

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

MICHAEL DEMIL, an individual,

Plaintiff/Counter-Defendant,

HENRI JAMES DEMIL, and individual, SARAH
MAE DEMIL, an individual, HANNAH RENE
DEMIL, an individual and SAVANNAH LYNN
DEMIL, an individual

Plaintiffs,

vs.

Case No. 2012-889-CK

RMD HOLDINGS, LTD, a Michigan corporation
and ROBERT E. DEMIL, an individual,

Defendants/Counter-Plaintiffs.

OPINION AND ORDER

Plaintiff Michael Demil (“Plaintiff”) has filed two motions for partial summary disposition of Defendant Robert Demil’s (“Defendant”) and RMD Holdings, Ltd.’s (“RMD”) breach of fiduciary duty claims against him. Defendant and RMD (collectively, “Defendants”) have filed a response to each motion and request that the motion be denied.

Factual and Procedural Background

On March 16, 2012, RMD filed a Counter-Complaint and Jury Demand alleging that Plaintiff breached his fiduciary duty to RMD. RMD supported its claim with 17 allegations which RMD claims constitute breach of Plaintiff’s fiduciary duty. In addition, in his Counter-Complaint, Defendant Demil alleges that Plaintiff breached his fiduciary duty to him. Defendant Demil supported his claim with 6 allegations forming the basis for his claim; however, the first three alleged bases for Defendant’s breach of fiduciary duty claims have been dismissed

pursuant to the Court May 30, 2014 Order. Plaintiff now seeks summary disposition of a portion of Defendant's and RMD's claims.

Standard of Review

Plaintiff's motion was filed pursuant to MCR 2.116(C)(7) and (10). MCR 2.116(C)(7) permits summary disposition where the claim is barred because of 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. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id.*

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively

admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.* at 121.

Arguments and Analysis

In support of that motion, Plaintiff contends that the allegations contained in paragraphs 4(c) and (e) of RMD's counter-complaint, and paragraph 8(e) of Defendant's counter-complaint, are barred to the extent that losses incurred as a result of his action(s), by RMD, were incurred more than three years before either counter-complaint was filed. In support of his contention, Plaintiff relies on MCL 450.1541a(4), which provides:

(4) An action against a director or officer for failure to perform the duties imposed by this section shall be commenced within 3 years after the cause of action has accrued, or within 2 years after the time when the cause of action is discovered or should reasonably have been discovered, by the complainant, whichever occurs first.

In response, Defendants do not dispute that the applicable statute of limitation would be either 2 or 3 years. Rather, Defendants contend that the doctrine of recoupment allows them to prosecute their claims, despite the fact that they would otherwise be untimely.

The Michigan Supreme Court, in *Mudge v Macomb County, et al.*, 458 Mich 87; 580 Nw2d 845 (1998), summarized recoupment as follows:

The defense of recoupment refers to a defendant's right, in the same action, "to cut down the plaintiff's demand, either because the plaintiff has not complied with some cross obligation of the contract on which he or she sues or because the plaintiff has violated some legal duty in the making or performance of that contract." 20 Am.Jur.2d, Counterclaim, Recoupment, § 5, p. 231. Recoupment is "a doctrine of an intrinsically defensive nature founded upon an equitable reason, inhering in the same transaction, why the plaintiff's claim in equity and good conscience should be reduced." *Pennsylvania R Co v Miller*, 124 F2d 160, 162 (CA 5, 1941).

As explained in *Warner v Sullivan*, 249 Mich 469, 471, 229 NW 484 (1930):

Recoupment is a creature of the common law. It presents to the court an equitable reason why the amount payable to the plaintiff should be reduced, and *the plaintiff*

will not be permitted to insist upon the statute of limitations as a bar to such a defense when he is seeking to enforce payment of that which is due him under the contract out of which the defendant's claim for recoupment arises. [Emphasis added.]

Accord *Bull v. United States*, 295 US 247, 261-262, 55 S Ct 695, 79 L Ed 1421 (1935) (the defense of recoupment is never barred by the statute of limitations as long as the main action itself is timely). See also anno.: *Claim barred by limitation as subject of setoff, counterclaim, recoupment, ...* 1 A.L.R.2d 630, § 14, 666-667 (“Almost without exception the cases which deal with recoupments ... run to the effect that if a defendant's claim is in fact a recoupment the general statutes of limitation do not defeat it; on the contrary it may be availed of defensively so long as plaintiff's cause of action exists”). Thus, the expiration of a limitation period does not foreclose a recoupment defense as long as the plaintiff's action is timely

Defendants contend that their breach of fiduciary duty claims are “logically related” to Plaintiff's Second Amended Complaint, and that as a result they are entitled to prosecute their otherwise untimely claims. However, Defendants fail to specify which of Plaintiff's claims their breach of fiduciary claims are linked to. Moreover, the Court has reviewed Plaintiff's Second Amended Complaint and it is not clear from the face of the pleadings what portion(s) of the Second Amended Complaint Defendants' breach of fiduciary claims are connected to. Given the fact that Defendants have failed to support their recoupment defense with any support, the Court is convinced that Plaintiff's motion must be granted with respect to paragraphs 4(c) and (e) of RMD's counter-complaint and paragraph 4(e) of Defendant's counter-complaint as those allegations relate to projects completed prior to March 16, 2009, more than three years before their counter-claims were filed.

In addition, Plaintiff contends that Defendant Demil cannot premise his breach of fiduciary duty claims on actions he took while working as a project manager for RMD. Defendants do not contest Plaintiff's assertion. Accordingly, Plaintiff should be granted

summary disposition of Defendant's breach of fiduciary duty claims contained in paragraphs 4(d) and (e) of Defendant's counter-complaint.

The remainder of Plaintiff's motion for summary disposition of Defendants' breach of fiduciary duty claims was filed pursuant to MCR 2.116(C)(10).

MCL 450.1541a(1) governs the fiduciary duties owed, and provides:

(1) A director or officer shall discharge his or her duties as a director or officer including his or her duties as a member of a committee in the following manner:

(a) In good faith.

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In a manner he or she reasonably believes to be in the best interests of the corporation

1) Breach of Duty of Loyalty by Supporting RMD's Competitor

The first portion of Defendants' claims at issue deals with Defendants' allegations that Plaintiff breached his fiduciary duty as an officer/director by financially supporting his son Henri and son-in-law Austin's business, Cyclone Fence ("Cyclone"), which is a competitor of RMD. (See RMD's counter-claim, at ¶4(a) and (b))

On January 27, 2012, Austin and Henri met with a bonding agent to discuss Cyclone's bonding and insurance needs. At this time Cyclone was a start-up and only had \$612 in assets. (See Defendants' Exhibit 32.) During that meeting, the bonding agent advised Austin and Henri that Cyclone would need about \$100,000 in cash in order to get bonding beyond the "credit card bonding program." On January 28, 2012, the day after the meeting, Plaintiff and his wife issued 8 checks in the total amount of \$104,000.00 to Austin, Henri and their wives. On February 21, 2012, \$103,400 was deposited into Cyclone's bank account.

It is undisputed that Cyclone competed with RMD for a project on at least 1 occasion. Defendants contend that Plaintiff breached his fiduciary duty to RMD by funding Cyclone, a competitor of RMD. Based on the fact that Plaintiff gave his son-in-law and son almost the exact amount of funding needed to allow Cyclone to be viable, the close proximity in time between the gifts and his children's meeting with the bonding agent, and the fact that funding a competitor of RMD would certainly not be in the best interest of RMD, the Court is convinced that a genuine issue of fact exists as to whether Plaintiff's actions breached his fiduciary duty to RMD and Defendant Demil.

2) *Breach of Fiduciary Duty by Making Inappropriate Disclosures*

The second portion of Defendants' claims at issue deals with Defendants' allegations that Plaintiff "shared private negative advice of corporate counsel concerning reservations about potential outside business partners with those same potential outside business partners." (*See* RMD's counter-claim at ¶4(f).) In December 2011, Plaintiff was trying to market and sell his shares in Plus Concrete, Inc. ("Plus") to RMD. Plaintiff obtained a "Representation Agreement" from Wall Street Private Equity Group, Inc. ("WSPEG") and forwarded it to RMD's counsel for review. RMD's counsel ultimately, via email, recommended that RMD not do business with WDPEG. (*See* Defendants' Exhibit 35.) In the email, RMD's counsel stated he thought WSPEG was "dodgy/fishy" and recommend staying clear of WSPEG. (*Id.*) Upon receiving the email, Plaintiff responded by questioning counsel's advice and stated that he did not trust Defendant and accused Defendant of trying to steal RMD from him. Further, Plaintiff copied several individuals to the email including Defendant and an employee of WSPEG.

Given Plaintiff's position as an officer/director of RMD at the time of these events, the Court is convinced that genuine issues of fact exist as to whether Plaintiff breached his fiduciary duties by sharing RMD's counsel's legal advice to a potential business partner and by disclosing the existence of bickering between him and Defendant to WDPEG.

3) Breach of Fiduciary Duty by Interfering with RMD's Bonding

The next portion of Defendants' claims at issue deals with Plaintiff's alleged interference with RMD's bonding. (See RMD's counter-complaint, at ¶4(g). After Defendant instructed RMD's bonding agent, Jeff Chandler, not to allow Plaintiff to initiate any bonding requests, Plaintiff allegedly contacted Mr. Chandler and instructed him not to issue any bonds on behalf of Nationwide.

Interfering with RMD's ability to obtain bonding for projects is certainly not in RMD's best interests. Accordingly, the Court is satisfied that genuine issues of fact exist as to whether Plaintiff breached his fiduciary duties by interfering with RMD's ability to obtain the bonding in question.

4) Breach of Fiduciary Duty by Stealing Defendant's Signature Stamp

In mid-September 2011, Plaintiff presented a check to Defendant for his signature. Defendant declined to sign the check but allegedly stated that Plaintiff could sign the check himself. However, Plaintiff refused to sign. Subsequently, RMD's sales manager found Plaintiff returning Defendant's signature stamp. Plaintiff had taken the stamp to sign the check in question. Upon learning that Plaintiff had used his stamp on the check, Defendant issued a stop payment on the check. On January 18, 2012, a replacement check was issued. Plaintiff signed the check, but added a note stating: "This check presented this day, 1/18/12, for payment on job which was paid twice before, one signed by [Defendant], second stamped by [Plaintiff], third I

am going to sign per [Defendant's] authority again and pay vendor who did nothing wrong but do work for our company. Hopefully this check will not be canceled by [Defendant]." (See Defendants' Exhibit 44.)

The Court is convinced that at a minimum, genuine issue of material fact exist as to whether the statement written by Plaintiff, evidencing discord in RMD's operations and characterizing the vendor's decision to work with RMD as a mistake, violated Plaintiff's fiduciary rights to RMD. Consequently, Plaintiff's motion must be denied as it related to the allegations regarding the signature stamps as set forth in ¶4(h) of RMD's counter-complaint.

5) Breach of Fiduciary Duty by Repeatedly Demanding Records

Defendants contend that Plaintiff has breached his fiduciary duties by continually requesting access to various RMD records as permitted by MCL 450.1487. (See RMD's counter-complaint, at ¶4(i).) While the amount of requests is arguably excessive, the fact remains that Plaintiff, as a shareholder, has the right to examine RMD's records by utilizing the procedure set forth in MCL 450.1487. Accordingly, the Court is convinced that this allegation cannot form the basis for Defendants' breach of fiduciary duty claims.

6) Breach of Fiduciary Duty by Making False Accusations

This portion of Defendants' breach of fiduciary duty claims encompasses Defendants' allegation that Plaintiff has made false accusations against RMD and Defendant Demil. (See RMD's counter-complaint, at ¶4(k).) However, Plaintiff, as an officer and director of RMD at the time, had a duty to ensure the proper procedures were being used. Moreover, the company whose financial information was questioned by Plaintiff was Plus Concrete, not RMD. Accordingly, the Court is convinced that this allegation cannot form the basis for RMD's breach of fiduciary duty claim.

7) *Breach of Fiduciary Duty by Allowing His Son to Attempt to Form a Competing Business*

Next, RMD alleges that Plaintiff breached his fiduciary duties by encouraging his son to attempt to cause the break-up of Plus, an entity which pays RMD substantial sums for the provision of services. (See RMD's counter-complaint, at ¶4(1).) However, it does not appear that Defendants have direct knowledge that Plaintiff knew or encouraged Henri to approach Mike or had agreed to form a new business. Moreover, the email relied upon in support of Defendants' allegation references, but does not include, Henri's offer. In addition, it is unclear from the evidence presented what the proposed company would be in the business of doing and whether that business would be contrary to RMD's best interests. Based on the lack of evidence provided in support of RMD's allegations, the Court is satisfied that this allegation cannot form the basis for RMD's breach of fiduciary duty claims.

8) *Breach of Fiduciary Duty by Submitting Bidding in Violation of RMD's Bidding Procedures.*

The next portion of Defendants' claim involves allegations that Plaintiff ignored RMD's policies and procedures, and by-laws, relating to bidding. (See RMD's counter-complaint, at ¶4(n).) The parties have submitted conflicting evidence regarding whether RMD's procedures were followed. Accordingly, summary disposition is improper as genuine issues exist.

9) *Breach of Fiduciary Duty by Wrongfully Encouraging Employees' Termination and Discouraging Employees From Following RMD Procedures*

The parties have submitted conflicting testimony with regards to this portion of Defendants' claims. Therefore, summary disposition is inappropriate.

10) *Breach of Fiduciary Duty by Refusing to Execute Documents*

Defendants contend that Plaintiff wrongfully refused to execute documents needed in order for RMD to obtain certain contracts. (*See* RMD's counter-complaint, at ¶4(p).) In support of his motion, Plaintiff contends that the only example Defendants have cited to is that he refused to sign a document in his capacity as a director of Plus, and that such an allegation cannot form a basis for breach of fiduciary duty claims as an officer/director of RMD. In response, Defendants contend that because Plus is a strategic partner of RMD, any action causing Plus to lose business also harms RMD. Further, Defendants contend that Plaintiff used his role in Plus as leverage in his dispute with Defendant. The Court is convinced that Plaintiff's motion must be denied based on the fact a reasonable trier of fact could find that a director of RMD using his role in a different company to allegedly harm RMD is not in the best interests of RMD.

11) Breach of Fiduciary Duty by Encouraging the Waste of Assets

Defendants contend that Plaintiff's actions caused RMD to lose money, and that making decisions that cause a director/officers' corporation to incur losses is a breach of fiduciary duty. (*See* RMD's counter-complaint, at ¶4(q).) However, Defendants have not cited to any instances other than those already addressed in other portions of their claims. Accordingly, the Court need not revisit those issues.

Conclusion

For the reasons set forth above, Plaintiff's motions for partial summary disposition of Defendant Robert E. Demil's and RMD Holdings, Ltd.'s breach of fiduciary duty claims are GRANTED, IN PART, and DENIED, IN PART. Specifically:

Plaintiff's motions for summary disposition of the portion of RMD's claims set forth in paragraphs 4(c),(e),(i),(k) and (l) is GRANTED. The remainder of Plaintiff's motion for summary disposition of RMD's breach of fiduciary duties claims is DENIED.

In addition, Plaintiff's motion for summary disposition of the portion of Defendant Robert E. Demil's breach of fiduciary duty claims set forth in paragraphs (d) and (e) of Defendant Robert E. Demil's counter-complaint is GRANTED.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: November 24, 2014

JCF/sr

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