STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MOSCHOURIS MANAGEMENT COMPANY, LLC,

Plaintiff,

Case No. 2020-179726-CB

v.

Hon. Martha D. Anderson

GAYLORD RETAIL INVESTORS, LLC,
VG BUILDING INVESTORS, LLC
21300 EUREKA RETAIL BUILDING, LLC
And GABRIEL SCHUCHMAN,

Defendants.

_____/

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

This matter is before the Court on Defendants' 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, Plaintiff has an ownership interest in the three Defendant limited liability companies. Specifically, Plaintiff has a 3.33% ownership interest in Defendant Gaylord Retail Investors, LLC, a 25% ownership interest in Defendant VG Building Investors, LLC, and a 13.375% ownership interest in Defendant 21300 Eureka Retail Building, LLC. Defendant Gabriel Schuchman is the manager of all three limited liability companies. It is Plaintiff's contention in the Complaint that it has made repeated efforts to obtain financial information from the Defendant entities in accordance with their respective

Operating Agreements and MCL 450.4503, however, Defendants have refused to comply. As a result, Plaintiff initiated this lawsuit against Defendants on February 18, 2020. Plaintiff has raised the following counts in its Complaint: Breach of Operating Agreements (Count One); Failure to Provide Records Contrary to MCL 450.4503(1)–(4) (Count Two); Request for Formal Accounting Pursuant to MCL 450.4503(5) (Count Three); and, Breach of Duty of Care (Count Four). Attached as exhibits to the Complaint are Plaintiff's demand letters, dated October 24, 2019.[1]

In their motion, Defendants argue that Plaintiff has failed to state a claim upon which relief can be granted and therefore, summary disposition is warranted under 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). "A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions." *Dalley v Dykema Gossett*, 287 Mich App 296, 305; 788 NW2d 679 (2010). (Citations omitted).

Regarding Count One, namely Breach of Operating Agreements, Defendants contend that Plaintiff has not pled that it has a contractual right under the Operating Agreements to

[1] Pursuant to MCR 2.113(C)(1), "[i]f a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading." Under MCR 2.113(C)(2), an attachment is a part of the pleadings for all purposes.

inspect the entities' books and records. That is, Plaintiff's demand letters do not cite to a single provision of any Operating Agreement or the Michigan Limited Liability Act, MCL 450.41010 *et seq*. to demonstrate that Plaintiff is entitled to the demanded relief. Defendants assert further that Plaintiff has failed to mention Defendants' response to the demand letters in which they indicated that they would comply with MCL 450.4503(1) for documents related to Gaylord Retail Investors, LLC and VG Building Investors, LLC. Defendants also indicated that other documents would be provided upon a request that is just and reasonable under MCL 450.4503.

In its response, Plaintiff argues that it has pled sufficient factual allegations regarding its membership interest in all three limited liability companies. Plaintiff contends further that the Operating Agreements of the limited liability companies give it the contractual right to inspect the books and records of the Defendant entities. What is more, the Operating Agreements do not provide a specific method on how the request for records must be made. Plaintiff asserts that it has made numerous requests to access the books and records of the limited liability companies, without success.

In their Reply, Defendants argue that they have produced approximately 300 pages of documents, including tax returns and balance sheets, to Plaintiff in compliance with MCL 450.4503 and MCL 450.4213 of the Michigan Limited Liability Act. Defendants contend that the dispute between the parties centers on what specific documents Plaintiff has a right to demand. Defendants argue that Plaintiff is not entitled to access every document maintained by the companies, but rather the books and records required to be kept under the Act and which have already been provided to Plaintiff.

While Defendants argue that Plaintiff's demand letters do not cite to the Operating Agreements or to Michigan statute, the Court notes that Defendants do not provide any authority to establish that Plaintiff was required to do so in order to have access to the books and records of the companies. The Court observes further that Defendants' objection centers mainly on *what* documents Plaintiff is entitled to receive. However, this issue appears to be the subject of a factual determination as opposed to a legal determination. Additionally, Defendants attach as exhibits to their Motion certain responses to Plaintiff's demand letters as well as other documents from the states of Indiana, Iowa, and Ohio. A (C)(8) motion, however, considers only the pleadings. Therefore, Defendants' exhibits are improper and have not been reviewed.

For purposes of this (C)(8) motion, the Court shall determine whether Plaintiff has adequately pled its Breach of Operating Agreements claim in Count One of the Complaint. "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).

In its Complaint, Plaintiff alleges that as a member, it is a party to the Operating Agreements[2] for Defendants Gaylord Retail Investors, LLC, VG Building Investors, LLC, and 21300 Eureka Retail Building, LLC. See Paragraphs 25-30 of the Complaint. Plaintiff relies on the companies' respective Operating Agreements, which provide in pertinent part:

> All members and their designated representatives shall have the right to inspect the Company's books and records at any reasonable time upon

[2] Plaintiff avers that the Operating Agreements are in the possession of the respective Defendant companies. See MCR 2.113(C)(1)(b). Pursuant to MCR 2.113(C)(2), "[a]n attachment or reference to an attachment under subrule (C)(1)(a) or (b) is a part of the pleading for all purposes."

> reasonable notice. See Paragraph 18 of the Complaint; Section 9.1 of the Gaylord Retail Investors, LLC Operating Agreement.
>
> The Manager shall provide to the Members reports concerning the financial condition and results of operation of the Company, including current balance sheets, income statements, and the Capital Accounts of the Members.... Such reports shall be provided at least annually. See Paragraph 19 of the Complaint; Section 9.3 of the Gaylord Retail Investors, LLC Operating Agreement.
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> The company shall maintain complete and accurate books and records of its business and affairs as required by the Act and such books and records shall be kept at the Company's principle office. Each member shall have complete access to all books and records of the Company at the Company's office during normal business hours. See Paragraph 20 of the Complaint; Section 2.1 of the VG Building Investors, LLC Operating Agreement.
>
> The company shall maintain complete and accurate books and records of its business and affairs as required by the Act and such books and records shall be kept at the Company's principal office. Each member shall have complete access to all books and records of the Company at the Company's Office during normal business hours. See Paragraph 21 of the Complaint; Section 2.1 of the 21300 Eureka Retail Building, LLC Operating Agreement.

Plaintiff next alleges that it has provided Defendant Schuchman with notice of its request to inspect the records of Defendants. Plaintiff attaches as exhibits to the Complaint, its demand letters for financial information from the three companies. Further, Plaintiff asserts that "Defendants have failed and refused to provide information, including financial information, about the current business of GRI, VGBI or Eureka." See Paragraph 22 of the Complaint. According to Plaintiff, Defendants breached the Operating Agreements when they "failed to provide Plaintiff with reports concerning the financial condition and results of operation of Defendants." Moreover, Plaintiff states that "Defendants have consistently refused to provide any substantive financial information to Plaintiff." See Paragraphs 32-35 of the Complaint. Finally, Plaintiff is seeking an order from the Court to allow it to access the requested financial information pursuant to the relevant Operating Agreements and to award Plaintiff monetary damages.

Upon review of Count One of the Complaint, Plaintiff alleges that there is a contract between the parties, namely the Operating Agreements, that Defendants purportedly breached the Operating Agreements by refusing to provide the requested financial information, thereby resulting in damages to Plaintiff. That is, Plaintiff is seeking monetary damages as well as a court order for access to the requested financial information. Based on the foregoing analysis and accepting all well-pled allegations as true and construing them in a light most favorable to Plaintiff, the Court finds that Plaintiff has adequately pled its Breach of Operating Agreements claim to survive summary disposition.

In relation to Count Two, namely Failure to Provide Records Contrary to MCL 450.4503(1)–(4), Defendants argue that Plaintiff's demand letters went beyond the scope of MCL 450.4503. According to Defendants, Plaintiff's requests for information and documents were overly broad and unreasonable. Further, Plaintiff's requests included information to which Plaintiff would not be entitled under the Michigan Limited Liability Act.

In its response, Plaintiff maintains that Count Two is an alternative count under the requirements of MCL 450.4503 wherein a company must provide certain financial information to its member upon written request. While Defendants argue that Plaintiff's requests are unreasonable, Plaintiff maintains that Defendants fail to provide any specificity as to why. In reply, Defendants assert that Plaintiff has not articulated a proper purpose for its demand for all of the companies' records. Defendants maintain that both the Michigan Limited Liability Act and the Operating Agreements require some form of reasonable request for the records.

Pursuant to MCL 450.4503(1), "[u]pon written request of a member, a limited liability company shall send a copy of its most recent annual financial statement and its most recent

federal, state, and local income tax returns, and any other returns or filings the limited liability company has submitted or is required to submit to any federal, state, local, or other governmental taxing authority, to the member by mail or electronic transmission." MCL 450.4503(2) provides that "[u]pon reasonable request, a member may obtain true and full information regarding the current state of a limited liability company's financial condition." Under MCL 450.4503(3), "[u]pon reasonable written request and during ordinary business hours, a member or the member's designated representative may inspect and copy, at the member's expense, any of the records a limited liability company is required to maintain under section 213, at the location where the records are kept." Finally, MCL 450.4503(4) provides that "[u]pon reasonable written request, a member may obtain other information regarding a limited liability company's affairs or may inspect, personally or through a representative and during ordinary business hours, other books and records of the limited liability company, as is just and reasonable."

It is Defendants' position that Plaintiff must articulate a proper purpose for their demand for the books and records under the Act. The Court notes, however, that Defendants have not provided any legal authority in support of this position. Moreover, the Court is not convinced that the term "reasonable request" for books and records requires the member to provide a proper purpose for its request for books and records. Rather, the request must be reasonable in terms of what books and records are being sought. Notwithstanding, Plaintiff already has a contractual and/or statutory right to certain company books and records as a member of the limited liability company.

While Defendants argue that Plaintiff's demand for books and records is unreasonably overbroad, this argument necessitates a factual, not a legal, determination.

Defendants also maintain that Plaintiff never invoked the Michigan Limited Liability Act in its demand letters, yet Defendants do not provide any authority that would require Plaintiff to do so in its demand letters.

For purposes of a (C)(8) motion, the Court must accept all well-pled factual allegations as true. In Paragraph 38 of the Complaint, Plaintiff alleges that Defendants have refused to provide access to the books and records as required in the Operating Agreements. Plaintiff asserts further that "Defendants have outright refused to provide requested records despite Plaintiff's reasonable and just requests, and despite Plaintiff's contractual and statutory right to access requested information." See Paragraph 40 of the Complaint. Plaintiff attaches its written demand letters as exhibits to the Complaint to demonstrate that written requests were made for Defendants' books and records. Based on the foregoing analysis and accepting all well-pled allegations as true and construing them in a light most favorable to Plaintiff, the Court finds that Plaintiff has adequately pled its Failure to Provide Records Contrary to MCL 450.4503(1)-(4) claim to survive summary disposition.

Defendants next argue that Count Three, namely Request for Formal Accounting Pursuant to MCL 450.4503(5), should be dismissed because Plaintiff cannot meet the threshold requirement of showing that a formal accounting is just and reasonable. Defendants also contend that an accounting is an equitable remedy that is extraordinary in nature and unnecessary when discovery would adequately determine the amounts in dispute.

Conversely, Plaintiff argues that a request for an accounting under MCL 450.4503(5) may be made when that request is just and reasonable under the circumstances. Since

Defendants have not provided any information in response to Plaintiff's demand letters, Plaintiff contends that a formal accounting is appropriate.

In reply, Defendants contend that Plaintiff has failed to plead that legal remedies are inadequate to justify its request for a formal accounting. Defendants cite to *Bradshaw v Thompson*, 454 F2d 75, 79 (6th Cir 1972), wherein the United States Court of Appeals, Sixth Circuit, reasoned that "[[a]n accounting is a species of disclosure, predicated upon the legal inability of a plaintiff to determine how much, if any, money is due him from another. It is an extraordinary remedy, and like other equitable remedies, is available only when legal remedies are inadequate." Additionally, Defendants argue that they produced the required documents and therefore, this count is moot.

Whether Defendants produced the required documents or not, this Court is only tasked with determining the legal sufficiency of the Complaint for purposes of a (C)(8) motion. MCL 450.4503(5) provides that "[a] member may have a formal accounting of a limited liability company's affairs, as provided in an operating agreement or whenever circumstances render it just and reasonable." Plaintiff asserts in the Complaint that it is a member of the Defendant companies, it made numerous requests for financial information, and that "Defendants have outright refused to provide any of the requested financial information." See Paragraphs 43-45 of the Complaint. Since Defendants have allegedly refused to provide any relevant financial information, Plaintiff asserts that "the only way for Plaintiff to ascertain the status of its ownership interest would be to conduct a formal accounting pursuant to MCL 450.4503(5)." See Paragraph 48 of the Complaint. Plaintiff also alleges that it "cannot, even with liberal discovery, reasonably be expected to ascertain and determine the extent of business conducted by Defendant or to reasonably ascertain the

current accurate status of the company's assets and liabilities due to the significant types of business activities and the relationships between Defendant and those with whom it has dealt." See Paragraph 23 of the Complaint.

"Under Michigan law, a suit for an accounting invokes a court's equitable powers. A plaintiff seeking an accounting has no right to proceed in equity if he has an adequate remedy at law. The burden of proof is on plaintiff to show the inadequacy of the legal remedy. The Michigan courts have long held that an accounting in equity is unnecessary where discovery is sufficient to determine the amounts at issue." W*ilson v. Cont'l Dev. Co.*, 112 F Supp 2d 648, 663 (WD Mich 1999). (Citations omitted). See also *Boyd v Nelson Credit Centers, Inc.*, 132 Mich App 774, 779; 348 NW2d 35 (1984).

Whereas Plaintiff alleges that Defendants have refused to comply with the subject Operating Agreements for the provision of books and records and that discovery would be insufficient to determine the amounts due, Defendants argue that an accounting is an extraordinary remedy that is available only when legal remedies are inadequate. Both parties provide compelling arguments, however, a (C)(8) motion may be granted only where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Wade, supra*. In light of the parties' dispute over the production of books and records as well as what type of information should be provided, the Court finds that factual development is necessary to determine whether or not an accounting would be a suitable, equitable remedy in this case. As such, the Court shall deny Defendants' (C)(8) motion regarding Plaintiff's Request for Formal Accounting Pursuant to MCL 450.4503(5) claim.

Finally, and with respect to Count Four, namely Breach of Duty of Care, Defendants argue that Gabriel Schuchman did not breach his duty of care by his refusal to honor Plaintiff's demands. Defendants maintain that Schuchman's actions complied with MCL 450.4503 of the Michigan Limited Liability Act. What is more, Plaintiff's demand letters were defective as they did not cite to the Operating Agreements or the Michigan Limited Liability Act. As noted earlier, however, Defendants fail to provide any authority to support this argument. Defendants also assert that Plaintiff's demand letters were overly broad and unreasonable since they sought documents beyond the scope of the Michigan Limited Liability Act. Yet, this assertion by Defendants requires a factual, rather than a legal, determination. Finally, Defendants maintain that Plaintiff fails to provide factual allegations that Defendant Schuchman violated MCL 450.4404.

In opposition, Plaintiff asserts that it properly pled that Defendant Schuchman breached his fiduciary duties in Paragraphs 50, 51, and 52 of the Complaint. Plaintiff maintains that Schuchman clearly failed to comply with the Operating Agreements and/or the Michigan Limited Liability Act. According to Plaintiff, any reasonably prudent person would agree that Defendants would be required to provide at least some information in response to the demand letters.

In reply, Defendants assert that that the requisite documents have been produced, and so Plaintiff's claim should be dismissed. As noted previously by this Court, the assertion by Defendants that Mr. Schuchman provided the requisite documents is a factual claim and will not be considered for purposes of a (C)(8) motion where only the pleadings are subject to analysis. Defendants also attach six pages of excerpts from their production of documents

as Exhibit A to their Reply. Again, this motion is a (C)(8) motion where only the pleadings can be considered. Thus, Exhibit A has not been reviewed by the Court.

In its Complaint, Plaintiff has alleged that Defendant Schuchman is the manager of the Defendant companies who is in control of the books and records for the companies. See Paragraph 13 of the Complaint. Plaintiff alleges that Defendant Schuchman, as the manager of the Defendant companies, "must act in good faith and with the degree of care that an ordinary prudent person would exercise under similar circumstances and in a manner that is in the LLCs' best interests." See Paragraph 50 of the Complaint. Pursuant to MCL 450.4404(1), "[a] manager shall discharge the duties of manager in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the manager reasonably believes to be in the best interests of the limited liability company."

Plaintiff cites to the relevant provisions within the Operating Agreements that grant it the right to the companies' books and records. See Paragraphs 18-21 of the Complaint. Plaintiff asserts further that it has made repeated efforts to obtain financial information pursuant to the Operating Agreements, without success. See Paragraph 14 of the Complaint. In the demand letters, attached as exhibits to the Complaint, counsel for Plaintiff states that Mr. Schuchman, as the member of authority or representative of the Defendant companies, must provide certain financial information relating to those companies. Plaintiff asserts further that Defendant Schuchman has a contractual and statutory obligation to provide certain financial information to Plaintiff, however, he has refused. As a result of Defendant Schuchman's refusal, Plaintiff asserts that it has suffered damages. See Paragraphs 51-53 of the Complaint.

Based on the foregoing analysis and accepting all well-pled allegations as true and construing them in a light most favorable to Plaintiff, the Court finds that Plaintiff has adequately pled its Breach of Duty of Care claim to survive summary disposition.

Accordingly, and for the reasons stated herein, Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) is DENIED.

It is further ordered that Plaintiff's request for attorney fees and costs is DENIED.

IT IS SO ORDERED.

This Opinion and Order does not resolve the last pending matter and does not close the case.

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

Dated: 6/4/2020.