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

THE HAYMAN COMPANY,
Plaintiff/Counter-Defendant,

v. **Case No. 14-142515-CZ**
Hon. James M. Alexander

NEAL HIGGINS WALTERS and
DOLPHIN PROPERTY ADVISORS, LLC,
Defendants/Counter-Plaintiffs.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition. These motions largely center on the interpretation of a May 28, 1990 letter that represents Defendant Neal Higgins' employment agreement with Plaintiff. Relevant to the current motions, Plaintiff is in the business of managing properties that it or third parties own.

Under the Employment Agreement, Defendant Higgins was to be paid a $50,000 base salary, plus 15% of certain fees while employed with Plaintiff. Higgins worked for Plaintiff from 1990 until 2007. Under the Agreement, however, the amounts due under paragraphs 3 and 4 survived Higgins' employment term. As a result, the interpretation of these provisions remains relevant.

Paragraph 3 of the Agreement provides: "Any Management Fees generated from managing a clients' property in which [Defendant is] credited with bringing the contract to [Plaintiff], [Defendant] shall receive a 10% of the fees collected."

And Paragraph 4 of the Agreement provides "[Defendant] shall also receive a 15% of any

partnership interest benefit The Hayman Company or related party owns in a newly acquired property for the company's portfolio. This benefit may include participation in the property's annual cash flow and/or residual value upon the sale or refinancing."

The parties mainly disagree about the meaning paragraph 3 of the Agreement. Plaintiff claims that, under said provision, "Defendants are only entitled to management fees generated by [Plaintiff] for managing **a client's property**." (emphasis added) And as a result, "Plaintiff seeks a ruling that under the contract, Defendants are not entitled to a share of fees generated by [Plaintiff] from the management of properties it acquired."

Defendants, on the other hand, seek a ruling that Plaintiff is obligated to "pay[] Higgins 10% of any management fees that [Plaintiff] has collected **from any company in its portfolio** that Higgins is credited with bringing to the Company" under paragraph 3 (emphasis added).

In addition to the dispute over paragraph 3, Defendants seek additional summary rulings. First, Defendants seek a ruling that Plaintiff is obligated to "continue paying Higgins 15% of its share of any 'partnership interest benefit' (promote) fee." Second, Defendants seek a dismissal of Plaintiff's Complaint because (1) it is barred by a statute of limitations and laches, (2) Plaintiff's conversion claims fail as a matter of law, and (3) there are otherwise no questions of fact in dispute.

As a result, the parties now seek 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). In response to Plaintiff's original motion for partial summary, Defendants seek summary under (I)(2).

Both parties rely on written contracts to support their positions. Michigan law is well-established that "a court must construe and apply unambiguous contract provisions as written."

Rory v Cont'l Ins Co, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

As often repeated by our Supreme Court, "courts must … give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Knight Enterprises v Fairlane Car Wash*, 482 Mich 1006; 756 NW2d 88 (2008); quoting *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

With respect to the interpretation of paragraph 3, the Court finds the same ambiguous. This is so because it is not apparent by the agreement's plain terms what is meant by "clients' property." This is an undefined term.

Higgins claims that the term had broad meaning to and within her employment with Plaintiff. Plaintiff, on the other hand, argues that "clients' property" really means "third-party property."

And both parties spend the overwhelming majority of their briefing presenting extrinsic evidence of the meaning of said term. This, despite the argument inherent in their respective motions in the first place – that the agreement is unambiguous. Extrinsic evidence, however, is only admissible if a contract is ambiguous. *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). And if the contract is ambiguous, then summary disposition over its meaning is wholly inappropriate.

In other words, both parties solely present extrinsic evidence in support of their arguments that the agreement is unambiguous – despite the fact that said evidence cannot be considered unless the agreement is deemed ambiguous.

Plaintiff, for example, relies heavily on a crossed-out provision (former Paragraph 2(B)) that remains readable in the Agreement. But this stricken provision is extrinsic evidence by its nature. It is not a part of the Agreement any more than any other provision that was the subject of negotiation, yet not included in the final Agreement.

Plaintiff also relies on deposition testimony, affidavits, and an expert opinion to support its interpretation. Defendants, on the other hand, cite to deposition testimony of multiple people, letters, affidavits, and business notes in support of their interpretation of the Agreement.

In any event, Paragraph 3 is ambiguous, which precludes summary disposition in either party's favor. The meaning of said provision rests with the trier of fact.[1]

Defendants next argue that Plaintiff's Conversion (Count I), Breach of Contract (Count II), and Recover of Payment/Assumpit (Count III) claims are barred by a statute of limitations. In support, Defendants cite to MCL 600.5807(8), which provides that a plaintiff must bring an action within "6 years for all other actions to recover damages or sums due for breach of contract." And the "period of limitations in contract actions typically begins to run on the date

---

1 Although not raised by the parties and certainly not dispositive for purposes of this motion, the Court also notes that had it found the clause unambiguous and as Plaintiff suggests, the parties' course of dealing establishes that Defendants' interpretation was the original intent and has been followed until now. In such a case, the Court could properly examine extrinsic evidence to determine if the contract is susceptible to more than one interpretation. In other words, a latent ambiguity may exist. On this issue, our Supreme Court has reasoned:

> A latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the necessity for interpretation or a choice among two or more possible meanings. To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if in fact that evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation. Then, if a latent ambiguity is found to exist, a court must examine the extrinsic evidence again to ascertain the meaning of the contract language at issue. *Shay v Aldrich*, 487 Mich 648, 668; 790 NW2d 629 (2010) (internal citations and quotations omitted).

the contract is breached." *Diversified Financial Systems, Inc v Schanhals*, 203 Mich App 589; 513 NW2d 210 (1994).

Defendants then claim that the alleged underlying breach is the date on which Defendant first accepted payment of unentitled management fees – sometime around 1990. The Court disagrees.

For purposes of an installment contract, such as this, MCL 600.5836 applies and provides that "[t]he claims on an installment contract accrue as each installment falls due." As a result, each alleged, wrongful acceptance of fees starts the clock. Plaintiff, therefore, is limited to pursuing claims for such alleged wrongful takings going back six years preceding the filing of the Complaint.[2]

Defendants next seek summary disposition of Plaintiff's Conversion claim (Count I). Michigan law establishes that "[t]he tort of conversion is 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App. 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

Defendants argue that they are entitled to summary of this claim because it is undisputed that Higgins did not believe that she was converting Plaintiff's property. But there is a bigger problem.

Although not raised by the parties, Michigan does not recognize a claim for conversion of money (as alleged by Plaintiff) except in very limited circumstances. "To support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care." *Head*, 234 Mich App at 111. Here, Plaintiff has failed to allege that

2 The Court also rejects Defendants' laches argument.

Defendants had the obligation to return that "specific" and "precise" money. *Anderson v Reeve*, 352 Mich 65, 70; 88 NW2d 549 (1958); and *Head*, 234 Mich App at 111-112.

Our appellate courts have further reasoned:

> Statutory conversion consists of knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property. *Head*, supra; MCL 600.2919a. This Court has ruled that simply retaining money does not amount to "buying, receiving or aiding in the concealment of stolen, embezzled or converted property." *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 592-593; 683 NW2d 233 (2004); quoting *Hovanesian v Nam*, 213 Mich App 231, 237; 539 NW2d 557 (1995).

For the foregoing reasons, because Plaintiff solely alleges the conversion of money, its Conversion claim fails as a matter of law.

Conclusion

For all of the foregoing reasons and considering all evidence in the light most favorable to the nonmovant, the Court finds that there are no material questions of fact in dispute, and Defendants are entitled to judgment as a matter of law regarding Plaintiff's Count I for Conversion. As a result, Defendants' motion for summary disposition is GRANTED under (C)(10), and said claim is DISMISSED.

Plaintiff is also limited to pursuing its claims on alleged overpayments under the Employment Agreement to those dating back six years from the filing of the Complaint.

In all other respects, both parties' motions are DENIED.

IT IS SO ORDERED.

September 2, 2015 /s/ James M. Alexander
Date Hon. James M. Alexander, Circuit Court Judge