

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

**JOE GOUGH, ET AL,
Plaintiffs,**

v.

**Case No. 14-141820-CZ
Hon. James M. Alexander**

**ERIC VON SCOTT, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants Slam Eloise, BPH Productions, Slam Productions, Sanford Nelson, Linden Nelson, and Michigan Motion Pictures Studios’ (collectively “the Movants”) motion for summary disposition.

This case revolves around a film production known as “Eloise” – based on the Eloise medical complex built in Westland around 1839. For a time, Eloise operated as a mental hospital. In their Complaint, Plaintiffs allege that they “conceived a film concept using the hospital as setting for an urban exploration thriller.”

Plaintiffs claim that, in March 2010, they met with certain Defendants for financing and production services. Plaintiffs allege that they “provided their screenplay, shared their notes and marketing plan and Defendant Nelson even led Plaintiffs through his studio complex to show them the capabilities.” After this meeting, however, Plaintiffs claim that “Defendant Nelson ‘passed’ on the project for apparent ‘lack of interest.’”

Plaintiffs claim that, in April 2014, the Detroit Free Press published an article about a

film based on Eloise that was produced by Sanford Nelson (the son of Michigan Motion Picture Studios' CEO, Linden Nelson). Plaintiffs allege that they soon discovered that, in May 2012, Defendants devised a plan to fraudulently acquire "Plaintiffs' intellectual property, including video footage, screenplays, notes, research, artwork, marketing plans and other work product" relative to the Eloise film project.

As a result of Defendants' alleged fraud, Plaintiffs claim that they have received "zero compensation or theatrical credit" for their work on the Eloise project. Consequently, Plaintiffs bring the present action "for enforcement of their legal rights and equitable remedies."

To their end, Plaintiffs sued on claims of: (1) breach of contract; (2) unjust enrichment; (3) fraud and intentional misrepresentation; (4) tortious interference with contract; (5) tortious interference with a business relationship or expectancy; (6) promissory estoppel; and (7) civil conspiracy.

In response to Plaintiffs' Complaint, all Defendants except the Von Scotts filed the present motion for summary disposition – seeking the same under MCR 2.116(C)(7) and (C)(8). A motion under (C)(7) determines whether a claim is barred, among other grounds, by a statute of limitations, and a (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Initially, the Court notes that both sides, at times, make references to "the evidence" or certain factual disputes. But the present motion is one brought (for the most part) under (C)(8).¹ When analyzing such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). A (C)(8) motion may be granted only where the claims

¹ Only the Movants' summary request based on the release is brought under (C)(7). As a result, the Court may only consider evidence outside of the pleadings with respect to said argument.

alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* And, when deciding such a motion, **the court considers only the pleadings.** MCR 2.116(C)(G)(5).

1. Breach of Contract (Count I)

The Movants first argue that they are entitled to summary disposition of Plaintiff’s breach of contract claim because they are not parties to the only contract referenced in Plaintiffs’ Complaint – a February 2, 2010 Agreement between Plaintiff Joe Gough and Defendants Eric and Yoli Von Scott.

“It goes without saying that a contract cannot bind a nonparty.” *AFSCME Council 25 v County of Wayne*, 292 Mich App 68, 80; 811 NW2d 4 (2011); quoting *Equal Employment Opportunity Comm v Waffle House, Inc*, 534 US 279, 294; 122 S Ct 754; 151 L Ed 2d 755 (2002).

Indeed, even a cursory reading of Plaintiffs’ Complaint fails to reveal any allegation that Plaintiffs contracted with the Movants. To the extent that Plaintiffs argue that the Movants should be somehow bound by the February 2010 Agreement, the Court rejects the argument. And Plaintiffs present no authority to support their novel argument. 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 above reasons, the Court finds that Plaintiffs’ breach of contract claim (Count I) against the Movants is so clearly unenforceable as a matter of law that no factual development

could possibly justify recovery. As a result, said Count is DISMISSED as to the Movants under (C)(8).

2. Unjust Enrichment (Count II)

The Movants next seek summary disposition of Plaintiffs' unjust enrichment claim (Count II) because Plaintiffs failed to sufficiently plead such a claim.

“[I]n order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant.” *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006); citing *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993).

The *Morris Pumps* Court further reasoned:

[a] third party is not unjustly enriched when it receives a benefit from a contract between two other parties, where the party benefited has not requested the benefit or misled the other parties Otherwise stated, the mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract, unjust enrichment, or restitution. *Morris Pumps*, 273 Mich App at 196; quoting 66 Am Jur 2d, Restitution and Implied Contracts, § 32, p 628.

Plaintiffs claim that the Movants were unjustly enriched through “wrongfully acquiring Plaintiffs’ work related to the Eloise film project” without reasonably compensating Plaintiffs.

But the Movants argue that Plaintiffs cannot establish that **they** conferred a benefit on the Movants because Plaintiffs’ own Complaint alleges that “[t]he Von Scott Defendants . . . sold Plaintiffs’ entire work product to the Nelson Defendants.” (Complaint at paragraph 85).

And if the Movants purchased Plaintiffs' alleged work product from the Von Scotts, then "Plaintiffs cannot claim that the Nelson Defendants unjustly benefitted from the alleged use of work product." In support, the Movants rely on the *Morris Pumps* Court's reasoning:

where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person. *Morris Pumps*, 273 Mich App at 196; quoting 66 Am Jur 2d, Restitution and Implied Contracts, § 32, p 628.

The Movants claim that Plaintiffs fail to allege the required "misleading act." Indeed, Plaintiffs' Complaint appears void any clear allegation of such. In their Response, however, Plaintiffs claim that the Movants "met with Plaintiffs several times and received the project package for Eloise from Plaintiff Gough. Subsequently, the Nelson Defendants 'feigned interest' and went behind Plaintiffs backs to collude with the Von Scotts and cut Plaintiffs out of the deal." This, Plaintiffs claim, is the misleading act.

In support of their summary request, the Movants rely *Karaus v Bank of New York Mellon*, 300 Mich App 9, 22; 831 NW2d 897 (2012). In *Karaus*, a contractor sued a bank for unjust enrichment on the basis of some construction work that he performed on the home. The bank's only relationship with the property, however, was that it held the mortgage.

After reproducing the above-quoted language from *Morris Pumps*, the *Karaus* Court concluded:

[The bank] has not received a benefit *from* plaintiff because if anything, [the bank] has merely received the benefit from the contract between plaintiff and [the homeowners].

[Further,] to the extent that [the bank] has retained a benefit from the work plaintiff performed on the property, it received that benefit only as a third party to the agreement between plaintiff and [the homeowners]. There is no allegation or evidence to support the contention that [the bank] requested any of the work performed by plaintiff or misled plaintiff to receive any benefit. Further, there is

no evidence that [the bank] ever gave any assurance that it would pay for the work completed by plaintiff, nor that it was even aware of the work as it was being performed. In light of the fact that [the bank] was completely uninvolved with any negotiations that had occurred before the work on the property was commenced, it cannot be said that any benefit [the bank] does retain is unjust. *Karaus*, 300 Mich App at 24 (emphasis in original).

Plaintiffs respond that the present case is distinguishable from *Karaus* because, in this case, the Movants were involved in negotiations over the project.

Both parties also readily cite to *Morris Pumps*. In that case, a supplier provided equipment and materials to a subcontractor for use on a large wastewater treatment project. When the subcontractor went out of business and abandoned the construction project, the suppliers' equipment and materials remained on the worksite.

The general contractor then hired a replacement subcontractor to complete the work, and that subcontractor used the supplier's materials that were previously provided. The replacement subcontractor, however, did not bill for said materials because they were already there, and neither the general contractor nor the replacement subcontractor ever paid for the materials. The supplier then sued the general contractor on an unjust enrichment theory.

The Court of Appeals concluded that the supplier's unjust enrichment claim was valid because "[r]egardless of whether [the general contractor] itself retained and used the materials, or merely acquiesced in the replacement contractor's retention and use of the materials, [the general contractor] was necessarily a party to the decision to use and retain the materials without paying plaintiffs."²

² The *Morris Pumps* Court further concluded:

If defendant's retention of the materials supplied by plaintiffs had been completely innocent and without knowledge, we might be inclined to conclude that defendant's enrichment was not unjust. However, we simply cannot classify defendant's act of retaining and using the materials, without ever ensuring that plaintiffs were compensated for the materials, as innocent, just, or equitable. We conclude that an inequity resulted to plaintiffs from defendant's wrongful retention of the materials. Defendant's retention of the materials, coupled with defendant's failure to compensate

The present case is more similar to *Morris Pumps*. Plaintiffs allege that the Movants knew that Plaintiffs researched Eloise and created a script based on the same. After Plaintiffs and the Movants held talks, Plaintiffs allege that the Movants acquired the project and “pawn[ed] it off as their own.”

With respect to the “misleading act” requirement, the Court agrees that Plaintiffs’ Complaint lacks clarity on this important issue. And, although perhaps thin, the Court finds that the above allegation may qualify as a “misleading act” as contemplated by *Morris Pumps* and *Karaus*. And, as in any summary motion brought under (C)(8), the Court Rules require that the Court “shall give the parties an opportunity to amend their pleadings.” MCR 2.116(I)(5).

As a result, the Court finds that the Movants are entitled to summary disposition of Plaintiffs’ unjust enrichment claim **in its present form** under (C)(8). But Plaintiffs must be provided with the opportunity to amend their Complaint to adequately plead their claim for unjust enrichment, and they have ten days from the date of this order to so amend.

3. Fraudulent Misrepresentation (Count III)

Next, the Movants seek summary disposition of Plaintiffs’ fraud and intentional misrepresentation claim because “Plaintiffs failed to plead the essential elements of their fraud claim.”

In order for Plaintiffs to succeed on a claim of fraudulent misrepresentation, the Michigan Court of Appeals has held that they must 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

plaintiffs, resulted in the unjust enrichment of defendant at plaintiffs’ expense. *Morris Pumps*, 273 Mich App at 197 (internal citation omitted).

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 NW2d 813 (1976), citing *Candler v Heigho*, 208 Mich 115, 121; 175 NW 141 (1919).

“[T]he absence of any one of [these elements] is fatal to a recovery.” *Hi-Way Motor Co*, 398 Mich at 336.

Specifically, the Movants claim that Plaintiffs “fail to identify the actual material representation (and/or the individual that actually made it).”

Plaintiffs' Complaint, at paragraph 80, alleges:

The Nelson Defendants' (sic) mislead Plaintiffs' (sic) into acquiring a voluminous amount of work and effort that the Plaintiffs had already completed related to the Eloise project. The Nelson Defendants had meetings with Plaintiffs' (sic) in regards to the Eloise project, exchanged emails, and phone calls, and then pretended to be uninterested in the project. In reality, the Nelson Defendants schemed behind Plaintiffs' back, acquired all of Plaintiffs (sic) work, and pawned the Eloise project off as there (sic) own creation.

The Movants further argue that, at the time of their alleged “feigned interest,” “the Nelson Defendants had already acquired Plaintiffs' work product and colluded with the Von Scott Defendants.” (Compliant at paragraph 91). As a result, the Movants argue that Plaintiffs effectively admit that they cannot point to any misrepresentation made with the intention that Plaintiffs would rely on them.

Indeed, the Movants' acquisition of Plaintiffs' work product is the alleged damage suffered by Plaintiffs. And it is inconsistent for Plaintiffs to say that they relied to their detriment on “feigned interest” **after** the Movants already acquired Plaintiff's work product (in other words, after they were allegedly damaged). In their Response, Plaintiffs simply ignore this nuance.

Because Plaintiffs fail to provide argument or authority that they could have relied on material misrepresentations made **after** the Movants had already acquired Plaintiffs' work product, the Court finds that the Movants are entitled to summary disposition of Plaintiffs' Count III for fraud and intentional misrepresentation under (C)(8).

3. Tortious Interference (Counts IV & VI)

The Movants next seek dismissal of Plaintiffs' claims for tortious interference (Counts IV and VI). In order to establish tortious interference with a contract or business relationship, a plaintiff must prove:

[1] the existence of a valid business relationship or the expectation of such a relationship between the plaintiff and some third party, [2] knowledge of the relationship or expectation of the relationship by the defendant, and [3] an intentional interference causing termination of the relationship or expectation which results in [4] damages to the plaintiff. *Blazer Foods, Inc v Rest Props*, 259 Mich App 241, 255; 673 NW2d 805 (2003); citing *Meyer v Hubbell*, 117 Mich App 699; 324 NW2d 139 (1982).

Further, "[O]ne who alleges tortuous interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992).

Further, Michigan Courts have long held that "defendants motivated by legitimate personal and business reasons are shielded from liability against this cause of action [tortious interference with a contractual or business relationship]." *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772, 780; 421 NW2d 289 (1988); citing *Christner v Anderson, Nietzke & Co, PC*,

156 Mich App 330, 348-349; 401 NW2d 641 (1986).³

With respect to these claims, Plaintiffs allege that they had contracts with the Von Scotts, and the Von Scotts breached those contracts. Plaintiffs allege that the Von Scotts did so because the Movants “instigated” them to.

The Movants claim that they are entitled to summary disposition because Plaintiffs admit that “the Nelson Defendants were motivated by a desire to produce a film set around the Eloise Medical Complex.”

In response, Plaintiffs simply conclude that the Movants’ “feigned interest” was a per se wrongful act that supports the tortious interference claims. The Court disagrees.

Even accepting all well-pled factual allegations as true, Plaintiffs fail to allege “the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law.” Rather, Plaintiffs simply allege that the Movants wanted to make a film – which is a legitimate business interest.

For the foregoing reasons, the Court finds that each of Plaintiffs’ tortious interference claims are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” Therefore, the Court GRANTS the Movants’ motion as it relates to Plaintiff’s Counts IV and VI for tortious interference.

4. Promissory Estoppel (Count VII)

Next, the Movants seek summary disposition of Plaintiffs’ claim for promissory estoppel.

³ See also *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996) (“Where the defendant’s actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.”).

The elements of a promissory estoppel claim consist of (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008).

Further, “[t]he promise must be definite and clear, and the reliance on it must be reasonable.” *Zaremba Equip*, 280 Mich App at 41; citing *Ypsilanti Twp v Gen Motors Corp*, 201 Mich App 128, 134; 506 NW2d 556 (1993).

The Movants claim that Plaintiffs have failed to allege any promise to support such a claim. The Court agrees.

Even the most cursory review of Plaintiffs’ Complaint fails to reveal a single allegation of any promise made by the Movants to the Plaintiffs. And in their Response, Plaintiffs again fail to identify any promise.

For the foregoing reasons, the Court finds that Plaintiffs’ promissory estoppel claim is “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” Therefore, the Court GRANTS the Movants’ motion as it relates to Plaintiff’s Count VII for promissory estoppel.

5. Civil Conspiracy (Count VIII)

Next, the Movants argue that they are entitled to dismissal of Plaintiffs’ civil conspiracy claim because Plaintiffs have failed to plead any actionable underlying tort on which to base the same.

Indeed, Michigan law is well settled that “a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort.” *Advocacy Org for Patients &*

Providers v Auto Club Ins Ass'n, 257 Mich App 365, 384; 670 NW2d 569 (2003); quoting *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

Because the Court has dismissed each of Plaintiffs' separate tort claims against the Movants, the Court finds that Plaintiffs' civil conspiracy claim must also be dismissed as a matter of law. Therefore, the Court GRANTS the Movants' motion under (C)(8) as it relates to Plaintiff's Count VIII for civil conspiracy.

6. The "Release"

Finally, the Movants claim that they are entitled to summary disposition of Plaintiffs' entire Complaint under (C)(7) based on a purported "release" executed by Plaintiffs and the Von Scotts.

As Plaintiffs point out, however, the Movants are not parties to this agreement. And, as stated, "[i]t goes without saying that a contract cannot bind a nonparty." *AFSCME*, 292 Mich App at 80; quoting *Equal Employment Opportunity Comm*, 534 US 279.

The Movants offer no authority for the premise that the Court should permit them to enforce the terms of an agreement between other parties. As a result, the Movants' request on this basis is DENIED.

Summary

To summarize, the Movants' motion for summary disposition is GRANTED with respect to Plaintiffs' claims for: (1) Breach of Contract (Count I); (2) Tortious Interference (Counts IV & VI); (3) Promissory Estoppel (Count VII); and (4) Civil Conspiracy (Count VIII), and these claims are DISMISSED only as to the Movants.

With respect to Plaintiffs' Count II for Unjust Enrichment, however, while the Movants are entitled to summary disposition of this claim in its present form, the Court finds that Plaintiffs are permitted an opportunity to amend their Complaint to adequately state a claim for the same within 10 days under MCR 2.116(I)(5).

In all other respects, the Movants' motion for summary disposition is DENIED.

IT IS SO ORDERED.

October 29, 2014
Date

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