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

RUDOLPH T. STONISCH, III,
Plaintiff,

v.

Case No. 18-166109-CB
Hon. James M. Alexander

MITCHELL BLACK and
DOD ENTERPRISES, LTD,
Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motion for partial summary disposition. In his amended complaint, Plaintiff claims to have advanced Defendants some $192,000 to allow Defendants to maintain and renovate Dick O'Dows (DOD). Plaintiff claims that he began advancing Defendants money in 2017, with the understanding that the parties would eventually enter into some type of repayment agreement. Plaintiff and Defendant Black eventually reached an agreement whereby Plaintiff would be receive a percentage of DOD's future revenue as repayment. This agreement, however, was not reached until August 30, 2017. Plaintiff contends that Defendant is not performing under the agreement.

Further, Plaintiff claims to have made additional contributions to Defendants after the August 30, 2017 agreement. Plaintiff alleges that Defendants have not repaid Plaintiff for the same. Finally, Plaintiff claims that he guaranteed a loan from Defendants' landlord for to be used for certain construction and renovation costs. Plaintiff claims that Defendants misrepresented how they would use the loan and used a portion of the loan to pay for operating expenses including rent. Plaintiff alleges that Defendants did not use the funds as they

represented to Plaintiff, and as a result, Plaintiff was damaged.

On these general allegations, Plaintiff filed his amended complaint on claims title (Count I) breach of contract; (Count II) breach of loan agreement; (Count III) breach of agreement; (Count IV) declaratory relief; (Count V) specific performance and injunctive relief; (Count VI) unjust enrichment; (Count VII) misrepresentation.

Defendants now move for partial summary disposition under MCR 2.116(C)(10). A (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).[1] Defendant so moves on Plaintiff's Counts I, IV, V, VI, and VII.[2]

I. Counts I, IV, V, and VII

Defendants first move for summary disposition on Plaintiff's count I, IV, V, and VII arguing the same should be dismissed because the seek to enforce an unenforceable agreement. First, Defendants argue that the agreement violates Michigan public policy and law, specifically the Michigan Liquor Control Code (LCC). Next, Defendants argue that the agreement lacks mutuality of obligation and consideration because it involves past consideration and doesn't require any obligation from Plaintiff.

Defendants' argument is based on the premise that the agreement violates the LCC. Defendants argue that the agreement would provide Plaintiff with revenue from alcohol sales,

1 In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden, 461 Mich* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

2 Defendants also moved for summary disposition of Plaintiff's Count III. In his response, Plaintiff acknowledges that Defendants seek summary disposition of Count III, and state that he does not oppose that relief. Based on the same, Defendant's motion for summary disposition of Plaintiff's Count III is granted, and the same is dismissed.

which is in violation of the LCC because Plaintiff is not listed on the liquor license. Defendants argue that since the agreement violates Michigan law, it cannot be enforced and counts I, IV, V, and VII should be dismissed.

In response, Plaintiff argues that the LCC does not void the contract, and that Defendants have failed to provide case law to support their position. Further, Plaintiff argues that Defendants can apply for a participation permit for a non-licensed person to receive a percent of gross sales. Further, Plaintiff argues that Defendants cannot refuse to apply for a participation permit to escape liability on the underlying agreement.

Plaintiff's Complaint is based on a contract theory. In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988). Further, "[c]ontracts of guaranty are to be construed like other contracts, and the intent of the parties, as collected from the whole instrument and the subject-matter to which it applies, is to govern." *Comerica Bank v Cohen*, 291 Mich App 40, 46; 805 NW2d 544 (2010) (internal quotation omitted).[3]

The LCC rule provides that, "a licensee shall not allow a person whose name does not appear on the license to use or benefit from the license." Mich. Admin. Code R 436.1041(1). Further, the LCC provides that a person or licensee who violates the act is guilty of a misdemeanor. MCL 436.109(1)-(2).

In the instant case, neither party provides Michigan law that is directly on point. It is well established that "[t]rial courts are not the research assistants of the litigants; the parties have

3 Michigan law is also well-established that "a court must construe and apply unambiguous contract provisions as written." *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008).

a duty to fully present their legal arguments to the court for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008).

Although not binding on the Court, *React Presents v Eagle Theater* unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 31, 2017 (Case No. 16-13288), is analogous to the present case. The parties in *Eagle* entered into a co-promotion agreement that provided the parties were to split net profits from all adjusted gross receipts from the bar sales. *Id.* at 3-4. The adjusted gross receipts included proceeds from concessions, which was not further defined. *Id.* at 4. Similar to the present case, the defendants in *Eagle* argued that the breach of contract claims fail because the agreement violated public policy as set forth in the LCC. *Id.*at 3.

Ultimately, the *Eagle* court found that the co-promotion agreement was valid and enforceable. In coming to that decision, the *Eagle* court reasoned that

> In Michigan, the paramount goal when interpreting a contract is to give effect to the intent of the contracting parties. *Old Kent Bank v. Sobczak*, 243 Mich. App. 57, 63-64 (2000). The court is to read the agreement as a whole and attempt to apply the plain language of the contract itself. *Id.* If the intent is clear from the language of the contract itself, there is no place for further construction or interpretation of the agreement. *Farm Bureau Mut. Ins. Co. v. Nikkel*, 460 Mich. 558, 566 (1999). A contract provision that is clear and unambiguous must be "taken and understood in [its] plain, ordinary, and popular sense." *Mich. Mut. Ins. Co. v. Dowell*, 204 Mich. App. 81, 87 (1994).
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> Where contract language is neither ambiguous nor contrary to a statute, the will of the parties, as reflected in their agreement, is to be carried out, and the contract is enforced as written. *See Cruz v. State Farm Mut. Auto. Ins. Co.*, 466 Mich. 588, 594 (2002). Because contracting parties are assumed to want their contract to be valid and enforceable, courts in Michigan construe contracts that are potentially in

> conflict with a statute and against public policy, where reasonably possible, to harmonize them with the statute. *Id.* at 599.

In upholding the co-promotion agreement, the court found that the plain language of the agreement did not include mention of alcohol proceeds, and as such, cannot be said to violate the LCC or the public policy reflected therein. *Id.* at 4. The court further explained that if the court were to find an ambiguity existed regarding the sharing of alcohol proceeds, the court would construe the agreement "in a manner that renders them compatible with the existing public policy as reflected in the administrative rules promulgated by the Michigan Liquor Control Commission, so as to give effect to the intent of the parties that their co-promotion agreements be enforced as written." *Id.* Finally, the court reasoned that "if the [c]ourt were to find a provision for illegal sharing of alcohol revenue that could potentially render the co-promotion agreements void, the [c]ourt could sever any such provision." *Id.* at 5.

Again, the *Eagle* court held that since the express terms of the co-promotion agreement provided the parties split profits from several revenue sources, the agreement did not violate public policy. *Id.*

In the instant case, the express terms of the agreement at issue, Defendant was to pay Plaintiff 10% of the amount that the monthly gross revenue exceeds $167,000. "Gross revenue" was defined to include the entire operation of the business including any and all future businesses arising out of the expansion of DOD. Similar to the agreement in *Eagle,* the agreement did not include mention of alcohol proceeds; rather it provides Defendants provide Plaintiff 10% of gross revenue from several sources. As such, the Court will follow the reasoning as outlined by the *Eagle* court and find that the August 30, 2017, does not violate public policy and is a valid agreement.

Here, the parties entered into an unambiguous contract. As the *Eagle* court did, this Court will assume that since the parties entered into a contract, they want their contract to be valid and enforceable. As such, the agreement is facially valid.

There are, however, factual questions related to the enforcement of the contract. First, there is a dispute as to whether the money to Defendants was a loan or if Plaintiff was purchasing an interest in DOD. Plaintiff disputes that the money was a loan and argues that he was granted an interest in DOD. Defendants, on the other hand, insist that the money advanced by Plaintiff was a loan.

Further, the parties dispute whether there was adequate consideration and mutuality of obligation in the formation of the contract. Defendants argue that the agreement was predicated on past consideration and that the preexisting duty rule applies, rendering the contract unenforceable. Plaintiff argues that there was adequate consideration for the agreement. Specifically, Plaintiff alleges that he contributed money to Defendants and Defendants had an obligation to repay the same as memorialized by their August 30, 2017 agreement. These issues do present questions of fact that must be submitted to the trier of fact for determination.

II. Count VI – Unjust Enrichment

Next, Defendants argue that Plaintiffs' unjust enrichment claims fail where there is a contract governing the same subject matter. Defendants argue that Plaintiff claims that two contracts control the subject matter at issue, and as such, Plaintiff is precluded from pursuing the same on an unjust enrichment theory. Defendant, however, disputes the oral agreement to repay Plaintiff for his contributions after the August 30, 2017 agreement.

Plaintiffs respond that the unjust enrichment claim was brought in the alternative to the breach of contract claims, and argue that if the agreement is found unenforceable, Plaintiff should be permitted to proceed on his unjust enrichment claim. Further, Plaintiff argues that Defendant disputes the existence of a contract for contributions after the August 30, 2017 agreement. Therefore, Plaintiff argues, there is a question of fact over whether there is a contract to govern the subject matter, which allows his claim for unjust enrichment to proceed as a viable alternative.

To establish a claim for unjust enrichment, a plaintiff must show: (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the defendant's retention of the benefit. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). Where an express contract exists between the parties, a contract cannot be implied in law which covers the same subject matter. *Cascade Elec Co v. Rice*, 70 Mich App 420, 426; 245 NW2d 774 (1976). However, if Plaintiff claims that there is a verbal agreement and that is disputed by Defendants, Plaintiff is "not required to elect to proceed under one theory or the other, but could seek recovery on the basis either of an express verbal contract, or an implied contract if the jury found the express verbal contract did not exist." *Id.* at 427.

Here, a portion of the relationship between Plaintiff and Defendants is governed by an express contract, the August 30, 2017 agreement. Under the express terms of the agreement at issue, Defendants were to pay Plaintiff 10% of the amount that the monthly gross revenue exceeds $167,000. The agreement expressly provide which proceeds the parties were to split and how. The Court declines to imply another contract between the parties under an unjust enrichment theory as to the August 30, 2017 agreement.

In regards to the oral agreement for contributions after the August 30, 2017 agreement, there is a factual dispute as to existence of the agreement. As such, the Court will allow Plaintiff to pursue recovery of the same under both a breach of contract and an implied contract theory.

Based on the foregoing, Defendants' motion for summary disposition as to Plaintiff's unjust enrichment claims is GRANTED as to the August 30, 2017 agreement, but is DENIED as to the verbal contract.

III. Count VII – Misrepresentation

Next, Defendants argues that Plaintiff's fraud claim fails because he could not have reasonably relied on any alleged misrepresentations. Further, Defendants argue that Plaintiff has failed to plead the circumstances surrounding the fraud with particularity. Specifically, Defendants argue that Plaintiff failed to plead when the representations were made and how they were made. Defendant also argues that Plaintiff's fraud claim is a restyled breach of contract claim, the Court agrees.

In response, Plaintiff argues that Defendants represented that they would use the $300,000 for construction and remodeling costs only. Plaintiff alleges that based on that representation, Plaintiff signed a guaranty for the same. Plaintiff further alleges that Defendants used the funds inconstant with their agreement by paying general operating expenses. Plaintiff contends that Defendants fraudulently misrepresented their future conduct as it relates to the funds.

It is well-established that "fraud must be pleaded with particularity." *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008), citing MCR 2.112(B)(1).

The Michigan Court of Appeals has held:

> To establish a claim of fraudulent misrepresentation, plaintiff was required to prove that: (1) defendant made a material representation; (2) the representation was false; (3) defendant knew, or should have known, that the representation was false when making it; (4) defendant made the representation with the intent that plaintiff rely on it; (5) and plaintiff acted on the representation, incurring damages as a result. Plaintiff must also show that any reliance on defendant's representations was reasonable. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005). *Hi-Way Motor Corp v Int'l Harvester Co*, 398 Mich. 330, 336; 247 N.W.2d 813 (1976), citing *Candler v Heigho*, 208 Mich. 115, 121; 175 N.W. 141 (1919).

Michigan law is also clear that "to sustain a fraud claim, the party claiming fraud must *reasonably* rely on the material misrepresentation." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 39; 761 NW2d 151 (2008) (emphasis in original), citing *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005); and *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004). Further, "an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute fraud." *Hi-Way Motor Corp v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

Here, Plaintiff claims that the lease contained a provision that the $300,000 was to be paid by the landlord to Defendants for renovation and construction expenses. Plaintiff alleges that Defendants represented that they would use the funds for the same. Based on Defendants' representation, Plaintiff signed a guaranty. Plaintiff further alleges that Defendant used a portion of the funds to pay for general operating expenses, which was in violation of the lease. As a result, Plaintiff claims he was damaged. Plaintiff is seeking recovery on a future promise, which is contractual in nature and does not constitute fraud.

Based on the foregoing, Defendants' motion for summary of Plaintiff's misrepresentation claim is GRANTED, and the same is dismissed.

IV. Damages

Finally, Defendants argue that damages in excess of $136,400 and all claims for damages in excess of the same should be dismissed because Plaintiff has failed to present evidence substantiating his claims. Plaintiff argues that he has presented evidence of his damages and supports the same with deposition testimony and an affidavit. As such, a question of fact exists as to the amount of damages. Based on the same, Defendants' motion for summary on damages in excess of $136,400 is DENIED.

V. Summary

To summarize, Defendants' motion for partial summary under (C)(10) is GRANTED as to Plaintiff's Counts III and VII, GRANTED IN PART as to Count VI, and DENIED as to Counts I, V, and damages in excess of $136,400. Plaintiff's (I)(2) motion is GRANTED in as much as the Court has found that the August 30, 2017 agreement is facially valid. As previously discussed, factual questions remain as to the ultimate enforcement of the agreement.

IT IS SO ORDERED.

March 27, 2019_____ /s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge