STATE OF MICHIGAN

NINTH JUDICIAL CIRCUIT COURT
TRIAL DIVISION

RAGHURAM ELLURU, M.D.,

Plaintiff,

v

GREAT LAKES PLASTIC, RECONSTRUCTIVE & HAND SURGERY, P.C., a Michigan corporation, and SCOTT D. HOLLEY, M.D., jointly and severally,

Defendants.

HON. PAMELA L. LIGHTVOET P47677

FILE NO. 2015-0575-CB

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OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court held in the
City and County of Kalamazoo, Michigan
on this 8th day of March, 2016;

HON. PAMELA L. LIGHTVOET, CIRCUIT JUDGE

Pending before the Court is Plaintiff Raghuram Elluru, M.D.'s Motion for Summary Disposition and Defendants Great Lakes Plastic, Reconstructive & Hand Surgery, P.C. and Scott D. Holley, M.D.'s Motion for Summary Disposition.

I. FACTS

Dr. Elluru and Dr. Holley formed Great Lakes Plastic, Reconstructive & Hand Surgery, P.C. (the Corporation) in 1998 for the purpose of practicing medicine. Dr. Elluru and Dr. Holley are the only shareholders of the Corporation and they each own 100 shares of the Corporation's stock. They are also the only members of the Board of Directors. Dr. Holley was elected as the President of the Corporation and Dr. Elluru was elected as the Secretary and Treasurer.

In early 2015, Dr. Elluru approached Dr. Holley to discuss dissolving the Corporation and separating their medical practices. On December 7, 2015, Dr. Holley sent Dr. Elluru a letter stating that he was immediately terminating Dr. Elluru for just cause. Dr. Elluru filed suit on December 11, 2015, seeking dissolution of the Corporation and Injunctive Relief. Plaintiff's Verified Complaint contains the following counts: Count I: Dissolution of Great Lakes Plastic Reconstruction & Hand Surgery, P.C. – Deadlock; Count II: Setting Aside of Purported Corporate Act Because of Dr. Holley's Conflict of Interest; and Count III: Dissolution of Great Lakes Plastic, Reconstruction & Hand Surgery, P.C. by Shareholder Because of Dr. Holley's Willfully Unfair and Oppressive Acts. Defendants have filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and Plaintiff has filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10). This Court heard oral arguments for the Motions for Summary Disposition on January 22, 2016.

II. STANDARD OF REVIEW

Summary disposition is available under MCR 2.116(C)(7) when a "claim is barred by a release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action." *Maiden v Rozwood*, 461 Mich 109, 118 n 3; 597 NW2d 817 (1999). A defendant who files a motion for summary disposition under (C)(7) may file

supportive material such as affidavits, depositions, admissions, or other documentary evidence. *Turner v Mercy Hosp & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995). When reviewing these motions, the court will accept the plaintiff's well-pleaded factual allegations as true unless contradicted by the parties' supporting affidavits, depositions, admissions, or other documentary evidence. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). "If no facts are in dispute, whether the claim is statutorily barred is a question for the court as a matter of law." *Adams v Adams*, 276 Mich App 704, 720; 742 NW2d 399 (2007).

A motion for summary disposition pursuant to MCR 2.116(C)(10) is appropriate when, except for damages, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. A court reviewing such motion must consider the pleadings, affidavits, depositions, admissions and any other documentary evidence available to it. *Radtke v Everett*, 442 Mich 368, 374 (1993). "The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence." *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420 (1994).

"The party opposing the 2.116(C)(10) motion then has the burden of showing that a genuine issue of disputed fact exists." *Id.* The non-movant may not rest upon mere allegations or denial in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115 (1991).

If the opposing party does not give evidence that a material factual dispute is alive, then the 2.116(C)(10) motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237 (1993). Furthermore, the evidence submitted must be "substantively admissible." *Maiden v Rozwood*, 461 Mich 109, 121 (1999). Merely stating facts that will be established at trial is not sufficient to avoid summary disposition. *Id.*

III. ANALYSIS

Defendants' Motion for Summary Disposition

Defendants argue that pursuant to MCR 2.116(C)(7), this Court does not have jurisdiction to hear this matter because the controversy is controlled by the arbitration provision in Plaintiff's Employment Agreement. "A three-part test applies for ascertaining the arbitrability of a particular issue: 1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue on its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract." *In re Nestorovski Estate,* 283 Mich App 177, 202; 769 NW2d 720 (2009). The Employment Contract between Plaintiff and the Corporation does contain an arbitration agreement. However, the Court finds that the arbitration provision of the Employment Agreement is not triggered because Dr. Holley did not have the authority to terminate Dr. Elluru.

Pursuant to Section 7.3 of the Bylaws, the President "shall be the chief operating officer of the Corporation and shall have the general powers of supervising and managing the day-to-day operations of the Corporation..." If the Chairman of the Board position has not been filled, then the President shall also "perform the duties and exercise the powers of the Chairman of the Board." Pursuant to Section 7.1 of the Bylaws, the Chairman of the Board "shall have the general powers of supervision and management usually vested in the chief executive officer of a corporation." The Bylaws gave Dr. Holley the general powers of supervision and management usually vested in the chief executive officer of a corporation. However, pursuant to Section 4.1 of the Bylaws, "[t]he business, property and affairs of the Corporation shall be managed by or under the direction of the Board of Directors..." Section 4.2 of the Bylaws covers removal or resignation stating "[e]xcept as otherwise provided in the Articles of Incorporation, any director or the entire Board of Directors may be removed, with or without cause, by

the holders of a majority of the shares then entitled to vote at an election of directors." Likewise, Section 7.7 allows the Board of Directors to remove an officer or agent.

The Court finds that that although Dr. Holley had the general powers of supervision and management, the Board of Directors still had the authority to manage the business, property, and affairs of the Corporation. In addition, the Bylaws required there to be a shareholder *majority* in order to remove a director or an officer. Dr. Holley did not have the authority to terminate Dr. Elluru on the Corporation's behalf without majority approval. Therefore, the Employment Agreement's arbitration provision would not be triggered as Dr. Holley alone had no authority to terminate Dr. Elluru.[1]

Defendant also argues that Plaintiff resigned, announced he was leaving the practice, or intended to dissolve the practice. However, Section 4.2 of the Bylaws states in part: "Any director may resign at any time by giving written notice to the Board, the Chairman of the Board, if any, or the President or Secretary of the Corporation." Likewise, Section 7.7 of the Bylaws states in part: "Any officer or agent may resign at any time by giving written notice to the Board, the Chairman of the Board, if any, or the President or Secretary of the Corporation." There has been no evidence presented to show that Plaintiff resigned. There is a letter setting forth Plaintiff's proposal for dissolution of the Corporation, but there is nothing that shows Plaintiff's written notice of resignation.

Plaintiff's Motion for Summary Disposition

Count I: Dissolution of Great Lakes Plastic, Reconstruction & Hand Surgery, P.C. – Deadlock

MCL 450.1823 states:

> A corporation may be dissolved by a judgment entered in an action brought in the circuit court of the county in which the principal place of business or registered office

[1] In *Altobelli v Hartmann*, 307 Mich App 612; 861 NW2d 913 (2014), which is currently before the Supreme Court for review, the Court of Appeals reviewed an arbitration clause in reference to a principal in a law firm suing another principal. Similarly, the instant case involves one shareholder suing another and a request for dissolution of the corporation. If the majority of shareholders acting for the Corporation terminated an employee, shareholder, or officer, the arbitration provision would be applicable as the Employment Agreement is between the "Employer" and the "Employee." However, that is not what occurred in this case.

of the corporation is located by 1 or more directors or by 1 or more shareholders entitled to vote in an election of directors of the corporation, upon proof of both of the following:

(a) The directors of the corporation, or its shareholders if an agreement among the shareholders authorized by section 488 is in effect, are unable to agree by the requisite vote on material matters respecting management of the corporation's affairs, or the shareholders of the corporation are so divided in voting power that they have failed to elect successors to any director whose term has expired or would have expired upon the election and qualification of his or her successor.

(b) As a result of a condition stated in subdivision (a), the corporation is unable to function effectively in the best interests of its creditors and shareholders.

Pursuant to Section 4.1 of the Bylaws, "[a] director shall hold office for the term for which he is elected and until his resignation or removal." The Action of Shareholders by Consent in Lieu of the 2014 Annual Meeting was signed by Dr. Holley on December 15, 2014, and by Dr. Elluru on December 16, 2014. The Action of Shareholders by Consent in Lieu of the 2014 Annual Meeting states that "Scott D. Holley, M.D. and Raghuram Elluru, M.D. be, and hereby are, elected to serve as the Directors for the Corporation for the ensuing year and until their successors are elected and qualified." The term for Dr. Holley and Dr. Elluru as directors of the Corporation ended on December 15, 2015, and December 16, 2015. However, Dr. Holley and Dr. Elluru are the only Shareholders and they have failed to elect successors because they are divided in voting power.

In addition, Dr. Holley and Dr. Elluru are unable to agree on material matters respecting management of the Corporation's affairs as the only two directors. The parties are not speaking to each other, Dr. Holley attempted to terminate Dr. Elluru,[2] the employees are having to take sides, and Dr. Holley is not acknowledging Dr. Elluru as a shareholder. Therefore, the Court finds that it is clear that

[2] Defendant relies on *Franchino v Franchino*, 263 Mich App 172; 687 NW2d 620 (2004) and argues that a shareholder does not have an expectation of employment. In *Franchino*, the plaintiff had 31% of the shares and the defendant had 69% of the shares. However, in this case each party owned 50% of the shares and under the Bylaws, Dr. Holley did not have a majority of the votes to fire Dr. Elluru.

the Corporation is unable to function effectively in the best interests of its creditors and shareholders. The requirements of MCL 450.1823 have been met and summary disposition is proper.

Count II: Setting Aside of Purported Corporate Act Because of Dr. Holley's Conflict of Interest

In Count II, Plaintiff argues that Dr. Holley violated MCL 450.1541a and Section 6.1 of the Bylaws when he attempted to force the sale of Dr. Elluru's shares, attempted to direct the Corporation to prohibit Dr. Elluru from working for five years, and attempted to discharge Dr. Elluru from employment. "A 'fiduciary duty' is '[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person." *Wallad v Access BIDCO, Inc,* 236 Mich App 303, 307; 600 NW2d 664 (2000). (Quoting Black's Law Dictionary (6th ed.)). If an officer or director fails to act for the corporation's benefit because of a personal interest, that director or officer breaches a fiduciary duty owed to the corporation's shareholders. *Id.* "MCL 450.1541a provides that a director or officer shall discharge his duties in good faith, with the care of an ordinarily prudent person under like circumstances, and in a manner believed to be in the best interests in the corporation." *Camden v Kaufman,* 240 Mich App 389, 394; 613 NW2d 335 (2000); MCL 450.1541a.

MCL 450.1545a and Section 6.1 of the Bylaws state:

> A transaction in which a director or officer is determined to have an interest shall not, because of the interest, be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, if the person interested in the transaction establishes any of the following:
>
> (a) The transaction was fair to the corporation at the time entered into.
>
> (b) The material facts of the transaction and the director's or officer's interest were disclosed or known to the board, a committee of the board, or the independent director or directors, and the board, committee, or independent director or directors authorized, approved, or ratified the transaction.
>
> (c) The material facts of the transaction and the director's or officer's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction.

Dr. Holley had a financial interest in terminating Dr. Elluru because it would give him control of the Corporation and it would allow him to acquire Dr. Elluru's shares for the adjusted net book value. This transaction was not fair to the Corporation at the time it was entered into, it was not disclosed to the Board of Directors, and it was not disclosed to the Shareholders. Therefore, the Court finds that Dr. Holley breached his fiduciary duty as a director and his actions should be set aside.

Count III: Dissolution of Great Lakes Plastic, Reconstruction & Hand Surgery, P.C. by Shareholder Because of Dr. Holley's Willfully Unfair and Oppressive Acts

MCL 450.1489 states, in relevant part:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:
>
> (a) The dissolution and liquidation of the assets and business of the corporation.
> ...
>
> (3) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

On December 7, 2015, Dr. Holley sent Dr. Elluru a letter stating that he was immediately terminating Dr. Elluru for just cause. Dr. Holley's termination of Dr. Elluru substantially interfered with the interests of Dr. Elluru as a shareholder because the Stock Redemption Agreement would require Dr. Elluru to sell his shares to the Corporation for the adjusted net book value. This would give Dr. Holley control of all of the Corporation's shares. As discussed above, the Bylaws did not give Dr. Holley the authority to

terminate Dr. Elluru. Therefore, Dr. Holley's termination of Dr. Elluru would not be considered conduct that is permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure. Therefore, the Court finds that Dr. Holley's actions constituted willfully unfair and oppressive conduct and dissolution of the Corporation would be proper.

IV. OPINION

Defendant's Motion for Summary Disposition is DENIED. Plaintiff's Motion for Summary Disposition is GRANTED. A status conference is scheduled for **Friday, March 25, 2016 at 3:00 p.m.** to discuss staying the case for 6 to 9 months to allow the parties to mediate or facilitate the complete dissolution and liquidation of assets.

IT IS SO ORDERED.

Date: March 18, 2016

HON. PAMELA L. LIGHTVOET (P47677)
Circuit Court Judge