

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

ABLE DEMOLITION, INC.  
A Michigan Corporation,

Plaintiff,

v

Case No. 15-149150-CB  
Hon. Wendy Potts

ADR CONSULTANTS, LLC, et al.

Defendants.

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OPINION AND ORDER RE: DEFENDANTS' MOTION FOR PARTIAL SUMMARY  
DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND (C)(10) AS TO COUNTS V, VI AND  
VII

At a session of Court  
Held in Pontiac, Michigan  
On

**JUL 06 2016**

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This matter is before the Court on Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10). Defendants request the Court dismiss Counts V, VI, and VII of Plaintiff's Complaint. Count V alleges a breach of the Michigan Builders Trust Fund Act, Count VI alleges Conversion, and Count VII alleges a claim to Pierce the Limited Liability Company.

In support of their motion, Defendants argue that there is no genuine issue of material fact relative to the claims brought and that Plaintiff Able Demolition has failed to state a claim upon which relief can be granted as to Counts V, VI, and VII. A motion under MCR 2.116(C)(8) is properly granted when the party opposing the motion "has failed to state a claim upon which

relief can be granted.” MCR 2.116(C)(8); *Radtke v Everett*, 442 Mich 368, 373; n505 NW2d 155 (1993). A motion under (C)(10) tests the factual support for 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).

Defendants first argue that Able’s claim under the Michigan Builders Trust Fund Act fails because there is no genuine issue of material fact that Able’s claims seek payment for work that was done on a public construction project. Defendants argue that the Act applies only to private projects, and the work that Able seeks payment for is a public construction project. Defendants argue that the work was done on blight demolitions in the City of Pontiac on behalf of the Michigan Land Bank.

In response, Plaintiff argues that the demolition work performed by Able on the subcontracts with ADR was not a government contract or a public works contract, despite the fact that the demolition occurred in the context of a governmentally funded program. In further support of its arguments, Plaintiff asserts that ADR operated as an independent contractor.

In *In re Certified Question from the US District Court for the Eastern District of Michigan*, 411 Mich 727; 311 NW2d 731 (1982), the Court held that MCL 570.151 *et seq.* did not apply to public construction projects. In support of the instant motion, Defendants attach evidence showing that the blight demolition project was conducted pursuant to funding that the Michigan Land Bank received to execute a Blight Elimination Initiative using a combination of

Federal Grant and Community Block Grant Funds, TARP Funds, and State and Private Funds. Defendants assert that it was not a private construction project. Plaintiff states that Able demolition did not contract with ADR on a public works project and argues that there was no requirement of a public bond. Plaintiff alleges that a public bond would be required of public works or public construction projects pursuant to MCL 501.101 *et seq.*

However, MCL 570.101 provides that “[w]hen public buildings or other public works are about to be built, repaired, or ornamented under contract at the expense of the state, or of any county, city, village, township, or school district thereof, it shall be the duty of the board of officers or agents, contracting on behalf of the state, county, city, village, township, or school district, to require sufficient security by bond for the payment by the contractor of all subcontractors and for the payment for all labor performed and materials and certain supplies furnished and used in the erection, repairing, or ornamenting of the public building or works.” *Id.* Plaintiff’s bond argument is unpersuasive because the work in the instant action involved a demolition project and not the building, repair, or ornamentation of the public building or works. Interpretation of an unambiguous statute is a question of law. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005). The fundamental goal of statutory interpretation is to ascertain the legislative intent as inferred from the words of the statute. “If the statute is unambiguous, judicial construction is neither required nor permitted.” *Id.* at 528-529. The instant statute is unambiguous, and judicial construction is not permitted. Accordingly, Plaintiff’s argument pursuant to MCL 570.101 is unpersuasive and Defendant’s motion for summary disposition is granted as to Count V—Breach of Michigan’s Builders Trust Fund Act of Plaintiff’s Complaint.

Defendants next argue that Able’s claim for conversion fails for pleading and factual omissions. Defendants claim that Able failed to allege how Ellentuck personally converted

anything. Defendants argue that Plaintiff's claims for conversion fail under MCR 2.116(C)(8). Defendants also argue that Ellentuck is entitled to summary disposition pursuant to MCR 2.116(C)(10) because any and all payments under the contract were the responsibility of the MLB. ADR argues that Able's right to payment was contingent upon receipt of funds by ADR from MLB.

Regarding Plaintiff's statutory conversion claim, Plaintiff must prove that Defendants knowingly received or aided in the concealment of converted or stolen property. MCL 600.2919a. A corporate agent or officer can be personally liable for the corporation's conversion if the individual participated in the tortious acts. *Citizens Ins Co v Delcamp Truck Center, Inc*, 178 Mich App 570, 576; 444 NW2d 210 (1989). "Statutory conversion consists of knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property." *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 592-593; 683 NW2d 233 (2004) (citations omitted).

When considering a motion under MCR 2.116(C)(8), all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). 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." *Id.* at 163. When deciding such a motion, the court considers only the pleadings. MCR 2.116(G)(5).

"[S]tatutory conversion, MCL 600.2919a(1) provides a cause of action for another person's stealing or embezzling property or converting property to the other person's own use. Statutory conversion consists of knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property. *Lawsuit Fin, LLC v Curry*, 261 Mich App 579,

592-93; 683 NW2d 233 (2004). Common law conversion consists of any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein. *Dept of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 13-14; 779 NW2d 237 (2010). At paragraph 31 of the Complaint, Plaintiff alleged that ADR and Ellentuck "converted the funds that had been paid on the projects for the Plaintiff's work (funds which were subject to the trust imposed by law) and used or diverted the funds to make payment to themselves or to others without the Plaintiff's consent, in bad faith, and with an intention of failing to use the funds for the benefit of Plaintiff." Plaintiff further alleged that "32. The Defendants willfully disregarded the Plaintiff's interest in the funds that were paid for the work performed at the construction sites and their actions constituted distinct actions of dominion over Plaintiff's property in a manner that was inconsistent with Plaintiff's rights to the property. 33. Michigan's conversion statute compiled at MCL 600.2919a provides for treble damages if a party is damaged because of another party buying, receiving or aiding in the concealment of converted property. 34. Defendants['] action constitutes a conversion and Plaintiff requests treble damages and the attorney's fees allowed pursuant to the conversion statute."

There can be no conversion of money unless there was an obligation on the party of defendant to deliver specific money to plaintiff. *Garras v Bekiares*, 315 Mich 141, 148; 23 NW2d 239 (1946). Plaintiff has not pled that Defendant knowingly converted the money or that there was an obligation of Defendants to deliver the specific money to Plaintiff.

The Court has reviewed Plaintiff's claim for conversion, and taking into account only the pleadings viewed in a light most favorable to the Plaintiff, the Court finds that Plaintiff's statutory conversion claim is so clearly unenforceable as a matter of law that no factual

development could possibly justify recovery. Thus, Defendant's motion for summary disposition is granted as to Count VI--Conversion of Plaintiff's Complaint.

Defendants also claim that Able's pierce the limited liability company claim has not been properly pled and that there is no genuine issue of material fact that ADR does not meet the legal elements to be an alter ego of Ellentuck. Defendants argue that "pierce the limited liability company" is not a stand alone claim in Michigan and that an action to pierce the corporate veil is not a separate cause of action. They further argue that Plaintiff has not alleged that ADR is a mere instrumentality of Ellentuck, or any of the other elements required to establish a claim to pierce the corporate veil.

In response, Plaintiff argues that if it is successful in proving its claims about the wrongful conversion of trust funds then a basis will exist for the "Pierce the Limited Liability Company" claim. Count VII of Plaintiff's Complaint states "36. The Defendant BARRY ELLENTUCK, in his wrongful concealment and diversion of the contract funds that his company collected for Plaintiff's subcontracted work, has wrongfully sought to use Defendant ADR CONSULTANTS, L.L.C. as a shield to immunize himself from personal liability for his deliberate and malicious conduct and personally benefit to the detriment of the Plaintiff. 37. In equity Plaintiff has the right to pierce the company shield of Defendant ADR CONSULTANTS, L.L.C., and pursue its collection claims against the Defendant BARRY ELLENTUCK as an individual."

"[T]here are three requisites to piercing the corporate veil and finding an identity between business entities. First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff." *Nogueras v Maisel & Associates of*

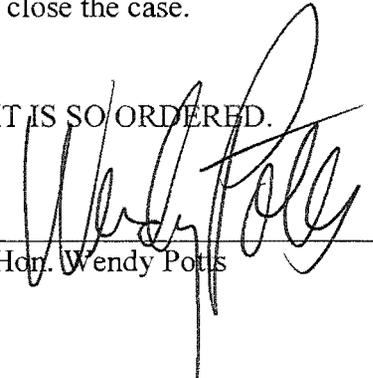
*Michigan*, 142 Mich App 71, 86; 369 NW2d 492 (1985). Other than stating mere conclusions in the Complaint, Plaintiff fails to plead facts establishing the requisites for a claim for alter ego or that the corporate entity was a mere instrumentality of another individual.

“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.” *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014). Thus, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court finds that Plaintiff’s complaint is “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Wade*, 439 Mich at 163. Accordingly, Defendants’ motion for summary disposition as to Count VII—Pierce the Limited Liability Company is granted.

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

Dated: JUL 06 2016

IT IS SO ORDERED.

  
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Hon. Wendy Potts