STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

CRAIG BERENS,

Plaintiff,

vs.

VOLUNTEER ENERGY SERVICES, INC., an Ohio corporation; and RICHARD SIBLE, individually and d/b/a Faith Energy Solutions, jointly and severally,

Defendants.
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Case No. 13-10645-CZB

HON. CHRISTOPHER P. YATES

ORDER DENYING DEFENDANT VOLUNTEER ENERGY SERVICES, INC.'S MOTION FOR SUMMARY DISPOSITION

Never say never. Indeed, on rare occasions, the Court has granted contested motions seeking summary disposition under MCR 2.116(C)(10) at the outset of cases. But Michigan law teaches that such motions are "generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the non-moving party's position." Liparoto Construction, Inc v General Shale Brick, Inc, 284 Mich App 25, 33-34 (2009). The use of the term "further discovery" suggests that, in the view of our Court of Appeals, allowance of some discovery is a virtual precondition to an award of summary disposition under MCR 2.116(C)(10). After all, a motion for summary disposition pursuant to MCR 2.116(C)(10) "tests the factual sufficiency of the complaint[,]" Maiden v Rozwood, 461 Mich 109, 120 (1999), which presupposes that the parties have been afforded the opportunity to develop the facts underlying their dispute. Here, Defendant Volunteer Energy Services, Inc. ("VESI") has asked the Court to declare it the victor before any type of discovery has taken place. This the Court cannot do.

In a nutshell, Plaintiff Craig Berens claims that he worked as a sales representative reporting in the first instance to Richard Sible and ultimately to Defendant VESI. Even at this early stage, the record contains ample evidence to support Berens's contention that he participated in a natural-gas sales program and that VESI supplied the natural gas for the program. By all accounts, Berens had a commercial relationship with Sible, who in turn had a contractual relationship with VESI. But in VESI's formulation of the factual background, Berens had no direct relationship with VESI. As a result, VESI contends that Berens's remedy must come exclusively from Sible, as opposed to VESI. For that reason, VESI argues that each of Berens's six claims against VESI must fail.

To be sure, some of Plaintiff Berens's claims are mutually exclusive. For example, the claim in Count One for breach of contract against VESI simply cannot coexist with the claim in Count Ten for unjust enrichment against VESI. See Belle Isle Grill Corp v City of Detroit, 256 Mich App 463, 478-479 (2003). In addition, some claims – such as the cause of action against VESI in Count Three for tortious interference with a business expectancy – seem nearly impossible to prove in light of the nature of the relationship between Berens and VESI. See Dalley v Dykema Gossett PLLC, 287 Mich App 296, 324 (2013) (plaintiff must allege and prove "'the interferer did something illegal, unethical, or fraudulent'"). But a plaintiff may plead claims in the alternative, see Johnson v Botsford General Hospital, 278 Mich App 146, 160-161 (2008), citing MCR 2.111(A)(2), and the plaintiff's complaint includes sufficient allegations to survive a motion for summary disposition under MCR 2.116(C)(8).[1] Thus, the case seemingly should proceed to the discovery phase of litigation. But VESI insists that MCR 2.116(C)(10) obligates the Court to bring this matter to a close right now.

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[1] Even if the allegations in Plaintiff Berens's complaint were so inadequate as to fall prey to a motion for summary disposition under MCR 2.116(C)(8), the Court would almost certainly have to permit Berens to amend his complaint to cure the deficiencies. See MCR 2.116(I)(5).

The Court must grant summary disposition pursuant to MCR 2.116(C)(10) if, but only if, "the proffered evidence fails to establish a genuine issue regarding any material fact." Maiden, 461 Mich at 120. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." West v General Motors Corp, 469 Mich 177, 183 (2003). To create such a genuine issue of material fact, a party opposing a motion for summary disposition under MCR 2.116(C)(10) must "set forth specific facts at the time of the motion showing a genuine issue for trial." See Maiden, 461 Mich at 121. But each side ordinarily must be afforded the opportunity to conduct discovery before having to shoulder that obligation in responding to a request for relief under MCR 2.116(C)(10). Indeed, our Court of Appeals regards a motion for summary disposition pursuant to MCR 2.116(C)(10) as "premature if discovery has not closed, unless there is no fair likelihood that further discovery would yield support for the nonmoving party's position." See St Clair Medical, PC v Borgiel, 270 Mich App 260, 271 (2006). Here, Plaintiff Berens can fend off Defendant VESI's motion for summary disposition under MCR 2.116(C)(10) as both unfounded and premature.

Plaintiff Berens has supplied the Court with a business card bearing his name and the name of Defendant VESI that identifies him as an "Authorized Representative" of VESI. See Response to Defendant Volunteer Energy's Motion for Summary Disposition, Exhibit 8. In addition, Berens has provided an e-mail from Shawn Hall, the "Regional Manager" for VESI, that includes a clipping describing Berens as a "representative for Volunteer Energy." See id., Exhibit 4. The comment on the e-mail from Shawn Hall states: "Nice job Craig!" Id. Although these pieces of evidence do not definitively establish a contractual relationship between Berens and VESI, they strongly suggest that even VESI recognized a commercial bond between itself and Berens. Moreover, because Michigan

law recognizes oral contracts for sales representatives, e.g., H J Tucker & Associates, Inc v Allied Chucker and Engineering Co, 234 Mich App 550, 554 (1999), the lack of a written contract between VESI and Berens does not prevent Berens from pursuing his claims. In sum, Berens has presented sufficient evidence to proceed with his claims at this early stage, even in the face of VESI's request for summary disposition under MCR 2.116(C)(10).[2] Consequently, the Court shall set this matter for an initial status conference to establish a scheduling order.

IT IS SO ORDERED.

Dated: February 17, 2014

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

[2] Nothing in this order precludes Defendant VESI from seeking summary disposition under MCR 2.116(C)(10) after the close of discovery.