

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

**JONATHAN LOVY, D.O.,
Plaintiff,**

v.

**Case No. 14-140005-CB
Hon. James M. Alexander**

**ARMEN A KORKIGIAN, D.O., ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants’ motion for summary disposition. Plaintiff was one of six shareholders in non-party Personal Health Care, PC (PHC). The remaining five shareholders consisted of the four individual Defendants and non-party Dr. Neil Belgiano.

In his Complaint, Plaintiff alleges that he invested \$625,000 for an equal one-sixth interest in PHC. Less than three years after completing this investment, Plaintiff claims that Defendants used their majority control to “swindle him out of that interest . . . by hatching a plan to ‘dissolve’ the corporation and ‘form’ the same company as a ‘new’ entity using the same offices, personnel, equipment, telephone numbers, etc., except without [Plaintiff].” That “new” entity is Defendant Progressive Health Care, PC.

Essentially, Plaintiff claims that the majority “instituted a fictional ‘dissolution’ to ‘squeeze out’ [Plaintiff] and have since retained possession of the overwhelming majority of assets, cash and receivables belonging to PHC.” As a result, Plaintiff filed the present suit for “the return of the ‘fair

value' of his interest.” To that end, Plaintiff’s Complaint alleges claims of: (1) Minority Oppression; (2) Breach of Fiduciary Duties; (3) Violation of MCL 450.1855a; (4) Violation of MCL 450.1551; (5) Accounting; (6) Tortious Interference with Business Expectancy; (7) Conspiracy; and (8) Unjust Enrichment.

In their first responsive pleading, Defendants filed the present motion for summary disposition – arguing that:

The undisputable fact is that [Plaintiff], as a shareholder of PHC, approved the dissolution of PHC at a shareholders['] meeting attended by [Plaintiff] and all other shareholders . . . with notice and knowledge of the purpose of the meeting. All of [Plaintiff’s] claims in his unverified Complaint flow from his argument that dissolution of PHC was improper and forced on him but since he voted for and approved the dissolution all of his claims fail.

Defendants argue that, based on the “undisputable fact” that Plaintiff voted for and approved PHC’s dissolution, Plaintiff’s Complaint must be dismissed because he approved all corporate actions that form the basis of his lawsuit. To that end, Defendants move for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Initially, the Court will note that Defendants acknowledge (on page nine of their brief) that Plaintiff claims that the dissolution vote “was forced upon him and that he never participated in a vote.” Based on this acknowledgement alone, the Court questions Defendants’ characterization as “undisputable” that Plaintiff voted for and approved PHC’s dissolution – which serves as the basis for their motion.

And just as Defendants predicted, in his response, Plaintiff attaches two affidavits – his own and that of Dr. Belgiano – who both claim that the dissolution vote never occurred.

Despite the dispute whether the dissolution vote occurred, Defendants argue that they are entitled to summary disposition because “a shareholder who votes for and approves corporate action, [cannot] separately or later . . . claim he has been harmed and has no cause of action.” In support, Defendants cite *Camden v Kaufman*, 240 Mich App 389, 397; 613 NW2d 335 (2000) and *Wallad v Access Bidco, Inc*, 236 Mich App 303, 305; 600 NW2d 664 (1999).

Indeed, the cited cases stand for just such a proposition. But, in this case, there is a question of fact as to whether a dissolution vote occurred. As a result, Defendants cannot rely on *Camden* and *Wallad* to support their summary request.

Further, as Plaintiff responds in the alternative, summary disposition under (C)(10) is usually premature before discovery on a disputed issue is complete. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). In this case, discovery is currently stayed until September 1, 2014, and due to conclude by December 31, 2014. As a result, summary under (C)(10) is also premature.

But the Court will be clear – as long as the affidavits of Plaintiff and Dr. Belgiano exist, there will be a legitimate factual dispute about whether a dissolution vote occurred.¹ No amount of discovery will change this, and the Court will consider MCR 2.114 sanctions should any additional (C)(10) motion on this issue be filed.

Inherent in their motion, Defendants also question Plaintiff’s deponents’ credibility. But 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

¹ Plaintiff has presented evidence that the vote did not occur (the affidavits of Plaintiff and Dr. Belgiano). Defendants have presented documentary evidence that the vote did happen.

motion” *White, supra* at 625, 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).

Regarding Plaintiff’s claims based on a violation of MCL 450.1855a and MCL 450.1551,² Defendants again fail to establish their entitlement to summary disposition. In fact, in their motion, Defendants admit that “all of the shareholders have been unable to agree on the proper valuation of the assets and what assets should be included in the valuation of PHC.” As a result, summary disposition of this claim is improper.³

Finally, Defendants conclude in three sentences at the end of their brief that “[t]here are no independent claims against Defendant [Progressive Health]” and, therefore, “the claims against it must be dismissed.” Michigan law is clear that, however, 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, as Plaintiff points out in his response, Plaintiff alleges claims of tortious interference, conspiracy, and unjust enrichment against Defendant Progressive Health. And Defendants, in their Reply Brief, fail to address these claims. As a result, summary disposition of Plaintiff’s claims against Defendant Progressive Health is unwarranted.

For the foregoing reasons and viewing the evidence in the light most favorable to Plaintiff,

2 MCL 450.1855a provides, in relevant part, “After payment or adequate provision has been made for the corporation’s debts, obligations, or liabilities, the remaining assets shall be distributed, except as otherwise provided in this section, in cash, in kind, or both in cash and in kind, to shareholders according to their respective rights and interests.” Plaintiff alleges an improper distribution and presents sufficient evidence of the same to survive summary disposition.

3 Defendants argue that Plaintiff’s claim under MCL 450.1551 also fails because it derives only from a breach of 450.1855a. But, as stated, Plaintiff’s 1855a claim remains viable. Because questions of fact remain regarding the proper distribution of assets, Plaintiff’s counter motion for summary disposition under MCR 2.116(I)(2) is similarly denied.

this Court cannot conclude that there are no material facts in dispute whereby Defendants are entitled to judgment as a matter of law. As a result, Defendants' Motion to for Summary Disposition is DENIED in its entirety.

IT IS SO ORDERED.

August 27, 2014
Date

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