

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

**LORENZO CAVALIERE, ET AL,
Plaintiffs,**

v.

**Case No. 13-138079-CZ
Hon. James M. Alexander**

**DRSN ASSOCIATES, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants Levin and Mestdagh's Motion for Summary Disposition as to Count II (Minority Oppression). Plaintiff Lisa Mancini is the Trustee of the Senior Health Care Trust, which is a minority member of Defendant DRSN Associates. Plaintiff Trust essentially alleges that the majority members embarked on a course of willfully unfair and oppressive conduct to punish it for refusing to sell its minority interest to the other members. Plaintiff claims that Defendants may also be trying to pressure Plaintiff Trust to sell.

Relevant to the present motion, Plaintiffs' Complaint included a claim for Minority Oppression (Count II). Defendants now seek summary disposition of this Count because Plaintiff has failed to make sufficient allegations to support a cause of action for the same.

To their end, Defendants now seek summary disposition under MCR 2.116(C)(8), which tests the legal sufficiency of the complaint.¹

¹ Defendants ask for summary under (C)(8) – despite continually referring a document (the Operating Agreement) outside of the pleadings. In support, Defendants suggest that the Court should follow nonbinding federal precedent, which provides of the same in some circumstances. But Defendants acknowledge that “there is not yet any Michigan

Under the Michigan Limited Liability Act, MCL 450.4515(1),

A member of a limited liability company may bring an action . . . to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member.

If Plaintiff establishes such conduct, the Court has broad discretion to craft an appropriate remedy under MCL 450.4515(1)(a)-(e). This section goes on to define “willfully unfair and oppressive conduct” as:

a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other member interests disproportionately as to the affected member. The term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure. MCL 450.4515(2).

Based on the foregoing, Defendants argue that, in order to state a claim, Plaintiff “would have to allege conduct which, at minimum, . . . was not permitted by the Operating Agreement and which constituted a continuing course of conduct or a significant action or series of actions which substantially interfered with the Heath Care Trust’s interests as a Member of DRSN.” And, Defendant argues, Plaintiff has failed to do so. In essence, Defendant’s motion appears to claim that Plaintiff allegations lack specificity.

Initially, the Court notes that Michigan is a notice-pleading state, which means that “All that is required is that the complaint set forth ‘allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.’” *Johnson v QFD, Inc*, 292 Mich App 359, 368; 807 NW2d 719 (2011); quoting MCR 2.111(B)(1).

precedent” on this point, and this Court is not convinced to create such.

With respect to its Minority Oppression claim, in Paragraph 25, Plaintiff alleges (in full):

While in control of Defendant DRSN, Defendants Levin and Mestdagh engaged in willfully, unfair and oppressive conduct toward Health Care Trust. By way of illustration but not limitation, they:

- (a) excluded Health Care Trust's agent, Plaintiff Cavaliere, from the day to day operations of Defendant DRSN;
- (b) excluded Health Care Trust's agent, Plaintiff Cavaliere, from attending Defendant DRSN's functions, meetings and other events;
- (c) excluded Health Care Trust's agent, Plaintiff Cavaliere, from discussions concerning material issues relating to Defendant DRSN;
- (d) cut the compensation of Health Care Trust's agent, Plaintiff Cavaliere, in half, and then altogether terminated that compensation and the provision of health care benefits;
- (e) made misleading statements about the business of DRSN, including but not limited to false statements concerning its opportunities on St. John's Novi campus;
- (f) refused to pay amounts due construction and property management companies of which Health Care Trust's agent, Plaintiff Cavaliere, was the manager and/or agent unless and until Health Care Trust agreed to sell its membership interests in Defendant DRSN;
- (g) interfered with the relationships of Health Care Trust's agent, Plaintiff Cavaliere, with employees he managed;
- (h) stopped providing monthly financial information regarding Defendant DRSN and its subsidiaries; and
- (i) threatened to take steps for the benefit of Mr. Boll that would render Health Care Trust's membership interests worthless and potentially destroy Defendant DRSN.

Defendants first argue that the conduct alleged in paragraph 25(a), (b), and (c) fail to state a claim because the complained-of actions are permitted by the Operating Agreement.

In response, Plaintiff cites *Berger v Katz*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2011 (Docket Nos. 291663, 293880). As the *Berger* panel reasoned, “[a]lthough the bylaws gave defendants the general authority to make business decisions such as setting salaries, issuing capital calls, or approving rental payments, that does not mean that

defendants were permitted to act in a manner that was willfully unfair and oppressive to plaintiff, as a minority shareholder.” The Court went on to conclude the exception regarding actions permitted by an operating agreement “cannot be read as permitting willfully unfair and oppressive conduct under the guise of defendants’ general authority to run and manage [the business].”

The Court agrees with this reasoning. As a result, assuming *arguendo* that the Operating Agreement reserves these rights to the management of the company, the Court is not convinced that there exists no basis for Plaintiff’s claim. This is so because, although the Operating Agreement may allow certain actions, said actions cannot be done in a willfully unfair and oppressive manner.

With respect to Plaintiff’s allegations in 25(d), (f), and (g), Defendants claim that they are entitled to summary disposition because Plaintiff alleges harm only to Mr. Cavaliere – and not the Trust itself, which is the “member” for purposes of MCL 450.4515(1). As stated, said section permits actions by “members” for willfully unfair and oppressive conduct that “interferes with the interests of the member as a member.” Because Mr. Cavaliere is merely an agent of the Trust that holds the ownership interest, Defendants argue that he cannot be considered a member for purposes of a minority oppression claim.

In response, Plaintiff argues that “Plaintiff Cavaliere acted on behalf of, and is the sole beneficiary of, Plaintiff Trust and, in that capacity, received benefits from Defendant DRSN.” Therefore, “[a]ny benefits that flow from Defendant DRSN to Plaintiff Trust flow for the ultimate benefit of Plaintiff Cavaliere.” In other words, Plaintiff wishes the Court to ignore the difference between Plaintiff Cavaliere (the Trust’s agent) and the Trust (the DRSN member) for purposes of its oppression claim.

Plaintiff, however, fails to cite to any authority to support its argument. 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). Because Plaintiff provides no authority to support the proposition that harm to an agent of a member trust is actionable under the Michigan Limited Liability Company Act, the Court must dismiss the allegations in Plaintiffs’ Paragraph 25(d), (f), and (g).

Next, the Court rejects Defendants’ claims with respect to Paragraph 25(e). Plaintiffs have sufficiently pled a claim for minority oppression in this paragraph. Defendant Trust is a member of DRSN and is entitled to accurate information regarding the same.

The Court also rejects Defendants’ claim with respect to Paragraph 25(h). Plaintiff is entitled to financial information about DRSN and has sufficiently pled a claim for minority oppression with respect to the same.

And, although perhaps thin, the Court finds that Defendants’ claim with respect to Paragraph 25(i) has been sufficiently pled to support a minority oppression cause of action. As Plaintiff points out, it is the threat of severe harm that forms the basis for willfully unfair and oppressive conduct – regardless of whether the conduct ultimately occurs.

Summary

For the foregoing reasons, considering only the pleadings and viewing all well-pled factual allegations in the light most favorable to Plaintiff, this Court cannot conclude that Plaintiff’s claims

for minority oppression are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery – except for those pled in Paragraphs 25(d), (f), and (g). As a result, summary disposition of Plaintiff’s Count II under MCR 2.116(C)(8) is GRANTED IN PART – and only with respect to the allegations made in paragraphs 25(d), (f), and (g).

In all other respects, Defendants’ motion is DENIED.²

IT IS SO ORDERED.

May 14, 2014
Date

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

² Had the Court considered this motion as a (C)(10) motion – as Defendants requested in the alternative – the Court would have reached the same result.