STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

CUSTOM PACK SOLUTIONS, INC.,

Plaintiff,

vs.

MEDLINE INDUSTRIES, INC., an Illinois corporation; and PROFESSIONAL HOSPITAL SUPPLY, INC., a California corporation,

Defendants.
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Case No. 15-02754-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8)

In an opinion and order rendered on February 4, 2016, the Court granted in part, and denied in part, the defendants' prior summary-disposition motion under MCR 2.116(C)(8). In doing so, the Court permitted Plaintiff Custom Pack Solutions, Inc. ("Custom Pack") to proceed on two claims: (1) fraudulent inducement and unjust enrichment; and (2) partnership in fact. Accordingly, Custom Pack filed a third amended complaint on February 24, 2016, asserting those two claims. Defendants Medline Industries, Inc. ("Medline") and Professional Hospital Supply, Inc. ("PHS") responded by moving for summary disposition under MCR 2.116(C)(8) and (10) on both remaining claims. Thus, the Court must now consider the viability of the two claims pleaded in Custom Pack's third amended complaint. Although the original complaint was filed nearly 18 months ago, the parties have not yet embarked upon discovery, so the Court shall limit its review to the allegations in the complaint. In spite of this narrow review, the Court concludes that neither remaining claim is sustainable, so the Court shall grant summary disposition to the defendants pursuant to MCR 2.116(C)(8).

I. Factual Background

When reviewing a motion under MCR 2.116(C)(8), "the court considers only the pleadings." Michigan *ex rel* Gurganus v CVS Caremark Corp, 496 Mich 45, 63 (2014). The Court "must accept all factual allegations in the complaint as true, along with all reasonable inferences or conclusions that can be drawn from them." Id. Consequently, the Court must limit its description of the factual background to the allegations set forth in the third amended complaint and the documents attached to that pleading.[1]

Beginning in 2008, Defendant PHS identified Plaintiff Custom Pack as "a 'partner' with PHS for the purposes [of] supplying a bid for custom procedure trays to Spectrum Health" as well as "any resulting work." See Third Amended Complaint, ¶ 1. And, as a result, Custom Pack "spent more than two years working with PHS, and later its new corporate parent, Medline, in order to secure a contract to supply custom procedure trays to Spectrum Health." Id., ¶ 9. To enhance its bid, PHS emphasized to Spectrum Health the involvement of Custom Pack as a local, minority-owned venture in the project. See id., ¶ 27. The involvement of Custom Pack achieved the results that PHS desired in two respects. First, in reviewing PHS's bid, Spectrum Health "awarded a maximum 7 points, out of the 100 total points available, for diversity and inclusion[,]" see id., ¶ 30, and "awarded additional points [to PHS] for commitment to local suppliers and vendors." Id., ¶ 31. Second, on January 10, 2014, Spectrum Health awarded the contract to PHS. See id., ¶ 49 & Exhibit 6.

On January 31, 2014, Defendant Medline "announced the completion of its acquisition of" Defendant PHS, see Third Amended Complaint, ¶ 38 & Exhibit 4, and thereafter assumed all the

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[1] According to MCR 2.113(F)(2), "[a]n exhibit attached or referred to under subrule (F)(1)(a) or (b) is a part of the pleading for all purposes[,]" so the Court may consider the documents attached to the pleading in its analysis of the propriety of summary disposition under MCR 2.116(C)(8).

obligations of the contract with Spectrum Health. See id., Exhibit 4. To fulfill its responsibilities under the Spectrum Health contract, Medline entered into a "Distribution Agreement" with Plaintiff Custom Pack in April of 2014.[2] Id., Exhibit 5. Then, seven months later, PHS sent Custom Pack a letter on November 10, 2014, terminating the parties' contractual relationship. Id., Exhibit 7. That letter cited section 8.1(c) of the parties' distribution agreement, which permitted termination "by any Party . . . upon not less than ninety (90) days prior written notice for convenience." See id., Exhibit 5. Custom Pack responded by filing this action against PHS and Medline, which in turn moved for summary disposition on both claims in Custom Pack's third amended complaint.

II. Legal Analysis

Although the defendants have relied upon MCR 2.116(C)(8) and (10) in requesting summary disposition, the Court shall confine itself to consideration of the motion as a demand for relief under MCR 2.116(C)(8), which "tests the legal sufficiency of the complaint." Gurganus, 496 Mich at 62. A request for summary disposition pursuant to that rule "is properly granted if '[t]he opposing party has failed to state a claim on which relief can be granted.'" Id. at 62-63. But the motion should be granted only when "the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" See Maiden v Rozwood, 461 Mich 109, 119 (1999). Applying these well-understood standards, the Court must consider the viability of Plaintiff Custom Pack's remaining claims for: (1) fraudulent inducement and unjust enrichment; and (2) partnership in fact. Each of those two claims warrants individualized consideration, so the Court shall analyze those two claims *seriatim*.

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[2] Representatives of Plaintiff Custom Pack and Defendants Medline and PHS all signed that distribution agreement. See Second Amended Complaint, Exhibit 5.

A. Fraudulent Inducement and Unjust Enrichment.

Count One of Plaintiff Custom Pack's third amended complaint presents an amalgam of two separate theories – fraudulent inducement and unjust enrichment – that do not necessarily work in tandem. Here, however, Custom Pack's decision to combine the two theories into one count makes sense. "Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." Samuel D Begola Services, Inc v Wild Brothers, 210 Mich App 636, 639 (1995). If that occurs, fraud in the inducement "to enter a contract renders the contract voidable at the option of the defrauded party." Id. at 640. Thus, if Custom Pack can establish fraud in the inducement, it can void the distribution agreement signed in April 2014 that the defendants ultimately invoked in November 2014 to terminate their contractual relationship with Custom Pack. See Third Amended Complaint, Exhibit 7. But unless Custom Pack can free itself from the distribution agreement, which constitutes a written contract with the defendants, Custom Pack cannot seek relief for unjust enrichment, which can only exist "if there is no express contract covering the same subject matter." See Belle Isle Grill Corp v City of Detroit, 256 Mich App 463, 478 (2003). Therefore, Custom Pack must first prevail on its assertion of fraud in the inducement before seeking relief on its claim for unjust enrichment. Accordingly, those two theories may be pleaded in a single count.

Although Michigan law does not foreclose Plaintiff Custom Pack from pursuing a claim for fraud in the inducement coupled with unjust enrichment, the viability of such a claim depends upon satisfaction of several requirements. First, in order to proceed on a claim for fraud in the inducement in an effort to invalidate a contract, "the party charging fraud must return or at least tender any sums paid" under the contract before asking the Court to set aside the contract. Paul v Rotman, 50 Mich

App 459, 463 (1973). Although Custom Pack has been acutely aware of this requirement since the Court issued its opinion resolving the first summary-disposition motion on February 4, 2016, it has neither returned nor tendered back the money that it received from the defendants under the parties' distribution agreement. Thus, Custom Pack has failed to meet the precondition for pursuing its claim for fraud in the inducement, so the defendants are now entitled to summary disposition on that claim pursuant to MCR 2.116(C)(8).

Second, in attempting to invalidate the distribution agreement, Plaintiff Custom Pack must demonstrate that the defendants committed fraud in the course of inducing Custom Pack to enter into that contract. And because the distribution agreement contains a merger clause,[3] see Third Amended Complaint, Exhibit 5 (Distribution Agreement, § 12), under Michigan law, "the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause." UAW-GM Human Resource Center v KSL Recreation Corp, 228 Mich App 486, 503 (1998). Custom Pack's third amended complaint attempts to satisfy this requirement by alleging that its principal signed the contract "in reliance on the PHS and Medline statements to him that the partnership upon which they had been working for two years was intact and would continue if Spectrum accepted their bid." See Third Amended Complaint, ¶ 44. But the distribution agreement itself formally renounced any type of partnership arrangement and declared the contracting parties independent contractors. Id., Exhibit 5 (Distribution Agreement, § 10(a)). More broadly, Custom Pack's principal alleges he was induced

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[3] Section 12 of the agreement states: "This Agreement sets forth the entire contract between the Parties concerning the subject thereof, and supersedes all prior and contemporaneous written or oral negotiations and agreements between them concerning the subject hereof. Except as herein provided, any modifications of this Agreement must be in writing and signed by all Parties."

to sign the distribution agreement, despite its termination-for-convenience clause, id. (Distribution Agreement, § 8.1(c)), by the statement "from Medline announcing their merger with PHS" that "'the Management Team will remain the same.'" See id., ¶ 45. That statement, however, did not create an obligation to work with Custom Pack in perpetuity, especially in light of the inclusion of a clause in the parties' distribution agreement permitting any contracting party to terminate the agreement for convenience with 90 days' prior written notice, so the Court must award summary disposition to the defendants under MCR 2.116(C)(8) with respect to Custom Pack's claim for fraudulent inducement and unjust enrichment.

B. Partnership in Fact.

Plaintiff Custom Pack alleges in Count Two of the third amended complaint that it entered into a partnership in fact with the defendants. Michigan law recognizes that a partnership may exist simply because of "the parties' actual conduct in their business arrangements, as opposed to whether the parties subjectively intend[ed] that such arrangements give rise to a partnership." See Byker v Mannes, 465 Mich 637, 649 (2002). "Thus, one analyzes whether the parties acted as partners, not whether they subjectively intended to create, or not to create, a partnership." Id. The problem with that theory in the instant case, however, is that an express term in the parties' distribution agreement laid to rest the possible existence of a partnership by stating:

> RELATIONSHIP. In entering into and complying with this Agreement, Assembler [*i.e.*, PHS], Supplier [*i.e.*, Custom Pack] and Distributor [*i.e.* Medline] are at all times performing as an independent contractor. Nothing in this Agreement shall constitute or be construed as a creation of a partnership or joint venture between Assembler, Supplier and/or Distributor. No Party to this Agreement shall represent itself or its organization as having any relationship to any of the other Parties other than that of an independent contractor for the limited purposes described in this Agreement.

See Third Amended Complaint, Exhibit 5 (Distribution Agreement, § 10(a)). That is, Custom Pack negotiated and signed a contract that unequivocally defined its relationship with each defendant as an independent-contractor arrangement, rather than a partnership.

Despite the clear language of the distribution agreement, Plaintiff Custom Pack contends that it informally entered into a partnership with the defendants before signing the distribution agreement, and that pre-existing partnership survived side-by-side with the independent-contractor arrangement that the distribution agreement created. That cannot be so because of three provisions in the parties' distribution agreement. First, the introductory language in that agreement explains that the contract "set[s] forth the terms and conditions under which [the parties] will do business with the intent of providing the Products to the Customer." See Third Amended Complaint, Exhibit 5 (Distribution Agreement at 1). Second, section 10(a) of the agreement provides that the parties have entered into a contractual arrangement as independent contractors, rather than as a partnership. Id. (Distribution Agreement, § 10(a)). Third, section 12 of the agreement makes clear that the "Agreement sets forth the entire contract between the Parties concerning the subject hereof, and supersedes all prior and contemporaneous written and oral negotiations and agreements between them concerning the subject hereof." Id. (Distribution Agreement, § 12). Accordingly, any pre-existing partnership ended for once and for all when the parties signed the distribution agreement in April of 2014.

The defendants acted entirely in conformity with the terms of the distribution agreement in terminating their relationship with Plaintiff Custom Pack for convenience pursuant to section 8.1(c) of that agreement, see Third Amended Complaint, Exhibit 5 (Distribution Agreement, § 8.1(c)), so the effort by Custom Pack to obtain relief based upon a partnership-in-fact theory invites the Court to look beyond that parties' integrated contract to furnish extra-contractual remedies. This the Court

cannot do, no matter how much the defendants' actions surprised Custom Pack. Under Michigan law, "unambiguous contracts are not open to judicial construction and must be enforced as written." Rory v Continental Ins Co, 473 Mich 457, 468 (2005). Here, the parties' distribution agreement is unambiguous in establishing that the one and only relationship between the contracting parties is an independent-contractor arrangement, not a partnership. The time for Custom Pack to air its theory of a partnership with the defendants expired when it signed the distribution agreement disclaiming such an arrangement. The Court cannot undo the crystal-clear terms of the parties' agreement on that point by permitting Custom Pack to pursue a partnership-in-fact claim. Accordingly, the Court must award summary disposition to the defendants on Count Two of the third amended complaint under MCR 2.116(C)(8).

III. Conclusion

For all of the reasons set forth in this opinion, the Court shall award summary disposition to the defendants under MCR 2.116(C)(8) with respect to both claims in Plaintiff Custom Pack's third amended complaint. Additionally, because the Court concludes that further amendment of Custom Pack's complaint would be futile, see Ormsby v Capital Welding, Inc, 471 Mich 45, 53 (2004), the Court shall deny Custom Pack leave to amend under MCR 2.116(I)(5).

IT IS SO ORDERED.

This is a final order that resolves the last pending claim and closes the case.

Dated: August 31, 2016

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge