

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**DOMINIK OLEKSY,
Plaintiff,**

v.

**Case No. 13-134923-CH
Hon. James M. Alexander**

**HARVEST CREET ASSOCIATION, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants’ Motion for Summary Disposition. Plaintiff is a homeowner in the Harvest Creek subdivision, and as such, is a member of Defendant Harvest Creek Association. As sometimes happens, Plaintiff disagrees with how the Association is run by the individual Defendants. Specifically, Plaintiff alleges that Defendant Association President Maria Gjokaj has run the Association “as if it was her personal fiefdom, totally disregarding any corporate, or other, formalities.”

Plaintiff’s Complaint comes after he was issued a violation for an improper fence. This violation, Plaintiff alleges, came on the heels of his “audacity” to question Ms. Gjokaj for “allowing the roads to fall into disrepair and in refusing to even consider making arrangements for Subdivision-wide trash removal,” which Plaintiff points out “would provide a cost savings to all the residents.”

These series of events led Plaintiff to look into the legality of the Association, and he discovered that it “had been dissolved in 2002.” This “rightfully concerned” Plaintiff, who worried about “the personal exposure to liability that he and the other residents may have in the

absence of a corporation responsible for the maintenance of the Subdivision.” When he requested a peek into the books and records of the Association, Ms. Gjokaj “simply ignored his requests.”

As a result, he filed a five-count Complaint, seeking: (1) compulsion of annual meetings and election of directors; (2) a production of books and records; and (3) an accounting. Plaintiff also sued on breach of fiduciary duty and “conversion, embezzlement and aiding same” claims.

Not inconsistent with their history, Defendants disagree with Plaintiff’s characterization of events and claim that this lawsuit is “frivolous.” To that end, Defendants filed the present motion for summary disposition as their first responsive pleading, arguing that they are entitled to dismissal of Plaintiff’s Complaint under MCR 2.116(C)(8) and (C)(10). In Response, Plaintiff requests summary on Counts I, II, and IV under (I)(2).

A (C)(8) motion tests the legal sufficiency of the complaint. When analyzing such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158 (1992). A motion under this subrule may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* When deciding such a motion, the court considers only the pleadings. MCR 2.116(C)(G)(5).

A (C)(10) motion tests the factual support for Plaintiff’s claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). The moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Id.* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

1. Count I – Compelling Annual Meeting and Election of Directors

Defendants first argue that they are entitled to summary disposition of Plaintiff's Count I, which requests that the association conduct an annual meeting and elect directors. In support, Defendants argue that such a meeting is scheduled, and as a result, "Defendants have shown good faith having compelled an annual meeting and election of directors."

Plaintiff responds that "Defendants do not dispute that there have been no annual meetings and no election of directors since 2006." Under the Nonprofit Corporation Act, such meetings are to be held annually, and the Circuit Court is empowered to order such meetings if not held every 15 months. MCL 450.2402.

Although it is good that Defendants have scheduled a meeting, the Court cannot find that Plaintiff's claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." As a result, summary disposition under (C)(8) is inappropriate and DENIED.

2. Count II – Compelling Production of Books and Records

Defendants next argue that they are entitled to summary disposition of Plaintiff's Count II, which seeks production of the books and records of the Association. In their motion, Defendants claim that all records have been produced, therefore, there is "no factual or legal basis for the relief sought by Plaintiff."

Plaintiff responds that the records "are hardly complete." MCL 450.2487 permits Plaintiff access to such documents, and the parties dispute whether the documents provided are complete. As a result, summary disposition of this Count is inappropriate and DENIED.

3. Count III – Breach of Fiduciary Duties

Defendants next argue that they are entitled to summary disposition of Plaintiff’s Count III, which alleges breach of fiduciary duty. “[I]n Michigan, directors and officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation which they serve.” *Salvador v Connor*, 87 Mich App 664, 675; 276 NW2d 458 (1978).

In their motion, Defendants argue that “Plaintiff has no reasonable basis to believe that the facts underlying his [breach of fiduciary duty claim] are in fact true.” Rather, Plaintiff’s Complaint is a “retaliation stemming from [Defendants’] request to remove Plaintiff’s fence.”

As Plaintiff points out, however, his factual allegations support the pled cause of action. Specifically, Plaintiff alleges missing funds from the Association accounts and a failure to schedule and attend annual meetings. Based on the foregoing, the Court cannot conclude that Defendants are entitled to summary disposition of this claim under (C)(8).

4. Count IV – Accounting

Next, Defendants argue that they are entitled to summary of Plaintiff’s Count IV, which seeks an accounting. Defendants claim that this Count should be dismissed because all records have been produced. Again, however, Plaintiff disputes this claim. As a result, summary disposition is inappropriate and DENIED.

5. Count V – Conversion, Embezzlement and Aiding Same

Defendants also seek summary disposition of Plaintiff’s Count V, which alleges “conversion, embezzlement and aiding same.” In support of their request, Defendants broadly claim that Plaintiff could not reasonably believe that the facts underlying his claim are true.

This allegation alone, however, is insufficient to establish entitlement to summary disposition of a claim. And to the extent that Defendants attach some cancelled checks to their Reply Brief, the Court is unconvinced that the same establish their entitlement to judgment as a matter of law.

6. Summary Disposition Under (C)(10)

Finally, the Court will also note that summary disposition under (C)(10) is usually premature if granted before discovery on a disputed issue is complete. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). In this case, no scheduling order has yet been issued because Defendants have yet to file their Answer. As a result, the Court finds that summary disposition under (C)(10) is entirely premature.

For all of the foregoing reasons, Defendants' motion for summary disposition is DENIED. Plaintiff's counter request for summary under (I)(2) is likewise DENIED. Defendants have 14 days from the date of this Opinion to file their Answer.

IT IS SO ORDERED.

February 5, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge