

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

**HILLTOP CONTRACTING, INC,  
Plaintiff,**

v.

**Case No. 15-149743-CB  
Hon. James M. Alexander**

**BIRMINGHAM DONUTS, INC, ET AL,  
Defendants.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Defendants’ motion for summary disposition. This case involves a dispute over nonpayment of a commercial construction contract. On June 24, 2013, Plaintiff and Defendant Duane Barbat executed a written contract, whereby Plaintiff would provide construction work for the buildout of a restaurant at 43119 Woodward in Bloomfield Township. The contract price was \$63,000, but Plaintiff claims that it was only paid \$45,000 – leaving a balance of \$18,000, plus another \$8,775 for “extra costs incurred.”

Despite what appears a simple breach of contract suit, Plaintiff is now suing to recover the alleged \$26,775 under a plethora of theories from a variety of Defendants. Specifically, Plaintiff also names Birmingham Donuts, Coffee Enterprises, and Christopher Barbat as Defendants.

Plaintiff does so on the allegation that “due to the failure to maintain corporate liability protections . . . [Duane Barbat], along with [Birmingham Donuts] and [Coffee Enterprises] is personally liable for the debt owed to Plaintiff.” And Plaintiff drags Christopher Barbat in on the allegation that he “is liable for the debts of [Birmingham Donuts] and [Coffee Enterprises].”

As stated, despite the existence of an express contract, in addition to its breach of contract claim, Plaintiff also sues on claims of account stated, common-law and statutory conversion, unjust enrichment, fraud in the inducement, and fraudulent misrepresentation.

Not surprisingly, Defendants responded to the Complaint by filing the present motion for summary disposition. In addition to seeking summary of Plaintiff's kitchen-sink claims under MCR 2.116(C)(8), Defendants also argue that Plaintiff's suit is barred by a prior settlement agreement or res judicata. To this end, Defendants move for summary disposition under MCR 2.116(C)(7), which determines whether a claim is barred, among other grounds, by a "release" or "prior judgment."

When analyzing a (C)(7) motion, the Court accepts the plaintiff's well-pleaded allegations as true and construes them in the plaintiff's favor unless the allegations are contradicted by documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Huron Tool & Eng'g Co v Precision Consulting Services, Inc*, 209 Mich App 365, 376-77; 532 NW2d 541 (1995).

A (C)(8) motion tests the legal sufficiency of the complaint. 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." *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a 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 such motions, the court considers only the pleadings. MCR 2.116(G)(5).<sup>1</sup>

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<sup>1</sup> "When 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

## I. Release

Defendants first argue that Plaintiff's claims are barred because the parties executed a valid release of liability. "A release of liability is valid if it is fairly and knowingly made." *Genesee Foods Servs v Meadowbrook, Inc*, 279 Mich App 649, 655; 760 NW2d 259 (2008).

Our appellate courts have further held:

The scope of a release is governed by the intent of the parties as it is expressed in the release. If the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13-14; 614 NW2d 169 (2000) (internal citations omitted).

The disputed release was executed in connection with the settlement of a 2013 case where nonparties to this case, B3 Investments and the Barbat Organization, sued Plaintiff Hilltop Contracting and its owner, Donald Koveleski, over a different construction project involving property located at 33747 Woodward in Birmingham (Jackson County Circuit Court Case No. 14-2426-CK).<sup>2</sup> The Court will note that B3 Investments and the Barbat Organization appear to be companies owned by Defendant Duane Barbat.

In any event, the December 22, 2014 "Settlement Agreement and Mutual Release" provides, in relevant part (emphasis added):

**The parties<sup>3</sup> hereby unconditionally and irrevocably remise, release, forever discharge, and covenant not to sue each other, and each of its** past, present, or future directors, officers (whether acting in such capacity or individually), shareholders, members, owners (including, but not limited to, Duane and Scott Barbat), partners, joint ventures, principals, trustees, creditors, attorneys, representatives, past, present, or future employees, managers, predecessors,

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MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

<sup>2</sup> The prior case began in Oakland County Circuit Court before Hon. Shalina Kumar (Case No. 13-138114-CK) before being transferred to Jackson County.

<sup>3</sup> "The parties" is a specifically defined term in the Agreement, meaning B3 Investments, LLC; the Barbat Organization, Inc f/k/a Barbat Capital, Inc; Hilltop Contracting, Inc.; and Donald Koveleski.

successors, assigns, and any agent acting or purporting to act for them or on their behalf **from any and all claims, counterclaims**, actions, causes of action, suits, set-offs, costs, losses, expenses, sums of money, accounts, reckonings, debts, charges, complaints, **controversies**, disputes, damages, judgments, executions, promises, omissions, duties, agreements, rights, and any and all demands, obligations and liabilities, **of whatever kind** or character, direct or indirect, whether known or unknown or capable of being known up until the date signed below, arising at law or in equity, by right or action or otherwise, **whether or not they could have been asserted**, which a party has and/or may have against the other party as they arise **pursuant to the claims and controversies that were filed in the Jackson County Circuit Court, case no. 14-2426-CK.**

As stated, this case involves a Bloomfield Township construction project (43119 Woodward), and the Jackson County Case involved a Birmingham construction project (33747 Woodward).

Relying on the broadly worded release, Defendants argue that, although the focus of the Jackson County case was the Birmingham construction project, the Bloomfield Township project became a part thereof when Hilltop filed a construction lien against said property on January 30, 2014 for \$26,775 (the same amount now sought by Plaintiff). And on April 18, 2014, the parties entered a Stipulated Order discharging said lien in the prior case.

Defendants argue that, based on these facts, the Bloomfield Township property became a claim or controversy that was or could have been asserted “pursuant to the claims and controversies that **were** filed” in the in the Jackson County case. Therefore, Defendants argue, Plaintiff’s present claims fail.

Plaintiff responds that the subject of the current suit, the Bloomfield Township property, was not mentioned in any of the pleadings or claims of the prior suit. Plaintiff further argues that said property had nothing to do the prior suit, which involved a different construction project, in a different city, with a different contract, evidence, plaintiffs, and venue.

Indeed, it appears that the Bloomfield Township property was only referenced once in the Jackson County case – and that was in the April 18, 2014 Stipulated Order releasing two liens. The Property, however, was not a part of any claim or counterclaim. The Bloomfield Township contract was never mentioned in the Jackson County case. And the April 18 Stipulated Order only used the Register of Deeds Liber and Page number to describe the lien.

Under these circumstances, the Court is unconvinced that the Property’s brief mention qualifies as a claim or controversy that arose pursuant to a claim and controversy “that [was] filed in the Jackson County Circuit Court.” This final clause is the issue. The remainder of the release language is very broad – referring to “any and all” claims or controversies. But the last line constrains said “claims” or “controversies” to only those that “arise pursuant to the claims and controversies **that were filed** in the Jackson County Circuit Court.”

If this final clause did not exist, then the Court would agree with Defendants. But neither the Bloomfield Township Property, nor the presently disputed contract, arose **pursuant to** the claims and controversies **that were filed** in the prior case. The Jackson County claims and controversies considered only the Birmingham Property.

For the foregoing reasons, the Court finds that the release does not bar the present suit, and Defendants’ motion on this basis is DENIED.

## **II. Res Judicata**

Defendants next argue that Plaintiff’s claims are barred by res judicata based on the Jackson County case.

The doctrine of res judicata bars a subsequent action when: (1) the prior action was decided on the merits; (2) both actions involve the same parties or their privies; and (3) the

claims in the second case were, or could have been, resolved in the first case. *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004); *Sewell v Clean Cut Mgmt*, 463 Mich 569, 575; 621 NW2d 222 (2001).

“Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, **but every claim arising from the same transaction** that the parties, exercising reasonable diligence, could have raised but did not.” *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999) (emphasis added).

*1. Prior action decided on the merits.*

The first element is whether the prior action was decided on the merits. The Court of Appeals has held “a voluntary dismissal **with prejudice** acts as an adjudication on the merits for res judicata purposes.” *Limbach v Oakland County Rd Comm’n*, 226 Mich App 389, 395; 573 NW2d 336 (1997) (emphasis added), citing *Brownridge v Michigan Mut Ins Co*, 115 Mich App 745, 748; 321 NW2d 798 (1982).

On January 19, 2015, Judge John McBain entered a Dismissal order in the Jackson County Case. As a result, the first element is met.

*2. Same parties or their privies.*

The next element is whether “both actions involve the same parties or their privies.” None of the present Defendants were involved in the prior suit, which instead involved separate companies owned by Defendants Duane and Christopher Barbat.

On this element, the Court of Appeals has reasoned:

The parties to the second action need be only substantially identical to the parties in the first action, in that the rule applies to both parties and their privies. As to

private parties, a privity includes a person so identified in interest with another that he represents the same legal right, such as a principal to an agent, a master to a servant, or an indemnitor to an indemnitee. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12-13; 672 NW2d 351 (2003).

While Defendants argue that they are in privity with the parties in the Jackson County case because they have the same owners, the Court is unconvinced. But an even bigger problem is the next element.

3. *Claims were or could have been resolved in the first case.*

The final element is whether “the claims in the second case were, or could have been, resolved in the first case.” Again, this element should be “broadly applied” – barring “not only claims already litigated, **but every claim arising from the same transaction** that the parties, exercising reasonable diligence, could have raised but did not.” *Dart*, 460 Mich at 586.

Our Courts use “a transactional test to determine if the matter could have been resolved in the first case,” which provides “the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief.” *Washington v Sinai Hosp*, 478 Mich 412, 420; 733 NW2d 755 (2007); quoting *Adair v Michigan*, 470 Mich 105, 124; 680 NW2d 386 (2004).

“Whether a factual grouping constitutes a ‘transaction’ for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation.” *Washington*, 478 Mich at 420; quoting *Adair*, 470 Mich at 125.

In this case, Plaintiff’s causes of action arise from a separate transaction than the Jackson County Case. The two cases involve different property, involving a separate contract, located in a different city. As a result, these two claims necessarily involve a different set of operative facts – which precludes application of the doctrine of res judicata.

For all of the foregoing reasons, Defendants' motion on this basis is DENIED.

### **III. Defendants' (C)(8) motion.**

Finally, Defendants move for summary disposition of Plaintiff's Counts II through VII because Defendants admit that Duane Barbat signed the express contract the forms the basis for Plaintiff's Count I and Plaintiff fails to plead any other valid claims against the remaining Defendants.

Initially, the Court notes that Plaintiff argues that summary disposition is premature because discovery is ongoing, but this concept only applies to (C)(10) motions. And Defendants are moving under (C)(8), which presumes the factual allegations contained in the Complaint are true. As a result, Plaintiff's discovery argument is misplaced.

Defendants first seek dismissal of Plaintiff's account stated (Count II) and unjust enrichment (Count V) claims – arguing the same are precluded by an undisputed express contract that covers the subject matter of the dispute, citing *Thomasma v Carpenter*, 175 Mich 428, 434-35; 141 NW 559 (1913) (reasoning that an account stated does not apply when there is an express contract that governs the dispute) and *King v Ford Motor Credit Co*, 257 Mich App 303, 327-28; 668 NW2d 357, 371 (2003) (holding “a contract will not be implied under the doctrine of unjust enrichment where a written agreement governs the parties' transaction”).

Indeed, a careful examination of Plaintiff's account stated claim reveals that it is simply a re-labeled breach of contract claim, where Plaintiff only alleges that Defendants failed to pay under the terms of the express contract.<sup>4</sup> As a result, the Court finds that Plaintiff has failed to adequately plead a claim for account stated, and the same (Count II) is DISMISSED.

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<sup>4</sup> Courts are not bound by the labels that parties attach to their claims. Indeed, “[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to

With respect to Plaintiff's unjust enrichment claim, it is true that the existence of an express contract covering the same subject matter will bar an unjust enrichment claim. But Plaintiff alleges that Defendants owe an additional \$8,775 for "extra costs incurred." **To the extent that these costs fall outside of the contract**, Plaintiff is entitled to pursue the same on under an unjust enrichment theory. As a result, Defendants' motion for summary of Plaintiff's unjust enrichment claim is DENIED.<sup>5</sup>

Next, Defendants seek dismissal of Plaintiff's fraud claims (Counts VI and VII) – arguing that that fraud in the inducement requires misrepresentations in character that relate to something other than the performance of the contract, citing *Huron Tool & Eng'g Co v Precision Consulting Services, Inc*, 209 Mich App 365, 373; 532 NW2d 541 (1995).<sup>6</sup> Otherwise, a plaintiff is simply alleging a disguised claim for breach of contract.

Indeed, a cursory review of Plaintiff's Complaint reveals that both of Plaintiff's fraud claims simply allege that Defendants misrepresented that they intended to perform their obligation (payment) under the contract. Because Plaintiff fails to allege any misrepresentation

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determine the exact nature of the claim." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012)

<sup>5</sup> The Court notes that Plaintiff alleges that all Defendants received a benefit supporting its unjust enrichment claim. Under the (C)(8) standard, the Court cannot conclude that said claims are so clearly unenforceable as a matter of law that no possible factual development could justify recovery. As a result, this claim survives as to all Defendants.

<sup>6</sup> The *Huron Tool* Court reasoned:

The distinction between fraud in the inducement and other kinds of fraud is the same as the distinction drawn by a New Jersey federal district court between fraud extraneous to the contract and fraud interwoven with the breach of contract. *Public Service Enterprise Group, Inc v Philadelphia Elec Co*, 722 F. Supp 184, 201 (D NJ, 1989). With respect to the latter kind of fraud, the misrepresentations relate to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort.

Such fraud is not extraneous to the contractual dispute among the parties, but is instead but another thread in the fabric of [the] plaintiffs' contract claim. . . . [It] is undergirded by factual allegations identical to those supporting their breach of contract counts. . . . This fraud did not induce the plaintiffs to enter into the original agreement nor did it induce them to enter into additional undertakings. It did not cause harm to the plaintiffs distinct from those caused by the breach of contract . . . . [Id.]

outside of Defendants' performance under the contract, Plaintiff's fraud claims fail as a matter of law, and the same (Counts VI and VII) are DISMISSED.

Finally, Defendants seek dismissal of Plaintiff's conversion claims (Counts III and IV) because Plaintiff fails to allege that Defendants have converted any of Plaintiff's property.

Michigan law provides that "[t]he tort of conversion is 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

Our appellate courts have further reasoned:

Statutory conversion consists of knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property. *Head*, supra; MCL 600.2919a. **This Court has ruled that simply retaining money does not amount to "buying, receiving or aiding in the concealment of stolen, embezzled or converted property."** *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 592-593; 683 NW2d 233 (2004) (emphasis added); quoting *Hovanesian v Nam*, 213 Mich App 231, 237; 539 NW2d 557 (1995).

This is precisely the case here. As stated, Plaintiff bases its conversion claim solely on the allegation that Defendants did not pay under the terms of an express or implied contract. These allegations cannot serve as the basis for a conversion claim.

For the foregoing reason, the Court finds the Plaintiff's conversion claims (Counts III and IV) fail as a matter of law, and the same are DISMISSED.

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**IV. Summary/Conclusion.**

To summarize and for all of the foregoing reasons, Defendants' motion for summary disposition is GRANTED IN PART to the extent outlined above.

Plaintiff's claims for account stated (Count II), conversion (Count III), statutory conversion (Count IV), fraud in the inducement (Count VI), and fraudulent misrepresentation (Count VII) are DISMISSED.

In all other respects, Defendants' motion is DENIED.

**IT IS SO ORDERED.**

March 2, 2016  
Date

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