

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MORRIS MARGULIES, an individual,

Plaintiff,

v

KAL-MOR PROPERTIES CO., a
Michigan Co-Partnership, and HAROLD
KALT, an individual,

Defendants.

Case No. 14-144246-CK

Hon. Wendy Potts

OPINION AND ORDER RE: PLAINTIFF'S MOTION FOR PARTIAL SUMMARY
DISPOSITION and DEFENDANT HAROLD KALT'S RENEWED MOTION FOR
SUMMARY DISPOSITION

At a session of Court
Held in Pontiac, Michigan

AUG^O15 2016

In 1988, Plaintiff Morris Margulies, Defendant Harold Kalt, and non-parties Michael Giddings and J. Leonard Hyman formed the partnership Defendant Kal-Mor Properties Co. to own and manage an office complex in Royal Oak. Under the partnership agreement, Kalt held a 33.333% "profit & loss" interest, Margulies and Hyman each held a 30.833% interest, and Giddings held a 5% interest. However, Kalt had a 50% voting interest, while Margulies, Hyman, and Giddings shared a 50% voting interest. In 1989, Kalt granted one-third of his profit & loss interest to his sons Steven and Allan Kalt, so that Harold, Steven, and Allan Kalt each held an 11.11% profit & loss interest, but Harold Kalt retained his 50% voting interest. Hyman assigned his interest to a family trust, and in August 2012 the trust sold both the voting interest and profit

& loss interest to Margulies and Kalt. As of August 1, 2012, Harold, Steven, and Allan Kalt collectively held a 48.75% profit & loss interest, Harold Kalt had a 61.56% voting interest, Margulies had a 46.25% profit & loss interest and a 34.69% voting interest, and Giddings had 5% profit & loss interest and a 3.75% voting interest.

In 2011, Kal-Mor's Bank of America loan matured, it was unable to satisfy its mortgage obligations, and the loan fell into default. In May 2012, the bank sold the debt to GMN Kalt Building, LLC, and GMN purchased the property at a July 3, 2012 foreclosure sale. Margulies claims that he tried to arrange financing through Level One Bank to redeem the property; however, Harold Kalt refused to cooperate. Instead, Kal-Mor obtained alternate financing that Margulies claims had less favorable terms and did not fully cover the redemption costs. Harold Kalt claims that the partnership interests were altered by December 2012 amendments to the partnership agreement that gave Steven, Allan, and Jeffrey Kalt both profit & loss and voting interests. However, Margulies disputes the validity of those amendments.

In July 2013, Kal-Mor issued a cash call to the partners, which Margulies claims he refused to pay because it was not authorized by the partnership agreement. According to Margulies, his voting and profit & loss interest were diluted by 50% after he refused to contribute. Margulies further alleges that Harold Kalt's company Bee Kalt Travel then loaned Kal-Mor \$400,000, which provided sufficient funding for Kal-Mor to redeem the property on December 27, 2013. Margulies claims that the partnership amendments, dilution of his interest, and foreclosure redemption allowed Harold Kalt and his family full control over the partnership and the ability to squeeze out Margulies and Giddings. Margulies filed this action against Harold Kalt and Kal-Mor in November 2014 asserting claims for breach of fiduciary duty, breach of

contract, violation of the Uniform Partnership Act, and seeking declaratory judgment and an accounting.

On August 7, 2015, the Court granted Harold Kalt's motion for summary disposition of Margulies' Count II alleging a breach of contract against Harold Kalt. Margulies now moves for partial summary disposition pursuant to MCR 2.116(C)(10) on his claim for breach of the fiduciary duty. Kalt moves for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) of Margulies' remaining claims: breach of the fiduciary duty, violation of MCL 449.18, request for declaratory relief regarding the amendment of the partnership agreement, request for an accounting, and conversion. A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and a motion under (C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Kalt first argues that Margulies' claim for breach of fiduciary duty fails because, in the context of a partnership agreement, the breach of a partnership agreement does not give rise to a tort claim independent of a breach of the partnership contract claim. In this Court's August 7, 2015 Opinion and Order regarding Kalt's motion for summary disposition, the Court held that "Margulies and Kalt vigorously dispute the facts and events underlying his claims that Kalt breached his fiduciary duties to the partnership. Further, if Margulies can show that he was wrongfully excluded from the partnership or that Kalt engaged in misconduct with respect to the partnership agreement amendments, then he may be entitled to a declaratory judgment regarding the validity of the amendments." Kalt argues that Margulies is not aware of any material information relating to the affairs of Kal-Mor Properties Co that was not disclosed to him by Kalt, that Kalt disclosed to Margulies all material information relating to the affairs of Kal-Mor,

and that the first and second amendments to the Partnership Agreement were adopted in accordance with and as permitted by the express terms of the Partnership Agreement.

In response, Margulies argues that the Partnership Agreement and amendments did not curtail or eliminate any fiduciary duties owed by a partner to another partner. Margulies further argues that partners owe each other fiduciary duties of good faith and fair dealing, and not just the duties set forth under MCL 449.20 and MCL 449.21. Margulies discusses the duties of good faith, fair dealing, honesty, and loyalty, and provides case law describing those duties, but he does not argue how Kalt breached those duties or present any evidence of an alleged breach of the same. Margulies claims that there are material questions of fact as to whether Kalt violated fiduciary duties when enacting the cash call mechanism, however, the complained of actions and the procedure implemented by Kalt in enacting the cash call mechanism were authorized by the Partnership Agreement.

“The fiduciary duty among partners is generally one of full and frank disclosure of all relevant information. Each partner has the right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs.” *Band v Livonia Assoc*, 176 Mich App 95, 113-14; 439 NW2d 285 (1989). Margulies has not shown what, if any, information Kalt did not disclose. Kalt presents evidence that Margulies did not respond to the notice of the partnership meeting to discuss the proposed cash call mechanism, and that Margulies did not attend the July 24, 2013 partnership meeting. Kalt asserts that Margulies did not provide any alternative suggestions to the proposal, and does not present any evidence that he suggested an alternate proposal. Because Margulies fails to demonstrate a question of fact on his breach of fiduciary claim, Kalt is entitled to summary disposition of that claim.

Margulies next argues that Count III for a violation of MCL 449.18 must be dismissed. MCL 449.18 provides that “[t]he rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by all of the following rules. . . .” *Id.* Margulies specifically alleges a violation of MCL 449.18(h), which provides “[a]ny difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners. However, an act in contravention of any agreement between the partners may not be done rightfully without the consent of all the partners.” *Id.* The allegations in Margulies’ complaint for a violation of MCL 449.18 relate to the first and second amendments of the Partnership Agreement.

Kalt asserts, and the Court agrees, that the complained of conduct—the amendment of the Partnership Agreement and the enforcement of the amended Partnership Agreement—is expressly permitted by the Partnership Agreement and applicable law. The Court previously held that the adoption of the first and second amendments to the Partnership Agreement did not constitute a breach of the agreement. In response, Margulies argues that material questions of fact exist as to whether the first amendment was properly enacted and that if it was not, then Kalt has violated MCL 449.18. The Court has already determined that the first and second amendments did not constitute a breach of contract. Margulies fails to show that a genuine issue of material fact exists regarding a violation of MCL 449.18. Therefore, Kalt is entitled to summary disposition of Margulies’ claim for violation of MCL 449.18.

Kalt next argues that Plaintiff’s claim for declaratory relief must be denied. “The power to grant declaratory relief is established by court rule. MCR 2.605(A)(1) provides as follows: In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or

not other relief is or could be sought or granted. Accordingly, the grant of a declaratory judgment is discretionary with the trial court and, in any event, can only be granted where there is an actual controversy.” *Skiera v National Indem Co*, 165 Mich App 184, 188; 418 NW2d 424 (1987) (citations omitted). Kalt argues that there is no genuine dispute that must be resolved by the Court to guide the future conduct of the parties. In the First Amended Complaint, Margulies requests the Court declare the rights with respect to the various amendments to the Kal-Mor Partnership Agreement and argues that the Court should restore the original terms of the Kal-Mor Partnership Agreement and strike the various amendments made by Defendants as improper. See paragraphs 92-93 of First Amended Complaint. Plaintiff fails to show that his claim is proper and that a genuine issue of material fact exists. Accordingly, Kalt’s motion for summary disposition of Margulies’ claim for a declaratory judgment is granted.

Plaintiff fails to show that he was wrongfully excluded from the partnership. MCL 449.22(a) provides that “[a]ny partner shall have the right to a formal account as to partnership affairs: If he is wrongfully excluded from the partnership business or possession of its property by his copartners.” *Id.* Kalt presents evidence showing that Margulies admitted during his deposition that he had not been excluded from the partnership. Thus, there is no genuine issue of material fact as to this issue, and Kalt is entitled to summary disposition of Margulies’ claim for an accounting.

Next, Kalt argues that Margulies’ claim for conversion fails because he has not alleged that Kalt exercised any dominion or control over any portion of Plaintiff’s partnership interest. Margulies’ claim for conversion is premised on the argument that Margulies’ interest in Kal-Mor is personal property, and that Kalt divested Margulies of 50% of his interest in Kal-Mor via the cash call and subsequent transfer. See paragraphs 103-104 of First Amended Complaint. Since

the Court has determined that the first and second amendments were not a breach of contract and that Kalt did not breach his fiduciary duty to Margulies, Margulies' claim for conversion fails as a matter of law. Accordingly, Kalt is entitled to summary disposition of Margulies' claim for conversion. For all of the reasons stated above, the Court grants Kalt's motion for summary disposition on the complaint and dismisses Plaintiff's claims against Kalt in their entirety.

Finally, Kalt argues that he is entitled to judgment in his favor on his counterclaim. Despite this assertion, Kalt fails to cite to any evidence in support of his claims. 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). Accordingly, Kalt's motion for summary disposition of his counterclaim is denied.

Kal-Mor asks this Court to deny Margulies' motion for summary disposition of Margulies' breach of the fiduciary claim and grant it summary disposition under MCR 2.116(I)(2), which gives the Court authority to enter summary disposition for the opposing party if it is entitled to judgment as a matter of law. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). The purpose of an (I)(2) motion is to assert that the opposing party is entitled to summary disposition on the exact same issues and claims. Plaintiff only moves for summary disposition as to Count I on its claim for breach of the fiduciary duty. In addition to the reasons that Margulies' breach of fiduciary duty claim fails as to Kalt, that claim fails as to Kal-Mor because Margulies has not shown that there exists any genuine issue of material fact. Thus, the Court grants Kal-Mor's motion for summary disposition pursuant to MCR 2.116(I)(2) and dismisses Margulies' claim for breach of the fiduciary duty.

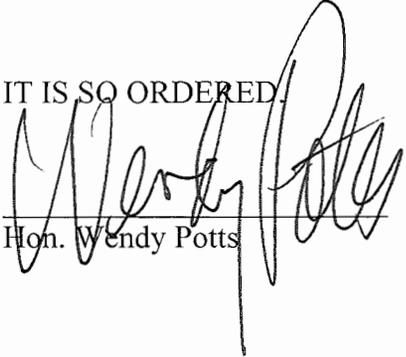
Plaintiff's motion for summary disposition on its claim for breach of the fiduciary is denied as moot since that claim is dismissed as to both Defendants Kalt and Kal-Mor.

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

Dated:

AUG 15 2016

IT IS SO ORDERED.


Hon. Wendy Potts