STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

BB7-9, LLC and CURIS RESTAURANTS, INC.,

Plaintiffs,

vs. Case No. 18-3053-CB

BIG BOY RESTAURANTS INTERNATIONAL, LLC, BIG BOY RESTAURANT MANAGEMENT, LLC, BIG BOY FRANCHISE MANAGEMENT, LLC, LIGGETT RESTAURANT MANAGEMENT, LLC, BIG BOY FOOD GROUP, LLC, BIG BOY ADVERTISING AND FOOD PRODUCTION FUND, INC., and BOB LIGGETT,

Defendants.
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OPINION AND ORDER

Defendants Big Boy Restaurants International, LLC, Big Boy Restaurant Management, LLC, Big Boy Franchise Management, LLC, Liggett Restaurant Management, LLC, Big Boy Food Group, LLC, Big Boy Advertising and Food Production Fund, Inc., and Bob Liggett (together as "Defendants") filed a motion for summary disposition under MCR 2.116(C)(8).

I. Background

On August 10, 2018, plaintiffs BB7-9, LLC and Curis Restaurants, Inc. ("Plaintiffs") filed their complaint alleging: count I, breach of contract; count II, breach of fiduciary duty; count III, anticipatory repudiation; count IV, fraudulent conveyance; count V; and successor liability—alter ego.

Specifically, Plaintiffs aver that BB7-9, LLC owns property at 99 N. Groesbeck, in Mt. Clemens, Michigan and entered into a Lease agreement with Big Boy Restaurant Management, LLC, who failed to pay rent and maintain the subject property as agreed;

that "Defendants have threatened that If Plaintiff does not accept a small fraction of the current indebtedness then Plaintiff will receive nothing"; Defendants repudiated the Lease; and that Defendants will transfer assets to intentionally defraud Plaintiffs. The Court heard oral argument on October 22, 2018 and took the matter under advisement.

II. Standard of Review

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. Law and Analysis

A. Breach of Contract (Count I)

Defendants argue that only Big Boy Restaurant Management, LLC, entered into a Lease with plaintiff BB7-9 and it has not breached the Lease or Franchise Agreement. Further, Defendants argue that Plaintiffs base their breach claim on an alleged breach of the duty of good faith, which Michigan does not recognize as a cause of action.

Plaintiffs respond that they alleged sufficient facts regarding Defendants' failure to maintain and failure to reimburse for reasonable repairs under the Lease agreement.

A party claiming a breach of contract must establish "(1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Dunn v Bennett*, 303

Mich App 767, 774; 846 NW2d 75 (2013) citation omitted. "It has been said that the covenant of good faith and fair dealing is an implied promise contained in every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Bank of Am, NA v Fid Nat Title Ins Co*, 316 Mich App 480, 500–01; 892 NW2d 467 (2016) citation omitted "However, Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." *Id.*; *Fodale v Waste Mgt of Michigan, Inc*, 271 Mich App 11, 35; 718 NW2d 827 (2006) (Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing).

Here, Plaintiffs have alleged the existence of a contract in the form of a Lease, that the contract was breached, and that they suffered damages. Complaint ¶ 1, 6-8. While Plaintiffs allege a breach of a duty of good faith, they also allege in paragraphs 6 and 7 of the Complaint that Defendants failed to reimburse BB7-9, LLC for maintenance costs and pay property taxes. *Id.* ¶6. Plaintiffs also allege a failure to maintain the property and make a rent payment for August of 2018. *Id.* ¶ 7-8.[1] Although Defendants contest the factual accuracy of those assertions, Defendants recognize that review under a motion under MCR 2.116(C)(8) is limited to the pleadings. Therefore, the Court is satisfied that Plaintiffs sufficiently state a cause of action against Big Boy Management, LLC for breach of contract under Count I of the Complaint on a basis other than the alleged breach of the duty of good faith. However, Plaintiffs claim for breach of the implied covenant of good faith and fair dealing must be dismissed.[2]

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[1] The Court also granted on the record Plaintiffs' request for leave to amend the complaint.

[2] Plaintiffs acknowledged on the record that the breach of contract claim did not rest on the breach of the duty of good faith, even though the complaint mentions it.

B. Breach of Fiduciary Duty (Count II)

Next, Defendants argue that Plaintiffs fail to state a claim for breach of fiduciary duty in Count II of the Complaint. According to Defendants, Michigan law does not recognize a fiduciary duty between franchisee and franchisor. Further, Defendants argue that a Lease Agreement between two commercial entities does not give rise to a fiduciary duty.

Plaintiffs respond that a fiduciary relationship arose from both the Lease Agreement and Franchise Agreement as well as Plaintiffs' trust in the "faithful integrity" of Defendants who had superiority of influence.

A fiduciary duty arises where there is a fiduciary relationship between the parties. Familiar examples are: trustees to beneficiaries, guardians to wards, attorney to clients, and doctors to patients. *Portage Aluminum Co v Kentwood National Bank,* 106 Mich App 290, 294; 307 NW2d 761 (1981). "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." *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute,* 266 Mich App 39, 47; 698 NW2d 900 (2005).

The present Plaintiffs have not cited to any authority for the proposition that a lease or a franchise agreement between business entities gives rise to a fiduciary duty. To the contrary, Michigan Courts have declined to find fiduciary obligations in the context of commercial transactions. See, e.g., *Ulrich v Fed Land Bank of St Paul*, 192 Mich App 194, 196; 480 NW2d 910 (1991)(allegations of inexperience and reliance were insufficient to claim a fiduciary relationship in a business transaction); *Bero Motors v Gen Motors Corp*, unpublished per curium opinion of the Court of Appeals, issued

October 2, 2001 (Docket No 224190) p, 5 (Franchise agreement did not create a fiduciary duty. Allegation of reliance on another was insufficient in a commercial setting.); *McDerment v Biltmore Properties, Inc*, unpublished per curium opinion of the Court of Appeals, issued December 29, 2005 (Docket No. 257155) p, 6 (No fiduciary relationship between parties in a commercial enterprise governed by contracts and other documents that guided the rights and obligations of the parties).

Plaintiffs recognize that the parties had a contract that guided their rights and obligations—according to Exhibits A and B attached to Plaintiffs' Complaint. The Court is not persuaded that the Franchise Agreement between Big Boy Franchise Management, LLC and Curis Restaurants, Inc. created any fiduciary obligations. Further, the attached Franchise Agreement appears to be related to a separate location in New Baltimore, Michigan. Neither is the Court convinced that the Plaintiffs' commercial Lease would support the creation of fiduciary obligations. Plaintiffs have not cited authority that a lease or franchise agreement creates a fiduciary duty. Therefore, Plaintiffs have failed to state a claim for breach of fiduciary duty in Count II of their Complaint.

C. Anticipatory Repudiation (Count III)

Defendants argue further that Count III for anticipatory repudiation fails to state a claim because the Complaint alleges only an "indication" of nonperformance and does not allege an unequivocally declared intent not to perform.

Plaintiffs respond that the Complaint sufficiently alleges that Defendants made statements, beyond mere "indications", of their intent to repudiate the Lease Agreement.

Under the doctrine of anticipatory breach, if a party to a contract, prior to the time of performance, unequivocally declares the intent not to perform, the innocent party has

the option to sue immediately for the breach of contract. *Brauer v Hobbs*, 151 Mich App 769, 776; 391 NW2d 482 (1986). "In determining whether a repudiation occurred, it is the party's intention manifested by acts and words that is controlling, not any secret intention that may be held. *Stoddard v Manufacturers Nat Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999) citation omitted. "Regarding oral repudiation, a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform." *Paul v Bogle*, 193 Mich App 479, 494; 484 NW2d 728 (1992).

In this case, Plaintiffs have averred that Defendant "indicated it may not be able to make further rental payments"; that Bob Liggett and Tom Jablonski "indicated to Plaintiff that Defendant is unable or unwilling to fulfill its obligations to Plaintiff namely presenting the rental payment for next month . . .; that Defendants "threatened that if Plaintiff does not accept a small fraction of the current indebtedness then Plaintiff will receive nothing" because "Defendants are insolvent", will not make future payments under the lease agreement and may seek bankruptcy protection. *Id.* ¶8, 9, 13. Plaintiffs have also incorporated into their Complaint an affidavit supporting the communication that BB109, LLC will not receive future rental payments. Complaint Exhibit D. Once attached as part of the pleading, an instrument becomes part of that pleading for purposes of review under MCR 2.116(C)(8) . *Laurel Woods Apartments v Roumayah,* 274 Mich.App 631, 635, 734 NW2d 217 (2007).

The Court is satisfied that the alleged statements which relate to future rental payments are not sufficiently positive as to be reasonably interpreted to mean that Defendant will not or cannot perform under the Lease. Therefore, Plaintiffs' motion for summary disposition will be granted as to Count III.

D. Fraudulent Conveyance (Count IV)

Defendants next argue that Plaintiffs' Count IV for fraudulent conveyance is unripe and lacks the specificity to meet Plaintiffs' pleading burden. According to Defendants, the Complaint does not allege what was transferred or who transferred it. Defendants also argue that there can be no fraudulent conveyance where there is no debt owed.

Plaintiffs respond that they are due significant funds for Defendants' failure to properly maintain and reimburse Plaintiffs for the maintenance on the leased premises. Further, Plaintiffs contend that the sale, transfer or disposal of Defendants' assets is in the final stages of completion.

The Uniform Voidable Transactions Act governing the setting aside of fraudulent conveyances states in pertinent part:

> (1) Except as otherwise provided in subsection (4), a transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim *arose before or after the transfer* was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following circumstances:
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> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:
>
> *(i)* Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
> *(ii)* Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

MCL 566.34. A UVTA cause of action under MCL 566.34 is appropriate where the

debtor made the transfer with the intent to hinder, delay or defraud any creditor of the debtor, or without receiving reasonably equivalent value. *Szkrybalo v Szkrybalo,* 477 Mich 1086, 1086, 729 NW2d 233 (2007). Once a creditor establishes the presence of multiple badges of fraud, he or she has established a fact question regarding actual intent. *Dillard v Schlussel*, 308 Mich App 429, 454; 865 NW2d 648 (2014).

Here, Plaintiffs have alleged sufficient facts to state a claim under MCL 566.34(1)(b). Specifically, Plaintiffs have alleged that: Defendants owe contractual obligations; the property has been transferred to parties not obligated to Plaintiff; that such transfers were made with the intent to defraud, hinder and delay; and that no transfers were made for reasonable equivalent value, or the remaining assets would be unreasonably small or that Defendants would incur debts beyond the ability to pay. Complaint ¶ 39-44. Defendants' position whether a debt is owed raises a question of fact and is beyond the scope of review on a motion for summary disposition under MCR 2.116(C)(8). Therefore, Defendants' motion must be denied as to Count IV.

E. Successor liability (Count V)

Defendants argue that while Plaintiffs name seven defendants in their lawsuit, the Complaint only asserts allegations against two defendants—Big Boy Restaurant Management, LLC as lessee and Big Boy Franchise Management, LLC as franchisor. According to Defendants, a vague claim of "alter ego liability" cannot be used to bring other defendants into this case with no cognizable underlying cause of action and no judgment. Further, Defendants argue that alter-ego is not an independent cause of action. Therefore, Defendants argue that claims against Big Boy Restaurants International, LLC, Liggett Restaurant Management, LLC, Big Boy Food Group, LLC, Big Boy Advertising and Food Production Fund, Inc. and Bob Liggett should be

dismissed.

Plaintiffs respond that there was an uncontroverted sale of assets. According to Plaintiffs, Defendant Liggett and Big Boy Restaurant Management, LLC engaged in bad faith in the transactions. Plaintiffs argue that defendants fall within the franchise agreement, controlled by Mr. Liggett, who has expressed his intent to use the separate entities as a means of rendering them insolvent and avoid paying Plaintiffs.

Generally, the law treats a corporation as a separate entity. *Glenn v TPI Petroleum, Inc*, 305 Mich App 698, 715–16; 854 NW2d 509 (2014). However, when this fiction is invoked to subvert justice, it may be ignored by the courts. *Id.* To pierce the corporate veil: (1) "the corporate entity must be a mere instrumentality of another individual or entity"; (2) "the corporate entity must have been used to commit a wrong or fraud"; and (3) "there must have been an unjust injury or loss to the plaintiff. *Rymal v Baergen*, 262 Mich App 274, 293–94; 686 NW2d 241 (2004) citation omitted No single rule delineates when a corporate entity should be disregarded, and the facts are assessed in light of a corporation's economic justification to determine if the corporate form has been abused. *Id.* When piercing the corporate veil, courts consider several factors including: "(1) whether the corporation is undercapitalized, (2) whether separate books are kept, (3) whether there are separate finances for the corporation, (4) whether the corporation is used for fraud or illegality, (5) whether corporate formalities have been followed, and (6) whether the corporation is a sham." *Glenn v TPI Petroleum, Inc*, 305 Mich App 698, 716; 854 NW2d 509 (2014) citation omitted.

The Michigan Court of Appeals has observed that "[w]hile no binding authority exists explicitly stating that piercing the corporate veil is not, by itself, a cause of action, such a cause of action has never been recognized in Michigan." *Kostopoulos v*

Crimmins, unpublished per curium opinion of the Court of Appeals, issued December 29, 2011 (Docket No. 299478) p, 3. The *Kostopoulos* Court further stated, "[w]e cannot find support for the proposition that piercing the corporate veil solely on an alter ego theory is in and of itself a cause of action. To the contrary, this Court has issued numerous unpublished opinions holding that a cause of action seeking to pierce the corporate veil, by itself, is not a cause of action recognized in Michigan." *Id.* collecting cases.

Here, this Court need not even reach the question of whether *alter ego* is an independent cause of action because Plaintiffs have not alleged sufficient facts to support piercing any corporate veil. Specifically, Plaintiffs have not identified what wrong or fraud occurred or what entities are alter egos. Instead, the Complaint only alleges that "Defendant corporations are merely agents or instrumentalities of the Defendants and are being used to commit fraud." ¶ 47-48. The Complaint makes no mention of an undercapitalized corporation, lack of separate books, lack of corporate formalities or whether the corporation is a sham. See, *Dutton Partners, LLC v CMS Energy Corp*, 290 Mich App 635, 645–46; 802 NW2d 717, 724 (2010)(Summary disposition should have been granted on alter ego theory where plaintiff presented insufficient facts of fraud, wrongdoing or misuse as required under Michigan law). For these reasons, Count V of Plaintiffs' complaint must be dismissed without prejudice.

In conclusion, Plaintiffs claims for breach of fiduciary duty and alter ego will be dismissed. Further, since no alleged facts support any cause of action against defendants other than Big Boy Restaurant Management LLC as lessee, all other defendants must also be dismissed.

IV. Conclusion

For the reasons set forth above, Defendants' motion is DENIED in part and GRANTED in part. Specifically, Defendants' motion is granted in part as to Count I for breach of the implied covenant of good faith and fair dealing, and denied in part as to breach of the Lease; granted as to Count II for breach of fiduciary duty, granted as to Count III for anticipatory repudiation, denied as to Count IV for fraudulent conveyance, and granted as to Count V for alter ego. Additionally, all defendants except Big Boy Restaurant Management, Inc., lessee, are also dismissed as no facts supporting any cause of action against them have been sufficiently alleged.

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.

Date: DEC 19 2018

Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge