

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

**STEVE STOCKTON,
Plaintiff,**

v.

**Case No. 16-151595-CB
Hon. James M. Alexander**

**PARTNERS TITLE AGENCY, LLC,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant’s motion for summary disposition.¹ According to his Complaint, Plaintiff is a 6.8644% minority member of Defendant. As a result of his ownership, Plaintiff claims that he was to receive quarterly membership distributions proportionate to his ownership.

Despite contributing towards Defendant’s success, Plaintiff claims that, in early 2012, Defendant took “unilateral and unwarranted action to repurchase [his] interest in [Defendant].” Around the same time, Plaintiff claims that Defendant stopped paying him his quarterly disbursement.² Plaintiff alleges that, in June 2015, he received a check for \$9,300 “representing the 2011 fourth quarter disbursement, as well as what [Defendant] considered his buyout amount.” But Plaintiff never cashed the check.

¹ The Court first notes that Defendant filed what purports to be a Reply Brief in support of its motion on September 9, 2016. While the Court typically allows Reply Briefs pursuant to an order entered under MCR 2.116(G)(1) (if time permits), Plaintiff chose to file its motion 21 days before the hearing, so no such order could enter. Because there is no Court Rule (and no order) permitting a Reply Brief, the same will not be considered.

² Plaintiff claims that he has not received any distribution representing fourth quarter 2011 onward.

Defendant, on the other hand, claims that it actually repurchased Plaintiff's membership interest, which is presumably why distributions stopped. The parties also appear to dispute the appropriate purchase price for Plaintiff's should Defendant repurchase.

In any event, Plaintiff sued on claims titled (1) declaratory judgment, (2) action for accounting, (3) constructive trust, (4) breach of contract, and (5) minority shareholder oppression.

Defendant now moves for summary disposition under MCR 2.116(C)(8) and (C)(10), which respectively test the legal and factual basis of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

A (C)(8) 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; *Lepp*, 190 Mich App at 730. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).³

A (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In presenting such a motion, "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

³ "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).

issue of disputed fact exists.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

1. Statute of Limitations under (C)(8)

Defendant first argues that Plaintiff’s claims are barred by a three-year statute of limitations found in Michigan’s Limited Liability Company Act, at MCL 450.4515(1)(e), which provides (emphasis added):

A member of a limited liability company may bring an action in the circuit court of the county in which the limited liability company's principal place of business or registered office is located to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member. If the member establishes grounds for relief, the circuit court may issue an order or grant relief as it considers appropriate, including, but not limited to, an order providing for any of the following:

- (a) The dissolution and liquidation of the assets and business of the limited liability company.
- (b) The cancellation or alteration of a provision in the articles of organization or in an operating agreement.
- (c) The direction, alteration, or prohibition of an act of the limited liability company or its members or managers.
- (d) The purchase at fair value of the member’s interest in the limited liability company, either by the company or by any members responsible for the wrongful acts.
- (e) An award of damages to the limited liability company or to the member. **An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued or within 2 years after the member discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.**

Defendant concludes (with little reasoning) that all of Plaintiff’s claims “arise from . . . transactions and occurrences that occurred in 2012” and are based in minority oppression. As a result, Defendant argues, all claims are barred by MCL 450.4515(1)(e).

But, as Plaintiff points out, there are serious flaws in Defendant’s argument. First, despite Defendant moving under MCR 2.116(C)(8), which requires the Court to **accept all well-pled factual allegations as true**, Defendant appears to ask the Court to ignore that Plaintiff’s **Verified** Complaint allegation that he **is a current Defendant member**. The Court cannot ignore Plaintiff’s allegations when ruling on a (C)(8) motion. Rather, the Court must accept the same as true. As a result, the Court must consider Plaintiff a current Defendant member for purposes of the present motion. As a result of said membership, Plaintiff alleges **ongoing** harm in the form of failed distributions to support his claims.

Second, under its plain language, MCL 450.4515(1)(e) only creates a three-year limitations period for actions seeking **damages**. This limitations period is not present for actions seeking “dissolution and liquidation”; “cancellation or alteration of a provision in the articles of organization or in an operating agreement”; “direction, alteration, or prohibition of an act of the limited liability company or its members or managers”; or “[t]he purchase at fair value of the member’s interest in the limited liability company, either by the company or by any members responsible for the wrongful acts.” MCL 450.4515(1)(a)-(d).

Instead, actions seeking relief under these subsections appear governed by the six-year limitations period found in MCL 600.5813. This finding is consistent with the Court of Appeals’ conclusion when analyzing the nearly identical language found in Michigan’s Business Corporations Act. See *Estes v Idea Engg & Fabrications, Inc*, 250 Mich App 270; 649 NW2d 84 (2002).⁴

⁴ Although this case is governed by Michigan’s Limited Liability Company Act (and not the Business Corporation Act), “[b]ecause the Business Corporation Act and the Limited Liability Company Act relate to the common purpose of forming a business and because both statutes contemplate the moment of existence for each, they should be interpreted in a consistent manner.” *Duray Dev, LLC v Perrin*, 288 Mich App 143, 159; 792 NW2d 749 (2010).

As a result, the three-year limitations period found in MCL 450.4515(1)(e) only bars Plaintiff's claims to the extent that he seeks **damages** prior to February 18, 2013 (three years before he filed his Complaint). But, to the extent Plaintiff seeks damages after said date (or seeks relief under MCL 450.4515(1)(a)-(d)), Plaintiff's claims are not time barred.

2. Actions in Compliance with Operating Agreement under (C)(10)

Defendant next claims that Plaintiff cannot base his claims on actions in compliance with Defendant's Operating Agreement. As previously stated, under MCL 450.4515(1), an LLC member may bring an action "to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member."

If a plaintiff establishes such conduct, the Court has broad discretion to craft an appropriate remedy under MCL 450.4515(1)(a)-(e). This section goes on to define "willfully unfair and oppressive conduct" as:

a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other member interests disproportionately as to the affected member. **The term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure.** MCL 450.4515(2) (emphasis added).

Based on the foregoing, Defendant concludes that its actions "were permitted by its Restated Operating Agreement," which was signed by Plaintiff.

In response, Plaintiff claims that when he was told that Defendant wished to exercise its option to repurchase his interest, he asked for the reason and support, which was never provided.

Additionally, even if Defendant wished to repurchase his shares, under Section 7.5 of the Operating Agreement, the parties must mutually agree on an appraiser to value said shares, and this was never done. Instead, Plaintiff claims that Defendant unilaterally sent him a check in April 2015 for \$9,391.74 – purporting to represent both (1) the unpaid fourth-quarter 2011 distribution, and (2) the repurchase price for Plaintiff’s interest.

But Plaintiff claims that he never agreed to this amount and never executed the Repurchase Agreement, and Defendant presents no evidence to the contrary.⁵ In the event of a disagreement over the appraisal, Section 7.5 of the Operating Agreement provides the method to conduct the same. But it appears undisputed that this was never done.

Plaintiff also disputes that Defendant had any right to redeem his interest because he did not violate any terms of the Operating Agreement. Regarding the repurchase, Defendant’s affiant only claims that she “believe[d] that [Plaintiff] was voluntarily withdrawing” from the company” when he didn’t cash the April 2015 check. But this **belief** is not an undisputed fact.

The Court also notes that both parties’ filings contain evidentiary support for their arguments – as well as challenges to certain of the other’s credibility. It is well settled, however, that credibility is an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, “courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion” *White*, 275 Mich App at 625.

In any event, there are numerous disputes that preclude summary disposition under (C)(10).⁶

⁵ As stated the moving party has the initial burden to produce evidence supporting its claims (before shifting to the opposing party). *Quinto*, 451 Mich 358.

⁶ Further, although not cited by either party, this Court has found persuasive the reasoning in *Berger v Katz*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2011 (Docket Nos. 291663, 293880). The

For all of the foregoing reasons and viewing the evidence in the light most favorable to Plaintiff, the Court cannot conclude that there are no material questions of fact in dispute that entitles Defendant to judgment as a matter of law. Therefore, Defendant's motion for summary under (C)(10) is also DENIED.

IT IS SO ORDERED.

September 14, 2016
Date

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

Berger panel opined “[a]lthough the bylaws gave defendants the general authority to make business decisions such as setting salaries, issuing capital calls, or approving rental payments, that does not mean that defendants were permitted to act in a manner that was willfully unfair and oppressive to plaintiff, as a minority shareholder.” The Court went on to conclude the exception regarding actions permitted by an operating agreement “cannot be read as permitting willfully unfair and oppressive conduct under the guise of defendants’ general authority to run and manage [the business].” As a result, although the Operating Agreement may allow certain actions, said actions cannot be done in a willfully unfair and oppressive manner.