

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

DONNA PARSONS and
WOODWARD SIX MILE PROPERTY, LLC,

Plaintiffs,

Case No. 2015-145172-CB
Hon. Wendy Potts

v

BARBARA LOVELESS, individually, and
BARBARA LOVELESS, as Co-Trustee of
George & Barbara Spears Trust,

Defendants,

**OPINION AND ORDER RE: DEFENDANT'S MOTION FOR SUMMARY DISPOSITION
OF PLAINTIFFS' CLAIMS AND PLAINTIFF DONNA PARSON'S MOTION FOR ORDER
DIRECTING DEFENDANTS TO REIMBURSE PARTNERSHIP EXPENSES DONNA L.
PARSONS INCURRED FOR THE WOODWARD PROPERTY PURSUANT TO MCR
2.116(C)(8) AND (C)(10)**

At a session of Court
Held in Pontiac, Michigan On
MAR 31 2016

This matter is before the Court on the following motions:

- (1) Defendants' Motion for Summary Disposition of Plaintiffs' Claims; and
- (2) Plaintiff Donna L. Parsons' Motion for Order Directing Defendants to Reimburse Partnership Expenses Donna L. Parsons Incurred for the Woodward Property Pursuant to MCR 2.116(C)(8) and (C)(10).

In their Motion for Summary Disposition, Defendants are requesting the Court to dismiss all of Plaintiffs' claims against them as set forth in the First Amended Complaint pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10).

In consideration of MCR 2.116(C)(7), the Court determines whether a claim is barred by the Statute of Limitations. A motion under MCR 2.116(C)(7) is decided on the pleadings, unless the parties submit evidence contradicting the allegations in the pleadings. *Turner v Mercy Hosp & Health Services*, 210 Mich App 345, 349 (1995). If there are no material factual disputes, whether a claim is barred is a question of law. *Id.*

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).

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties...in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Maiden, supra* at 120; *Quinto v Cross & Peters Co.*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Defendants first argue that Plaintiffs' Count VI, “Declaratory Action,” should be dismissed as a matter of law under MCR 2.116(C)(8) since declaratory relief is a remedy and not a claim. While declaratory relief is technically an improper cause of action, the Michigan Court of Appeals has noted that it has become commonplace for plaintiffs to assert declaratory relief as a separate cause of action. When this occurs, Michigan courts will read complaints as a whole in order to

“look beyond the mere procedural labels used in the pleadings.” *Wiggins v City of Burton*, 291 Mich App 532, 561; 805 NW2d 517 (2011). Upon review of the First Amended Complaint, the Court will not dismiss Count IV since Plaintiffs are in fact seeking declaratory relief. As such, the Court denies summary disposition with regard to this ground under MCR 2.116(C)(8).

Secondly, Defendants contend that Plaintiffs’ Count V, “Sanctions Pursuant to MCR 2.114 and MCL 600.2591,” should be dismissed as a matter of law pursuant to MCR 2.116(C)(8) as those authorities do not provide an independent cause of action. Defendants maintain further that Plaintiffs’ claims are premature at this point. The Court defers to MCL 600.2591, which provides that “[u]pon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.” The language of the statute supports Defendants’ position that this claim is premature. The Court shall grant Defendants’ motion for summary disposition as to this ground under MCR 2.116(C)(8).

Third, Defendants maintain that Barbara Loveless has no personal liability to Plaintiffs and as such, all claims made against her personally should be dismissed with prejudice pursuant to MCR 2.116(C)(8) and (C)(10). Defendants indicate that the Spears’ Judgment of Divorce awarded George Spears’ partnership interest to the George and Barbara Spears Trust. While there is a survivorship provision to the Trust, the 50% interest in the Partnership has remained in the Trust as there have been no distributions of trust property to Defendant Loveless.

In response, Plaintiffs refer to Defendant Barbara Loveless’ Answer to Interrogatory Number One in which she stated that she claims a partnership interest in the Partnership designated as North Woodward Investments. In her Answers to Interrogatories Number Two and Four, Defendant Loveless asserted that she is the successor and assignee to all right, title, and interest in

the Partnership and the property held by her deceased former husband. In her Answer to Interrogatory Number Five, Defendant Loveless indicated that she claims an interest in the Partnership as Co-Trustee of the George and Barbara Spears Irrevocable Trust dated April 3, 2012. Defendant Loveless stated further that if the survivorship provision is self-effectuating, then she claims an interest in the Partnership in her own right.

In Defendants' March 4, 2015 Answer to the Complaint, Barbara Loveless admits that she is the successor to George Spears' partnership interest in North Woodward Investments. In light of Defendant Loveless' answers, the Court finds that there is a question of material fact where further factual development is necessary to determine whether or not Defendant Barbara Loveless has an individual interest in the Partnership and any corresponding personal liability. Therefore, the Court cannot grant Defendants' summary disposition motion with regard to their third argument under MCR 2.116(C)(8) or (C)(10).

Fourth, Defendants contend that Plaintiffs' claims are barred by the Statute of Limitations and should be dismissed pursuant to MCR 2.116(C)(7). Defendants maintain that every claim Plaintiffs make in their Complaint accrued long before six years prior to their institution of this action on January 23, 2015. Therefore, Plaintiffs' contract claims in Counts I, II, and IV should be dismissed.

The Court takes note of Defendants' argument that the six year Statute of Limitations bars Plaintiffs' Counts I, II, and IV. While the six year Statute of Limitations clearly applies to a breach of contract claim, Defendants fails to explain how the contract-based Statute of Limitations applies to Plaintiffs' claims of dissolution and breach of fiduciary duty as set forth in the First Amended Complaint. "It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate

for him his arguments, and then search for authority either to sustain or reject his position.” *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Pursuant to MCL 600.5807(8), a plaintiff must bring an action within “6 years for all other actions to recover damages or sums due for breach of contract.” A breach of contract claim accrues when the breach occurs. *Blazer Foods, Inc v Restaurant Properties*, 259 Mich App 241, 245-246; 673 NW2d 805 (2003). In other words, “[a] cause of action for breach of contract accrues when a contracting party fails to do what he is obligated to do under the contract.” *Jacobs v Detroit Auto. Inter-Ins. Exch.*, 107 Mich App 424, 431; 309 NW2d 627 (1981).

A motion filed under MCR 2.116(C)(7) is decided on the pleadings, unless the parties submit evidence contradicting the allegations in the pleadings. In this matter, there is a material factual dispute surrounding the actual accrual date of Plaintiffs’ breach of contract claim against these Defendants. Respectively, the parties disagree as to when the assignment of George Spears’ partnership interest to the Trust occurred, namely on June 3, 1992 through the Judgment of Divorce or on April 3, 2012 through the execution of the Irrevocable Trust Agreement and Assignment of Partnership Interest. The determination of the assignment date of George Spears’ partnership interest will resolve the outstanding issue concerning the validity of the 1997 Agreement, which authorized DOJA to pay the partnership property taxes, insurance, and maintenance. Additionally, the Court is aware of Defendant Barbara Loveless’ position that she only became aware of the 1997 Agreement in 2011. For these reasons, the Court denies Defendants’ summary disposition motion regarding Count I under MCR 2.116(C)(7).

With respect to Count II, “Dissolution of Partnership,” Plaintiffs maintain that the Statute of Limitations, as a general rule, “does not begin to run until dissolution or until there has been a settlement or an accounting of the partnership dealings.” *Reindel v Reindel*, 253 Mich 680, 682-83;

235 NW2d 861 (1931). As such, the Court cannot grant Defendants' summary disposition motion in relation to Count II under MCR 2.116(C)(7).

With regard to Count IV, "Breach of Fiduciary Duty," Defendants mischaracterize that claim as a contract-based claim that is subject to a six year Statute of Limitations. It is not this Court's responsibility to provide the legal authority concerning the applicable Statute of Limitations on Defendants' behalf and so Defendants have failed to convince this Court to grant summary disposition on this ground under MCR 2.116(C)(7).

According to Defendants, Plaintiffs' fraud claim in Count III should also be dismissed as exceeding the six year Statute of Limitations pursuant to MCL 600.5813.¹ Defendants rely on the fact that the Judgment of Divorce was entered in 1992 and the Agreement between DOJA and the Partnership was executed in 1997. In response, Plaintiffs claim that Defendant Barbara Loveless knew that George Spears had no authority to execute the 1997 Agreement between DOJA and North Woodward Investment Company when he allegedly lost his interest pursuant to the 1992 Judgment of Divorce. According to Plaintiffs, Defendant Loveless failed to disclose the above fact to the other partners and continued to remain silent, effectively concealing this fraud, even after she learned of the 1997 Agreement in 2011. Therefore, Plaintiffs contend that their fraud claim is timely on account of the fraudulent concealment by Defendant Loveless.

"Where the basis of the action is a fraud perpetrated by the defendant, the original fraud is regarded as a continuing affirmative act, and mere silence of the defendant is treated as concealment." *Barrett v Breault*, 275 Mich. 482, 491; 267 NW2d 544 (1936). "As a general rule, for fraudulent concealment to postpone the running of the period of limitation, the fraud must be manifested by an affirmative act or misrepresentation. An exception to this rule is that there is an

¹ MCL 600.5813 - All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes.

affirmative duty to disclose where the parties are in a fiduciary relationship.” *Brownell v Garber*, 199 Mich App 519, 527; 503 NW2d 81 (1993); *Lumber Vill., Inc. v Siegler*, 135 Mich App 685, 694-95; 355 NW2d 654 (1984).

As stated previously, a (C)(7) motion is decided on the pleadings, unless the parties submit evidence contradicting the allegations in the pleadings. The Court observes that there is a material factual dispute as to the actual assignment date of George Spears’ partnership interest, which must be resolved prior to this Court’s determination of whether or not George Spears had the authority to enter into the 1997 Agreement. Further, Defendant Barbara Loveless asserts that she was not even aware of the 1997 Agreement until 2011. Clearly, there is a question of fact as to the nature and timing of Defendants’ alleged fraudulent concealment of George Spears’ lost partnership interest that occurred in either 1992 or 2012 in addition to the contractual obligations of DOJA as set forth in the 1997 Agreement. On account of the material factual disputes surrounding the actual accrual date of Plaintiffs’ fraud claim, the Court denies Defendants’ summary disposition on this ground under MCR 2.116(C)(7).

In relation to Plaintiffs’ Count III, “Fraud Based on Failure to Disclose Facts/Silent Fraud,” Defendants also argue that the claim is devoid of any legal merit and it is misrepresentative of all relevant facts alleged and therefore, it should be dismissed with prejudice. As noted previously, there is a material question of fact as to whether or not George Spears had authority to execute the 1997 Agreement in consideration of the June 3, 1992 Judgment of Divorce or alternatively, the April 3, 2012 Assignment of Partnership Interest. In terms of the 1997 Agreement, Defendant Barbara Loveless claims that she was unaware of that Agreement until 2011. Again, the Court recognizes that there is a question of fact regarding the nature and timing of Defendants’ alleged fraudulent concealment of George Spears’ lost partnership interest and DOJA’s contractual

obligations under the 1997 Agreement. As such, the Court will not grant Defendants' request for summary disposition under MCR 2.116(C)(8) or (C)(10) as to this ground.

Finally, Defendants argue that Plaintiffs' claims are barred due to their predecessor's actions, agreements, and admissions. Defendants rely on the February 5, 2011 letter from attorney David J. Plese, counsel for Steve Parsons at that time, who admitted that the 1997 Agreement provided that DOJA would maintain the properties through the payment of property taxes, insurance, and maintenance. It is Defendants' contention that Mr. Plese's letter is a party admission chargeable against Plaintiff that would be admissible as a hearsay exception. However, "[a] statement cannot be used as a party admission unless the party made the statement." *Merrow v Bofferding*, 458 Mich 617, 633; 581 NW2d 696 (1998). The Court finds that Mr. Plese' letter does not qualify as a party admission and therefore, Defendants are not entitled to summary disposition on this ground under either MCR 2.116(C)(8) or (C)(10).

Accordingly, Defendants' Motion for Summary Disposition is granted as to Count V, "Sanctions Pursuant to MCR 2.114 and MCL 600.2591," and denied as to all other grounds.

*Plaintiff Donna L. Parsons' Motion for Order Directing Defendants to Reimburse
Partnership Expenses Donna L. Parsons Incurred for the Woodward Property
Pursuant to MCR 2.116(C)(8) and (C)(10)*

In Plaintiff Parson's motion, she argues that since 2013 alone, she has personally paid at least \$46,244.79 in taxes, insurance, and expenses to maintain the North Woodward Investments Partnership property in which Defendants Barbara Loveless individually and/or as Co-Trustee of the Barbara & George Spears Trust claim a 50% interest.

Under the Uniform Partnership Act, MCL 449.18, Plaintiff Parsons asserts that she is entitled to reimbursement from Defendants for 50% of those partnership expenses. Pursuant to MCR 2.116(C)(8) and (C)(10), Plaintiff requests reimbursement for 50% of the partnership expenses, namely \$46,244.79, in addition to interest on that amount, to be determined at a later date.

Plaintiff also requests the Court to order Defendants to contribute 50% toward any future expenses incurred pending this litigation.

In their Response, Defendants contend that all partnership expenses paid prior to the death of Steve Parsons on August 6, 2012, were paid by DOJ in lieu of rent and in consideration of DOJ's rights to retain all income generated from the subject properties. The exhibits indicate that DOJ documented those expenses in its IRS tax returns from 2006 through 2013. Based upon DOJ's IRS tax returns, the company paid the property's taxes for the years 2011 and 2012, expenses for which Plaintiff is currently seeking reimbursement.

Additionally, DOJ deducted \$5,825.89 for liability insurance expenses in its 2013 IRS tax return whereas Plaintiff claims to have incurred insurance expenses in 2013. Yet, Plaintiff's insurance payments on one particular policy appear to have been made on behalf of the "named insured," DOJ, and not the Partnership. As such, the Partnership did not receive any insurance protection under this policy.

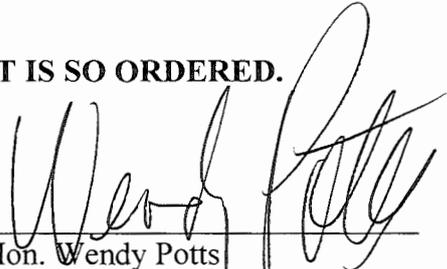
In consideration of the parties' respective arguments and the supporting exhibits, the Court finds that there is a genuine issue regarding the material facts related to payment of the partnership expenses claimed by Plaintiff. As such, the Court cannot grant Plaintiff summary disposition on this ground pursuant to MCR 2.116(C)(10). The Court further finds that MCR 2.116(C)(8) is not applicable to Plaintiffs' motion as written.

The final request by Plaintiff concerns the payment of \$11,675.35 in attorney fee expenses related to a District Court eviction lawsuit. In that action, however, Plaintiff sought enforcement of a lease between the tenants and DOJ, not the Partnership. According to Defendants, Plaintiff did not seek Defendants' approval to file that lawsuit nor did Defendants approve of Plaintiff's unilateral action in the 36th District Court. Thus, the Court will not grant summary disposition pursuant to MCR 2.116(C)(10) on that ground.

Accordingly, Plaintiff Donna L. Parsons' Motion for Order Directing Defendants to Reimburse Partnership Expenses Donna L. Parsons Incurred for the Woodward Property Pursuant to MCR 2.116(C)(8) and (C)(10) is denied as to the reimbursement of expenses.

With regard to payment of future expenses during the pendency of this action, the parties shall comply with the terms of the Partnership Agreement and/or the applicable provisions of the Uniform Partnership Act.

IT IS SO ORDERED.



Hon. Wendy Potts
Circuit Court Judge

Dated: **MAR 31 2016**