

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

HODGES SUPPLY COMPANY,

Plaintiff,

vs.

Case No. 2015-4528-CB

IAN WEIMER and WEIMER  
PLUMBING, INC.,

Defendants.

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OPINION AND ORDER

Plaintiff have filed a motion for leave to amend its complaint. Defendants have filed a response and request that the motion be denied.

I. Facts and Procedural History

On December 17, 2015, Plaintiff filed its complaint in this matter ("Complaint"). In the Complaint, Plaintiff alleges that on August 1, 2006, Defendant Ian Weimer ("Defendant Weimer") submitted a credit application to Plaintiff. The application sought to obtain approval to acquire materials and supplies for Defendant Weimer Plumbing, Inc. ("WPI"). Plaintiff alleges that it supplied materials and supplies to WPI, and that there is an unpaid balance on the account in the amount of \$119,770.29. Further, Plaintiff alleges that on July 28, 2006, Defendant Weimer executed a personal guarantee guarantying all of WPI's obligations to Plaintiff, and that it has breached the terms of that guaranty.

The Complaint contains claims for: Breach of Contract (Count I), Breach of Guaranty (Count II), Violation of the Michigan Builders Trust Fund Act (Count III),

Fraud/Fraudulent Misrepresentation (Count IV), and Conversion (Count V). On March 14, 2016, Plaintiff filed its instant motion to amend the Complaint. On March 17, 2016, Defendants filed their response. On March 21, 2016, the Court held a hearing in connection with the motion and took the matter under advisement.

## II. Standard of Review

MCR 2.118(A)(2) provides that leave to amend a pleading shall be freely given when justice so requires. A motion to amend ordinarily should be granted, unless one of the following particularized reasons exists: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, and (5) futility of amendment. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000). Delay alone does not justify denying a motion to amend, but a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. *Franchino v Franchino*, 263 Mich App 172, 191; 687 NW2d 620 (2004).

## III. Arguments and Analysis

The proposed amended complaint seeks to add Danielle Weimer as a defendant, to include Ms. Weimer in its claims for violation of the Michigan Builders Trust Fund Act, fraud/fraudulent misrepresentation, and conversion. In addition, Plaintiff seeks to add a claim to pierce WPI's corporate veil against Defendant Weimer and Ms. Weimer, both of whom are allegedly officer(s), director(s) and/or agent(s) of WPI.

While Defendants have objected to Plaintiff's motion as a general matter, the only specific basis in their response is that Plaintiff's proposed claim for violation for the

Michigan Builders Trust Fund Act ("MBTFA") against Ms. Weimer is futile as she is not a contractor, subcontractor or principle within the meaning of the statute.

The provision of the MBTFA at issue in this case is MCL 570.152, which provides:

Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefor, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of a felony in appropriating such funds to his own use while any amount for which he may be liable or become liable under the terms of his contract for such labor or material remains unpaid, and may be prosecuted upon the complaint of any persons so defrauded.....

While it appears undisputed that Ms. Weimer was not a contractor or subcontractor, Plaintiff asserts that Ms. Weimer is a corporate officer of WPI, and that corporate officers of contractor or subcontractors may be liable under the MBTFA. The issue of whether a corporate officer can be liable under the MBTFA was addressed by the Michigan Court of Appeals in *People v Brown*, 239 Mich App 735; 610 NW2d 234 (2000).

In *Brown*, the defendant contended that because the plaintiff contracted with the entity rather than the corporate officer, only the entity could be liable under the MBTFA. In rejecting the defendant's position, the Court, in quoting *Attorney General v Ankerson*, 148 Mich App 524, 557; 385 NW2d 658 (1986), held: "It is beyond question that a corporate employee or officer is personally liable for all tortious and criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation." *Brown*, 239 Mich App at 739. The Court in *Brown* went on to

apply the rule set forth in *Ankerson* to find that a corporate officer may be liable under the MBTFA if he participated in violating the Act. *Id.* at 740.

While *Brown* involved a criminal prosecution under the MBTFA, the rule set forth in that case has been applied in the civil context to hold corporate officer liable for violations of the MBTFA. See *BC Tile & Marble Co, Inc. v Multi Bldg Co, Inc.*, 288 Mich App 576; 794 NW2d 76 (2010). Accordingly, Defendants' contention that Ms. Weimer cannot be held liable under the MBTFA because she is not a "contractor" within the meaning of the statute is without merit. In the proposed amended complaint, Plaintiff alleges that Ms. Weimer is an officer, director and/or agent of WPI, and that she participated in violating the MBTFA. Accordingly, the Court is convinced that Plaintiff's proposed claim against Ms. Weimer for violating the MBTFA is properly stated and is not futile on its face. Consequently, Plaintiff's contention to the contrary is without merit.

Based on Defendants' failure to identify any deficiencies in Plaintiff's proposed amended complaint, and the fact that this matter is in its infancy, the Court is convinced that Plaintiff's motion for leave to amend should be granted.

#### IV. Conclusion

Based upon the reasons set forth above, Plaintiff's motion for leave to file an amended complaint is GRANTED. Plaintiff must file its proposed amended complaint and summons within 14 days of this Opinion and Order. This Opinion and Order does not resolve the last claim and does not close the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: MAR 23 2016

Kathryn A. Viviano  
Hon. Kathryn A. Viviano, Circuit Court Judge