

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

KATINA DART, as Trustee of the Katina  
Estelle Dart Amended and Restated Trust  
u/a/d January 22, 1999,

Plaintiff,

v

Case No. 15-145064-CB  
Hon. Wendy Potts

HARRY CENDROWSKI and ROBERT M.  
CARSON, Managers of NFC Investors, VIII, LLC,

Defendants.

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**OPINION AND ORDER RE: DEFENDANT'S MOTION TO DISMISS AMENDED  
COMPLAINT PURSUANT TO MCR 2.116(C)(7) and (C)(8)**

At a session of Court  
Held in Pontiac, Michigan

On

~~\_\_\_\_\_~~  
**FEB 29 2016**  
~~\_\_\_\_\_~~

This matter is before the Court on Defendant's Motion to Dismiss Amended Complaint Pursuant to MCR 2.116(C)(7) and (C)(8). The parties appeared before the Court on Defendant's motion on July 29, 2015. Following oral argument, the Court took the matter under advisement and indicated that a written opinion would be issued.

In their motion, Defendants are requesting the Court to summarily dismiss Plaintiff's First Amended Complaint under the legal doctrines of res judicata and collateral estoppel, the rule of compulsory joinder, or in the alternative, for Plaintiff's failure to state a valid cause of action within the First Amended Complaint.

By way of background, Plaintiff Katina Dart employed Defendant Harry Cendrowski and his accounting and advisory firm from 1996 to 2012 to prepare her tax returns and advise her on investments. Cendrowski occasionally informed Dart about “club deals,” which were investments in private equity companies that Cendrowski limited to friends and family.

In August 2008, Dart, Cendrowski, and Defendant Robert Carson formed NFC Investors VIII, LLC (“NFC VIII”) in order to purchase shares of First Michigan Bank Corporation, now known as Talmer Bank. Cendrowski and Dart each hold a 41.67% membership, and Carson holds a 16.66% membership in NFC VIII. Carson and Cendrowski were appointed as the managers of NFC VIII. The NFC VIII Operating Agreement<sup>1</sup> provides that no member is entitled to withdraw from the company without the written consent of the manager, and no member is entitled to a withdrawal distribution unless approved by the manager. The Operating Agreement further states that the manager has discretion to make distributions.

In October 2013, Dart initiated a lawsuit, namely 13-136549-CZ, against Cendrowski, his business partner, John T. Alfonsi, and his accounting and advisory firm on claims of professional malpractice and breach of fiduciary duty. Dart alleged that the defendants improperly invested Dart’s funds in various entities, which resulted in a total loss of her investments. Among those investments at issue in the 2013 case was NFC VIII. The parties in the 2013 case accepted case evaluation in August 2014 and Dart’s claims were dismissed with prejudice in the October 2, 2014 Stipulated Order of Dismissal with Prejudice.

On January 20, 2015, Dart commenced this lawsuit, claiming that she is entitled to a distribution of Talmer Bancorp stock from NFC VIII. Dart subsequently filed a First Amended

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<sup>1</sup> See Defendants’ Exhibit 5 in their Motion to Dismiss Amended Complaint Pursuant to MCR 2.116(C)(7) and (C)(8) and Plaintiff’s Exhibit B in her Response to Defendant’s Motion for Summary Disposition.

Complaint on March 17, 2015, in which she asserts claims of minority member oppression and claim and delivery.

On March 20, 2015, Defendants filed their Motion to Dismiss Amended Complaint Pursuant to MCR 2.116(C)(7) and (C)(8).

Defendants request summary disposition pursuant to MCR 2.116(C)(7) for the reasons that Plaintiff's First Amended Complaint is barred by the doctrines of res judicata and collateral estoppel and the rule of compulsory joinder.

"A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered." *Maiden v Rozwood*, 461 Mich 109, 118-19; 597 NW2d 817 (1999); MCR 2.116(G)(3) and (G)(5). "If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff." *Turner v Mercy Hosps. & Health Servs. of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).

#### *Res Judicata*

According to Defendants, Dart's claims are barred by res judicata on account of the parties' settlement on the merits and dismissal with prejudice of the 2013 case. Defendants contend further that the current claims were or could have been resolved in the 2013 case.

The doctrine of res judicata bars a subsequent action when: (1) the prior action was decided on the merits; (2) both actions involve the same parties or their privies; and (3) the claims in the second case were, or could have been, resolved in the first case. *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004); *Sewell v Clean Cut Mgmt*, 463 Mich 569, 575; 621

NW2d 222 (2001). For purposes of privity, “a perfect identity of the parties is not required, only a ‘substantial identity of interests’ that are adequately presented and protected by the first litigant.” *Adair, supra* at 122.

“Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.” *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999), citing *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160-163; 294 NW2d 165 (1980); and *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995). “Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit.” *Adair, supra* at 124-25.

First, Defendants argue that the prior case was decided on the merits. Second, Defendants contend that both actions involve substantially the same parties or their privies. As noted previously, a perfect identity of the parties is not required. Instead, there need only be a substantial identity of interests that are presented and protected by the first litigant. *Adair, supra* at 122. Defendants maintain that the parties are substantially similar in that Dart and Cendrowski were clearly parties in both actions. Both Cendrowski and Carson are parties to this current action due to the fact that they are the managers of NFC VIII.

The Court observes that Plaintiff’s 2013 lawsuit named as defendants Cendrowski, his business partner, and his accounting and advisory firm whereas Plaintiff’s current action names Cendrowski and Carson, the managers of NCF VIII, as defendants.

In terms of whether or not the two cases present a substantial identity of interests that are adequately presented and protected by the first litigants, the Court shall consider the interests in

both cases. Plaintiff presented tortious claims in the 2013 lawsuit, to which Cendrowski, his partner Alfonsi, and their firm were made to defend their accounting and advisory services. In contrast, Plaintiff's current claims relate to the allegedly oppressive management of NFC VIII, to which defendants Cendrowski and Carson must now defend. This Court is not persuaded by Defendant's argument that both actions involve substantially the same parties or their privies or that there was a substantial identity of interests that were adequately presented or protected within the earlier case in order to bar the present action.

Third, Defendants assert that the present lawsuit arises as part of the same transaction as the 2013 case, and the facts of both cases are related in time, space, origin, and motivation. According to Defendants, Dart sought rescission of her investments, including NFC VIII, and asked to "get her money back" in the 2013 case. Defendants argue that Dart's investment in NFC VIII, the value of that investment, and Dart's rights to recovery based on that investment were actually litigated and resolved in the 2013 case.

Conversely, Dart maintains that she did not litigate, in the 2013 case, the question of whether or not NFC VIII should allow her to withdraw or alternatively, whether or not NFC VIII should give her a distribution. Rather, the 2013 tort case comprised of claims of professional malpractice and breach of fiduciary duty only as to Cendrowski, his partner, and his accounting and advisory firm. The issues were limited to whether the investments chosen for Dart were appropriate and whether the defendants' investment advice was prudent. The current case concerns Dart's attempt to fulfill her rights under the NFC VIII Operating Agreement. Regardless of what was litigated in the 2013 case or the outcome of that case, Dart argues that she remains a 41.67% owner of NFC VIII and is still entitled to the benefits related to that ownership interest.

In order for res judicata to apply, the Court must determine whether the claims in the second case were, or could have been, resolved in the earlier 2013 case. The Court shall consider the same transaction test and examine whether the facts are related in time, space, origin or motivation, and whether they form a convenient trial unit.

In light of the parties' arguments and upon review of the parties' pleadings and supporting documentation, the Court finds that the present lawsuit does not arise out of the same transaction or occurrence as the 2013 case. The Court observes that the 2013 case litigated whether or not Cendrowski, his partner, or his accounting firm engaged in tortious acts by placing Dart into certain high-risk investments.

In contrast, the present case does not consider NFC VIII as an investment vehicle, but rather addresses only the allegation that the managers, Cendrowski and Carson, have deprived Dart of her membership rights in NFC VIII. While Plaintiff raised the issue of whether or not her investment in NFC VIII was illiquid – in relation to her investment losses as claimed in the 2013 case –there is no indication that the issue was fully litigated or determined in that first case to be prevented from being raised here.

The Court agrees with Plaintiff's position and finds that the two cases rely on dissimilar operative facts as the claims originate from the distinctive actions of the different defendants such as the advisement of personal financial investments or the management of NFC VIII. The motivation of Plaintiff in the first action was to recover from investment losses that allegedly resulted from negligent advisement by Cendrowski, Alfonsi, and their company, which is distinct from the current case wherein Plaintiff is seeking to enforce her membership rights in NFC VIII.

Ultimately, the Court finds that Plaintiff's causes of action in the current case arise from a different group of facts, a different contractual relationship, and different alleged conduct than in

the underlying lawsuit. See *Washington v Sinai Hosp*, 478 Mich 412, 420; 733 NW2d 755 (2007) (holding “this Court uses a transactional test to determine if the matter could have been resolved in the first case,” which provides “the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief.”); quoting *Adair v Michigan*, *supra* at 124.

Thus, the Court finds that the present action asserts claims that are wholly independent of the claims asserted in the 2013 case against Cendrowski, his partner, and his accounting and advisory firm. The Court is not persuaded that Plaintiff could have diligently brought the current claims under the 2013 case.

Accordingly and for reasons stated herein, the Court finds that Plaintiff’s claims are not barred by *res judicata*. Therefore, Defendant’s motion for summary disposition is DENIED on this ground.

#### *Collateral Estoppel*

Next, Defendants argue that Dart’s claims are barred by collateral estoppel because her issues with the NFC VIII investment were actually litigated and adjudicated by a final judgment on the merits in the 2013 case.

In relation to the affirmative defense of collateral estoppel, the Michigan Supreme Court has held: “Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there must be mutuality of estoppel.”

An issue is actually litigated where it is “put into issue by the pleadings, submitted to the trier of fact for a determination, and thereafter determined.” *Cogan v Cogan*, 149 Mich App 375, 379; 385 NW2d 793 (1986). See *Monat v State Farm Ins Co*, *supra* at 683-684.

It is the Court’s opinion that collateral estoppel is inapplicable here because the claims and issues in the present case were not actually pled or litigated in the 2013 case. Further, the Court concludes that Plaintiff did not have a full and fair opportunity to litigate her current claims of minority member oppression and claim and delivery in the 2013 case. Thus, Defendants have not persuaded this Court that Dart’s claims are barred by collateral estoppel and consequently, Defendants’ motion for summary disposition on this basis is DENIED.

#### *Compulsory Joinder*

Defendants argue further that MCR 2.203(A), “Compulsory Joinder,” required Dart to bring all of her claims against Cendrowski in the 2013 case. MCR 2.203(A) provides that a party “must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.” An action arises from the same transaction or occurrence, for the purpose of this rule, only if it arises from the identical events leading to the other action. *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 669; 341 NW2d 783 (1983).

As noted previously, the Court has determined that the current action does not arise out of the same transaction or occurrence as the 2013 case. The two cases rely on distinct operative facts and therefore, Defendants are not entitled to relief under MCR 2.203(A). Defendants’ motion for summary disposition is DENIED with respect to compulsory joinder.

*Failure to State A Claim*

Pursuant to MCR 2.116(C)(8), Defendants argue that Plaintiff's First Amended Complaint fails to state a claim upon which relief may be granted for the reasons that it does not allege any wrongdoing on the part of Defendants and it still fails to plead the basic elements of any recognizable cause of action.

When reviewing a summary disposition motion pursuant to MCR 2.116(C)(8), all well-pleaded factual allegations are accepted as true and are construed in a light most favorable to the non-movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The Court only considers the pleadings in a (C)(8) motion. *Id.* "A court may only grant a motion pursuant to MCR 2.116(C)(8) where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dep't of Corr.*, 439 Mich 158, 163; 483 NW2d 26 (1992).

According to Defendants, Dart's First Amended Complaint fails as to Count One because she cannot pursue a minority member oppression claim without alleging that Defendants engaged in wrongdoing. Since Defendants' refusal to allow Dart to withdraw from NFC VIII or receive a distribution was authorized by the Operating Agreement, her oppression claim fails as a matter of law. Defendants argue further that the managers' actions under the Operating Agreement did not constitute willful and/or oppressive conduct.

In opposition, Plaintiff contends that she sufficiently pled the elements of her minority member oppression claim under MCL 450.4515 as well as her claim and delivery theory. Plaintiff alleges in her response, only, that NFC VIII's Operating Agreement fails to comply with Michigan statute, i.e., MCL 450.4102(2)(q), and it violates the rule against perpetuities because

the managers have unfettered discretion to deny written consent to withdrawals or distributions indefinitely.

As noted previously, the Court only considers the pleadings in a motion for summary disposition pursuant to MCR 2.116(C)(8). To determine whether or not Plaintiff has failed to state a valid claim for minority member oppression upon which relief can be granted, the Court shall examine the applicable statute in relation to Plaintiff's claims in Count One of the First Amended Complaint.

Pursuant to MCL 450.4515(1), “[a] member of a limited liability company may bring an action in the circuit court of the county in which the limited liability company's principal place of business or registered office is located to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member.”

The statute defines “willfully unfair and oppressive conduct” as “a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other member interests disproportionately as to the affected member. **The term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure.**” MCL 450.4515(2). (Emphasis added).

The Court observes that Count One of Plaintiff's First Amended Complaint includes the following claims in pertinent part:

- “24. Defendants have it within their power, under NFC’s Operating Agreement, to prevent Plaintiff from withdrawing from NFC or obtaining the value of the Talmer stock which NFC is holding and have exercised such power to deprive Plaintiff of the benefits of her 41.67% ownership in NFC; in the alternative, Defendants have it within their power to allow her to withdraw from NFC and take the value of 114,592 shares of Talmer stock, which represents her 41.67% interest in NFC.
25. Defendants have refused to allow Plaintiff to withdraw from NFC and take the value of her beneficial interest in her 41.67% ownership of NFC, except under an onerous condition which would deprive her of a significant gain in her interest in NFC, which would be detrimental to her and wrongfully enrich them.
26. Such refusal is willfully unfair and oppressive toward Plaintiff in that Defendant’s continuing course of conduct substantially interferes with Plaintiff’s interests as a member of NFC by depriving Plaintiff of the very objective – making money – which is intrinsic to membership of NFC.
27. Allowing Plaintiff to enjoy the benefit of what is justly hers, to wit: 114,592.5 shares of Talmer stock or its present value, would not prejudice NFC or the other members of NFC, because such would not diminish their ownership interest in NFC or their beneficial interest in the combined 160,407.5 shares of Talmer stock which results from their combined 58.33% ownership interest in NFC.
28. The refusal by Defendants to release to Plaintiff the 114,592.5 shares of Talmer stock in which she has a beneficial interest, effectively denying her the value of her ownership interest in NFC, constitutes oppressive conduct which is fundamentally unfair and which substantially interferes with the interests of Plaintiff as a member of NFC.”

Plaintiff’s First Amended Complaint identifies as “willfully unfair and oppressive conduct,” Defendants’ refusal to allow Plaintiff to withdraw from NFC VIII or to take a withdrawal distribution. Yet, Plaintiff agreed to and executed the NFC VIII Operating Agreement, which provides that no member is entitled to withdraw from the company without the written consent of the manager, and no member is entitled to a withdrawal distribution unless approved by the manager. In this case, the NFC VIII Operating Agreement authorizes the conduct of Defendants that Plaintiff characterizes as willfully unfair and oppressive. As noted in MCL 450.4515(2), conduct or actions that are permitted by an agreement, articles of incorporation, bylaws, or written corporate policy or procedure fall outside of the definition of

willfully unfair and oppressive conduct. Further, the Court agrees with Defendants' position that Plaintiff has failed to identify any conduct by either Cendrowski or Carson that was illegal or fraudulent and/or in violation of the NFC VIII Operating Agreement. As such, Plaintiff has failed to state a claim for minority member oppression under MCL 450.4515(1).

For the foregoing reasons, considering only the pleadings and viewing all well-pled factual allegations in the light most favorable to Plaintiff, this Court concludes that Plaintiff's claim for minority member oppression is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade, supra* at 163. As a result, summary disposition of this claim under MCR 2.116(C)(8) is GRANTED.

In relation to Plaintiff's Count Two, Claim and Delivery, Defendants argue that Dart cannot pursue a claim and delivery theory because she does not have the right to possess the stock held by NFC VIII. Only the party who owns the property at issue may assert a cause of action for claim and delivery. In this case, Defendants maintain that NCF VIII, and not Dart, owns the subject Talmer stock. Therefore, Plaintiff fails to state a valid claim.

In opposition, Plaintiff asserts that her 41.67% ownership in NFC VIII entitles her to a beneficial interest in 114,592.5 shares of the Talmer stock, which NFC VIII is holding.

MCL 600.290(1)(c) provides that a "civil action may be brought to recover possession of any goods or chattels which have been unlawfully taken or unlawfully detained and to recover damages sustained by the unlawful taking or unlawful detention...An action may not be maintained under this section by a person who, at the time the action is commenced, does not have a right to possession of the goods or chattels taken or detained."

The Court agrees with Defendants' position that Plaintiff does not have a right to the Talmer stock, which is owned by NFC VIII. In her First Amended Complaint, Plaintiff even concedes in paragraph twelve that NFC VIII acquired approximately 275,000 shares of Talmer stock. As such, it is this Court's opinion that Dart cannot pursue her claim and delivery count as she does not have a right to possession of the Talmer stock.

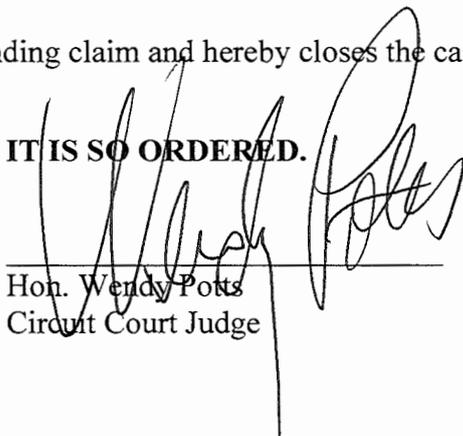
Considering only the pleadings and viewing all well-pled factual allegations in the light most favorable to Plaintiff, this Court concludes that Plaintiff's claim and delivery count is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade, supra* at 163. As a result, summary disposition of this claim under MCR 2.116(C)(8) is GRANTED.

Accordingly, Defendants' Motion to Dismiss Amended Complaint Pursuant to MCR 2.116(C)(8) is GRANTED and the Court hereby dismisses Plaintiff's First Amended Complaint with prejudice.

This Opinion and Order resolves the last pending claim and hereby closes the case.

**IT IS SO ORDERED.**

Dated: FEB 29 2016

  
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Hon. Wendy Potts  
Circuit Court Judge