STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

UNIVERSAL PROTECTION SERVICE, LLC,

Plaintiff,

Case No. 14-143378-CK
Hon. Wendy Potts

v

ASHKENAZY ACQUISITION CORP., et al.

Defendants.

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OPINION AND ORDER RE: DEFENDANTS' MOTION FOR PARTIAL SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10) and PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

At a session of Court
Held in Pontiac, Michigan
On
SEP 23 2016

This matter is before the Court on Defendants' Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(10) and Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(10). Defendants move for partial summary disposition of Counts III-VII of Plaintiff's complaint. Those claims are for tortious interference with a contract regarding Rivercenter and Faneuil Hall, tortious interference with a business relationship regarding Rivercenter and Faneuil Hall, civil conspiracy, unjust enrichment, and promissory estoppel. Plaintiff moves for summary disposition on its claims for breach of contract regarding Northland, breach of contract regarding Eastland, and tortious interference with a business relationship regarding Ashkenazy. On September 14, 2016, the parties appeared before the Court for oral argument on the motions, at which time the Court took the matters under advisement.

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Under (C)(10), "In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

Defendants argue that summary disposition of Plaintiff's claims for tortious interference with a contract and tortious interference with business relations is appropriate because there are no genuine issues of material fact regarding those claims. On the other hand, Plaintiff argues that summary disposition is appropriate in its favor on its claim for tortious interference with a business relationship. Defendants allege that the Faneuil Hall and Rivercenter contracts were terminable at will, and that Plaintiff has not established that Ashkenazy acted wrongfully or with malice. Defendants argue that the Faneuil Hall contract was terminated when Universal sent a termination notice on August 26, 2014. Thus, Defendants argue, there is no evidence that Ashkenazy interfered with the Faneuil Hall contract. Defendants argue that Plaintiff's allegations merely assert that actions taken by Ashkenazy were wholly consistent with Ashkenazy's role as asset manager of the malls. Defendants claim that termination of the Faneuil Hall and Rivercenter contracts was for legitimate business reasons: to avoid another instance where Universal allegedly walked off the job with minimal notice, and for the economic reasons of providing cost savings to the malls and higher pay to the security guards.

Plaintiff argues it did not ultimately terminate the agreement and supports this allegation by referencing a termination letter attached to Defendant's Motion. In that letter, David Cherna

stated that Ashkenazy was terminating the agreement. Plaintiff argues that it cannot be expected to continue to provide services to Defendants without being paid. Universal claims that Ashkenazy directed the general managers at Faneuil Hall and Rivercenter to terminate their contracts with Universal just one day after Universal terminated the contracts at Northland and Eastland for nonpayment. Universal asserts that Ashkenazy issued the termination directive out of pure retaliation for Universal canceling the contracts at Northland and Eastland for nonpayment. Universal claims that Press told Cesolini that he would make it his life's mission to see that Universal never received a dime from Defendants, and further argues that Ashkenazy has no actual evidence that guards at other properties were untrained.

"The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *BPS Clinical Laboratories v BCBSM*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996).

Further, "[t]he elements of tortious interference are (1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant." *Mahrle v Danke*, 216 Mich. App. 343, 350; 549 N.W.2d 56 (1996).

To be successful on a claim for tortious interference with a contractual or business relationship, the plaintiff "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." *Badiee v Brighton Area School*, 265 Mich App 343, 366-367; 695 NW2d 521 (2005). "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances. If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *Id.* Here, Defendants have presented evidence that their conduct was not wrongful per se and have demonstrated that their actions had a legitimate business purpose. Since Defendants have demonstrated legitimate business reasons for terminating the contracts, those acts cannot form the basis of a claim for tortious interference. Thus, Defendants' motion for summary disposition of Plaintiff's claims for tortious interference with a contract and tortious interference with a business relationship is granted and those claims are dismissed.

Defendants next argue that Plaintiff's claim for civil conspiracy must be dismissed because there is no underlying tort. Plaintiff asserts that Defendants' alleged tortious interference is the underlying tort. "A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569, 580 (2003). Since the Court granted the motion for summary disposition regarding the claims for tortious interference, and since Plaintiff's claim for civil conspiracy is premised only on the claims for tortious interference which were dismissed, summary disposition of Plaintiff's claim for civil conspiracy is granted and that claim is dismissed.

Universal next claims that summary disposition is appropriate in its favor on its breach of contract claims because valid contracts existed between Universal and Northland and between Universal and Eastland. Universal claims that Northland and Eastland breached those contracts by failing to pay Universal's invoices for security services rendered.

In response, Defendants assert that Universal breached its agreement to provide fully trained guards at Northland. Defendants present evidence purporting to show that some of the guards at Northland did not receive certain training. Defendants further claim that the training of Eastland guards was deficient and present evidence purporting to show that Universal admitted a lack of documentation regarding practical training exercises at Eastland. Thus, Defendants claim, summary disposition is appropriate because Universal has admitted that it did not provide the training that it should have. Defendants argue that the fact that Northland did not terminate its contract with Plaintiff immediately following the Cochran incident is of no bearing on Universal's failure to adhere to its contractual obligations. Despite nonpayment allegedly because of cash flow issues, when Northland became aware of insufficient training by Universal, Northland asserted that additional basis for nonpayment.

Universal argues that the lack of training defense and first breach argument is frivolous as it pertains to Eastland. Defendants argue that the Cochran incident demonstrates that the guards were untrained. Universal claims that this defense is without merit because the Cochran incident took place at Northland, which is 26 miles away from Eastland, and that a different group of guards worked at each mall. Universal maintains that Northland and Eastland have separate contracts with Universal, and that Eastland may not use an alleged breach by Universal of the Northland agreement as a basis to avoid payment under the Eastland Agreement.

As to the Northland agreement, Universal argues that Northland never complained about Plaintiff's security services, training, or its actions during the Cochran incident. Universal further argues that there exist no written complaints from Northland, Ashkenazy, or any tenant. The Cochran incident took place on January 28, 2014, and Universal provided security services at Northland until August 22, 2014. Universal further asserts that Northland has no evidence that Plaintiff breached the contract and that Plaintiff provided fully trained and qualified uniformed security officers and supervisors. Universal claims that the Court should pierce the corporate veil and hold Ashkenazy jointly and severally liable with Northland and Eastland on the claims for breach of contract.

The contract provides that Universal will furnish fully trained and qualified uniformed security officers and supervisors, but the contract does not define what constitutes "fully trained and qualified." A party who breaches a contract may not maintain an action against the other contracting party for its subsequent breach or failure to perform, provided the initial breach is substantial. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). A breach is considered substantial where it "has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party." *Baith v Knapp-Stiles, Inc*, 380 Mich 119, 126; 156 NW2d 575 (1968) (citations omitted). But where factual issues exist regarding whether a contracting party initially and substantially breached an agreement, the issue must be left to the trier of fact. *Michaels, supra.*

Defendants assert that Plaintiff breached the parties' agreement by failing to provide fully trained and qualified security officers and supervisors. Plaintiff asserts that Defendants breached

the contract by not paying for services that Plaintiff provided to Defendants. There exists a question of fact as to whether Plaintiff first breached the contract by not providing fully trained and qualified security officers. Accordingly, the issue must be left to the trier of fact.

During oral argument on the motions, the parties agreed to dismiss Plaintiff's claims for unjust enrichment and promissory estoppel. Accordingly, those claims are dismissed.

Lastly, Defendants argue Plaintiff's alter-ego and veil piercing theories fail because there is no genuine issue of material fact that Northland and Eastland are independent corporate entities. In support of this argument, Defendants present Certificates of Formation showing that Northland and Eastland are incorporated under Delaware law and also present the LLC Agreements for Northland and Eastland purporting to show the formation and operation of the entities. Defendants attach ownership charts purporting to show that Ashkenazy is neither a direct nor indirect owner of Northland or Eastland. Defendants claim the bank statements attached to their motion for summary disposition support the claim that Northland, Eastland, and Ashkenazy maintained separate bank accounts at all times. Further, Defendants present testimony from Joe Press purporting to demonstrate that that Ashkenazy was neither a joint owner nor a joint co-signor on the Northland or Eastland accounts. Defendants also presented the expert testimony from Jahn Brodwin of FTI Consulting who opined that Northland and Eastland were not sham entities and that the tax returns reflect what would normally appear on a tax return for a company that manages real estate.

In response, Plaintiff argues that Northland and Eastland are alter egos of Ashkenazy. Plaintiff claims that Ashkenazy failed to mention that Northland and Eastland did not maintain corporate governance records, did not maintain annual financial statements or refused to produce them, did not maintain records of profit distributions or refused to produce them, and that

Northland, Eastland, and Ashkenazy all used the same accounting firm to prepare their tax returns. Plaintiff argues that the bank statements that Defendants produced in favor of their arguments actually support Plaintiff's position and clearly show that the accounts were jointly owned by Northland and Ashkenazy and by Eastland and Ashkenazy. Additionally, Plaintiff claims the evidence shows that Ashkenazy controlled Northland and Eastland's bank accounts, and signed and approved all checks. Plaintiff asserts that Defendants argument that it is not an owner of Northland or Eastland is irrelevant.

"In *Nogueras v Maisel & Associates of Michigan,* 142 Mich App 71, 86; 369 NW2d 492 (1985), this Court set forth the standard for piercing the corporate veil: [T]here are three requisites to piercing the corporate veil and finding an identity between business entities. First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff." *SCD Chem. Distribs. v Medley*, 203 Mich App 374, 381; 512 NW2d 86 (1994). Further, "[a]s a general proposition, the law treats a corporation as an entirely separate entity from its stockholders, even where one person owns all the corporation's stock. *Kline v Kline,* 104 Mich. App. 700, 702; 305 NW2d 297 (1981). This fiction is a convenience, introduced to serve the ends of justice. *Allstate Ins Co v Citizens Ins Co of America,* 118 Mich. App. 594, 600; 325 N.W.2d 505 (1982). However, when this fiction is invoked to subvert justice, it may be ignored by the courts." *Foodland Distribs. v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996).

Both parties' submissions contain extensive evidentiary support for their assertions as well as challenges to the other's evidence and credibility. A genuine issue of material fact exists when reasonable minds could differ on a material issue. *Allison v. AEW Capital Mgt., LLP,* 481

Mich. 419, 425, 751 N.W.2d 8 (2008). The evidence presented shows there are many questions of fact as to whether Northland and Eastland are mere instrumentalities of Ashkenazy that would require piercing the corporate veil. Accordingly, Defendants' motion is denied.

For all of the reasons stated above, the Court grants Defendants' motion on Plaintiff's claims for tortious interference with a contract regarding Rivercenter and Faneuil Hall, tortious interference with a business relationship regarding Rivercenter and Faneuil Hall, and civil conspiracy. Thus, Counts III, IV, and V of the Second Amended Complaint are dismissed. Upon the oral stipulation of the parties during oral argument, Plaintiff's claims for unjust enrichment and promissory estoppel, Counts VI and VII of the Second Amended Complaint, are dismissed. Lastly, Plaintiff's motion for summary disposition on its claims for breach of contract regarding Northland and breach of contract regarding Eastland are denied.

This Order does not resolve the last pending claim or close the case.

IT IS SO ORDERED.

Dated: SEP 23 2016

Hon. Wendy Potts