STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

GEORGE BRIKHO,

Plaintiff,

Case No. 2019-173526-CB

v.

Hon. Martha D. Anderson

TERRY FARIDA, ET AL.,

Defendants.

CONSOLIDATED WITH:

FARIDA HOLDINGS, LLC,

Plaintiff,

Case No. 2019-178048-CB

v.

Hon. Martha D. Anderson

EDENZ GARDENING CENTER, INC.,

Defendant.

_____/

OPINION AND ORDER RE: DEFENDANT EDENZ GARDENING CENTER, INC.'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8)

This matter is before the Court on Defendant Edenz Gardening Center, Inc.'s Motion for Summary Disposition Pursuant to MCR 2.116(C)(8). The Court dispenses with oral argument in accordance with MCR 2.119(E)(3).

By way of background, and in relation to case number 2019-178084-CB, Plaintiff Farida Holdings, LLC and Defendant Edenz Gardening Center, Inc. executed a Promissory

Note[1] on February 7, 2018 in which Defendant agreed to pay Plaintiff the amount of $91,410.00, subject to certain conditions. The parties also entered into a Security Agreement[2] relative to the $91,410.00 amount. On August 28, 2019, Plaintiff initiated litigation against Defendant on allegations that Defendant breached the terms of the Promissory Note and Security Agreement. This matter was originally filed in Wayne County, however, the Honorable Brian R. Sullivan transferred the case to Oakland County on October 17, 2019. This action was subsequently consolidated with an earlier case, i.e., case number 2019-173526-CB, on January 23, 2020. Defendant's Motion for Summary Disposition specifically relates to the Complaint in case number 2019-178048-CB.

In its motion, Defendant Edenz Gardening Center, Inc. is seeking the dismissal of Plaintiff's Complaint pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When analyzing such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). A (C)(8) motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* And, when deciding such a motion, the Court considers only the pleadings. MCR 2.116(G)(5).

Defendant's motion presents the argument that Plaintiff has failed to state a claim upon which relief can be granted in consideration of the plain terms of the Promissory Note.

---

[1] The Promissory Note is attached as Exhibit A to Plaintiff's Complaint. Pursuant to MCR 2.113(C)(2), "[a]n exhibit attached or referred to under subrule (C)(1)(a) or (b) is a part of the pleading for all purposes."
[2] The Security Agreement is attached as Exhibit B to Plaintiff's Complaint. Pursuant to MCR 2.113(C)(2), "[a]n exhibit attached or referred to under subrule (C)(1)(a) or (b) is a part of the pleading for all purposes."

Defendant maintains that the payment terms of the Note provide that Defendant would pay back the Note only if Defendant has authorized and made distributions to its equity holders. Defendant asserts that *in the event* that distributions are made, then one-half of the distributions would be utilized to satisfy the Note. Defendant characterizes this payment term as a "possibility" rather than a requirement.

Defendant argues that it is not in default under the Note for the reason that Defendant has not made distributions to its equity holders. According to Defendant, Plaintiff admits as such when it alleges in the Complaint that "the parties agreed that the Edenz Note would be paid back out of the distributions (profits) of Edenz." See Paragraph 17 of the Complaint. Plaintiff alleges further that "Edenz is not making such distributions…The failure of Edenz to make distributions…" See Paragraphs 19-20 of the Complaint.

Since Defendant has not made any distributions, Defendant argues that it is not obligated to pay on the Note and therefore, Defendant is not in default. As such, Defendant asserts that Plaintiff is unable to state a claim upon which relief can be granted. Defendant contends further that all five counts in Plaintiff's Complaint are premised on Plaintiff's erroneous interpretation of the Promissory Note and therefore, those claims should be dismissed.

In response, Plaintiff argues that Defendant should have made payments toward the Note based upon Defendant's 2018 financial statements,[3] which reveal a significant net income that was either disbursed or should have been disbursed to its equity holders.

---

[3] Defendant argues that Plaintiff attached its income statements as Exhibit B to its Response, which is impermissible for a (C)(8) motion where only the pleadings are considered. However, Plaintiff refers to Defendant's 2018 financial statements in Paragraph 19 of the Complaint and notes that these statements are not attached since Defendant has copies and they may be deemed confidential by Defendant. Pursuant to MCR 2.113(C)(1)(b), the Court will not strike Exhibit B from Plaintiff's Response.

Plaintiff speculates that Defendant made disbursements to its equity holder, George Brikho. Plaintiff asserts further that Mr. Brikho may have received "disguised disbursements" such as payment for legal expenses. According to Plaintiff, the answer as to whether or not there were any noncash distributions will be revealed in discovery.

Plaintiff also characterizes Defendant's purported act of indefinitely retaining its significant profits and refusing to disburse these profits to equity holders as a breach of the parties' Promissory Note. See Paragraph 20 of the Complaint. Plaintiff argues that if Defendant refused to make disbursements to avoid making payments on the Promissory Note, then Defendant has breached the Note through its bad faith and unfair dealings.

Finally, Plaintiff maintains that Defendant's summary disposition motion focuses primarily on the Breach of Contract claim. With respect to its Breach of Contract claim, Plaintiff contends that its Complaint contains sufficient allegations that Plaintiff and Defendant were parties to a contract, that Defendant breached the contract, and that Plaintiff was damaged as a result of Defendant's breach. In the next breath, however, Plaintiff states that "[f]actual development in this matter is likely to show that Edenz breached the Promissory Note."[4]

In its Reply Brief, Defendant asserts that Plaintiff cannot, and does not, allege that Defendant is required to make distributions under the terms of the Note. Defendant argues that simply because a company earns a profit in a given year, this does not automatically result in distributions to equity holders. Defendant points out that this is why payments under the Note are tied to distributions and not profit.

[4] See page 6 of the Response.

With regard to Plaintiff's implied duty of good faith and fair dealing argument, Defendant contends that the decision to make distributions is an autonomous, intra-company decision between Defendant and its owners. Therefore, Plaintiff has no standing to dispute or challenge Defendant's exercise of its business judgment whether to make or withhold distributions to its equity holders. In addition, the Note's terms are clear and unambiguous and so this implied duty cannot override the payment terms.

Upon review of the subject Complaint, the Court takes note of Plaintiff's allegations in Count One that Defendant has breached the parties' contracts and that Plaintiff was damaged as a result of Defendant's breach. "A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co. v Ahrens Const., Inc.*, 495 Mich 161, 178; 848 NW2d 95 (2014).

The payment terms of the parties' Promissory Note provide in pertinent part as follows:

> 1. **Payments**. Commencing on the date hereof and continuing until repayment in full of principal and accrued interest under this Note, in the event Maker [Defendant] has authorized and made, or intends to authorize and make, in any calendar month any cash dividends and/or distributions to its equity holders (each, a "Proposed Distribution Amount"), Maker shall withhold from each Proposed Distribution Amount (and shall not pay the same to its equity holders as cash dividends and/or distributions) an amount equal to one-half (1/2) of such Proposed Distribution Amount (the "Withheld Amount"). Commencing on the date hereof and continuing until repayment in full of principal and accrued interest under this Note, as of the first day of each calendar month, Maker shall pay to Payee the aggregate net after-tax amount of all Withheld Amounts for the immediately preceding calendar month.[5]

[5] See Exhibit A of the Complaint.

Pursuant to Paragraph 6 of the Promissory Note, an event of default is defined as "(i) Maker fails to make any payment of all or any part of the principal and interest when due hereunder." Under the parties' Security Agreement, an event of default is defined as "(a) the Borrower shall fail to pay any and all of the Obligations when due."[6]

"When interpreting a contract, the examining court must ascertain the intent of the parties by evaluating the language of the contract in accordance with its plain and ordinary meaning. If the language of the contract is clear and unambiguous, it must be enforced as written. A contract is unambiguous, even if inartfully worded or clumsily arranged, when it fairly admits of but one interpretation. Every word, phrase, and clause in a contract must be given effect, and contract interpretation that would render any part of the contract surplusage or nugatory must be avoided." M*cCoig Materials, LLC v Galui Const., Inc.*, 295 Mich App 684, 694; 818 NW2d 410 (2012).

Based upon the clear and unambiguous language of the payment terms, the Court agrees with Defendant that payment becomes due under the Promissory Note *in the event* that Defendant has authorized and made, or intends to authorize and make, any cash dividends and/or distributions to its equity holders. Stated otherwise, the Note does not require Defendant to make payments unless Defendant has made or intends to make cash dividends and/or distributions to its equity holders.

In light of the express payment term language, Plaintiff has failed to provide sufficient factual allegations that Defendant has in fact breached the terms of the Promissory Note and Security Agreement. Specifically, Plaintiff has not presented any factual allegations that Defendant actually made any cash dividends and/or distributions to its equity holders to

[6] See Paragraph 5 of the Security Agreement; Exhibit B of the Complaint.

activate the requirement of payment on the Note. Plaintiff even concedes in the Complaint that Defendant has not made any distributions. In Paragraph 19 of the Complaint, Plaintiff alleges that "Edenz is not making such distributions in an effort to avoid repaying the Edenz Promissory Note." In Paragraph 20 of the Complaint, Plaintiff alleges that "[t]he failure of Edenz to make distributions and distribute one half of such distributions is a default under the Edenz Note."

Both the Promissory Note and the Security Agreement define an event of default when the Maker or Borrower fails to pay its obligations when due. Without making or intending to make cash dividends and/or distributions, Defendant is not under any obligation to make payments on the Note and so an event of default does not occur. As such, the Court agrees with Defendant that Plaintiff has not adequately plead the elements of a breach of contract action to survive summary disposition.

The Court is cognizant of Plaintiff's argument in its Response that Defendant is in default because Defendant might have made disguised distributions to avoid paying on the Note. The Court observes, however, that this "disguised distribution" argument is not raised in the Complaint. Furthermore, this argument is based upon pure conjecture and conclusory statements without any factual support other than a vague reference to legal and accounting fees incurred in 2018. "A judgment may not be based upon speculation or conjecture, however plausible." *City of Highland Park (Highland Park Gen. Hosp.) v Grant-Mackenzie Co.*, 366 Mich 430, 437; 115 NW2d 270 (1962). "Conclusory statements, unsupported by allegations of fact, are not sufficient to state a cause of action." *Allegheny Ludlum Corp. v Dep't of Treasury*, 207 Mich App 604, 605; 525 NW2d 512 (1994).

Next, Plaintiff presents the argument in its Response that Defendant is bound by the implied covenant of good faith and fair dealing to make disbursements to its equity holders in order to pay on the Note. Yet, this theory is not addressed by Plaintiff in its Breach of Contract claim within the Complaint.

"Michigan law does not recognize an implied contractual duty of good faith. Where the express terms of a contract govern the disputed issue, a court should not imply a duty of good faith." *Aetna Cas. & Sur. Co. v Dow Chem. Co.*, 883 F Supp 1101, 1111 (ED Mich 1995). (Citations omitted). "An implied covenant of good faith and fair dealing in the performance of contracts is recognized by Michigan law only where one party to the contract makes its performance a matter of its own discretion." *McLiechey v Bristol W. Ins. Co.*, 408 F Supp 2d 516, 522 (WD Mich 2006). (Citations omitted).

Certainly, Defendant's discretionary decision to make distributions to its equity holders is an internal corporate business decision that is outside of the scope of the parties' contractual relationship. That is, Defendant is not contractually obligated to Plaintiff under the Promissory Note or Security Agreement regarding distributions to its equity holders. Thus, Plaintiff has no standing to challenge Defendant's exercise of its business judgment in deciding whether to make distributions to its equity holders.[7] As such, Defendant argues – and the Court agrees – that Plaintiff cannot demonstrate that Defendant was bound by or

[7] "The business judgment rule is a presumption that directors in making business decisions, not involving direct self-interest or self-dealing, act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest. This rule insulates from judicial review and second-guessing even those decisions that turn out to be wrong. This rule protects directors from undue fear of personal liability and encourages the innovation, quick decision, and occasional risk-taking that are important to a corporation's success. It also protects directors from the harassment of litigators who might otherwise contest ordinary business decisions. *In re Consumers Power Co. Derivative Litig.,* 132 FRD 455, 464 (ED Mich 1990). "A court should be most reluctant to interfere with the business judgment and discretion of directors in the conduct of corporate affairs." *Matter of Estate of Butterfield*, 418 Mich 241, 255; 341 NW2d 453 (1983). (Citations omitted).

breached any implied duty of good faith and fair dealing with respect to the subject contracts in this matter.

Regarding Plaintiff's Counts Two and Three, namely Foreclosure of Security Interest Against Edenz and Claim and Delivery/Replevin Against Edenz, both of these claims are dependent upon the allegation that Defendant is in default of the Promissory Note and/or the Security Agreement. Since Plaintiff has not adequately plead that Defendant breached either contract, these two claims fail.

In relation to Plaintiff's request for an Injunction against Edenz in Count Four of the Complaint, Plaintiff argues that assets are in jeopardy as a result of the wrongful actions of Defendant. See Paragraph 44 of the Complaint. Again, Plaintiff has not adequately pled that Defendant breached either the Promissory Note or the Security Agreement and therefore, this claim fails as well.

Next, Plaintiff's Unjust Enrichment Against Edenz claim, or Count Five, fails as a matter of law because there is an express Promissory Note and Security Agreement between the parties. In fact, Plaintiff alleges the existence of these express agreements between the parties in Paragraphs 12 and 13 of the Complaint. "The existence of an enforceable, express agreement between the parties covering the same subject matter entitles defendants to summary disposition of plaintiff's claim for unjust enrichment." *Smith Living Tr. v Erickson Ret. Communities*, 326 Mich App 366, 395; 928 NW2d 227 (2018).

Accepting all well-pled factual allegations as true and construing the allegations in a light most favorable to Plaintiff, the Court finds that Plaintiff's claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify

recovery." *Wade, supra*. Accordingly, Defendant's Motion for Summary Disposition is GRANTED under MCR 2.116(C)(8).

It is hereby ordered that Plaintiff's Complaint[8] against Defendant is DISMISSED with prejudice.

It is further ordered that Defendant's request for attorney fees is DENIED.

IT IS SO ORDERED.

This Opinion and Order resolves the last pending matter and closes the case of 19-178048-CB. However, this Opinion and Order does NOT resolve the last pending matter and does NOT close the case of 19-173526-CB.

/s/ Martha Anderson
HON. MARTHA D. ANDERSON
Business Court Judge

Dated: 4/7/2020.

[8] Referencing the Complaint in case number 2019-178048-CB.