

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

**C. KELLY DAMMAN and
GREGORY J. DAMMAN,
Plaintiffs,**

v.

**Case No. 15-150836-CB
Hon. James M. Alexander**

**DAMMAN HOLDINGS, LC, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants’ motion for partial summary disposition. Plaintiffs Kelly and Gregory Damman and Defendant Mike Damman are siblings. Mike is the manager and majority owner of Defendant Damman Holdings, which is a real estate holding company. Kelly and Greg were minority members of the company.¹

In a prior ruling, the Court dismissed Plaintiffs’ Count III – but allowed Count IV to proceed “to the extent that Plaintiffs allege that the redemption decision was made in retaliation for Greg’s objecting to distribution decisions.”

Relevant to the present motion, Plaintiffs claim that Mike has breached the November 2009 First Amended Operating Agreement of Damman Holdings by failing to make annual cash distributions equal to 55% of the company’s profits for fiscal years 2009-2014. This alleged breach serves as the foundation for Plaintiffs’ Count I for breach of the Operating Agreement and Count II seeking declaratory relief.

¹ Greg Damman held his interest through, and was the trustee of, the Damman Management Trust.

Defendants now move for summary disposition of the remainder of Plaintiffs' claims under MCR 2.116(C)(10), which tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).²

Defendants claim that they are so entitled for the following reasons. First, Plaintiffs' claims fail as a matter of law. Second, Plaintiffs' claims are barred by res judicata. Third, Plaintiffs' claims fail under the plain, unambiguous language of the Operating Agreement.

1. Res Judicata

Because it demands little attention, the Court will first address Defendants' res judicata argument. 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).

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

² Defendants' motion again asks for summary of Plaintiffs' Count IV, which the Court previously denied. But Defendants' motion concentrates on an alleged breach of the 55% distribution issue, which is not the direct basis of Plaintiffs' Count IV. As such, the 55% argument does not serve as the basis for dismissal of Count IV. Defendants do, however, appear to argue that res judicata bars all claims, which the Court will consider.

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.

Defendants argue that res judicata bars the present lawsuit because these parties were involved in a prior, 2008 lawsuit before Judge Rudy Nichols, and Plaintiffs could have pursued their present claims in it.

In the prior case, our Plaintiffs sued on claims that Mike, among other things, improperly authorized the redemption of Marc’s interest, engaged in self-dealing, failed to provide financial information, failed to distribute monies that Plaintiffs were entitled to, and otherwise deflated the value of the company.

This prior lawsuit resulted in a settlement that included (among other things) the negotiation and execution of the November 2009 First Amended and Restated Operating Agreement.

In other words, the Operating Agreement that serves as the basis for Plaintiffs’ present claims did not exist until after the prior lawsuit was resolved. Therefore, the current alleged breaches could not have possibly been brought in the prior lawsuit.

Because the November 2009 Operating Agreement did not exist while the prior case was pending, and the current case involves claims accruing after dismissal of the prior action, Defendants’ motion based on res judicata is DENIED.

2. 55% Cash Distributions

Defendants next argue that Plaintiffs' Counts I and II fail because (1) using a 55% distribution rate would result in the violation of another Operating Agreement term, and (2) Mike has sole discretion to determine any cash distribution. Each of these arguments inherently implicates the proper interpretation of the Operating Agreement.

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). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court.” *Holmes*, 281 Mich App at 594.

As often repeated by our Supreme Court, “courts must ... give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.” *Knight Enterprises v Fairlane Car Wash*, 482 Mich 1006; 756 NW2d 88 (2008); quoting *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

The “Distributions of Distributable Cash and Capital Proceeds” provision of the Amended Operating Agreement, at 7.3(a), provides:

The Company shall distribute to the Common Members from time to time, but not less frequently than annually, Distributable Cash; provided, however, the Company shall distribute Distributable Cash to the Common Members equal to their Tax Distribution by April 15th, June 15th, and September 15th of each Fiscal Year and January 15th of the following Fiscal Year. Except as provided in Section 10, all distributions, including the Tax Distributions, shall be made to the Common Members in proportion to their respective Common Voting Percentages on the date of the distribution.

“Distributable Cash” is a defined term in the Amended Operating Agreement. It means:

at any time, that portion of the cash and cash equivalent assets of the Company (but shall exclude Capital Proceeds) which, in light of the Company's then current and foreseeable sources of, and needs for, cash, exceeds the amount of cash needed by the Company, as determined by the Manager(s), to (i) service its debts and obligations in a timely fashion, (ii) maintain adequate working capital and reserves, and (iii) conduct its business and carry out its purposes, including reinvestment of funds received by the Company.

In addition to implicating this definition of "Distributable Cash," Section 7.3(a) also states that the Company "shall distribute Distributable Cash to the Common Members equal to their Tax Distribution." The term "Tax Distribution" is also a defined term in the Agreement. It means:

an amount equal to the product of (i) the Maximum Tax Rate for the current Fiscal Year or 55% whichever is higher, multiplied by (ii) the Profits allocable to the Members by the Company for such Fiscal Year. Profits shall be as defined without the adjustments in (a) through (e), but including any special allocations under Section 7.4.

Further, under Section 7.3(c):

No distributions shall be declared and paid unless, after the distribution is made, the Company would be able to pay its debts as they become due in the usual course of business and the assets of the Company are in excess of the sum of: (i) the Company's liabilities, plus (ii) the amount that would be needed to satisfy the preferential rights of other Members upon dissolution that are superior to the rights of the Members(s) [sic] receiving the distribution.

And as part of the 2009 settlement, at the same time the parties amended the Damman Holdings Operating Agreement, an Amended Membership Interest Redemption Agreement between Damman Holdings and Marc's holding company was also amended. It provided that the following was an event of default:

if, commencing in 2009, cash distributions, made during the calendar year, from the Company or its subsidiaries to M. Damman Co., LC exceed an amount equal to 1) Michael J. Damman's marginal state and federal income taxes caused by the inclusion of Company taxable income on Michael J. Damman's individual tax returns for that year, plus 2) Ten percent of Company taxable income allocable to M. Damman Co., LC for that year.

And, if the Company distributed such an amount, then (Defendants claim) it would trigger a Default under the Amended Redemption Agreement – “resulting in the acceleration of the entire balance of the promissory note payable to Marc, the potential foreclosure of Marc’s security interest in all assets of the Company, and the Company being unable to pay its bills in the ordinary course as they became due.”

In other words, Defendants argue, the Company could not possibly distribute at the 55% rate because doing so would result in an event of default under the Amended Redemption Agreement, which would result in a breach of the Amended Operating Agreement.

Additionally, Defendants claim, Michael had complete discretion under the definition of “Distributable Cash” to make the determination of the same. Because he had such contractual discretion, Defendants argue, he could not have breached the Amended Operating Agreement for exercising the same.

The Court will note the confusing runaround that is Section 7.3(a). This section appears to use the terms “Distributable Cash” (and its specific definition) and “Tax Distribution” (and its specific, different definition) almost interchangeably.

For example, said Section provides that “The Company shall distribute to the Common Members from time to time, but not less frequently than annually, Distributable Cash.” Ordinarily, a reader would then look to the definition of said term, which is provided in Appendix A. But the Section continues that “the Company **shall distribute** Distributable Cash to the Common Members **equal to** their Tax Distribution.” In other words, Distributable Cash must equal the Tax Distribution. But “Tax Distribution” is defined differently than “Distributable Cash.”

The Court will also note an inherent problem with Defendants' argument and interpretation. Defendants claim that they cannot distribute at 55% because the same would amount to a breach and default under the Amended Redemption Agreement, which would result in a breach of the Amended Operating Agreement. But the Amended Operating Agreement doesn't appear to provide any other choice but to distribute at 55%.

As stated, Section 7.3(a) provides that "the Company **shall distribute** Distributable Cash to the Common Members **equal to** their Tax Distribution." And Tax Distribution is defined as "an amount equal to the product of (i) the Maximum Tax Rate for the current Fiscal Year **or 55% whichever is higher**, multiplied by (ii) the Profits allocable to the Members by the Company for such Fiscal Year."

It is undisputed that 55% is higher than the Maximum Tax Rate under the Agreement. As a result, the only choice under the Tax Distribution definition is to pay at the 55% rate. As a result, the Amended Operating Agreement appears to require a 55% distribution, but Defendants claim that paying the same would result in the breach. But the reverse is also true. Not paying at the same appears to result in a breach. Under Defendants' interpretation, the Company apparently has no choice but to breach one section or another.

Plaintiffs, on the other hand, argue that Section 7.3(a) requires the Company to pay "Distributable Cash" at the 55% rate "by April 15th, June 15th, and September 15th of each Fiscal Year and January 15th of the following Fiscal Year." And it is undisputed that the Company paid less than this amount for the years 2010 through 2014.

The problem with Plaintiffs' interpretation is that, if the Company pays Michael at the 55% rate, then Damman Holdings is in technical breach of the Amended Redemption Agreement, which then creates a breach of the Operating Agreement. Plaintiffs' solution is that

the Amended Redemption Agreement only affects Michael's distribution because only he is mentioned in the default provision.³

But this interpretation only presents another problem – Section 7.3(a) requires that “all distributions, including the Tax Distributions, shall be made to the Common Members in proportion to their respective Common Voting Percentages on the date of the distribution” In other words, by disproportionately distributing Plaintiffs a different amount than Defendants, the Company could be breaching this last sentence of Section 7.3(a) because said distribution would not be “in proportion to [the Members’] Common Voting Percentages.”

Plaintiffs also claim that, even if the Company could not distribute at 55%, there is no reason that it could not distribute an amount greater than it did, but still under 55%. But the problem with this argument is that the Agreement offers no option to deviate from 55% (as the higher number). Rather, the Agreement is silent as to a situation where the Company cannot “afford” to distribute at 55%, but could “afford” to do so at 51%. There doesn't seem to be a provision to allow the same.

In any event, this case presents an all-too-common problem in legal drafting – ambiguity. Both parties present interpretations that necessarily require a breach of another term of the very same Agreement they intend to enforce. It is wholly inappropriate for this Court to decide on summary disposition which provision must give to another.

The Court will also note, with respect to Defendants' argument that Michael had contractual discretion to determine the “Distributable Cash,” it remains questionable whether he actually exercised that discretion. This is so because it appears from all evidence before this

³ As stated, Section 2(e)(viii) provides (emphasis added):
if, commencing in 2009, cash distributions, made during the calendar year, from the Company or its subsidiaries to **M. Damman Co., LC** exceed an amount equal to 1) **Michael J. Damman's** marginal state and federal income taxes caused by the inclusion of Company taxable income on **Michael J. Damman's** individual tax returns for that year, plus 2) Ten percent of Company taxable income allocable to **M. Damman Co., LC** for that year.

Court that Michael never did any tangible calculations of the same. Rather, it appears that he had a vague notion of the Company's Distributable Cash in his mind, and based on this vague notion, provided direction to the Company's accountant to make the distributions.

Based on the little evidence before the Court, it is impossible to say as a matter of law that Michael complied with the Amended Operating Agreement by actually calculating the amount of "Distributable Cash." And, at the very least, it remains a question of fact.

Based on the plain language of the same, the Court finds that the Amended Operating Agreement is ambiguous because it is open to more than one reasonable interpretation such that summary disposition is inappropriate and denied. Factual development is necessary in order to determine the intent of the parties. *Holmes*, 281 Mich App at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

As a result, Defendants' motion on these bases is DENIED.

3. Count II for Declaratory Relief

Finally, Defendants argue that Plaintiffs' Count II seeking declaratory relief fails as a matter of law because said claim actually seeks rescission, which is unavailable under these circumstances.

Plaintiffs respond that they are not seeking rescission; rather, they are seeking declaratory relief "to prevent Defendants from exercising the Company's Option to purchase [Kelly's] Common Membership Interest under Section 8 of the Amended Operating Agreement . . . during the pendency of this litigation."

But Plaintiffs' argument mischaracterizes the relief actually sought in their Complaint. In the Wherefore Clause of their Count II, Plaintiffs request "that the Court enter an Order declaring

that the Company's Option with respect to Kelly Damman's Common Membership Interest under Section 8 . . . is void and unenforceable based on the Company's breach of the Amended Operating Agreement."

While the Court is not necessarily convinced that this is a valid declaratory relief claim, Defendants offer little reasoning beyond their cursory rescission argument why the Court should dismiss Plaintiffs' Count II. And Michigan law is clear that, "A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim." *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

Because Defendants have failed to establish their entitlement to dismissal of Plaintiffs' Count II, their motion with respect to the same is DENIED.

4. Summary

To summarize, Defendants' motion is DENIED in its entirety.

IT IS SO ORDERED.

August 10, 2016
Date

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