STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JULIE ELLEN NEWMAN, et al,

Plaintiffs,

v

Case No. 15-146394-CZ
Hon. Wendy Potts

ELAINE KAREN LIPSCHUTZ, et al,

Defendants.

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OPINION AND ORDER RE: PLAINTIFF/COUNTER-DEFENDANT'S MOTION FOR PARTIAL SUMMARY DISPOSITION UNDER MCR 2.116(C)(8) AND FOR COSTS AND ATTORNEY'S FEES UNDER MCR 2.114, MCR 2.625, AND MCL 600.2591 and THIRD-PARTY DEFENDANT SCOTT NEWMAN'S MOTION FOR SUMMARY DISPOSITION OF AMENDED THIRD-PARTY COMPLAINTS

At a session of Court
Held in Pontiac, Michigan
On
JUL 28 2016

This case arises from a family dispute over a loan extended by Defendant JPMorgan Chase Bank, N.A., purportedly for the purpose of financing business operations of Defendant MALAK Equities, LLC and other family owned businesses. Plaintiff, the Julie Ellen Winkelman Revocable Living Trust (Julie Trust), is a member of MALAK. Plaintiffs' complaint alleges, among other claims, that MALAK converted and conspired with other Defendants to convert Plaintiffs' property. Plaintiffs assert several other claims against Defendants, and Defendants, in turn, assert various counterclaims against Plaintiffs as well as cross claims and third-party claims. In particular, MALAK asserts claims against the Julie Trust for breach of MALAK's

operating agreement and breach of fiduciary duty, and MALAK and the Lipschutz parties assert third party claims against Scott Newman, which will be discussed in more detail below.

This matter is presently before the Court on (1) the Julie Trust's motion for summary disposition of Count II of the Defendant/Counter-Plaintiff MALAK's Amended Counterclaim and Third Party Complaint and (2) Third Party Defendant Scott Newman's motion for summary disposition of the amended third-party complaints. On June 15, 2016, the Court heard oral argument on the motions and took the matters under advisement.

The Julie Trust's Motion for Summary Disposition under MCR 2.116(C)(8) and for Costs and Attorney's Fees under MCR 2.114, MCR 2.625, and MCL 600.2591

The Julie Trust moves for summary disposition alleging that Count II for breach of fiduciary duty of MALAK's Amended counterclaim and third party complaint should be dismissed for failure to state a claim. A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

The Julie Trust is a member of MALAK that holds at 30% membership interest and a 31.579% voting share of MALAK. The Julie Trust argues that the Michigan Limited Liability Company Act and common law fail to impose a fiduciary duty on a non-managing, minority member of a Michigan LLC. The Michigan Limited Liability Company Act only provides for a fiduciary duty under MCL 450.4404(1), which states "(1) A manager shall discharge the duties of manager in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the manager reasonably believes to be in the best interests of the limited liability company." *Id.*

Manager and Member are both defined terms under the Michigan Limited Liability Company Act. "'Manager' or 'managers' means a person or persons designated to manage the limited liability company pursuant to a provision in the articles of organization stating that the business is to be managed by or under the authority of managers." MCL 450.4102(2)(o). "'Member' means a person who has been admitted to a limited liability company as provided in section 501, or, in the case of a foreign limited liability company, a person that is a member of the foreign limited liability company in accordance with the laws under which the foreign limited liability company is organized." MCL 450.4102(2)(p). The Julie Trust argues that as a member, and not a manager, it did not owe MALAK a fiduciary duty because the statute only establishes a fiduciary duty between a manager and the LLC.

In response, MALAK argues that its allegations create questions of fact regarding the existence of fiduciary duties and that the Julie Trust has cited no binding precedent in Michigan for the proposition that members of Michigan LLCs owe no fiduciary duties to each other or to the LLC unless they are appointed as managers of the LLC. MALAK admits that the statute is silent on the duties owed between members. The express mention in a statute of one thing implies the exclusion of other similar things. *Bradley v Saranac Community Schools Bd of Educ*, 455 Mich 285, 298; 565 NW2d 650 (1997). Thus, the express mention of a manager owing a fiduciary duty to the limited liability company without mention of a similar duty for a member implies that the Legislature only intended to create the duty for managers. *Id.*

MALAK cites several decisions addressing fiduciary duties that partners in closely held business ventures and closely held corporations owe to each other. See *Latimer v Piper*, 261 Mich 123; 246 NW 65 (1933) and *Band v Livonia Assoc*, 176 Mich App 95; 439 NW2d 285 (1989). However, MALAK cites no authority that this same principle applies to the instant

matter. Because MALAK fails to demonstrate that the Julie Trust owed it a fiduciary duty, the Julie Trust is entitled to summary disposition under (C)(8) of Count II. Accordingly, Count II of Defendant/Counter-Plaintiff MALAK Equities, LLC's Amended Counterclaim and Third Party Complaint is dismissed.

The Julie Trust moves for an Order imposing a sanction on MALAK for the filing of what it alleges is a legally deficient claim. In support of its motion, the Julie Trust cites to MCR 2.625 and MCL 600.2591 and asserts that MALAK's claim violates MCR 2.114 because it is not well grounded in fact or warranted by existing law.

MCR 2.114 requires that all documents filed with the court be signed by a party or counsel and provides that the signature "constitutes a certification by the signer that . . . to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law . . ." MCR 2.114(D)(2). The signature is also a certification that the document "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D)(3). The rule further provides that if a document is signed in violation of the rule, "the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . ." MCR 2.114(E).

The Court looks to the reasonableness of the inquiry into the factual and legal basis for the claims in determining whether a document is signed in violation of MCR 2.114. *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). Certainly, MALAK's claim for breach of the fiduciary duty was a novel legal theory to which the Court gave due consideration before ultimately rejecting it. The fact that MALAK did not prevail on its claim

for breach of the fiduciary duty against the Julie Trust does not render it frivolous. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). Therefore, the Julie Trust's motion for sanctions is denied.

Scott Newman's Motion for Summary Disposition of Amended Third-Party Complaints

MALAK and the Lipschutz parties each filed third party complaints asserting claims against Newman. MALAK's third party complaint alleges claims for tortious interference and aiding and abetting the Julie Trust's breach of the fiduciary duty. Likewise, the Lipschutz parties' third party complaint alleges tortious interference, fraudulent inducement, conspiracy, and aiding and abetting.

Newman first asserts that the Court lacks personal jurisdiction over him requiring dismissal of the third party complaints pursuant to MCR 2.116(C)(1). Plaintiffs have the burden of establishing a prima facie showing of jurisdiction. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995). A Court reviewing a (C)(1) motion examines the pleadings, affidavits, and other documentation submitted by the parties in the light most favorable to the nonmoving party, and all factual disputes are resolved in the nonmovant's favor. MCR 2.116(G)(5); *Jeffrey*, supra. Allegations in the complaint are taken as true to the extent they are uncontroverted by the evidence. *Williams v Bowman Livestock Equipment Co*, 927 F2d 1128, 1130-1131 (CA 10, 1991). Whether a court has personal jurisdiction over a party is a question of law. *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 426; 633 NW2d 408 (2001).

Jurisdiction can be established by way of general personal jurisdiction or specific (limited) personal jurisdiction. The parties do not argue that Michigan can exercise general personal jurisdiction over Newman, since Newman was not served in Michigan, was not

domiciled in Michigan at the time process was served, and has not consented to general jurisdiction. Thus, the Court need only analyze limited personal jurisdiction. To determine whether the Court may exercise limited person jurisdiction, it "must determine whether the defendant's conduct falls within a provision of a Michigan long-arm statute and whether the exercise of jurisdiction comports with due process." *Id.* at 428.

Newman alleges that the facts pled in the third party complaints do not support the exercise of jurisdiction under Michigan's long arm statute. Limited personal jurisdiction exists if (1) Defendant's conduct falls within a provision of Michigan's long-arm statute and (2) the exercise of jurisdiction comports with due process. *Id.*

Long-arm jurisdiction exists if Newman transacted "any business within the state." MCL 600.705(1). Our courts interpret the long-arm statute broadly such that the "slightest transaction" of business is sufficient to bring a party within Michigan's long-arm jurisdiction. *Oberlies*, 246 Mich at 430. At a minimum, Newman's contacts with Michigan were telephone calls and correspondence made from New York with Julie, her other counsel (including prospective counsel) and bankers in Michigan. Pursuant to the request of Kenneth Lipschutz, Newman also made telephone calls from New York to Michigan. When deciding such a motion, the Court is bound to resolve factual disputes in the non-movants' favor. *Jeffrey*, 448 Mich at 184. As a result, the Court finds Newman's telephone calls and correspondence from New York with Julie, other counsel, and bankers in Michigan is sufficient to establish the slightest transaction.

The next question is whether Newman has sufficient minimum contacts with Michigan such that exercising jurisdiction comports with due process. *Oberlies*, 246 Mich at 432-433. To make this determination, the Court applies a three-part test:

(1) Defendant must have purposefully availed himself of the privilege of conducting activities in Michigan.

(2) The cause of action must arise from Defendant's activities in the state.

(3) Defendant's activities must be substantially connected with Michigan. See *Jeffrey*, 448 Mich at 186.

Purposeful availment exists if Newman engaged in "a deliberate undertaking to do or cause an act or thing to be done in Michigan." *Id* at 187-188. Third Party Plaintiffs assert, and the Court agrees, that Newman purposefully availed himself of the privilege of conducting activities in Michigan by his telephone calls and correspondence to Michigan regarding the loan documents and the Art LLCs. See *Walter v M Walter & Co, Inc*, 179 Mich App 409, 413; 446 NW2d 507, 509 (1989).

Next, the Court must determine whether the cause of action arose from Newman's activities in the state. *Jeffrey*, 448 Mich at 186. "Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King Corp v Rudzewicz*, 471 US 462, 475; 105 S Ct 2174; 85 L Ed 2d 528 (1985). The Court finds that Newman's contact with the third party plaintiffs is sufficient to establish this second part of the test.

The final factor is whether Newman's activities are "substantially" connected with Michigan such that jurisdiction is "reasonable." *Oberlies*, *supra*. In whether "the exercise of personal jurisdiction comports with fair play and substantial justice," *Jeffrey*, *supra*, the Court should consider several factors including (i) the burden on the defendant; (i) the forum state's interest in adjudicating the dispute; (iii) the plaintiff's interest in obtaining convenient and effective relief; (iv) the interstate judicial system's interest in obtaining the most efficient

resolution of controversies; and (v) the shared interest of the several states in furthering fundamental substantive social policies. *Id* at 189.

The Court acknowledges that litigating this matter in Michigan does present a burden for Newman, who lives and works in New York. However, Michigan has an interest in disputes involving Michigan residents and persons doing business in Michigan, such as Newman. Plaintiff also has an interest in litigating this dispute in one forum rather than being forced to pursue a separate action against Newman in New York. Judicial economy and efficiency are also furthered by litigating all of these claims together in one forum. The final factor regarding the shared interests of the states does not appear to be directly applicable here. In sum, analysis of the factors show that Newman's activities are substantially connected to Michigan and exercise of jurisdiction is reasonable.

The Court concludes that the third party plaintiffs have made a prima facie showing of this Court's jurisdiction over Newman. Accordingly, Defendant's motion for summary disposition under (C)(1) is denied.

Newman next argues that the third party complaints contain claims that are not authorized by MCR 2.204(A). Newman argues that MCR 2.204 allows only limited third-party claims which seek to recover for the third party defendant's derivative liability to the third party plaintiff for its liability on the original plaintiff's claims. Newman claims that the instant third party complaints contain no claims for derivative liability and that they seek to impose original liability on Newman for tortious interference with Defendants' contract, conspiracy, and aiding and abetting the Julie Trust's breach of fiduciary claim.

In response, the Lipschutz parties argue that the consequence of Newman's fraudulent inducement of the Lipschutz parties to execute a new note to JPMorgan is that JPMorgan has

now sued Kenneth, Elaine, and the Elaine Trust on that note. The Lipschutz parties argue that Newman may be liable to them for all or part of JPMorgan's claims. The Lipschutz parties further assert that Newman's actions induced Julie to not renew the JPM loan, which resulted in JPMorgan declaring a default against the Lipschutz parties. Thus, they argue that Newman would be liable to them for any of JPMorgan's successful claims against them. The Lipschutz parties argue their claims are proper under MCR 2.206(A)(2) because the claims asserted arise out of the same transaction, occurrence or series of transactions or occurrences and questions of fact common to both Julie and Newman will arise in the action. However, MCR 2.206 only applies to the joinder of plaintiffs or defendants and does not apply to third party complaints against a third party defendant. See MCR 2.206.

MALAK responds to Newman's arguments by claiming that MCR 2.204 is not the only procedural mechanism by which a defendant may assert claims adding new parties. MALAK argues that the only limitations on a defendant's ability to file claims adding new parties via MCR 2.203(G) are the rules governing necessary and permissive joinder of parties. MALAK claims that when MCR 2.203(G) and MCR 2.206 are read together, new parties may be added through the filing of a counterclaim so long as the claims asserted against the original plaintiff/counterclaim-defendant and the claims against the new, added party arise out of the same transaction, occurrence, or series of transactions or occurrences and involve common questions of law or fact. MCR 2.203(G) only applies to adding additional parties to a counterclaim or cross-claim, and is not applicable in adding a new party as a third-party defendant. *Id.*

MCR 2.204 governs third party practice and when a defendant may bring in a third party. "Subject to the provisions of MCL 500.3030, any time after commencement of an action, a

defending party, as a third-party plaintiff, may serve a summons and complaint on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim. The third-party plaintiff need not obtain leave to make the service if the third-party complaint is filed within 21 days after the third-party plaintiff's original answer was filed. Otherwise, leave on motion with notice to all parties is required. Unless the court orders otherwise, the summons issued on the filing of a third-party complaint is valid for 21 days after it is issued, and must include the expiration date. See MCR 2.102(B)(8)." MCR 2.204(A)(1).

The Complaint contained the following allegations:

Count I: Breach of Contract and Rescission against Elaine Lipschutz and the Elaine Trust

Count II: Breach of Fiduciary Duties against Elaine Lipschutz and the Elaine Trust

Count III: Conversion against Kenneth Lipschutz and MALAK

Count IV: Aiding and Abetting against Kenneth Lipschutz, MALAK, and JPMorgan

Count V: Breach of Promissory Note against MALAK

Count VI: Conspiracy against Kenneth Lipschutz, Elaine Lipschutz, the Elaine Trust, MALAK, and JPMorgan

Count VII: Declaratory Judgment against JPMorgan, Kenneth Lipschutz and MALAK

Count VIII: Declaratory Judgment against Elaine Lipschutz and the Elaine Trust

Count IX: Partition against Elaine Lipschutz and the Elaine Trust

The claims against Newman in MALAK's Third Party Complaint are: Count III: Tortious Interference with Contractual Relations and Count IV Aiding and Abetting Breach of Fiduciary Duty. The claims against Newman in the Lipschutz parties' Third Party Complaint are: Count VI: Tortious Interference, Count VII: Fraudulent Inducement, Count VIII: Conspiracy, and Count IX: Aiding and Abetting.

Thus, pursuant to MCR 2.204(A), the only potentially proper third party claims against Newman, where Newman could be liable to MALAK or the Lipschutz parties for all or part of the Plaintiffs' claims, are MALAK's claim for aiding and abetting and the Lipschutz parties' claims for conspiracy and aiding and abetting. The Court finds that the remaining third party claims against Newman are improper under MCR 2.204 and those claims are dismissed.

Newman next asserts that the third party complaints fail to state a claim and must be dismissed pursuant to MCR 2.116(C)(8). Since the only remaining third party claims against Newman are MALAK's claim for aiding and abetting breach of fiduciary duty and the Lipschutz parties' claims for conspiracy and aiding and abetting, the Court will only address those claims.

"When reviewing a motion brought under MCR 2.116(C)(8), the court considers only the pleadings. Moreover, the court must accept all factual allegations in the complaint as true, along with all reasonable inferences or conclusions that can be drawn from them. However, conclusory statements that are unsupported by allegations of fact on which they may be based will not suffice to state a cause of action." *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014).

MALAK asserted a claim for aiding and abetting breach of fiduciary duty against Newman. MALAK asserts that Newman knowingly participated in the Julie Trust's violations of fiduciary duties. A third person is liable to a beneficiary for aiding and abetting breach of the fiduciary relationship when a person in a fiduciary relationship to another violates his duty as a fiduciary and the third person has participated in the violation of the duty. *In re Goldman Estate*, 236 Mich App 517, 522; 601 NW2d 126 (1999). However, a claim for aiding and abetting breach of the fiduciary duty is not a standalone claim. Since the Court has dismissed MALAK's claim against the Julie Trust for breach of the fiduciary duty, MALAK's claim against Newman

for aiding and abetting a breach of the fiduciary duty fails as a matter of law. Thus, Newman's motion for summary disposition of MALAK's third party claim for aiding and abetting breach of the fiduciary duty is granted and that claim is dismissed.

The Lipschutz parties also asserted a claim against Newman for aiding and abetting. The Lipschutz parties pled that Newman aided and abetted both Julie and the Julie Trust to assist them in breaching the agreements and promises under the Plan, breaching the Julie Trust's fiduciary duties and obligations under the CTA, unlawfully and tortuously interfering with Julie and/or the Julie Trust's obligations under the Plan, the Art Lease, and the JPM loans and business relationships related thereto, and fraudulently inducing the Lipschutz parties and the Kenneth Trust to enter into loan agreements with JPMorgan to provide funding to the family business. Considering only the pleadings, and accepting all well-pled factual allegations as true, the Court concludes that the Lipschutz parties' claim for aiding and abetting is not "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).

Finally, the Lipschutz parties asserted a claim against Newman for conspiracy. A conspiracy is defined as two or more persons who, by some concerted action, accomplish a criminal or unlawful purpose or accomplish a lawful purpose by criminal or unlawful means. *Advocacy Organization for Patients & Providers v Auto Club Ins Assn*, 257 Mich App 365, 384; 670 NW2d 569 (2003). Civil conspiracy is not an independent actionable tort, but is simply a method of establishing the liability of a person who would not otherwise be responsible for the underlying wrongful acts. *Roche v Blair*, 305 Mich 608, 613-614; 9 NW2d 861 (1943). There must be an underlying tort to sustain a conspiracy allegation. See *Cleary Trust v Edward-Mariah Muzyl Trust,* 262 Mich App 485, 507; 686 NW2d 770 (2004).

The Lipschutz parties pled that Julie and Newman engaged in concerted actions to accomplish an unlawful purpose, including, but not limited to, causing a breach of the agreements and promises under the Plan, causing a breach of the Julie Trust's fiduciary duties, unlawfully and tortiously interfering with Julie and the Julie Trust's obligations under the Plan, the Art Lease, the JPM loan, and fraudulently inducing the counter-plaintiffs and the Kenneth Trust to enter into loan agreements with JPMorgan to providing funding to the family business. To the extent that the Lipschutz parties are asserting civil conspiracy as an independent tort against Newman, the Court dismisses the claim. See *Roche, supra* and *Cleary Trust, supra.*

Newman moves the Court to sanction third party plaintiffs under MCR 2.114, MCL 2.625, and MCL 600.2591 on the ground that the claims were frivolous. Whether a document is signed in violation of MCR 2.114 focuses on the reasonableness of the inquiry into the factual and legal basis for the claims. *Harkins*, 257 Mich App at 576. Further, under MCL 600.2591, if the Court determines that an action is frivolous, it "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." MCL 600.2591(1). The statute provides three alternative definitions of "frivolous": (1) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party; (2) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true; or (3) The party's legal position was devoid of arguable legal merit. Whether a claim is frivolous depends on the facts of the case. *Kitchen*, 465 Mich at 662.

In deciding whether the claims asserted against Newman were frivolous, the Court has reviewed the claims finds that the claims had arguable legal and factual merit and that there is a reasonable basis to believe the facts underlying the party's legal position were true. The Court

does not find that the primary purpose of initiating the action was to harass, embarrass, or injure Newman. *Id.* Accordingly, Newman's request for costs and attorney fees is denied.

This Order does not resolve the last pending claim or close the case.

IT IS SO ORDERED.

Dated: JUL 28 2016

Hon. Wendy Potts