

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

INFINITY-810 LOFTS, LLC,
a Michigan Limited liability company,

Plaintiff/Counter-Defendant,

v

Case No. 14-144266-CK
Hon. Wendy Potts

BACKEREI, LLC,
a Michigan Limited liability company,

Defendant/Counter-Plaintiff.

OPINION AND ORDER RE: PLAINTIFF/COUNTER-DEFENDANT INFINITY-810 LOFTS,
LLC'S MOTION FOR SUMMARY DISPOSITION AGAINST DEFENDANT/COUNTER-
PLAINTIFF BACKEREI, LLC'S COUNTER-COMPLAINT

At a session of Court
Held in Pontiac, Michigan
On

MAY 05 2016

This matter is before the Court on Plaintiff/Counter-Defendant Infinity 810 Lofts' motion for summary disposition of Defendant/Counter-Plaintiff Backerei LLC's counterclaims pursuant to MCR 2.116(C)(10). Infinity asserts that summary disposition is appropriate because Defendant is not the real party in interest to pursue claims against Infinity. An argument asserting plaintiff is not a real party in interest is properly analyzed under MCR 2.116(C)(8) or (C)(10). See *Leite v Dow Chemical Co*, 439 Mich 920, 920; 478 NW2d 892 (1992). Infinity's motion under (C)(10) tests whether there is a factual dispute for trial. *Maiden v Rozwood*, 461 Mich 109, 119-120, 597 NW2d 817 (1999).

Infinity asserts that Defendant is not a real party in interest because Defendant assigned its rights, claims, and interests that it may have against any party, person(s), proper or corporation liable for the loss claimed and that it authorized Hastings Mutual Insurance Company to sue, compromise, or settle all claims in Backerei's name. The Michigan Court Rules and relevant case law provide that an action must be brought by a "real party in interest," MCR 2.201(B), which is defined as "one who is vested with the right of action on a given claim." *Hofmann v Auto Club Ins Assn*, 211 Mich App 55, 95 (1995). In support of its arguments, Infinity alleges that Backerei is attempting to gain a windfall of damages by suing Infinity to collect on damages that it was already compensated for by its insurance company. Infinity alleges that Backerei failed to plead or set forth evidence that its damages claim exceeds the amount that it was already compensated by its insurance company.

In response, Backerei claims that summary disposition is premature because discovery was ongoing at the time that the motion was filed. Backerei also claims that it is the real party in interest because it swore that its loss was \$192,334.78, and Hastings only paid Backerei approximately \$146,589.64. Backerei argues that leaves an additional \$60,000 loss which was not subrogated and to which Backerei is the real party in interest. Backerei cites to *Morrow v Shah*, 181 Mich App 742, 450 NW2d 96 (1989) wherein Backerei alleges that the Court held that a party is subrogated up to the amount paid. However, the Court in *Morrow* actually held that plaintiff may not seek reimbursement for anticipated but unpaid insurance benefits covering expenses to be incurred in the future. *Id*, 181 Mich App at 748. Thus, Backerei's citation to *Morrow* is unpersuasive.

Although summary disposition under MCR 2.116(C)(10) is usually premature if granted before discovery on a disputed issue is complete, summary disposition may be proper before the

close of discovery if further discovery does not stand a fair chance of uncovering factual support for the opposing party's position. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). In the instant action, the Court finds that further discovery does not stand a fair change of uncovering factual support for Backerei's position that it is a real party in interest.

Backerei next argues that summary disposition is not appropriate because the subrogation agreement did not transfer Backerei's entire claim to Hastings. Backerei claims to have additional claims that arose after Hastings determined the amount that it would pay Backerei to repair its building. However, although Backerei states it has additional claims, it does not support this assertion with any documentary evidence. 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). Where the burden of proof at trial rests on a nonmoving party, in responding to a motion for summary disposition under MCR 2.116(C)(10), the nonmoving party may not rest on the allegations in the pleadings, but must "set forth specific facts showing that a genuine issue of material fact exists." *Quinto*, 451 Mich at 362. "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Id.* at 363.

Backerei submitted its claim--a "Sworn Statement In Proof of Loss and Subrogation Agreement"--to Hastings, its insurance company. In the claim, Backerei alleged a loss under its insurance policy in the amount of \$192,334.78. As part of the sworn statement of loss, Frank Hobrecht, Backerei's member, agreed to subrogate Backerei's claims related to the loss. The

subrogation agreement provides: “In consideration of and to the extent of said payment, the undersigned hereby subrogates said Company to all of the rights, claims and interest which the undersigned may have against any party, person, persons, property or corporation liable for the loss mentioned above, and authorized the said Company to sue, compromise, or settle in the undersigned’s name, or otherwise, all such claims and to execute and sign releases and acquittances and endorse checks or drafts given in settlement of such claims to the name of the undersigned with the same force and effect as if the undersigned executed or endorsed them.” Thus, Infinity argues and the Court agrees that Backerei assigned its rights relating to the loss mentioned in the Sworn Statement in Proof of Loss and Subrogation Agreement to Hastings.

“[A]n assignee of a cause of action becomes the real party in interest with respect to that cause of action, inasmuch as the assignment vests in the assignee all rights previously held by the assignor.” *Cannon Township v Rockford Public Schools*, 311 Mich App 403; 875 NW2d 242, 246-247 (2015), (Citations omitted). When Frank Hobrecht filed the sworn statement in proof of loss and subrogation agreement on behalf of Backerei with Hastings, he claimed \$192,334.78 in losses under the policy. The subrogation agreement on the sworn statement states that “[i]n consideration of and to the extent of said payment, the undersigned hereby subrogates said Company to all of the rights, claims and interest which the undersigned may have against any party, person, persons, property or corporation liable for the loss mentioned above, and authorized the said Company to sue, compromise, or settle in the undersigned’s name, or otherwise, all such claims and to execute and sign releases and acquittances and endorse checks or drafts given in settlement of such claims in the name of the undersigned with the same force and effect as if the undersigned executed or endorsed them.” Thus, in submitting the sworn

statement in proof of loss and subrogation agreement to Hastings, Hobrecht, on behalf of Backerei, subrogated Hastings all its claims relating to the loss claimed.

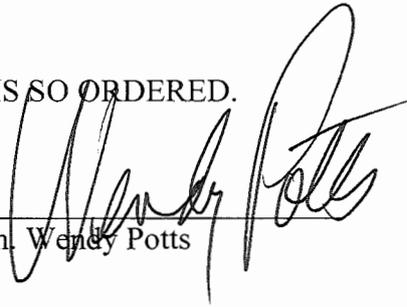
Backerei attempts to argue that it has other claims outside the allegations already pled that are not subject to subrogation. However, Backerei provides no documentary evidence of those claims. “A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim.” *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). Additionally, in responding to a motion for summary disposition under MCR 2.116(C)(10), the nonmoving party may not rest on the allegations in the pleadings, but must “set forth specific facts showing that a genuine issue of material fact exists.” *Quinto*, 451 Mich at 362. Backerei’s allegations of additional claims fail.

In sum, the Court finds that Backerei is not a real party in interest because it is not “vested with the right of action” on its claims. *Hofmann v Auto Club Ins Assn*, 211 Mich App 55, 95; 535 NW2d 529 (1995). To the extent there are valid claims against Infinity 810, those claims must be brought by Hastings. Accordingly, Infinity’s motion is granted and Backerei’s counterclaim against Infinity 810 is dismissed.

Dated:

MAY 05 2016

IT IS SO ORDERED.


Hon. Wendy Potts