

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

**SARAH POPE, DPM,
Plaintiff/Counter-Defendant,**

v.

**Case No. 14-142884-CK
Hon. James M. Alexander**

**MID-OAKLAND FOOT CARE, PLLC
and SHAY ROSENFELD, DPM,
Defendants/Counter-Plaintiff (Mid-Oakland).**

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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff’s motion for partial summary disposition and Defendants’ cross motion for partial summary disposition. Plaintiff is a podiatrist and former employee of Defendant Mid-Oakland Foot Care. Defendant Rosenfeld is the sole member of Mid-Oakland.

In July 2012, Plaintiff entered into an Employment Agreement with Mid-Oakland, whereby Plaintiff would be paid a set weekly salary, plus a “production bonus” at an increasing percentage based on services performed by Plaintiff. In April 2014, Plaintiff provided notice of termination of the Agreement – based on allegations, in part, that she was not paid bonuses, not provided with insurance, and paychecks were returned for insufficient funds.

Plaintiff then sued on claims of: (1) breach of contract, (2) unjust enrichment, (3) tortious interference with a business expectancy, (4) fraud, (5) innocent misrepresentation, (6) defamation, and (7) intentional infliction of emotional distress.

Defendant Mid-Oakland responded by filing a Counter-Complaint, generally alleging that

Plaintiff failed to live up to her obligations under the Employment Agreement, including (in part) that she failed to work full-time hours, failed to properly maintain patient medical records, and maintained unsure, duplicative private patient information.

Specifically, Mid-Oakland's Counter-Complaint alleges claims of: (1) breach of express contract, (2) breach of implied contract, (3) breach of fiduciary duty, (4) tortious interference with contractual and business relationship; (5) unjust enrichment; and (6) conversion.

Both parties now move for partial summary disposition under MCR 2.116(C)(8), which tests the legal sufficiency of the complaint. In 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; 483 NW2d 26 (1992). A motion under this subrule may be granted only where the claims 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(G)(5).

In her motion, Plaintiff argues that she is entitled to summary disposition of Mid-Oakland's counter-claims for breach of implied contract, breach of fiduciary duty, tortious interference with contractual and business relationship; and unjust enrichment because Mid-Oakland failed to state a valid claim for each.

In their motion, Defendants argue that, should the Court dismiss Mid-Oakland's implied contract claims, it should also dismiss the same claims alleged by Plaintiff. Defendants also argue that Plaintiff's fraudulent and innocent misrepresentation claims fail because they relate to alleged misrepresentations of future performance. Finally, Defendants seek dismissal of Plaintiff's express and implied breach of contract claims as to Defendant Rosenfeld because he was not a party to any Agreement.

The Court will note that, in her Reply Brief, Plaintiff claims that she is willing to stipulate to dismiss her breach of implied contract claim without prejudice, and at oral argument on the present motions, Defendants stipulated to dismissal of Plaintiff's breach of contract claim.

Plaintiff also concedes that she did not name Defendant Rosenfeld as a Defendant to her breach of express contract claim, therefore, there is no ground on which summary may be granted. Based on Plaintiff's concession, the Court finds that Defendant Rosenfeld is not subject to Plaintiff's breach of contract claim.

1. Mid-Oakland's Breach of Implied Contract and Unjust Enrichment Claims

Plaintiff first argues that she is entitled to summary disposition of Mid-Oakland's breach of implied contract and unjust enrichment claims because there is an express contract (the Employment Agreement) covering the same subject matter.

Indeed, it is well settled that equitable claims (such as these) cannot be maintained when there is an express contract covering the disputed subject matter. See, e.g., *Campbell v Troy*, 42 Mich App 534, 537; 202 NW2d 547 (1972); *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992); and *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

In response, Defendants argue that they are simply pleading in the alternative under MCR 2.111(A)(2)(b) because the Court may ultimately rule that the Agreement "may not be valid, parts of it may not be valid, or certain aspects of the parties' conduct may not fall under the Employment Agreement at all."

But, as Plaintiff points out, Defendants admit the parties executed the written Employment Agreement, and this Agreement contains a merger clause that "nullifies all antecedent claims."

UAW-GM Human Resource Center v KSL Recreation Corp, 228 Mich App 486, 502; 579 NW2d 411 (1998).¹

A review of Mid-Oakland's Counter-Complaint reveals that its Breach of Implied Contract and Unjust Enrichment claims are based wholly on allegations that Plaintiff did not fully perform her duties and obligations under the parties' written contract. As a result, said claims are appropriately dismissed.

2. Mid-Oakland's Breach of Fiduciary Duty Claim.

Next, Plaintiff argues that she is entitled to summary disposition of Mid-Oakland's breach of fiduciary duty claim.

Generally, "[a] fiduciary relationship arises when one reposes faith, confidence, and trust in another's judgment and advice. Where a confidence has been betrayed by the party in the position of influence, this betrayal is actionable, and the origin of the confidence is immaterial." *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 515; 309 NW2d 645 (1981).

Plaintiff argues that, in this straightforward employer-employee relationship, such a claim cannot stand unless Mid-Oakland can establish the source of said duty and an acceptance of such duty by Plaintiff. And, Plaintiff argues, Defendants entirely failed to do so. The Court agrees.

While Defendants may wish to impose a fiduciary duty on Plaintiff, an employee subject to an Employment Agreement, they simply do not identify an appropriate basis for doing so. The

¹ Further, to the extent that Defendants base their implied contract claim on "an implied covenant of good faith and fair dealings," the Court rejects such reliance as contrary to Michigan law. *Fodale v Waste Mgmt of Mich, Inc*, 271 Mich App 11, 35; 718 NW2d 827 (2006).

Court also rejects Defendants' reliance on *Shwayder Chem Metallurgy Corp v Baum*, 45 Mich App 220; 206 NW2d 484 (1973).

Shwayder involved allegations that an accountant worked for a company that processed scrap tungsten carbide into tungsten-carbide grit. This involved a specialized and secret process that the accountant only learned as a result of his work for said company. The accountant also signed a confidentiality agreement.

Approximately one year later, the accountant quit and formed his own, competing company with the knowledge he gained at the plaintiff company. In these circumstances, the Court of Appeals agreed with the trial court that the accountant owed a fiduciary duty to the plaintiff company.

This case is easily distinguishable. Plaintiff is a doctor who was formerly employed by Mid-Oakland under the terms of an Employment Agreement. Mid-Oakland fails to identify the unique circumstances that warrant imposing a heightened duty on Plaintiff in order to support its breach of fiduciary duty claim. As a result, summary disposition of this claim is also appropriate.

3. Mid-Oakland's Tortious Interference Claims

Plaintiff next seeks dismissal of Mid-Oakland's claim for tortious interference. In order to establish tortious interference with a contract or business advantage, 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). 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.”).

Mid-Oakland alleges that Plaintiff tortuously interfered with its relationships with its patients and certain health insurance carriers. Moreover, Mid-Oakland alleges that Plaintiff violated applicable laws by removing and maintaining patient records from its offices after the termination of her employment.

On their face, Mid-Oakland’s allegations are sufficient to survive summary disposition. In fact, although not necessarily relevant to a (C)(8) motion, there are many questions on this claim that will ultimately depend on determinations made by the trier-of-fact.

4. Plaintiff's Fraudulent and Innocent Misrepresentation Claims.

Finally, Defendants seek summary disposition of Plaintiff's fraudulent and innocent misrepresentation claims.

To establish a claim of fraudulent misrepresentation, plaintiff was required to 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 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 N.W.2d 813 (1976), citing *Candler v Heigho*, 208 Mich. 115, 121; 175 N.W. 141 (1919).

Further, "an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute fraud." *Hi-Way Motor*, 398 Mich at 336.

Defendants seek summary of these claims for two reasons. First, Defendants argue that Plaintiff failed to plead such claims with sufficient particularity. Second, Defendants argue that said claims impermissibly relate to future conduct.

Initially, the Court rejects Defendants' argument that Plaintiff failed to plead with sufficient particularity. Plaintiff's Complaint adequately identifies the who, when, and how necessary to plead fraud.

Defendants next argue that Plaintiff's claims fail because they both are founded on representations regarding "future contractual performance" generally not actionable in fraud. While Plaintiffs acknowledge that the alleged fraudulent misrepresentation was based on future conduct, Plaintiffs argue that the "bad faith exception" applies in this case.

Under this doctrine, "a fraudulent misrepresentation may be based upon a promise made in bad faith without intention of performance." *Hi-Way Motor*, 398 Mich at 337-338.

In her Complaint, Plaintiff alleges that, during contract negotiations, Defendants made certain promises that induced Plaintiff to enter into the Employment Agreement. Plaintiff also alleges that, shortly after executing the Agreement, it became clear that Rosenfeld “had no intention of fulfilling these promises.”

The Court finds that this statement is sufficient to establish that Plaintiff alleges that the “bad faith exception” applies such that she may base her misrepresentation claims on promises relating to future conduct.

Summary

To summarize, Plaintiff’s motion for partial summary disposition under (C)(8) is GRANTED IN PART, and Mid-Oakland’s breach of implied contract, unjust enrichment, and breach of fiduciary duty claims are DISMISSED.

The parties also stipulated to dismissal of Plaintiff’s breach of implied contract claim.

Finally, based on Plaintiff’s concession, the Court finds that Defendant Rosenfeld is not subject to Plaintiff’s breach of contract claim.

In all other respects, the parties’ motions are DENIED.

IT IS SO ORDERED.

January 7, 2015
Date

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