STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

SBR ASSOCIATES II, LLC,

Plaintiff,

v. **Case No. 20-181076-CB**
Hon. James M. Alexander

A.F.J. DEVELOPMENT COMPANY, L.L.C.,

Defendant,

_____/

OPINION AND ORDER RE: DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

This matter is before the Court on Defendant's Motion for Summary Disposition. The Court dispenses with oral argument in accordance with MCR 2.119(E)(3).

By way of background, Plaintiff was interested in pursuing a potential multimillion-dollar mixed-use development real estate project located on West Big Beaver Road in Troy, Michigan and owned by Kelly Properties, LLC. In order to pursue this development project, Plaintiff was considering entering into a partnership or joint venture. As such, Plaintiff contacted Defendant in July 2019 to gauge Defendant's level of interest. After Defendant expressed interest, the parties executed a Confidentiality and Non-Circumvention Agreement[1] on July 20, 2019 and in regard to Plaintiff's proposed development project. The parties subsequently met in August 2019 to discuss Plaintiff's plans for the property. During the meeting, Plaintiff shared a detailed brochure of the

[1] See Exhibit A of the Complaint. 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.

proposed development. At the same time, Defendant disclosed that it was also engaged in discussions with Kelly Properties, LLC regarding the subject property.

Ultimately, Plaintiff entered into a joint venture agreement with Kirco Development, LLC and subsequently executed a Letter of Intent to Kelly Properties, LLC in relation to the property. However, Plaintiff discovered that Defendant had since entered into an agreement with Kelly Properties, LLC for the development of the Troy property. Consequently, Plaintiff filed a Complaint against Defendant on May 5, 2020 on the following grounds: (Count One) Breach of Contract; (Count Two) Tortious Interference with Business Expectancy; and, (Count Three) Unjust Enrichment. In response, Defendant filed its Motion for Summary Disposition.

In its motion, Defendant argues that the claims alleged in Plaintiff's Complaint fail as a matter of law and so summary disposition is warranted 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). "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).

With respect to Count One of the Complaint, namely "Breach of Contract," Defendant argues that the terms of the Confidentiality and Non-Circumvention Agreement ("Agreement") do not preclude or prohibit the actions that Defendant purportedly engaged in. Stated otherwise, the Agreement did not prohibit Defendant from continuing its own negotiations or efforts to purchase the

property at issue. Conversely, Plaintiff emphasizes the word "Non-Circumvention" in the title of the Agreement and asserts that the parties intended, and agreed, that Defendant would not circumvent Plaintiff in its potential acquisition of the property. According to Plaintiff, the parties also made a verbal agreement during the August 2, 2019 meeting that Defendant would not circumvent Plaintiff. Specifically, Plaintiff alleges in Paragraph 18 of the Complaint that "[a]t the meeting, and with full knowledge of SBR's proposal for the Kelly Property, Jonna expressly agreed that AFJ would abide by all the terms of the Agreement." As such, Plaintiff maintains that Defendant's summary disposition motion should be denied since there are factual questions as to whether Defendant circumvented Plaintiff. In its Reply, Plaintiff points out that this motion is brought under MCR 2.116(C)(8), which is based solely on the pleadings that include the parties' Agreement.

The Court observes that the subject Agreement provides in pertinent part as follows:

> C. Arkan Jonna et al [Defendant] has agreed to keep all information relating to the possible acquisition and development of these properties referred to in paragraph A and B [Troy property] above confidential. No disclosures to any third parties will be permitted unless given written authorization by SBR Associates II LLC. Jurisdiction regarding these matters have been agreed as Oakland County Michigan.
>
> NOW, THEREFORE, the parties hereto agree as follows:
>
> 1. Facsimile copies shall constitute an original.
> 2. This Agreement shall be governed by and construed in accordance with the laws of the State of Michigan.

"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).

Clearly, the parties concede that the Agreement, executed on July 20, 2019, is a valid contract between the parties. What is in dispute is whether Defendant has breached the parties' Agreement or for purposes of a (C)(8) analysis, whether Plaintiff has adequately pled this second element of a breach

of contract claim to survive summary disposition. The unambiguous, substantive terms of the Agreement,[2] require Defendant to keep Plaintiff's proposed development of the Troy property confidential. Further, the contractual terms prohibit Defendant from disclosing Plaintiff's development proposal to any third party without Plaintiff's written authorization.

These contractual terms do not support Plaintiff's allegations that the Agreement prohibited Defendant from pursuing its own project with Kelly Properties, LLC. Understandably, Plaintiff wishes to rewrite the Agreement to protect its own interests. However, the parties are bound by the express terms of the Agreement, which only prohibit Defendant from disseminating confidential information regarding Plaintiff's potential development project.

Plaintiff's argument that summary judgment is precluded in light of Defendant's August 2, 2019 verbal affirmation of the Agreement is also misplaced. In Paragraph 18 of the Complaint, Plaintiff alleges that Defendant agreed to be bound by the terms of the Agreement. Again, the terms of the parties' Agreement prohibit the disclosure by Defendant of Plaintiff's confidential information concerning its proposed development project. Upon review of the allegations in the Complaint, Plaintiff has not demonstrated that Defendant breached those specific terms of the Agreement. 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 not adequately pled its Breach of Contract claim to survive summary disposition.

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[2] Michigan law is well-established that "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate." *Holmes v Holmes*, *supra* at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997). "Contracts must be construed as a whole, giving effect to all provisions. Courts must avoid interpretations that would render any part of a contract surplusage or nugatory and must also, if possible, seek an interpretation that harmonizes potentially conflicting terms." *Village of Edmore v Crystal Automation Systems Inc.*, 322 Mich App 244, 263; 911 NW2d 241 (2017). (Citations omitted).

In relation to Count Two of Plaintiff's Complaint, namely "Tortious Interference with Business Expectancy," Defendant argues that Plaintiff has failed to allege the existence of a valid business expectancy with Kelly Properties, LLC. Even if Plaintiff had a business expectancy with Kelly Properties, LLC, that expectancy would have simply been to make an offer on the Troy property, which Plaintiff did. Further, Defendant maintains that Plaintiff has not alleged in its Complaint that Defendant intentionally interfered with Plaintiff's purported business expectancy with Kelly Properties, LLC that induced or caused a breach of that expectancy or relationship. Defendant also points out that the action giving rise to Defendant's purported tortious interference stems from its alleged breach of the parties' Agreement. Yet, the Agreement does not restrict or prohibit Defendant from pursuing its own development project with Kelly Properties, LLC.

In opposition, Plaintiff argues that it had a reasonable expectancy, which is what this claim requires. What is more, Plaintiff contends that Defendant's intentional interference resulted in Kelly Properties, LLC's rejection of the Letter of Intent submitted by Plaintiff and Kirco Development, LLC. Plaintiff also asserts that Defendant's actions were "per se wrongful" because they were directly contrary to the parties' Agreement. Even if Defendant's actions were not per se wrongful, Plaintiff maintains that at a minimum, Defendant acted unethically and that conduct can satisfy the claim for tortious interference with a business expectancy. See *Dolenga v Aetna Cas. & Sur. Co.*, 185 Mich App 620, 626; 463 NW2d 179 (1990).

In Reply, Defendant again argues that Plaintiff has only alleged a reasonable expectation of a business expectancy as opposed to the existence of a valid business expectancy with Kelly Properties, LLC. In this case, Plaintiff desired to enter into a business relationship with Kelly Properties, LLC, however, it was incapable of doing so without first finding a business partner. Furthermore, Defendant indicates that its purported, per se wrongful act was the violation of the parties' Agreement, which did not occur.

"The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *BPS Clinical Labs. v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698–99; 552 NW2d 919 (1996). (Citations omitted).

"One who alleges tortuous interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Feldman v Green,* 138 Mich App 360, 378; 360 NW2d 881 (1984). "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak v R L Polk Co,* 193 Mich App 1, 12-13; 483 NW2d 629 (1992).

Further, Michigan Courts have long held that "defendants motivated by legitimate personal and business reasons are shielded from liability against this cause of action [tortious interference with a contractual or business relationship]." *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772, 780; 421 NW2d 289 (1988). (Citations omitted).

With regard to the first element of a tortious interference with a business expectancy claim, Plaintiff alleges in Paragraph 34 of the Complaint that "SBR had a reasonable expectation of a business expectancy with Kelly." As argued by Defendant, having a "reasonable expectation of a business expectancy" does not correlate to a "valid business expectancy." Here, Plaintiff was seeking to enter into a partnership or joint venture in order to propose a development plan, via a Letter of

Intent or offer, to Kelly Properties, LLC. Certainly, Plaintiff was hoping to negotiate a contract with Kelly Properties, LLC, however, Plaintiff has not presented any allegations to demonstrate that it was reasonably likely or probable that Kelly Properties, LLC would choose its offer. "The expectancy must be a reasonable likelihood or probability, not mere wishful thinking." *Trepel v Pontiac Osteopathic Hosp.*, 135 Mich App 361, 377; 354 NW2d 341 (1984).

In its Complaint, Plaintiff alleges in Paragraph 36 that "AFJ intentionally, maliciously, and unjustifiably interfered with that business expectancy by secretly, unlawfully and unethically using information SBR had provided to AFJ that was subject to the restrictions in the Agreement and by circumventing SBR in violation of the Agreement." As stated previously, Plaintiff has not adequately pled its Breach of Contract claim to demonstrate that Defendant violated the parties' Agreement. Since Plaintiff relies upon the alleged breach as the basis for Defendant's purported intentional, malicious, and unjustifiable interference, this claim fails as well. Therefore, Plaintiff has not adequately pled its Tortious Interference with Business Expectancy claim to survive summary disposition.

Finally, and with respect to Plaintiff's Count Three in the Complaint, namely "Unjust Enrichment," Defendant argues that this claim cannot be sustained due to the express Agreement between the parties. According to Defendant, the express Agreement covers the same subject matter as alleged in the implied contract. Therefore, Plaintiff's Unjust Enrichment claim should fail as a matter of law. In contrast, Plaintiff asserts that Defendant has not conceded that the parties' Agreement is valid or covers a specific subject matter or that the August 2, 2019 verbal agreement is valid and covers the same subject matter. In its Reply, Defendant argues that this claim fails as a matter of law because Defendant has not denied the existence or validity of the parties' Agreement. Rather, the parties are disputing its terms.

In relation to Plaintiff's Unjust Enrichment claim in the Complaint, the Court notes that "[u]njust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another. It is grounded in the idea that a party shall not be allowed to profit or enrich himself inequitably at another's expense. A claim of unjust enrichment can arise when a party has and retains money or benefits which in justice and equity belong to another." *Wright v Genesee Cty.*, 504 Mich 410, 417; 934 NW2d 805 (2019). (Citations omitted). "The law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Morris Pumps v Centerline Piping, Inc.*, 273 Mich App 187, 195; 729 NW2d 898 (2006).

"But a contract will be implied only if there is no express contract covering the same subject matter." *Genesee Cty. Drain Comm'r v Genesee Cty.*, 321 Mich App 74, 78; 908 NW2d 313 (2017). The elements of an unjust enrichment claim are: "(1) receipt of a benefit by the defendant from the plaintiff and, (2) which benefit it is inequitable that the defendant retain." *Dumas v Auto Club Ins. Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991). (Citations omitted).

In Paragraph 39 of the Complaint, Plaintiff alleges that "[o]n August 1 and 2, 2019, in the email and at the meeting, SBR provided AFJ with a valuable benefit regarding SBR's plans to develop the Kelly Property." That is, Plaintiff's development proposal was released following the execution of the parties' July 20, 2019 Confidentiality and Non-Circumvention Agreement, as expressly stated in Section B of the Agreement. Specifically, "[s]uch disclosure and exact location will be provided after execution of this document [Agreement]."

Here, the parties both acknowledge the existence and validity of the July 20, 2019 Confidentiality and Non-Circumvention Agreement. What the parties dispute is the scope of the restrictions within the Agreement as they relate to Defendant's conduct. "If the parties admit that a contract exists, but dispute its terms or effect, an action will not also lie for quantum meruit or implied contract. In other words, alternative pleading of an implied contract claim is only allowed in a contract

setting where a party doubts the existence of a contract." *Bowlers' Alley, Inc. v Cincinnati Ins. Co.*, 32 F Supp 3d 824, 834 (ED Mich 2014). Moreover, Plaintiff cannot rely upon an implied contract claim when the express Agreement covers the same subject matter as Plaintiff references in Count Three. Therefore, Plaintiff's Unjust Enrichment claim fails as a matter of law.

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

The Court observes further that Plaintiff has not sought leave to amend its Complaint should Defendant's motion be granted. Pursuant to MCR 2.116(I)(5), "[i]f the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." In accordance with MCR 2.116(I)(5), the Court further finds that an amendment to any claim in Plaintiff's Complaint would not be justified in consideration of the plain and unambiguous terms of the parties' Agreement.

It is hereby ordered that Plaintiff's Complaint is dismissed with prejudice.

It is further ordered that Defendant's request for attorney fees and costs is denied.

IT IS SO ORDERED.

This Opinion and Order resolves the last pending matter and closes the case.

August 26, 2020
Date

James M. Alexander
Honorable James M. Alexander
Circuit Court Judge