

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

**ADAM OSSIPOVE,
Plaintiff,**

v.

**Case No. 15-148125-CB
Hon. James M. Alexander**

**SCHAEFER DEVELOPMENT, LLC, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motion for summary disposition. Plaintiff brought this case on claims that he has not been paid certain salary and other compensation as a result of his employment with Defendant Schaefer Development. Plaintiff also claims that he holds a 10% member interest in Defendant Eagle One conveyed to him by Defendant Steven Schafer.

On these general allegations, Plaintiff brought claims for: (Count I) breach of contract, (Count II) declaratory relief, (Count III) minority oppression, (Count IV) breach of fiduciary duty, and (Count V) accounting.

Defendants now seek summary disposition under MCR 2.116(C)(8) or (C)(10), which respectively test the legal and factual basis of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Defendants first argue that they are entitled to summary disposition of Plaintiff's Count I for breach of contract because Plaintiff's allegations appear to seek commission payments, and any agreement to share commissions on a sale of real estate must be in writing. And in this case,

Plaintiff cannot produce any writing.

In support, Defendants cite to MCL § 566.132(1), which provides:

In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:

...

(e) An agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate.

And Defendants characterize Plaintiff's job as one that is based on a commission for the sale of real estate. As a result, the lack of any writing is fatal to Plaintiff's breach of contract claim.

In response, Plaintiff argues that he was not a real estate salesperson. Rather, Plaintiff claims that, as Schaefer's vice president of acquisitions, his duties were far broader. In his Affidavit attached to his Response, Plaintiff claims that he worked on projects once they were already under contract – meeting with city or township officials, working on zoning issues, working on other obstacles to development, and reviewing site plans (among other tasks).

As a result, Plaintiff argues that he is not barred by the statute of frauds or failure to be a licensed real estate broker from receiving a percentage of certain projects as compensation.¹ The Court agrees. Plaintiff's Affidavit is evidence that his role at Schaefer was much broader than a real estate salesperson.

Defendants identify no legal reason why Plaintiff could not be employed under a verbal employment agreement.² And despite Defendants' attempt to qualify Plaintiff's Affidavit as "self-serving" and, therefore, appropriately ignored, the Court declines to do so. Defendants' argument about Plaintiff's veracity is nothing more than an attack on his credibility.

¹ Defendants also claim that MCL 339.2510 and MCL 339.2512a defeat Plaintiff's breach of contract claim. But, as stated, Plaintiff claims, via Affidavit, that he was not a broker. As a result, said sections do not apply to him.

But it is well settled that credibility is an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, “courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion” *White, supra* at 625, citing *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004); and *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005).

For the foregoing reasons, Defendants’ motion for summary of Plaintiff’s Count I for breach of contract is DENIED.

Defendants next move for summary disposition of Plaintiff’s Count II for declaratory relief – claiming the same is simply a re-hashed breach of contract claim contained in Count I. The Court agrees. In his Count II, Plaintiff simply asks the Court to declare that he is entitled to the unpaid compensation that he alleges he is entitled to in Count I. Because Plaintiff simply re-hashes his Count I, Plaintiff’s Count II is DISMISSED.

Defendants next seek dismissal of Plaintiff’s Counts III, IV, and V based on Plaintiff’s allegation that he is a 10% member in Eagle One. Indeed, in his Complaint, Plaintiff alleges that he “is a minority member of Defendant Eagle, owning a 10% membership interest.” (Complaint, at paragraph 18). This interest serves as the basis for Plaintiff’s Count III for minority oppression, Count IV for breach of fiduciary duty, and Count V for an accounting.

Defendants argue that they are entitled to dismissal of said claims because he cannot produce

² In his Affidavit, Plaintiff claims that he was employed by Schaefer.

any writing that reflects his acquisition of said interest, citing MCL 450.4501(1). The cited statute provides (emphasis added):

A person may be admitted as a member of a limited liability company in connection **with the formation of the limited liability company** in any of the following ways:

(a) If an operating agreement includes requirements for admission, by complying with those requirements.

(b) If an operating agreement does not include requirements for admission, if either of the following are met:

(i) The person signs the initial operating agreement.

(ii) The person's status as a member is reflected in the records, tax filings, or other written statements of the limited liability company.

(c) In any manner established in a written agreement of the members.

Since Plaintiff does not allege that he was a member at the formation of Eagle, MCL 450.4501(1) does not apply. But under MCL 450.4501(2) (emphasis added):

A person may be admitted as a member of a limited liability company **after the formation** of the limited liability company in any of the following ways:

(a) If the person is acquiring a membership interest directly from the limited liability company, by complying with the provisions of an operating agreement prescribing the requirements for admission or, **in the absence of provisions prescribing the requirements for admission in an operating agreement, upon the unanimous vote of the members entitled to vote.**

(b) If the person is an assignee of a membership interest, as provided in section 506.

Defendants claim that, to acquire an interest in a company after formation, a person is required either to: (1) comply with the applicable terms of the operating agreement, or (2) receive a unanimous vote of the existing voting members. And, Defendants claim, neither of these things happened. In fact, Defendants argue, Plaintiff admitted in discovery responses that he never signed any document that reflects his acquisition of any ownership interest in Eagle.

And Mr. Schaefer, via Affidavit, claims that he is merely the **managing** member – and not the **sole** member of Eagle.

Plaintiff's Response appears to assume, with no factual support, that Mr. Schaefer is the sole member of Eagle.³ Based on this assumption, Plaintiff argues that he became a member of Eagle under MCL 450.4506(1), which provides:

Unless otherwise provided in an operating agreement, an assignee of a membership interest in a limited liability company that has more than 1 member may become a member only upon a unanimous vote of the members entitled to vote. **An assignee of a membership interest in a limited liability company that has 1 member may become a member in accordance with the terms of the agreement between the member and the assignee.**

But Defendants in both their motion and reply brief assert (with evidentiary support) that Mr. Schaefer is **not** the sole member, and as a result, Plaintiff must allege a unanimous vote to acquire an alleged membership interest. But Plaintiff fails to allege that any unanimous vote occurred.

Because Plaintiff identifies no writing providing his membership interest, nor alleges that a unanimous vote of all members granted him the same, Plaintiff's claim that he is a member of Eagle fails as a matter of law. And because each of Plaintiff's Counts III, IV, and V are founded on the allegation that he is a member, each of these claims necessarily fail as a matter of law.

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For all of the foregoing reasons and viewing all evidence in the light most favorable to Plaintiff, the Court finds that there are no material facts in dispute and Defendants are entitled to judgment as a matter of law. Therefore, the Court GRANTS Defendants motion for summary disposition with respect to Plaintiff's Counts III, IV, and V, and DISMISSES the same in their entirety.

IT IS SO ORDERED.

February 3, 2016 _____
Date

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

³ In fact, in Plaintiff's Complaint, Plaintiff merely alleges that "Defendant Schafer has been **the member in control** of Eagle," (emphasis added) which is not the same as **the sole** member of Eagle.