

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BASIL RAYIS,

Plaintiff,

v

Case No. 2014-142089-CK

Hon. Wendy Potts

ROBERT RAYIS,

Defendant.

OPINION AND ORDER RE: DEFENDANT'S MOTION FOR SUMMARY
DISPOSITION

At a session of Court
Held in Pontiac, Michigan

On

JUL 17 2015

Plaintiff Basil Rayis and Defendant Robert Rayis are brothers and former co-owners of Jack's Temple Hotel, Inc. In 1996 Defendant was convicted of federal drug charges and served 42 months in prison. Plaintiff claims in his complaint that before and during Defendant's incarceration Plaintiff paid various expenses for Defendant and his family, which Defendant repeatedly promised to repay but failed to repay in full. Plaintiff further alleges that in September 2013 Jack's was sold for \$3,177,118.75, and Plaintiff gave Defendant \$1,413,208 from the proceeds of the sale. Plaintiff claims that he distributed the funds based on Defendant's promise to use the proceeds to repay Plaintiff and pay his share of the tax liability from the business sale. However, Plaintiff claims that he ended up paying the full \$870,658 in taxes owed and to date Defendant has refused to repay him.

Plaintiff filed this action in July 2014 to collect on Defendant's alleged promise to pay half of the taxes and asserting several theories of liability: breach of contract (Count I), unjust

enrichment (Count II), fraud and misrepresentation (Count III), innocent misrepresentation (Count IV), and promissory estoppel (Count V). The case was originally filed in the general civil docket but was later reassigned to the business court docket.

Defendant moves for summary disposition under MCR 2.116(C)(7), which tests whether a claim is barred as a matter of law, and (C)(8), which tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). The parties waived oral argument and the Court is deciding the motion without a hearing. MCR 2.119(E)(3).

I. Statute of Frauds

Defendant first asserts that Plaintiff's Count I alleging breach of contract, Count II alleging unjust enrichment, and Count V alleging promissory estoppel are barred by the statute of frauds. MCL 566.132(1) requires certain agreements to be writing and signed by the party against whom enforcement is sought. Specific to this case, the statute requires a signed writing for "an agreement that, by its terms, is not to be performed within 1 year from the making of the agreement." MCL 566.132(1)(a). Defendant claims that the alleged promise to repay monies advanced while Defendant was incarcerated and the alleged promise to repay the \$450,000 taken from the corporation could not have been performed within a year. However, Plaintiff's complaint only seeks damages for Defendant's alleged failure to pay his portion of the taxes, which Plaintiff readily concedes in his response to this motion. Because Plaintiff admits that he is only seeking relief regarding Defendant's alleged promise to pay half of the tax liability, Defendant's arguments regarding repayment of other monies are moot.

Regarding the alleged promise to pay half of the taxes, Defendant asserts that this could not have been performed within one year because the tax liability remained undetermined for more than year after the sale of the property. However, this assertion is not supported by the

allegations in the pleadings. At no point in the complaint does Plaintiff allege when the tax liability was determined or when he paid the taxes. Moreover, neither party presented any evidence showing when these events occurred. Contrary to the parties' claim that the Court is limited to allegations in the pleadings, the Court can consider evidence outside the pleadings in deciding a (C)(7) motion. *Maiden, supra* at 119.

Moreover, even if the tax liability remained undetermined for months, this is not necessarily fatal to Plaintiff's claim. An oral promise to repay is barred by MCL 566.132(1)(a) only if it could not be performed within one year. *Drummev v Henry*, 115 Mich App 107, 111; 320 NW2d 309 (1982). "[I]f there is any possibility that an oral contract is capable of being completed within a year, it is not within the statute of frauds, even though it is clear that the parties may have intended and thought it probable that it would extend over a longer period and even though it does so extend." *Drummev, supra*. Thus, the key question is whether Defendant could have reimbursed Plaintiff within one year of making the promise. Based on the lack of allegations in the complaint or evidence as to exactly when Defendant's promise to pay was made, when the tax liability was determined, or when Plaintiff paid the taxes, the Court cannot decide this issue as a matter of law.

Defendant next asserts that the alleged oral promise to pay the company's tax liability is barred because it was a promise to answer for the debt of another. MCL 566.132(1)(b) requires a "special promise to answer for the debt, default, or misdoings of another person" to be in writing and signed by the party against whom enforcement is sought. Defendant asserts that the taxes were owed by the corporation, not by Plaintiff or Defendant, and Defendant was not a shareholder of the corporation at the time of the sale. However, Plaintiff contends that he paid the taxes, and Defendant's promise was to repay Plaintiff, not pay a liability owed by the

corporation. Because Plaintiff alleges that Defendant promised to pay Plaintiff, not the corporation or the taxing authority, § 132(1)(b) does not apply and the claim is not barred on this ground.

II. Statute of Limitations

Defendant also argues that Plaintiff's breach of contract, unjust enrichment, and promissory estoppel claims are barred in part by the six-year limitation period for contract claims. See MCL 600.5807(8). However, Defendant acknowledges that Plaintiff's claim that Defendant agreed to pay half of the taxes from the sale proceeds was filed within six years of the September 2013 sale, which is the earliest the claim could have accrued. As noted above, Defendant's arguments regarding repayment of other monies are moot. Because there is no dispute that Plaintiff is seeking only relief on the alleged promise to pay half of the taxes from the business sale, and this claim was filed within six years of accrual, the claim is timely and Defendant is not entitled to summary disposition on this ground.

III. Standing

Defendant next asserts that Plaintiff does not have standing to sue because he is not the real party in interest. An action must be brought by a "real party in interest," MCR 2.201(B), which is defined as "one who is vested with the right of action on a given claim." *Hofmann v Auto Club Ins Assn*, 211 Mich App 55, 95; 535 NW2d 529 (1995). Defendant appears to be asserting that the claim for payment of taxes belongs to and should have been brought by the corporation. However, Defendant misconstrues the allegations and claims in the complaint. Plaintiff is not suing to collect money Defendant owes the corporation; rather, Plaintiff claims that Defendant made to a promise to repay Plaintiff for half of the corporation's taxes that Plaintiff ultimately paid. Because Plaintiff is vested with the right to seek enforcement of

Defendant's alleged promise to Plaintiff, he is the real party in interest and summary disposition on this ground is denied.

IV. Failure to State Misrepresentation Claims

In his final arguments, Defendant claims that Plaintiff failed to state cognizable misrepresentation claims in Counts III and IV because they are based on a future promise and not a statement of past or existing fact. "Generally, a claim of fraud cannot be based on a promise of future conduct." *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 378; 689 NW2d 145 (2004). "An exception to this rule exists, however, if a promise is made in bad faith without the intention to perform it." *Derderian, supra*. Although Plaintiff contends that his claims fall within this exception, there is no allegation in the complaint that Defendant made the promises in bad faith or without the intention to perform. Because the facts and circumstances of a misrepresentation claim must be pleaded with particularity, MCR 2.112(B)(1), the Court agrees that Plaintiff failed to state misrepresentation claims. However, in lieu of dismissing the claims, the Court will allow Plaintiff an opportunity to amend his complaint to state cognizable misrepresentation claims. MCR 2.116(I)(5).

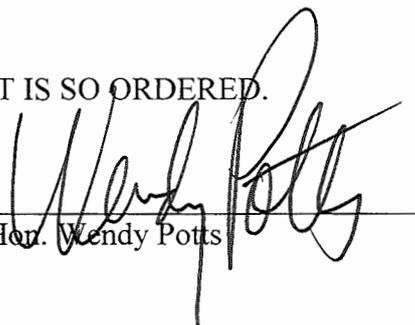
V. Conclusion

For all of these reasons, Defendant's motion for summary disposition is denied. Plaintiff may file an amended complaint within 14 days.

Dated:

JUL 17 2018

IT IS SO ORDERED.



Hon. Wendy Potts