

**STATE OF MICHIGAN**  
**SAGINAW COUNTY CIRCUIT COURT**

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MICHAEL PRATT,

Plaintiff,

v.

VERNELL PHIPPS and NICOLE PHIPPS,

Defendants.

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Case No. 16-029916-CB

Judge: M. Randall Jurrens (P27637)

**OPINION AND ORDER DENYING  
DEFENDANTS' MOTION FOR  
SUMMARY DISPOSITION**

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Alleging he is in a business partnership with defendants, plaintiff's complaint asserts claims for accounting, breach of fiduciary duty, conversion, civil conspiracy, and dissolution.

In lieu of answering, defendants seek summary dismissal of plaintiff's complaint under MCR 2.116(C)(8) and (10).

For the reasons stated in this opinion, the court concludes that plaintiff's complaint survives the present attack and the case should proceed for now.

***Background***

On May 23, 2016, plaintiff filed a complaint alleging the parties formed a partnership to sell used cars, and asserted claims for accounting, breach of fiduciary duty, conversion (common law and statutory), civil conspiracy, and dissolution of the partnership.

On July 5, 2016, defendants filed a Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and (C)(10), with a supporting brief, affidavit, and documentary evidence.

On August 4, 2016, plaintiff filed a response to defendants' motion, with a supporting brief, affidavit, and documentary evidence.

Defendant's motion was heard on August 22, 2016, and the court took the matter under advisement.

### *Summary Disposition Standards*

Motions brought pursuant to MCR 2.116(C)(8) test the *legal* sufficiency of a claim. Such motions are determined on the pleadings alone, assuming all well-pleaded factual allegations are true and construed in a light most favorable to the nonmovant. The court must also accept all reasonable inferences that can be drawn from the factual allegations as true. *State v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 1023 (2014). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Conversely, motions brought under MCR 2.116(C)(10), test the *factual* sufficiency of a claim or defense. In determining such motions, courts (a) must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties (although only to the extent that the content or substance would be admissible evidence), (b) must not assess credibility or determine facts, and (c) must view the admissible evidence (including reasonable inferences) in the light most favorable to the nonmoving party. MCR 2.116(G)(3)(5)(6); *Maiden*, at 120-121. Summary disposition "is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Management, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Here, defendants' motion and arguments do not describe how plaintiff's complaint fails to plead the requisite elements of his various causes of action, or is otherwise legally deficient. Rather, defendants have focused on whether the evidence supports the formation of any partnership, effectively testing the factual sufficiency of plaintiff's claims. Accordingly, defendants' motion implicates only MCR 2.116(C)(10).

### *Analysis*

"A partnership is an association of 2 or more persons . . . to carry on as co-owners a business for profit . . .", *MCL 449.6(1)*.

"For a partnership to exist, it must be shown by an agreement, since it is the intention of the parties that is of prime importance in ascertaining the existence of a partnership." *Le Zontier*

*v Shock*, 78 Mich App 324, 333; 260 NW2d 85 (1977). However, parties must merely have an intent to carry on a business for profit, not necessarily a subjective intent to create a partnership. *Byker v Mannes*, 465 Mich 637, 644-653; 641 NW2d 210 (2002), aff'd 469 Mich 881 (2003). "Stated more plainly, the statute does not require partners to be aware of their status as 'partners' in order to have a legal partnership." *Id.* at 646. Ultimately, the determination of whether a partnership exists is a question of fact. *Miller v City Bank & Trust Co*, 82 Mich App 120, 123; 266 NW2d 687 (1978).

In the absence of an express agreement, *Van Stee v Ransford*, 346 Mich 116, 133; 77 NW2d 346 (1956), courts have considered a variety of factors in determining whether a partnership exists, including:

- ***subjective intent***  
*Byker*, at 649-650
- ***contribution***  
*Miller*, at 124; *Falkner v Falkner*, 24 Mich App 633, 644; 180 NW2d 491 (1970)
- ***profit / loss sharing***  
*Miller*, at 124-125; *Falkner*, at 643; *Klein v Kirschbaum*, 240 Mich 368, 371; 215 NW 289 (1927); *Lobato v Paulino*, 304 Mich 668, 675, 677; 8 NW2d 873 (1943)
- ***mutual agency and control***  
*Miller*, at 125; *Lobato*, at 675
- ***management rights***  
*Falkner*, at 643
- ***certificate of co-partnership***  
*Miller*, at 126; *Lobato*, at 677
- ***use of the term "partner"***  
*Miller*, at 126; *Lobato*, at 675; *Falkner*, at 643
- ***tax identification number***  
*Byker*, at 641 n 1
- ***income tax returns***  
*Miller*, at 126; *Lobato*, at 674; *Falkner*, at 644; *Byker*, at 641 n 1
- ***bank account name / signatories***  
*Lobato*, at 674, 677; *Falkner*, at 644
- ***partnership name***  
*Lobato*, at 674, 677
- ***partnership letterhead***  
*Lobato*, at 677
- ***commingling of funds or property***  
*Lobato*, at 677
- ***term of existence***  
*Lobato*, at 677

In this regard, there is significant evidence supporting defendants' position that plaintiff is not their partner<sup>1</sup>:

- a Certificate of Persons Conducting Business Under Assumed Name as "Jones Pre-Owned Sales" filed by Nicole alone (Defendants' Ex A)
- a Michigan license to sell used cars in the name of "Jones Pre-Owned Sales" filed by Nicole alone (which certified she was "not acting as the alter ego, in the place of, or on behalf of, any other person or persons in seeking th[e] license") (Plaintiff's Ex B)
- per defendant's affidavit, "At one point, Pratt asked if he could be a partner and I advised that it would take an investment of \$25,000. \* \* \* He only came up with \$800" (Defendants' Ex C)
- a line of credit with Nextgear Capital was taken out by "Nicole Lynn Phipps d/b/a Jones Pre-owned Sales" (Defendants' Ex E)
- per defendant's affidavit, plaintiff was advised that he was only a "contract" employee and would receive a 1099 (Defendants' Ex C)
- plaintiff was paid a commission on one or more vehicle sales as a "contractor" (Defendants' Ex B and C)
- Nicole purchased 3623 Dixie Hwy in her own name (Plaintiff's Ex H)
- a certificate of assumed name for "Jones Pre-Owned Auto Sales" was filed by Nicole alone (Defendants' Ex A)
- a line of credit with 1<sup>st</sup> Choice Financial Services was taken out by "Nicole Phipps d/b/a Jones PreOwned Auto Sales" (Defendants' Ex E)

Standing alone, this is compelling evidence that defendants did not engage in a partnership with plaintiff. However, plaintiff counters with evidence supporting his position that the parties did intend to carry on a business for profit together:

- plaintiff purchased insurance and other items for the business (e.g. computers, furniture, furnace, hot water tank) (Plaintiff's Ex A, D, and J)
- distribution of "profit from November" to plaintiff (Plaintiff's Ex P)
- plaintiff made a "cash down payment" to the business' building contractor (Plaintiff's Ex A and I)
- several months' profits were not distributed to anyone but, rather, invested "back into the business" (Plaintiff's Ex A)
- plaintiff "managed employees on an equal basis" with defendant (Plaintiff's Ex A)
- a radio commercial approved by defendants in which plaintiff's fiancé identified herself as one of the "first ladies" of the business (Plaintiff's Ex A and K)
- a radio commercial approved by defendants in which plaintiff identifies himself as "one of the owners of JP Auto" (Plaintiff's Ex A and K)

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<sup>1</sup> The court is not unaware of defendants' assertion of additional "incidents of [ ] ownership and management" (Defendants' Brief, pp 2-3), but the court can consider only those supported by affidavits, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

- statements made by defendant(s), recorded by plaintiff, in which defendant(s) acknowledge plaintiff as a partner, and acknowledge he had been paid half of the profits (Plaintiff's Ex A and L)

Although the [lack of] indicia of partnership arguably predominates in favor of defendants, plaintiff has clearly produced material evidence supporting his position that he was in partnership with defendants (with other evidence, presumably relevant in determining whether a partnership exists, remaining un[der]developed by either side<sup>2</sup>).

When viewing the record in the light most favorable to plaintiff, *Maiden*, at 120, the court concludes that there is a genuine issue of material fact whether the parties intended to carry on a business for profit, *Miller*, at 123. Accordingly, dismissal of plaintiff's complaint is not appropriate at this time, particularly "before discovery on a disputed issue is complete." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009).

### ***Conclusion***

Plaintiff asserts various claims premised on being in partnership with defendants. Defendants argue plaintiff was never their partner and support their position with significant evidence. Plaintiff, however, counters with evidence that the parties, in fact, did carry on a business together for profit.

When viewing the record in the light most favorable to plaintiff, the court concludes that there is a genuine issue of material fact whether a partnership existed. Accordingly, defendants' motion for summary disposition is being denied.

**IT IS SO ORDERED.**

Date: August 25, 2016

\_\_\_\_\_/s/\_\_\_\_\_  
M. Randall Jurrens, Circuit Judge (P27637)

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<sup>2</sup> Counsels' written and oral arguments alluded to, but did not produce, other evidence indicating a [lack of] partnership (and, additionally, even other avenues of inquiry may be envisioned, potentially advantaging one side or the other).