

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

JOBY CLARK,

Plaintiff,

vs.

Case No. 2013-4479-CB

BUTOKU KARATE SCHOOL, LLC,
and JOHN WASILINA,

Defendants.

OPINION AND ORDER

Defendants have filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). Plaintiff has filed a response and requests that the motion be denied.

Factual and Procedural History

In March 2003 Plaintiff and Defendant John Wasilina (“Defendant”) formed Defendant Butoku Karate School, LLC (“Butoku”) in order to operate a karate school (the “School”). Plaintiff and Defendant operated the School through Butoku until late 2010. In 2010 Plaintiff stepped down as an employee and member of Butoku due to ongoing criminal proceedings against him.

On November 6, 2013, Plaintiff filed his complaint in this matter asserting claims for: Fraud (Count I), Failure to Distribute (Count II), and Conversion (Count III). Plaintiff’s claims are based on his assertion that his agreement to step down as an employee and member of Butoku was based on Defendant’s promise to pay for his interest in Butoku and agreement to return Plaintiff’s interest in Butoku after the criminal

proceedings were resolved. Specifically, Plaintiff alleges that Defendant has failed to compensate him for his 50% interest in Butoku and has refused to reinstate him as a member and employee of Butoku.

On December 10, 2014, Defendants filed their instant motion for summary disposition. On January 21, 2015, Plaintiff filed his response to the motion and requested that the motion be denied. On January 26, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

Standard of Review

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

Count I of Plaintiff's complaint purports to state a claim for fraud. To assert an actionable fraud claim, the plaintiff must demonstrate that: (1) the defendant made a material representation; (2) it was false; (3) when the defendant made it, the defendant knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) the defendant made it with the intention that it should be acted upon by the plaintiff; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff thereby suffered injury. *Cooper v Auto Club Ins Association, supra; Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). Trial courts must carefully examine whether alleged fraudulent statements are "statements of past or existing fact, rather than future promises or good-faith opinions" and whether the alleged statements "are objectively false or misleading." *Cooper, supra* at 416.

In this case, Plaintiff's fraud claim is based on a Defendant's alleged promise to re-hire Plaintiff once the criminal proceedings had been resolved. However, a claim of fraud may not be based on a promise of future conduct, unless the promise is made in bad faith with no intention of performing. *Derderian v Genesys Health Sys*, 263 Mich App

364, 378 ; 693 NW2d 825 (2005). While Plaintiff asserts that Defendant did not have any intention of keep his promise at the time it was made, he has failed to provide the Court with any evidence in support of his position. “Fraud will not be presumed; it must be proven by ‘clear, satisfactory and convincing evidence.’” *Johnson v Wausau Ins Co*, 283 Mich App 636, 643; 769 NW2d 755 (2009) citing *Hi-way Motor Co, supra* at 336. Given Plaintiff’s failure to support his position, the Court is convinced that Plaintiff has failed to meet its burden. Consequently, Defendants’ motion for summary disposition of Plaintiff’s fraud claim must be granted.

Count II of Plaintiff’s complaint alleges that Plaintiff is entitled to an additional distribution as a withdrawing limited liability member. Section 509 of the Michigan Limited Liability Company Act governs withdrawal, and provides:

Sec. 509. (1) A member may withdraw from a limited liability company only as provided in an operating agreement. A member withdrawing pursuant to an operating agreement may become entitled to a withdrawal distribution as described in section 305.

(2) An operating agreement may provide for the expulsion of a member or for other events the occurrence of which will result in a person ceasing to be a member of the limited liability company.

Section 305, which governs situations in which the withdrawing member is entitled to a distribution, provides:

Sec. 305. Until the effective date of withdrawal, a withdrawing member shall share in any distribution made in accordance with section 304. An operating agreement may provide for an additional distribution to a withdrawing member. If a provision in an operating agreement permits withdrawal but is silent on an additional withdrawal distribution, a member withdrawing in accordance with the operating agreement is entitled to receive as a distribution, within a reasonable time after withdrawal, the fair value of the member’s interest in the limited liability company as of the date of withdrawal based upon the member’s share of distributions as determined under section 303.

While Plaintiff contends that no operating agreement governing Butoku exists, his position is contradicted by multiple documents he has signed. Indeed, Defendants have attached a March 28, 2002 operating agreement for Butoku, which is signed by both Plaintiff and Defendant (“Operating Agreement”). Moreover, the parties signed a January 12, 2011 resolution memorializing Plaintiff’s decision to step down as a member of Butoku, which references specific sections of the Operating Agreement (the “Resolution”). Based on the evidence presented by Defendants, the Court is convinced that there is no genuine issue of material fact with respect to whether there is an operating agreement for Butoku.

While the original Operating Agreement does not address distributions upon withdrawal, the Resolution, which specifically cites the portion of the Operating Agreement related to amending the terms of the Operating Agreement, specifically provides that Butoku does not owe Plaintiff “any monies, duties, rights, responsibilities, privileges, accountings, or any other items or tangible means of remunerations in any way.” *See* Operating Agreement. Accordingly, by executing the Resolution Plaintiff agreed to amend the Operating Agreement to provide, *inter alia*, that he was not entitled to any further remuneration, which by extension includes a right to further distributions. Moreover, while Plaintiff contends that he never received any distributions, Defendants have presented un-contradicted evidence that Plaintiff received a check for \$50,000.00 on January 5, 2011, which clearly provides that it was given as a distribution of funds. *See* Defendants’ Exhibits at p. 37. Accordingly, Plaintiff clearly received a sizable distribution shortly before assigning his interest in Butoku.

Based on the clear and unambiguous language of the Resolution, as well as the fact that Plaintiff received a distribution shortly before assigning his interest in Butoku, the Court is convinced that Plaintiff is not entitled to any additional distributions under the Limited Liability Act. Consequently, Defendants' motion for summary disposition of Count II on Plaintiff's complaint must be granted.

Plaintiff's remaining claim is for conversion. The common law tort of conversion is defined as "any distinct act of dominion 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). In this case, Plaintiff has failed to establish what personal property Defendant(s) have allegedly converted, and he has failed to provide any clarity to this issue in his response to the instant motion. Accordingly, Plaintiff has failed to state an actionable claim for conversion. As a result, Defendants' motion for summary disposition of Plaintiff's conversion claim must be granted.

Conclusion

For the reasons discussed above, Defendants' motion for summary disposition is GRANTED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last claim and CLOSES the case.

IT IS SO ORDERED.

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

Dated: February 6, 2015

JCF/sr

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