

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

PAUL GRAHAM, et al,

Plaintiffs,

v

Case No. 13-135081-CB
Hon. Wendy Potts

FELLOWSHIP FOR STRENGTHENING
THE FUTURE OF FAMILIES, et al,

Defendants.
_____ /

SUPPLEMENTAL OPINION AND ORDER RE:
INDIVIDUAL DEFENDANTS' MOTION TO DISMISS
AND
DEFENDANT FELLOWSHIP FOR STRENGTHENING THE FUTURE OF FAMILIES'
MOTION TO DISMISS AMENDED COMPLAINT
AND
PAUL GRAHAM AND JOHN SUSIN'S CROSS-MOTION FOR SUMMARY
DISPOSITION

At a session of Court
Held in Pontiac, Michigan

On
MAR 24 2014

The matter is before the Court on the parties' cross-motions for summary disposition. Following a hearing on the motions, the Court took the matter under advisement and issued an order allowing Plaintiffs to file a supplemental brief addressing Defendants' arguments regarding personal jurisdiction and the forum selection clause in the agreement. Because Plaintiffs did not file any additional briefs and the time for doing so has passed, the Court is prepared to rule on the motions.

Defendants' arguments regarding res judicata and the statute of limitation are properly analyzed under MCR 2.116(C)(7), which tests whether a claim is barred as a matter of law. A motion under (C)(7) is decided on the pleadings, unless the parties submit evidence contradicting the allegations in the pleadings. *Turner v Mercy Hosp & Health Services*, 210 Mich App 345, 349 (1995). If there are no material factual disputes, whether a claim is barred is a question of law. *Id.*

Defendants argue that this case is barred by res judicata because Alpine already sued the same Defendants in a Utah court. The doctrine of res judicata bars a subsequent action between the same parties based on identical facts or evidence. *Sewell v Clean Cut Management*, 463 Mich 569, 575; 621 NW2d 222 (2001). "A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Id.* Plaintiffs contend that their claims are not barred because the Utah case was not decided on the merits. In fact, the dismissal order cited by Defendants states that the case was dismissed without prejudice for lack of prosecution. Because there is no evidence that the Utah case was decided on the merits, Plaintiffs' claims are not barred by res judicata.

Defendants also assert that venue is improper because Defendants do not reside or conduct business here, Plaintiffs do not have a place of business here, and the contract was not entered into in Michigan. Plaintiffs contend, and the Court agrees, that Defendants waived any objection to venue by failing to file a motion for change of venue before or at the time they answered the complaint. Even if Defendants had timely moved for a change of venue, the motion would be without merit because venue in a tort action is proper in the county where the Plaintiffs have a place of business if Defendants do not reside or do business in Michigan and the injury

did not occur in Michigan. See MCL 600.1629(1)(d) and 600.1621(b). The Court will not dismiss the claims based on improper venue.

Defendants also ask the Court to dismiss the claims because Plaintiffs did not properly serve them. However, defective service of process does not warrant dismissal unless it failed to notify Defendants of the action. *In re Gordon Estate*, 222 Mich App 148, 157; 564 NW2d 497 (1997). Because Defendants received notice of this action, the Court will not dismiss the claims on this ground.

Defendants also argue that Plaintiffs' claims are barred by the applicable limitations periods. Regarding the breach of contract claim, which is alleged only against Fellowship, Defendants contend that it is time-barred because it was filed more than six years after Fellowship declared Alpine in default. Plaintiffs do not dispute that their contract claim is subject to a six-year limitation period. Instead, they contend that Defendants did not "formally terminate" the contract until July 26, 2007. However, a breach of contract claim accrues when the breach occurs. *Blazer Foods, Inc v Restaurant Properties*, 259 Mich App 241, 245-246 (2003). Plaintiffs' argument ignores the evidence that Defendants sent Graham a letter on March 27, 2007 stating that Alpine was in default of its contract obligations. Defendants also sent Alpine notice on May 13, 2007 that Fellowship was canceling the remaining portion of Alpine's contract. Because the alleged breach occurred more than six years before this case was filed, the breach of contract claim is barred.

Even if the claim was timely filed, Plaintiffs fail to demonstrate that they have standing to bring a breach of contract claim that belongs to Alpine. An action must be brought by a "real party in interest," MCR 2.201(B), which is defined as "one who is vested with the right of action on a given claim." *Hofmann v Auto Club Ins Assn*, 211 Mich App 55, 95 (1995). Although

Plaintiffs claim that Alpine assigned its contract rights to them, they present no evidence of the alleged assignment. Because Plaintiffs fail to show that they are the real parties in interest, their breach of contract claim is barred on this ground as well. Therefore, the Court grants Fellowship summary disposition of Count I alleging breach of contract.

Defendants also argue that Plaintiffs' quantum meruit and restitution claims fail because there is an express agreement covering the same subject matter. The Court cannot imply a contract where an express agreement covers the same subject matter. *Hickman v General Motors Corp*, 177 Mich App 246, 251; 441 NW2d 430 (1989). Because Plaintiffs admit that there is an express agreement between Alpine and Defendants, Count II alleging quantum meruit and Count IV alleging restitution fail as a matter of law and the Court grants summary disposition of those claims.

Defendants also assert that Plaintiffs' tort claims are time-barred. The fraud claim is subject to the six-year limitation period of MCL 600.5813. The negligence and tortious interference claims are subject to the three-year limitation period of MCL 600.5805(10). Although the nature of Plaintiffs' "breach of trust" claim regarding misappropriation of grant money is not clear, to the extent that it is based on breach of a fiduciary duty or conversion, it would also be subject to a three-year limitation period. Thus, Plaintiffs' fraud claims would be barred if they accrued before July 15, 2007, and the other tort claims would be barred if they accrued before July 15, 2010. A tort claim generally accrues at the time the wrong on which the claim is based was done. MCL 600.5827. However, the Court cannot determine when Plaintiffs' claims accrued because the complaint does not allege when Defendants committed these alleged torts. Summary disposition of the tort claims on this ground is denied without prejudice.

Defendants also argue that Plaintiffs' claims are subject to dismissal because the broadband agreement had a forum selection clause. The agreement states that any dispute "rising out of this Agreement" must be brought in Wayne County, Utah. If parties agree in writing that an action will be brought only in another state, this Court is obligated by statute to dismiss or stay the action unless certain factors are present. MCL 600.745(3); *Hansen Family Trust v FGH Industries, LLC*, 279 Mich App 468, 476; 760 NW2d 526 (2008). The statutory factors that could preclude dismissal are (a) the Court is required by statute to entertain the action; (b) Plaintiffs cannot secure effective relief in the other state for reasons other than delay in bringing the action; (c) the other state would be a substantially less convenient place for the trial of the action than this state; (d) the agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or (e) it would for some other reason be unfair or unreasonable to enforce the agreement. MCL 600.745(3). Because Plaintiffs have not demonstrated that any of those factors are applicable to this dispute, Defendants are entitled to dismissal of any claim that arises out of the broadband agreement.

Applying this analysis to Plaintiffs' amended complaint, the Court concludes that Plaintiffs' remaining claims must be dismissed because they arise, at least in part, from the broadband agreement. Plaintiffs' general factual allegations begin with the claim that Plaintiffs' assignor Alpine Systems Engineering Ltd entered into the broadband with Defendant Fellowship for Strengthening the Future of Families and discuss the details of the agreement. Plaintiffs' Count III alleges fraud and a "breach of trust" that the Individual Defendants allegedly committed in connection with the broadband agreement. Count V alleges fraud that Defendant Donald Foutz committed in connection with Plaintiffs' engineering services under the broadband agreement. Count VI alleges negligence that Donald Foutz committed in connection with

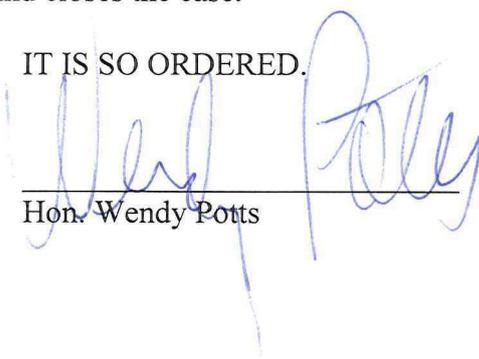
information provided to Alpine under the broadband agreement. Count VII alleges that Donald Foutz tortiously interfered with Alpine's broadband agreement. Because all of these claims arise from the broadband agreement, and Alpine agreed that it would bring these claims in Utah, the Court dismisses the remaining claims.

For all of these reasons, the Court grants Defendants summary disposition and dismisses Plaintiffs' claims with prejudice.

This order resolves the last pending claim and closes the case.

IT IS SO ORDERED.

Dated: **MAR 24 2014**



Hon. Wendy Potts