

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

**HAT TRICK, LLC and
HAT TRICK II, LLC,
Plaintiffs,**

v.

**Case No. 14-142368-CZ
Hon. James M. Alexander**

**COLLIERS INTERNATIONAL DETROIT, LLC, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on three motions for summary disposition filed by Plaintiff, Defendant Colliers International, and Defendants Peter Jankowski.

Plaintiffs are two single-purpose entities formed by their sole shareholder, Leo Lee, for purposes of acquiring and owning commercial real estate. Colliers is a large real estate firm, with a presence in the metro Detroit area. Jankowski and Brian Schwartz were Colliers independent contractors and licensed commercial real estate salespersons.

Plaintiffs generally allege that Defendants concealed and misrepresented information regarding three Detroit-area properties (known as Oakman, Midland, and Woodrow Wilson) in order to induce Plaintiffs to purchase the same. As a result, Plaintiffs claim that they were damaged “by purchasing the . . . properties for more money than what the properties were actually worth.”

Plaintiffs filed its Second Amended Complaint on claims of: (1) fraudulent misrepresentation, (2) negligent misrepresentation, (3) silent fraud, (4) breach of fiduciary duty, (5) conversion, (6) embezzlement, (7) breach of contract, (8) unjust enrichment, and (9) conspiracy.

Plaintiff and Colliers seek summary disposition under MCR 2.116(C)(10), which tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). In response to Plaintiffs' motion, Jankowski seeks summary of Plaintiffs' Complaint under (I)(2).

And Jankowski also seeks summary disposition of Colliers' Crossclaim under MCR 2.116(C)(7), which tests whether a claim is barred, among other grounds, by an agreement to arbitrate. *Maiden*, 461 Mich at 119.

I. Plaintiffs' Motion – Agency

Plaintiffs first move for partial summary disposition seeking a ruling that, as a matter of law, Colliers is “vicariously responsible for any and all liability assessed against defendants Brian Schwartz and/or Peter Jankowski arising out of the plaintiffs' purchase of the properties described in this action.”

And Colliers response to said motion mirrors the arguments made in its own, substantive motion for summary disposition such that it makes sense to address both at the same time.

In their motion, Plaintiffs claim that Jankowski and Schwartz were Colliers agents – Jankowski, Colliers' Vice President and person in charge of Colliers' Detroit office, and Schwartz, a Colliers “senior associate.”

Plaintiffs claim that Lee previously invested in real estate in California before relocating to the Detroit area. In August 2013, Plaintiffs claim that Lee saw Jankowski's name on a Colliers sign on a commercial property in Royal Oak. Lee then called Jankowski to inquire about purchasing properties.

Plaintiffs claim that Lee met with Jankowski and Schwartz at Colliers' Detroit office and emailed both at their colliers.com email addresses. Although Plaintiffs admit that the parties never entered any written agreement for Jankowski and Schwartz to serve as Lee's buyers' broker, Plaintiffs claim that Jankowski and Schwartz acted as if they were Lee's broker.

In this alleged role, Plaintiffs claim that Jankowski and Schwartz presented many potential real estate investment deals, drove him past many properties, and identified many properties outside of Colliers' listings for potential purchase.

Plaintiffs claim that Jankowski and Schwartz used Colliers' subscription to CoStar, a service that lists commercial properties for sale, to help identifying potential investment properties.

Lee ultimately made offers to purchase at least eight properties identified by Jankowski and Schwartz. For each of these properties, Plaintiffs claim that (1) all properties were identified solely by Jankowski and Schwartz and (2) none of these properties were listed by Colliers, Jankowski, or Schwartz. In other words, Plaintiffs claim that Jankowski and Schwartz cannot claim that they were sellers' brokers on the properties.

Generally, Plaintiffs claim that Jankowski and Schwartz made several false statements in order to induce Lee to purchase the properties. These statements include: (1) there were other bidders who would purchase if Lee didn't act immediately; (2) neighboring property owners

would purchase the property at a profit; and (3) false market rent values and capitalization rates to justify the purchase price.

Post-closing, Plaintiffs claim that Jankowski and Schwartz convinced Lee to hire them as property or project managers – despite having no experience doing such.

In their motion for partial summary disposition, Plaintiffs argue that Jankowski and Schwartz acted as agents for Colliers, such that their actions should be necessarily imputed to Colliers. In support, Plaintiffs cite *St Clair Intermediate Sch Dist v Intermediate Educ Ass'n*, 458 Mich 540, 556-557; 581 NW2d 707 (1998) for the proposition that: “in determining ‘[w]hether an agency has been created,’ we consider ‘the relations of the parties as they in fact exist under their agreements or acts’ and note that in its broadest sense agency ‘includes every relation in which one person acts for or represents another by his authority.’” *St Clair Intermediate Sch Dist*, 458 Mich at 557, quoting *Saums v. Parfet*, 270 Mich 165, 170-171, 258 NW 235 (1935).

But Plaintiffs ignore the prior paragraph of *St Clair Intermediate*, which provides: ““When there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes a question of fact....”” *St Clair Intermediate Sch Dist v Intermediate Educ Ass'n*, 458 Mich 540, 556-557; 581 NW2d 707 (1998); quoting *Miskiewicz v Smolenski*, 249 Mich 63, 70; 227 NW 789 (1929).

And in this case, Colliers so disputes. In support of its argument, Colliers correctly claims that Plaintiffs can identify no written broker agreement between Lee (or Plaintiffs) and it. Colliers also argues that: (1) Plaintiffs never paid it any money (instead dealing directly with Jankowski and Schwartz) and (2) the subject purchases were described as “joint ventures” between Plaintiffs and Jankowski and Schwartz.

In any event, agency in this case is a question of fact that precludes summary disposition – particularly because **both** parties’ submissions contain evidentiary support for their assertions. For this reason, Plaintiffs’ motion for partial summary disposition is DENIED.¹

II. Defendant Colliers’ Motion / Jankowski’s (I)(2) Motion

Both Colliers’ motion and Jankowski’s (I)(2) motion address the substance of Plaintiffs’ alleged claims. As such, it makes sense to address these motions together.

Defendant Colliers argues that it is entitled to summary disposition because: (1) Plaintiffs cannot establish that they reasonably relied on Jankowski’s and Schwartz’s representations when deciding to purchase the property; (2) Plaintiffs did not mitigate their damages; and (3) if successful on these arguments, Plaintiffs’ civil conspiracy claim must also be dismissed. Jankowski also moves for summary disposition under (I)(2) for similar reasons.

A. The alleged misrepresentations

Jankowski first argues that his and Schwartz’s oral statements amounted to nothing more than inactionable “mere puffing.” Jankowski also argues that the present case is substantially similar to a prior case decided by the Court – *Dasch, Inc, et al v. Signature Associates* (Docket No. 12-126590-NZ), and as such, this Court should rule as it did in *Dasch*.

In *Dasch*, out-of-town buyer plaintiffs sought investment opportunities in the metro Detroit area. In their search, *Dasch*’s Director of Acquisitions contacted a real estate broker who worked at Signature Associates. The broker eventually presented the subject sale-leaseback opportunity to *Dasch*.

¹ Colliers also raises the issue of the reasonableness of Plaintiffs’ reliance in its Response to Plaintiff’s motion for partial summary disposition. But Colliers also raises the same issue in its own Motion and will be addressed there.

Ultimately, Dasch purchased certain property, and shortly thereafter, the sole leaseback tenant went bankrupt – causing Dasch to lose considerable money when it could not find reasonable replacement tenants at anywhere near the same lease rates. Dasch then sued on claims that Signature fraudulently and negligently misrepresented the value of the properties and the market lease rates.

The Court conducted a bench trial and held that the majority of alleged misrepresentations were inactionable statements of opinion. The Court of Appeals affirmed the Court's decision. (Docket No. 321147).

Jankowski now argues that, in this case, the majority of the alleged representations are also inactionable statements of opinion, quoting the Court's reasoning in *Dasch*:

Defendants argued that, under Michigan law, a plaintiff cannot succeed on a misrepresentation claim based on opinion.

Indeed, it is well established that “[m]ere expressions of matters of opinion, however strongly or positively made, though they are false, are no fraud, because, as is said in one case, these are matters in respect to which many men will be of many minds, and judgments are often governed by whim and caprice.” *Kulesza v Wyhowski*, 213 Mich 189, 193; 182 NW 53 (1921), quoting Cooley on Torts, p. 483.

Additionally, “[a]n action for fraud may not be predicated upon the expression of an opinion or salesmen's talk in promoting a sale, referred to as puffing.” *Van Tassel v McDonald Corp*, 159 Mich App 745, 750; 407 NW2d 6 (1987); citing *Windham v Morris*, 370 Mich 188; 121 NW2d 479 (1963); *Hayes Construction Co v Silverthorn*, 343 Mich 421; 72 NW2d 190 (1955); *Graham v Myers*, 333 Mich 111; 52 NW2d 621 (1952).

Further, “[r]epresentations of value are usually regarded as matters of opinion.” *Sutton v Benjamin*, 231 Mich 153, 155; 203 NW 667 (1925). “Although statements of value, when the purchaser has had no opportunity to examine the property, have been held to be statements of fact.” *Sutton*, 231 Mich 155; citing *Pinch v Hotaling*, 142 Mich 521; 106 NW 69 (1905).

“Representations as to property value are mere expressions of opinion, especially where plaintiff can inspect the property before purchasing it.” *Kamalath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 555; 487 NW2d

499 (1992), citing *Sutton v Benjamin*, 231 Mich 153, 155; 203 NW 667 (1925); and *Cole Lakes, Inc v Linder*, 99 Mich App 496, 505; 297 NW2d 918 (1980).

Adding an interesting wrinkle to this case, the alleged misrepresentations were not directly about purchase price of these particular pieces of property. Instead, they concerned the market lease rates for the respective geographical areas. But these rates were critical to determining the value of the pieces of property in the valuation method used by Plaintiffs. In fact, Dailey described market rents as “the most important thing.” (Tr. Vol. I, 64:16-22). This is so because the income approach requires determining a market rent for a space then using that market rent in a formula to come up with the building’s worth. (Tr. Vol. IV, 62:4-13).²

In other words, market rates were the critical component for our Plaintiffs in determining a value for the buildings. As a result and for our purposes, the market rates were **the value figure** for the deal, and they represented (by definition) the potential future earnings of the buildings.³

Initially, the Court will note that there is one seemingly substantial difference between this case and *Dasch*. In *Dasch*, the plaintiff buyers **knew** that the defendant brokers represented the sellers in the deal. And in this case, Plaintiffs claim that Defendants were their buyers’ brokers. And, Plaintiffs claim, this alleged relationship creates a duty on Defendants’ part. But neither party spends much time addressing this issue.

² The income capitalization approach, by its very definition, is based on anticipated future earnings. In *Antisdale v Galesburg*, 420 Mich 265, 276-277 n 1; 362 NW2d 632 (1984), our Supreme Court noted the following description of the income approach:

“The income approach is based on the premise that there is a relation between the income a property can earn and its value. A large number of commercial properties are purchased and leased to tenants by the owner who does not get the advantages arising from his own occupancy of the property. Consequently, the future net income the property is capable of earning is the main benefit to the owner. For this reason the worth of the property to prospective purchasers is based largely upon its income. In addition to income earned annually during an ownership term, another important benefit is the net amount received from the sale of the property when ownership is terminated. The earning potential of the property at that time will directly affect its sale price. The net income earning capacity of the property now and at ownership termination is, therefore, an important gauge of its value. The income approach to value translates the estimated future income of a property into total present value by the use of various data and organized mathematical computations.” 2 State Tax Comm Assessor's Manual, Ch X, p 1.

³ Although not dispositive, the Court notes that our Supreme Court has also rejected fraud claims based on allegations of misrepresentation of future earning potential. See, e.g., *Burch v Stringham*, 210 Mich 48, 52; 177 NW 147 (1920); *Kulesza v Wyhowski*, 213 Mich 189, 192-193; 182 NW 53 (1921); and *Bourke v Checker Cab Mfg Corp*, 239 Mich 229; 214 NW 82 (1927).

In any event, Plaintiffs' Complaint alleges 11 misrepresentations about the three properties (Second Amended Complaint, at ¶ 25):

In direct response to . . . questions from Lee, Colliers, Jankowski and Schwartz represented to Lee:

- a. In writing, that rents for Woodrow Wilson were \$3.00-\$6.00 NNN and that these rents were consistent with the "market rate."
- b. In writing, that the rents for Midland were \$3.00-\$5.00 NNN and that these rents were consistent with the "market rate."
- c. In writing, that the capitalization rates for Woodrow Wilson were between 40.36% and 80.72%.
- d. In writing, that the capitalization rates for Midland were between 164% and 273%.
- e. Orally, prior to April 18, 2014, that the Woodrow Wilson property was worth in excess of \$500,000, vacant.
- f. Orally, prior to April 18, 2014 e-mail from Schwartz, that a comparable, but less desirable building to the Woodrow Wilson Building was listed for sale for \$500,000.
- g. Orally, prior to April 18, 2014, that the Woodrow Wilson Property, once leased, would be worth in excess of \$800,000.
- h. In an oral statement, regarding the Woodrow Wilson Property, that the seller for the Woodrow Wilson Property was requesting \$250,000 for the sale of that property.
- i. In an oral statement, regarding the Midland property, that the Midland property had a true cash value of \$180,000.
- j. In an oral statement regarding the Oakman property, that the seller was offering the property for sale for \$30,000, when in fact, Mr. Schwartz and Mr. Jankowski knew that the seller was willing to sell the Oakman property for \$5,000.
- k. Other statements (oral or written) that may further be identified or specified.

Plaintiff does not appear to identify any additional alleged misrepresentations in his motion or responses on summary.

Based on the above-cited law, Jankowski argues that many of these alleged misrepresentations are inactionable. The Court agrees. The alleged statements in ¶ 25 a., b., c., d., e., g., and i., all solely involve expressions of opinion or value that are inactionable in either fraudulent or negligent misrepresentation. As a result, these statements may not be the basis for a misrepresentation claim.

The remaining statements are not expressions of opinion or value, and can therefore be used as the basis for a misrepresentation claim. These representations are:

f. Orally, prior to April 18, 2014 e-mail from Schwartz, that a comparable, but less desirable building to the Woodrow Wilson Building was listed for sale for \$500,000.

h. In an oral statement, regarding the Woodrow Wilson Property, that the seller for the Woodrow Wilson Property was requesting \$250,000 for the sale of that property.

j. In an oral statement regarding the Oakman property, that the seller was offering the property for sale for \$30,000, when in fact, Mr. Schwartz and Mr. Jankowski knew that the seller was willing to sell the Oakman property for \$5,000.

Based on the foregoing, Jankowski's motion for summary on which alleged misrepresentations are actionable is GRANTED IN PART – but only to the extent outlined above.

B. Reasonable reliance?

On the remaining alleged representations (¶ 25 f., h., and j.), Colliers and Jankowski argue that Plaintiffs' reliance was unreasonable. Indeed, in order to establish a fraudulent misrepresentation claim, a plaintiff "must . . . show that any reliance on defendant's representations was reasonable." *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d

167 (2005), citing *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999); *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994).

But the reasonableness of Plaintiffs' reliance is appropriately a question of fact. This is particularly true when Plaintiffs claim that the alleged misrepresentations come from their buyers' broker (and not the seller or seller's agent). Summary on this issue is DENIED.⁴

C. Do Defendants owe Plaintiffs any duty?

As stated, the parties spend minimal time on whether Defendants owe Plaintiffs any duty under Michigan law – particularly considering Plaintiffs' allegation that Defendants were their buyers' broker (which may implicate Colliers depending on the trier-of-fact's determination on agency).

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 reason, the Court finds it inappropriate to rule as a matter of law on this issue at this time.

D. Mitigation

Next, Colliers argues that Plaintiffs did not mitigate their damages. But the Court rejects this argument because the reasonableness of mitigation efforts are properly questions of fact for the trier of fact. *Device Trading, Ltd v Viking Corp*, 105 Mich App 517, 520-521; 307 NW2d

⁴ The Court also rejects Colliers' argument that any alleged misrepresentations were not made to the Plaintiff entities because they did not exist at the time the alleged statements were made. As Plaintiff argues, Michigan recognizes the doctrine of imputed knowledge, which provides that a corporation can rely on the knowledge of its officers or agents. *New Properties, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 134; 762 NW2d 178 (2009). Additionally, as provided later, Plaintiffs will be provided an opportunity to amend their Complaint.

362 (1981) and *Bak v Citizens Ins Co*, 199 Mich App 730, 739; 503 NW2d 94 (1993) (holding “[r]easonableness of mitigation is a question of fact”).

Both Colliers and Jankowski ask this Court to rule that Plaintiffs have taken absolutely no steps to mitigate their damages such that it can decide mitigation as a matter of law under *Braverman v Granger*, 303 Mich App 587, 590; 844 NW2d 485 (2014). But Plaintiffs present some evidence that they did the best they could under the circumstances. As a result, summary on this issue is DENIED. Mitigation in this case is appropriately a question of fact.

E. Conversion, Embezzlement, Unjust Enrichment, and Breach of Contract

Jankowski next presents a **factual** argument as to why Plaintiffs’ conversion, embezzlement, unjust enrichment, and breach of contract claims should be dismissed. But Jankowski’s citation to a single case on speculative damages does not convince the Court that these claims should be dismissed as a matter of law. As a result, summary on these claims is DENIED.

F. Civil Conspiracy

Finally, Colliers and Jankowski argue that Plaintiffs’ civil conspiracy claim must fail because “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).

But Defendants' argument with respect to conspiracy is based on the assumption that the Court dismissed each of Plaintiffs' tort claims on summary. But this is not the case. As a result, the Court rejects Defendants' argument on this issue, and summary on the same is DENIED.

G. Supplemental Briefs / Amendment

Finally, Jankowski and Colliers argue, via supplemental briefs, that Plaintiffs committed a fraud on the Court because one of the subject properties was never actually owned by Plaintiffs – instead, it is owned by another Lee entity, L2 Investments.

In response, Plaintiffs claim that the alleged fraud regarding the ownership of one of the properties is simply an innocent error that is correctable with an Amended Complaint. The Court agrees. As in any summary motion brought under (C)(10), 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, Plaintiffs must be provided with the opportunity to amend their Complaint to identify the proper owner of the subject properties. Plaintiffs have 14 days to so amend. And Defendants have 7 days thereafter to respond.

III. Defendant Jankowski's Motion

Finally, Defendant Jankowski moves for summary disposition of Colliers' Crossclaims against him based on an agreement to arbitrate.

In Michigan, “a ‘question of arbitrability’ is an issue for judicial determination unless the parties unequivocally indicate otherwise.” *Gregory J Schwartz & Co v Fagan*, 255 Mich App 229, 232 (2003), citing *Howsam v Dean Witter Reynolds, Inc*, 537 US 79; 123 S Ct 588; 154 L Ed 2d 491 (2002). Further, MCL 691.1686(1) provides that “[a]n agreement contained in a

record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.”

Further, “[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.” MCL 691.1686(2). Michigan courts have consistently reasoned that “our Legislature and our courts have strongly endorsed arbitration as an inexpensive and expeditious alternative to litigation.” *Rembert v Ryan’s Family Steak Houses, Inc*, 235 Mich App 118,133; 596 NW2d 208 (1999). As a result, “any doubts about the arbitrability of an issue should be resolved in favor of arbitration.” *DeCaminada v Coopers & Lybrand*, 232 Mich App 492, 499; 591 NW2d 364 (1998).

Jankowski’s motion is based on a provision found in his Independent Contractor Agreement with Colliers, which provides (emphasis added):

Dispute Resolution and Arbitration. Any disputes between you and Company, including but not limited to disputes regarding this Agreement or the breach thereof, shall be resolved exclusively by arbitration in Oakland County, State of Michigan. The parties agree to abide by all decisions and awards rendered in such proceedings. Such decisions and awards rendered by the arbitrator shall be final and conclusive and may be entered in any court having jurisdiction thereof as a basis of judgment and of the issuance of execution for its collection. All such controversies, claims or disputes shall be settled in this manner in lieu of any action at law or equity; provided, however, that nothing in this Section shall be construed as precluding Company from bringing an action in court for injunctive relief or other equitable relief, in which case venue shall be had in Oakland County, State of Michigan.

In response to Jankowski’s motion, Colliers’ sole argument is that Jankowski waived his right to arbitrate by participating in the present lawsuit without moving for dismissal of its Crossclaims until now.

In support of its argument, Colliers cites *North West Michigan Const, Inc v Stroud*, 185 Mich App 649, 651; 462 NW2d 804, 805 (1990) for the proposition that “[a] party’s right to

assert arbitration as a defense may be waived by certain conduct, and each case is to be decided on the basis of its particular facts.”

Additionally, “[a] waiver may be express or it may be implied when a party actively participates in a litigation or acts in a manner inconsistent with its right to proceed to arbitration.” *Joba Const Co, Inc v Monroe Co Drain Com’r*, 150 Mich App 173, 178; 388 NW2d 251 (1986).

In *North West*, the plaintiff construction company sued two homeowners for monies due under a construction contract containing a broad arbitration provision. The homeowners answered the Complaint on June 17, 1988, and pled the affirmative defense of an agreement to arbitrate. But the homeowners did not file a motion to dismiss based on the arbitration provision until February 27, 1989 (over eight months later). The trial court denied the motion to dismiss because, after the initial pleadings, “neither party took any action to invoke the arbitration provisions.” *North West*, 185 Mich App at 651. Instead, “[b]oth parties . . . actively participated in the litigation through discovery, pre-trial and mediation.” *Id.*

The *North West* Court reasoned:

In *Hendrickson, supra*, p. 300, 404 N.W.2d 728, this Court, quoting from 98 A.L.R.3d 767, § 2, pp 771-772, stated:

Various forms of participation by a defendant in an action have been considered by the courts in determining whether there has been a waiver of the defendant’s right to compel arbitration or to rely on arbitration as a defense to the action. It has been generally held or recognized that by such conduct as defending the action or proceeding with the trial, a defendant waives the right to arbitration of the dispute involved. A waiver of the right to arbitration [sic] on the part of a defendant of a dispute sought to be litigated in court has also been found from particular acts of participation by a defendant, each act being considered independently as constituting a waiver. Thus, a defendant has been held to have waived the right to arbitration of the dispute involved by filing an answer without properly demanding or asserting the

right to arbitration, by filing an answer containing a counterclaim against the plaintiff without demanding arbitration or by filing a counterclaim which was considered inconsistent with a previous demand for arbitration, by filing a third-party complaint or cross-claim, or by taking various other steps, including filing a notice of readiness for trial, filing a motion for summary judgment, or utilizing judicial discovery procedures. *North West*, 185 Mich App at 651-652 (error in original).

Based on the foregoing, the *North West* Court affirmed the trial court's denial of the homeowners' motion to dismiss, finding "the trial court did not err in finding that defendants, by their active participation in the proceedings, had waived their right to assert arbitration as a ground for dismissal." *Id.* at 652.

Colliers argues that Jankowski waived his right to arbitrate by: (1) failing to seek enforcement of the arbitration provision for over one year; (2) participating in depositions; (3) issuing subpoenas; and (4) serving Colliers with discovery requests.

In this case, Colliers filed its Crossclaim against Jankowski on January 27, 2015. Jankowski filed his Answer to said Crossclaim on May 1, 2015 – asserting the affirmative defense of an agreement to arbitrate.

Jankowski does not dispute that he waited until November 4, 2015 (just over six months) to file his motion to dismiss based on the arbitration clause. And Jankowski similarly does not dispute participating in discovery.

Rather, Jankowski argues that "virtually all" discovery that he conducted "focused on gathering evidence in defense of Plaintiffs' action, not the crossclaims." In other words, regardless of the Counterclaims, Jankowski was a named Defendant in Plaintiffs' original Complaint. As a result, he had a place in this lawsuit and needed discovery in support of his defense to Plaintiffs' action.

In support of this argument, Jankowski cites *SCA Services, Inc v Gen Mill Supply Co*, 129 Mich App 224, 231-32; 341 NW2d 480 (1983) for the proposition that conducting discovery necessary to a defense of another party's claims does not constitute waiver of an arbitration clause. Indeed, the *SCA Services* case appears to stand for the notion that, in such situations, the proper focus is on **the nature** of the discovery conducted – and not the fact that discovery was conducted.

As a result, if Jankowski sought discovery from Colliers in support of its defense to Plaintiffs' claims, then there is no waiver. But if Jankowski sought discovery from Colliers in support of its defense to Colliers' Crossclaim, then he may have waived his right to arbitration. But the mere fact that some information would be relevant to the defense of both claims is not dispositive. *SCA Services, Inc*, 129 Mich App at 231 (reasoning "The mere fact that during discovery certain facts about the contracts now in dispute were discussed does not constitute a waiver by General Mill.").

Colliers cites to a single, written discovery request from Jankowski in support of its motion. In it, Jankowski makes three requests for production:

1. Please produce the entire employee file for Peter Jankowski.
2. Please produce an exact copy of all errors and omissions insurance or other insurance policies of all kind involving Peter Jankowski.
3. Please produce all emails, correspondence, text messages or any other written document involving or pertaining to Peter Jankowski, Brian Schwartz or present litigation since September 1, 2013.

As stated, Plaintiffs named Jankowski as a Defendant in each of its nine counts – essentially claiming that Jankowski made fraudulent misstatements or actively concealed information that caused Plaintiffs to purchase property for far more than it was worth.

Colliers' counterclaims against Jankowski are based in breach of contract, indemnification, and conspiracy (with co-crossclaim defendant Schwartz) and seek damages on the claim that Jankowski engaged in business activities outside of his scope of work at Colliers, which led to Plaintiffs' lawsuit – despite Colliers' lack of involvement in the subject transactions.

Although perhaps a close call, the Court finds that each of Jankowski's discovery requests to Colliers are at least arguably relevant to defend against Plaintiffs' claims. Although some of this information may also be used to defend Colliers' Counterclaim, the Court is convinced that, under *SCA Services*, the mere fact that some information is relevant to both is not dispositive. Further, Jankowski asserted arbitration in his first responsive pleading and moved to dismiss based on the same approximately six months after said pleading. Based on the foregoing, the Court finds that Jankowski did not waive his right to enforce the arbitration provision.

In reaching this decision, the Court is also mindful of the overriding legal principles when deciding whether a claim appropriately belongs in arbitration – that our courts have “strongly endorsed arbitration” and “any doubts about the arbitrability of an issue should be resolved in favor of arbitration.” *Rembert*, 235 Mich App at 133; *DeCaminada*, 232 Mich App at 499.

Each of Colliers crossclaims against Jankowski arise out of the Independent Contractor Agreement and are, therefore, subject to its broad arbitration provision.

For all of the foregoing reasons, the Court GRANTS Jankowski's motion to dismiss Colliers' Crossclaim based on the arbitration provision found in the Independent Contractor Agreement.

III. Summary/Conclusion

To summarize, Plaintiffs' motion for partial summary disposition is DENIED.

Colliers motion is also DENIED.

Jankowski's motion with respect to which statements may serve as the basis for Plaintiffs' misrepresentation claims is GRANTED IN PART as outlined above. In all other respects, Jankowski's motion is DENIED.

Plaintiffs have 14 days to amend their Complaint to properly name the parties that own the properties at issue.

Defendant Jankowski's motion for summary disposition of Colliers' Crossclaim against him is GRANTED, and said Crossclaim against Jankowski must be submitted to arbitration.

IT IS SO ORDERED.

February 17, 2016
Date

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