

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

**VPH PHARMACY, INC, ET AL,
Plaintiffs,**

v.

**Case No. 15-148851-CB
Hon. James M. Alexander**

**VINCENT HOWARD,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION (AMENDED)¹

This matter is before the Court on Defendant Vincent Howard's Motion for Partial Summary Disposition. In 2005, Howard founded Plaintiff VPH Pharmacy as a closed-door pharmacy servicing institutional customers like nursing homes, long-term care facilities, and assisted-living facilities.

In October 2009, Howard and Plaintiff Deven Patel entered into an Option Agreement for the sale of VPH to Patel. Howard also agreed that Patel would operate VPH under a Management Agreement while deciding whether to exercise the purchase option. Patel operated VPH for almost a year before deciding to exercise his option to purchase VPH from Howard.

In connection with Patel acquisition of VPH, he and his designee, Shabhana Patel, executed a Promissory Note, Pledge Agreement, and Security Agreement. Patel, personally and by his agents and proxies, Shabhana Patel and Nandan Patel, have owned and managed VPH since that time.

Under the Note's terms, Patel paid all monthly payments between April 2010 and August 2015. Then, one day before the final balloon payment of \$1,190,972.76 was due (September 1, 2015), Plaintiffs filed the present action generally on claims that Howard misused or misappropriated

VPH's funds, mismanaged VPH, or created other liabilities for Plaintiffs.

Howard responded to the Complaint with his own counter- and third-party claims regarding alleged breaches of the note and security agreements and fraudulent misrepresentations.

On December 18, 2015, the Court entered an order appointing UHY Advisors as a MRE 706 Expert to conduct a forensic accounting of VPH. On June 7, 2016, UHY issued its Report that concluded that Patel and other VPH parties transferred and commingled VPH's assets to numerous other companies owned by Patel and his wife, Ameer Patel. Howard claims that such transfers and commingling constitutes breaches of the security instruments, a cross-default of the note, and therefore, warrants summary disposition in Howard's favor on his breach of contract and conversion claims (Counts II, XI, and XII).

To this end, Howard now moves for partial summary disposition of said claims under MCR 2.116(C)(9) and (C)(10). MCR 2.116(C)(9) tests whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery. *Lepp v Cheboygan Area Schools*, 190 Mich App 726 (1991). MCR 2.116(C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).²

In support of his motion, Howard attaches (amongst other things): (1) the Note; (2) the Pledge and Security Agreements; (3) his Affidavit; (4) the UHY Report, and (5) his written notice of default to the VPH parties.

¹ This Opinion is only amended to remove the line appearing on the final page that "This Order is a Final Order that resolves the last pending claim and closes the case."

² 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).

Under the Court's August 4, 2016 Order, Plaintiffs were required to file a response brief by August 24, 2016. Plaintiffs, however, failed to file a response or present any evidence by this deadline. Instead, Plaintiffs filed a cursory response on August 30, 2016 – without addressing its tardiness (much less establishing a showing of good cause). Because Plaintiffs' response was filed six days after the Court-ordered deadline, it will not be considered.

The Michigan Court of Appeals has held that:

A party opposing a motion brought under C(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing that there is a genuine issue for trial. . . . [W]here the opposing party fails to come forward with evidence, beyond allegations or denials in the pleadings, to establish the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993) (internal citations omitted).

As a result, the Court concludes that Plaintiffs fail to present any evidence contradicting Howard's claims, and as a result fail to establish a question of fact regarding Howard's entitlement to judgment as a matter of law. The Court, therefore, GRANTS Howard's motion for partial summary disposition under (C)(10) on his Counts II, XI, and XII and enters judgment against VPH Pharmacy, Deven Patel, Shabhana Patel, and Nandan Patel in the amount of \$1,278,310.55 (as of August 1, 2016), plus interest (from said date) and attorney fees. Howard may present an appropriate judgment for entry.

IT IS SO ORDERED.

September 12, 2016
Date

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