

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

KANTGIAS FAMILY LIMITED PARTNERSHIP  
a Michigan Limited Liability Partnership,

Plaintiff/Counter-defendant,

vs.

Case No. 2013-000171-CB

DAVID PASCOE,

Defendant/Counter-plaintiff,

and

DAVID PASCOE,

Third-party Plaintiff,

vs.

DIETECH NORTH AMERICA, L.L.C., a  
Michigan Limited Liability Company, and  
JOHN CHRISTOPHER KANTGIAS,

Third-party Defendants.

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OPINION AND ORDER

This matter is before the Court on the Plaintiff/Counter-Defendant Kantgias Family Limited Partnership's ("KFLP") and Third Party Defendants Dietech North America, LLC and John Christopher Kantgias' (KFLP and Third Party Defendants collectively as, "Movants") motion for summary disposition of Defendant/Counter-Plaintiff/Third-Party Plaintiff David Pascoe's ("Defendant") remaining counter and third party claims pursuant to MCL 2.116(C)(8) and (10). Defendant has filed a response and requests that the motion be denied.

*Factual and Procedural History*

KLFP and Defendant are co-owner-members of Dietech North America, LLC (“Dietech”).<sup>1</sup> KLFP holds a 75% owner-membership interest and Defendant holds the remaining 25% owner-membership interest. Since April 2003, Third-Party Defendant John Christopher Kantgias (“JC”) and non-party Dennis Alderson have been Dietech’s managers. JC is also Dietech’s president, and the managing member of KLFP.

On August 21, 2012, the managers unanimously made a capital call pursuant to Article 3.2 of Dietech’s Operating Agreement. According to KLFP, Dietech needed to raise \$2.7 million in operating capital to pay back a line of credit that was being recalled. Movants allege that Defendant was given proper notice of his mandatory pro rata capital contribution share under Article 3.2. Movants also assert that Defendant refused to pay his capital share by the September 7, 2012 deadline, thereby defaulting under the Operating Agreement. As a result of the alleged default, KLFP “lent” Defendant his \$675,000.00 share of operating capital to Dietech pursuant to Article 3.3. Movants further claim that Article 3.3 permits KLFP to secure the loan with a lien on Defendant’s membership interest, and to enforce the lien in court. Consequently, KLFP brought this action for declaratory judgment on January 16, 2013.

Defendant denies wrongdoing in his answer and affirmative defenses. In addition, he has filed a counter-complaint against Dietech and JC, alleging in part: breach of contract; breach of fiduciary duty; and shareholder oppression under the Corporations Act, MCL 450.4515; and requesting an accounting.

On November 19, 2013, the Court entered an Opinion and Order granting Plaintiff summary disposition of Defendant’s shareholder oppression claims and granting Plaintiff’s own

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<sup>1</sup> Formerly known as Quality Metalcraft Tech Division, LLC.

declaratory action. The Court subsequently denied Defendant's motion for reconsideration of the November 19, 2013 Opinion and Order.

On December 23, 2013, Movants filed their instant motion for summary disposition of Defendant's remaining counter and third party claims. Defendant has filed a response to the motion and requests that it be denied. In addition, Movants have filed a reply brief in support of their motion. On January 27, 2014, the Court held a hearing in connection with the instant motion and took the matter under advisement. The Court has reviewed the pleadings submitted in connection with the motion and the arguments made at the hearing and is now prepared to make its decision.

#### *Standards of Review*

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

#### *Arguments and Analysis*

##### 1) Defendant's Breach of Contract Claims

The first alleged basis for Defendant's breach of contract claims is that by 2000, KFLP or JC and Mike Chetcuti acquired Nick Stumbos' membership interest in Dietech in violation of Article 5.3 of the Operating Agreement. Further, Defendant asserts that by 2003 JC or KFLP acquired Mike Chetcuti's membership interest in violation of Article 5.3.

In their motion, Movants contend that these claims are barred by the statute of limitations because these actions took place over 6 years before Defendant filed his counter and third party claims. In response, Defendant concedes that the applicable statute of limitations is 6 years but maintains that any denial of his voting rights under the Agreement that has taken place within the last 6 years can be the basis for his claim. However, it is undisputed that the decisions to acquire the membership interests at issue took place more than 6 years ago. Accordingly, the Court is satisfied that Movants are entitled to summary disposition of Defendant's breach of contract claims to the extent that they are based on the 2000 or 2003 acquisition of membership interests.

Defendant also contends that JC breached the Agreement by establishing a line of credit for Dietech from his mother in violation of Articles 6.1 and 7.15 of the Agreement. Article 6.1 of the Agreement provides:

6.1 Voting. All members shall be entitled to vote on any matter submitted to a vote of the members. Notwithstanding the foregoing, the Members shall have the right to vote on all of the following: (a) the dissolution of the Company; (b) the merger of the company; (c) a transaction involving an actual or potential conflict of interest between a Manager and the Company; (d) an amendment to the Articles; or (e) the sale, exchange, lease or other transfer of all or substantially all of the assets of the Company other than in the ordinary course of business.

Further, Article 7.15 provides:

7.15 Limitations. Notwithstanding the foregoing and any other provision contained in this Operating Agreement to the contrary, no act shall be taken, sum expended, decision made, obligation incurred or power exercise by any Manager or Officer on behalf of the Company except by the unanimous consent of all Members with respect to (a) any significant and material purchase, receipt, lease, exchange, or other acquisition of any real or personal property or business; (b) the sale of all or substantially all of the assets and property of the Company; (c) any

*mortgage, grant of security interest, pledge or encumbrance upon all or substantially all of the assets and property of the Company; (d) any merger; (e) any amendment or restatement of these Articles or this Operating Agreement; (f) any matter which could result in a change in the amount or character of the Company's capital; (g) any change in the character of the business and affairs of the Company; (h) the commission of any act which would make it impossible for the Company to carry on its ordinary business and affairs; or (i) any action that would contravene any provision of the Articles or this Operating Agreement or the Act.*

In their reply, Movants assert that the Court has already held, in its January 7, 2014 Opinion and Order, that the decision to establish a line of credit did not violate Article 7.15. However, the holding in the January 7, 2014 Opinion and Order was limited in scope and simply found that the decision did not require unanimous consent under subsection (f). In his current response, Defendant contends that the decision required unanimous consent under subsection (c). Section 7(b) of the line of credit grants a security interest in “**all** of [Dietech's] assets, financial accounts, accounts receivable, inventory, prepaid items, and all other items of worth titled to, or otherwise owing to, [Dietech].” As such, the line of credit included a grant of a security interest in all or substantially all of Dietech's assets. Consequently, the decision to establish the line of credit required unanimous consent pursuant to Article 7.15(c) of the Agreement. As a result, Defendant's breach of contract claims must be allowed to move forward to the extent that they are based on the decision to establish the line of credit.

Defendant's breach of contract claims are also based on Dietech and KFLP's alleged refusal to make distributions prior to March 31, 2012 and 2013 in violation of Article 4.2 of the Agreement. However, it is undisputed that the 2012 tax distribution was made in August 2012 and that the 2013 distribution was made in July 2013. As such, the Court has already held, in its November 2013 Opinion and Order that damages for the breaches related to the late distributions are limited to attorney fees.

2) Defendant's Breach of Fiduciary Duty Claims

As a preliminary matter, Defendant's breach of fiduciary duty claims are barred to the extent that said claims are based on actions take more than 3 years before he filed his counter and third-party complaints. MCL 600.5808(10). Moreover, the Court has already held that Defendant's claims are barred to the extent that they are predicated on the same alleged acts of wrongdoing he relied upon in his shareholder oppression claims. *See* the November 19, 2013 Opinion and Order.

Defendant's remaining basis for his breach of fiduciary duty claims is that certain employees and/or managers were over-compensated. However, a suit for breach of fiduciary duty owed to the corporation can only be brought by an individual if the individual can prove that he was personally owed a fiduciary duty and the damage was not just to the corporation, but to him personally. *Mich Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). In this case, the "over-payments" identified by Defendant were made to various employees/managers of Dietech. However, Defendant was not a manager or employee of Dietech at the time the "over-payments" were made. Indeed, because the payments were only made to employees/managers, Defendant was not singled out or otherwise personally damaged by the decision. Moreover, if the decision to make the "over-payments" was harmful to Dietech, each of the members' interest in Dietech would have been impacted equally. Accordingly, to the extent, if any, that issuing the "over-payments" was a breach of fiduciary duty, the breach would be to the corporation and would need to be pursued derivatively. *Mudgett, supra*. Consequently, Defendant does not have standing to pursue this claim individually. As a result, and for the other reasons discussed above, Movants are entitled to summary disposition of Defendant's breach of fiduciary duty claims.

### 3) Defendant's Accounting Claim

Finally, Defendant alleges that he is entitled to an accounting. An accounting is only necessary where discovery is insufficient to determine the amounts at issue. *Cyril J Burke, Inc v Eddy & Co Inc.*, 332 Mich 300; 51 Nw2d 238 (1952). A party seeking an accounting has the burden of proof to establish that he/she does not have an adequate remedy at law. *Wilson v Continental Development CO*, 112 F Supp 2d 648, 663 (WD Mich 1999). In this case, Defendant has failed to establish that discovery has been insufficient in this matter or that he does not have an adequate remedy at law. Accordingly, his request is denied without prejudice.

#### *Conclusion*

For the reasons set forth above, Plaintiff/Counter-Defendant Kantgias Family Limited Partnership's and Third Party Defendants Dietech North America, LLC and John Christopher Kantgias' motion for summary disposition pursuant to MCL 2.116(C)(8) and (10) is GRANTED, IN PART, and DENIED, IN PART. Specifically:

- Defendant's breach of contract claims are barred under the 6 year statute of limitations to the extent that they are based on the 2000 or 2003 acquisition of Nick Stumbo's and Mike Chetuti's membership interests;
- Movants' motion is denied to the extent it seeks summary disposition of the portion of Defendant's breach of contract claims based on the decision to establish a line of credit without allowing Defendant to vote;
- Defendant's damages for late tax distributions are limited to attorney fees;
- Movants' motion for summary disposition of Defendant's breach of fiduciary duty claims is granted; and
- Defendant's request for an accounting is denied, without prejudice, based on his failure to establish that discovery has been insufficient in this matter and that he does not have an adequate remedy at law.

Pursuant to MCR, 2.602(A)(3), this *Opinion and Order* does not resolve the last pending issue and does not close this case.

IT IS SO ORDERED.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: February 24, 2014

JCF/sr

Cc: *via e-mail only*

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