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

D.B FRENCH & COMPANY, LLC,
Plaintiff,

v.

Case No. 18-168010-CB
Hon. James M. Alexander

BRADLEY LOTT, ET AL,
Defendants.

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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants Bradley Lott, Kirk Love, Zachary Cherocci, and North Financial, LLC's motion for summary disposition.

According to Plaintiff's Amended Complaint, Plaintiff is an investment firm that was affiliated with L.M Kohn, a nationally recognized broker-dealer and registered investment advisory firm. Plaintiff grew to fifteen employees and had affiliations with over twenty-five investment advisors, including the individual Defendants, Lott, Love, Cherocci, and Sultan. The Individual Defendants conducted their investment business through Plaintiff and L.M. Kohn.

Plaintiff further alleges that originally, it had two members. Dainforth French, the company's CEO, owed 95% of the company, and Julia Oody owned the remaining 5%. Plaintiff claims that on June 10, 2014, Lott joined Plaintiff as a financial advisor, and on March 26, 2018, Lott became a member of Plaintiff and was awarded a 20% membership interest.

Plaintiff alleges that the Individual Defendants negotiated with L.M. Kohn to terminate their relationship with Plaintiff and affiliate with North Financial (an entity formed by the

Individual Defendants). Further, Plaintiff alleges that the Individual Defendants recruited Plaintiff's investment advisors and customers to terminate their relationships with Plaintiff and join North Financial. Plaintiff claims that on August 14, 2018, the Individual Defendants removed all of their client files from Plaintiff to North Financial' s office. And on August 15, 2018, L.M. Kohn terminated Plaintiff.

Plaintiff further alleges that the Individual Defendants made misrepresentations to Plaintiff's investment advisors that Plaintiff was in financial distress. Plaintiff alleges that the Individual Defendants conspired with L.M. Kohn to raise fees so that customers with terminate their relationship with Plaintiff and transfer their accounts to another broker-dealer. As a result of the Individual Defendants' conduct, Plaintiff claims at least ten investment advisors and/or employees terminated their relationship with Plaintiff and affiliated with North Financial.

On these general allegations, Plaintiffs sued on claims of (Count I) breach of fiduciary duties against Lott and Sultan; (Count II) tortious interference against all defendants; (Count III) fraudulent and/or negligent misrepresentation against all defendants; and (Count IV) conspiracy against all defendants.

As stated, Defendants Bradley Lott, Kirk Love, Zachary Cherocci, and North Financial, LLC now move for summary of Plaintiff's Amended Complaint under MCR 2.116(C)(8), and (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461

Mich 109, 120; 597 NW2d 817 (1999).[1] And a (C)(10) motion tests the factual support for a plaintiff's claims. *Id.* at 120.[2]

I. Breach of Fiduciary Duties (Count I)

Defendant Lott first argues that Plaintiff's breach of fiduciary duty claim should be dismissed because Lott was not a member of Plaintiff at the time of any alleged wrongdoing. As such, Lott could not have breached any fiduciary duties, as he did not owe any duties to Plaintiff.

Conversely, Plaintiff argues that as a matter of law, Lott was a member of the company. Plaintiff argues that pursuant to MCL 450.4102, in the absence of an operating agreement, an individual may become a member of a limited liability company upon the unanimous vote of the members. Plaintiff did not have an operating agreement, and Plaintiff contends that it only had one member, Dan French. This, however, is inconsistent with the allegations in Plaintiff's Complaint that Plaintiff had two members, French and Oody. Plaintiff claims that Dan French voted to approve Plaintiff as a member, which is evidenced by a March 26, 2018 letter that formalized Lott's membership interest. (*See* Plaintiff's Response Exhibit 7).

The letter provides (in relevant part):

> This letter confirms our agreement that you have been awarded a 20% membership interest in D.B. French & Company, LLC.

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[1] Such a 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." *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).
Further, "[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

[2] 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.

> We are processing the details of this arrangement including executing a Managing Member Resolution approving the awards, updating the LLC's operating agreement to document the member's respective member interests, and finalizing a Membership Interest Transfer Agreement. *Id.*

Lott argues that despite the above-referenced letter, Plaintiff admits that it did not take the steps outlined in the letter to finalize his membership in Plaintiff. Specifically, Lott argues that Plaintiff admitted that there is no resolution approving an award of a membership interest, a membership transfer agreement between Lott and Plaintiff. (*See* Defendant's Exhibit 9, at 18-22). Further, Plaintiff admitted that as of August 17, 2018, Dan French was the sole member and sole manager of D.B. French. *Id.* at 21. And finally, Plaintiff executed a Resolution, which was adopted by unanimous written consent, effective August 17, 2018, that stated that the undersigned (Dan French) is the sole member and sole manager of Plaintiff. (Plaintiff's Exhibit 21). Dan French was the only signatory on the Resolution. *Id.*

Based on Plaintiff's own admissions, Dan French was the sole member and manager of Plaintiff as of August 17, 2018.[3] The alleged wrongdoing Plaintiff complains of occurred began in July 2018 and ended when Plaintiff was terminated on August 14, 2018. Therefore, at all relevant times, Lott was not a member of Plaintiff. As such, Lott did not owe Plaintiff any fiduciary duties, and could not have breached the same.

In the alternative, Plaintiff argues at minimum, there is a question of fact as to whether Lott was a partner of Plaintiff. MCL 449.6(1) defines a partnership as "an association of 2 or more persons . . . to carry on as co-owners of a business for profit." "The determination of whether a partnership exists is a question of fact." *Miller v City Bank & Trust Co*, 82 Mich App 120, 123;

[3] Although Plaintiff submits an affidavit from Dainforth French stating that Lott received a membership interest, this contradicts his sworn testimony in his deposition. It is well-established that a party may not create an issue of fact by submitting an affidavit that contradicts its own prior deposition testimony. *Kaufman & Payton, PC v. Nkkila*, 200 Mich App 250, 257; 503 NW2d 728 (1993). Such is the case here.

266 NW2d 687 (1978). In the absence of an express agreement, the test to be used in determining if a partnership exists are the acts and conduct in relation to the business. *Van Stee v Ransford,* 346 Mich 116, 133; 77 NW2d 346 (1956).

Plaintiff argues that Lott held himself out as a partner of Plaintiff. Specifically, Plaintiff argues that Dan French stated in front of Lott and Drew Jackson, Concorde's president of asset management that Lott was a partner, and Lott did not deny the assertion. (Plaintiff's Response Exhibit 10, at 52-53. Further, Plaintiff argues that Lott and French discussed Lott's partnership status at meetings and Lott documented the same. (Plaintiff's Response Exhibit 3). Based on the foregoing, there is a question of fact, as minimal as it may be, as to whether Lott was a partner of Plaintiff.

Band v Livonia Assocs., 176 Mich App 95, 113-14; 439 NW2d 285 (1989) held:

> The courts universally recognize the fiduciary relationship of partners and impose on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs. Partners are held to a standard stricter than the morals of the marketplace and their fiduciary duties should be broadly construed . . . The fiduciary duty among partners is generally one of full and frank disclosure of all relevant information. Each partner has the right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs.

Plaintiff has alleged that, as a partner, Lott had a duty to disclose his knowledge of Plaintiff's termination, the formation of North Financial, and other information that affected the partnership. Since a question of fact exists as to whether Lott was a partner, the trier of fact must first determine if Lott was, in fact, a partner. If it is determined that Lott was a partner, the trier of fact must then determine if Lott breached any fiduciary duties he may have owed to Plaintiff.

Based on the foregoing, genuine issues of material fact as to whether Lott is a partner of Plaintiff and whether he breached any fiduciary duties exist. As such, Lott's motion for summary disposition of Plaintiff's breach of fiduciary duty claim is DENIED.

II. Tortious Interference (Count II)

Next, Defendants argue that Plaintiff's claim for tortious interference must be dismissed because there is no evidence that any of the Individual Defendants said or did anything to interfere or impact Plaintiff's relationship with L.M. Kohn. To the contrary, Defendants argue that L.M. Kohn's principals have testified that the Individual Defendants had no influence on their decision to terminate Plaintiff and Dan French.

Plaintiff argues that it is undisputed that it had a valid business relationship and expectancy with its financial advisors and with L.M. Kohn. Plaintiff argues that Defendants lied about Plaintiff's financial condition in order to persuade L.M. Kohn to terminate Plaintiff and to induce Plaintiff's financial advisors to disaffiliate with Plaintiff.

> The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted.
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> *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005) (internal citations omitted) (paragraph breaks added for clarity).[4]

As stated, Plaintiff argues that Defendants lied about Plaintiff's financial status to tortuously interfere with Plaintiff's business relationships and expectancies. The only statement

[4] Further, "[O]ne 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). 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). See also *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996) ("Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.").

that Plaintiff cites to in support of their position is that, at a presentation on August 14, 2018, Lott said that he knew "Dan's finances were not that great." (Plaintiff's Exhibit 15, at 74). Beyond this single statement, Plaintiff does not provide any evidentiary support to maintain its claim for tortious interference against Lott. Further, the statement that Plaintiff relies on to support its claim was made *after* Plaintiff was terminated. And, importantly, the statement was not made about Plaintiff. It was made about nonparty Dainforth French. Therefore, the statement could not have interfered with Plaintiff's business relationships or expectancies.

Plaintiff does not appear to allege, or support any allegation that any other Defendant specifically interfered with Plaintiff's business relationships or expectancies. Further, Plaintiff argues, without support that Defendants "hatched a plan" with L.M. Kohn to have Plaintiff terminated. It is well established that the party opposing a motion for summary disposition 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. *Maiden*, 461 Mich at 120-121.

Based on the foregoing, Plaintiff has not established that a genuine issue of material fact exists as to its claim for tortious interference. As such, Defendant's motion to dismiss Plaintiff's claim for tortious interference is GRANTED, and the same is DISMISSED.

III. Fraudulent and/or Negligent Misrepresentation (Count III)

Next, Defendants argue that Plaintiff's fraud claim should be dismissed. Defendants argue that Plaintiff has never pled that Defendants made any representations to Plaintiff, that Defendants made any representations with the intent that Plaintiff act upon the same, or that Plaintiff relied on

any representation. Instead, Plaintiff argues that Defendants made statements to third parties to induce third parties to terminate their relationship with Plaintiff.

In response, Plaintiff argues that "[c]onsidering Defendants' gross misrepresentation about Plaintiff's financial condition, there are clear and genuine issues of fact regarding Plaintiff's fraud claim.

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).

After a careful review of Plaintiff's Amended Complaint, Plaintiff has failed to plead its claim of fraud with particularity against Defendants. Plaintiff does not allege that Defendants

made any representations to Plaintiff or that Plaintiff relied on any representations from Defendants. Based on the same, Plaintiff has failed to state a claim for fraud against any Defendant. Additionally, Plaintiff has not supported its claim for fraud with evidence sufficient to create a genuine issue of material fact.

Based on the foregoing, Defendant's motion to dismiss Plaintiff's fraudulent misrepresentation claim is GRANTED, and the same is DISMISSED.

IV. Conspiracy (Count IV)

Finally, Defendants argue that since Plaintiff has failed to prove any of its underlying torts, it cannot maintain an action for civil conspiracy. Defendants also argue that Plaintiff has not provided any evidence rebutting their affidavits that state they did not disclose Plaintiff's financial information to third parties. Defendants also argue that forming a competing venture without competing does not give rise to a conspiracy claim.

To the contrary, Plaintiff argues that the Defendants did conspire to form a competing business venture, which gives rise to a conspiracy claim. Further, Plaintiff argues that there are separate, actionable, underlying torts that allow Plaintiff to proceed on its conspiracy claim.

The Michigan Court of Appeals has held that, "A civil conspiracy is [1] a combination of two or more persons, [2] by some concerted action, [3] to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992).

But "a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable, tort." *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App

618, 632; 403 NW2d 830 (1986); see also *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003).

Based on the Court's rulings as outlined above, Plaintiff's only remaining claim is for breach of fiduciary duty against Defendant Lott. As such, Plaintiff cannot maintain a claim for civil conspiracy against Defendants Lott, Love, Cherocci, and North Financial, LLC. Therefore, Defendants motion to dismiss Plaintiff's claim for civil conspiracy is GRANTED, and the same is DISMISSED.

V. Conclusion

Based on the foregoing, Defendant Lott's motion for summary of Plaintiff's breach of fiduciary duty claim is DENIED. Defendants' motion for summary of Plaintiff's tortious interference, fraudulent misrepresentation, and civil conspiracy claims pursuant to MCR 2.116(C)(8) and (C)(10) are GRANTED, and the same are DISMISSED.

It is further ORDERED that Defendants' motion for sanctions is DENIED. And Plaintiff's motion to adjourn the status conference is GRANTED. The status conference scheduled for September 3, 2019, is adjourned to September 12, 2019 at 8:30 a.m. Clients will settlement authority must be present.

IT IS SO ORDERED.

August 14, 2019 /s/ James M. Alexander

Date Hon. James M. Alexander, Circuit Court Judge