STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

NASSER BEYDOUN, an individual,

Plaintiff/Counter-Defendant,

Case No: 15-004812-CB
Hon. Brian R. Sullivan

-Vs-

EBEID INVESTMENTS, III, L.P. a Missouri Limited Partnership and RUSSELL J. EBEID, jointly and severally,

Defendants,

And

FAIRLANE CLUB , LLC, a Michigan Limited Liability Company, Jointly and severally,

Defendants and Counter-Plaintiffs.

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the City County Building, City of Detroit, County of Wayne, State of Michigan, on 7/18/2017

PRESENT: HONORABLE BRIAN R. SULLIVAN

Plaintiff sued defendant Ebeid for membership interest in Ventures, LLC, which owned the Fairlane Club. Plaintiff claimed defendant promised him ownership and, further, that plaintiff contributed money to the club during the transfer of ownership from plaintiff to

defendant as consideration for his membership in the LLC. Plaintiff eventually sued defendants for breach of contract, fraud/misrepresentation and unjust enrichment.

Defendant moved for summary disposition claiming Beydoun's claims were barred by a release, and an integration clause in that release, signed by plaintiff at the time ownership transferred from plaintiff to defendant. Moreover, defendant denies any money plaintiff contributed to the business was consideration for membership in the LLC. Oral argument was held on two occasions[1].

The court grants defendant's motion for summary disposition because the release bars plaintiff's claims and for the reasons stated below.

A. FACTS

Plaintiff Nasser Beydoun (Beydoun) owned the Fairlane Club, a social and athletic club located in Dearborn, Michigan.[2] Plaintiff's purchase of the Fairlane Club was financed by two sources, a mortgage/note to Fifth Third with a balance in the amount of about $3,600,000.00 and a note from Ford Motor Land with a balance of over $200,000.00. These loans were secured by the assets of the club and plaintiff's personal guaranty.

[1]The first argument was adjourned so plaintiff could produce evidence of monetary investments he made for the benefit of defendant, through the Fairlane Club, in consideration of his membership in the LLC.

[2]Plaintiff owned it through Fairlane Club Holdings, LLC. The club was managed by Fairlane Club Operations, an LLC owned solely by plaintiff.

Beydoun defaulted on the loans. Beydoun approached Russell Ebeid (Ebeid) about August, 2009 to purchase the club. Some written proposals were exchanged but no agreement was signed by the parties. Beydoun contends he and Ebeid had an oral agreement that Beydoun would become a member of an LLC to be formed by Ebeid (defendant Ventures), and defendants would buy the debt of plaintiff's club from the note holders. Plaintiff claims the terms of their oral agreement is contained in an unsigned e-mail dated March 26, 2010 from Ebeid sent to Beydoun entitled, "Term Sheet." Beydoun testified, " … As far as I was concerned, it [the Term Sheet] was a binding agreement." (Beydoun deposition, February 17, 2017, page 14). That is, the Term Sheet contained the terms of the oral agreement between he and Ebeid.

Term Sheet

The Term Sheet provided:

1) It was a non-binding understanding of the parties;

2) Ebeid Investments was to form a new Michigan LLC; which turned out to be Ventures, LLC;

3) Ebeid initially would be the sole member of the new LLC and would contribute about $750,000.00 to the new LLC for 75% interest;

4) Ebeid would acquire the two promissory notes of the Fairlane Club;

5) Beydoun would:

a) Make a capital contribution of $150,000.00 to the new Company for 15%

interest[3];

b) Receive his membership interest in Ventures as an additional member upon the payment of that capital contribution;

c) Ventures' operating agreement would be amended to grant him membership;

d) Have the option to purchase additional (24%) non-voting units of the LLC for about $120,000.00, increasing his ownership interest from 15% to 39% and reducing Ventures' interest from 75% to 51%; and

6) Ventures would foreclose on the Fairlane Club, acquire its assets and eliminate old memberships.

It is undisputed Beydoun negotiated a reduction in the Fifth Third note from $3,600,000.00 (or $3,400,000.00) to about $1,700,000.00. Ebeid purchased the Fifth Third note. Beydoun also reduced the Ford Land note. Beydoun never made any capital contributions to Ventures. The operating agreement of Ventures was never amended to provide Beydoun a membership interest. Beydoun never signed an agreement with defendant to obtain an ownership interest in the LLC.

Beydoun managed the club until the liquor license transferred to defendant. In January, 2011, after the liquor license transferred, Ventures foreclosed on the mortgage and the assets of plaintiff and got a Sheriff's deed to the property. Beydoun signed a Surrender Agreement on March 1, 2011. Beydoun's personal guaranty was forgiven and released by Ventures.

[3]Michael Morrison was another prospective member of Ventures with a 10% interest for $100,000.00, but he

B. STANDARD OF REVIEW

MCR 2.116(C)(10). A motion pursuant to (c)(10) tests the factual support of a claim. The court can consider the pleadings, affidavits, depositions, admissions and any other documentary evidence submitted by the parties in support of, and in opposition to, the motion. The evidence must be considered by the court in a light most favorable to the non-moving party. See *Downey v Charlevoix County Road Commission,* 227 Mich App 621 (1998).

The moving party has the initial burden to establish by affidavits, depositions, admissions, etc. that there is no genuine issue as to any material fact. See *Quinto v Cross and Peters Company,* 451 Mich 358 (1996). After the moving party has established or met its burden, the burden then shifts to the non-moving party to demonstrate that there is a genuine issue of material fact. See *Quinto, supra.* If the evidence shows there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law. See *The Healing Place at North Oakland Medical Center v Allstate Insurance Company,* 277 Mich App 51 (2007). A genuine issue of fact exists when the record establishes that reasonable minds differ on an issue of material fact. See *West v General Motors Corporation,* 469 Mich 177 (2003).

The party who opposes the motion may not rest on mere allegations or denials

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opted to not join.

contained in the pleadings. The party must, by documentary evidence, set forth specific facts showing the existence of a genuine issue of material fact. MCR 2.116(c)(d).

Defendant has also moved for summary disposition pursuant to MCR 2.116(C)(7). "Entry of judgment, dismissal of the action, or other relief is appropriate because of *release,* … (MCR 2.116(c)(7).

C. DISCUSSION

A Surrender Agreement was signed by Beydoun and his entities (Fairlane Clubs Holding, LLC and Fairlane Club Operations, LLC) when the assets of the club were surrendered to Ventures. Ventures agreed to forebear from enforcing its loan documents and released the personal guaranty signed by plaintiff. The agreement also contained a release of defendants by plaintiff.

1. Release in Surrender Agreement

The Surrender Agreement contains a release:

> Waiver and release of all claims and defenses. *Debtors* … hereby waive, relinquish, discharge and *release Ventures* and its successors, assigns, *members,* officers, heirs, *agents,* employees and attorneys from *all claims and defenses of any kind or nature* … by agreement or otherwise, against Ventures, whether previously or now existing or arising out of or relating to any transactions or dealings between debtor and Ventures, or any of them, through the date of this agreement with respect to the loan documents, the obligations or otherwise, including without any limitation, any deferment of affirmative defenses, counter-claims, set offs, deductions or recoupment. Surrender Agreement,paragraph 17, emphasis supplied.

The interpretation of the release in the Surrender Agreement is a question of law for the court to decide. *Patterson v Kleiman,* 447 Mich 429 (1994). The scope of the release is governed by the intent of the parties as expressed in the language of the release. If that text is unambiguous the party's intentions is ascertained from the plain and ordinary meaning of the language of the release. A contract is ambiguous only if the language is reasonably susceptible to more than one interpretation. See *Rinke v Automotive Moulding Company,* 226 Mich App 432 (1997). A dispute about the meaning of the release does not establish non-ambiguity. See *Gortney v Norfolk and Western Railroad Company,* 216 Mich App 535 (1996).

The language of this release in the Surrender Agreement is broad. It bars "all claims … relating to any transactions between Ventures, its members, agents, etc. and the debtors, …" which includes plaintiff. Ebeid is included as agent of Ventures. See *Romska v Opper,* 234 Mich App 512 (1999).

Plaintiff contends the release only applies to the club, the notes and the foreclosure, and does not affect his right to become a member of the LLC. However, the release is not as restricted as plaintiff claims. The release covers "all claims" in broad language, which includes plaintiff's right to membership. See *Skotak v Vic Tanny International, Inc.,* 203 Mich App 616 (1994). The releasing parties (debtors) are Beydoun and his companies. The released party is defendant and its agents, etc.

The release clearly articulates it is for "all causes of action" from:

> "all claims and defenses of every kind or nature, whether existing by virtue of state, federal bankruptcy … law, by agreement or otherwise, against Ventures, whether previously or now existing or arising out of or relating to any transactions or dealings between debtor and Ventures, or any of them, through the date of this agreement with respect to the loan documents, the obligations or otherwise …" (Paragraph 17, Surrender Agreement, page 6).

The plain language of the release bars "all claims" by plaintiff and defendants arising out of any transaction between plaintiff and Ventures, the entity plaintiff seeks membership interest in. The "claims … by agreement … now existing …" includes plaintiff's alleged oral agreement, by the plain language of the release.

2. Integration clause in Surrender Agreement.

The Surrender Agreement also contains an integration clause which states:

> The entire agreement and understanding among the parties relating to this subject matter hereof, and *supersedes all prior* proposals, negotiations, *agreements and understandings* relating the subject matter. And entering into this agreement, debtor (plaintiff) acknowledges that it is not relying on any statement, representation, warranty, covenant or agreement of any kind made by Ventures or any employer or agent of Ventures, except for the agreements of Ventures set forth herein. (page 8,paragraph 22b).

Beydoun claims this integration clause does not bar his claims. It is undisputed that the oral contract claimed by plaintiff to exist with defendants pre-existed the signing of the Surrender Agreement. The integration clause also bars plaintiff's claims. The integration

clause extinguishes any agreements apart from those in the Surrender Agreement. The oral agreement alleged by plaintiff to exist with defendants is included in this language.

3. Beydoun's contributions to club

Plaintiff further asserts he made cash contributions to the Fairlane Club from his other companies, which payments constituted consideration in lieu of direct capital contributions to the Ventures[4]. Plaintiff further asserts he made capital improvements of $165,874.82 to the Fairlane Club between May, 2010 and October, 2011. Plaintiff has provided no supporting evidence that such contributions, if made, were for that purpose. Plaintiff has presented statements which show general categories of payments for the general operation of the club. But plaintiff has not produced specific evidence the source of the money was from plaintiff, or that such money was contributed pursuant to a specific agreement for plaintiff's membership in Ventures.

Plaintiff asserts the money included capital from Easy Business Solutions (plaintiff's company) and plaintiff's UBS personal checking account. $186,292.21 (of the total contribution of $467,042.21) plaintiff claims to have been contributed after he signed the

[4]Plaintiff did provide a general category of payments he says were made, a computer generated ledger. There was no supporting documentation of cancelled checks, transfers from bank accounts, etc. which would support these expenditures were actually from plaintiff or were made pursuant to any agreement for a membership in the LLC and not the functioning of the business alone. The exhibit sheet attached by plaintiff showed expenditures from equipment, remodeling, carpet, computer and upgrade services, lawn care, permits, resurfacing of tennis courts, etc. These are club operating expenses. However, there are no cancelled checks as to who received the money, evidence of where the money came from, evidence the plaintiff was the source of the money as plaintiff alleges or was made pursuant to any agreement.

Surrender Agreement on March 1, 2011.

Plaintiff has not explained why he contributed four times that required by (his understanding of) the agreement contained in the Term Sheet ($150,000.00) with no concomitant admittance into the LLC or increase in his membership interest. Plaintiff has not provided evidence that money was actually spent on the club in exchange for membership in Ventures.

Plaintiff's contention is unsupported by evidence, contradicts the Term Sheet, and contradicts plaintiff's own deposition testimony:

> Q. Do you understand that this Term Sheet was non-binding, as it indicates there?
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> A. This was the preliminary, but it was never – I mean, *as far as I was concerned, it was a binding agreement.* (Nasser Beydoun deposition, February 17, 2017, page 14).

The Term Sheet requires capital contributions to the company, not to the business plaintiff owned and operated.

In short, plaintiff has not met his burden to establish the money he alleged he infused into the Fairlane Club constituted new consideration for his membership into Ventures and not the normal operation of his club. Moreover, this assertion contradicts plaintiff's deposition testimony that the Term Sheet constituted the agreement between the parties. Plaintiff has offered no evidence of any oral agreement, other than the one he

testified is based on the Term Sheet, which plaintiff contends was made before March, 2011.

The court finds this "agreement" was extinguished by the Surrender Agreement and subsumed in the integration clause.

The funding operation of the club by Beydoun as new consideration for a new agreement has never been established by evidence. Plaintiff was given a second opportunity to present any evidence to the court to support his contribution for membership in the LLC, but has failed to do so. See *Mitchum v City of Detroit,* 355 Mich 182 (1959). It is waived. MR 2.116(G).

FRAUD

Plaintiff has failed to specifically identify the oral representations he reasonably relied upon when making any of these additional contributions in support of any contract. Plaintiff has the obligation to specifically show reasonable reliance on the alleged false representation. See *Nieves v Bell Industries, Inc.,* 204 Mich App 49 (1994). Moreover plaintiff must allege he reasonably relied on the representations (misrepresentations), made to him. *Novak v Nationwide Mutual Insurance Company,* 235 Mich App 675 (1999). Plaintiff has failed to do so.

A claim for fraud must be predicated upon present or past facts specifically pled in the complaint. A reference to a future promise does not constitute fraud. See *Highway Motor Company v International Harvester,* 398 Mich 330 (1976).

Plaintiff has not demonstrated how an oral contract or promise that he was to become a (future) member of the LLC (upon payment to the LLC which was not done) could survive the Surrender Agreement, especially where the Surrender Agreement indicated it is the entire agreement between all the parties.

The integration clause specifically bars collateral agreements not expressed in the written contract. It cannot serve as a basis for a fraud claim. See *Barclae v Zarb,* 300 Mich App 455 (2013); *UAW-GM Human Resource Center v KSO Recreation Corp.,* 228 Mic App 486 (1998).

Unjust enrichment

The elements of unjust enrichment are the receipt of a benefit by defendant from the plaintiff and plaintiff's unjust retention of the benefit. See *Moll v Wayne County*, 332 Mich 274 (1952); *Michigan Educational Employees Mutual Insurance Company v. Morris,* 460 Mich 180 (1999).

Plaintiff has the duty to establish the nature of the transaction and the liability. *MEEMIC, supra,* at 198-199. Plaintiff has not done so. To recover a claim for unjust

enrichment there cannot be an express contract covering the same subject matter. See *Belle Isle Awning Corp. v City of Detroit,* 256 Mich App 463 (2003)*; Dumas v ACIA,* 437 Mich 521 (1991). An express contract, the Surrender Agreement, exists. In addition the plaintiff testified that the Term Sheet was the binding oral agreement.

Plaintiff claims defendant was unjustly enriched when plaintiff put money into his own business on which defendant Ventures ultimately foreclosed. Plaintiff claimed to have put the money into his own club pursuant to an agreement he had with defendant. Defendant denied the existence of any agreement. Plaintiff has offered no evidence any such agreement was made. Plaintiff produced evidence he put money into his own club, but no evidence it was done pursuant to any agreement with defendant or that it benefitted defendant unjustly. The only agreement plaintiff offered any evidence of was extinguished by the Surrender Agreement.

Summary disposition on the count of unjust enrichment is granted as there is no genuine issue as to any material fact that defendant was not unjustly enriched or plaintiff made any contributions to his business pursuant to an agreement with defendant or for defendant's unjust benefit.

CONCLUSION

Plaintiff has alleged Ebeid, as a member of an LLC to be formed, agreed plaintiff

would have membership in that LLC. Then, Ebeid denied plaintiff's membership into that LLC after it acquired ownership of the Fairlane Club. Beydoun claims the Term Sheet is the agreement of the parties, although their agreement was oral. The terms of that deal mandated plaintiff make a contribution to the LLC, which Beydoun never made, thus depriving plaintiff of a membership interest. Moreover, Ebeid's alleged promise was a contingent future promise that Beydoun "would be" a member of the LLC contingent upon payment to the LLC. Fraud and misrepresentation cannot be predicated on the unperformed future action predicated on or unfulfilled contingency. The release and integration clause of the Surrender Agreement extinguished any agreement and cause of action between plaintiff and the LLC and its members. Finally, Beydoun claims he performed after the Surrender Agreement by infusing capital into the club during the transfer of ownership, even though the club was in default and lost all its assets to Ventures. These assertions of the infusion of capital post Surrender Agreement are unsupported by any evidence and any subsequent agreement.

This order resolves all pending claims and hereby closes the case. MCR 2.602; and

IT IS SO ORDERED.

/s/ Brian R. Sullivan

BRIAN R. SULLIVAN
Circuit Court Judge

ISSUED: 7/18/2017