

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

ELI NHAISSI,

Plaintiff,

v

MARSHA WALKER, et al,

Defendants.

2014-141382-CB
Case No. ~~15-141382-CB~~
Hon. Wendy Potts

OPINION AND ORDER RE: DEFENDANTS AND COUNTER-PLAINTIFFS' MOTION FOR
SUMMARY DISPOSITION UNDER MCR 2.116(C)(7), (8), AND (10)

At a session of Court
Held in Pontiac, Michigan

On
NOV 19 2015

Plaintiff Eli Nhaissi and Defendant Marsha Walker are each 50% shareholders of Defendant Northland Towers Group, Inc. (NTG). NTG is the general partner of Northland Towers Associates Limited Partnership (NTALP), which owns the Northland Towers office complex in Southfield. The property has been managed since 1990 by Defendant Northland Towers Management Group, Inc. (NTMG), which is owned by Walker. NTG has two assets: a 1% partnership interest in NTALP and a bank account with slightly more than \$5,000 in distributions based on that 1% NTALP interest. NTG was formed in 1990 by Plaintiff, Walker, and her late husband Haron Gabyzon. When Gabyzon died in March 2003, Walker acquired his interest in NTG and assumed management of the company. Although NTG's bylaws require a three-member board, NTG has been without a third member since the death of Gabyzon and did not replace Gabyzon as President because Walker and Nhaissi are each 50% owners and are unable to agree on filling the director or President vacancies.

Plaintiff claims that for several years beginning in 2008 he asked Walker for access to NTG and NTALP's books and records but was unable to obtain her cooperation. Plaintiff further claims that when he obtained access to some records in 2013, he discovered that Walker received more compensation than the 4% cap of revenues allowed in NTALP's partnership agreement. Although Plaintiff claimed that Walker was improperly taking funds from NTG, Defendants contend that NTG's bank records show that the only money taken from NTG was a distribution that was equally shared by Walker and Plaintiff.

This case came before the Court several months ago on Defendants' initial motion for summary disposition under MCR 2.116(C)(8) asserting that Plaintiff's claims failed as a matter of law. The Court granted the motion in part by dismissing Plaintiff's conversion claims and limiting Plaintiff's breach of fiduciary duty and breach of contract claims to conduct occurring within the limitation period. The Court also rejected Plaintiff's theory that he was entitled to be NTG's President under the bylaws § 5.07 pertaining to an absence in the Presidency. The Court allowed Plaintiff to pursue his claims for an accounting and inspection of corporate books and records, and also allowed Plaintiff to file an amended complaint.

The matter is now before the Court on Defendants' renewed motion for summary disposition under MCR 2.116(C)(7), which tests whether a claim is barred as a matter of law, and MCR 2.116(C)(10), which tests whether there is a factual dispute for trial. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

Defendants first assert that Plaintiff's Count II alleging breach of contract and Count IV alleging breach of fiduciary duty fail as a matter of law because they are premised on the allegation that Defendants improperly took funds or assets from NTG and Plaintiff cannot produce evidence of this claim. Plaintiff appears to concede that he cannot show any

misappropriation, but asks the Court to postpone dismissing the claims until an accounting is completed. However, Defendants are seeking dismissal under (C)(10) after the close of discovery, and it is incumbent on Plaintiff to produce admissible evidence showing a factual dispute for trial. *Maiden, supra*. Because Plaintiff is unable to demonstrate a question of fact on his contract or fiduciary duty claims, Defendants are entitled to summary disposition of Counts II and IV. Because summary disposition of these claims is warranted under (C)(10), the Court need not address Defendants' arguments that the claims are also time-barred.

Defendants next argue that Count I should be dismissed because Plaintiff continues to assert that he is entitled to be President of NTG under the bylaws. In response, Plaintiff concedes that Count I was the result of a drafting error and he is not entitled to be NTG's President. Moreover, Plaintiff presents no evidence that Defendants failed to comply with the bylaws in filling the board vacancies. Rather, the parties are in agreement that the director and President vacancies cannot be filled because Plaintiff and Walker are deadlocked. Because the bylaws do not give Plaintiff the automatic right to be NTG's President and there is no evidence of a bylaws violation, Defendants are entitled to summary disposition of Count I.

Defendants also argue, and the Court agrees, that Plaintiff's Count V to compel inspection of books and records and Count VI seeking an accounting are moot because Plaintiff obtained or should have obtained the necessary information through discovery. An accounting is unnecessary if Plaintiffs can determine the amount at issue through discovery. *Boyd v Nelson Credit Centers, Inc.*, 132 Mich App 774, 779; 348 NW2d 25 (1984). Plaintiff and his expert accountant were given access to Defendants' financial and corporate records, and Plaintiff has not identified any information he was unable to access. Thus, Defendants are entitled to summary disposition of these claims as well.

Defendants also ask the Court to dismiss Plaintiff's Count III seeking a constructive trust because it is a remedy, not a cause of action. Although Plaintiffs dispute Defendants' argument, the Court of Appeals has held that a constructive trust is only an equitable remedy, not an independent cause of action. See *CPAN v MCCA*, 305 Mich App 301, 325; 852 NW2d 229, 243-44 (2014), *opinion vacated in part on other grounds*, 870 NW2d 70 (Mich 2015). Thus, Defendants are entitled to summary disposition of that claim. Even if a constructive trust was a cause of action, Plaintiff fails to explain how he would be entitled to a constructive trust where there is no evidence that Defendants improperly took funds or assets from NTG. Thus, Defendants are entitled to summary disposition of that claim.

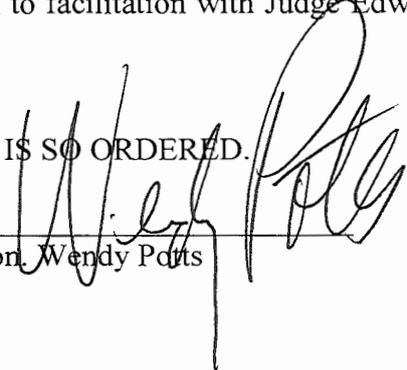
Finally, Defendants ask the Court to grant their request to dissolve NTG because of the deadlock. Although there is no dispute that a deadlock exists, the Court agrees with Plaintiff that the extreme remedy of dissolution is not warranted where the corporation appears to be functioning normally. *Barnett v Int'l Tennis Corp*, 80 Mich App 396, 417; 263 NW2d 908 (1978). The Court also agrees with Plaintiff that given the inability of Plaintiff and Walker to agree on anything, dissolution would likely require appointing a receiver to perform the wind up, and NTG has insufficient assets to compensate the receiver. Thus, the Court denies Defendants request for summary disposition on its dissolution counterclaim.

In sum, the Court grants Defendants summary disposition of Plaintiff's claims and dismisses them with prejudice. The Court denies summary disposition of Plaintiff's counterclaim seeking dissolution. The Court further orders the parties back to facilitation with Judge Edward Sosnick to be completed within 30 days.

Dated:

NOV 19 2015

IT IS SO ORDERED.


Hon. Wendy Parks