

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

**ROYAL 8, LLC,
Plaintiff/Counter-Defendant,**

v.

**Case No. 19-172943-CB
Hon. James M. Alexander**

**NEVAR JAHWARY and
ARUM YULKO,
Defendants/Counter-Plaintiffs/Cross-Plaintiffs**

&

**FADI ESSA,
Defendant/Cross-Defendant**

_____ /

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant/Cross-Defendant Nevar Jahwary's motion for summary disposition.

According to Plaintiff's Amended Complaint, Plaintiff and Defendants are members of Ferndale Lodging, LLC. The sole asset of Ferndale Lodging is a hotel located in Ferndale. Plaintiff acquired its interest in Ferndale Lodging from Essa and Jahwary on or about September 10, 2018, pursuant to a Membership Interest Purchase Agreement. Pursuant to the Membership Interest Purchase Agreement, Plaintiff agreed to pay Essa and Jahwary \$500,000 for a 33.3% interest in the company.

Plaintiff's Amended Complaint alleges, among other things, that Essa and Jahwary would be responsible for competing renovations at the hotel. Although renovations were not completed, the hotel received a temporary certificate of occupancy in December 2018. At that time, Jahwary was responsible for the day-to-day operations. Plaintiff alleges that in his managerial role, Jahwary has violated the Operating Agreement and Memorandum by failing to complete the renovations, maintaining and operating the hotel in a clean and orderly manner, by incurring debt, and by using company funds for personal use.

On these general allegations, Plaintiff filed its Amended Complaint on claims titled: (Count I) breach of the Memorandum of Understanding – damages; (Count II) breach of the Memorandum of Understanding – specific performance; (Count III) declaratory judgment; (Count IV) damages under MCL 450.4515; and (Count V) breach of the Member Interest Purchase Agreement.

In response, Essa filed an Amended Cross-Complaint against Jahwary. Essa alleges that Jahwary, as managing member of Ferndale Lodging, engaged in wrongdoing to the detriment of Essa and the company. Essa alleges that pursuant to the Operating Agreement, Essa and Jahwary were to each contribute \$30,000 for the down payment on a land contract purchase of the Hotel by Ferndale Lodging. Essa claims that he paid Jahwary for his share of the down payment. Essa alleges that Jahwary formed West Coast Wholesale, LLC, for the sole purpose of defrauding Essa by getting him to pay the entire down payment.

Further, Essa claims that West Coast Wholesale contracted to sell small refrigerators to be used in hotel rooms. Essa sent payment in the amount of \$150,000 for the refrigerators. Sometime after the initial payment, Essa made another \$50,000 payment to West Coast

Wholesale pursuant to its request. Essa claims that Jahwary removed \$101,000 from the West Coast Wholesale bank account for personal use.

Essa further alleges that the hotel at issue suffered property damage as a result of an insured, covered casualty. Essa claims that Jahwary received \$130,000 in payment from the insurance company, Atlantic Casualty Insurance Company, but failed to turn the funds over to Ferndale Lodging. Essa alleges that Jahwary used funds that belonged to Ferndale Lodging for his personal use.

On these general allegations, Essa filed his Amended Cross-Complaint on claims titled: (Count I) common law conversion; (Count II) statutory conversion; (Count III) fraud; (Count IV) breach of contract; (Count V) breach of fiduciary duty; (Count IV) shareholder oppression; (Count VII) accounting; and (Count VIII) indemnification.

As stated, Jahwary now moves for summary disposition of Essa's claims for common law conversion, statutory conversion, and accounting 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. *Maiden*, 461 Mich at 120.²

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.

Further, Jahwary argues that the Amended Cross-Complaint includes allegations that are unrelated to the case currently pending before the Court. Therefore, Jahwary argues, those allegations and claims violate MCR 2.203(D) and must be dismissed pursuant to MCR 2.504(B)(1).

I. MCR 2.203 Cross-Claims

First, Jahwary argues that the Amended Cross-Complaint must be dismissed as violative of MCR 2.203(D). Jahwary argues that the Amended Cross-Complaint alleges new claims that are unrelated to the underlying action. Jahwary further argues that since the actions do not arise from the same transactions or occurrences, Essa's Amended Cross-Complaint is not proper. Additionally, Jahwary argues that the referenced insurance claim was not for Ferndale Lodging, rather a different property in which Essa did not hold an ownership interest. Based on the same, Jahwary argues that these claims, if pursued, should be brought as a separate action, not as a cross-claim.

In response, Essa argues that the allegations in his Amended Cross-Complaint do arise out of the same transactions or occurrences that are the subject of the original Complaint. Further, Essa argues that it includes a claim that a party against whom the cross-claim is asserted may be liable to the cross-claimant. And finally, Essa argues that the claims relate to the property that is the subject matter of the original action, the business interests of Ferndale Lodging and the hotel it own.

MCR 2.203(D) provides:

A pleading may state as a cross-claim a claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or that relates to property that is the subject matter of the original action. The cross-claim may include a claim that the party

against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

Further, MCR 1.105 provides:

These rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties.

Here, after a review of the pleadings, the Court finds that the Amended Cross-Complaint does comport with MCR 2.203(D). In Essa's Amended-Cross Complaint, he alleges that Jahwary created West Coast Wholesale to covert Essa's funds, which were to be used for the hotel. Essa also alleges that the payments made from Atlantic Casualty Insurance Company were also converted by Jahwary. Although Jahwary disputes these allegations, he has not provided any evidence supporting his position.

Further, in the interest of judicial economy and pursuant to MCR 1.105, the Court finds that, in the interest of justice, the claims asserted in the Amended Cross-Complaint should remain with this Court in the current action.

Based on the foregoing, Jahwary's motion to dismiss Essa' Amended Cross-Complaint and strike any allegations to West Coast Wholesale, LLC, and Atlantic Casualty Insurance Company is DENIED.³

³ The Court notes that in his Reply, Jahwary argues that the West Coast Wholesale transaction is already subject to a separate lawsuit filed in the United States District Court for the Eastern District of Michigan. As a result, Jahwary argues that the allegations in Essa's Amended Cross-Complaint are duplicative and must be stricken because it seeks the same recovery in both State and Federal Court. The Court finds that this argument is not properly before the Court, and the Court will not address the same. In his reply, Jahwary asserts a separate ground for which dismissal is warranted. The Court is unconvinced by Jahwary's cursory argument that it should dismiss this case based on a prior action when the true nature of his motion was one brought dismiss pursuant to (C)(8) and (C)(10). Should Jahwary wish to file a (C)(6) motion, he may do so, but the Court will not address the same absent full and complete briefing on the issues. It is well established that "[t]rial courts are not the research assistants of the litigants; the parties have 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).

II. Common Law Conversion

Next, Jahwary argues that Essa failed to state a claim for common law conversion, and as such, the claim should be dismissed pursuant to MCR 2.116 (C)(8). Specifically, Jahwary argues that Essa has failed to allege that Jahwary's initial exercise of domain over any monies at issue was wrongful. Instead Jahwary argues that the funds at issue were obtained by Essa's consent.

In response, Essa argues that the Amended Cross-Complaint alleges that Jahwary obtained the funds from Essa under false pretenses, and then converted the funds to his personal use. (See Amended Cross-Complaint, ¶¶26, 27, 32, 33)

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.

In *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004), the Court of Appeals reasoned, “[t]o support an action for conversion of money, the defendant must have obtained the money without the owner’s consent to the creation of a debtor-creditor relationship and must have had an obligation to return the specific money entrusted to his care.” *Lawsuit Fin*, 261 Mich App at 591 (internal quotations and citations omitted).

Considering only the allegations in Essa's Amended Cross-Complaint, the Court finds that Essa has stated a claim for conversion. Specifically, Essa claims that Jahwary obtained the money through “theft, embezzlement, and distinct acts of dominion wrongfully exerted over the

property of Essa and Ferndale Lodging, LLC.” (Amended Cross-Complaint, at ¶33). As such, Essa has stated a claim for conversion, and Jahwary’s motion to dismiss the same is DENIED.

III. Statutory Conversion

Next, Jahwary argues that Essa’s claim for statutory conversion fails because the statute was not designed to provide a remedy against the individual who has actually converted the property. Instead, Jahwary argues that the statute provides a remedy to those who *received* stolen, embezzled, or converted funds. Since Essa claims that Jahwary converted the property, Jahwary argues that he cannot also be liable for statutory conversion.

However, the Supreme Court of Michigan has explained:

Indeed, when the Legislature first enacted what we now refer to as the statutory conversion remedy, in 1976, its terms did not provide a separate remedy against a converter. As originally enacted, MCL 600.2919a stated:

‘A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise.’

In interpreting this now-defunct provision, the Court of Appeals has explained that, initially, MCL 600.2919a was not “designed to provide a remedy against the individual who has actually stolen, embezzled, or converted the property.” Rather, it proscribed conduct that “occur [s] after the property has been stolen, embezzled, or converted by the principal....”

In 2005, the Legislature amended MCL 600.2919a to its present language. In particular, Subsection (1)(a) created a remedy against a person who “steal[s] or embezzl[es] property or convert[s] property to the other person's own use.”

Aroma Wines & Equip, Inc. v Columbian Distribution Service, Inc., 497 Mich 337, 353-54; 871 NW2d 136 (2015).

Based on the Supreme Court's holding in *Aroma Wines*, a claim for statutory conversion can be brought against a person who steals, embezzles, or converts property. Based on the same, Jahwary's argument fails, and his motion to dismiss Essa's claim for statutory conversion is DENIED.

IV. Accounting

Finally, Jahwary argues that Essa's claim for an accounting should be dismissed because Essa has an adequate remedy at law. Jahwary argues that since Essa can inspect, review, and copy all books and records of the Company during discovery, his claim for an accounting is unnecessary. Further, Jahwary argues that it is impossible for him to provide an accounting since M. Shapiro Management Company, LLC has possession of all of the books and records of Ferndale Lodging.

Essa, however, argues that as a member of the limited liability company, he is entitled to an accounting pursuant to MCL 450.4503. MCL 450.4503(5) provides, "[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."

However, as Jahwary argues, "[a]n accounting is unnecessary where discovery is sufficient to determine the amounts at issue." *Boyd v Nelson Credit Centers, Inc.*, 132 Mich App 774, 779; 348 NW2d 25 (1984).

Here, Essa does not provide any evidence to indicate that he cannot get the information he seeks in his accounting claim through discovery. As such, Essa fails to create a question of fact that he is entitled to an accounting.

Based on the foregoing, Jahwary's motion to dismiss Essa's claim for an accounting is GRANTED, and the same is DISMISSED.

V. Conclusion

In conclusion, Jahwary's motion for summary disposition and to strike Essa's Cross-Complaint pursuant to MCR 2.203(D) is DENIED. Jahwary's motion to dismiss Essa's common law and statutory conversion claims pursuant to (C)(8) is DENIED. And Jahwary's motion to dismiss Essa's claim for an accounting pursuant to (C)(10) is GRANTED, and the same is DISMISSED.

IT IS SO ORDERED.

November 6, 2019
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge