets of Hawthorn Mellody were sold to Mueller-Pinehurst Dairy, Inc. in order to establish standing.

¶ 29 In its briefing in response to the court's order, plaintiff submitted, as to standing, a supplemental affidavit from McMahon stating that, in 2002, Hawthorn Mellody, Inc. sold all assets, including accounts receivable, to Prairie Farms. In addition, plaintiff pointed to testimony by Rosinsky that she is employed by Muller-Pinehurst Dairy and that Muller-Pinehurst is owned 50% by Prairie Farms and 50% by the Midwest Dairymen's Association. Finally, plaintiff pointed to

testimony by Neal Rosinsky that Muller-Pinehurst currently owns Hawthorn Mellody, LLC, and that it purchased Hawthorn Mellody, LLC, from Prairie Farms in March 2008.

¶ 30 On September 13, 2011, argument reconvened. The trial court struck a supplemental affidavit that defendant had submitted on the basis that it contradicted defendant's deposition testimony. The court then denied defendant's summary judgment motion because, by arguing that plaintiff's motion must fail due to existing issues of material fact, defendant implicitly conceded the existence of factual issues.

¶ 31 The court granted plaintiff's summary judgment motion. As to plaintiff's standing, the court determined that the cases upon which defendant relied to argue that Mellody-Pinehurst is not the legal successor to Hawthorn Mellody, Inc. involved questions of successor liability not, as here, whether the successor could act as plaintiff.

¶ 32 As to whether there was a genuine issue of fact regarding the amount owed, the court found there was not because Rosinsky's affidavit established that, while she did not know the specifics of each transaction, she utilized business records, including bills and credits, to establish the amount due. In contrast, defendant "cannot come up with an amount even today. The defendant does not know. A general denial is not sufficient in Illinois to create an issue of fact for summary judgment." The court entered judgment on the full amount requested, $490,078.52.

¶ 33 As to the proper defendant's identity, the court found that defendant was personally responsible for the debt because it was not disclosed to plaintiff that defendant was acting on behalf of P & M Distributors, Inc. The court found that defendant was never disclosed as an agent for that corporation, and that the checks were written on an account for P & M Dairy Distribution, Inc. Thus, the court determined, plaintiff was not put on notice that defendant was acting on behalf of P & M

Distributors, Inc. such that P & M Distributors, Inc. was a party to the agreement. The court found defendant, as the agent of an undisclosed principal, was personally liable for the obligation that he incurred on behalf of the principal.

¶ 34 Defendant filed a motion to reconsider with affidavits. Defendant argued that the record did not establish that the alleged oral agreement was enforceable or that he was personally liable for the debt. Further, he argued that the amended complaint never pleaded that he was an undisclosed agent, (rather the trial court raised that concept after summary judgment was briefed) and that the attached affidavits by *former Hawthorn Mellody employees* (who were employed there from 2004 to 2008 and who attested that McMahon was their immediate supervisor) disputed the theory because they established that: (1) Hawthorn Mellody and P&M Distributors, Inc. shared the same street address during the period in question; (2) their offices were divided by a corridor, and windows allowed each company to see into the offices of the other; (3) Hawthorn Mellody received mail for both companies, would sort and divide the mail, and would deliver mail addressed to P & M Distributors, Inc. to the P & M office; (4) the trucks used by P & M Distributors, Inc. parked in front of the office building (sometimes, as depicted in one photograph, next to Prairie Farms' trucks) and had "P&M Distributors" in large letters on the side; and (5) they received orders from Patrick, who managed P & M Distributors, Inc., from 2005 through 2007 and they, along with others in the office knew, and discussed among themselves including with McMahon, that the orders received from Patrick were for and on behalf of P & M Distributors, Inc. In addition, attached to the affidavits were letters received that were addressed to P & M Distributors, Inc. which were typical of those sorted and delivered to that office.

¶ 35 Plaintiff argued, and the court agreed, that the new affidavits were new evidence improperly submitted on a motion to reconsider. Nevertheless, the court *allowed* the filing of the affidavits and stated that it considered them. However, the court denied the motion to reconsider, finding that the question whether defendant was an undisclosed agent was not a new theory beyond the pleadings but, rather, a confirmation that defendant was not acting on behalf of a corporation when he entered into the oral agreement. Defendant appeals.

¶ 36 II. ANALYSIS

¶ 37 A. Standard of Review

¶ 38 Summary judgment is appropriate only when the pleadings, depositions, and admissions on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201 (2009). In reviewing a summary judgment disposition, we strictly construe the record against the movant and liberally in favor of the nonmoving party. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). Summary judgment is a drastic means of disposing of a case and should not be granted unless the movant's right to judgment is clear and free from doubt. *Id.* at 280. The sole function of the trial court in acting upon a motion for summary judgment is to determine whether a question of material fact exists, not to resolve the issue. *Id.* Where reasonable persons could draw divergent inferences from undisputed facts, the issue should be decided by a trier of fact and the summary judgment motion should be denied. *Id.* The resolution of a motion for summary judgment is not a matter committed to the sound discretion of the trial court; either the movant is entitled to judgment as a matter of law or the motion must be denied. *Manhanm v. Daily News-Tribune*, 50 Ill. App. 3d 9, 12 (1988). The trial court may not weigh the evidence or make credibility

determinations at the summary judgment stage. *AYH Holdings, Inc. v. Avreco*, 357 Ill. App. 3d 17, 31 (2005). We review *de novo* a trial court's grant of summary judgment. *Ioerger*, 232 Ill. 2d at 201.

¶ 39 B. Genuine Issues of Material Fact

¶ 40 On appeal, defendant argues that there are numerous genuine issues of material fact. Specifically, defendant argues that: (1) although plaintiff pleads that it is the successor to Hawthorn Mellody, Inc., the evidence refutes this contention and plaintiff lacks standing; (2) he is not, in his personal capacity, a proper defendant; and (3) the terms of the alleged oral contract have not been established, and the amount of any damages remains unclear. For the following reasons, we agree with defendant.

¶ 41 1. Evidence of Plaintiff's Standing

¶ 42 Defendant argues first that plaintiff has not established that it stands in the shoes of Hawthorn Mellody, Inc. He asserts that the evidence first and foremost clearly establishes that Hawthorn Mellody, Inc. remains an existing corporation owned by McMahon as its sole shareholder. Accordingly, defendant argues that the record establishes that *no* entity is the legal successor to Hawthorn Mellody, Inc., but certainly there is no question of fact that Muller-Pinehurst is not, as the complaint alleges, the legal successor to Hawthorn Mellody, Inc. Further, defendant argues that the documents plaintiff produced do not identify defendant, his corporation, or any contract with either, as one of the assets sold either to Prairie Farms or, in 2008, Muller-Pinehurst, nor do the documents reflect that Muller-Pinehurst acquired Hawthorn Mellody's rights in accounts receivable. Thus, he argues, plaintiff is not entitled to judgment as a matter of law.

¶ 43 In response, plaintiff asserts first that defendant's objection to its standing is waived because he did not replead, when given leave to do so, standing as an affirmative defense. See *In re A.W.J.*, 197 Ill. 2d 492, 496 (2001) (standing is an affirmative defense that is waived if not pleaded). Further, even if not waived, plaintiff argues that it does not possess a burden to prove that it has standing to recover the debt; rather, it argues that defendant failed to meet its affirmative burden of proving that plaintiff lacked standing to collect the debt. Plaintiff asserts that it was not required to prove it was the legal successor in order to recover an overdue debt it purchased as part of an arms-length transaction. According to plaintiff, "whether plaintiff was the 'legal successor' to Hawthorn Mellody is not the proper inquiry. In this case, plaintiff is not being sued to collect a debt owed by Hawthorn Mellody, thereby making the determination of whether plaintiff was the legal successor relevant. [cite] Instead, plaintiff is recovering a[n] *overdue debt owed* Hawthorn Mellody, *which was an asset it purchased* as part of the dairy distribution business." (Emphases added.) Plaintiff asserts that, a few months after defendant terminated the business relationship between "the parties," it acquired Prairie Farms via its purchase of Hawmell, LLC and, therefore, that it acquired the dairy distribution business of "Hawthorn Mellody" via that transaction. It notes that nothing shows that any other entity has the right to recover this debt or is in fact attempting to recover this money from defendant.

¶ 44 We conclude that there is an issue of fact regarding whether plaintiff has standing to recover the alleged debt. First, defendant has not waived the standing argument, as an affirmative defense raised in a summary judgment motion is timely and may be considered, even if not raised in defendant's answer. See *Salazar v. State Farm Mutual Automobile Ins. Co.*, 191 Ill. App. 3d 871, 876 (1989). Second, although plaintiff alleges that it has no burden to prove standing, it is required to prove what it pleads; it *pleaded* it is the legal successor to Hawthorn Mellody, Inc. To be a

successor corporation, there must be a common identity of officers, directors, and stock between the selling and purchasing corporation. See, *e.g.*, *Vernon v. Schuster*, 179 Ill. 2d 338, 346-47 (1997); *Ashley v. IM Steel*, 406 Ill. App. 3d 222, 239 (2010).[4] Here, McMahon was and still is the sole shareholder of Hawthorn Mellody, Inc. McMahon is not an officer of Muller-Pinehurst but, rather, remains president of Hawthorn Mellody, Inc. Accordingly, Muller-Pinehurst and Hawthorn Mellody, Inc. do not share a common identity of stock, officers, and directors.

¶ 45 To the extent that defendant possessed a burden to raise a question of fact regarding plaintiff's standing, he has done so. Plaintiff essentially asserts that its questionable legal status with respect to Hawthorn Mellody, Inc. does not preclude summary judgment because: (1) it was not required to prove the legal relationship it pleaded; (2) it is clear from the record that defendant owed money to Hawthorn Mellody LLC, that Muller-Pinehurst bought Hawthorn Mellody, LLC when it bought Prairie Farms, and that no other party is trying to collect the debt; and (3) it is not required to prove its status as a successor to recover on an overdue debt it purchased as part of an arms-length transaction. However, if, as plaintiff requests, we essentially take Hawthorn Mellody, Inc. out of the equation, then Muller-Pinehurst needs to establish a right to recover on the amount defendant allegedly owed Hawthorn Mellody, LLC, the entity from which defendant or his company ordered milk at the time of the alleged breach. First, if Muller-Pinehurst may be considered the successor to Hawthorn Mellody, LLC, it is *not* so alleged, even though plaintiff's counsel acknowledged that Hawthorn Mellody, LLC, *not* Hawthorn Mellody, Inc., was the party that entered into the alleged oral

[4]At issue in *Vernon* and *Ashley* was the existence of a successor corporation for purposes of successor liability. However, the factors for assessing whether a corporation is, in fact, the successor to another corporation does not hinge on the purpose for making the assessment.

agreement in 2002, and asserted that Hawthorn Mellody, LLC, would have to be substituted as the plaintiff.

¶ 46 Second, it is not clear from the record that, when in 2008 it purchased assets from Hawmell, LLC, Muller-Pinehurst purchased as an asset the debts owed to Hawthorn Mellody, LLC. Plaintiff submitted deposition testimony from Neal and Judy Rosinsky that Prairie Farms owns 50% of Muller-Pinehurst and that Muller-Pinehurst subsequently purchased the assets of Hawthorn Mellody, LLC. Neal Rosinsky testified that Muller-Pinehurst paid Prairie Farms, the "then-owner of Hawthorn Mellody, LLC," to acquire Hawthorn Mellody, LLC. This alleged transaction is not reflected in the documents produced in discovery. Rather, in the 2008 transaction, Hawmell, LLC, sold only certain assets to Muller-Pinehurst, specified as "business literature, information, and records of seller relating only to the distribution business from seller's Chicago location, including customer lists and records." The agreement does not reflect whether the business assets Muller-Pinehurst purchased from Hawmell, LLC, included any outstanding accounts receivable or contracts, let alone that *any* of the assets purchased came from Prairie Farms Dairy, Inc. (one of its *two* members and the entity that purchased certain assets from Hawthorn Mellody, Inc.). Critically, the documents do not reflect that, when Muller-Pinehurst bought "certain assets" from Hawmell, LLC, those assets included assets belonging to Prairie Farm Dairy, and, if so, that the assets bought from Prairie Farms Dairy included Hawthorn Mellody, LLC *and* its accounts receivable.

¶ 47 Accordingly, plaintiff is not entitled to judgment as a matter of law where there exist questions of fact regarding whether plaintiff is, as it pleads, the successor corporation to Hawthorn Mellody, Inc. or Hawthorn Mellody, LLC, or whether, regardless of its status and relationship to

Hawthorn Mellody, Inc., Muller-Pinehurst purchased the outstanding accounts receivables owed to Hawthorn Mellody, LLC.

¶ 48 2. Evidence of Defendant's Identity as Proper Party

¶ 49 Defendant next argues that there is a question of fact regarding whether he entered into an oral contract in his individual capacity. Plaintiff, in turn, argues that defendant's attempt to avoid personal liability by asserting that P & M Distributors, Inc. is responsible for the debt must fail because: (1) "no documents or testimony establish any factual basis for concluding that P & M Distributors, Inc., was known by Hawthorn Mellody or disclosed by defendant as the intended purchaser of the dairy products," but, rather, all invoices and payments received involved the names of other nonexistent legal entities (P & M Dairy and P & M Dairy Distribution, Inc.). Plaintiff further asserts that the evidence reflects that defendant acted on behalf of either a nonexistent corporation (P & M Dairy) or an undisclosed principal (P & M Distributors, Inc.) and that, either way, he is personally liable on the contract. We disagree.

¶ 50 Viewing the facts in defendant's favor, there is evidence from which a factfinder could conclude that McMahon and Hawthorn Mellody, LLC knew that defendant's relationship with Hawthorn Mellody was entered into on behalf of P & M Distributors, Inc., not on behalf of defendant personally. For example, according to McMahon, regarding his business relationship with defendant in 1998, "So Hawthorn Mellody [Inc.] would supply milk to Charles Izzo's *company*, and Charles Izzo's *company* would sell it to customers, and then pay Hawthorn Mellody for the milk?" (Emphases added.) McMahon answered, "correct." When McMahon was asked whether Hawthorn Mellody, Inc.'s relationship was with defendant personally or with a corporation that defendant owned, McMahon replied, "I don't know." Although the complaint alleges that, in 2002, McMahon

met with defendant and Wilberding to continue the prior relationship, it was unknown to McMahon whether the relationship being continued was with defendant personally or with his company. McMahon testified that he did not know whether defendant participated in the 2002 meeting in a personal capacity or on behalf of his corporation. In contrast, defendant testified that, from 1998 to 2007, P & M Distributors, Inc. (*i.e.*, the company) purchased milk and dairy products from Hawthorn Mellody, and he flatly disputed being present at the 2002 meeting where he allegedly entered into an oral agreement in his personal capacity. Thus, when one party testifies that he did *not* personally engage in business, but, rather, his corporation did, and the other party testifies that he does *not know* one way or the other, the facts are arguably undisputed that defendant did *not* act in his personal capacity. Certainly, the facts are not undisputed that he *did* act in a personal capacity.

¶ 51 Further, as to the question whether defendant acted as an agent of an undisclosed principal (a question that did not arise until after summary judgment was briefed and defendant had been sued as the principal, not an agent to a principal), there exists evidence that, viewed in defendant's favor, suggests that P & M Distributors, Inc. was not an undisclosed entity. Defendant testified and produced evidence in the form of bank records and tax identification numbers showing that P & M Distributors, Inc., P & M Dairy, and P & M Dairy Distribution, Inc. were varying names for P & M Distributors, Inc. The name P & M Dairy arose for brevity purposes when customers placed orders, and was included on the bank account to more efficiently cash checks made out to P & M Dairy. Despite plaintiff's assertion that no one at Hawthorn Mellody knew on whose behalf defendant was acting, allegedly proving that defendant was not disclosed as an agent of P & M Distributors, Inc., evidence in the record at summary judgment reflected that P & M Distributors was painted on defendant's trucks, that the company shared space in the same offices as Hawthorn Mellody, Inc.

and, later, Hawthorn Mellody, LLC, and that McMahon knew of P & M Distributors, Inc., but did not know defendant's full relationship with that company. Defendant testified that McMahon knew that P & M Distributors, Inc. was defendant's corporation because, when P & M Distributors, Inc. once bid on work in Cook County, McMahon became upset and exchanged words with defendant. In addition, McMahon stated that he knew milk was sold to defendant after November 2002, because he saw the milk being loaded onto trucks; defendant's trucks, however, had P & M Distributors painted on the side.

¶ 52 Further, *after* summary judgment, the court allowed the submission by defendant of affidavits from former Hawthorn Mellody employees that reflected that Hawthorn Mellody knew of the existence of P & M Distributors, Inc. (indeed, Hawthorn Mellody sorted and distributed mail addressed to P & M Distributors, Inc. and could see into P & M Distributors' offices), and that the orders placed with Hawthorn Mellody were made on P & M Dairy's behalf. Plaintiff argues that the evidence in the affidavits does not speak to the manner in which defendant represented himself when entering into the 2002 agreement. However, the sole question when considering a summary judgment motion is to determine whether a question of material fact exists, not to resolve the issue. *Forsythe*, 224 Ill. 2d at 280. Accordingly, the record as it currently stands reflects an issue of fact regarding whether defendant acted in a personal capacity and/or whether plaintiff knew that defendant acted on behalf of P & M Distributors, Inc.

¶ 53 3. Evidence of Terms of Contract

¶ 54 Defendant finally argues that summary judgment was improper because the terms of the alleged oral contract were never established. Defendant does not dispute that there was a business relationship for the purchase of milk with Hawthorn Mellody between 1998 and 2007. He argues,

however, that there are issues of fact regarding whether there was a meeting that resulted in an oral contract, as he disputed being present at a 2002 meeting and entering into an agreement. Further, defendant argues that while there was a business relationship since 1998 and defendant was obligated to pay for milk purchased from Hawthorn Mellody, the record is devoid of any evidence regarding the duration of the agreement, specific payment terms, the manner in which credits would be issued, or any other certain terms for determining the essential terms of the alleged contract. Finally, defendant argues that there is a question of fact regarding the amount allegedly due to plaintiff under the alleged oral contract because plaintiff's only witness regarding the amounts due under the oral agreement, Rosinsky, offered contradictory testimony regarding her knowledge of the accounts and the accuracy of the summary statements as they pertained to the cartage relationship and credits due to defendant under that arrangement. Defendant argues that the trial court erred by finding that defendant had a burden of proof on plaintiff's motion for summary judgment to determine or present an amount due, and that, by determining the deficiencies in plaintiff's evidence did not matter, the court effectively and improperly weighed the evidence at summary judgment.

¶ 55 As we have already concluded that genuine questions of fact exist on issues as material as whether the proper plaintiff and proper defendant are parties to this lawsuit, we need not reach defendant's argument regarding the additional questions of fact as to the contract itself. Indeed, if plaintiff is not the proper plaintiff, then it cannot establish any right to recover on the alleged contract. If the contracting party was P & M Distributors, Inc., and defendant was not doing business in a personal capacity, plaintiff cannot establish any breach of an agreement by defendant. Because of the fundamental nature of these issues, we need not delve deeply into questions regarding the terms of the underlying contract.

¶ 56 Nevertheless, we make the following observations. It is not clear from the record that plaintiff (if the correct plaintiff) is entitled to judgment as a matter of law on a contract it formed with defendant (if the correct defendant) in the amount alleged. While there is no question that there was a business relationship, the record reflects a question of fact regarding whether, as pleaded in the amended complaint, defendant was present at a meeting in November 2002 whereby he entered into an oral contract with plaintiff. Further, although defendant is correct that the terms of the alleged contract remain, at best, vague (indeed, we know defendant ordered around $30,000 worth of products weekly, plaintiff delivered those products, and defendant paid weekly invoices; we do not know the specific agreed-upon price, terms of delivery, etc.), defendant's argument is better framed as one challenging plaintiff's ability to state a claim, as opposed to a question of fact. This is because defendant is not actually challenging any terms. For example, defendant is not arguing that milk products were not delivered and plaintiff did not perform, or that the price he was charged was not the price agreed upon, etc. Thus, while defendant argues plaintiff did not establish the elements of the claim it pleaded, he concedes there was an agreement and does not base his argument on a question of fact regarding any terms.

¶ 57 Instead, defendant's argument is that the damages alleged are simply incorrect because plaintiff's records do not properly credit him for payments that he made, and they incorrectly charge him for milk delivered on plaintiff's behalf but without the corresponding credit agreed upon for having performed such services. However, plaintiff is correct that, generally, a defendant may not summarily dispute the movant's evidence to create an issue of fact. "If the party moving for summary judgment supplies facts that, if not contradicted, would warrant judgment in its favor as a matter of law, the opponent cannot rest on his pleadings to create a genuine issue of material fact."

Harrison v. Hardin County Community School District No. 1, 197 Ill. 2d 466, 470 (2001). Defendant did not dispute plaintiff's evidence with counteraffidavits or other evidence. He presented only checks that he claimed represented all of the payments he made to plaintiff, but Rosinsky testified that she took those checks into account when assessing the total amount due.

¶ 58 Nevertheless, despite defendant's lack of affirmative evidence, and as noted above, the failure to affirmatively dispute evidence comes into play where the evidence proffered, if not contradicted, *would* warrant judgment in the movant's favor. Here, defendant established through plaintiff's own witness that there are apparent flaws and inaccuracies *within* plaintiff's own documents. In that regard, there is evidence in the record that raises a question as to whether the evidence proffered entitles plaintiff to judgment in the amount claimed. We agree with defendant that, where the trial court considered the flaws and concluded that they did not outweigh the overall credibility of Rosinksy's testimony, it weighed the evidence. Again, weighing and appraising evidence and making credibility determinations at summary judgment is improper. *AYH Holdings, Inc.*, 357 Ill. App. 3d at 31. Accordingly, as we must view the evidence in defendant's favor, we cannot conclude that plaintiff's right to the damages requested is clear and free from doubt. See *Tralmer v. Soztneps*, 283 Ill. App. 3d 677, 682 (1996) (summary judgment improper where there remained a material question of fact regarding the amount of damages).

¶ 59 III. CONCLUSION

¶ 60 For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed and the cause is remanded.

¶ 61 Reversed and remanded.