

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

**MICHIGAN NETWORK SERVICES, LLC and
MICHAEL WAYNE,
Plaintiffs,**

v.

**Case No. 16-153524-CB
Hon. James M. Alexander**

**123.NET, INC and
DANIEL IRVIN,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition. Defendant 123.Net is a telecommunications company that provides phone service, wireless service, fiber, and data center space to its customers. Plaintiff Michigan Network Services (“MNS”) was a long-time client and wholesaler of 123.Net that provided services to its clients that it obtained from 123.Net. Plaintiff Michael Wayne is a 25% owner of MNS, and Defendant Daniel Irvin is the majority shareholder and President of 123.Net.

This case involves a dispute over an October 4, 2014 Settlement Agreement that resolved a prior lawsuit by selling 100% of MNS’s assets to 123.Net. This Settlement Agreement was entered over the objections of Wayne. Plaintiffs characterize this action as seeking enforcement of the Settlement Agreement, “specifically monies owed by 123NET to MNS.”

Despite what appears a simple breach of contract suit, Plaintiffs sued on claims titled (Count I) breach of contract, (Count II) unjust enrichment, (Counts III and V) aiding and abetting

breach of fiduciary duty, and (Counts IV and VI) tortious interference with business relationship or expectancy.

And, in response, Defendant 123.Net filed a Counterclaim against MNS for (Count I) breach of contract, (Count II) fraudulent misrepresentation, and (Count III) silent fraud.

In other words, the parties are doing their best to make this case needlessly more complicated than it is. In furtherance of this goal, both sides have now **each** filed two motions 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).¹ And a (C)(10) motion tests the factual support for a plaintiff's claims. *Id.*²

First, Plaintiffs filed a motion for summary on their breach of contract claim. Of course, neither Plaintiff Wayne nor Defendant Irvin is a party to the contract Plaintiffs seek to enforce – only MNS and 123.Net are. As a result, it's unclear what place Wayne and Irvin have in Plaintiffs' Count I.

On a related note, in the second motion, Defendants move for summary of Plaintiff Wayne's individual claims. Then Plaintiffs filed a motion for summary of 123.Net's Counterclaim. Finally, Defendants then filed a motion for summary of Plaintiffs' Counts II, III, and IV.

¹ 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).

Further, "[w]hen 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).

² In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden*, 461 Mich 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. Plaintiffs' Motion with Respect to Count I.

As stated, Plaintiffs first move for summary of their Count I for breach of contract. 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).

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).

Plaintiffs claim that Defendants breached the Settlement Agreement by not paying the \$200,000 advance on commissions and not paying 15% of gross commissions on retained customers. The relevant contract provision provides:

In further consideration of the covenants and promises contained [in] this Settlement Agreement, [123.Net] shall pay to [MNS] a 15% monthly commission paid to [MNS] on gross sales generated from any and all of [MNS's] current customers that transfer their accounts to [123.Net] for so long as those customers

remain with Defendant, with a one-time upfront advance on those commissions of Two Hundred Thousand Dollars (\$200,000.00) (the “Commissions Advance”).

It appears undisputed that 123.Net only paid \$100,000 of the \$200,000 Commissions Advance payment. Plaintiffs’ motion postures as if the parties dispute the meaning of “gross sales,” which is the source of the alleged second breach.

But in response to Plaintiffs’ motion, Defendants argue that 123.Net is willing to pay the outstanding \$100,000 Commissions Advance, but they claim that “123.Net is entitled to either set-off or recoupment from MNS.” This is so, Defendants argue, because MNS “committed fraud” in the formation of the Settlement Agreement by misrepresenting that it transfer its interest in TransNetwork to 123.Net.

Indeed, the Agreement provides:

In full and final settlement of the claims asserted in the [prior lawsuit], [MNS] has agreed to forever transfer and assign to [123.Net] 100% of [MNS’s] current client contracts and accounts receivable to [123.Net], all of [MNS’s] devices, equipment and inventory necessary to service those contracts, [MNS’s] corporate name, [MNS’s] wireless client contracts serviced and operated under the corporate name “TransNetworks,” all of which are more particularly described as follows:

. . .

Full transfer of the wireless business called “TransNetworks” to [123.Net], and

Full rights to use all of [123.Net’s – sic MNS’s] corporate and trade names, including but not limited to, “Michigan Network Services” and “TransNetworks.”

And, Defendants argue, “MNS committed silent fraud when it failed to disclose that a third party had a prior interest in the assets transferred to 123Net” under the Agreement.

Specifically, Defendants claim that:

After execution of the Settlement Agreement, 123Net believed it owned the equipment used by TransNetworks to provide service to its customers and attempted to use that equipment. Shortly thereafter, however, non-party John Mullins . . . took possession of the equipment and claimed to have owned the

equipment the entire time. 123Net was locked out from accessing the TransNetworks radios.

In other words, Defendants argue that MNS breached the Settlement Agreement by failing to transfer ownership of TransNetworks' "equipment, radios, leases, [and] materials" to 123.Net.

Indeed, "[t]he rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform. However, that rule only applies when the initial breach is substantial." *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994) (internal quotations and citations omitted).

In their Reply Brief, Plaintiffs do not dispute that MNS never transferred such TransNetwork equipment. Instead, it appears that Plaintiffs dispute that the same was required under the Settlement Agreement.

In other words, there appears to be a dispute over the term "Full transfer of the wireless business called "TransNetworks" to [123.Net]" – specifically, whether said "full transfer" included TransNetworks' equipment. But this provision is ambiguous on its face because it is unclear what "full transfer" means.

Because this term is ambiguous, and it is relevant to Defendants' first breach argument, summary disposition on Plaintiff's Count I for breach of contract is inappropriate and DENIED.

II. Defendants' Motions.

Next, Defendants move for summary with respect to Plaintiff Wayne's claims (Counts II, V, and VI) and Counts II, III and IV of Plaintiff's First Amended Complaint.

A. Count II – Unjust Enrichment

Defendants first seek dismissal of Plaintiffs’ unjust enrichment claim – arguing (1) it is precluded by an undisputed express contract that covers the subject matter of the dispute, and (2) Wayne conferred no direct benefit upon Defendants.

Generally, “in order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant.” *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006); citing *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993).

“However, a contract will be implied only if there is no express contract covering the same subject matter.” *Barber*, 202 Mich App at 375. See also *King v Ford Motor Credit Co*, 257 Mich App 303, 327-28; 668 NW2d 357, 371 (2003) (reasoning “a contract will not be implied under the doctrine of unjust enrichment where a written agreement governs the parties’ transaction”).

With respect to their unjust enrichment claim, Plaintiffs’ Complaint alleges that Defendants received the benefit of the Settlement Agreement without fully compensating Plaintiffs thereunder. In other words, Plaintiffs simply allege a breach of the Settlement Agreement. But this is not a proper unjust enrichment claim because it is simply a rehashed breach of contract claim.

Because an express contract governs the sale of MNS’s assets to 123.Net, Plaintiffs’ unjust enrichment claim fails as a matter of law. As a result, the same is DISMISSED under

(C)(8).³

B. Counts III and V – Aiding and Abetting Breach of Fiduciary Duty

Defendants next argue that Plaintiffs' claims for aiding and abetting breach of fiduciary duty claims fail. In their First Amended Complaint, Plaintiffs allege that other MNS members, Jonathan Lodden and Amanda Robinson, "owed a duty to MNS as a Managing Director and Officers of MNS and [TransNetworks]." And, Plaintiffs allege, said individuals breached their fiduciary duties by "acting in their own self-interest" by entering into the Settlement Agreement.

And, Plaintiffs claim, Defendant Irvin had knowledge of the alleged breach and encouraged Lodden and Robinson to enter into the Settlement Agreement. In other words, Plaintiffs are suing the majority shareholder and President of 123.Net based on 123.Net's purchase of MNS that settled prior litigation. And they are doing so, in relevant part, on an aiding and abetting breach of fiduciary duty theory.

It is undisputed that the Settlement Agreement contains a Release that provides (emphasis added):

Both [MNS] and [123.Net], individually, and on behalf of their successors, agents, assigns, heirs, and representatives, do hereby release and forever discharge each other and any former or current partners, shareholders, members, employees, successors, heirs, assigns, directors, officers, agents, representatives, attorneys, and insurers, for any and all manners of actions, causes of action, charges, suits obligations, demands, rights, damages, complaints, attorneys' fees, costs, expenses, or any and all other claims of liability of whatsoever nature he has, had, or will ever have in the future relating to professional services provided by and Plaintiffs as of the date of this Settlement Agreement and/or arising out of the claims asserted or that could have been asserted in [the prior case]. It is understood and agreed that this is a full and final release of all claims of every nature and kind whatsoever, and releases claims that are known and unknown, suspected an unsuspected, by the

³ With respect to Plaintiff Wayne, Plaintiffs also fail to allege any direct benefit conferred by Plaintiff Wayne on Defendants to otherwise support said claim. As a result, had the Court not granted for failure to state a claim, Plaintiff Wayne's claim would fail on that basis.

parties.

This release barred all claims (whether known or unknown) by MNS and its members, including Wayne, against 123.Net, and its shareholder, Irvin. Because both Plaintiffs are bound by this Release, Plaintiffs' aiding and abetting breach of fiduciary duty claims are barred.

For this reason, the Court GRANTS Defendants' motion for summary disposition of Plaintiffs' Counts III and V under (C)(8), which are hereby DISMISSED.

C. Counts IV and VI – Tortious Interference

Defendants next seek summary of Plaintiffs' claims for tortious interference with a business relationship or expectancy.

The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005) (internal citations omitted) (paragraph breaks added for clarity).

Further, “[O]ne who alleges tortuous interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another.” *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). “A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances.” *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992).

Further, Michigan Courts have long held that “defendants motivated by legitimate personal and business reasons are shielded from liability against this cause of action [tortious interference with a contractual or business relationship].” *Formall, Inc v Community Nat'l Bank*,

166 Mich App 772, 780; 421 NW2d 289 (1988); citing *Christner v Anderson, Nietzke & Co, PC*, 156 Mich App 330, 348-349; 401 NW2d 641 (1986).⁴

Defendants argue that they are entitled to summary of said claims for two reasons. First, there is nothing inherently wrong with 123.Net's purchase of MNS's assets to support a tortious interference claim. Second, said claims are barred by the Release. Third, with respect to Plaintiff Wayne, he cannot establish that he, individually, had any direct relationship with any MNS customers. The Court agrees with all of these arguments.

First, 123.Net's purchase of MNS to settle the underlying lawsuit cannot possibly be said to be inherently wrongful. Further, the Release bars said claims. And, finally, Plaintiff Wayne only alleges that Defendant Irvin interfered with MNS's relationships (not Wayne's).

For all of the foregoing reasons, the Court GRANTS Defendants' motion for summary disposition of tortious interference claims, and Plaintiffs' Counts IV and VI are dismissed under (C)(8).

III. Plaintiffs' Motion for Summary of Defendants' Counterclaim.

Finally, Plaintiffs seek dismissal of 123.Net's Counterclaim against MNS. As stated, said Counterclaim asserted claims for (Count I) breach of contract, (Count II) fraudulent misrepresentation, and (Count III) silent fraud.

⁴ See also *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996) ("Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.").

A. Counterclaim Count I – Breach of Contract

123.Net’s breach of contract Counterclaim is generally based on the allegation that MNS never transferred all of TransNetworks’ assets to it – as required by the Settlement Agreement. As stated, this is a dispute over the meaning of the ambiguous provision “Full transfer of the wireless business called “TransNetworks” to [123.Net]” – specifically, whether said “full transfer” included TransNetworks’ equipment.

Because this provision is ambiguous, summary disposition of 123.Net’s breach of contract Counterclaim is DENIED.

B. Count II – Fraudulent Misrepresentation

Plaintiffs next move for summary of 123.Net’s Counterclaim Count II for fraudulent misrepresentation. Said claim is based on the allegation that MNS misrepresented its intent to transfer TransNetworks’ physical assets to 123.Net under the Settlement Agreement.

Plaintiffs argue that said claim should be dismissed because the Settlement Agreement does not contain any obligation to transfer TransNetworks’ physical assets, and any alleged oral promise otherwise is defeated by the Agreement’s integration and merger clause, which provides:

This Settlement Agreement represents the final and complete agreement between the parties with respect to the subject matter. . . . No statements promises or representations have been made by any party to any other party, or are relied upon, and no consideration has been or is offered, promised, expected or held out, other than as stated in this Settlement Agreement. . . . There are no other oral or written agreements concerning the matters contained in this Settlement Agreement. All prior agreements, discussions and negotiations among the parties relating to the Action have been and are merged and integrated into, and superseded by, this Settlement Agreement.

First, for the reasons already stated, it's unclear if the Settlement Agreement requires the transfer of TransNetworks' physical assets. This is a jury question because the contract is ambiguous. If a jury finds that the intent was to transfer TransNetworks' physical assets, then MNS's failure to do so would constitute a breach – because the same was an express obligation under the Agreement.

Further, if the jury determines that the Agreement required the transfer of TransNetworks' physical assets, then MNS's alleged misrepresentation of its ownership of (or ability to transfer) said assets may constitute the misrepresentation of an existing fact outside of the agreement that could serve as the basis for a fraud in the inducement claim.

This is so because fraud in the inducement requires misrepresentations in character that relate to something other than the performance of the contract. *Huron Tool & Eng'g Co v Precision Consulting Services, Inc*, 209 Mich App 365, 373; 532 NW2d 541 (1995).⁵

But, if the jury determines that the Agreement **does not** require the transfer of TransNetworks' physical assets, then any alleged misrepresentation about MNS's ownership of the same cannot serve as the foundation for any fraud claim. This is so because the merger clause precludes reliance on any representation unrelated to obligations contained in the Agreement.

⁵ 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.]

But, in no event, can 123.Net's allegation that MNS misrepresented **its intention to** transfer TransNetworks' physical assets serve as the basis for a fraud claim because, if the jury so finds, the same would simply be an alleged fraud in the performance of a contract term.

In any event, because numerous questions of fact exist, the Court finds that summary judgment on 123.Net's Counterclaim for fraudulent misrepresentation is premature and DENIED.

C. Count III – Silent Fraud

Finally, MNS seeks summary judgment of 123.Net's silent fraud claim. Said claim is based on the allegation that MNS failed to disclose that it was paying 15% commissions to an agent that generated sales from certain customers that were transferred from MNS to 123.Net. This alleged failure to disclose resulted in 123.Net receiving less money than it anticipated.

To prove silent fraud, also known as fraudulent concealment, the plaintiff must show that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure. A plaintiff cannot merely prove that the defendant failed to disclose something; instead, "a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Lucas v Awaad*, 299 Mich App 345, 363-364; 830 NW2d 141 (2013); quoting *Roberts v Saffell*, 280 Mich App 397, 404; 760 NW2d 715 (2008)

Plaintiffs argue that 123.Net cannot establish that MNS owed it any legal duty to disclose that some customer contracts were maintained by an agent, particularly when such agents are commonplace in the industry. Additionally, 123.Net fails to allege that MNS made some type of representation by words or actions that was false or misleading or was intended to deceive.

In response, 123.Net **concludes** that MNS had a "legal or equitable duty to disclose," but it fails to describe or identify the source of said duty. 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 123.Net fails to produce evidence to demonstrate a genuine issue of material fact concerning whether MNS had a duty to disclose the existence of a servicing agent, summary disposition of 123.Net’s silent fraud claim is appropriate.

As a result, the Court GRANTS Plaintiffs’ motion for summary of 123.Net’s silent fraud Counterclaim under (C)(10), and the same is DISMISSED.

IV. Summary/Conclusion.

To summarize and for all of the foregoing reasons, Plaintiffs’ motion for summary disposition of the Counterclaim is GRANTED IN PART, and only 123.Net’s Counterclaim for silent fraud is DISMISSED.

Defendants’ motions for summary disposition are also GRANTED as outlined above. Plaintiffs’ claims for (Count II) unjust enrichment, (Counts III and V) aiding and abetting breach of fiduciary duty, and (Counts IV and VI) tortious interference with business relationship or expectancy are hereby DISMISSED.

In all other respects, both parties’ motions are DENIED. Only Plaintiffs’ Count I for breach of contract; 123.Net’s Counterclaim Count I for breach of contract; and 123.Net’s Counterclaim Count II for fraudulent misrepresentation survive.

IT IS SO ORDERED.

October 26, 2016
Date

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