

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

ROBERT E. DEMIL,

Plaintiff,

vs.

Case No. 2013-4291-CB

MICHEAL DEMIL and CRAIG  
FENTON

Defendants.

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OPINION AND ORDER

Plaintiff has filed a motion for a temporary restraining order, to disgorge and for the return of corporate assets. Defendants have filed a joint response and request that the motion be denied.

I. Factual and Procedural History

In February 2008, the parties requested that attorney Rogue Tyson, RMD Holdings, Ltd.'s corporate counsel, draft various documents regarding the corporate governance of Fenton Excavating & Construction, Inc. ("Fenton Construction"). Specifically, Mr. Tyson drafted the following documents, each of which was executed by each of the parties: (1) voting agreement (the "Voting Agreement"), (2) shareholder 488 agreement, (iii) buy-sell agreement, (4) capitalization agreement (the "Capitalization Agreement"), (5) assignment of assets agreement, (vi) transfer of assets agreement, and (vii) administrative services agreement. Pursuant to the parties' agreements, Robert E. Demil,

Michael Demil and Craig Fenton were each 1/3 owners of Fenton Construction and each received an equal amount of shares, *inter alia*.

On October 24, 2013, Plaintiff filed his complaint in this matter. In his complaint, Plaintiff alleges that Defendants have violated the provisions of the Voting Agreement and Capitalization Agreement by issuing additional stock in Fenton Construction without the unanimous consent of all shareholders and by amending the bylaws of the company without the unanimous approval of all shareholders. Specifically, Plaintiff alleges that Defendant breached the contracts at issue by implementing decisions that were not passed unanimously and by failing to submit the parties' disputed votes to arbitration.

Plaintiff and Defendants have since filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10) and have each responded to the opposing motion. On November 24, 2015, the Court entered its Opinion and Order granting in part Defendants' motion for summary disposition as to Plaintiff's breach of contract claim to the extent it is based on the issuance of stock previously authorized at the time of incorporation and denying the remainder of the motion.

Plaintiff now moves for a preliminary injunction enjoining Defendants from:

- a. Using, appropriating, transferring, assigning, and/or directing any assets of Fenton Construction to pay for Defendants' legal fees; and
- b. Causing Fenton Construction to modify the frequency or increase the amount of any compensation that is to be paid to Defendants.

Plaintiff also requests that the Court order Defendants to reimburse Fenton Construction all amounts it has paid to counsel for the attorney fees Defendants have incurred in this matter. The Court has held an evidentiary hearing in connection with Plaintiff's motion. At the conclusion the hearing the Court took the matter under advisement.

## II. Standard of Review

"[I]njunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." discretion. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). (citation and internal quotation marks omitted). Pursuant to a longstanding principle, "a particularized showing of irreparable harm ... is ... an indispensable requirement to obtain a preliminary injunction." *Id* at 9 (citation and internal quotation marks omitted). Accordingly, "a preliminary injunction should not issue where an adequate legal remedy is available." *Id*. "[T]he three additional factors in a preliminary injunction analysis are (1) whether harm to the applicant absent an injunction outweighs the harm it would cause to the adverse party, (2) the strength of the moving party's showing that it is likely prevail to on the merits, and (3) harm to the public interest if an injunction is issued." *Id*. at 6 n 6.

## II. Arguments and Analysis

In this case, Plaintiff contends that injuries are irreparable where a defendant is actively using corporate assets for their own gain and to oppress a fellow shareholder. However, Plaintiff has failed to support his position in any

way. A party may not merely state a position and then leave it to the Court to rationalize and discover the basis for the claim, nor may he leave it to the Court to search for authority to sustain or reject his position. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Based on Plaintiff's failure to support his position, Plaintiff's assertion is properly denied.

Moreover, the relief Plaintiff seeks in connection with his instant motion is intended to remedy prior, and prevent additional, monetary damages. Specifically, Plaintiff seeks an order preventing Defendants from causing Fenton Construction to pay attorney fees, requiring Defendants to reimburse Fenton Construction the fees it has already paid, and enjoining Defendants from increasing the compensation they are to receive from Fenton Construction. (See Plaintiff's brief, at 8.) "A preliminary injunction should not issue where an adequate legal remedy is available." *Pontiac Fire*, 482 Mich at 9. In this case, an adequate remedy at law, i.e. monetary damages, will be available in the event that Plaintiff prevails in connection with his claims. Moreover, the majority of the alleged damages that forms the basis for the instant motion would have been incurred by Fenton Construction, a non-party, rather than Plaintiff. For these reasons, the Court is convinced that Plaintiff has failed to establish that irreparable harm will be caused if an injunction is not entered. Consequently, Plaintiff has failed to establish an indispensable prerequisite for obtaining a preliminary injunction. *Pontiac Fire*, 482 Mich 8. Accordingly, Plaintiff's motion must be denied.

Finally, Plaintiff requests that the Court appoint a receiver to "take charge of [Fenton Construction]. However, as noted above, Fenton Construction is not a party to this matter. Plaintiff has not provided the Court with any authority by which it is empower to appoint a receiver to a run an entity that is not a party to the litigation. Consequently, the Court is convinced that Plaintiff has failed to meet his burden in connection with his request for a receiver. As a result, Plaintiff's request must be denied.

#### Conclusion

Based upon the reasons set forth above, Plaintiff Robert E. Demil's motion for a temporary restraining order, to disgorge and for the return of corporate assets is DENIED. In addition, Plaintiff's request for a receiver is DENIED.

In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

Date: AUG 12 2015

Kathryn A. Viviano  
Hon. Kathryn A. Viviano, Circuit Court Judge