

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

**EDWARD KIM,
Plaintiff,**

v.

**BEET, LLC, ET AL,
Defendants.**

**Case No. 13-137098-CK
Hon. James M. Alexander**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motion for partial summary disposition. Plaintiff is a member and former President and CEO of Defendant Beet, LLC. In August 2013, Beet terminated Plaintiff's employment.

In its Complaint, Plaintiff (among other claims) alleges that Defendant wrongly terminated his employment (Count II). At issue in the current motion – the parties dispute whether Plaintiff's employment was at-will or terminable only for just-cause. Defendants argue that Plaintiff's employment was at will, and therefore, his wrongful termination claim is barred. Plaintiff, on the other hand, argues that his employment was only terminable for just cause.

To their end, Defendants now move for summary disposition under MCR 2.116(C)(8), which 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).

Our Supreme Court has held that, generally, there is a presumption that “employment relationships are terminable at the will of either party.” *Lytle v Malady*, 458 Mich 153, 163; 579 NW2d 906 (1998). This presumption, however, can be rebutted “so that contractual obligations and limitations are imposed on an employer’s right to terminate employment.” *Lytle, supra* at 164, citing *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980). The *Lytle* Court continued that:

Courts have recognized the following three ways by which a plaintiff can prove such contractual terms: (1) proof of “a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause”; (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer’s policies and procedures instill a “legitimate expectation” of job security in the employee. *Lytle, supra* at 164 (internal citation omitted).

Plaintiff cites to two paragraphs of the Operating Agreement in support of his wrongful termination claim. These paragraphs provide (in full):

5.6.1 In the event that (1) any Member who is employed by the Company decides to voluntarily cease working for the Company for any reason whatsoever, and at any time, (2) any Member is convicted of a felony (including a plea of nolo contendere) which involves dishonesty, fraud, or moral turpitude, or other criminal conduct against the Company or a Member, (3) any Member conducts himself in a manner seriously detrimental to the professional reputation and standing of the Company, (4) a breach by a Member of his duties of good faith and fair dealings to the Company of the other Members, (5) any Member violates any of the restrictive covenants set forth in Article XI, such Member, or (6) termination of a Members (sic) employment with the Company for “cause” (defined below) (“Transferor”) shall be deemed to have made, immediately prior to the occurrence of such event or circumstance, an offer to sell to the Company all or any portion of his membership interest in the Company (“Transferor’s Membership Interest”) in the manner described in this Section 5.6. Any determination to be made by the Company as to whether there has occurred any of the circumstances described in subsections (3), (4), (5), or (6) of this Section 5.6 shall be made by the Members other than the Member whose conduct is at issue.

If the Company elects not to purchase all or any portion of the Transferor's Membership Interest in the manner described in this Section 5.6. There shall be no obligation or requirement that either the Company or the Remaining Members purchase all of the Transferor's Membership Interest under this Section 5.6, any purchase of the Transferor's Membership Interest being solely upon election to do so.

5.6.2 For the purposes of this Section, "cause" shall include the following: (a) the failure of the Member to perform her duties under this Agreement (other than by reason of illness, injury, or incapacity); (b) an unauthorized use or disclosure by the Member of the Company's confidential information or trade secrets, which use or disclosure causes material harm to the Company; (c) a material breach by the Member of any agreement between the Member and the Company; (d) a material failure by the Member to comply with the Company's written policies or rules; (e) the Member's conviction of, or plea of guilty or no contest to, a felony under the laws of the United States or any state thereof; (f) the Member's gross negligence or willful misconduct; (g) the Member's commission of an act involving moral turpitude; or (i) the Member's habitual insobriety.

Plaintiff argues, without citation to any specific portion of the above provisions that he "understood and interpreted Section 5.6.1 of the Agreement as granting a 'just cause' term regarding his overall 'involvement' at BEET." The Court disagrees.

Rather, by their plain terms, these sections simply deal with the calculation of the value of Plaintiff's shares post termination, which the other Members retain the right to repurchase. If Plaintiff is terminated for cause, then under Section 5.6.5, the value of Plaintiff's shares is discounted by 50%. These sections, however, offer no "just cause" employment relationship and no reasonable trier-of-fact could so conclude.

Plaintiff also argues that "[t]here is no mention of an at-will separation in the Agreement."

The Court notes the initial problem with Plaintiff's argument – that Michigan law **presumes** at-will employment absent clear language otherwise. As a result, the lack of any "at-will" language is not dispositive an "at-will" employment relationship.

The bigger problem with Plaintiff's argument, however, is that the Operating Agreement provides that Plaintiff's employment as an officer isn't guaranteed. Under Section 9.2 of the Agreement, "[t]he Officers shall be elected by, **and serve at the pleasure of**, the Executive Committee, and may be removed by the affirmative vote of a majority of the Executive Committee." (emphasis added). Section 9.3 also contemplates an at-will relationship, stating that Officers may be "removed or otherwise disqualified to serve."

As a result, considering only the pleadings and accepting all well-pled factual allegations as true, the Court concludes that Plaintiff's claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.¹

There is simply nothing in the Operating Agreement whereby any reasonable trier-of-fact could conclude that Plaintiff's employment relationship with BEET was one terminable only for just cause. For all of the foregoing reasons, Defendants' motion for partial summary disposition is GRANTED, and Plaintiff's Count II for wrongful termination is DISMISSED.

IT IS SO ORDERED.

June 11, 2014
Date

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

¹ Plaintiff's discovery argument is unavailing because a (C)(8) motion is based solely on the pleadings.