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

Defendants Olympus Global, LLC ("Olympus") and Delta Global, LLC ("Delta") filed a motion for partial summary disposition under MCR 2.116(C)(10).

Defendants Christopher Shaya ("Mr. Shaya") and Daniel Gladys ("Mr. Gladys") also filed a similar motion for summary disposition under MCR 2.116(C)(10). Hereafter, "Defendants" refers to all defendants collectively.[1]

I. Factual and Procedural Background

This case arises out of the sale of diabetic test strips. Plaintiff Northwood is a durable medical equipment provider. Northwood had a contract with Roche[2] (not a party to this litigation), a company that manufactures blood-glucose test strips. Defendants Mr. Mankopf and Mr. Shaya formed Olympus in March 2013. Northwood and Olympus entered into a Distributor Agreement in May 2014 where Northwood would sell test strips to Olympus for distribution.

Plaintiff Northwood claims that Olympus sold test strips to customers outside the permitted distribution network thereby causing Northwood to violate the terms of the Northwood-Roche contract. Roche brought suit against Northwood in federal court in Indiana and named Mr. Shaya and Mr. Gladys as additional defendants. Mr. Shaya and Mr. Gladys have since been dismissed from the federal litigation.

Northwood, in turn, brought suit in this Court seeking recovery from various defendants including Olympus, Mr. Shaya and Mr. Gladys for allegedly causing the breach of its Northwood-Roche agreement. Mr. Shaya and Mr. Gladys were not parties to the Northwood-Roche contract and now, by counterclaim, seek recovery from Northwood for money spent defending the Roche litigation.

By amended Complaint dated February 26, 2018, Northwood alleges: count I, negligent misrepresentation; count II, fraudulent misrepresentation; count III, fraud in the inducement;

[1] Because Defendants raise the same arguments in their separate motions for summary disposition, the Court will address both motions here as a single opinion.
[2] "Roche" refers to Roche Diagnostics Corp and Roche Diabetes Care, Inc.

count IV, innocent misrepresentation; count V, silent fraud; count VI, breach of contract as to Olympus and Delta; count VII, civil conspiracy to defraud; count VIII, contractual indemnity as to Olympus and Delta; count IX, common law indemnity as to Delta; count X, piercing the corporate veil as to Shaya, Gladys and Mankopf; and count XI, tortious interference with a contract.

By counterclaim on June 1, 2018, Mr. Shaya and Mr. Gladys asserted against Northwood claims for: negligence (count I); fraud/misrepresentation (count II); and silent fraud (count III). In its motion for summary disposition dated June 22, 2018, Northwood challenges the legal sufficiency of all counts in the counterclaim. Previously, Olympus, Delta, Mr. Shaya and Mr. Gladys filed a motion for summary disposition seeking dismissal of various counts in Northwood's amended complaint. The Court issued a written *Opinion and Order* on May 10, 2018 granting in part and denying in part the motions.

Specifically, the Court dismissed Counts I-V, VII and XI against Mr. Gladys, dismissed Counts I-V to the extent that they were based on the allegation that Mr. Shaya "promised that the product Defendants purchased from Plaintiff would be sold to DME providers," dismissed Counts I and V against Mr. Shaya to the extent brought against them independently of Plaintiff's piercing the corporate veil, and dismissed Count VI to the extent based on Section II(3) of the Distributor Agreement. The Court denied the remainder of Defendants' motions.

After the Court's May 9, 2018 *Opinion and Order*, there remains against Olympus and Delta claims for fraud (Counts I-V and VII), breach of contract (Count VI) contract indemnity (Count VIII) and common law indemnity against only Delta (Count IX). Mr. Mankopf and Northwood settled their claims against each other.

The Court heard oral argument on January 14, 2019 and took the matter under advisement. The Court at that time held in abeyance Defendants' other motions relating to discovery and to disqualify counsel pending the decision on the motion for summary disposition.

II. Standard of Review

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, Law and Analysis

Fraud Claims:

Defendants argue that the Court in essence dismissed the substance of fraud claims in its previous *Opinion and Order* and should now dismiss the claims completely. Specifically, the Court dismissed the portion of Plaintiff's fraud claims based on Defendants' promise to sell the strips to DME providers. According to Defendants, the remaining fraud claims all rest on the promise of future performance which cannot serve as the basis for fraud.

Defendants also argue that Northwood did not reasonably rely on any false representation because it had the means to determine if the representations were false. According to Defendants, Northwood "turned a blind eye" when it learned that Olympus sold strips to Coastal Medical instead of Home Medical Equipment. Defendants contend that Northwood could have determined whether Coastal Medical had the requisite license under Florida law with a simple internet search. Defendants contend that Northwood deliberately failed to gather facts regarding the sale of the strips because it wanted to continue making profits.

Northwood responds that Mr. Shaya made misrepresentations about past and present business relationships, sales, and information--specifically, that Mr. Shaya falsely represented selling the strips to HME and that a list of HME payers provided in July and December 2014 were the payers for the DME strips as plan beneficiaries. According to Northwood, Mr. Shaya knew that he was selling the strips to Republic and Medical Supply Solutions, Inc.("MSSI") and not DME. Northwood argues that Mr. Shaya knew that he provided a false list because he provided "an augmented list" while possessing the actual HME payer list. Northwood argues that Mr. Shaya never informed Northwood that it diverted the sale of DME strips to other entities. Finally, Northwood argues that Michigan law does not require due diligence as a prerequisite to reliance under a fraud theory so whether the fraud could have been ascertainable does not disprove reliance.

Actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered

damage. *M&D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998) citations omitted.

A misrepresentation claim requires reasonable reliance on a false representation. *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). There can be no fraud where a person has the means to determine that a representation is not true. *Id.* However, fraud does "not require the party asserting fraud to have performed an investigation of all assertions and representations made by its contracting partner as a prerequisite to establishing fraud." *Titan Ins Co v Hyten*, 491 Mich 547, 557; 817 NW2d 562 (2012). The *Titan Ins Co* Court further clarified that while it is true that a "fraud is not perpetrated upon one who has full knowledge to the contrary of a representation . . . there is no common-law duty to attempt to acquire such knowledge." *Id.* n4. "Ignoring information that contradicts a misrepresentation is considerably different than failing to affirmatively and actively investigate a representation." *Id.* at 555.

Here, while the Court previously dismissed Northwood's fraud claims to the extent that they rested on promises of future performance, the Court did not dismiss the fraud claims entirely. Northwood has now produced evidence that it alleges shows a pattern of an ongoing deception in the context of multiple purchase orders over time. Specifically, Northwood bases its fraud claim on evidence that Defendants altered documents and otherwise misrepresented the entities that had actually purchased the strips. Such misrepresentations would relate to past or existing facts as opposed to future performance and therefore do not fall under the portion of the fraud claims that the Court previously dismissed.

Defendants' argument regarding lack of reliance also fails to persuade. Defendants argue that Northwood had the ability to discover the misrepresentations but chose not to do so. However, Defendants over-read the reliance standard. As *Titan Ins Co* made clear, the law does

not impose on a litigant a duty to investigate a representation. Rather, a party has the "means to determine that a representation is not true" when a party has information that it chooses to ignore or has actual knowledge of a contrary position.

For example, the *Nieves* Court determined that while the plaintiff read at-will language in employment documents, he chose to believe other representations rather than the signed contract. *Nieves,* 204 Mich App at 465. Here, Defendants have not alleged that Northwood had information that it chose to ignore or otherwise knew of a position contrary to the relevant representations. Rather, Defendants argue that Northwood did not perform sufficient due diligence because had it done so, it could have easily discovered Defendants' misrepresentations. Defendants have not cited authority requiring such efforts.

Even to the extent that Defendants argue that Northwood knew that Olympus and Delta did not sell the strips to DMEs, and therefore could not reasonably rely on such representations, Northwood contests that version of facts and argues that it did not know. Therefore, questions of material fact exist regarding what Northwood knew and whether it reasonably relied on any representations. As such, Defendants' motion for summary disposition must be denied with regard to the lack of reasonableness of reliance.

Civil Conspiracy:

Defendants next argue that absent an underlying tort, Northwood may not pursue a civil conspiracy claim. Further, Defendants argue that the civil conspiracy claim fails because Mr. Shaya and Mr. Gladys at all times acted as agents of Olympus and Delta. Since a conspiracy requires two or more persons, and because a corporation cannot conspire with its agents or employees acting on its behalf, Defendants argue that the civil conspiracy claim must fail.

Specifically, Defendants claim that Mr. Mankopf, Mr. Shaya and Olympus are not distinct legal entities but are "one and the same" when the individuals acted on behalf of the organizations.

Northwood responds that Olympus and Delta acted tortiously in pursuit of a common design to defraud Northwood. According to Northwood, Mr. Shaya acted on his own personal behalf rather than merely as an agent of Olympus or Delta.

"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) citation omitted. However, "a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Id.* There can be no conspiracy between a corporation and its directors if the directors act on behalf of the corporation. An exception to this general rule exists, however, where the directors have an independent personal stake in a particular action and, therefore actually act on their own behalf. *Blair v Checker Cab Co*, 219 Mich App 667, 674–75; 558 NW2d 439 (1996).

Here, as discussed above, questions of material fact exist regarding Northwood's fraud claims. Therefore, the Court cannot conclude at this point that the civil conspiracy claim fails for lack of an underlying tort. Additionally, Northwood requests that this Court pierce the corporate veil of Olympus and Delta. Therefore, the Court also cannot conclude at this point that Mr. Shaya and Mr. Gladys only acted as agents for the respective corporations. Northwood has also presented evidence that Mr. Shaya received personal payments from MSSI and Republic and therefore had a personal stake or acted on his own behalf. Therefore, Defendants' motion for summary disposition on the civil conspiracy count must be denied.

Piercing the Corporate Veil:

Defendants seek dismissal of Count X on the basis that Northwood may not pierce the corporate veil and impose liability against Mr. Shaya and Mr. Gladys individually. Defendants argue that piercing the corporate veil is an equitable remedy sparingly invoked to cure certain injustices or where the corporate entity has been used to avoid legal obligations.

Northwood responds that Olympus and Delta were merely alter egos of Mr. Shaya and Mr. Gladys. That is, the individuals never actively managed Olympus, never capitalized the corporation or kept records regarding expenses. Further, according to Northwood, Mr. Shaya used Olympus and Delta to commit fraud on Northwood by providing fraudulent payer lists and selling strips to unpermitted entities.

There is no single rule delineating when the corporate entity may be disregarded. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456–57; 559 NW2d 379 (1996) citation omitted. "First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff." *Id.*

In the present matter, the Court previously denied Defendants' motion for summary disposition under MCR 2.116(C)(8) concerning piercing of the corporate veil. While piercing the corporate veil is not a cause of action standing alone, Northwood has produced evidence that Defendants used the corporate form to commit fraud and has also presented evidence that Mr. Shaya did not capitalize or manage the entities. As such, Northwood has sufficiently raised questions of material fact such that the Court could decide to disregard the corporate entities. Therefore, Defendants' motion for summary disposition on Count X must be denied.

Damages:

Defendants argue that Northwood has no "loss of future profits" damages but realized a gain of up to 3 million dollars during the period of the Roche-Northwood, Olympus/ Delta transactions.

Northwood responds that it acted as a third party administrator on behalf of Binson's Hospital Supplies, Inc. and received fees for its services, which include fees for product and pricing from Roche. According to Northwood, Defendants' fraud caused Roche to terminate that product and pricing agreement resulting in substantial lost profits to Northwood. Northwood contends that Defendants' motion seeks summary disposition regarding the amount of damages rather than the fact that Northwood incurred damages. Northwood claims that it not only seeks lost business profits but also damages from the "Roche matter", indemnification and attorney's fees.

Lost profits damages must be reasonably certain and cannot be based solely on conjecture or speculation. *Bonelli v Volkswagen of Am, Inc*, 166 Mich App 483, 511; 421 NW2d 213 (1988). However, the law does not require mathematical certainty but allows recovery for lost profits are difficult to calculate and are speculative to some degree. *Id.* citation omitted. Uncertainty as to the fact of damages as opposed to amount precludes recovery. *Id.*

Here, the Court is satisfied that Northwood raises questions of material fact that it incurred legal fees and lost fees for service when Roche terminated a product and pricing agreement wherein Northwood generated fees as a third party administrator.

Because the parties presented meritorious arguments, the request for sanctions is denied. For the foregoing reasons, Defendants' motion for summary disposition must be denied.

IV. Conclusion

For the reasons set forth above, Defendants' motions for summary disposition are DENIED. 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.

HONORABLE JAMES M. BIERNAT, SR.
In the absence of Hon Richard L. Caretti

Dated: January 18, 2019

Cc: John M. Sier
Edward Lennon
Andrew Abood