

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

ROBERT LORRAINE,

Plaintiff,

v

Case No. 15-149656-CB

Hon. Wendy Potts

MICHIGAN ALTERNATIVE, LLC,
NICHOLAS AGRO, and JOHN D.
CARSON,

Defendants,

OPINION AND ORDER RE: DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

At a session of Court
Held in Pontiac, Michigan
On

~~JUN 21 2016~~

This matter is before the Court on Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(10). Defendants assert that Plaintiff Robert Lorraine's Complaint is premised on criminal activity and an illegal enterprise which precludes legal or equitable relief.

In support of their motion, Defendants argue that Lorraine's claims are based on an illegal drug dealing enterprise and that his decision to invoke his Fifth Amendment privilege is fatal to his claims. Additionally, Defendants argue that public policy forbids enforcement of Lorraine's illegal contracts and that Michigan courts do not enforce contracts that violate the public policy of the state. Lorraine seeks damages for alleged breaches of contract that involve illegal subject matter: the operation of illegal marijuana dispensaries and a growing facility.

Defendants allege that Lorraine's breach of fiduciary duty and equitable claims for promissory estoppel, unjust enrichment, fraud, and conversion all fail because Lorraine does not have clean hands. Defendants claim that Lorraine does not have a claim for oppression because only a member can maintain an action for oppression and they argue that Lorraine's interest is that of a constructive member, but that the Limited Liability Company Act requires an actual member and not one created by a legal fiction.

Defendants argue that public policy forbids the enforcement of Lorraine's illegal contracts. In support of their arguments, Defendants cite to *Mahoney v Lincoln Brick Co*, 304 Mich 694, 706-07; 8 NW2d 883, 888 (1945) for the proposition that contracts that violate the public policy of the state are illegal and void regardless of whether an actual injury is present. Defendants argue that Lorraine's repeated use of his Fifth Amendment privilege shows that every aspect of his complaint is shrouded in illegality.

In response, Plaintiff argues that his claims are not based upon an illegal enterprise but are valid contractual obligations that are enforceable. Plaintiff attaches an affidavit to his response, but it merely states that the response brief is true and accurate to the best of his knowledge, information, and belief. An information and belief affidavit is inadequate and fails to comply with the requirements that affidavits must show affirmatively that the affiant, if sworn as a witness, could testify competently to the facts set forth in the affidavit. *Jones v Shek*, 48 Mich App 530, 532; 210 NW2d 808 (1973).

Defendants next argue that Lorraine's equitable claims for breach of fiduciary duty, promissory estoppel, unjust enrichment, fraud, and conversion fail because equity does not aid those with unclean hands. In support of this position, Defendants cite to *Rose v National Auction Grp, Inc*, 466 Mich 453, 466; 646 NW2d 455, 462 (2002) wherein the Court held that "[g]iven

the improper conduct by Mr. Rose, plaintiffs' equitable claims of fraud and misrepresentation are barred by the bedrock principle that the preservation of the integrity of the judicial system means no court acting in equity can allow its conscience to be moved to give such a plaintiff relief. Indeed, the maxim that one who come into equity must come with clean hands is the expression of one of the elementary and fundamental conceptions of equity jurisprudence." *Id.* (Citations and quotations omitted). Further, the Court in *Rose* held that "A breach of fiduciary duty claim requires that the plaintiff 'reasonably reposed faith, confidence, and trust' in the fiduciary. . . . [P]laintiffs could not reasonably have believed that it was appropriate to engage in a shill bidder scheme or reasonable have expected that they were legally entitled to have defendants follow through with such an illegal scheme. Thus, the evidence does not support plaintiffs' breach of fiduciary duty claim regardless of whether defendants actually owed any fiduciary duties to plaintiffs." *Id.* (citations and quotations omitted). The assertion of his Fifth Amendment rights does not prohibit the inference that Lorraine's claims are premised on an illegal enterprise. *Allen v Michigan Basic Property Ins Co*, 249 Mich App 66, 74; 640 NW2d 903 (2001). Likewise, Plaintiff could not reasonably believe that it was appropriate to engage in the marijuana growing operation, and he does not provide any evidence showing that his business was a legal enterprise.

Defendants lastly assert that Lorraine cannot maintain an action for oppression because only a member can maintain an action for oppression. Defendants assert that Lorraine is not a member of Michigan Alternative, LLC. At paragraph 32 of the Complaint, Lorraine stated that he had been denied a one-third interest in Michigan Alternative. Further, at paragraph 127 of the Complaint, Lorraine alleged that "Plaintiff is constructively at least a 1/3 member/owner of Michigan Alternative, LLC and the d/b/a known as Eastside Alternative." Defendants argue, and

the Court agrees, that the Limited Liability Company Act requires an actual member not a constructive member as alleged in the Complaint.

A motion under (C)(10) tests the factual support for a claim. *Maiden v Rozwood*, 461 Mich 109, 119-120; 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).

In support of their motion, Defendants attach the deposition transcript of Robert Lorraine. The transcript of Lorraine’s deposition testimony reveals that the stores and properties referenced in the complaint were involved in the growing and retail sale of marijuana. The transcript of the deposition testimony also reveals that Lorraine repeatedly invoked his Fifth Amendment right against self-incrimination when he was asked about issues central to his claims. “The privilege against self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also permits him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. However, a party to a civil action who invokes his Fifth Amendment privilege does so to the peril of his claim.” *Allen v Michigan Basic Property Ins Co*, 249 Mich App 66, 74; 640 NW2d 903 (2001) (internal citations and quotations omitted).

In his response, Plaintiff merely attaches an information and belief affidavit in support of his arguments. In his affidavit, Plaintiff states that he has “read the attached Response Brief to

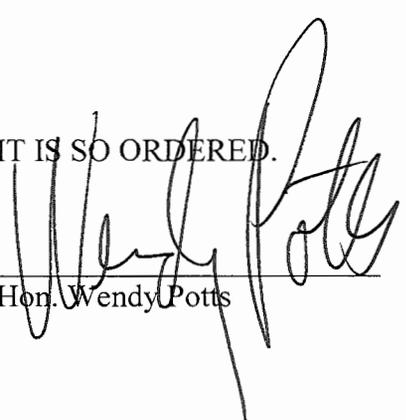
Defendants' Motion for Summary Disposition dated March 30, 2016 ('Response Brief'). 3. The Response Brief is incorporated herein in its entirety as true and accurate to the best of my knowledge, information and/or belief. 4. I am familiar with the facts set forth therein, and that said facts are true and correct to the best of my knowledge, information, and/or belief." Plaintiff's statements are conclusory and lack factual assertions. "[M]ere conclusory allegations within an affidavit that are devoid of detail are insufficient to create a question of fact." *Hamade v Sunoco, Inc (R & M)*, 271 Mich App 145, 163; 721 NW2d 233 (2006) (internal citations and quotations omitted). Thus, Plaintiff's affidavit does not establish the existence of a genuine issue of material fact on an essential element of his claim.

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*, 451 Mich at 362. The Court finds that Plaintiff merely presented his conclusory affidavit, which is insufficient to create a question of fact. *Id.*

Accordingly, for all of the reasons stated above, the Court grants Defendant's motion for summary disposition and dismisses Plaintiff's complaint. This Order resolves the last pending claim and closes the case.

Dated: JUN 21 2016

IT IS SO ORDERED.


Hon. Wendy Potts