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

TRADEWINDS DEVELOPMENT GROUP, INC,
Plaintiff,

v. **Case No. 15-148752-CB**
Hon. James M. Alexander

STERLING MORTGAGE & INVESTMENT CO,
Defendant.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant's motion for summary disposition. According to its First Amended Complaint, Plaintiff is an entity that helps investors in locating properties, finding purchasers for said properties, setting up land contracts, or selling properties that its investors own. Plaintiff claims that Defendant is a property management company, but Defendant claims that it is a mortgage lender, broker, and servicer.

Plaintiff claims that, after establishing land contracts, it will refer investors to property management companies, like Defendant. And Plaintiff claims that, when it does so, it acts as an agent for said investors in all matters relating to property management companies (including supervision of the management companies).

When acting as a property manager, Plaintiff alleges that Defendant's role is to collect payments from residents residing in the investors' homes and pay taxes, repairs, and other costs on the properties – before forwarding the net income to Plaintiff.

Plaintiff brought the present suit on claims that Defendant failed to "account for various income it received, escrow funds, tax penalties it incurred, insufficient fund checks it sent to Plaintiff and other monies it owed Plaintiff as agent for the investors."

Plaintiff also claims that Defendant sent Plaintiff over $59,000 in checks in 2012 and 2013 that weren't cashed, and Defendant has refused to reissue the checks. Plaintiff also generally claims that Defendant has failed to maintain its books and accounts.

On these claims, Plaintiff filed a two-Count First Amended Complaint on claims of breach of contract and conversion.

Defendant now moves for summary disposition of the same under MCR 2.116(C)(5) or (C)(8). A (C)(5) motion challenges whether a plaintiff lacks the legal capacity to sue. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000). And a (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When considering a (C)(8) motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163; *Lepp*, 190 Mich App at 730. Additionally, when considering a (C)(8) motion, the court considers only the pleadings. MCR 2.116(G)(5).[1]

Defendant's motion is based on a single argument – that, according to its Complaint, Plaintiff was not the contracting party on any of the alleged contractual relationships that form the basis for Plaintiff's claims. Rather, the individual investors would have contracted with Defendant directly. As a result, Defendant argues, Plaintiff is not a party to any of the contracts that it is suing on, and therefore, has no right to enforce the same.

[1] But "[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003). Plaintiff fails to attach any executed, written contracts between the "investors" and Defendant.

The Court first notes that Plaintiff's Response to Defendant's motion was filed nine minutes late – at 4:39 pm on February 10, 2016. And under a December 15, 2015 Stipulated Order, said response was due by 4:30 pm on that day. Because it was late, Defendant's Reply Brief asks the Court to strike Plaintiff's Response as untimely. But the Court will exercise its discretion and decline to do so. Plaintiff's Response was minimally late and will be considered.

In said cursory Response, Plaintiff claims that it is contractually vested with the authority to bring this lawsuit on behalf of the investors based on powers of attorney for each investor. But Plaintiff does not cite to any authority that the Limited Powers of Attorney attached to its Response are (1) valid, or (2) allow Plaintiff to prosecute claims in Michigan. And Michigan law is clear that, "A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim." *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

These questions are particularly critical when Michigan law is clear that "[a] plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Fieger v Commr of Ins*, 174 Mich App 467, 471; 437 NW2d 271 (1988).

Further, in Michigan, a power of attorney is "strictly construed." *Long v City of Monroe*, 265 Mich 425, 427; 251 NW 582 (1933). And the purported Powers of Attorney attached to Plaintiffs' response provide that the named "investor" "Appoints [Plaintiff] as its attorney-in-fact for the limited purpose of prosecuting a lawsuit against [Defendant] and/or any other parties deemed necessary arising from [Defendant's] management of its properties."

And Defendant claims, with an Affidavit to support, that it does not perform any property management duties. Rather, it services mortgage loans and land contracts. Indeed, **all** of the

"Property Management Agreements" attached to Plaintiff's response appear to name **Plaintiff** (not Defendant) as the property manager for each identified property.

And Plaintiff fails to provide any executed, written contracts whereby Defendant manages investors' properties that would implicate the purported Powers of Attorney. Instead, Plaintiff improperly just announces its position and leaves it to this Court to discover and rationalize the basis for Plaintiff's claim.

But the Court declines to do so.

For the foregoing reasons, the Court GRANTS Defendant's motion for summary disposition under (C)(5) and DISMISSES Plaintiff's Complaint.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

February 24, 2016_____ __/s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge