

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

NORTHWOOD, INC.,
Plaintiff,

vs.

Case No. 17-4622-CB

OLYMPUS GLOBAL, LLC, DELTA
GLOBAL, LLC, CHRISTOPHER SHAYA,
JEREMIAH MANKOPF, and
DANIEL GLADYS,
Defendants,

and

CHRISTOPHER SHAYA, JEREMIAH MANKOPF,
and DANIEL GLADYS,
Defendants/Counter-Plaintiffs,

vs.

NORTHWOOD, INC.,
Plaintiff/Counter-Defendant,

and

JEREMIAH MANKOPF,
Defendant/Counter-Plaintiff/Cross-Plaintiff,

vs.

CHRISTOPHER SHAYA,
Defendant/Counter-Plaintiff/Cross-Defendant.

OPINION AND ORDER

Cross-defendant Christopher Shaya (“Mr. Shaya”) filed a motion for summary disposition under MCR 2.116(C)(8) of defendant/cross-plaintiff Jeremiah Mankopf’s (“Mr. Mankopf”) cross claims.

I. Factual and Procedural Background

Plaintiff Northwood, Inc. (“Northwood”) is a durable medical equipment provider that sold blood-glucose test strips to defendants Olympus Global, LLC (“Olympus”) and Delta

Global, LLC. Mr. Mankopf and Mr. Shaya owned Olympus and entered into a Distribution Agreement with Northwood. Northwood claimed that Olympus sold test strips to customers outside the permitted distribution network thereby causing Northwood to violate the terms of Northwood's contract with Roche, not a party to the litigation.

Based on its discovery findings, Mr. Mankopf filed an Amended Cross-Claim against co-defendant Mr. Shaya alleging that: Olympus was profitable; that Mr. Shaya expressed a desire to exit the business; that Mr. Shaya actually had in place a secret plan to divert accounts with Northwood from Olympus to Delta, LLC thereby causing injury to Mr. Mankopf.

Specifically, Mr. Mankopf's First Amended Cross Claim against Mr. Shaya alleges: count I, fraudulent misrepresentation; count II, civil conspiracy; count III, common law and statutory conversion; count IV, breach of contract; count V, contractual indemnification; count VI, and breach of express and contractual fiduciary duty. Mr. Shaya now seeks summary disposition on all counts for failure to state a claim.

On October 3, 2018, the Court entered a Stipulated Order of Dismissal with Prejudice of all claims by Northwood against Mr. Mankopf and all claims by Mr. Mankopf against Northwood. Mr. Shaya filed a motion to set aside the October 3, 2018 order. At oral argument on November 19, 2018, the Court set aside the Stipulated Order but granted oral motions to dismiss all claims as to each side, giving effect to the substance of the Stipulated Order of Dismissal. The Court then heard oral arguments on Mr. Shaya's motion for summary disposition and took the matter under advisement.

II. Standard of Review

Summary disposition of a plaintiff's complaint is proper where a claim is barred because of, inter alia, release, statute of frauds, or an agreement to arbitrate. MCR 2.116(C)(7). "In

analyzing a motion for summary disposition pursuant to MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.” *Pusakulich v Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). The court must consider the pleadings, affidavits, depositions, admissions and documentary evidence filed or submitted by the parties to determine whether a genuine issue of material fact exists. MCR 2.116(G)(5); *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000).

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. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 426-427; 722 NW2d 243 (2006) (citation omitted). 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. *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

III. Arguments and Analysis

The Release:

Mr. Shaya first argues that a release clause in the Dissolution Agreement bars Mr. Mankopf's claims. Mr. Mankopf responds that the release was obtained by fraud and therefore does not bar his claims. Mr. Mankopf argues that he specifically pled that Mr. Shaya lied and told him that he wished to no longer continue in the line of business. Amended Cross Complaint ¶6. In Reply, Mr. Shaya argues that the cross-complaint does not in fact plead a claim of fraudulent inducement but only alleges that Mr. Shaya did not wish to continue in the business. According to Mr. Shaya, a representation of state of mind as opposed to a material fact, does not support a fraud claim.

A release is valid if fairly and knowingly made. *Denton v Utley*, 350 Mich 332, 342; 86 NW2d 537 (1957). A release is not fairly made and invalid if: “(1) the releasor was dazed, suffering from shock or under the influence of drugs; (2) there was misrepresentation as to the nature of the instrument; or (3) there was other fraudulent or overreaching conduct.” *Trongo v Trongo*, 124 Mich App 432, 435; 335 NW2d 60 (1983).

The Dissolution Agreement between the parties states, in pertinent part,

Mutual Release. Each of the Members, for themselves and their respective successors and assigns . . . hereby release and forever discharges the other Member and their successors and assigns . . . from any and all causes of action, suits, liabilities, debts, damages, controversies, agreements, tresses, judgments, executions, demands and claims of any nature whatsoever, whether in law or equity, *whether known or unknown*, accrued or unaccrued, certain or contingent (collectively, the “claims”) which the Releasing Member has had or claims to have had, now has or claims to have, or may in the future have, against Released member *arising out of or in connection with (i) the operation of the business of the Company prior to the date hereof, or (ii) any relationship, agreement, undertaking, arrangement and the like heretofore existing between the Members.* The immediately foregoing shall not be construed to prevent (sic) a Member from bringing an action to enforce or recover damages for breaches of this Agreement or any other document or instrument executed and delivered by any of the Members in connection herewith.

Mr. Mankopf’s Exhibit 2, emphasis added.

The Court must enforce the release as written. Although Mr. Mankopf seeks to rely on the fraud exception to avoid enforcement of the release, Mr. Mankopf has not alleged facts supporting the conclusion that the release was procured by fraud. That is, Mr. Mankopf does not allege that he entered into the release un-knowingly, that Mr. Shaya misrepresented the nature of the document that the document lacks authenticity or that Mr. Mankopf was misled into signing the release. Instead, Mr. Mankopf merely claims that Mr. Shaya expressed a desire to leave the test strip business but actually planned to continue in the business under a different entity. Mr. Mankopf’s fraud allegations concern the diversion of business not fraud in the inducement

regarding the release. Because the Release specifically included causes of action “known or unknown,” the fact that Mr. Mankopf did not know of Mr. Shaya’s alleged diversion of business does not invalidate a release knowingly made.

Mr. Mankopf also argues that the terms of the release, although broadly worded, apply only to claims arising out of the operation of the business. However, Mr. Mankopf overlooks the second part of the sentence which includes claims arising out of the relationship, agreement, undertaking, arrangement “and the like” existing between the members. *Id.* Mr. Mankopfs tort claims for fraud and conversion rest on the allegation that Mr. Shaya obtained the release by representing his desire to leave the business, which was allegedly false. Those representations would arise out of the relationship and business undertaking between the parties/members. Consequently, the Court will enforce the release as written except for claims based on the Dissolution Agreement itself, as excluded under the last sentence of the release.

Fraud:

Mr. Shaya next argues that the fraud claim: relies on future events or intentions rather than misrepresentations of fact; alleges no proximate causation; and lacks particularity under MCR 2.113(B)(1). More fully, Mr. Shaya argues that the alleged misrepresentation of his intent to leave the business was a statement of future intent that did not preclude Mr. Mankopf from obtaining a fair value for his interest in Olympus.

Mr. Mankopf responds that Mr. Shaya’s statement that he no longer wished to continue in the business of selling blood glucose strips was false, that Mr. Shaya knew at that time that it was false, that Mr. Shaya made the representation with the intent that Mr. Mankopf would rely on it, and Mr. Mankopf did rely on it. Amended Cross Claim ¶ 6-8. Mr. Mankopf further responds

that he relied on the representations and agreed to the dissolution of a lucrative company without receiving fair market value and therefore lost millions of dollars in revenue. *Id.* ¶9, 36.

Except for claims of fraud in the inducement, fraud must be predicated on statements relating to past or existing fact. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639–40; 534 NW2d 217 (1995). However, a “fraudulent misrepresentation may be based on a promise made in bad faith, without the intent of performance. *Foreman v Foreman*, 266 Mich App 132, 147; 701 NW2d 167 (2005).

Here, in addition to being barred by the release, Mr. Mankopf’s fraud claim also fails to allege proximate cause. Mr. Mankopf has alleged nothing in the misrepresentation—that Mr. Shaya intended to leave the test strip business—that would cause Mr. Mankopf to obtain less than market value for his interest in Olympus. Therefore, the fraud claim fails to allege facts supporting proximate causation.

Conversion:

Next, Mr. Shaya argues that the cross-complaint fails to state a claim of conversion because it does not specify the property converted and Mr. Mankopf had no property interest in business diverted from Olympus. That is, Olympus’ business was not Mr. Mankopf’s personal property. Mr. Mankopf responds that he alleges that Mr. Shaya converted his interest in the profits and lucrative contracts of Olympus. Cross-complaint, ¶16.

Conversion is any distinct act of dominion wrongfully exerted over another’s personal property in denial of or inconsistent with the party’s rights therein. *Aroma Wines & Equip, Inc v Columbian Distribution Services, Inc*, 497 Mich 337, 346; 871 NW2d 136 (2015).

A suit “to enforce corporate rights or to redress or prevent injury to a corporation, whether arising from contract or tort, ordinarily must be brought in the name of the corporation,

and not that of a stockholder, officer, or employee.” *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003). Where the alleged injury to the individual results only from the injury to the corporation, “the injury is merely derivative and the individual does not have a right of action against the third party.” *Mich Nat’l Bank v Mudgett*, 178 Mich App 677, 680; 444 NW2d 534 (1989). Members have no interest in specific limited liability company property. MCL 450.4504(2); *VanderWerp v Plainfield Twp*, 278 Mich App 624, 630; 752 NW2d 479 (2008).

Although Mr. Mankopf alleges that he had a property interest in the business of Olympus, Amended Cross Complaint ¶14, the lost profits of Olympus would not create a personal property interest for Mr. Mankopf. Therefore, the diverted business does not support a personal claim for conversion. Mr. Mankopf conflates his shareholder interest in Olympus with Olympus’ property interests. Central to any conversion claim is that a plaintiff first have a right to the property. Here, Mr. Mankopf’s rights to the business are derivative and nothing in the cross-complaint indicates that Mr. Mankopf sues on behalf of the LLC.¹ Therefore, the conversion claim in the cross complaint is not only barred by the Release but is legally insufficient and must be dismissed.

Civil Conspiracy Claim:

Next, Mr. Shaya argues that because the cross complaint fails to state any tort claims, it also fails to state a civil conspiracy claim. Mr. Mankopf responds that the fraud and conversion claims support the civil-conspiracy claim. Mr. Mankopf alleges that when he and Mr. Shaya agreed to dissolve Olympus, Mr. Shaya instructed Northwood to conceal from Mr. Mankopf that

¹ The proper form of recovery for such a loss would be a shareholder claim.

it continued conducting business with Mr. Shaya through another LLC. Therefore, Mr. Mankopf states that Mr. Shaya acted in concert with agents of Northwood and Delta Global, LLC.

“A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.” *Advocacy Org for Patients & Providers v Auto Club Ins Ass’n*, 257 Mich App 365, 384; 670 NW2d 569 (2003). A “claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable, tort.” *Early Detection Ctr, PC, v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986) citation omitted.

Because the Court has decided that the fraud and conversion claims are both legally insufficient and barred by release, the civil conspiracy claim also fails because it cannot stand alone without an underlying tort. As a result, Mr. Mankopf’s claim for civil conspiracy must also be dismissed.

Breach of the Dissolution Agreement and Indemnification:

Mr. Shaya next argues that the cross-complaint does not cite to any breached provisions of the Dissolution Agreement. Mr. Mankopf responds that he properly pled breach of the agreement based on the disclosure of confidential information, breach of fiduciary duties imposed by the agreement, and failure to cease operations, liquidate assets and indemnify. Specifically, Delta Global, LLC could only continue Olympus’ business through disclosure of Olympus’ information relating to customers, vendors, subcontractors, products, trade secrets and technology.

Mr. Mankopf has attached a copy of the Dissolution Agreement as Exhibit A to the Amended Cross-Complaint and sufficiently references the titles of the relevant paragraphs so as

to put Mr. Shaya on notice of the nature of the claimed breaches. Therefore, Mr. Mankopf sufficiently states a claim for breach of the Dissolution Agreement.

Mr. Shaya also argues that the indemnification clause only obligates Mr. Shaya to indemnify Mr. Mankopf for losses that Mr. Shaya causes. Northwood sued Mr. Mankopf, according to Mr. Shaya, for Mr. Mankopf's own actions. Mr. Mankopf responds that Mr. Shaya must indemnify for damages caused by Mr. Shaya's fraud. The indemnification clause includes, among other things, expenses, and reasonable attorney's fees resulting from Mr. Shaya's personal liability, the breach of the Dissolution Agreement, or any claims or demands made against Mankopf arising out of any act or omission by Mr. Shaya after the effective date. Response Exhibit 2.

Under MCR 2.116(C)(8), the Court only looks to the pleadings when considering a motion for summary disposition. Therefore, any factual inquiry beyond the face of the complaint is premature. The Cross-Complaint places Mr. Shaya on notice of the nature of the claim and alleges breach of the Dissolution Agreement. The cause of any losses lies beyond the four-corners of the complaint. Therefore, Mr. Shaya's motion must be denied for the breach and indemnification claims.

Breach of Fiduciary Duties:

Finally, Mr. Shaya argues that the breach of fiduciary duty claim fails for lack of factual support. Although the Dissolution Agreement contains a release clause that provides for fiduciary duties in the winding up of Olympus, according to Mr. Shaya, nothing in that agreement prevents him from doing business with Northwood through another LLC.

Mr. Mankopf responds that Michigan imposes a duty of loyalty, honesty and good faith and fair dealing on members of an LLC. The Amended Cross-Claim contains allegations that Mr. Shaya secretly diverted business and engaged in self-dealing.

Damages may be obtained for a breach of fiduciary duty when a "position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Prentis Family Found v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 47; 698 NW2d 900 (2005).

Under the terms of the Dissolution Agreement, Mr. Shaya owed a fiduciary duty to Mr. Mankopf in the winding up of Olympus. Mr. Mankopf has alleged that Mr. Shaya had a personal stake in the diversion of business to Olympus, that he used an opportunity from Olympus for his own gain, and that he engaged in self-dealing or disloyal acts. Further, Mr. Shaya could have used information gained from his role in Olympus to profit. Therefore, the counter-complaint states a claim for breach of fiduciary duty.

In summary, Count I, fraudulent misrepresentation, count II for civil conspiracy and the conversion claims in count III will be dismissed. The motion will be denied as to the remaining counts.

I. Conclusion

For the reasons set forth above, Mr. Shaya's motion is GRANTED in part and DENIED in part. Specifically, counts I-III of the cross-complaint are dismissed. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

DEC 19 2018


HONORABLE RICHARD L. CARETTI