STATE OF MICHIGAN

SAGINAW COUNTY CIRCUIT COURT

SARGENT DOCKS AND TERMINAL, INC,
SARGENT SAND COMPANY, LLC, and
WILLIAM WEBBER,

Plaintiffs,

v

THOMAS WEBBER,
AVANT LOGISITCS, LLC,
f/k/a SARGENT LOGISTICS, LLC,
MARCELLUS ENERGY SERVICES, LLC,
and ERIC STRANG,

Defendants.
_____/

Case No. 11-014229-CB

Judge: M. Randall Jurrens (P27637)

OPINION AND ORDER RE: DEFENDANTS' MOTION FOR SUMMARY DISPOSITION No. 3
(Member Oppression)

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_____/

This case arises out of a failed business venture.

The plaintiffs' amended complaint alleges, in part, that defendant Thomas Webber ("Tom") committed oppressive conduct toward the plaintiff limited liability company or its other member, plaintiff William Webber ("Bill"), in violation of MCL 450.4515.

Tom seeks dismissal of this claim because an earlier Order of the court dismissing the claim constitutes the "law of the case" and/or he is not a "manager[] or member[] in control" as required by the enabling statute.

For the reasons stated in this opinion, the court concludes that Count 2, *Member Oppression*, should be dismissed.

Background

The Factual Background, Procedural Background, and Summary Disposition Standards included in the court's Opinion and Order re: Defendants' Motion for Summary Disposition No. 1 are adopted and incorporated by reference.

Analysis

The plaintiffs allege in Count 2, *Member Oppression*, that that Tom's actions constitute "illegal, fraudulent and/or willfully oppressive [conduct] toward [the LLC] . . . and Bill" (Amended Complaint, ¶¶ 55).

Tom now requests dismissal of this claim because, in part, the court's March 5, 2012 Order represents the "law of the case" when it granted the defendant's initial summary disposition motion (filed December 6, 2011 as part of an initial response to the original October 17, 2011 Complaint), in which the motion asserted:

- the then-sole plaintiff, William Webber, was not the real party in interest, *MCR 2.201(B)* (i.e. Bill was not a "member" of the LLC, and because
- the two members of the LLC, Thomas and Sargent Dock and Terminals Inc, each owned a 50% interest, so the then-sole defendant, Thomas Webber, was not a proper party defendant since he was not a "manager[] or member[] in control" as required by the LLC member oppression statute, *MCL 450.4515*.

Although referencing "[the court's] opinion and orders . . . on the record of March 5, 2012" in granting the requested summary disposition[1], the March 5, 2012 Order does not state on its face which of the above assertions it is based upon. Indeed, review of the transcript of the court's oral opinion from the bench indicates the focus was predominantly, if not exclusively, on the former and not the latter argument. Arguably, then, although the court's prior grant of summary disposition was partially based on a motion that raised, but was not clearly decided on, the same issue now before the court in Motion No. 3, the court is not necessarily obliged to dismiss Count 2 under the "law of the case" doctrine.

Alternatively, with discovery now complete and his interest in the LLC having been confirmed to be limited to a 50% member, Tom argues, as he did in his 2011 motion, that he was

[1] The Order also granted plaintiff leave to file an amended complaint and add additional parties; resulting in a First Amended Complaint being filed April 3, 2012 (adding the corporate and LLC plaintiffs, the LLC defendants, an additional individual defendant, and Counts 4, 5, and 6).

not a "manager or member in control" of the LLC and can, therefore, have no liability under the statutory "member oppression" provision, *MCL 450.4515* (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* <u>*in control*</u> of the limited liability company *are illegal or fraudulent or constitute willfully unfair and oppressive conduct* toward the limited liability company or the member. * * *

Here, the members' interests are split 50/50 between Bill and Tom (the members being originally Thomas Webber and Sargent Dock and Terminals, with the latter interest seemingly now assigned to William Webber) (Amended Complaint, ¶¶ 3-4; Defendants' MSD No. 1, Exhibit 2).

Since the Articles of Organization do not designate a "manager" (Defendants' MSD No. 1, Exhibit 1), the LLC is a "member-managed" limited liability company, *MCL 450.4401*. Accordingly, with control shared equally, the plaintiffs cannot establish that "managers or members *in control*" committed acts in violation of MCL 450.4515.

Nonetheless, the plaintiffs argue that since Tom was a member of the LLC, and since there is no formally designated manager, MCL 440.4401 applies:

> If management is vested in the members, both of the following apply:
>
> (a) The members are considered managers for purposes of applying this act, including section 406 regarding the agency authority of managers, unless the context clearly requires otherwise.
> (b) The members have, and are subject to, all duties and liabilities of managers and to all limitations on liability and indemnification rights of managers.

Thus, the argument goes, since Tom is a member and there is no manager, Tom is considered a manager, and managers are subject to oppression claims. But plaintiffs cite no case for the proposition that mere member status in a member-managed LLC supports a charge of "oppression". If that were the case, then, without more, a 1% member in a member-managed LLC (possessing the attributes of a manager, by default, *MCL 440.4401*) could be subjected to claims of oppression.

Rather, while a member in a "member-managed" limited liability company is considered a manager with authority to act on behalf of and to bind the company (see Cambridge and Christopoulos, *Michigan Limited Liability Companies*, 2d ed, § 7.3, p 328), this alone does not necessarily raise a member to the level of a "manager . . . *in control*"; assuming, as a fair reading of MCL 440.4515 allows, the phrase "in control" relates back to both "member" and "manager". To be subject to a charge of "oppression", MCL 450.4515 reasonably requires that one possess the ability to oppress, and this ability comes from being "in control". The key is "control". While the statute does not define "control", the court finds nothing in the complaint, the Articles, the

Operating Agreement, or written arguments that differentiate the members' interests or authority here. So even though he may be considered a manager due to his member status, without more, Tom was no more "in control" than Bill. See *Alliance Associates, LC v Alliance Shippers, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 1, 2006 (Docket No. 265101). And without control, conduct is not actionable regardless of how unfair or oppressive it may be.

Accordingly, regardless whether the court's March 5, 2012 Order represents the "law of the case", the plaintiffs cannot establish the necessary element of an oppression claim that Thomas Webber was "a manager[] or member[] in control of the limited liability company". There being no genuine issue of material fact, defendant Thomas Webber is entitled to dismissal of Count 2 pursuant to MCR 2.116(C)(10).

Conclusion

Defendant Tom Webber requests dismissal of Count 2, *Member Oppression*, because an earlier Order of the court dismissing the claim constitutes the "law of the case", and/or because he is not a "manager[] or member[] in control" as required by MCL 450.4515.

The court concludes that regardless of the intent of the March 5, 2012 Order, there is no genuine issue of material fact that defendant Tom Webber is not a manager or member in control of the LLC. Accordingly, pursuant to MCR 2.116(C)(10)[2], the defendants' Motion for Summary Disposition No. 3 is being **GRANTED** and Count 2, *Member Oppression*, is being dismissed.

IT IS SO ORDERED.

Date: August 7, 2015 /s/ (P27637)
M. Randall Jurrens, Circuit Judge

[2] Although the defendant's motion and supporting brief do not state under which subrule of MCR 2.116(C) relief is sought, the manner the issue is framed ("Is there a genuine issue of material fact . . .?") indicates the motion is brought under MCR 2.116(C)(10). On the other hand, since the plaintiffs' complaint merely states "Thomas Webber holds a 50% Member interest in [the LLC]" (Amended Complaint, ¶ 4), the plaintiffs' amended complaint fails to state a claim on which relief can be granted under MCL 450.4515. Accordingly, dismissal of Count II, *Member Oppression*, is alternatively appropriate under MCR 2.116(C)(8).