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

GREAT LAKES BUSINESS CREDIT, LLC,
Plaintiff,

v. **Case No. 16-152065-CB**
Hon. James M. Alexander

RICHARDSON PLACE, LLC, ET AL,
Defendants.
_____/

OPINION AND ORDER RE: MOTION FOR SUMMARY DISPOSITION

This matter is before the Court on Defendants motion for partial summary disposition. Defendant Richardson Place formerly owned and operated a manufacturing company doing business as Dusevoir Metal Products on property owned by Defendant Mason-Thomas Holdings. Defendant Susan Richardson is the sole member and owner of Richardson Place and a managing member of Mason-Thomas. Susan's husband, Defendant Mason Richardson, is also a member of Mason-Thomas.

According to its First Amended Complaint, Plaintiff lent money to non-party Dusevoir Acquisitions so that it could purchase certain of Richardson Place's assets. The closing of the sale occurred at Plaintiff's office in Troy. Plaintiff claims that it was "induced" to lend money to Dusevoir Acquisitions based on representations contained in the Asset Purchase Agreement "as well as other documents and information provided/represented at closing."

Plaintiff claims that Defendants violated both the Asset Purchase Agreement and a Landlord Waiver Agreement by breaching certain terms of the same. Plaintiff generally claims that "Defendants fraudulently induce[d] [it] to fund and loan money for the Business Deal by

directly providing documents\information to [Plaintiff] and by providing documents to [Dusevoir Acquisitions] to (in turn) provide to [Plaintiff] for the purpose of obtaining financing from [it]."

On these general allegations, Plaintiff filed the present Complaint alleging claims of (Count I) fraudulent misrepresentation; (Count II) innocent misrepresentation; (Count III) breach of contract (or, alternatively, promissory estoppel); (Count IV) conversion; (Count V) unjust enrichment; and (Count VI) conspiracy.

Defendants now moves for partial summary disposition – seeking dismissal of Plaintiff's misrepresentation and breach of contract claims (Counts I, II and III, respectively), and for partial dismissal of Plaintiff's conversion claim (Count IV).

Defendants do so under MCR 2.116(C)(8) and (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).

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.

Defendants claim that they are entitled to summary because (1) Plaintiff is not in privity with Defendants and has no standing to sue for the breach of an agreement, to which, it is not a party; (2) Plaintiff is not a third-party beneficiary of any of the Agreements; (3) in support of its fraud claims, Plaintiff has only pled representations made to a third party; and (4) Plaintiff did not have any security interest in the cash on deposit in Richardson's bank account, as a result, their conversion claim as to such cash fails.

I. Breach of Contract/Third-Party Beneficiary (Count III)

Defendants first argue that Plaintiff's breach of contract claim fails because there was no contract between Plaintiff and Defendants and none of the Agreements were for Plaintiff's direct benefit.

A. The Asset Purchase Agreement

The Court will initially note that it appears Plaintiff wishes to step into the shoes of Dusevoir Acquisitions and sue on the Asset Purchase Agreement, but Plaintiff offers no legal theory on which it may do so. 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).

It is well settled that, 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).

With respect to the Asset Purchase Agreement, Plaintiff cannot overcome the first element – the existence of a contract. Simply, Plaintiff is not a party to the Asset Purchase Agreement. As a result, any direct breach of contract claim based on the same fails as a matter of law.

Plaintiff also curiously claims that it can void **the Loan Agreements it entered with non-party Dusevoir Acquisitions** because Defendants fraudulently induced it to enter into said agreements. But it isn't clear why Plaintiff thinks this argument is relevant to its Count III for breach of contract based on different agreements.

Plaintiff next claims that it is a third-party beneficiary to the Agreements between Dusevoir Acquisitions and Richardson Place. The Revised Judicature Act provides, at MCL 600.1405, provides:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

With respect to this statute, our Supreme Court has reasoned:

> A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise "directly" to or for that person. By using the modifier "directly," the Legislature intended "to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract." *Schmalfeldt v N Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003); citing MCL 600.1405; *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999).

The *Koenig* Court held, "section 1405 does not empower just any person who benefits from a contract to enforce it. Rather, it states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation "directly" to or for the person." *Koenig*, 460 Mich at 676-677.

Further, the Asset Purchase Agreement, at Section 8.9, contains a no third-party beneficiary clause – specifically providing that the contract "is intended for the sole and exclusive benefit of the Parties, and no other person shall have any right to rely hereon or derive any benefit herefrom."

Simply, the Court is unconvinced under an objective standard that Defendants made any direct promises to Plaintiff such that Plaintiff is entitled to third-party beneficiary status under the Asset Purchase Agreement. *Schmalfeldt*, 469 Mich at 428. The Court, therefore, GRANTS Defendants' motion for summary disposition under (C)(10) as to Plaintiff's Count III to the extent it is based on third-party beneficiary status under the Asset Purchase Agreement.

Finally, Plaintiff pleads its Count III as a promissory estoppel claim in the alternative.

> The elements of a promissory estoppel claim consist of (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008).

Further, "[t]he promise must be definite and clear, and the reliance on it must be reasonable." *Zaremba Equip*, 280 Mich App at 41; citing *Ypsilanti Twp v Gen Motors Corp*, 201 Mich App 128, 134; 506 NW2d 556 (1993). But, Defendants argue, Plaintiff has failed to allege any promise with respect to the Asset Purchase Agreement. The Court agrees.

As a result, promissory estoppel cannot save Plaintiff's claims related to the Asset

Purchase Agreement, and the same are properly dismissed.

B. The Landlord Waiver

Plaintiff also claims that Defendants breached the Landlord Waiver executed by Mason-Thomas Holdings (as Landlord) by selling three pieces of equipment (two overhead cranes and a chain hoist) that were a part of the asset sale to Duvesoir Acquisitions.

Under the Landlord Waiver, Mason-Thomas agreed that it would not assert any liens against any of Duvesoir Acquisitions' property. Plaintiff argues that the three pieces of equipment were specifically a part of the sale under the Asset Purchase Agreement – making them Duvesoir Acquisition property. As a result, Plaintiff claims that Defendants breached the Landlord Waiver by selling the same.

On this issue, Defendants offer little argument. Indeed, the Landlord Waiver is specifically based on promises made to Plaintiff. As a result, Plaintiff may appropriately base a breach of contract claim against Mason-Thomas on the same.

But Plaintiff cannot assert said claim against any of the other Defendants because Mason-Thomas is the only party to the Landlord Waiver. And "'[i]t goes without saying that a contract cannot bind a nonparty.'" *AFSCME Council 25 v County of Wayne*, 292 Mich App 68, 80; 811 NW2d 4 (2011); quoting *Equal Employment Opportunity Comm v Waffle House, Inc*, 534 US 279, 294; 122 S Ct 754; 151 L Ed 2d 755 (2002).

For the foregoing reasons, the Court DENIES Defendants' motion for summary disposition under (C)(10) as to Plaintiff's Count III to the extent it is based on an alleged breach of the Landlord Waiver by Mason-Thomas Holdings.

Plaintiff's Count III for breach of contract may only go forward against Mason-Thomas Holdings – and only to the extent that it is founded on an alleged breach of the Landlord Waiver.

II. Fraud/Misrepresentation (Counts I and II)

Defendants next argue that they are entitled to dismissal of Plaintiff's fraud claims because Plaintiff only alleges misrepresentations made to a third party.

> Generally, in order to establish an actionable fraud claim, a plaintiff must show (1) [t]hat defendant made a material representation; (2) that it was false; (3) that when he made it he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. *Lawrence M Clarke, Inc v Richco Const, Inc*, 489 Mich 265, 283-84; 803 NW2d 151 (2011).

Further, "[a] An allegation of fraud based on misrepresentations made to a third party does not constitute a valid fraud claim." *Intl Broth of Elec Workers, Local Union No 58 v McNulty*, 214 Mich App 437, 447; 543 NW2d 25 (1995). It is also well-established that "fraud must be pleaded with particularity." *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008), citing MCR 2.112(B)(1).

A careful review of Plaintiff's First Amended Complaint reveals that Plaintiff did make particular allegations of fraud to directly to Plaintiff. (See First Amended Complaint, at ¶¶ 22, 23, 27, and 30). As a result, Defendants' motion on this basis is DENIED.

III. Conversion (Count IV)

Finally, Defendants move for summary disposition of Plaintiff's conversion claim to the extent that it is based on a General Dynamics check that Richardson Place deposited on February 9, 2015.

It is undisputed that Richardson Place deposited this check into its account on the same day that the Asset Purchase closed. And, although the General Dynamics account receivable was an asset to be sold, all cash held in Richardson Place bank accounts was specifically excluded.

In relevant part, Plaintiff bases its conversion claim on the allegation that the General Dynamics check was part of an accounts receivable as set forth in the Asset Purchase Agreement between Duvesoir Acquisitions and Richardson Place. As a result, Plaintiff claims that it had a security interest in the said check under a Security Agreement.

But, as stated, it is undisputed that the check was deposited into a cash account on the day of the sale. And the only evidence before the Court is that this deposit occurred **before the sale closed**. (Affidavit of Susan Richardson, Exhibit D to Defendants' Motion). Plaintiff only offers speculation to the contrary. But speculation is insufficient to create a question of fact to preclude summary disposition under (C)(10).

Further, to the extent that Plaintiff argues that it was Defendants' duty to update the closing documents to accurately reflect the current assets being transferred (and, therefore, the status of cash accounts and accounts receivable), this argument is one properly made in support of a breach of contract claim brought by Duvesoir Acquisition against Richardson Place. But this argument fails with respect to a conversion claim brought by Plaintiff.

For the foregoing reasons and viewing all evidence in the light most favorable to Plaintiff, the Court concludes that there are no material questions of fact in dispute and Defendants are entitled to partial summary disposition of this claim as a matter of law. As a result, the Court GRANTS Defendants' motion on this basis and DISMISSES Plaintiff's Count IV to the extent that it is based on an alleged conversion of the General Dynamics check.

IV. Summary/Conclusion

To summarize, Defendants' motion for partial summary disposition is GRANTED IN PART.

Plaintiff's Count III for breach of contract may only go forward against Mason-Thomas Holdings – and only to the extent that it is founded on an alleged breach of the Landlord Waiver. In all other respects, Plaintiff's Count III is DISMISSED.

And Plaintiff's Count IV is DISMISSED to the extent that it is based on an alleged conversion of the General Dynamics check.

In all other respects, Defendants' motion is DENIED.

IT IS SO ORDERED.

September 21, 2016__ __/s/ James M. Alexander_____
Date Hon. James M. Alexander, Business Court Judge