

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

**TALAL YONO, ET AL,
Plaintiffs,**

v.

**Case No. 14-139819-CB
Hon. James M. Alexander**

**MASOUD YONO, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on three motions for summary disposition. Plaintiff filed a motion for partial summary disposition of Defendant’s Count VII of their Counter-Complaint. And Defendants Masoud Yono and Michael Greenbaum filed a motion for partial summary disposition as to any claims regarding Lakepoint Property, LLC and a motion for partial summary disposition of any claims brought by Plaintiff Talal Yono in the names of various limited liability companies and as to Counts III, V, and VII.

According to their First Amended Complaint, Plaintiff Talal Yono is a shareholder in each of the Plaintiff business entities. This case generally arises from Defendants’ “mismanagement of the assets of the plaintiff entities, breach of fiduciary duty, misappropriation of assets of the plaintiff entities, fraud, usurpation of business opportunities, breach of contract, civil conspiracy, and other wrongful acts.”

Defendants responded to this lawsuit by filing a Counter-Complaint on claims that Plaintiff Talal Yono failed to make a cash call, improperly removed funds from the businesses,

and breached his fiduciary duties. Defendants, in part, also seek dissolution of some of the business entities.

The moving parties move for summary disposition under MCR 2.116(C)(5), (C)(8) or (C)(10). A motion under MCR 2.116(C)(5) challenges whether a plaintiff lacks the legal capacity to sue. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000). A (C)(8) motion tests the legal sufficiency of the complaint, and a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).¹

1. Plaintiffs' motion for partial summary disposition.

Plaintiff first seeks partial summary disposition and dismissal of Defendants' Counter-Claim for Abuse of Process (Count VII). The Court of Appeals has held:

To recover pursuant to a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding. In *Vallance v Brewbaker*, 161 Mich App 642, 646; 411 NW2d 808 (1987), this Court described a meritorious claim of abuse of process as a situation where the defendant has used a proper legal procedure for a purpose collateral to the intended use of that procedure. The Court further stated that there must be some corroborating act that demonstrates the ulterior purpose. A bad motive alone will not establish an abuse of process. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992) (internal citations omitted), citing *Friedman v Dozorc*, 412 Mich 1, 30-31; 312 NW2d 585 (1981).

Moreover, “the ulterior purpose alleged must be more than harassment, defamation, exposure to excessive litigation costs, or even coercion to discontinue business.” *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 323; 788 NW2d 679 (2010); quoting *Early*

¹ The Court notes that Plaintiffs filed Surreply Briefs that are not permitted by Michigan Court Rules or the Court's Order setting the summary disposition briefing schedule. As a result, they will not be considered.

Detection Center, PC v New York Life Ins Co, 157 Mich App 618, 629-630; 403 NW2d 830 (1986).

Plaintiffs argue that they are entitled to dismissal of Defendants' abuse of process claim because such a claim cannot be founded solely on the issuance of a summons and complaint – as Defendants allege here. In support, Plaintiffs cite *Dalley*, 287 Mich App 296 for the proposition that: “[a] complaint must allege more than the mere issuance of the process, because an ‘action for abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue.’” *Dalley*, 287 Mich App at 322; quoting *Friedman v Dozorc*, 412 Mich 1, 31; 312 NW2d 585 (1981).

In response, Defendants argue that Plaintiff Talal Yono “abused the civil process by using the underlying litigation for his own ulterior motives.” To do so, Defendants argue that Plaintiffs filed their Complaint full of “glaring errors and obvious misstatements” and made claims that were “factually unsupportable.” As a result, “[t]he misuse of process was improper since Plaintiff/Counter-Defendant knew, or should have known, that the allegations in the Verified Complaint were false.” And “[a]s long as Plaintiff/Counter-Defendant continues to prosecute the underlying litigation . . . , Defendants/Counter-Plaintiffs will continue to suffer damages.”

In other words, Defendants allege no more than “harassment, defamation, [or] exposure to excessive litigation costs” as found insufficient to establish an abuse of process claim under *Dalley*, 287 Mich App at 323. Rather, Defendants only complaint is Plaintiffs' filing of the underlying litigation. This, however, cannot amount to an abuse of process. See *Dalley*, 287 Mich App at 322; and *Friedman*, 412 Mich at 31.

Considering only the pleadings and accepting all well-pled factual allegations as true, the Court finds that Defendants' Counter-Claim for Abuse of Process (Count VII) is so clearly unenforceable as a matter of law that no factual development could justify a right of recovery. As a result, Plaintiff's motion for partial summary disposition of said claim is GRANTED under (C)(8), and the same is DISMISSED.

2. Defendants' motion for partial summary disposition regarding Lakepoint Property.

Next, Defendants Yono and Greenbaum move for partial summary disposition of any claims relating to Plaintiff Talal Yono's purported interest in Lakepoint Property, LLC.

In support, Defendants argue that Plaintiffs' original, Verified Complaint alleged that he paid for his purported interest in Lakepoint with a check in the amount of \$925,000. But after making several discovery requests, Defendants argue that Plaintiff was never able to produce said check.

Defendants claim that Plaintiffs then changed the Lakepoint allegations in their First Amended Complaint by alleging that Talal Yono was to contribute \$925,000 in exchange for a 25% interest in Lakepoint. But Plaintiffs now allege the source of these funds was \$600,000 from Talal Yono and another \$325,000 from another source and accounted as a loan to Talal.

In fact, Defendants admit receiving the \$600,000 from Talal, but claim that it was a loan that has since been repaid with interest. In essence, Defendants argue that they are entitled to summary disposition under (C)(10) because they disagree with Plaintiffs' version of the facts.

In response, Plaintiffs present the Affidavit of Talal Yono and other documentary evidence that supports their claim that Talal would contribute \$925,000 in exchange for a 25%

interest in Lakepoint. In fact, Talal paid \$600,000 to Masoud Yono, which is undisputed; but the parties disagree about the reason for this payment.

In any event, Defendants' motion is one that generally attacks the facts as alleged by Plaintiffs and the credibility of Talal Yono.

But Michigan courts have long held that credibility is an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, "courts 'may not resolve factual disputes or determine credibility in ruling on a summary disposition motion'" citing *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004); and *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). *White, supra* at 625.

For all of the foregoing reasons, the Court finds that resolution of this issue is so substantially intertwined with fact-finding and credibility determinations to render summary disposition wholly inappropriate. As a result, Defendants' (C)(10) motion on this basis is DENIED.

3. Defendants Yono and Greenbaum's motion for partial summary disposition.

Defendants Yono and Greenbaum next move for summary disposition based on Plaintiffs' failure to make a written demand of the corporations prior to bringing this lawsuit. Defendants, in conclusory fashion, also challenge the specificity of Plaintiffs' fraud claim.

Under Michigan's Limited Liability Company Act, MCL 450.4510:

A member may commence and maintain a civil suit in the right of a limited liability company if all of the following conditions are met:

...

(b) The plaintiff has made written demand on the managers or the members with the authority requesting that the managers or members cause the limited liability company to take suitable action.

(c) Ninety days have expired from the date the demand was made unless the member has earlier been notified that the demand has been rejected or unless irreparable injury to the limited liability company would result by waiting for the expiration of the 90-day period.

Defendants argue that Talal Yono never made a written demand asking the LLCs to take action. As a result, Defendants claim that Mr. Yono lacks the capacity to sue because he failed to comply with a requirement of the Limited Liability Company Act – citing *Eston v Argus, Inc*, 328 Mich 554, 556-557; 44 NW2d 154 (1950).

In response to this motion, Plaintiffs do not dispute that they failed to issue a written demand. Instead, they argue that Defendants waived the standing or capacity-to-sue defense when they failed to raise the same in their first responsive pleading. Our Court of Appeals has held:

Under MCR 2.111(F)(2), . . . a defense is waived if not pleaded or raised by motion. MCR 2.116(D) sets forth the timetable to raise particular issues by motion. . . . Issues related to capacity to sue, other action pending, and affirmative defenses must be raised not later than the first responsive pleading. MCR 2.116(D)(2). *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 319; 503 NW2d 758 (1993).

Indeed, under MCR 2.116(D)(2), “[t]he grounds listed in subrule (C)(5) [including a lack of “the capacity to sue”] . . . must be raised in a party’s responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party’s first responsive pleading.”

In their Reply Brief, Defendants argue that Plaintiffs’ argument “overlooks two critical points. First, [Defendants] raised Talal Yono’s lack of standing in their first responsive pleading” – directing the Court to their “Response in Opposition to Plaintiff’s Motion for Preliminary Injunctive Order and for Appointment of Receiver” filed on April 29, 2014.

But Defendants' argument on this point appears to be based on a misunderstanding of what constitutes a "pleading" for purposes of the cited Court Rules. Under MCR 2.110:

The term "pleading" includes only:

- (1) a complaint,
- (2) a cross-claim,
- (3) a counterclaim,
- (4) a third-party complaint,
- (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and
- (6) a reply to an answer.

No other form of pleading is allowed.

A response in opposition to a motion for preliminary injunctive order is **not** a "pleading" for purposes of the cited Court Rules. And a review of Defendants' actual first responsive pleading, their Answer to Complaint and Affirmative Defenses (filed on May 1, 2014), reveals that Defendants did not raise the defense that Plaintiffs lacked the capacity to sue. And Defendants also failed to raise the defense in their Answer to Plaintiffs' First Amended Complaint and Affirmative Defenses (filed on July 22, 2014).

Because Defendants failed to raise the defense that Plaintiffs lacked the capacity to sue in their first responsive pleading, they waived the defense, and Defendants' motion for summary on this basis is DENIED.²

The Court also rejects Defendants' cursory conclusion that Plaintiffs' fraud claim should be dismissed based on a failure to plead specific facts. 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 Defendants fail to present any meaningful analysis on this issue, their request for summary of Plaintiffs' fraud is DENIED.

² The Court rejects Defendants' argument that its "Non-Fulfillment of Conditions Precedent" defense is applicable to this issue. This defense provides that it is founded on contractual obligations, not Michigan's Limited Liability Company Act.

Summary

To summarize, Plaintiffs' motion for partial summary disposition of Defendants' Counter-Claim for Abuse of Process (Count VII) is GRANTED under (C)(8), and the same is DISMISSED.

Both of Defendants Yono and Greenbaum's motions, however, are DENIED.

IT IS SO ORDERED.

March 11, 2015
Date

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