

**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 Defendant DRSN's motion for summary disposition of Count I (Breach of Contract) and Defendants Levin and Mestdagh's Motions for Summary Disposition as to Count II (Minority Oppression).

Plaintiffs generally allege that the parties were involved in the business of building and operating skilled nursing and related health-care facilities and affiliated office and residential facilities. Plaintiff Cavaliere collaborated with others to create Defendant DRSN. At the end of his involvement with DRSN, Cavaliere was employed as the Director of Development.

In their Complaint, Plaintiffs claimed that Defendants terminated Plaintiff Cavaliere without cause (Breach of Contract – Count I), and that the majority members embarked on a course of willfully unfair and oppressive conduct to punish them for refusing to sell its minority interest to the other members (Minority Oppression – Count II).

Defendants now move for summary disposition of these claims under MCR 2.116(C)(10), which tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597

NW2d 817 (1999). In such a motion, “the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

I. Defendant DRSN’s Motion.

Defendant DRSN first moves for summary disposition of Plaintiffs’ Count I for Breach of Contract. This Count is levied solely at DRSN and is based on the allegation that DRSN employed Plaintiff Cavaliere with “the understanding and agreement that he would and could only be terminated for just cause.” (Complaint, at paragraph 20).

DRSN argues that it is entitled to dismissal of said claim because discovery has revealed that there was no such agreement. As a result, Cavaliere was simply an at-will employee subject to dismissal by DRSN.

Indeed, 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*, 458 Mich 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. *Lytte*, 458 Mich at 164 (internal citation omitted).

In its motion, DRSN argues that Cavaliere admitted at deposition that there was no agreement for just cause employment. In addition, the DRSN Operating Agreement provides that any officer of the company "may only be removed by the Manager, who may do so at any time." Section 5.7.3.

At his deposition, Cavaliere testified as follows (Cavaliere Deposition, at 12:10-13:3):

Q: And did you have a specific conversation with Mr. Levin in which you discussed this claim that you would be employed by Defendant DRSN with the understanding and agreement that you would and could only be terminated for just cause?

A: We did not have a specific conversation that I recall.

Q: Okay. What then is the basis for your understanding that you could only be terminated for just cause?

A: We were working – it wasn't a (sic) employee-employer scenario when we started DRSN. We started this company together and worked it together, just like two partners would.

Q: Okay. And so let me ask this: Did you at any point in time have a discussion with Mr. Levin in which you discussed that you could only be terminated for just cause?

A: No.

Further, after he learned that his termination from DRSN was being discussed, Cavaliere sent an email to Richard Levin, DRSN's CEO and a Manager, stating his case to try to convince Mr. Levin to not terminate him.¹ At the end, Cavaliere states: "I clearly understand what you described the other night and will accept whatever role ownership choose for me including no role whatsoever if that is the decision." This statement is consistent with Cavaliere's testimony that there was no just

¹ The Court rejects Plaintiff's argument that this email constitutes an inadmissible settlement negotiation under MRE 408. This email references no negotiation and is, by all appearances, simply a request to reconsider any discussions

cause employment relationship.

In response, Plaintiff argues that his employment was just cause based on (1) “a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause”; or (2) “an express agreement, either written or oral, regarding job security that is clear and unequivocal.” *Lytle*, 458 Mich at 164.

Plaintiff claims that there are questions of fact as to whether Plaintiff had an employment agreement for a definite or determinable term. As a result, Plaintiff claims that such an definite-duration agreement is terminable only for cause – citing *Rood v General Dynamics Corp*, 444 Mich 107, 117, n 13; 507 NW2d 591 (1993) (noting “Employment contracts for a definite duration are presumptively terminable only for just cause.”), citing *Toussaint*, 408 Mich at 611.

Acknowledging that there is very little caselaw on this issue, Plaintiff then examines cases from several other jurisdictions. But accepting and applying the general principle that employment agreements for a definite or determinable term results in a just-cause employment situation, the Court still needs to examine the conduct of the parties to determine if such an agreement was in place.

The *Rood* Court warned:

Contractual liability is consensual. A basic requirement of contract formation is that the parties mutually assent to be bound. In *Rowe*, this Court recognized “the difficulty in verifying oral promises,” especially in the employment relations context, because individuals often harbor “optimistic hope of a long relationship” that causes them to misinterpret their employer’s oral statements as manifestations of an intention to undertake a commitment in the form of a promise of job security. Accordingly, and in an effort to recognize oral contracts for job security only where the circumstances suggest both parties intended to be bound, the *Rowe* Court held that “oral statements of job security must be clear and unequivocal to overcome the presumption of employment at will.” *Rood*, 444 Mich at 118-119 (internal citations

about terminating him.

omitted); quoting *Rowe v Montgomery Ward & Co*, 437 Mich 627, 636-645; 473 NW2d 268 (1991).

But Plaintiff presents no evidence of any specific promise other than general “discussions” about working together until he and Levin sold the business. A careful review of these alleged conversations, however, reveal no promises in response to specific inquiries (or specific discussions) about job security or a definite term of employment.

And Plaintiff’s position that these conversations did amount to specific promises is belied by DRSN’s Operating Agreement that specifically gave DRSN’s Manager the power to remove “any officer . . . at any time.”²

For the foregoing reasons, the Court concludes that no reasonable trier-of-fact in the Plaintiff’s position would have interpreted DRSN’s statements or conduct in the manner alleged by Plaintiff.³

Therefore, the Court concludes that there are no material questions of fact in dispute, and DRSN is entitled to judgment as a matter of law. As a result, Defendant DRSN’s motion for summary disposition is GRANTED, and Plaintiff’s Count I is DISMISSED.

II. Defendants Levin and Mestdagh’s Motion.

Next, Defendants Richard Levin, Levin Living Trust, and Mestdagh Family Trust move for summary disposition of Plaintiff’s Count II for minority oppression. Under the Michigan Limited Liability Act, MCL 450.4515(1),

² This fact also distinguishes this case from *Zuehlke v Impact Auto Collision, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 31, 2009 (Docket No. 281842).

³ The Court also rejects Plaintiff’s argument that there was never any discussion that employee was an at-will employee. The problem with this argument is that Michigan law presumes at-will employment absent clear language

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).

In a May 14, 2014 Opinion and Order the Court dismissed allegations of conduct alleged in Paragraph 25(d), (f), and (g). As a result, Plaintiffs’ Complaint at paragraph 25 now alleges the following conduct in support of their minority oppression claim:

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;
- ...
- (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;

otherwise.

...

(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 argue that Plaintiffs' Count II should be dismissed because: (1) there is no evidence of any interference with the Health Care Trust's interest as a member; and (2) exclusive management authority was vested in DRSN's Managers in accordance with the Operating Agreement.

Plaintiffs' initial response to Defendants' motion is that this Court already ruled that these allegations, if proven, are actionable in its May 14, 2014 Opinion re: Defendants' prior (C)(8) motion for summary disposition.

Indeed, the Court's prior Opinion was based on Defendants' argument that, under no circumstances, could a shareholder be oppressed if the alleged conduct was authorized by the Operating Agreement. This, the Court ruled, was not the case. Following the reasoning in *Berger v Katz*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2011 (Docket Nos. 291663, 293880), the Court previously held that "although the Operating Agreement may allow certain actions, said actions cannot be done in a willfully unfair and oppressive manner."⁴ This

⁴ Since the Court's prior Opinion, our Supreme Court has addressed and provided more clarity regarding shareholder rights under the Business Corporation Act. In *Madugula v Taub*, 496 Mich 685; 853 NW2d 75 (2014), the Court reasoned:

This Court has never exhaustively listed the interests or rights that shareholders have as shareholders of a corporation. However, we have recognized that "[t]he relation between a corporation and its stockholders is contractual in its nature" and that "[t]he charter of a corporation is its constitution. It prescribes the duties of stockholders and directors within the limits of the charter in the exercise of the power conferred upon them." Beyond a corporation's articles of incorporation, we may also consider a corporation's bylaws and the governing statutes to determine a shareholder's interests.

ruling, which the Court is not inclined to revisit, previously served to reject the same “management authority” argument again advanced by Defendants. As a result, the Court is solely left with Defendants’ “lack of evidence” argument.

As stated, MCL 450.4515(2) provides that “willfully unfair and oppressive conduct” is “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.” Such 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.” *Id.*

In their response, Plaintiffs allege that “in retaliation for refusing to sell its interest in DRSN, the Trust was, among other things, excluded from the day to day operations of DRSN, excluded from attending DRSN’s functions, meetings and other events, and excluded from discussions concerning material issues relating to Defendant DRSN. In support, Plaintiffs provide deposition testimony, Mr. Cavaliere’s Affidavit, and other evidence.

Plaintiffs also allege (with evidentiary support) that “agendas for member meetings no longer were sent to the Trust or Mr. Cavaliere, but only to the other members.” And Plaintiffs allege that DRSN made misleading statements regarding the business.

Plaintiffs also allege (with evidentiary support) that “Mr. Cavaliere regularly did in fact receive financial statements as the agent of the Trust regarding DRSN, . . . [but] in late 2012, Defendants stopped providing such information.” Further, Plaintiffs claim that they specifically

Under the BCA, a shareholder is “a person that holds units of proprietary interest in a corporation” Through this interest in the corporation, a shareholder retains certain statutory rights that allow the shareholder to protect and gain from his or her interest as a shareholder, including, but not limited to, the right to vote, inspect the books, and receive distributions. The BCA also allows shareholders to

requested financial information in March 2013, but this information was never provided.

Finally, Mr. Cavaliere claims in his Affidavit that, “[w]hen the Trust refused to sell its interest in DRSN, Mr. Levin threatened to take steps that would render the Trust’s membership interests worthless and potentially destroy DRSN.” Plaintiff’s claim that Mr. Levin also threatened to “squash” him if the Trust would not sell its interest.

Michigan law recognizes that “directors and officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation which they serve.” *Salvador v Connor*, 87 Mich App 664, 675; 276 NW2d 458 (1978). The *Salvador* Court continued:

The same is true of majority shareholders, since: **[The] law requires the majority in control of the corporation the utmost good faith in its control and management as to the minority** and it is the essence of this trust that it must be so managed so as to produce to each shareholder, the best possible return upon his investment. *Id.* at 675 (internal citations omitted) (emphasis added).

Considering the totality of the circumstances, the Court finds that a trier of fact could reasonably conclude that this pattern of conduct or series of actions constitutes oppression within the meaning of the Michigan Limited Liability Act.

For all of the foregoing reasons, the Court finds that there remain material questions of fact in dispute such that Defendants are not entitled to judgment as a matter of law. Therefore, Defendants’ motion for summary disposition of Plaintiff’s Count II is DENIED.

Finally, Defendants seek dismissal as to Defendant Richard Levin, individually. In their Response, Plaintiffs appear to concede that they have no cause of action against Levin, individually, but he is somehow a necessary party to this action under MCR 2.205(A). The Court disagrees.

Plaintiffs’ Complaint makes no allegations against Mr. Levin, individually. Rather, Plaintiffs

enter into voting agreements and shareholder agreements. *Madgula*, 496 Mich at 418-419 (internal

only allege claims against him in his capacity as a Manager of DRSN, as a trustee of the Levin Trust, and as co-Trustee of the Mestdagh Trust. As a result, the Court DISMISSES Plaintiffs' Complaint as to Defendant Richard Levin (in his individual capacity only).

III. Summary

To summarize, Defendant DRSN's motion for summary disposition is GRANTED, and Plaintiff's Count I is DISMISSED.

Defendants Richard Levin, Levin Living Trust, and Mestdagh Family Trust motion for summary disposition of Plaintiff's Count II for minority oppression, however, is DENIED.

Defendant Richard Levin (in his individual capacity only) is DISMISSED from this lawsuit.

IT IS SO ORDERED.

May 20, 2015
Date

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