

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

**JOHN A. CHOATE,
Plaintiff,**

v.

**Case No. 13-138046-CB
Hon. James M. Alexander**

**JAMES RYNERSON, MD, and
RYSURG, LLC,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant's motion for summary disposition. Via the terms of a March 1, 2013 Operating Agreement, the parties contracted to form a company to produce and market an invention for the treatment of blepharitis (a common eye disease). That company, Defendant RySurg, was to be owned 80% by Defendant Rynerson and 20% by Plaintiff.

In the fall of 2013, the parties began to disagree about Plaintiff's compensation. Plaintiff believed that he was to be paid a salary in addition to an ownership interest for his work. Defendant believed that Plaintiff's compensation was his ownership interest in the company. Plaintiff then resigned from the company and filed the present suit in December 2013.¹ Before being served with Plaintiff's Complaint, however, RySurg and Rynerson, Inc. filed suit in state Court in Palm Beach County, Florida.² Both the Florida and Michigan Complaints seek

¹ Plaintiff's Amended Complaint alleges claims of: (1) Fraud/Misrepresentation, (2) Breach of Contract, (3) Breach of Fiduciary Duty, (4) Shareholder Oppression, (5) Unjust Enrichment, and (6) Conversion.

² Defendants were served on February 6, 2014, and the Florida Complaint was filed on January 22, 2014.

resolution of the parties' failed business relationship.³ Defendants now seek to dismiss the present suit because the parties' Operating Agreement contained a Florida forum-selection clause – which was apparently included in anticipation of majority shareholder Dr. Rynerson's move to Florida.

To that end, Defendants move for summary disposition under MCR 2.116(C)(1), which tests whether the Court has personal jurisdiction over a defendant. The Court of Appeals has reasoned “[w]hile not identical, dismissal based on a forum-selection clause is similar to a grant of summary disposition for lack of personal jurisdiction.” *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341, 344; 725 NW2d 684 (2006).

In a (C)(1) motion, Plaintiff has the burden of establishing a prima facie showing of jurisdiction to avoid summary disposition. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995). A court reviewing such a motion must examine the affidavits, pleadings, depositions, admissions as well as any other documentation submitted by the parties. MCR 2.116(G)(5); *Jeffrey, supra*. All factual disputes are resolved in the non-movant's favor. *Id*. Whether a court has personal jurisdiction over a party is a question of law. *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 426; 633 NW2d 408 (2001).

“It is undisputed that Michigan's public policy favors the enforcement of contractual forum-selection clauses and choice-of-law provisions.” *Turcheck*, 272 Mich App at 345.

Under the Revised Judicature Act, MCL 600.745(3):

If the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur:

- (a) The court is required by statute to entertain the action.

³ The Florida Complaint alleges claims of: (1) Breach of Fiduciary Duty, (2) Breach of Contract, (3) Declaratory Judgment, (4) Breach of Contract, (5) Injunctive Relief, and (6) Fraud in the Inducement.

(b) The plaintiff 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.

(e) It would for some other reason be unfair or unreasonable to enforce the agreement.

The *Turcheck* Court reasoned:

A party seeking to avoid a contractual forum-selection clause bears a heavy burden of showing that the clause should not be enforced. Accordingly, the party seeking to avoid the forum-selection clause bears the burden of proving that one of the statutory exceptions of MCL 600.745(3) applies. *Turcheck*, 272 Mich App at 348, citing *The Bremen v Zapata Off-Shore Co*, 407 US 1, 17-18; 92 S Ct 1907; 32 L Ed 2d 513 (1972).

The clause relied on by Defendants is found in Section 12.13 of the Operating Agreement and provides:

Jurisdiction and Venue. Any civil action or legal proceeding arising out of or relating to this Agreement shall be brought in the courts of record of the State of Florida located in Palm Beach County, Florida or the United States District Court, Southern District of Florida. Each party consents to the jurisdiction of such court in any such civil action or legal proceeding and waives any objection to the laying of venue of any such civil action or legal proceeding in such court. Service of any court paper may be effected on such party by mail, as provided in this Agreement, or in such other manner as may be provided under applicable laws, rules of procedure or local rules.

In his Response, Plaintiff claims that the exceptions found in (a), (b), (c), and (d) apply.

Plaintiff first argues that “[t]he agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means” because Defendants fraudulently induced him to sign the agreement containing the forum-selection clause by promising to pay him a salary in addition to an ownership interest – despite

never intending to do so. As Defendants point out in their reply brief, however, Plaintiff's argument misses the mark.

In order to invoke (3)(d), the alleged misrepresentation necessarily must concern the procurement of the forum-selection clause itself – standing independently from the remainder of the agreement. See *Preferred Capital, Inc v Assocs in Urology*, 453 F3d 718, 722 (6th Cir 2006); *Moses v Bus Card Express*, 929 F2d 1131, 1138 (6th Cir 1991); and *Scherk v Alberto-Culver Co*, 417 U.S. 506, 519 n 14; 94 S Ct 2449; 41 L Ed 2d 270 (1974).

Because Plaintiff's "fraud" argument doesn't allege fraud with respect to the forum-selection clause that is independent of the Operating Agreement, his argument fails. Plaintiff admits that he knew of the forum-selection clause before he signed the agreement, and he still chose to sign. While Plaintiff apparently now doesn't like the forum-selection clause, his dislike is insufficient to establish that exception (d) applies.

Next, Plaintiff claims that exception (a) applies because "plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action." In support, Plaintiff claims that Florida does not recognize a claim for minority shareholder oppression – "thereby denying Plaintiff effective relief which is otherwise available to him pursuant to MCL 450.1489."

In response, Defendants concede that "there is no Florida statute recognizing a claim for minority oppression," but Plaintiff can still obtain effective relief under Florida law, which permits a minority shareholder to claim **direct** injury based on a claim for breach of fiduciary duty. See *Orlinsky v Patra*, 971 So 2d 796 (Fla App 3rd Dist 2007). This Court agrees. Florida recognizes a common-law claim for breach of fiduciary duty, under which, Plaintiff can secure effective relief.

Plaintiff next argues that his conversion claim cannot be dismissed because it has nothing to do with the Operating Agreement. In this claim, Plaintiff alleges that Defendant absconded with Plaintiff's personal property when he came to Michigan to close the RySurg's Milford office.

In response, Defendants cite to section 2.4 of the Operating Agreement, which provides that "All real and personal property owned by the Company shall be owned by the Company as an entity and no Member shall have any ownership interest in such property in its individual name or right." Because the Operating Agreement so provides, Defendants argue that any dispute as to the ownership of personal property in the RySurg office falls within the terms of the Operating Agreement. The Court agrees.⁴

Finally, the Court also rejects Plaintiff's arguments that: (1) Florida courts do not have jurisdiction to apply Michigan law regarding dissolution of a Michigan LLC, and (2) Florida is "substantially less convenient."

Initially, the Court notes that Plaintiff offers no legal authority in support of these arguments. Michigan law is clear that, "A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim." *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

Additionally, Defendants do cite Florida law for the notion that Florida will apply Michigan law when appropriate. See *Denison v Denison*, 658 So 2d 581, 583 (Fla App 1995). Further, Plaintiff's "convenience" argument only applies to himself. Defendants are not inconvenienced by Florida litigation – as Defendant Rynerson anticipated moving his residence and the business to Florida, which was the reason for its inclusion in the Agreement.

⁴ Although not addressed by the parties, the Court also questions whether the few items allegedly owned by Plaintiff satisfy this Court's \$25,000 jurisdictional limit.

To conclude, the Court finds that Plaintiff has failed to carry his “heavy burden” to establish that the contractual Florida forum-selection clause should not be enforced. As a result, Defendants’ Motion for Summary Disposition under (C)(1) is GRANTED, and Plaintiff’s Complaint is DISMISSED.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

April 30, 2014
Date

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