

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

**CERTIFIED FACTORY WHEEL, LLC,
Plaintiff,**

v.

**Case No. 19-176258-CB
Hon. James M. Alexander**

**ERIC PERKINS,
Defendant.**

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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant's Motion for Summary Disposition.

According to Plaintiff's Complaint, Plaintiff is in the business of remanufacturing and repairing wheels and selling the finished products to customers. Defendant was employed by Plaintiff until July 2018, holding various positions. Most recently, Defendant was a Production Manager and Director of Operations.

In his role, Defendant was responsible for, among other things, overseeing the purchase and pickup of damaged/used wheels from Plaintiff's supplier's scrap yard. The wheels would be returned to Plaintiff for inventory. Plaintiff would then issue a check to its supplier; which Defendant would deliver.

Plaintiff alleges that Defendant purchased wheels for his own benefit through Plaintiff's account and failed to tender funds from scrap yards to Plaintiff. Plaintiff further alleges that Defendant misused company time and resources for his own benefit.

On these general allegations, Plaintiff filed its Complaint on claims titled (Count I) silent fraud; (Count II) breach of fiduciary duties; (Count III) common law and statutory conversion; (Count IV) breach of contract; (Count V) accounting; (Count VI) unjust enrichment; and (Count VII) permanent injunction.

As stated, Defendant now moves for summary disposition of Plaintiff's Complaint pursuant to 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

I. Count I - Silent Fraud

According to Plaintiff's Complaint, Defendant had a duty to disclose that he purchased wheels for his own benefit and to forward the proceeds from sales to Plaintiff. (Complaint, at ¶20). Plaintiff further alleges that Defendant did not disclose purchases or proceeds and that Plaintiff reasonably relied on Defendant's silence by continuing to employ Defendant. (Complaint, at ¶¶21, 22). As a result of Defendant's concealment, Plaintiff has suffered damages. (Complaint, at ¶23).

In his motion, Defendant argues that Plaintiff's claim is preempted by the Michigan Uniform

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.

Trade Secret Act (MUTSA). Alternative, Defendant argues that Plaintiff cannot meet the elements of silent fraud because Defendant did not know he was creating a false impression, he did not intend for Plaintiff to rely on any concealments, and Plaintiff did not rely on the same because Plaintiff received the wheels it paid for.

In response, Plaintiff argues that its silent fraud claim is not based on trade secrets, so therefore, MUTSA does not apply. The Court agrees. Plaintiff further argues that it has satisfied the elements of silent fraud, and that Defendant cannot escape liability by merely claiming that he was unaware that his non-disclosure would create a false impression or that Plaintiff would rely on the same.

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).

To prove silent fraud, also known as fraudulent concealment, the plaintiff must show that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure. A plaintiff cannot merely prove that the defendant failed to disclose something; instead, “a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive.” *Lucas v Awaad*, 299 Mich App 345, 363-364; 830 NW2d 141 (2013); quoting *Roberts v Saffell*, 280 Mich App 397, 404; 760 NW2d 715 (2008)

After a careful review of Plaintiff’s Complaint, Plaintiff has failed to plead its silent fraud with particularity. Specifically, Plaintiff does not allege that Defendant intentionally concealed his actions with the intent to defraud Plaintiff. Rather, Plaintiff merely alleges that Defendant had a duty to disclose and failed to do the same. (Complaint, at ¶¶ 20, 21).

Based on the foregoing, Plaintiff has failed to state a claim for silent fraud. As such, Defendant's motion for summary disposition pursuant to (C)(8) of Plaintiff's fraud claim is GRANTED, and the same is DISMISSED.

II. Count II – Breach of Fiduciary Duties

Next, Defendant argues that since he is not an officer, director, or member of Plaintiff, he does not owe any fiduciary duties to Plaintiff. In response, Plaintiff argues that as a high-level employee, Defendant did owe Plaintiff fiduciary duties. Specifically, Plaintiff argues that as Director of Operations, Defendant was trusted with valuable functions and confidential information.

The parties agree that, “[t]o establish a breach of fiduciary duty, the plaintiff must demonstrate a fiduciary relationship between himself and defendants.” *Holland v Jobete Music Co.*, 1999 WL 33446487. “A fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another. Relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed.” *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995).

To support their respective positions, both parties cite to unpublished law. Plaintiff relies on *Dana Ltd v American Axel and Mfg Holdings, Inc*, 2012 WL 2524008, at *12, for the proposition that, “[t]he general rule is that the employer-employee relationship does not give rise to a fiduciary relationship unless the employee is a high-level employee, or if there is a specific agency relationship.”

Here, Plaintiff has presented some evidence by way of affidavits that Defendant was a “high-level employee.” Aaron Campagne, Plaintiff's general manager, averred that Defendant was a high-

level employee and, at some point during his employment was the Director of Operations. (Plaintiff's Response, Exhibit 2). Further, Campagne stated that as a high-level employee, Defendant carried out "valuable functions" and was "trusted with highly important and confidential information." *Id.* David Briggers, owner and managing member of Plaintiff, also stated that Defendant was a high-level employee. (Plaintiff's Response, Exhibit 4). Further, Briggers stated that Defendant was Plaintiff's agent in dealing with third parties. *Id.*

At this point in the proceeding, Plaintiff has presented some evidence that Defendant may have been a high-level employee, and as such, may have owed fiduciary duties to Plaintiff. Although Plaintiff's cited law is not binding on this Court, based on the evidence presented, the Court will allow Plaintiff's claim for breach of fiduciary duties to continue at this stage in the proceeding.

Based on the foregoing, Plaintiff has created a genuine issue of material fact as to whether Defendant owed fiduciary duties to Plaintiff. As such, Defendant's motion to dismiss the same is DENIED.

III. Count III Common Law and Statutory Conversion

Next, Defendant argues that Plaintiff's conversion claims fail because Michigan, generally, does not recognize a cause of action for conversion of money. Further, Defendant argues that Plaintiff has not identified the "resources" Defendant allegedly converted. As such, Defendant argues that Plaintiff has failed to state a claim for conversion.

In response, Plaintiff argues that Defendant had an obligation to return specific funds that Defendant received from the sale of scrap metal. As such, Plaintiff argues that it has identified a specific identifiable sum of money. Further, Plaintiff argues that Defendant converted Plaintiff's

resources including scrap metal, truck and fuel payments, Plaintiff's account number, and Plaintiff's time and salary.

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).

Here, although Plaintiff claims it has identified a sum that it believes it is owed, Plaintiff has failed to allege or identify the same. Alleging that it is owed general funds is too general to maintain an action for conversion of money. Plaintiff also alleges that Defendant has converted salary and payments Plaintiff made towards Defendant’s truck and fuel. However, Plaintiff has, again, failed to identify specific identifiable funds to maintain an action for conversion of money.

As it relates to “scrap metal,” Plaintiff’s claim is actually one for money. Plaintiff refers to paragraphs 11 and 14 to support its position for conversion of scrap metal. Those paragraphs provide that Defendant exchanged scrap metal for cash and kept the cash he received for himself.

(Complaint, at ¶¶ 11, 14). Again, Plaintiff has failed to identify the specific money it alleges it is owed.

Finally, in its Response, Plaintiff argues that the account number was another resource that Defendant converted. However, after a review of Plaintiff's Complaint, Plaintiff has not plead the same. Plaintiff has plead that an account number was generated with the supplier, and that Defendant purchased wheels from the supplier with Plaintiff's account number for his own benefit. Although Plaintiff alleges that Defendant used the account number, Plaintiff has failed to establish or plead that the account number itself was converted. Rather, Plaintiff it appears that the crux of Plaintiff's Complaint is that Plaintiff did not realize the profits from the sale of the wheels. As with the other "resources," Plaintiff is seeking money, which has not been identified to maintain a conversion action.

Based on the foregoing, Plaintiff has failed to create a genuine issue of material fact as it relates to Count III of its Complaint. As such Defendants' motion for summary of Plaintiff's conversion claim is GRANTED, and the same is DISMISSED.

IV. Count IV – Breach of Contract

Next, Defendant argues that Plaintiff's breach of contract claim fails. His argument, however, is contradictory. First, Defendant claims that the contract that the parties had was oral and argues that he did not breach any terms of the contract. But Defendant then goes on to argue that the contract does not exist.

In response, Plaintiff argues that contract prohibited Defendant from misusing Plaintiff's resources for his personal use, which was in violation of the parties' contract.

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).

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).

Here, there is some evidence that there may have been an oral contract between the parties such that a question of fact remains regarding the same. In his affidavit, Biggers stated that an employment contract prohibited Defendant from using Plaintiff’s recourses. (Plaintiff’s Response, Exhibit 4). And as previously stated, Defendant has argued that the parties had an oral contract.

Based on the foregoing, the Court finds that a genuine issue of material fact regarding Plaintiff’s claim for breach contract, and Defendants’ motion for summary of the same is DENIED.

V. Count V – Accounting

The parties agree, “[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). Based on the same, Plaintiff agreed to “dismiss its accounting claim without prejudice.” (Response, at 13). As such, Plaintiff’s Count V is DISMISSED.

VI. Count VI – Unjust Enrichment

Next, Defendant argues that Plaintiff's unjust enrichment claim fails because there is an express contract governing the subject matter. Further, Defendant argues that Defendant did not receive any benefit from Plaintiff, so Plaintiff cannot maintain its claim for unjust enrichment.

In response, Plaintiff argues that it can maintain its claim for unjust enrichment in the alternative because Defendant has contested the existence of an oral contract. Further, Plaintiff argues that Defendant did receive benefits from Plaintiff, namely the use of Plaintiff's resources to obtain a personal financial gain.

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.

Again, as discussed above, although at one-point Defendant indicates that there was an oral contract between the parties, in the next breath, he claims that no such contract exists ("Plaintiff is alleging a contract (non-compete) that does not exist." (Defendant's Motion, at 6)). As such, since Plaintiff is claiming there was a verbal agreement and that is disputed by Defendant, Plaintiff can seek recovery under both theories if the trier-of-fact determines that an

express verbal contract did not exist.

Based on the foregoing, Defendant's motion to dismiss Plaintiff's unjust enrichment claim is DENIED.

VII. Count VII – Permanent Injunction

Finally, Defendant argues that Plaintiff is not entitled to an injunction because Plaintiff has failed to establish the elements for the same. The Court agrees.

Granting injunctive relief is within the sound discretion of the court. The exercise of such discretionary power must not be arbitrary. Decision must be based upon the facts of the particular case. A strict legal right, if incompatible with the equities of the case, does not necessarily entitle one to equitable redress. *Holland v Miller*, 325 Mich 604, 611; 39 NW2d 87 (1949).

Injunctive relief, however, is an extraordinary remedy that courts normally grant only when (1) justice requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable injury. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 110; 593 NW2d 595 (1999) (internal quotations and citations omitted).

Here, Plaintiff simply alleges that Defendant engaged in unauthorized and improper conduct. Plaintiff has not alleged that there is no adequate remedy at law or that a real and imminent danger of irreparable injury exists. As such, Plaintiff has failed to plead and establish that it is entitled to a permanent injunction. Based on the same, Defendant's motion to dismiss Plaintiff's claim for a permanent injunction is GRANTED, and the same is DISMISSED.

VIII. Conclusion

Defendants' motion for summary disposition of Plaintiff's Complaint pursuant to (C)(8) and (C)(10) is GRANTED as to Plaintiff's Count I (silent fraud), Count III (conversion), Count V (accounting), and Count VII (permanent injunction), and Plaintiff's claims for the same are DIMSISSED.

Defendant's motion as to the remainder of Plaintiff's claims is DENIED.

But, while the factual allegations contained in Plaintiff's Complaint may fall short for purposes of the present motions, whenever the Court is inclined to grant a (C)(8) motion, the Court Rules require that a plaintiff be provided an opportunity to amend to properly allege sufficient facts to support its claim. MCR 2.116(I)(5). Plaintiff has requested to amend its Complaint as to its claim for silent fraud and to add a claim for fraudulent misrepresentation. The Court will provide Plaintiff such an opportunity. Plaintiff has 21 days to amend its Complaint to properly allege its fraud claims only.

IT IS SO ORDERED.

November 27, 2019
Date

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