

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

**AMBULATORY ANESTHESIA ASSOCIATES, PC,
Plaintiff,**

v.

**Case No. 15-146034-CZ
Hon. James M. Alexander**

**RICARDO BORREGO, MD,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on the following motions for summary disposition: (1) Plaintiff's motion for partial summary disposition as to liability on its Amended Complaint Counts I, II, and IX; (2) Plaintiff's motion for summary disposition of Defendant's Counterclaim and Third-Party Complaint; and (3) Defendant's motion for partial summary disposition of Plaintiff's Amended Complaint Counts III, IV, V, VI, and IX.

Plaintiff Ambulatory Anesthesia Associates was incorporated on October 28, 2005 and is in the business of providing anesthesia medical services. Plaintiff claims that, at all times, its stock has been owned in equal 1/3 shares by Defendant Dr. Borrego and Third-Party Defendants Dr. Alhadi and Dr. Henderson.

Dr. Borrego served as Plaintiff's president from its incorporation until March 11, 2014. Plaintiff claims that Drs. Alhadi and Henderson have served as Plaintiff's directors and officers from its incorporation until the present, with Dr. Alhadi currently serving as Plaintiff's president and Dr. Henderson currently serving as Plaintiff's secretary and treasurer.

Plaintiff alleges that it provides anesthesia services at three main locations: (1) the Dearborn Surgery Center, (2) Monroe Hospital Surgery Center, and (3) Truvista Surgery Center in Troy. Of these locations, Plaintiff claims that the Dearborn Surgery Center is the most lucrative – accounting for more than 50% of its gross annual revenue.

On March 11, 2014, Plaintiff claims that Drs. Alhadi and Henderson voted to remove Dr. Borrego from his positions as president, director and chief administrative officer. The removal was based on allegations that Dr. Borrego: (1) refused to provide documents and information concerning Plaintiff's business operations and banking records to the other shareholders; (2) made payments to or for the benefit of himself and his family without proper documentation or support; and (3) failed to make required pension contributions for Plaintiff's shareholder employees.

Following Dr. Borrego's removal from the aforementioned positions, Plaintiff claims that Drs. Alhadi and Henderson determined that, while in control of Plaintiff, Dr. Borrego (in part): (1) usurped business opportunities available to Plaintiff, (2) wrongfully competed with Plaintiff, (3) used Plaintiff's funds to pay expenses of his competing businesses, (4) used Plaintiff's malpractice insurance, equipment, name, goodwill, and service providers in pursuit of his competing business ventures, (5) exposed Plaintiff to potential liability; (6) entered into a medical services contract with the Dearborn Surgery Center in his own name; (7) failed to obtain life insurance with Plaintiff as the beneficiary to fund a stock purchase under the Buy-Sell and Deferred Compensation Agreement; and (8) failed to work "full time" and provide his best efforts for Plaintiff.

Plaintiff also claims that, after his removal from his former positions, Dr. Borrego: (1) continued to make undisclosed and unauthorized payments from Plaintiff's bank accounts for his

own or his family members' benefit; (2) refused Plaintiff's demand that he have the Dearborn Surgery Center contract put in Plaintiff's name – rather than his own; (3) continued to wrongfully compete with Plaintiff; (4) failed to turn over compensation that he received for medical services; (5) continued to usurp business opportunities available to Plaintiff; and (6) failed to devote his “full time” and best efforts to Plaintiff.

On these general allegations, Plaintiff initially filed suit against Dr. Borrego on March 17, 2015 – but subsequently amended its Complaint on May 18, 2015 – generally alleging breach of contract, fraud, and breach of fiduciary duty claims.¹

In response to the lawsuit, Dr. Borrego filed a Counter- and Third-Party Complaint against Plaintiff and Drs. Alhadi and Henderson respectively. His version of events, not surprisingly, is far different than Plaintiff's, and he denies any wrongdoing at any time.

Dr. Borrego claims that he was involved in Dearborn Surgery Center since its inception in 1999. In fact, in 2004 (the year before Plaintiff was incorporated), Dr. Borrego claims that he entered into an agreement to be the Medical Director of Dearborn Surgery Center, which included an agreement he exclusively provide anesthesia services for the same.

Dr. Borrego generally claims that he was the driving force behind incorporating Plaintiff and first brought Dr. Henderson on board in January 2006, with Dr. Alhadi joining in July 2006. Under their Shareholder Employment Agreements, each of the doctors was entitled to the same salary and distributions – with the exception that Dr. Borrego was entitled to at least an additional \$50,000 annually for his chief administrative officer duties.

¹ Plaintiff's First Amended Complaint specifically alleges claims of: (Count I) breach of fiduciary duty; (Count II) breach of Employment Agreement; (Count III) breach of Buy-Sell and Deferred Compensation Agreement; (Count IV) fraudulent inducement as to the Buy-Sell; (Count V) innocent misrepresentation as to the Buy-Sell; (Count VI) silent fraud as to the Buy-Sell; (Count VII) breach of Plaintiff's Bylaws; (Count VIII) unjust enrichment; (Count IX) conversion/embezzlement/theft; (Count X) injunctive relief; (Count XI) declaratory relief; and (Count XII) accounting.

Also in January 2006, Dr. Borrego claims that he assigned his contract to provide anesthesia services to Dearborn Surgery Center to Plaintiff. Dr. Borrego also claims that he continued to seek out and obtain opportunities for Plaintiff and his fellow Plaintiff shareholders. These opportunities include his procuring: (1) Monroe Hospital and Surgery Center, (2) an endoscopy center in Troy, (3) Michigan Head and Spine Institute, (4) Novi Surgery Center, (5) the Surgical Institute of Michigan in Westland, and (6) Truvista Surgery Center in Troy.

But sometime between 2011 and 2012, the Monroe Hospital and Surgery Center became unprofitable, and Plaintiff began using revenue from its profitable arrangements to cover the losses there.

At the annual shareholder meetings from 2011 through 2014, Dr. Borrego claims that he implored his fellow Plaintiff shareholders to terminate services at Monroe Hospital, but they refused. Dr. Borrego also claims that Drs. Alhadi and Henderson also refused to reduce their compensation until the situation at Monroe Hospital improved.

Dr. Borrego further claims that, between 2011 and 2014, he earned significantly less than Drs. Alhadi and Henderson – despite having an additional stipend for the additional daily work of managing and administering Plaintiff. And, during this entire time, Dearborn Surgery Center remained the most profitable source of revenue for Plaintiff.

Around the same time, Dr. Borrego claims that Drs. Alhadi and Henderson began fearing that they would lose their most significant source of earnings (Monroe Hospital). As a result, in early 2014, Dr. Borrego claims that they purported to remove him as a member of the Board of Directors and as an officer of Plaintiff.

Dr. Borrego claims that Drs. Alhadi and Henderson also: (1) terminated his management and administrative rights, (2) removed him from all financial and bank accounts, and (3) hired

new corporate counsel. Dr. Borrego claims that he was never notified of any meeting, and he first learned of these actions two days after the meeting and vote allegedly occurred.

And, Dr. Borrego claims, neither Drs. Alhadi and Henderson never expressed any interest in Plaintiff management or oversight until terminating the Monroe Hospital arrangement was seriously discussed.

Further, Dr. Borrego alleges, since the March 2014 removal from his positions, Drs. Alhadi and Henderson continue to hold shareholder or Board of Director meetings without notice to and without his presence. And since that time, Drs. Alhadi and Henderson have unilaterally reduced Dr. Borrego's compensation while preserving their own.

On these general claims, Dr. Borrego filed his Counter- and Third-Party Complaint on claims of shareholder oppression, breach of contract, breach of fiduciary duties, and declaratory relief.

After this case began, on September 30, 2015, Plaintiff claims that Dr. Borrego revoked his assignment to Plaintiff to provide anesthesia services at Dearborn Surgery Center – thereby taking over providing such services there under a new business that Dr. Borrego solely owns. This, Plaintiff claims, substantially reduced its revenue.

In any event and despite the parties' wildly differing accounts of this case, the parties filed the present cross motions for summary disposition – Plaintiff seeking the same under MCR 2.116(C)(10) and Dr. Borrego under (C)(8). In response to Plaintiff's motions, Dr. Borrego additionally seeks summary under MCR 2.116(I)(2).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. A motion under this subrule may be granted only where the claims alleged are so clearly unenforceable as

a matter of law that no factual development could possibly justify recovery. *Wade v Dept of Corrections*, 439 Mich 158; 483 NW2d 26 (1992).

A motion under (C)(10) tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). 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).

I. Plaintiff's Motion for Partial Summary Disposition of its Counts I, II, and IX.

Plaintiff first seeks partial summary disposition as to liability on its claims for breach of employment contract (Count II), breach of fiduciary duty, (Count I), and conversion (Count IX) based solely on Dr. Borrego's deposition testimony and admission that he unilaterally terminated Plaintiff's anesthesia services at Dearborn Surgery Center, "and has since been providing competing anesthesia services through his wholly owned company [Anesthesia Surgical Associates], utilizing the same doctors and nurses to do so, and pocketing the proceeds for the services himself."

In response, Dr. Borrego first argues that the Court already determined (at an October 8, 2015 TRO Hearing) that Dr. Borrego's contract with Dearborn Surgery Center was a personal contract between those two parties. Further, the Court found that the contract "long predated Dr. Borrego's involvement with Plaintiff and [Drs. Alhadi and Henderson]."

While the Court recognizes, as argued in Plaintiff's Reply Brief, that preliminary rulings are not binding as ultimate determinations on the merits, this Court has reevaluated the parties' submissions and the **overwhelmingly disputed evidence** presented and finds that there is no reason to reverse course at this time. For purposes of the present motion, just as at the TRO stage, the Court finds that Dr. Borrego's contract with Dearborn Surgery Center was personal to him and predated Plaintiff's incorporation and Dr. Borrego's involvement Drs. Alhadi and Henderson. This finding alone precludes summary disposition because Plaintiff's entire argument is based on a contrary determination.

Further, there are simply far too many disputed issues that are properly submitted to the trier-of-fact. For example, assuming arguendo that the trier-of-fact or Court determines that Dr. Borrego's contract with Dearborn Surgery Center was, in fact, properly an agreement between Plaintiff and Dearborn Surgery Center, Dr. Borrego maintains that he was not the first party to materially breach his Agreements with Plaintiff such that Plaintiff succeeds on its claims.

Dr. Borrego bases his argument on the allegation that Drs. Alhadi and Henderson conduct in removing him from his positions was illegal under Michigan's Business Corporations Act. This is so, Dr. Borrego argues, because Drs. Alhadi and Henderson acted without a meeting or provide notice on their potential actions.

Under MCL 450.1407(1), Dr. Borrego argues that Drs. Alhadi's and Henderson's actions were only possible if Plaintiff's **Articles of Incorporation** provide that such action could occur without a vote.² But Plaintiff's Articles do not so provide.

² MCL 450.1407(1) provides, in relevant part:

The articles of incorporation may provide that any action required or permitted by this act to be taken at an annual or special meeting of shareholders may be taken without a meeting, without prior notice, and without a vote, if consents in writing, setting forth the action so taken, are signed by the holders of outstanding shares having not less than the minimum number of votes that would be necessary to authorize or take the action at a meeting at which all shares entitled to vote on the action were present and voted.

As a result, Dr. Borrego maintains that MCL 450.1407(2) controls. It provides, in relevant part: “Any action required or permitted by this act to be taken at an annual or special meeting of shareholders may be taken without a meeting, without prior notice, and without a vote, **if before or after the action all the shareholders entitled to vote consent in writing.**” (emphasis added).

Since Dr. Borrego undisputedly did not consent to his own removal, he maintains that Drs. Alhadi’s and Henderson’s actions in removing him were contrary to MCL 450.1407(2). As a result, they were the first to breach the Agreements.

Plaintiff responds that the Bylaws permit Drs. Alhadi’s, and Dr. Henderson’s actions because they contain a clause that allows actions by shareholders through consent resolutions and without a formal meeting where a quorum to take the action exists. Dr. Borrego does not dispute that the Bylaws so provide. But, he argues, because they so provide, the Bylaws are inconsistent with the Articles and the statute, and when such a conflict exists, the Bylaws give way to the Articles or Statute, citing MCL 450.1231.

The cited statute provides, in relevant part: “The bylaws may contain any provision for the regulation and management of the affairs of the corporation **not inconsistent with law or the articles of incorporation.**” MCL 450.1231 (emphasis added).

Indeed, Plaintiff’s Bylaws appear inconsistent with Plaintiff’s Articles of Incorporation in that the latter does not permit action without a formal meeting. The Court also rejects Plaintiff’s argument that MCL 450.1231 only controls what the Articles of Incorporation **may** contain, and therefore, has no bearing on Plaintiff’s Bylaws. Plaintiff has cited no provision of the Business Corporations Act that permits the Bylaws of a company to authorize action without a meeting such as allegedly took place here.

And the Court cannot ignore that the legislature chose to use the phrase “Articles of Incorporation” in MCL 450.1407(1) and the word “Bylaws” in other sections of the BCA. This specific choice indicates an intent to only allow a corporation’s “Articles of Incorporation” to provide that action without a meeting is possible. As a result, Plaintiff’s reliance on the Bylaws for such authority is misplaced as they conflict with the Articles and Statute.³

For all of the foregoing reasons, the Court DENIES Plaintiff’s motion for partial summary disposition as to liability on its claims for breach of employment contract (Count II), breach of fiduciary duty, (Count I), and conversion (Count IX).

II. Plaintiff’s Motion for Partial Summary Disposition of Dr. Borrego’s Counter- and Third-Party Claims.

Plaintiff next seeks dismissal of Dr. Borrego’s Counter- and Third-Party Complaint because it fails to state any valid claims because all of Plaintiff’s, Drs. Alhadi’s, and Dr. Henderson’s actions were lawful under Dr. Borrego’s Employment Agreement or Plaintiff’s Bylaws or Articles of Incorporation.

In support, Plaintiff argues that, 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.”

But the statute specifically excludes, from the definition of “willfully unfair and oppressive conduct” any “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).

³ Further, assuming arguendo that the Bylaws did permit such action, there remain questions of fact as to which side was the first to materially breach the agreements, and summary disposition would be improper.

In response, Dr. Borrego first argues that, Plaintiff has provided no evidence to support any of their allegations of wrongdoing against Dr. Borrego that would allow them to use their business judgment to remove him from his roles in Plaintiff.

Indeed, whether Dr. Borrego acted in a way that implicated Drs. Alhadi's and Henderson's business judgment is so substantially intertwined with fact-finding and credibility determinations as to render summary disposition wholly inappropriate.⁴

As a result, Plaintiff's motion for summary disposition on this basis is DENIED.

III. Dr. Borrego's Motion for Partial Summary Disposition.

Finally, Dr. Borrego seeks dismissal of Plaintiff's claims for fraud (Counts IV and VI), misrepresentation (Count V), conversion (Count IX), and breach of the Buy-Sell Agreement (Count III).

A. Fraud-based claims (Counts IV, V, and VI)

Plaintiff's fraud-based claims are based on the allegation that, "[p]rior to execution of the Buy-Sell Agreement, Dr. Borrego failed to disclose . . . that he was not capable of obtaining and/or did not intend to obtain, life insurance on his life naming [Plaintiff] as the beneficiary for the purpose of funding the obligations to purchase his stock in [Plaintiff] under [said

⁴ Further, although not addressed by the parties, this Court has repeatedly cited with approval the reasoning found in *Berger v Katz*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2011 (Docket Nos. 291663, 293880): "[a]lthough the bylaws gave defendants the general authority to make business decisions such as setting salaries, issuing capital calls, or approving rental payments, that does not mean that defendants were permitted to act in a manner that was willfully unfair and oppressive to plaintiff, as a minority shareholder."

The *Berger* panel went on to conclude: "[t]he exception in MCL 450.1489(3) cannot be read as permitting willfully unfair and oppressive conduct under the guise of defendants' general authority to run and manage [the business]." Questions of fact also remain on this issue.

Agreement].” The Buy-Sell Agreement does not contain any express obligation that Dr. Borrego do so.

Dr. Borrego argues that he is entitled to summary disposition of the fraud-based claims because Plaintiff has not alleged a breach of a duty separate and distinct from the alleged breach of the Buy-Sell Agreement. Further, the Buy-Sell Agreement delineates the obligations of the parties and contains a valid merger/integration clause. As a result, any pre-contractual misrepresentations that are contradicted by the plain terms of the written contract fail as a matter of law.

The Buy-Sell Agreement provides, at section 18.c.:

Entire Agreement. This document, together with the Exhibits attached hereto, contains the entire agreement, and constitutes the contract, between the parties hereto with respect to the subject matters hereof, and no representations, warranty, affirmation of fact, promise or other statement not specifically herein set forth shall be binding on any party hereto. This Agreement supersedes and replaces any and all prior agreement(s) dealing with the subject matter hereof, including, but not limited to the Prior Agreement, as described in subsection 1.a above.

Despite acknowledging in writing that there were no other agreements, representations, or commitments between the parties, Plaintiff argues that it relied on Dr. Borrego’s pre-contractual promise that he would obtain life insurance with Plaintiff as the beneficiary in order to fund the Buy-Sell Agreement in the event of his death. This argument serves as the foundation for its fraud-based claims.

Michigan law is well-established that “a court must construe and apply unambiguous contract provisions as written.” *Rory v Cont’l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, “[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.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

Michigan law is also clear that “to sustain a fraud claim, the party claiming fraud must reasonably rely on the material misrepresentation.” *Zaremba Equip, Inc v Harco Nat’l Ins Co*, 280 Mich App 16, 39; 761 NW2d 151 (2008) (emphasis in original), citing *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005); and *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004). The same is true for innocent misrepresentation claims. *Zaremba*, 280 Mich App at 39; citing *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999).

Dr. Borrego argues that Buy-Sell Agreement’s merger provision renders unreasonable, as a matter of law, Plaintiff’s claim that Drs. Alhadi and Henderson relied on Dr. Borrego’s promise to obtain life insurance.

Indeed, our appellate courts have reasoned:

There is an important distinction between (a) representations of fact made by one party to another to induce that party to enter into a contract, and (b) collateral agreements or understandings between two parties that are not expressed in a written contract. It is only the latter that are eviscerated by a merger clause, even if such were the product of misrepresentation. It stretches the UAW-GM ruling too far to say that any pre-contractual factual misrepresentations made by a party to a contract are wiped away by simply including a merger clause in the final contract. Such a holding would provide protection for disreputable parties who knowingly submit false accountings, doctored credentials and/or already encumbered properties as security to unknowing parties as long as they were savvy enough to include a merger clause in their contracts. *Barclae v Zarb*, 300 Mich App 455, 481; 834 NW2d 100 (2013); quoting *Star Ins Co v United Commercial Ins Agency, Inc*, 392 F Supp 2d 927, 928-929 (ED Mich 2005).

In fact, the *Barclae* Court heavily relied on and extensively quoted *Star Ins Co*, 392 F Supp 2d 927. The *Star Ins Co* Court continued:

The key element in cases involving a merger clause is whether one justifiably relied on the representations of another when the parties' written agreement clearly stated that by signing the document they were agreeing that the document made up the parties' entire agreement regarding the terms of the contract and its performance standards. The Michigan courts have said that, as it pertains to representations regarding additional agreements or contractual terms, a party would not be justified in relying on them where there is a merger clause. The reasoning behind this is clear, one should not be heard to complain that they relied on oral promises regarding additional or contrary contract terms when there is written proof, signed by both parties, to the contrary. Yet, a party could still justifiably rely upon representations made by another party regarding things outside the scope of the contractual terms, such as the other party's solvency, indebtedness, experience, clientele, client retention rate, business structure, etc. If these representations are false when they are made, not merely opinion and not future promises, they could constitute fraud in the inducement. *Star Ins Co*, 392 F Supp 2d at 929-930; citing *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 554-555, 487 NW2d 499 (1992).

The key laid out in *Barclae* and *Star Ins Co* is that “[t]here is an important distinction between (a) representations of fact made by one party to another to induce that party to enter into a contract, and (b) collateral agreements or understandings between two parties that are not expressed in a written contract.” *Barclae*, 300 Mich App at 481; quoting *Star Ins Co*, 392 F Supp 2d at 928-929. The latter of these two “are eviscerated by a merger clause, even if such were the product of misrepresentation.” *Id.*

The alleged representation that founds the basis for Plaintiff's fraud claims is one in the nature of a collateral agreement or understanding between the two parties that is not expressed in the written contract – namely, the future promise that Dr. Borrego would obtain or try to obtain life insurance for the benefit of Plaintiff. If this was a requirement, it would have been a part of the Agreement. In any event, the alleged statement is not a representation of fact made by Dr. Borrego to induce Plaintiff into signing the Buy-Sell Agreement.

For the foregoing reasons, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court finds that Plaintiff's fraud-based claims are so clearly

unenforceable as a matter of law that no factual development could justify a right of recovery. As a result, the Dr. Borrego's motion for summary disposition of said claims are GRANTED under (C)(8), and Plaintiff's Counts IV, V, and VI are DISMISSED.

B. Conversion (Count IX)

Dr. Borrego next seeks dismissal of Plaintiff's conversion claim (Count IX). Plaintiff bases this claim on the allegation that Dr. Borrego stole its money when he failed to turn over compensation that he received for medical services. In support, Plaintiff cites to Dr. Borrego's Shareholder Employment Agreement, which provides that "all income generated by Shareholder for professional medical services shall be the exclusive property of [Plaintiff]."

As a result, Plaintiff claims, the Employment Agreement "establishes [Plaintiff's] rights in and to any monies Dr. Borrego received for his medical services." The Court agrees, but this allegation actually only pleads a breach of contract claim. In other words, Plaintiff alleges that it is entitled to certain monies under the terms of an express contract. That is an appropriate claim for breach of contract. But alleging a failure to make payment under said contract does not amount to conversion.

Michigan law provides 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).

Our appellate courts have further reasoned:

Statutory conversion consists of knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property. *Head*, supra; MCL 600.2919a. **This Court has ruled that simply retaining money does not amount to "buying, receiving or aiding in the concealment of stolen,**

embezzled or converted property.” *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 592-593; 683 NW2d 233 (2004) (emphasis added); quoting *Hovanessian v Nam*, 213 Mich App 231, 237; 539 NW2d 557 (1995).

This is precisely the case here. As stated, Plaintiff bases its conversion claim solely on the allegation that Dr. Borrego is retaining money due under an express contract. This allegation cannot serve as the basis for a conversion claim.

For the foregoing reasons, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court finds that Plaintiff’s conversion claim is so clearly unenforceable as a matter of law that no factual development could justify a right of recovery. As a result, the Dr. Borrego’s motion for summary disposition of said claim is GRANTED under (C)(8), and Plaintiff’s Count IX is DISMISSED.

C. Breach of Buy-Sell Agreement (Count III)

Dr. Borrego next argues that Plaintiff’s claim for breach of Buy-Sell Agreement (Count III) should be dismissed. Plaintiff bases said claim on the allegation that Dr. Borrego did not obtain life insurance with Plaintiff named as beneficiary as required under the Buy-Sell Agreement.

But, as stated above, the Buy-Sell Agreement does not contain such an express obligation on Dr. Borrego to obtain life insurance. As a result, Plaintiff cannot allege a breach of said Agreement based solely on this allegation.

For the foregoing reasons, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court finds that Plaintiff’s claim for breach of Buy-Sell Agreement is so clearly unenforceable as a matter of law that no factual development could

justify a right of recovery. As a result, the Dr. Borrego's motion for summary disposition of said claim is GRANTED under (C)(8), and Plaintiff's III is DISMISSED.

4. Summary

To summarize, both of Plaintiff's motions for partial summary disposition are DENIED.

Dr. Borrego's motion for partial summary disposition, however, is GRANTED, and Plaintiff's claims for fraud (Counts IV and VI), misrepresentation (Count V), conversion (Count IX), and breach of the Buy-Sell Agreement (Count III) are DISMISSED.

IT IS SO ORDERED.

January 20, 2016
Date

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