

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

**JOHN THOMAS,  
Plaintiff,**

v.

**Case No. 14-141054-CD  
Hon. James M. Alexander**

**ALTe TECHNOLOGIES, INC, ET AL,  
Defendants.**

---

**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Defendants Accesspoint, LLC and Access Resource Solutions, LLC's (collectively "AccessPoint") motion for summary disposition. Plaintiff was previously employed by Defendant ALTe Technologies as its CEO.

In its Complaint, Plaintiff claims that Defendants ALTe, Simon Ahn, Theodore Oshman, and AccessPoint: (1) breached two employment agreements by failing to raise Plaintiff's base pay, failing to pay him a bonus, and failing to pay him a severance (Count I); (2) terminated his employment in violation of the Whistleblowers' Protection Act (Count II); and (3) terminated him in violation of public policy after Plaintiff refused a demand to perjure himself in another lawsuit (Count III).

AccessPoint claims that it is entitled to summary disposition because: (1) it did not sign either of Plaintiff's employment agreements (ALTe was the contracting party with Plaintiff); (2) AccessPoint did not have any knowledge of Plaintiff's alleged whistleblowing, nor did it participate in the events that led to Plaintiff's separation; and (3) AccessPoint did not have knowledge that Mr. Oshman allegedly demanded that Plaintiff perjure himself in a separate lawsuit.

In response to AccessPoint's motion, Plaintiff does not dispute any of AccessPoint's arguments. Rather, Plaintiff argues that AccessPoint is properly a defendant in this case for one, simple reason – “it entered into a contract with ALTe *designating itself as plaintiff's co-employer.*” (emphasis in original). Because AccessPoint acted as ALTe's “Professional Employment Organization,” (PEO) it “assumed both the *benefits* (presumably in the form of higher premiums than a staffing agency agreement) and the *burdens* that flow from the employment relationship.” (emphasis in original).

In fact (in its Response), Plaintiff admits that “AccessPoint did not ‘actually’ commit the adverse employment actions against Plaintiff.” But Plaintiff argues this is immaterial because AccessPoint contracted to be Plaintiff's employer and had ultimate control over ALTe's employees. So it does not matter whether or not AccessPoint had any knowledge or engaged in any wrongdoing.

To its end, AccessPoint seeks summary disposition 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). Under (C)(10), “In presenting a motion for summary disposition, 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).

Initially, with respect to Plaintiff's Count I for Breach of Employment Contract, the Court finds that AccessPoint was not a party to either the 2012 or 2013 Executive Employment Agreement. Even if AccessPoint should be considered Plaintiff's co-employer, it is unclear how the Court could impose contractual duties on a non-party to said agreements. And Plaintiff offers no authority on this

precise issue. For this reason, the Court finds that AccessPoint is not a proper Defendant to Plaintiff's breach of contract claim, and the same is properly dismissed only as to AccessPoint.

Next, with respect to Plaintiff's Whistleblower (Count II) and Public Policy (Count III) claims, the Court is faced with a very narrow issue. Can a party be held liable for such claims in the absence of any allegation of wrongdoing simply because they may hold co-employer status? On this issue, the parties present no binding Michigan authority.

In support of its position that co-employers may be liable in the absence of allegations of wrongdoing, Plaintiff cites to *Bailey v YourSource Mgmt Group*, 111 Fair Empl Prac Cas (BNA) 1146; 2011 US Dist LEXIS 14499 (ED Mich, 2011) and *Russell v Bronson Heating and Cooling*, 345 F Supp 2d 761 (ED Mich, 2007). These cases are distinguishable, however, because in both, the PEOs tried to defend the lawsuits by disclaiming that they were co-employers.

Additionally, each case involved situations where the PEOs were potentially liable for *their own behavior*. In both *Bailey* and *Russell*, the plaintiffs made sexual harassment complaints to the respective PEOs' human resource department.

In this case, however, Plaintiff does not allege that AccessPoint ever knew of his complaints. Additionally, as stated, Plaintiff admits that "AccessPoint did not 'actually' commit the adverse employment actions against Plaintiff."

The Court is more persuaded by reasoning provided in *Torres-Negron v Merck & Co*, 488 F3d 34 (CA 1, 2007). In *Torres*, the plaintiff worked for Merck-Mexico on temporary assignment from her employer, Merck-PR. While at Merck-Mexico, the plaintiff experienced "continuous harassment and discrimination" about her gender and nationality. The plaintiff, however, never complained to Merck-PR about said behavior. Despite this, when Plaintiff filed suit, she named

Merck-PR as a defendant.

Plaintiff argued, in part, “that Merck-PR [was] strictly liable for Merck-Mexico’s conduct under a joint-employer liability theory.” *Torres*, 488 F3d at 40 note 6. The *Torres* Court noted, however, that:

[J]oint-employer liability does not by itself implicate vicarious liability. The basis for the finding that two companies are “joint employers” is that “one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer.” “[T]he ‘joint employer’ concept recognizes that the business entities involved are in fact separate but that they share or co-determine those conditions of employment.” Thus, a finding that two companies are an employee’s “joint employers” only affects each employer’s liability to the employee **for their own actions, not for each other’s actions**, as [the plaintiff] would have us hold. *Torres*, 488 F3d at 40 note 6 (emphasis added), citing *Rivas v Federacion de Asociaciones Pecuaria de PR*, 929 F2d 814, 820 n.17 (1st Cir 1991); *NLRB v Browning-Ferris Indus, Inc*, 691 F2d 1117, 1122-23 (3d Cir 1982)); and *Virgo v Riviera Beach Assocs*, 30 F3d 1350, 1359-63 (3d Cir 1994) (holding that two companies were joint employers and therefore liable to the employee, but using agency principles to determine the extent of one employer’s liability for the other employer’s actions).

In this case, Plaintiff does not allege any wrongdoing on the part of AccessPoint. Without such, and absent compelling authority to the contrary, the Court finds it improper to impose potential liability solely based on co-employer status.

For the above reasons, AccessPoint’s motion for summary disposition under (C)(10) is GRANTED, and Plaintiff’s Complaint as to only Defendants Accesspoint, LLC and Access Resource Solutions, LLC’s is DISMISSED.

**IT IS SO ORDERED.**

October 1, 2014  
Date

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