by Macomb County Circuit Court
12/19/2018

STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

RALPH ROBERTS REALTY LLC,
Plaintiff/Counter-defendant,

vs. Case No. 2017-3267-CB

DENNIS HADEL, DJH INVESTMENT HOLDINGS LLC, 251644 ROSENBUSCH GROUP LLC, BLACKETT GROUP LLC, and 35590 CAPRI GROUP LLC,
Defendants/Counter-plaintiffs.
_______________________________________/

OPINION AND ORDER

Defendants/Counter-plaintiffs Dennis Hadel, DJH Investment Holdings LLC, 251644 Rosenbusch Group LLC, Blackett Group LLC and 35590 Capri Group LLC ("Defendants") filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10) and 2.116(I)(1).

I. Background

Ralph Roberts Realty ("Plaintiff") is a real estate firm. Defendants DJH Investment Holdings LLC, 25164 Rosenbusch Group, LLC, 23676 Blackett Group LLC, 35590 Capri Group, LLC are limited liability companies that defendant Dennis Hadel owns to hold his investment properties. Answer ¶4-7. Plaintiff alleges that defendant Dennis Hadel ("Mr. Hadel") purchased thirteen properties over four years through its investor program. Specifically:

Aug. 13, 2010, 26501 Grandmont, Roseville, (signed) ¶15.
Sep. 3, 2010, 39764 Chart Street, Harrison Township (signed) ¶16.
Nov. 30, 2010, 26377 Couzens Ave., Madison Heights (signed) ¶17.
July 28, 2011, 23791 Lexington Ave., Easpointe, (signed) ¶18
Jan. 12, 2012, 23676 Blackett Ave., Warren, (signed) ¶19
Feb. 16, 2012, 35590 Capri Group, LLC (signed) ¶20
Apr. 12, 2012 25164 Rosenbusch Blvd., Warren (signed) ¶21

July 27, 2012 32750 N. River Road, Harrison Township (signed) ¶22
December 2012, (bankruptcy disclosure)
Apr. 12, 2013 25564 Wagner Ave., Warren (oral) ¶23.
Oct. 25, 2013 26632 Groveland St. Roseville (oral) ¶24
Dec. 6, 2013 26307 Grandmont St. Roseville (oral) ¶25
Feb. 21, 2014 24339 Laetham Ave., Eastpointe (oral) ¶26
Oct. 17, 2014 2071 Los Angeles Ave. Warren (oral) ¶27

Plaintiff claims that it successfully bid at sheriff's sale to purchase foreclosed properties on behalf of Defendants under the terms of its program. Plaintiff alleges that the purported agreements with Defendants entitles it to fifty percent of the net equity in properties that Defendants purchased through the program. Plaintiff now seeks to enforce the agreements—five oral agreements and eight written. Plaintiff filed its amended complaint on October 30, 2017, alleging: count I, breach of contract and count II, unjust enrichment. The Court heard oral arguments on Defendants amended motion for summary disposition and took the matter under advisement.

## II. Standard of Review

Motions for summary disposition based on the statute of frauds fall under MCR 2.116(C)(7). When reviewing a motion under MCR 2.116(C)(7), the Court accepts all well-pleaded allegations as true and construes them most favorably to the plaintiff. *Beauregard-Bezou v Pierce,* 194 Mich App 388, 390-391; 487 NW2d 792 (1992). The Court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties. *Harrison v Director, Dep't of Corrections,* 194 Mich App 446, 449; 487 NW2d 799 (1992); MCR 2.116(C)(7); MCR 2.116(G)(5). A movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.

*Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999).

Summary disposition under MCR 2.116(C)(8) is appropriate where a party fails to state a claim upon which relief can be granted. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 426-427; 722 NW2d 243 (2006) (citation omitted). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119–20; 597 NW2d 817 (1999). The court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.* citation omitted. A court will only grant a motion under MCR 2.116(C)(8) where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

The Court will grant a motion for summary disposition under MCR 2.116(C)(10) if the documentary evidence shows no genuine issue of material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-55; 597 NW2d 28 (1999). The party opposing the motion for summary disposition has the burden of showing that a genuine issue of disputed fact exists. *Fulton v Pontiac Gen Hosp*, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The Court does not assess credibility, weigh the evidence, or resolve factual disputes; if material evidence conflicts, the Court will deny the motion for summary disposition under MCR 2.116(C)(10). *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

## III. Arguments and Analysis

### A. Judicial Estoppel

The doctrine of judicial estoppel prevents a litigant who "has successfully and unequivocally" asserted a position in a prior proceeding "from asserting an inconsistent one at a subsequent proceeding." *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 474; 556 NW2d 517 (1996). Judicial estoppel is an equitable doctrine, invoked by discretion, to protect the integrity of the judicial process and prevent the miscarriage of justice. *Opland v Kiesgan*, 234 Mich App 352, 364-65; 594 NW2d 505 (1999).

The Court of Appeals has held that in the context of bankruptcy disclosures, a finding of judicial estoppel requires a showing that: (1) plaintiff assumed a position contrary to the one asserted under oath in the proceedings; (2) the bankruptcy court adopted the contrary position; and (3) the omission did not result from mistake or inadvertence. *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 480-81; 822 NW2d 239 (2012). Because debtor's disclosure obligations are essential to the bankruptcy process, courts will not permit a debtor to obtain relief from bankruptcy by representing that no claims exist and then subsequently benefit from asserting those claims. *Id.*

The Court of Appeals has applied the reasoning in *Spohn* to conclude that a sworn bankruptcy petition that omitted a potential lawsuit sufficiently met the "contrary position" prong; the second prong was met when the bankruptcy court confirmed the debtor's plan; the third prong was satisfied when a party knew of the factual basis of the undisclosed claims and had a motive for concealment. *Jarrett-Cooper v Rosett*, unpublished opinion of the Court of Appeals, issued March 20, 2014 (Docket No. 312958) p 2.

Here, Plaintiff filed for reorganization under Chapter 11 of the Bankruptcy Code in 2012. Defendants argue that the doctrine of judicial estoppel bars Plaintiff's present claims where Plaintiff took a contrary position in bankruptcy proceedings regarding the value of the agreements. Plaintiff responds that it identified Mr. Hadel as a property investor in its bankruptcy disclosure and listed eight of the contracts then existing. Plaintiff's Exhibit C. Plaintiff attaches a Fifth Amended Disclosure from its bankruptcy filing that states, "Debtors also have claims and causes of action against former investors for failure to pay [Plaintiff] its share of the profits from sold houses." Plaintiff's Exhibit B.

The Fifth Amended Disclosure further states that, "Realty also owns the right to the splits generated as a result of investors' sales of real estate. Realty estimates that there are approximately 300 properties with respect to which it is entitled to splits . . . Realty believes that the net present value of these contracts is zero. . ." Plaintiff's Exhibit B. Plaintiff also includes, as its Exhibit C, a document that identifies Mr. Hadel as an investor with contracts relating to eight properties: 23676 Blackett, 23791 Lexington, 25164 Rosenbusch, 25290 Quarter Deck, 26377 Couzens, 26501 Grandmont, 35590 Capri, and 39764 Chart.

Plaintiff concludes that it adequately disclosed the contracts and that Defendants misunderstand the role of the disclosures in bankruptcy proceedings. The Court has reviewed the federal cases that Plaintiff cites that declined to apply judicial estoppel to bankruptcy disclosures, as well as cases that reached the opposite result, and concludes that the present matter concerns more than mere omissions or failure to specify the nature of an asset about which a trustee otherwise has knowledge.

Instead, Plaintiff here took the position before the bankruptcy court and its creditors that three hundred contracts had no present value. It is a contrary position, after those proceedings concluded, to now assert that each one of the contracts entitles Plaintiff to tens of thousands of dollars or more. The contracts existed at the time of the bankruptcy and Plaintiff clearly would have a motive to understate to its creditors the value of assets that it knew it would continue to hold until a later date. Finally, any contention that the contracts had no value without Plaintiff's continuing contribution or participation in the contracts fails because the purchasers of the properties, under the alleged terms of the agreements, assumed all ongoing responsibilities regarding the properties. Put differently, once Plaintiff participated in the acquisition of the properties, Plaintiff had no further role. Finally, even if the Court were to account for appreciation or maturation of the contracts, the value of the contracts in 2012 would not have been zero.

Consequently, Defendants meet the *Spohn* test—specifically that Plaintiff presented a contrary position to the bankruptcy court. Further, Plaintiff's position, which the court relied upon, also satisfies the third prong of *Spohn* because Plaintiff must have known of the value of the contracts and had a motive to not fully disclose their worth. Therefore, the doctrine of judicial estoppel bars Plaintiff's claims with regard to the seven properties in this litigation identified in the Fifth Amended Disclosure.

Turning to the remaining six properties at issue in this case—32750 N. River Road; 25564 Wagner; 26632 Groveland; 26307 Grandmont; 24339 Laetham Avenue; and 2021 Los Angeles, only one—32750 N. River—is supported by a purportedly signed contract. See Plaintiff's amended Complaint Exhibit 9.

The N. River agreement is dated October 4, 2012, two months before the filing of Plaintiff's Fifth Amended Disclosure.[1] Plaintiff's Fifth Amended Combined Plan of Reorganization and Disclosure Statement from its Chapter 11 Bankruptcy filing is dated December 5, 2012. Plaintiff's Exhibit B. Since the N. River Agreement predated the Fifth Amended Disclosure in the bankruptcy proceedings, it existed at the time of the Disclosure yet was not disclosed. Therefore, it will not now be considered for the same reasons as those articulated in *Spohn* (Judicial estoppel barred claim not disclosed in bankruptcy); See also, *Kircher v Charter Tp of Ypsilanti*, unpublished per curium opinion of the Court of Appeals, issued July 14, 2016 (Docket No. 325098) p, 5(Judicial estoppel barred claim where asset not listed in bankruptcy); *White v Wyndham Vacation Ownership, Inc*, 617 F3d 472, 484 (CA 6, 2010)(By signing bankruptcy petition, party swore it was accurate therefore it was a contrary position to omit a harassment claim). The omission of an asset is clearly a contrary position, even more so than the representation of no value.

Therefore, the Court is satisfied that the doctrine of judicial estoppel bars the purported agreements in this case that predate the December 2012 disclosure. Defendants have not presented any support or argument regarding the relationship of the bankruptcy to the remaining properties, which all involve only oral agreements. Therefore, at this juncture, the Court has insufficient information to analyze the doctrine of judicial estoppel as it may relate to those properties.

[1] To the extent the parties may disagree with the actual date of signing, the Court relies on the clear terms of the contract. "Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990).

Regarding the remaining oral agreements, the Court is satisfied that MCL 566.132(1)(e) bars their enforcement. MCL 566.132(1)(e) states that an "agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate" must be in writing and signed by the party to be charged. See also, *Craib v Comm on Nat'l Missions of Presbytery of Detroit of United Presbyterian Church, USA*, 62 Mich App 617, 621; 233 NW2d 674 (1975). This provision protects owners of real estate against unfounded claims based on alleged oral agreements for the payment of commissions for services in procuring sales. *Ekelman v Freeman*, 350 Mich 665, 667; 87 NW2d 157 (1957). The statute applies both to purchases and sales. *Gustafson v Bud Clark, Inc*, 5 Mich App 118, 120; 145 NW2d 858 (1966).

The statute does not define the term "commission," but in other contexts, the Legislature has defined "commission" as "compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the amount of orders or sales or as a percentage of the dollar amount of profits." MCL 600.2961. Blacks Law Dictionary defines "commission" in relevant part as "a fee paid to an agent or employee for a particular transaction . . ." Black's Law Dictionary, 10th ed 2014. Here, while payment of the commission of 50% of net equity of the properties was deferred, the alleged obligation to pay that amount accrued upon the purchase of the various properties. Since Plaintiff had no further ongoing role regarding the properties, Defendants' alleged obligation to pay Plaintiff resulted from Plaintiff's services performed during the purchase transactions. Therefore, the equity payment obligations, though deferred, formed part of Plaintiff's compensation for its agent services.

Plaintiff relies on *Summers v Hoffman*, 341 Mich 686, 690; 69 NW2d 198 (1955) to argue that the statute of frauds does not apply to its alleged oral agreements because they are agreements to share profits and not agreements for commissions. However, in *Summers,* both parties continued to contribute to the "joint adventure" after the sale with one providing the money and development and the other selecting an attorney, performing services in the clearing of the property, "looking after the lumber", and otherwise devoting time and effort. *Id.*

Here, however, Plaintiff has alleged no further obligation regarding the purported enterprise after the initial transaction. The purported contracts here did not give Plaintiff the right to enter, possess, alienate, convey, occupy, use or modify the properties. There is no evidence that Plaintiff provided any services or contribution for the improvement or maintenance of the properties. Instead, Plaintiff represents that Defendants owned 100 percent of the properties. Plaintiff uses the equity in the property merely to measure its allegedly agreed-upon profits. Plaintiff argues that it provided expertise in the initial procurement of the properties but that is precisely what real estate agents do. Therefore, the Court is not persuaded that Plaintiff's alleged agreement differs in any significant respect from a real-estate-agent commission—other than its unorthodox form of calculating compensation. The public policy of protecting homeowners against subsequent unfounded claims for commissions remains the same in this context. As a result, MCL 566.132(1)(e) bars enforcement of the alleged oral contracts and Defendants are entitled to summary disposition regarding 25564 Wagner, 26632 Groveland, 26307 Grandmont, 24339 Laetham Avenue, 2021 Los Angeles.

For the above-stated reasons, Defendants are entitled to summary disposition on Plaintiff's complaint.

IV. Conclusion

For the reasons set forth above, Defendant's' motion is GRANTED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* resolves the last pending claim and closes this case.

IT IS SO ORDERED.

Date: DEC 19 2018

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