

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.

**OPINION AND ORDER RE: DEFENDANTS' MOTION FOR RELIEF FROM
FEBRUARY 29, 2016 ORDER**

At a session of Court
Held in Pontiac, Michigan

On

MAY 12 2016

This matter is before the Court on Defendants' Motion for Relief from February 29, 2016 Order pursuant to MCR 2.612(C)(1)(f). The Court dispenses with oral argument in accordance with MCR 2.119(E)(3).

By way of background, Defendants filed a Motion to Dismiss Amended Complaint Pursuant to MCR 2.116(C)(7) and (C)(8) on March 20, 2015. The parties appeared before the Court on Defendants' motion and following oral argument, the Court took the matter under advisement and subsequently issued a written opinion on February 29, 2016.

In the February 29, 2016 Opinion and Order, the Court denied Defendants' request for summary disposition under MCR 2.116(C)(7) by finding that Plaintiff's claims were not barred

by res judicata, collateral estoppel, or compulsory joinder. However, the Court did find that Plaintiff's claims for minority member oppression and claim and delivery were so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. As a result, the Court granted summary disposition in favor of Defendants pursuant to MCR 2.116(C)(8).

Consequently, Defendants filed their motion for relief from the Court's February 29, 2016 Opinion and Order on the ground of "[a]ny other reason justifying relief from the operation of the judgment." MCR 2.612(C)(1)(f). Defendants argue that once the Court determined that there were no valid claims under MCR 2.116(C)(8), the defenses to those claims, namely res judicata, collateral estoppel, and compulsory joinder, were meaningless and essentially legally irrelevant to the Court's decision. Therefore, Defendants maintain that the Court's analysis of res judicata, collateral estoppel, and compulsory joinder under MCR 2.116(C)(7) constitutes dicta and lacks the force of an adjudication.

Defendants are requesting that the Court either vacate pages three through eight of the February 29, 2016 Opinion and Order or reissue that Opinion and Order with the omission of its analysis related to MCR 2.116(C)(7). Defendants do not request that the Court alter or amend the dispositive ruling pursuant to MCR 2.116(C)(8).

In response, Plaintiff points out that the defenses of res judicata, collateral estoppel, and compulsory joinder, in addition to the failure to state a claim argument, were the very issues that Defendants submitted to this Court for adjudication. According to Plaintiff, Defendants presumably presented their (C)(7) issues in good faith as they believed that those defenses were essential to the determination of the case. As such, Plaintiff maintains that the Court's analysis

and determination of the (C)(7) issues should not be considered dicta and the six pages should not be excised from the Opinion and Order.

“Statements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication.” *Roberts v Auto-Owners Ins. Co.*, 422 Mich 594, 597-98; 374 NW2d 905 (1985). In consideration of Defendants’ Motion for Relief from February 29, 2016 Order and the parties’ respective arguments, the Court agrees with Defendants’ position that the Court’s determination that there were no valid claims under MCR 2.116(C)(8) rendered the analysis regarding the defenses to those claims, namely res judicata, collateral estoppel, and compulsory joinder, legally irrelevant to the Court’s ruling. For purposes of clarification, the Court finds that the analysis related to MCR 2.116(C)(7) constitutes dicta.

In support of their request that the (C)(7) analysis be vacated from the February 29, 2016 Opinion and Order as dicta, Defendants rely on the Michigan Supreme Court case of *Village of Lincoln v Viking Energy of Lincoln, Inc.*, 474 Mich 1018; 708 NW2d 378 (2006), wherein the Michigan Supreme Court vacated the Court of Appeals’ analysis of whether a zoning ordinance was barred by public policy following a determination that the same zoning ordinance was unconstitutional. *Id.* Defendants also rely on the Michigan Supreme Court case of *Wayne County Employees Ret. Sys. v Wayne Charter County*, 497 Mich 36, 43; 859 NW2d 678 (2014) wherein the Michigan Supreme Court vacated a particular provision of the Court of Appeals’ decision for the reason that “questions of constitutionality are not decided where a case may be disposed of without such a determination.” *MacLean v Mich. State Bd. of Control for Vocational Ed.*, 294 Mich 45, 50, 292 NW 662 (1940).

In this case, the Court’s ruling focused on Defendants’ summary disposition motion that presented the defenses of res judicata, collateral estoppel, and compulsory joinder and a failure to

state a claim argument. The Court was not tasked with determining questions of constitutionality as in the *Village of Lincoln* case, nor did this Court address questions of constitutionality following a determination of the matter as in the *Wayne County Employees* case. Thus, Defendants' reliance on those distinguishable cases is misplaced. Additionally, and as indicated by Plaintiff, the Michigan Supreme Court in the *Roberts* case did not vacate the portion of the Court of Appeals' opinion that constituted dicta.

Moreover, the Court takes note of Defendants' position on page ten of their Motion to Dismiss Amended Complaint Pursuant to MCR 2.116(C)(7) and (C)(8) as follows:

Carson and Cendrowski move for dismissal based on MCR 2.116(C)(7) and (C)(8). Under sub-rule (7), the present complaint is barred by the settlement, stipulation and dismissal with prejudice of the prior litigation (Case #1)...**Alternatively**, under sub-rule (8), the complaint, on its face, fails to state a claim on which relief may be granted because *inter alia* it fails to identify any alleged wrongdoing by Carson or Cendrowski and fails to plead the basic elements of any recognizable cause of action." [Emphasis added.]

In Defendants' Reply Brief in Support of Motion to Dismiss Complaint, the Court observes Defendants' position as follows:

"To be clear, Carson and Cendrowski respectfully submit that this matter should be dismissed – **first and foremost** – under the law of res judicata, collateral estoppel, and the rule of compulsory joinder...**However, should the Court disagree**, Dart's two claims (member oppression and claim and delivery) should still be dismissed because neither states a valid cause of action." [Emphasis added.]

Undeniably, Defendants' primary argument in their summary disposition motion and reply brief centered on MCR 2.116(C)(7) regarding the defenses of res judicata, collateral estoppel, and compulsory joinder. The Court's interpretation of Defendants' directive in their reply brief was to first analyze the law of res judicata, collateral estoppel, and the rule of compulsory joinder and then only if the Court was inclined to deny those defenses, would the

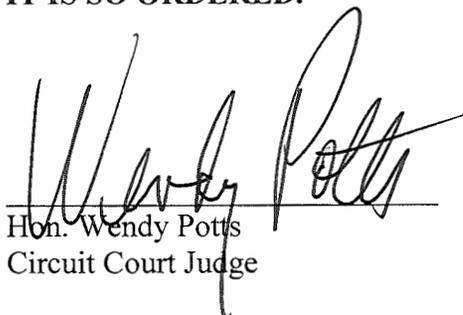
Court examine Plaintiff's minority member oppression and claim and delivery counts pursuant to MCR 2.116(C)(8).

Accordingly, the Court provided a comprehensive analysis of Defendants' grounds for summary disposition, as requested by Defendants, and will not now vacate the analysis related to MCR 2.116(C)(7) irrespective of the finding that it constitutes dicta. Stated otherwise, the Court shall not vacate pages three through eight of the February 29, 2016 Opinion and Order nor reissue an Amended Opinion and Order that omits the (C)(7) analysis.

With the exception of the Court's clarification that the analysis related to MCR 2.116(C)(7) constitutes dicta, Defendants' Motion for Relief from February 29, 2016 Order is hereby denied.

IT IS SO ORDERED.

Dated: **MAY 12 2016**



Hon. Wendy Potts
Circuit Court Judge