STATE OF MICHIGAN

NINTH JUDICIAL CIRCUIT COURT
TRIAL DIVISION

ZEIGLER MOTORSPORTS, LLC,

Plaintiff,

v

M & M MOTOR MALL, INC., SEAN DEVROU, CATHERINE DEVROU, and JOHN SPEARS,

Defendants.

HON. PAMELA L. LIGHTVOET P47677

FILE NO. 2016-0160-CB

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OPINION AND ORDER DENYING DEFENDANTS M&M MOTOR MALL'S, SEAN DEVROU'S, AND CATHERINE DEVROU'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court held in the
City and County of Kalamazoo, Michigan
on this 21st day of July, 2016;

HON. PAMELA L. LIGHTVOET, CIRCUIT COURT JUDGE

Pending before the Court is Defendants M & M Motor Mall Inc., Sean Devrou, and Catherine Devrou's Motion for Summary Disposition.

FACTS

Plaintiff Zeigler Motorsports, LLC (Zeigler) sells power sports vehicles in five states. Defendant M & M Motor Mall, Inc. (M & M) is also in the business of selling power sports vehicles. Defendants Sean and Catherine Devrou were the owners and operators of M & M. Defendant John Spears was an employee of M & M, serving as the general manager. Plaintiff, the Devrous, and M & M entered into an Asset Purchase Agreement pursuant to which Plaintiff agreed to purchase all of M & M's assets including parts. On September 11, 2015, Plaintiff and Defendants closed on the transaction.[1] Plaintiff paid $990,774.49 of the purchase price for M & M's parts and accessories inventory (Inventory Purchase Price). Plaintiff filed this lawsuit alleging:

Count I – Breach of Warranty by M & M, Mr. Devrou, and Ms. Devrou;
Count II – Fraud by Mr. Spears;
Count III – Innocent Misrepresentation by Mr. Spears;
Count IV – Vicarious Liability by M & M, Mr. Devrou, and Ms. Devrou;
Count V – Contractual Indemnification by M & M, Mr. Devrou, and Mrs. Devrou;
Count VI – Civil Conspiracy of All Defendants

Defendant Spears filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(8) or in the alternative under MCR 2.116(C)(10) for Counts II, III, and VI. Defendants M & M, Sean Devrou, and Catherine Devrou filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (10) for Counts I, IV, V, and VI. This Court heard oral arguments on the Motions for Summary Disposition on July 5, 2016. This Court denied Defendant Spears' Motion for Summary Disposition of Count II and Plaintiff stated that it intended to file an amended pleading removing Counts III and IV so those counts were dismissed. This Court took Defendants M & M, Sean Devrou, and Catherine Devrou's Motion for Summary Disposition of Counts I, IV, and V under advisement.

STANDARD OF REVIEW

A motion for summary disposition brought pursuant to MCR 2.116(C)(8) for failure to state a claim upon which relief can be granted tests the legal basis of a claim. Such a motion is tested by the pleadings

[1] As an employee, Defendant Spears was not a party to the contract.

alone with all well-plead allegations being accepted as true. The proper test for the motion is whether a claim is so manifestly unenforceable as a matter of law that no factual development could support recovery. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381 (1997).

A motion for summary disposition pursuant to MCR 2.116(C)(10) is appropriate when, except for damages, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. A court reviewing such motion must consider the pleadings, affidavits, depositions, admissions and any other documentary evidence available to it. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). "The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence." *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

"The party opposing the MCR 2.116(C)(10) motion then has the burden of showing that a genuine issue of disputed fact exists." *Id.* The non-movant may not rest upon mere allegations or denial in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

If the opposing party does not present evidence that shows a material factual dispute is alive, then the MCR 2.116(C)(10) motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993). Furthermore, the evidence submitted must be "substantively admissible." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Merely stating facts that will be established at trial is not sufficient to avoid summary disposition. *Id.*

ANALYSIS

Count I – Breach of Warranty: M & M, Mr. Devrou, and Ms. Devrou

Defendants argue that it is impossible that Plaintiff suffered damages from an inflated inventory purchase price because the inventory purchase price was verified by an independent third party (Allied Inventory) before the closing per the parties' Asset Purchase Agreement. Plaintiff argues that Defendants

presented inaccurate information to the Inventory Service and, as a result, the entire process was tainted. Section 2.4A of the Asset Purchase Agreement (attached as Exhibit 1 to Plaintiff's Complaint) states: "A physical inventory by a mutually agreed upon independent parts inventory service (the "Inventory Service") shall be taken before the Closing for purposes of development of an inventory of the parts and accessories to be purchased..."

In viewing this Motion pursuant to MCR 2.116(C)(10), it is unclear whether the Inventory Service assessed the age of the parts or relied on information submitted by M & M. Discovery has not taken place and there is not enough information before the Court at this time to determine the facts. As discovery is ongoing, Defendant's Motion under MCR 2.116(C)(10) is denied.

In viewing this Motion pursuant to MCR 2.116(C)(8) and accepting Plaintiff's allegations as true, a valid claim for Breach of Warranty has been pled. Count I of Plaintiff's Complaint states the elements necessary to allege a breach of warranty claim. Plaintiff alleges that Defendants made various representations and warranties which lead it to enter into the Asset Purchase Agreement, Plaintiff relied on those representations and warranties, Defendants breached the representations and warranties, and Plaintiff suffered damages as a result. Therefore, Defendants Motion for Summary Disposition of Count I is denied under MCR 2.116(C)(8) also.

Count IV – Vicarious Liability: M & M, Mr. Devrou, and Ms. Devrou

At the July 5, 2016, hearing, the Court held that Plaintiff sufficiently pled a claim for Fraud as to Defendant Spears. Therefore, Plaintiff has also sufficiently pled a claim for Vicarious Liability as it alleges that Mr. Spears committed tortious misconduct while acting on behalf of Defendants in his capacity and within his authority as their agent.

Count V – Contractual Indemnification: M & M, Mr. Devrou, and Mrs. Devrou

Section 8.1 of the Asset Purchase Agreement states:

Indemnification. Seller and Shareholder, jointly and severally, shall indemnify and defend Buyer and Buyer's members, managers, officers, directors, employees and agents (collectively, the "Buyer Indemnified Parties") against and hold them harmless from:

(a) All Liability resulting from, arising out of or related to (i) any inaccuracy in or breach of any representation or warranty of Seller or Shareholder contained in this Agreement or any schedule to this Agreement, or (ii) any breach by Seller or Shareholder of any agreement or covenant of Seller or Shareholder contained in this Agreement or any schedule to this Agreement.

(b) Any imposition upon any of the Buyer Indemnified parties of any Liability related to the operation of the Business prior to the Closing or any other Excluded Liability.

"Liability" is defined in the Asset Purchase Agreement as

any direct or indirect Indebtedness, guaranty, endorsement, claim, cause of action, suit, proceeding, hearing, investigation, charge, complaint, demand, injunction, judgment, order decree, ruling, damage, liability, penalty, fine, cost, obligation, tax, sanction, deficiency, assessment, interest, penalty, Lien, loss, expense, fee (including, without limitation, court costs and attorneys' fees), responsibility and any similar item, of any kind, fixed or unfixed, known or unknown, asserted or unasserted, liquidated or unliquidated, secured or unsecured, and whether or not required to be disclosed on financial statements.

Defendants argue that the indemnification provision provided in the purchase agreement is inapplicable because there were no inaccuracies presented in the Purchase Agreement or subsequent documentation, as evidenced by the closing documents, the third-party inventory, and M & M's inventory submitted to Plaintiff prior to entering the agreement. Plaintiff alleges that Defendants "breached numerous representations and warranties in the Agreement, and extensive information provided by them to Zeigler pursuant to the Agreement was false, misleading, and inaccurate." Complaint, ¶ 87. A Motion for Summary Disposition pursuant to MCR 2.116(C)(8) is tested by the pleadings alone with all well-pled allegations being accepted as true. In analyzing only Defendants arguments regarding this claim pursuant to MCR 2.116(C)(8), Plaintiff has pled a sufficient claim for indemnification. Defendants also argue that there was nothing relied upon by Plaintiff that caused any damage to Plaintiff whatsoever. However, Plaintiff's Complaint alleges that it suffered damages in the form of an inflated Inventory Purchase Price and contractual attorneys' fees incurred in connection with enforcing the Agreement.

Count II – Fraud: Mr. Spears

During oral arguments, this Court granted Defendant Spears' Motion for Summary Disposition as to Count II. This Opinion is addressing Count II in order to more specifically outline why this Court granted Defendant Spears' Motion to Summary Disposition as to Count II.

To prove a claim of fraud, a plaintiff must establish that: (1) the defendant made a material representation, (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. See *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 339, 404; 617 NW2d 543 (2000). Claims of fraud must be stated in a complaint "with particularity." MCR 2.112(B)(1). The mere statement that fraud has occurred is legally insufficient. *LaMothe v. Auto Club Ins. Assn.,* 214 Mich App 577, 586; 543 NW2d 42 (1995).

Plaintiff's Complaint alleges that Mr. Spears was one of the "principal negotiators" on behalf of M & M, that he "wrote up hundreds of thousands of dollars in M & M's obsolete parts to reflect the current value of new parts, rather than the one cent obsolete value that had been M & M's routine practice" and that "on September 11, 2015, the date of the closing, Mr. Spears instructed Dan Taylor, an M & M employee at the time of the closing who now is employed by Zeigler, to manually adjust M & M's inventory in its computer system to reflect $65,501 worth of parts that had actually already been sold or given away to customers and M & M employees; those parts were not actually present at M & M's facility." Complaint, ¶¶ 21, 25 and 47. Plaintiff's Complaint also alleges that following Mr. Spears' markup and manipulation, M & M's inventory and financial records were materially false; Mr. Spears knew that M & M's inventory and financial records were materially false; that Mr. Spears manipulated M & M's records with the intent that Zeigler would rely on them; that Zeigler reasonably relied on M & M's

manipulated records; and Plaintiff suffered damages as a result. See Complaint, ¶¶ 66-70. Therefore, Plaintiff Complaint alleged the elements necessary to plead a sufficient claim for fraud.

OPINION

Defendants M & M, Sean Devrou, and Catherine Devrou's Motion for Summary Disposition as to Counts I, IV, and V is DENIED. Defendant Spears' Motion for Summary Disposition as to Count II was previously denied at the July 5, 2016 Hearing.

IT IS SO ORDERED.

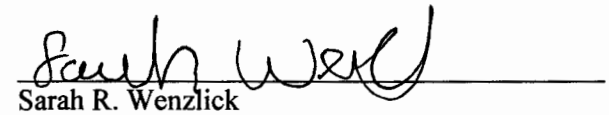
Date: July 21, 2016

HON. PAMELA L. LIGHTVOET (P47677)
Circuit Court Judge

CERTIFICATE OF MAILING

I, Sarah R. Wenzlick, certify that on this date I mailed a copy of this **OPINION AND ORDER DENYING DEFENDANTS M&M MOTOR MALL'S, SEAN DEVROU'S, AND CATHERINE DEVROU'S MOTION FOR SUMMARY DISPOSITION** to the parties in interest at their above-stated addresses via US First Class mail.

Dated: July 21, 2016



Sarah R. Wenzlick
Law Clerk to the Honorable Pamela L. Lightvoet