

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

**LORNE B. GOLD,  
Plaintiff,**

v.

**Case No. 15-146008-CB  
Hon. James M. Alexander**

**MICHIGAN SURGERY SPECIALISTS, PC,  
Defendant.**

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**AMENDED OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Defendant’s motion for summary disposition. Plaintiff is the Court-Appointed Receiver in the case of *Wagner v Wagner*, Oakland County Circuit Court Case No. 09-763427-DM. In an effort to collect on outstanding property and support obligations due his ex-wife, the Hon. Joan Young appointed Plaintiff as receiver over any and all of Dr. Wagner’s interests.<sup>1</sup> On February 4, 2015, Judge Young ordered Plaintiff to file the present case – apparently to recover the value of his shares of Defendant Michigan Surgery Specialists.

This case primarily involves a dispute over the per-share price of Dr. Wagner’s 1,200 shares in Defendant. Plaintiff wishes to sell his shares, and Defendant apparently wishes to buy the same. Plaintiff argues that the per-share price should be \$1,000, and Defendant argues that it is \$125. This dispute caused Plaintiff to file the current action on claims of breach of contract, statutory conversion, accounting, and shareholder oppression.

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<sup>1</sup> A very broad receivership order was entered by Judge Young on December 20, 2012. The Court will not speak to the efficacy of this order, and Defendant’s efforts to challenge an existing order of a fellow Circuit Court Judge are not properly raised in this forum. For purposes of this case, the Court views Plaintiff Lorne Gold as standing in the shoes of Dr. John Wagner, Jr.

Defendant now moves for summary disposition under MCR 2.116(C)(8) or (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint, and a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In response, Plaintiff seeks summary disposition of his Counts I, II, and III under MCR 2.116(I)(2).

### **1. Breach of Contract.**

Defendant first asks the Court to dismiss Plaintiff's breach of contract claim because the Buy/Sell Agreement sets the per-share price at \$125, and this number was never amended.

In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

Michigan law is well-established that “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

The contract at issue in this case is a July 1, 2003 “Buy/Sell Agreement.” It provides, in relevant part:

The “Agreed Value” shall mean the value of a share of common stock of the Corporation as set by the Shareholders of the Corporation as set forth on Exhibit

B. The Shareholders may annually review the Agreed Value. In the event the Shareholders revise the Agreed Value such revised Agreed Value shall be the Agreed Value from that date until revised again in accordance with this Agreement.

The Agreed Value on Exhibit B is listed at “\$125/share.” And the Agreement further provides that it “may be amended only by written agreement signed by all parties of this Agreement or their personal representatives, successors, or assigns.”

The Agreement further provides that Defendant may purchase back the shares of a shareholder “[i]n the event of the occurrence of a Triggering Event.” Such events include “the cessation of such Shareholder’s employment with the Corporation for any reason.”

Dr. Wagner’s license to practice medicine was suspended in July 2012. In March 2013, the Corporation sent a letter to Dr. Wagner – purporting to terminate his employment and making an election to purchase his 1,200 shares.

For unknown reasons, although, it doesn’t appear that further action occurred until December 2014, when Defendant issued a check to Plaintiff Receiver for \$77,263.34, which was never cashed. This amount, Defendant argues, constituted the entire purchase price for Dr. Wagner’s shares in Defendant.

Plaintiff claims, however, that this purported tender came too late under Section 7 of the Buy/Sell Agreement’s terms, which requires a closing occur within 60 days of Defendant’s alleged exercise of its option. And December 2014 alleged tender occurred over a year-and-a-half after the March 2013 election.

As a result, it appears that the parties dispute (not only the purchase price) but the legitimacy of Defendant’s purported election, and therefore, the current ownership of Plaintiff’s 1,200 shares.

Setting that dispute aside for the moment, Defendant argues that it is undisputed that the shareholders never actually revised the Agreed Value in a writing signed by all shareholders. As a result, the Buy/Sell Agreement's defined \$125 per share Agreed Value figure was never amended.

In response, Plaintiff presents ample evidence (including admissions contained in affidavits attached to Defendant's motion) whereby it appears that Defendant's shareholders voted to raise the Agreed Value price to \$1,000 at least once and perhaps numerous times. In fact, Plaintiff cites to a revised Buy/Sell Agreement that contains the change. Plaintiff also attaches meeting minutes that indicate the \$1,000 per share amendment, and these minutes were "passed unanimously."

Plaintiff also presents evidence that one other shareholder's (Pierret) shares were redeemed for "a sum effectively equal to the revised Agreed Value." Plaintiff claims that there are two additional redemptions (Gorosh and Barbosa) that are possibly under dispute and an additional shareholder (Plomaritis) that is missing from corporate documents. Plaintiff claims that it is unclear when or if Plomaritis ceased being a shareholder, and if so, what his shares were repurchased at.

Based on all the foregoing, and only for purposes of the present motion, the Court finds that there exist sufficient questions of fact about whether a unanimous vote to amend constitutes a writing within the meaning of the Buy/Sell Agreement such that summary disposition on this claim is inappropriate. The Court further finds that there are material questions of fact regarding the current ownership of Plaintiff's 1,200 shares.

For these reasons, Defendant's request for summary of Plaintiff's Count I is DENIED.

## 2. Statutory Conversion.

Defendant next moves for summary disposition of Plaintiff's statutory conversion claim – arguing that money cannot serve as the basis of a conversion claim.

The Revised Judicature Act provides, at MCL 600.2919a:

(1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:

(a) Another person's stealing or embezzling property or converting property to the other person's own use.

...

(2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.

Michigan law establishes that “[t]he tort of conversion is ‘any distinct act of domain wrongfully exerted over another’s personal property in denial of or inconsistent with the rights therein.’” *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App. 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

But “[t]o support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care.” *Head*, 234 Mich App at 111.

Defendant argues that Plaintiff cannot succeed on his conversion claim when he fails to establish that Defendant has been entrusted with specific monies. As a result, Defendant claims that Plaintiff's conversion count fails.

Plaintiff responds that he does not allege a conversion of money. Rather, Plaintiff's conversion claim is founded on the conversion of Plaintiff's stock shares. Indeed, Michigan's Business Corporation Act, at MCL 450.1471 provides, in relevant part, that “The shares of a corporation are personal property.”

But it appears that Defendant abandoned any claim that it owns any of Plaintiff's shares. Rather, the present suit appears to seek a determination of the appropriate purchase price of said shares. Because the Court finds that Defendant abandoned any claim that it currently owns Plaintiff's shares, Defendant's motion for summary of Plaintiff's Count II for conversion is GRANTED.

### **3. Accounting.**

Defendant next argues that Plaintiff is not entitled to an accounting because one has already been provided. Defendant also claims that "to the extent that the Court does not dismiss the other claims, [it] will permit [Plaintiff] to conduct an accounting of the post-March 22, 2013 books and records."

In other words, Defendant appears to acknowledge that Plaintiff is entitled to some form of an accounting if he alleged any valid claims against it. Since the Court has denied Defendant's summary request with respect to at least one of Plaintiff's claims, the Court finds that Defendant's request for summary of Plaintiff's accounting claim is also DENIED.

### **4. Shareholder Oppression.**

Finally, Defendant argues that Plaintiff's shareholder oppression claim must be dismissed because Plaintiff failed to allege any wrongdoing by the other shareholders.

Under MCL 450.1489(1), in order to establish a shareholder oppression claim, a plaintiff must establish "that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder."

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 shareholder as a shareholder. 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 shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure. MCL 450.1489(3).

Plaintiff claims that Defendant has “unlawfully stolen or converted” his 1,200 shares of stock. But, as stated, it appears that Defendant abandoned any claim that it presently owns Plaintiff’s shares. As a result, summary disposition of Plaintiff’s MCL 450.1489 claim is properly GRANTED, and the same is DISMISSED.

**5. Summary.**

To summarize, Defendant’s motion for summary disposition is GRANTED IN PART, and Plaintiff’s Counts II (conversion) and IV (under MCL 450.1489) are DISMISSED. In all other respects, Defendant’s motion is DENIED.

Plaintiff’s motion for summary disposition of its Counts I, II, and III under (I)(2) is also DENIED.

**IT IS SO ORDERED.**

June 10, 2015 \_\_\_\_\_  
Date

\_\_\_\_\_/s/ James M. Alexander\_\_\_\_\_  
Hon. James M. Alexander, Circuit Court Judge