

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

DORIS L. NEAL, VINCENT T. VAN TIEM,
9 MILE & KELLY, LLC and CALVIN ROCK
CONDOMINIUM ASSOCIATION,

Plaintiffs,

vs.

Case No. 2014-1623-CZ

CORRINE ROCK,

Defendant.

_____ /

OPINION AND ORDER

Defendant has filed a motion for summary disposition pursuant to MCR 2.116(C)(5) and (8). Plaintiffs have filed a response and request that the motion be denied. Defendant has also filed a reply brief in support of her motion.

Factual and Procedural History

Calvin Rock was the original owner of an office building in Eastpointe, MI (“Subject Property”). In 2003 Calvin Rock converted the Subject Property into three individual condominiums. While Mr. Rock retained unit 1, he sold units 2 and 3 to another individual (units 1, 2 and 3 collectively as, the “Units”).

In 2005 Defendant, as personal representative of Mr. Rock’s estate, assumed control of the condominium association governing the Units, as well as ownership of unit 1. Subsequently, Talmer Bank and Trust (“Talmer”) foreclosed on units 2 and 3. By October 2012 Talmer was the owner of record of units 2 and 3. On October 10, 2012, Talmer sold units 2 and 3 to an entity listed on the deed as “9 Mile & Kelly, LLC, a Michigan Limited Liability Company.” However,

9 Mile & Kelly, LLC did not exist at the time of the sale. Plaintiff Vincent T. Van Tiem (“Plaintiff Van Tiem”) executed the sales documents on behalf of the non-existing entity.

On March 5, 2013, Defendant, on behalf of Plaintiff Calvin Rock Condominium Association (the “Association”), filed a lien against units 2 and 3 for unpaid assessments/dues. In June 2013 Plaintiffs paid 8 months of back assessments. On July 3, 2013, Defendant released the lien that had been filed.

On October 17, 2013, Plaintiff Van Tiem filed articles of incorporation for Plaintiff 9 Mile & Kelly, LLC. On October 30, 2013, Plaintiff Doris L. Neal (“Plaintiff Neal”), Plaintiff Van Tiem’s wife, requested an “annual meeting” of the Association. On November 7, 2013, an annual meeting was held, at which Plaintiff Neal was elected as the Association’s president and Plaintiff Van Tiem was elected as the Association’s vice president. On March 25, 2013, Defendant filed the Association’s 2013 tax returns.

On April 23, 2014, Plaintiffs filed their complaint in the instant matter asserting claims against Defendant for: Count I- Accounting, Count II- Production of Books and Records, Count III- Breach of Fiduciary Duties, and Count IV- Statutory Conversion. On September 29, 2014, Defendant filed her instant motion for summary disposition pursuant to MCR 2.116(C)(5) and (8). On November 12, 2014, Plaintiffs filed their response and request that the motion be denied. On the same day, Defendant filed her reply brief in support of her motion. On November 17, 2014, the Court held a hearing in connection with the motion and took the matter under advisement.

Standards of Review

MCR 2.116(C)(5) provides that summary disposition is appropriate if the party asserting the claim lacks the legal capacity to sue. In reviewing such a motion, a court must consider the

affidavits, together with the pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties. MCR 2.116(G)(5); *George Morris Cruises v Irwin Yacht & Marine Corp*, 191 Mich App 409, 413; 478 NW2d 693 (1991).

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

Arguments and Analysis

In her motion, Defendant contends that Plaintiff 9 Mile & Kelly, LLC ("Plaintiff 9 Mile") does not have standing to maintain its claims because it did not exist until October 17, 2013 and therefore could not have an interest in units 2 and 3 until that date. Further, Defendant contends that Plaintiffs Neal and Van Tiem do not have standing because they do not have any individual interest in units 2 or 3.

In their response, Plaintiffs contend that Defendant's motion as to Plaintiff 9 Mile should be denied under the de facto corporation doctrine and/or the corporation by estoppel doctrine. The Michigan Court of Appeals, in *Duray Development, LLC v Perrin*, 288 Mich App 143, 152-153; 792 NW2d 749, summarized the two doctrines as follows:

De facto corporation and corporation by estoppel are separate and distinct doctrines that warrant individual treatment. The de facto corporation doctrine provides that a defectively formed corporation—that is, one that fails to meet the technical requirements for forming a de jure corporation—may attain the legal

status of a de facto corporation if certain requirements are met, as discussed later in this opinion. The most important aspect of a de facto corporation is that courts perceive and treat it in all respects as if it were a properly formed de jure corporation. For example, it can sue and be sued. Often, as in this case, the status of the company is crucial to determine whether the parties forming the corporation are individually liable.

Corporation by estoppel, on the other hand, is an equitable remedy and does not concern legal status. The general rule is: “Where a body assumes to be a corporation and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence.” Like the de facto corporation doctrine, corporation by estoppel often arises in the context of assessing individual versus corporate liability. The purpose of the doctrine is so “that one who contracts with an association as a corporation is estopped to deny its corporate existence ... so as to prevent one from maintaining an action on the contract against the associates, or against the officers making the contract, as individuals or partners.” [Internal Citations Omitted]

In order to qualify under the de facto corporation doctrine, the incorporators must have (1) proceeded in good faith, (2) under a valid statute, (3) for an authorized purpose, and (4) have executed and acknowledged articles of incorporation pursuant to that purpose. In this case there has been no allegation of bad faith. Accordingly, the first element is met. With regards to the second element it appears undisputed that Plaintiff 9 Mile was formed in accordance with the Michigan Limited Liability Act, MCL 450.4141, *et seq*, which is a valid statute. *Duray*, 288 Mich App at 155. Further, Plaintiff 9 Mile appears to have been formed for the purpose of purchasing real property, which it appears undisputed is an authorized purpose.

Whether Plaintiff 9 Mile qualifies as a de facto corporation comes down to element 4, i.e. whether the incorporators have executed and acknowledged articles of association. While it is undisputed that articles of incorporation were filed for Plaintiff 9 Mile, they were not filed until a year after units 2 and 3 were purchased. However, failure of incorporators to file articles of incorporation does not necessarily preclude a finding that an entity exists as a corporation, for parties other than the state, prior to such filing. *Henderson v Sprout Bros, Inc*, 176 Mich App

661, 672; 440 NW2d 629 (1989), superseded by rule on other grounds MCR 2.403(L)(1). Accordingly, the delay in filing articles of incorporation does not preclude finding that Plaintiff 9 Mile was a de facto corporation. Consequently, the Court is convinced that the elements of the de facto corporation doctrine could be satisfied viewing the evidence in the light most favorable to Plaintiffs.

With regards to the corporation by estoppel doctrine, the purpose of the doctrine is to preclude a third party from maintaining claims against individual incorporators on the underlying contract. See *Duray Dev LLC*, 288 Mich App at 152-153. Accordingly, the doctrine is intended to be invoked as a shield by individual incorporator/officer defendants to protect them from individual liability. In this case, Plaintiffs seek to invoke the doctrine as a sword to allow Plaintiff 9 Mile to maintain its claims. However, this does not appear to be the intended purpose of the doctrine and Plaintiffs have failed to provide any authority permitting the doctrine to be expanded for their intended purpose. Consequently, the Court is convinced that the corporation by estoppel doctrine is inapplicable to the facts in this case.

While the Court has held that a genuine issue exists as to whether Plaintiff 9 Mile has standing to bring its claims under the de facto corporation doctrine, the Court must also determine whether Plaintiffs Van Tiem and Neal have standing to pursue their claims. In the event that the Court ultimately finds that Plaintiff 9 Mile was not a de facto corporation, the individuals contracting as the non-existing corporation, as well as any stockholders or members who have expressly or impliedly authorized the contract, become individually liable on the contract. *Campbell v Rukamp*, 260 Mich 43, 46; 244 NW 222 (1932). By extension, if Plaintiffs Van Tiem and/or Neal could be liable under the contract as owners of units 2 and 3, they would also have standing to sue as the owner(s) of units 2 and 3. Accordingly, the Court is convinced

that Plaintiffs Van Tiem and Neal have standing, in the event that Plaintiff 9 Mile does not, to maintain the claims set forth in the complaint.

Finally, Defendant seeks summary disposition on the basis of her assertion that the Association does not have standing because it has been dissolved since 2007. However, Defendant failed to make this argument in its initial motion, and has continued to fail to support its position in any way. A party may not merely state a position and then leave it to the Court to rationalize and discover the basis for the claim, nor may he leave it to the Court to search for authority to sustain or reject his position. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Based on Defendant's failure to support her position the Court will not address the issue at this time.

Conclusion

For the reasons set forth above, Defendant's motion for summary disposition is DENIED. Pursuant to MCR 2.602(A)(3), this matter remains OPEN.

IT IS SO ORDERED.

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

Dated: December 12, 2014

JCF/sr

Cc: *via e-mail only*
Matthew S. Weaver, Attorney at Law, mweaver@gmhlaw.com
William M. Ellenstein, Attorney at Law, aandrianos@sbcglobal.net