

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

**KEN BOWERS,
Plaintiff,**

v.

**Case No. 14-140063-CZ
Hon. James M. Alexander**

**D&M LOGISTICS, INC, ET AL,
Defendants.**

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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motion for summary disposition. Plaintiff has a history of working as a transportation safety consultant for major trucking companies and firms. Sometime in 2003 or 2004, Plaintiff and Defendant David Menke began discussions about Plaintiff's investment in the Defendant entities, America's Transportation Resources (ATR) and D&M Logistics.

ATR is in the business of providing leased or temporary drivers to trucking companies. Menke operated ATR before these discussions. Plaintiff claims that D&M was created out of the parties' talks, whereby Plaintiff loaned \$17,000 to D&M in exchange for a promissory note and option agreement. Under the agreement, Plaintiff's loan could be converted into shares of the D&M if Plaintiff exercised his option within 3 years (by April 8, 2007). Menke was also supposed to match Plaintiff's \$17,000 investment. At the time, however, Plaintiff was employed by an unrelated company.

The parties' agreement was reduced to a series of April 2004 written documents: (1) a promissory note, (2) an option agreement, and (3) an indemnification agreement.

Plaintiff claims that Menke ran D&M exclusively between 2004 and 2007. During this time, Menke claimed that the company was a financial bust that he repeatedly infused capital into and provided services through ATR to keep the company afloat. In early 2007, Plaintiff's employment with the unrelated company ceased, and he sought employment with ATR. He and Menke agreed on a salary, and Plaintiff began work.

But Plaintiff did not make a written request to exercise his option to convert his \$17,000 loan in D&M into shares of the company – in part, because Menke represented that D&M was in dire financial shape. But Plaintiff claims that he and Menke orally agreed to extend the option agreement until D&M turned around.

Between 2007 and 2012, Plaintiff claims that he worked hard to increase sales at ATR and bring in significant business for both ATR and D&M. Despite his success for the Defendant entities, Plaintiff generally claims that his pay was reduced; he and his wife weren't provided health insurance as promised; money was improperly removed from his paycheck for life insurance; and Menke misrepresented insurance coverage on a customer-leased D&M truck.

Plaintiff claims that (despite Menke's representations otherwise) D&M was tracking to be successful company between 2007 and 2012, and Plaintiff repeatedly requested to exercise his option, but Menke kept stalling and coming up with excuses. Menke then terminated Plaintiff's employment in April 2012.

On April 23, 2012, Plaintiff then demanded full payment on the note in the amount of \$38,464.88 – representing \$17,000 in principal and \$21,464.88 in interest. Several months later, on September 4, 2012, D&M issued an \$18,500 check to Plaintiff, who cashed the same.

Defendants claim that this check, along with prior interest-only payments of \$2,240 on December 12, 2008 and \$4,080 on June 1, 2011, represented a full and final payment on the promissory note. The check stub also notes “Payment of Principal and Interest replaces check #2102 Dated 5-17-12.”

In his motion Response, Plaintiff does not actually dispute Defendants’ claims that the note was repaid in full. In fact, Plaintiff makes little effort to explain this check – other than arguing that it constitutes “a resolution of one aspect of the damages claimed or a mitigation of the ultimate damages that are claimed.”

In any event, Plaintiff generally claims that Menke: (1) denied Plaintiff the option to purchase shares of D&M, (2) lied to about the financial position of D&M in an attempt to avoid Plaintiff’s purchase option, and (3) retained certain safety manuals and materials created by Plaintiff. On these allegations, Plaintiff filed his Complaint on claims of: (Count I) Breach of Contract, (Count II) Fraud, and (Count III) Claim and Delivery.

Defendants now move for summary disposition of Plaintiff’s claims under MCR 2.116(C)(10), which tests the factual support for a cause of action. *Maiden v Rozwood*, 461 Mich 109, 119-20 (1999).

1. Breach of Contract (Count I).

Plaintiff breach of contract claim is founded on the allegations that the option to purchase, which was intended to expire in 2007, “was extended by the parties on several occasions and was in full force and effect through May of 2012.” And Plaintiff claims that he was fired in order to prevent him from exercising his option to purchase a portion of D&M.

Plaintiff also briefly alleges a breach of an employment contract, but he fails to identify any express employment contract.

Michigan law is well-established that “a court must construe and apply unambiguous contract provisions as written.” *Rory v Cont’l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

Under the terms of the Option Agreement, in order to exercise the option to convert the note into D&M shares, Plaintiff was required to: (1) issue a written demand (para 4) before April 8, 2007 (para 3); (2) discontinue his employment with the other employer; (3) accept employment at D&M, **and** (4) enter into a shareholder agreement with D&M (para 3). It is undisputed that he did none of these things.

Although Plaintiff claims that his breach of contract claim is based on Defendants’ failure to allow him to exercise the option to convert into D&M shares, Plaintiff was the one that held the option to declare the note due and payable upon default.¹ And Plaintiff did just that on April 23, 2012. And Plaintiff does not dispute or present any evidence to establish that the \$18,500 check and the interest only payments of \$2,240 (on December 12, 2008) and \$4,080 (on June 1, 2011) did not represent a full and final payment on the promissory note.

¹ The note provides that in the event of a default, “the principal of this Promissory Note and all accrued interest thereon, may, at the option of [Plaintiff], be declared due and payable, whereupon the same shall forthwith immediately become due and payable.” It appears undisputed that interest payments were not made as agreed, which constitutes the default that triggered Plaintiff’s option to accelerate.

Because Plaintiff accelerated the note and fails to establish a question of fact that the aforementioned payments constituted a full and final payment of the promissory note, he cannot base any breach of contract claim on the promissory note or the option agreement. This is so because the note was fully repaid. As a result, whether the parties verbally agreed to extend the option does not matter once Plaintiff received a full payment on the note. At this point, Plaintiff elected to get repaid on the note (rather than exercise any option). In other words, there was nothing to convert and Defendants cannot be liable for a breach of an unelected option.

With respect to alleged breaches founded on nonpayment of fringe benefits, Defendants argue that MCL 408.473 provides that “An employer shall pay fringe benefits to or on behalf of an employee in accordance with the terms set forth in the **written contract or written policy.**” (emphasis added). Defendants argue that Plaintiff has identified no written contract or policy, on which, to base his claims. On this issue, Plaintiff failed to respond or otherwise present any evidence that a material question of fact is in dispute. As a result, summary of claims based on non-payment of fringe benefits are similarly dismissed.

Next, Defendants claim that any claims based on a reduction in Plaintiff’s wages also fail because Plaintiff was an at-will employee. Again, Plaintiff fails to respond or present any evidence creating a material question of fact on this claim.

In fact, Plaintiff fails to establish that there are any material questions of fact in dispute with respect to any portion of his breach of contract claim. Rather, Plaintiff simply issues broad, conclusory statements that the claim should survive summary. 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).

For the foregoing reasons and viewing all evidence in the light most favorable to Plaintiff, the Court concludes that there are no material questions of fact in dispute and Defendants are entitled to Judgment of Plaintiff's Count I for breach of contract as a matter of law. As a result, Defendants' motion for summary disposition under MCR 2.116(C)(10) is GRANTED, and Plaintiff's Count I is DISMISSED.

2. Fraud (Count II).

Defendants next argue that Plaintiff fails to state a claim for fraud in the inducement (Count II). The Michigan Court of Appeals has held:

To establish a claim of fraudulent misrepresentation, plaintiff was required to prove that: (1) defendant made a material representation; (2) the representation was false; (3) defendant knew, or should have known, that the representation was false when making it; (4) defendant made the representation with the intent that plaintiff rely on it; (5) and plaintiff acted on the representation, incurring damages as a result. Plaintiff must also show that any reliance on defendant's representations was reasonable. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005). *Hi-Way Motor Corp v Int'l Harvester Co*, 398 Mich. 330, 336; 247 N.W.2d 813 (1976), citing *Candler v Heigho*, 208 Mich. 115, 121; 175 N.W. 141 (1919).

In their motion, Defendants argue that fraud in the inducement requires misrepresentations in character that relate to something other than the performance of the contract. *Huron Tool & Eng'g Co v Precision Consulting Services, Inc*, 209 Mich App 365, 373; 532 NW2d 541 (1995).² Otherwise, a plaintiff is simply alleging a disguised claim for breach of contract. The Court agrees.

² The *Huron Tool* Court reasoned:

The distinction between fraud in the inducement and other kinds of fraud is the same as the distinction drawn by a New Jersey federal district court between fraud extraneous to the contract and fraud interwoven with the breach of contract. *Public Service Enterprise Group, Inc v Philadelphia Elec Co*, 722 F. Supp 184, 201 (D NJ, 1989). With respect to the latter kind of fraud, the misrepresentations relate to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort.

In this case, Plaintiff's fraud claim is founded on the allegation that Menke never intended to allow Plaintiff to exercise his option. But this allegation relates to performance of a material term contained in the contract. As such, it may serve as the basis of a breach of contract claim, but it cannot serve as the basis of a tort claim.

Further, as Defendant points out, Plaintiff cannot establish any damages. Plaintiff held the option to accelerate the note in the event of a default. He did so. And he does not dispute or present any evidence that the note was paid in full. Assuming arguendo that the option was verbally extended through April 2012 (as Plaintiff claims), he didn't choose to exercise the option. He chose to be repaid on the note. As a result, he cannot claim any damages based on his failure to exercise his option.

For the foregoing reasons and viewing all evidence in the light most favorable to Plaintiff, the Court concludes that there are no material questions of fact in dispute and Defendants are entitled to Judgment of Plaintiff's Count II for fraud as a matter of law. As a result, Defendants' motion for summary disposition under MCR 2.116(C)(10) is GRANTED, and Plaintiff's Count II is DISMISSED.

3. Claim and Delivery.

Defendants next claim that they are entitled to summary disposition of Plaintiff's Count III for claim and delivery. With respect to this claims, Plaintiff has entirely failed to respond and thereby concedes dismissal of said claims is appropriate.

Such fraud is not extraneous to the contractual dispute among the parties, but is instead but another thread in the fabric of [the] plaintiffs' contract claim. . . . [It] is undergirded by factual allegations identical to those supporting their breach of contract counts. . . . This fraud did not induce the plaintiffs to enter into the original agreement nor did it induce them to enter into additional undertakings. It did not cause harm to the plaintiffs distinct from those caused by the breach of contract [Id.]

4. Summary.

To summarize, Defendants' motion for summary disposition is GRANTED, and Plaintiff's Complaint is DISMISSED in its entirety.

IT IS SO ORDERED.

April 1, 2015
Date

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