

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

THE RIVER URGENT CARE &
MEDICAL CLINIC, P.C.,

Plaintiff,

v

Case No. 2013-134356-CZ
Hon. Wendy Potts

MED MAX, LLC, et al,

Defendants.

_____/

OPINION AND ORDER RE:
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION
AND
MOTION FOR PARTIAL SUMMARY DISPOSITION TO DISMISS COUNT IV –
FRAUD AND DEFENDANT DARRYL KAPLAN

At a session of Court
Held in Pontiac, Michigan
On

~~AUG 25 2014~~

On March 18, 2011, Plaintiff The River Urgent Care & Medical Clinic, P.C. agreed to purchase two automated medication dispensing machines (AMD) from Defendant Med Max LLC. The agreement allowed River Urgent 90 days to “terminate the agreement and return all equipment.” However, it does not state when the 90-day period begins to run. On May 23, 2011, River Urgent entered into a separate agreement with non-party MedVend to manage and service the AMDs. River Urgent paid for both AMDs in full in May 2011. More than a year later, in June 2012, Med Max installed the first AMD at River Urgent’s Novi location. The second machine was never delivered. On July 12, 2012, River Urgent wrote Med Max through legal counsel stating that it was terminating the agreement under the 90-day termination provision and demanding return of its money. After Med Max failed to refund the payment, River Urgent filed

this action alleging rescission, breach of contract, and unjust enrichment against Med Max and fraud against Med Max and its principal Defendant Darryl Kaplan.

Defendants now move for summary disposition of River Urgent's claims under MCR 2.116(C)(8), which tests the legal sufficiency of the pleading, and (C)(10), which tests the factual support for the claim. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Defendants first contend that River Urgent is not entitled to terminate or rescind the sales agreement because it did not do so within 90 days of entering the agreement in March 2011. Med Max's argument presumes that the 90-day termination period begins to run as of the date of the sales agreement. However, as noted above, the agreement does not state that the 90-day period begins on the date the agreement is executed. Med Max cites more specific language in River Urgent's management agreement with MedVend stating that the termination period is "within ninety days from the date of sale." However, the management agreement was between River Urgent and MedVend, a separate company that not a party to this action. Med Max cites no evidence or authority supporting its position that MedVend's management agreement controls the agreement between River Urgent and Med Max.

River Urgent asserts that language referring to returning the equipment on termination implies that the 90-day period begins after installation of the machine, and it timely terminated within the 90-day window. The Court agrees with River Urgent that, in the absence of specific language stating when the 90-day termination period begins to run, its interpretation that the termination period begins on installation is reasonable. However, Med Max's claim that the 90-day period runs from the date of sale is also a reasonable interpretation. Thus, the agreement language is ambiguous because it is reasonably susceptible to more than one interpretation. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). Because interpretation of an ambiguous contract is a question for the trier of fact, *Klapp v United Ins*

Group Agency, Inc., 468 Mich 459, 469; 663 NW2d 447 (2003), the Court cannot decide this as a matter of law.

Even if the contract language unambiguously required River Urgent to terminate within 90 days of the date of the sales agreement, this argument would only apply to its claim that Med Max breached the contract. River Urgent asserts claims for rescission, unjust enrichment, and fraud that are not based on the 90-day termination language. Med Max fails to explain how River Urgent's alleged failure to timely terminate the agreement would bar it from bringing a claim for rescission based on mutual mistake or a claim for fraudulent inducement. Defendants are not entitled to summary disposition on this ground.

Defendants also appear to be renewing their argument from their original (C)(8) motion that that River Urgent failed to plead its fraud claim with particularity as required by MCR 2.112(B)(1). Because the Court already rejected Defendants' request to dismiss the fraud claim on the pleadings and the amended complaint sufficiently states a claim for fraudulent inducement, the Court will not revisit Defendants' arguments about insufficient pleading.

Defendants also assert that River Urgent cannot present evidence to support its fraud claim. However, Dr. Nasry's affidavit and deposition testimony supports the allegation in the complaint that Kaplan made several material misrepresentations to induce River Urgent to enter into the sales agreement. The fact that Kaplan and other witnesses for Defendants deny that Kaplan made the misrepresentations only serves to underscore the factual dispute. The Court cannot determine credibility or find facts in deciding a motion for summary disposition. *Skinner v Square D Co.*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Defendants also renew their prior argument that Plaintiff's fraud claim is barred the economic loss doctrine, which bars a tort theory of recovery where the claim arises from a sale of goods and results in only economic loss. *Neibarger v Universal Coops.*, 439 Mich 512, 520; 486

NW2d 612 (1992). However, as River Urgent notes, the economic loss doctrine does not bar a fraud claim that is “extraneous” to the contract, such as a claim for fraudulent inducement. See *Huron Tool and Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 373; 532 NW2d 541 (1995). River Urgent alleges that Kaplan and Med Max made representations extraneous to the agreement and presents evidence to support those claims. Because there is a question of fact whether Kaplan and Med Max made fraudulent representations extraneous to the agreement that induced River Urgent to enter into the agreement, the fraud claim is not barred by the economic loss doctrine.

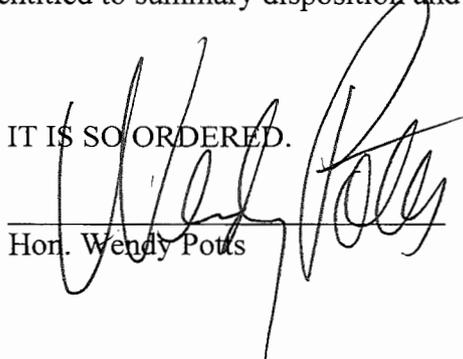
In its response to Kaplan’s request to dismiss the claims against him, River Urgent appears to argue that the Court should pierce the corporate veil and hold Kaplan personally liable for its contract claim against Med Max. However, the only allegations against Kaplan in the amended complaint are in the fraud theory. Because River Urgent did not plead that Kaplan is liable on any claim other than fraud, the Court will not entertain River Urgent’s arguments for holding him personally liable on the breach of contract theories. To the extent that River Urgent can show that Kaplan engaged in fraud or participated in Med Max’s alleged fraud, it can seek damages against him personally. Although a member of an LLC is generally not liable for the acts, debts, or obligations of the LLC, MCL 450.4501(4), an agent or officer of the LLC can be held liable for torts that he commits. *Hartman & Eichhorn Bldg Co v Dailey*, 266 Mich App 545, 549; 701 NW2d 749 (2005). Thus, River Urgent may pursue its fraud theory against Kaplan, however, it cannot hold Kaplan personally liable on the contract theories.

For all of these reasons, Defendants are not entitled to summary disposition and the Court denies the motions.

Dated:

AUG 25 2014

IT IS SO ORDERED.



Hon. Wendy Potts