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

AMIR DAIZA, ET AL,
Plaintiff/Counter-Defendant,

v. **Case No. 18-169918-CB**
Hon. James M. Alexander

BLAIR MCGOWEN, ET AL,
Defendants/Counter-Plaintiffs.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motion for partial summary disposition. Plaintiff's Complaint alleges that he and Defendant Blair McGowan formed Eagle Theater by verbal agreement in or about September 2011. Plaintiff claims Defendants Blair and Mark McGowan were to add Plaintiff to the corporate documents, but have failed to do so. Plaintiff and Defendant, Blair McGowan, also formed the co-partnerships Urban Land Development Corporation (ULDC) and ULD. Plaintiff filed this Complaint on general claims that the Individual Defendants breached their fiduciary duty as managing member of the businesses, engaged in an effort to oppress him as a minority shareholder, breach of contract, and conversion of business assets.

Defendants' current motion seeks dismissal of the derivative claim (Count I) for breach of contract; (Count II) breach of fiduciary duty; (Count III) statutory conversion of Eagle Assets; (Count IV) accounting; (Count VI) statutory conversion regarding Urban Land Development Corporation; (Count VIII) minority shareholder oppression; and (Count XII) breach of contract.[1]

1 Defendants also moved for summary disposition of Counts XV, XVI, and XVII, for indemnification and

And Defendants so move under MCR 2.116(C)(5), (C)(8), and (C)(10).

A (C)(5) motion tests whether a plaintiff lacks the legal capacity to sue. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000). A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).[2] And a (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden*, 461 Mich at 120.[3]

Defendants argue that Counts I, II, III, IV, VI, VIII, and XII must be dismissed because they fail as a matter of law, and further, Counts I, II, VI, and VIII must be dismissed because Plaintiff lacks the legal capacity to sue.

I. Count I – Breach of Contract

Defendants first seek dismissal of Plaintiff's derivative claim on behalf of Eagle because (1)Plaintiff Daiza is not a member of Eagle Theater Entertainment, LLC, and (2) he failed to comply with notice requirements pursuant to MCL 450.4510. Defendants argue that summary disposition is appropriate under MCR 2.116(C)(5), (C)(8), and (10).

In response, Daiza argues that he is a member of Eagle. Further, Daiza claims that he has evidence that establishes he is (and was) a member of Eagle. In support of his position, Daiza

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contribution under MCR 2.116(C)(7). Plaintiff, in their Response to Defendants' motion state, "[b]ased on the August 10, 2018 Order of the United States District Court for the Eastern District of Michigan (Cases No. 16-13288 & 16-13311). Plaintiffs agree to voluntarily dismiss their Counts XV, XVI, and XVII, for indemnification and contribution." (Plaintiffs' Response Brief ¶ 10) As such, Counts XV, XVI, and XVII are dismissed.

2 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).

3 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.

cites to an email authored by Defendant Blair McGowan. The email, dated June 18, 2012, to PNC Bank states, "I, Blair McGowan, would like to take my name off this account as signer, and leave the other member of our LLC, Amir Daiza as the only signor." (Response Exhibit B). Further, Daiza is referred to as a "partner" in other communications. (Response Exhibits C-D).

Defendants argue that the use of "member" and "partner" were used interchangeable, and were "obviously incorrect." Defendants assert that even with this statement, Blair McGowan was the sole member and owner of Eagle.

As Defendants state, in order to establish standing, Plaintiff must be able to demonstrate that he has a "legally protected interest that is in jeopardy of being adversely affected." *Dep't of Treasury v. Comerica Bank*, 201 Mich App 318; 506 NW29 283 (1993). By their own admission, Daiza is a "member" of the LLC. As such, Daiza would, certainly, have a legally protected interest in the matter. Further, any challenges Defendants have to Daiza's status as a "member" would necessarily create genuine issue of a material fact.

Defendants argue that, if Daiza can establish that he was a member of Eagle, the derivative claims are subject to summary disposition under MCR 2.116(C)(8) because Daiza failed to comply with statutory notice requirements expressed in MCL 450.4510(b) and (c). Defendants allege that Daiza did not establish that a written demand was made or that ninety days had expired from the date of the demand.

MCL 450.4510 provides (in relevant part):

> A member may commence and maintain a civil suit in the right of a limited lability company if . . .
> (b) The plaintiff has made written demand on the managers or the members with the authority requesting that the managers or members cause the limited liability copany to take suitable action.
>
> (c) Ninety days have expired from the date the demand was made unless the

> member has earlier been notified that the demand has been rejected or unless irreparable injury to the limited liability company would result by waiting for the expiration of the 90-day period.

In response, Plaintiffs argue that the claim is both individual and derivative in nature. Further, Plaintiffs allege in their complaint that Daiza repeatedly issued written requests for actions regarding management disputes. (Complaint at ¶34). Further, Plaintiff argues that several of these claims were addressed in a previous suit, which was dismissed without prejudice in Case No. 2017-161874-CB. As a result, Plaintiffs argue, Defendants had written notice of the requested action and more than ninety days had passed before the filing of the present complaint.

Accepting all well-plead allegations as true, the Court cannot say that the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade,* 439 Mich at 163. Based on the foregoing, Defendants' motion as to Count I under MCR 2.116(C)(5), (C)(8), and (C)(10) is denied.

II. Count II – Breach of Fiduciary Duty

Defendants next seek dismissal of Plaintiff's breach of fiduciary duty claim. Again, Defendants argue that summary disposition is appropriate under because Daiza lacks standing to sue. As previously discussed, there are facts to establish that Daiza is a member of Eagle. Again, summary under MCR 2.116(C)(5) is denied for the reasons previously addressed.

With respect to such a breach of fiduciary duty claim, Michigan law recognizes that "a manager must perform the duties of manager in good faith, in a prudent manner, and in a manner believed to be in the best interest of the limited liability company." MCL 450.4404(1). Further, the fiduciary duties owed by the managing member of a limited liability company are owed to

the actual members of the limited liability company. *Salem Springs, LLC v. Salem Twp.*, 312 Mich App 210, 223; 880 NW2d 793 (2015).

Defendants argue that they are entitled to dismissal of said claim because Plaintiff failed to adequately plead acts sufficient to support the claim. In Response, Plaintiffs, argue that it did. Specifically, Plaintiffs allege that Defendant Blair McGowan (1) has caused Eagle to breach its obligations to file tax returns; (2) used Eagle's money and assets without consent and for his own benefit; (3) wrote checks to himself form Eagle's accounts unrelated to Eagle's business; (4) drained corporate earnings; and (5) made preferential payments to himself or entities he controls. (Complaint at ¶¶ 64-70).

After a careful review of the Complaint, considering only the pleadings and accepting all well-pled factual allegations as true, the Court finds that Plaintiff has plead adequate factual allegations to sufficiently support its breach of fiduciary duty claim, and Defendants' motion for dismissal of the same is DENIED.

III. Counts III and IV – Statutory Conversion and Accounting

Defendants next seek summary of Plaintiff's statutory conversion of Eagle Assets claim and for an accounting. Michigan law provides that "[t]he tort of conversion is 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

"Statutory conversion, by contrast, consists of knowingly "buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property." *Head*, 234 Mich App at 111; quoting MCL 600.2919a.

Defendants argue that these claims are predicated on Daiza being able to establish that he is a member of the limited liability company. Defendants argue that since Plaintiff cannot establish his status as a member, the claims must be dismissed. Further, Defendants argue that only members are entitled to an accounting, so Daiza is not permitted to receive the same.

Based on the Court's prior ruling in this Opinion, Defendants' motion as to Counts III and IV is denied.

IV. Count VIII – Shareholder Oppression

Defendants next seek dismissal of Plaintiff's Count VIII for shareholder oppression. Again, Defendants' only argument as it relates to Daiza's shareholder oppression claim is that it must fail due to Daiza's status as a member.

Once again, this argument fails, and as a result, summary disposition as to Count VIII is denied.

V. Count XII – Breach of Contract

Next, Defendants claim that Plaintiffs failed to state a claim for breach of contract against Defendant Eagle. Plaintiffs assert a breach of contract claim arising out of an alleged breach of a promissory note executed by Defendant Dan McGowan on behalf of Defendant One South. Defendant argues that Defendant Eagle was not a party to the contract, and therefore, is entitled to judgment as a matter of law.

In response, Plaintiffs argue that promissory note was executed contemporaneously with a Pledge and Escrow agreement. Plaintiffs argue that these two documents should be read together as both documents reference the other. These agreements, as alleged by Plaintiffs, were part of an overall deal whereby Daiza loaned Defendant One South a sum of money subject to the terms of the Pledge and Escrow Agreement. Defendant Eagle, Plaintiff asserts, was a party

to the Pledge and Escrow Agreement, and therefore, is a party to the promissory note.

It is well-established Michigan Law that "the general rule [is] that separate agreements are treated separately. However, when parties enter into multiple agreements relating to the same subject-matter, we must read those agreements together to determine the parties' intentions. *Wyandotte Elec Supply Co v. Elec Techonology Sys*, 499 Mich 127, 148; 881 NW2d 95 (2016). Further, "[w]here one writing references another instrument for additional contract terms, the two writings should be read together." *Forge v. Smith*, 458 Mich 198, 207; 580 NW29 876 (1998).

Pursuant to the August 24, 2014 Pledge and Escrow Agreement, the Pledgor, Blair McGowan was to deliver his issued and outstanding membership interests of Eagle Theater. Further, although Defendant Eagle was not the pledgor or pledgee, Eagle was subject to the terms of the agreement. Specifically, in the event of a default, a court could appoint a receiver over Eagle or order the liquidation of Eagle.

Considering only the pleadings and accepting all well-pled factual allegations as true, the Court finds that Plaintiff has plead adequate factual allegations to sufficiently support its breach of contract claim against Defendant Eagle, and Defendants' motion for dismissal of the same is denied.

VI. Claims Involving Urban Land Development Corporation and ULD

Finally, Defendants make several arguments as it relates to Urban Land Development and ULD. Again, Defendants argue that in regards to Count II, Daiza lacks standing to sue, Plaintiffs failed to comply with notice requirements pursuant to MCL 450.1493a. And again, as previously discussed, these arguments fail, and summary disposition is denied.

Defendants argue that Plaintiffs have failed to state a derivative claim against Blair

McGowan on behalf of ULD because the Michigan Partnership Act does not recognize breach of fiduciary duty in Count II. As such, Defendants argue that the claim for the same should be dismissed.

In response to this argument, Plaintiffs rely on MCL 449.20, which states that "[p]artners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability." Plaintiff further relies on the Court of Appeals expansion of MCL 449.20, which reasoned:

> "[C]ourts 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 . . ." *Band v. Livonia Assoc*, 176 Mich App 95, 113-14; 439 NW2d 285 (1989).

It is evident that Michigan does recognize that partners owe a fiduciary duty to the partnership and other partners. As such, summary disposition for failure to state a claim on this issue is denied.

Next, Defendants argue that summary disposition pursuant to MCR 2.116(C)(5) and (8) is necessary as to Dazia's individual claims alleged against Urban Land Development Corporation in Count VI. Defendants argue that failed to plead facts evidencing an exception to the derivative nature of the claim, and therefore, lacks standing to bring an individual claim for conversion.

Plaintiffs respond to this by arguing that Daiza did suffer personal injury that was separate and distinct from other shareholders. Specifically, Plaintiffs plead, "Defendant Blair McGowan has not made any payments or distributions to Daiza pursuant to Diaza's ownership interest." (Complaint at ¶95).

Based on Plaintiff's allegation, the Court finds that Plaintiff has plead adequate factual

allegations to sufficiently support its individual claim against Defendant Urban Land Development Corporation, and Defendants' motion for dismissal of the same is denied.

Finally, Defendants argue that Plaintiff's claim for minority shareholder oppression in Count VIII as it relates to ULD co-partnership must be dismissed pursuant to MCR 2.116(C)(8) because Michigan Law does not recognize the cause of action under the Uniform Partnership Act.

In response, Plaintiffs argue that oppression claims have been brought under common law. See e.g., *Love v. Wilson*, 364 Mich 684, 696; 111 NW2d 849 (1961). Defendants in reply, do not provide any authority to dispute Plaintiffs' position. Based on the same Defendants' motion for summary disposition for minority shareholder oppression is denied.

Beyond the foregoing conclusions, it is well-settled that "summary disposition is premature if granted before discovery on a disputed issue is complete. *Villiage of Diamondale v. Grabble*, 240 Mich App 553, 566; 618 NW2d 23 (2000). This case was filed on November 14, 2018. Defendants filed their first responsive pleading on December 12, 2018. At this point in the litigation, a scheduling order has not been issued outlining discovery dates. Certainly, discovery has not been completed as the case is in its infancy. As such, in addition to the reasons addressed previously, Defendants' Motion for Summary Disposition under MCR 2.116(C)(10) is premature.

Summary/Conclusion

To summarize, Defendants' motion for partial summary disposition is DENIED in its entirety.

IT IS SO ORDERED

March 6, 2019___ __/s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge