

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

**BELLEVILLE SQUARE LIMITED PARTNERSHIP, ET AL,
Plaintiffs,**

v.

**Case No. 15-150481-CB
Hon. James M. Alexander**

**KINGSVILLE HOMES, INC, ET AL,
Defendants.**

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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants Kingsville Homes & Belleville Square Holdings' and David Bushman's motions for summary disposition. Plaintiff Belleville Square Limited Partnership previously owned the Belleville Square Shopping Center. Plaintiff Applebaum Trust is a limited partner in Belleville Limited Partnership, and Defendant Kingsville Homes is a General Partner.

In April 2014, Richard Sloan (a majority shareholder in Kingsville) passed away. This occurrence triggered a clause in the Limited Partnership Agreement that required liquidation of the Partnership.

Plaintiffs brought this case on claims that, despite the Partnership Agreement's mandate, Defendants refused to wind up the partnership and distribute excess cash. Plaintiff then filed the present action – asking the Court (among other things) to appoint a receiver to liquidate and wind up the Limited Partnership.

But, Plaintiffs claim, shortly after the original Complaint was filed, Defendants acted in concert to sell the shopping center to themselves through a conveyance to a related party, Defendant Belleville Square Holdings. And, Plaintiffs claim, Belleville Holdings is comprised of the same owners as the Limited Partnership – **except** the Applebaum Trust. Plaintiffs further allege that, instead of making the required distribution, “Defendants are using the sale proceeds as leverage to try to coerce the Applebaum Trust to sign a release or otherwise consent to certain prior activities of Defendants.”

Defendants, on the other hand, argue that the liquidation only came after Plaintiffs demanded the same. Defendants claim that Kingsville was appointed as the liquidator, obtained a fair market value appraisal from Stout Risius Ross, and sold the property to Belleville Holdings at the fair market value. Kingsville then distributed the excess cash held by the Partnership together with the net sale proceeds. Defendants argue that everything that was done was done according to the Partnership Agreement and Plaintiffs’ demands, and as a result, Plaintiffs cannot complain now.

In any event, Plaintiffs’ Second Amended and Supplemental Complaint alleges claims for: (Count I) breach of contract (Kingsville), (Count II) breach of fiduciary duty (Kingsville), (Count III) aiding and abetting breach of fiduciary duty (Bushman), (Count IV) concert of action/civil conspiracy, and (Count V) appointment of receiver.

The moving parties now move for summary disposition under MCR 2.116(C)(8) and/or (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Such a motion 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. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).¹

A (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Id.* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

I. Defendant David Bushman's Motion

The Court will first address Defendant David Bushman's (C)(8) motion. As stated, Plaintiffs' claims against Bushman are (Count III) aiding and abetting a breach of fiduciary duty, and (Count IV) concert of action/civil conspiracy.

But it is apparent from Bushman's motion that he mistakes Plaintiffs' Complaint to allege a single breach of fiduciary duty claim directly against him. And, Bushman claims, said claim fails because he owed no fiduciary duty to Plaintiffs.

But, as Plaintiffs quickly point out in their Response, Plaintiffs do not allege any breach of fiduciary duty claim directly against Bushman. As a result, Plaintiffs argue that Bushman's

¹ "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 MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

motion is flawed and must be denied. The Court, unfortunately, agrees. Although Bushman attempts to salvage his motion for summary with his Reply Brief, the Court cannot consider arguments raised for the first time in such a brief.

Because Bushman's motion is founded on the mistaken belief that Plaintiffs' Complaint fails because he owed no fiduciary duty to them, which is not the case, said motion is appropriately DENIED.

Assuming arguendo the Court did consider the substance of (and new arguments advanced in) Bushman's reply brief, summary disposition would still be DENIED.

Michigan law recognizes a cause of action for aiding and abetting the breach of a fiduciary duty. *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 445; 683 NW2d 171 (2004), rev'd in part 472 Mich 192; 694 NW2d 544 (2005). Such a claim may be brought when a person "knowingly joins a fiduciary in an enterprise where the personal interest of the latter is or may be antagonistic to his trust becomes jointly and severally liable with him for the profits of the enterprise." *Echelon*, 261 Mich App at 445; quoting *Hayes-Albion Corp v Kuberski*, 421 Mich 170, 187; 364 NW2d 609 (1984).

Further, "[w]here a person in a fiduciary relation to another violates his duty as fiduciary, a third person who participates in the violation of duty is liable to the beneficiary. If the third person makes a profit through such participation, he is chargeable as constructive trustee of the profit so made." *Echelon*, 261 Mich App at 445; quoting *In re Goldman Estate*, 236 Mich App 517, 521; 601 NW2d 126 (1999).

A careful review of Plaintiffs' Second Amended Complaint reveals that they have sufficiently pled that Bushman knew that Kingsville, in its capacity as the general partner of the Limited Partnership, owed fiduciary duties to the Applebaum Trust and the partners. (Complaint,

at ¶ 70, 76). Despite this knowledge, Plaintiffs claim that Bushman “induced or otherwise caused Kingsville to breach its fiduciary duties” in numerous, specific ways. (Complaint, at ¶ 77).

Because the Court is bound to accept these allegations as true for purposes of a (C)(8) motion, the Court cannot conclude that this claim is “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” As a result, assuming *arguendo* that the Court considered the substantive, new arguments raised in Bushman’s reply brief, summary disposition would still be DENIED.

Because Bushman’s Reply Brief fails to advance any distinct argument as to Plaintiffs’ concert of action/civil conspiracy claim, Bushman also fails to establish his entitlement to judgment as a matter of law on said claim.

II. Defendants Kingsville Homes and Belleville Square’s Motion

Next, Defendants Kingsville Homes and Belleville Square Holdings seek dismissal of Plaintiffs’ Second Amended Complaint under (C)(8) and (C)(10). As stated, Plaintiffs allege the following claims against these Defendants: (Count I) breach of contract (against Kingsville), (Count II) breach of fiduciary duty (against Kingsville), (Count IV) concert of action/civil conspiracy, and (Count V) appointment of receiver.

A. Breach of Contract (Count I)

In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

Michigan law is well-established that “a court must construe and apply unambiguous contract provisions as written.” *Rory v Cont’l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

Plaintiffs base said claim on the allegation that Kingsville breached the Limited Partnership Agreement by “its failure to dissolve the partnership and make distributions to the partners” pursuant to its terms. (Complaint, at ¶67). In other words, Plaintiffs allege two (and only two) distinct breaches: (1) failure to dissolve the partnership, and (2) failure to make distributions to the partners.

In support of their motion, Defendants argue that Kingsville (1) could not have breached the Agreement by failing to dissolve the Partnership because the same automatically dissolved upon Sloan’s passing, and (2) did not breach the Agreement by failing to make distributions because Kingsville (while serving as the General Partner) had the discretion to distribute excess cash when it believed appropriate.

With respect to the dissolution argument, Plaintiffs claim that, despite that the Partnership Agreement provides that the Partnership automatically dissolved upon the death of Richard Sloan, “over a year later the partnership continued to purport to act under the [Partnership Agreement], including executing the Consent Resolutions that ostensibly appointed Kingsville as liquidator.” In other words, despite the dissolution requirement, Plaintiff argues that the

Partnership “had not liquidated or wound up its affairs and was continuing to operate well past the date of [Sloan’s] death.” This is the breach alleged by Plaintiff.

While Defendants’ argument focuses on automatic dissolution, it ignores the nature of Plaintiffs’ allegations – that, despite the supposed automatic dissolution, Kingsville did not actually cease acting as General Partner, and therefore, breached the Agreement.

With respect to Plaintiff’s distribution allegation, the parties simply disagree about the appropriateness of cash distributions. And both sides present ample evidence in support of their positions.

For the foregoing reasons, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court finds that Plaintiffs have sufficiently pled their breach of contract claim such that the Court cannot conclude that the same is so clearly unenforceable as a matter of law that no factual development could justify a right of recovery. As a result, the Defendants’ motion for summary disposition of Plaintiffs’ breach of contract claim under (C)(8) is DENIED.

Similarly, viewing the evidence in the light most favorable to Plaintiffs, the Court cannot conclude that there are no material questions of fact in dispute that entitles Defendants judgment as a matter of law. Therefore, Defendants’ motion for summary under (C)(10) is also DENIED.

B. Breach of Fiduciary Duty (Count II)

Defendants next argue that Plaintiffs’ breach of fiduciary duty claim against Kingsville fails because Kingsville only acted in accordance with its duties under the Partnership Agreement.

Generally, “a fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of another.” *Prentis Family Fund, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 43; 698 NW2d 900 (2005).

Plaintiffs argues that Kingsville, as a Partner in the Limited Partnership, owed it the highest fiduciary duty, citing *Band v Livonia Assoc*, 176 Mich App 95, 113; 439 NW2d 285 (1989), which reasoned “The courts universally recognize the fiduciary relationship of partners and impose on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs.”²

Despite this duty, Plaintiffs claim that Kingsville “failing to distribute millions of dollars in Excess Cash, failing to market the Property and instead selling it to an affiliate for a depressed price and distributing sale proceeds to partners other than the Applebaum Trust (who only received delayed, conditional checks). In support, Plaintiffs present ample evidence to survive summary disposition.

As a result, Defendants’ motion on this claim is similarly DENIED.

C. Civil Conspiracy (Count IV)

Finally, Defendants argue that Plaintiffs’ civil conspiracy claim must fail because such a claim may not exist in the air; rather, it is necessary to prove a separate, actionable tort, citing *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003).

² Plaintiff also cites *Phillipson v Phillipson*, 302 Mich 84, 91; 4 NW2d 477 (1942), which reasoned “When a partnership is dissolved by death of one of the partners, it is the duty of the surviving partners to wind it up and in so doing are liable as fiduciaries.”

But Defendants' argument with respect to conspiracy is based on the assumption that the Court dismissed Plaintiffs' tort claim on summary. But this is not the case. As a result, the Court must reject Defendants' argument on this issue.

D. Appointment of a Receiver (Count V)

Defendants next seek dismissal of Plaintiffs' claim seeking appointment of a receiver because the Court already denied Plaintiffs' motion for the same on March 1, 2016. Further, Defendants argue that appointment of a receiver is an "ancillary, equitable remedy – and not an independent cause of action." In support, Defendants cite *Petitpren v Taylor Sch Dist*, 104 Mich App 283, 296; 304 NW2d 553, 558 (1981), which reasoned "[u]nless specifically allowed by statute, a suit may not be maintained solely for the purpose of establishing a receivership as the appointment of a receiver may only be made as an ancillary remedy to other relief sought."

Indeed, the Court's power to appoint receivers is broad and, as long as there remains a pending claim, the Court has the power to do so. The Revised Judicature Act provides, at MCL 600.2926, provides:

Circuit court judges in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law. This authority may be exercised in vacation, in chambers, and during sessions of the court. In all cases in which a receiver is appointed the court shall provide for bond and shall define the receiver's power and duties where they are not otherwise spelled out by law. Subject to limitations in the law or imposed by the court, the receiver shall be charged with all of the estate, real and personal debts of the debtor as trustee for the benefit of the debtor, creditors and others interested.

The court may terminate any receivership and return the property held by the receiver to the debtor whenever it appears to be to the best interest of the debtor, the creditors and others interested.

As a result, Plaintiffs need not plead a separate claim for appointment of a receiver. As long as this case remains pending, the Court may entertain a motion for the same.

For this reason, Defendants' motion for summary of Plaintiffs' Count V is GRANTED, and the same is DISMISSED.

III. Defendants Kingsville Homes and Belleville Square's Motion

To summarize, Defendant Bushman's motion for summary disposition is DENIED.

Defendants Kingsville Homes and Belleville Square Holdings motion for summary is GRANTED IN PART – but only with respect to Plaintiffs' Count V for appointment of a receiver, which is DISMISSED. In all other respects, these Defendants' motion is DENIED.

IT IS SO ORDERED.

September 21, 2016
Date

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