STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

FIRST GOLD BUYERS, INC.,
A New York corporation,

Plaintiff,

V

PLAYERS CHOICE GOLF, LLC, a Michigan limited liability company, JOSHUA W. HERRERA, an individual, LEADING EDGE GOLF, LLC, a Michigan Limited liability company, and BRADLEY T. NAY, an individual,

Defendants.
_____/

Case No. 15-1028-CB

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At a session of said Court held in Lansing, Ingham County, Michigan, on April 13, 2018

PRESENT: Honorable Joyce Draganchuk
Circuit Judge

This case was tried before the Court on January 7 and 8, 2018. It was taken under advisement to issue written findings of fact and conclusions of law.

Plaintiff has a 5-count Complaint alleging two counts of breach of contract, and single counts of claim and delivery, fraudulent transfer, and tortious interference with a contractual relationship. On June 28, 2016, this Court signed an order of administrative closing only with respect to Joshua Herrera because he and his wife filed bankruptcy. That order closed this case with respect to Count II (breach of contract as to Joshua Herrera) in its entirety and Count IV (fraudulent transfer as to all Defendants) only as it pertains to Joshua Herrera.

The Court has considered the testimony, the exhibits admitted, and arguments of counsel. The burden of proof by a preponderance of the evidence is applied to the Plaintiff. The Court has assessed witness credibility and the weight to be afforded to the evidence and makes the following findings of fact and conclusions of law:

Joshua Herrera was the owner of Players Choice Golf, LLC ("Players Choice"), which was formed in 2012. In the Fall of 2013, Players Choice began operating out of an inflatable dome in Okemos. They provided an indoor driving range, a putting studio, and a Trackman swing analyzer. Players Choice also offered a club fitting service that featured the skills of Mr. Herrera, recognized by Golf Digest as one of the top 100 golf fitters in the country. Mr. Herrera borrowed money from friends and relatives to start his business. The year 2014 was a banner year for him. He had gross sales of $1.8 million. That all ended on March 29, 2015 when the dome collapsed during a power failure.

Everything owned by Players Choice sat under the collapsed dome for over three months. As one employee described it, large holes were torn in the dome and exposed the items underneath to the elements. Mr. Herrera described the dome as three layers of Kevlar and it was so heavy that the landlord informed him he would have to rent a crane to remove it. Mr. Herrera was only able to salvage the Trackman, which was a leased piece of equipment, six shirts and some socks.

Mr. Herrera tried to continue the business at another location after the dome collapse. He relocated to a store front at 2805 Jolly Road and drew on his club fitting skills to try and stay afloat.

Bradley Nay was an old school friend of Mr. Herrera's. They had not had contact for a number of years while Mr. Nay worked and lived outside of Michigan. Mr. Nay

returned to Michigan in 2015. Shortly before Father's Day, he went to the location of the dome expecting to buy a golf bag. He discovered that the dome had collapsed. He called the phone number for Players Choice and was directed to the store on Jolly Road. He found the store to be lacking inventory so he left and bought the golf bag elsewhere.

On August 7, 2015, Plaintiff First Gold Buyers, Inc. and Players Choice executed a Promissory Note and Security Agreement, which will be described more fully below as the subject of the first count for breach of contract. The Chief Financial Officer of First Gold is George Meladze. Mr. Meladze is the person Mr. Herrera dealt with in connection with the loan.

In the meantime, Mr. Nay claims that while he was living in Houston he got the idea to get into the golf simulator business. To that end, he approached Mr. Herrera in mid to late September, 2015, and inquired about using some of the Players Choice space for his own golf simulator business. Again, Mr. Nay observed no inventory at the Jolly Road location and Mr. Herrera confirmed that he had no inventory and he owed people money. Mr. Nay testified that he was initially going to rent only part of Players Choice's space but he made the decision in the beginning of October, 2015, to rent the entire space.

Both Mr. Herrera and Mr. Nay deny that they had any discussions about funding a new company that Mr. Nay would come to own known as Leading Edge Golf, LLC ("Leading Edge"). They also deny they had any deal where assets of Players Choice would be transferred to Leading Edge and then Mr. Herrera would become a part owner of Leading Edge at some time in the future. Mr. Nay denied being involved in any phone call with Mr. Meladze regarding financing for Leading Edge.

Mr. Meladze first heard of Leading Edge one day when he received an email from them. He thought it was odd because he had no connection to Michigan but suddenly received an email from this Michigan company. He contacted Mr. Herrera and Mr. Herrera told him not to worry because he and a friend of his started up a business that was the same as Players Choice. Mr. Meladze didn't worry because at that time he was still receiving daily payments on the Note.

Mr. Meladze identified a typical email that he previously received from Players Choice dated September 9, 2015 (Ex. 12). A Facebook post from October 14, 2015 on Leading Edge's page contained some of the same language (Ex. 5). A grand opening announcement for Leading Edge that pictured Mr. Herrera still did not cause Mr. Meladze concern because he was continuing to receive payments from Players Choice.[1]

Mr. Meladze testified that several of Leading Edge's website postings and email messages did cause him concern, but it was unclear whether his concern was triggered contemporaneously with the postings or whether he became concerned after-the-fact. A website posting that advertised eight used hitting mats selling for $150 each seemed unusual because a new business was selling used equipment (Ex. 10). The same website information advertised services for Leading Edge that would seem to put it in direct competition with Players Choice. Another announcement of the November 13 grand opening revealed that Leading Edge had the same Jolly Road address as Players Choice (Ex. 14) and it was offering club fittings, which were the core business of Players Choice (Ex. 16).

[1] This is not true according to the loan payment schedule in Exhibit 3. As of November 13, multiple electronic transfers had been attempted but rejected for non-sufficient funds.

Mr. Meladze recounted having six telephone conversations with Mr. Herrera about Leading Edge. He summarized the information Mr. Herrera gave him as follows: He was "doing this thing" with a childhood friend. He owed money to creditors but needed credit from his suppliers so he had to open a new company not under his name. He was not an owner of Leading Edge so creditors could not go after him, but he did have control of Leading Edge. He had to invest money in Leading Edge and he had to physically be there. In return, he would receive about 20% of the shares in Leading Edge that would be transferred to him after his bankruptcy concluded. He would then be an owner of Leading Edge. When Mr. Meladze realized that Mr. Herrera was telling him he was trying to avoid creditors, Mr. Meladze reminded him that he was also a creditor. Mr. Herrera reassured Mr. Meladze that he would be taken care of.

Mr. Nay denies ever being involved in any phone calls or discussing funding for Leading Edge with Mr. Herrera, but Mr. Meladze described someone named Brad being on the phone in one of the phone calls with Mr. Herrera in which details of funding Leading Edge were discussed. In that call, Mr. Herrera requested that First Gold extend a line of credit to Leading Edge for purchase of equipment for use on Jolly Road. Mr. Herrera also said that Mr. Nay formed Leading Edge because Players Choice could no longer obtain additional lines of credit and Leading Edge could get credit from the same vendors. Mr. Meladze acknowledged that "Brad's" only participation in the call was to say "hi."

Count I: Breach of contract (Players Choice only)

Players Choice does not dispute that there was a contract and that it breached that contract. First Gold and Players Choice agree that the principal due under the loan is

$111,030.00. Players Choice should be held liable for the debt incurred, but an issue remains regarding a late fee provision.

First Gold and Player's Choice executed a Promissory Note for $127,030 on August 7, 2015. The Note provides that $77,030.00 was to cover the balance owed on previous loans and $50,000.00 was to be a new loan (Ex. 1). Interest was 7%. Repayment was to be made in daily installments of $350 for each business day beginning on October 1, 2015 until October 1, 2016, when the balance was due. Any installment not paid when due would result in a late charge of $350. The Note was secured by Player's Choice current and after-acquired assets (Ex. 2).

Payments under the August 7, 2015 Note began on October 1, 2015 as scheduled. Nine payments of $350 were made with the last regular payment occurring on October 14, 2015. Only one additional payment was made on November 17, 2015. First Gold considers Player's Choice to be in default as of October 15, 2015.

> Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty. MCL 440.2718(1).

A liquidated damage clause allows the parties to fix the amount of damages if there is a breach of contract, when actual damages are not easily proven or ascertainable. *Moore* v *St. Clair County*, 120 Mich App 335 (1982). However, the stipulated sum must bear some reasonable relationship to the actual damages that would result, otherwise the clause is void as a penalty.

There is little room for doubt that the late fee in the Note is a liquidated damage clause. While liquidated damages are useful in cases where damages may not be easily

calculated such as construction delays, that is not the case here. This was a contract for the loan of money and nonperformance is easily measured by the amount of money not paid plus interest. In fact, enforcing the late charge in this case would give First Gold a windfall in that it would receive more than two times the amount due under the Note. Contract damages are meant to be compensatory and not punitive. The late charge is an unenforceable liquidated damage clause.

Count III: Claim and delivery (as to Players Choice)

First Gold has provided little support for its claim and delivery action. Its trial brief makes no mention of the claim. It was mentioned in opening statement at trial, but the only evidence of any property that might be subject to claim and delivery was the testimony about the hitting mats. Mr. Nay testified that Leading Edge never sold the hitting mats and that the last he knew the mats were in the attic at Leading Edge.[2] Mr. Herrera testified that the mats were seized in an execution and public sale in 2016 in connection with a lawsuit by another creditor (Ex. BB).

First Gold cannot succeed on a claim and delivery action when the property is in the hands of a non-party and no evidence has been submitted to show what money damages would be due in lieu of a return of property.

Count IV: Fraudulent transfer (as to Players Choice, Leading Edge, and Bradley Nay)

[2] Mr. Nay testified that Leading Edge lost $80,000 in 2015 and $66,000 in 2016 and he has sold the business.

First Gold's Complaint alleges a fraudulent transfer under Uniform Fraudulent Transfer Act, MCL 566.31, et seq. At the time the Complaint was filed, the pertinent sections of the Act provided as follows:

> Sec. 4. (1) A transfer made or obligation incurred by a debtor is fraudulent 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:
>
> > (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 he or she would incur, debts beyond his or her ability to pay as they became due.
>
> Sec. 5. (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer or obligation.
>
> (2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.[3]

First Gold has never specified which theory under either of the two sections it is relying on. However, regardless of the section, before a transfer can be deemed fraudulent, there has to actually be a transfer. Furthermore, the transfer has to be of an

[3] [3] The statute has been amended since the filing of the Complaint to provide that a fraudulent transfer is voidable by the creditor and that the creditor has the burden of proof by a preponderance of the evidence. Neither amendment impacts the conclusions here.

asset, which is defined in MCL 566.31 as "property of a debtor." First Gold maintains that Players Choice transferred its inventory to Leading Edge. Inventory is an asset, but whether or not there was a transfer of inventory first requires an analysis of whether Players Choice had any inventory *to* transfer.

The August 7, 2015 promissory note from Players Choice to First Gold covered a previously owed debt of $77,030 and an additional $50,000 for the purchase of new inventory. Mr. Meladze M testified that Players Choice sent an emailed copy of a Maple Hill Golf invoice in order to show First Gold where the new loan money would be spent (Ex. 9). The invoice dated August 7, 2015 was for golf equipment totaling $33,622.45. First Gold wired $42,093.46 directly to Maple Hill Golf (Ivanrest Golf Center Inc.) on August 12, 2015. Mr. Meladze testified that he believed the new loan money was to purchase new inventory. He further believed that the amount was greater than the amount of the invoice for some reason that he could not recall.

In a previously filed Affidavit, Mr. Meladze stated that the total amount of the additional new loan was $50,000 as stated in the Note (Ex. A). However, he testified at trial that he had nothing to document any disbursement over the $42,093.46 that was wired to Ivanrest Golf Center. First Gold would never loan money to pay a past bill. Mr. Meladze was relying on Joshua Herrera saying that he got the inventory, but Mr. Meladze had no first-hand knowledge that it was ever delivered.

Steve Stroch is the assistant general manager at Maple Hill Golf. He is in charge of purchasing and sales. He assisted Players Choice with its orders. He has never spoken to Mr. Meladze or First Gold. He testified that he had never before seen the Maple Hill Golf invoice (Ex. 9) that was sent by Joshua Herrera to First Gold. He searched the

records of Maple Hill Golf and could not find any record of the invoice and the items listed in the invoice were never shipped.

Mr. Stroch verified a Customer Balance Detail for Players Choice covering dates August 3, 2015 to September 30, 2015 (Ex. E). The Customer Balance Detail shows that $42,093.46 was received on Players Choice account on August 12, 2015. It was applied to a balance due in the amount of $8,471.01, leaving a credit balance of $33,622.45. That credit balance was reduced by multiple invoices through September 30, 2015 at which time there was a $252.33 credit balance remaining. That credit no longer exists according to Mr. Stroch. He did not believe it was applied to Leading Edge and suggested that it could have been refunded. He did not recall the first date that Leading Edge purchased anything. Joshua Herrera always placed the orders for Leading Edge, but he never held himself out to be the owner.

Joshua Herrera produced the actual invoices reflected in the Customer Balance Detail as well as his club fitting notes for the corresponding customers of Players Choice (Ex. AA). He testified that the last day Players Choice was open for business was September 28 or September 29, 2015. The last invoice date of September 30, 2015 reflected the date of the invoice and not the date of the Players Choice transaction.

Bradley Nay testified that he took out loans to start Leading Edge. He produced bank statements that showed large deposits on October 5 and October 7, 2015 (Ex. F). On October 5, he received a $15,000 loan from MSUFCU. On the same date, he received and deposited a $10,000 loan from Lake Trust. On October 7, he took a loan from his 401k and deposited $28,595, which was also supported by documentation from his employer (Ex. K). On November 25, 2015, he received a $30,000 loan from his mother

reflected in a Promissory Note (Ex. L). All these loans, he testified, were used to fund Leading Edge. He also produced statements from Bank of America, MasterCard, and American Express that reflected his purchases (Exs. G, H, and I). All those purchases occurred in the month of October and reflected inventory purchases for Leading Edge.

In addition, Mr. Nay produced receipts and invoices that he paid for furniture (Ex. M), computers (Ex. N), turf (Ex. O), golf simulators (Ex. P), range finders (Ex. Q), and golf clubs and supplies (Exs. S, T, U, and V). His sales receipts show that Leading Edge made its first sale on October 13, 2015 (Ex. W).

Mr. Nay filed Articles of Organization for Leading Edge on September 29, 2015. He was first in the Jolly Road location as Leading Edge on about October 13, 2015 and Leading Edge first paid rent on October 5, 2015.

Kasey Lofgren began working for Players Choice in the first part of 2014. He was working at the time of the dome collapse. He continued working for Players Choice even after the dome collapse but did not receive any pay. He worked out of the Jolly Road location for a very short period of time. He believed that about 45 days went by after he stopped working for Players Choice and before he began working for Leading Edge. He had no contact with Joshua Herrera or Bradley Nay during that 45-day period. He was hired by Bradley Nay to work for Leading Edge and he answers to Bradley Nay.

When Mr. Lofgren first started working for Leading Edge it had no new equipment for sale. Players Choice never operated again at the dome location after the collapse. Very little, if anything, was useable after the collapse – maybe a few golf shafts. The putting studio was destroyed and the dome had holes ripped in it and it allowed the elements to come in. 99% of the equipment was lost and he had no knowledge of Mr.

Herrera buying inventory after the collapse. He never saw any inventory. He worked for a very short time at Jolly Road location for Players Choice and there was very, very little merchandise for sale. He assumed it was the 1% that survived.

The only reasonable conclusion to be drawn from the above testimony is that Players Choice had no inventory that survived the dome collapse. When First Gold wired $42,093.46 to Maple Hill Golf, whether known or not, it was financing an existing debt of $8,471.01. The credit balance that remained on Players Choice's account was drawn down by Mr. Herrera as he continued to service customers with club fitting while working out of the Jolly Road location. By September 30, 2015, there was only a couple of hundred dollars remaining. There is no evidence that Mr. Herrera ever purchased any inventory and there is no evidence that he had any money with which to purchase inventory.

Mr. Nay, on the other hand, obtained plenty of money starting in October 2015. His documented receipt of loans and his documented purchase of equipment and inventory is convincing evidence that he did indeed fund Leading Edge himself as opposed to using the inventory and assets of Players Choice.

First Gold argues that there are a number of common elements between Players Choice and Leading Edge that show an intent to defraud: (1) operating out of the same retail storefront, (2) providing the same services, (3) employing the same employees, (4) marketing to the same customers, (5) using the same leased equipment, (6) using the same marketing copy, (7) redirecting users of the Players Choice website to the Leading Edge website, and (8) using the same phone number. None of these constitute a transfer of an asset – that is, something that was owned by Players Choice. And while they may

be terribly suspicious, if there was no transfer of an asset then the issue of intent will not be reached. Undoubtedly, Mr. Herrera and Mr. Nay collaborated in the formation of Leading Edge. But collaboration to start a new business is not a fraudulent transfer if no transfer ever took place.

Even more alarming than the above similarities is the outright admission that Mr. Herrera made to Mr. Meladze about his scheme to continue the Players Choice business under the name Leading Edge in order to avoid creditors and then to buy into Leading Edge as an owner at a later date. The Court finds this testimony credible. However, as damaging as those statements are, there is no evidence that Mr. Herrera ever actually succeeded in his plan. In order to carry out the plan, Mr. Herrera had to have money – money to purchase inventory and money to put into Leading Edge so he could attain his reward of part ownership. Mr. Herrera did not have any money. His loan from First Gold was exhausted by the end of September. He became an employee of Leading Edge earning $12.50 an hour. His wife had to go back to work as an RN. They filed bankruptcy in 2016. Most importantly, the only hope he had for any influx of cash was through his lawsuit against the dome landlord but that was dismissed in 2017. Mr. Herrera may indeed have had the plan that he described to Mr. Meladze, but his plan collapsed just like the dome.

It is hard to deny that First Gold is right to argue that where there's smoke there's fire. However, sometimes there is smoke and any reasonable person would call the fire department thinking there is a fire but the fire department arrives only to find that there is no fire. That doesn't mean that calling the fire department wasn't a perfectly reasonable thing to do – it was – and it was here. But there is no fire.

Count V: tortious interference with contract/business relationship (as to Leading Edge and Bradley Nay)

Tortious interference with contract requires proof that: (1) First Gold had a contract with Players Choice and Mr. Herrera, (2) Leading Edge and Mr. Nay knew of the contract, (3) Leading Edge and Mr. Nay intentionally interfered with the contract, (4) Leading Edge and Mr. Nay improperly interfered with the contract, (5) Leading Edge and Mr. Nay's conduct caused Players Choice to breach the contract, and (6) First Gold was damaged.

Tortious interference with business relationship or expectancy requires proof that: (1) First Gold had a business relationship with Players Choice and Mr. Herrera at the time of the interference, (2) the business relationship or expectancy had a reasonable likelihood of future economic benefit for First Gold, (3) Leading Edge and Mr. Nay knew of the business relationship at the time of the interference, (5) Leading Edge and Mr. Nay improperly interfered with the business relationship or expectancy, (6) Leading Edge and Mr. Nay's conduct caused Players Choice and Mr. Herrera to disrupt or terminate the business relationship or expectancy, and (7) First Gold was damaged.

Tortious interference of either type requires that the interferer must have some knowledge of the contract or the business relationship. The only evidence that Leading Edge/Mr. Nay had any knowledge of the loan between First Gold and Players Choice is Mr. Meladze's testimony that during the course of a phone call with Mr. Herrera someone on the phone named Brad said hi. Someone on the phone named Brad may have indeed said hi, but that is insufficient evidence to show that Mr. Nay had knowledge of the contract.

It also must be shown that Leading Edge and Mr. Nay's interference caused the breach of the loan agreement or the disruption of the business relationship. The Court cannot conclude that this loan went into default because of Mr. Nay. The loan went into default because Players Choice ran out of money. The loan money was exhausted with the purchase of clubs used for Mr. Herrera's golf fittings. Once that money was gone, the only thing Mr. Herrera had left was his skill and he proceeded to make the best of that by becoming an employee at $12.50 an hour. There is no showing any type of tortious interference.

For all the reasons set forth above,

IT IS HEREBY ORDERED that judgment should enter in favor of Plaintiff and against Defendant Players Choice Golf, LLC on Count I in the principal amount of $111,030.00 plus interest and costs, if applicable.

IT IS FURTHER ORDERED that Plaintiff has no cause for action on Counts III, IV, and V against any of the Defendants.

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Hon. Joyce Draganchuk (P39417)
Circuit Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the above Findings of Fact and Conclusions of Law upon the attorneys of record by placing said document in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on April 13, 2018.

/S/

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Michael Lewycky
Law Clerk/Court Officer