

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

EDWARD CASTLE, JR. and  
THE FILTER DEPOT, LLC,

Plaintiffs,

vs.

Case No. 2014-3568-CB

MARCIA SHOHAM, JONATHAN  
SHOHAM and MIDWEST AIR  
FILTER, INC.,

Defendants.

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OPINION AND ORDER

Defendants have filed two motions for partial summary disposition. Plaintiffs have filed a response to each motion and request that the motions be denied. Further, Defendants have filed a reply brief in support of each of their motions.

I. Factual and Procedural History

Plaintiff Edward Castle, Jr. ("Plaintiff Castle") is a minority owner of Plaintiff Filter Depot, LLC ("Filter Depot"). Defendant Midwest Air Filter, Inc. ("MAF") is the majority owner of Filter Depot. Since 2013 Defendants Marcia and Jonathan Shoham (collectively, the "Shoman Defendants") have owned and operated MAF.

On September 12, 2014, Plaintiff Castle filed his original complaint in this matter. In his complaint, Plaintiff Castle alleged that MAF, at the direction of the Shoham Defendants, has engaged in various improper activities.

On January 21, 2015, Plaintiffs filed their first amended complaint ("Amended Complaint"). The Amended Complaint added Filter Depot as a plaintiff and contains the

following claims: Count I- Member Oppression against MAF under MCL 450.4515, Count II- Fraud, Fraudulent Omission, and Silent Fraud against MAF, Count III- Breach of Contract against MAF, Count IV- Unjust Enrichment against MAF, Count V- Attorney Fees pursuant to MCL 450.4503 against MAF, Count VI- Accounting, Count VII- Breach of Common Law Fiduciary Duties against MAF, Count VIII- Breach of Statutory Fiduciary Duties against MAF, Count IX- Statutory and Common Law Conversion against Defendants, Count X- Aiding and Abetting Breaches of Fiduciary Duty, Fraud, Conversion, Breach of Contract, Member Oppression, and Unjust Enrichment against Defendants, and Count XI- Civil Conspiracy against Defendants.

On January 28, 2015, Defendants filed their motion for summary disposition pursuant to MCR 2.116(C)(8). In their motion, Defendants requested that the Court dismiss Counts VIII-XI of the Amended Complaint. On February 20, 2015, Plaintiff filed his response to the motion, requesting that the Court deny Defendants' motion. In addition, Defendants filed a reply brief in support their motion. On March 16, 2015, the Court entered its Opinion and Order dismissing the portion of Plaintiff's breach of fiduciary duty claim based on ¶¶59 (b), (f), (g), (j), (m), (q), (r), and (u), as well as Plaintiff's conversion of money, conspiracy, and aiding and abetting breach of contract, unjust enrichment and membership oppression claims.

On July 9, 2015, Defendants filed their instant motion for summary disposition of the portion of Plaintiff's claims based on the termination of his employment. On August 12, 2015, Plaintiff filed his response and requests that the motion be denied. On August 13, 2015, Defendants filed a reply brief in support of their motion.

On July 16, 2015, Defendants filed their instant motion for summary disposition of the portion of Plaintiff's claims related to the increase of management fees that were charged. On August 12, 2015, Plaintiff filed his response and requests that the motion be denied. On August 13, 2015, Defendants filed their reply brief in support of their motion.

On August 17, 2015, the Court held a hearing in connection with the motions and took the matters under advisement.

## II. Standard of Review

A motion under MCR 2.116(C)(10) 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.

## III. Arguments and Analysis

In this case, Plaintiff alleges that his minority interest in Filter Depot has been subjected to willfully unfair and oppressive conduct by Defendants in violation of MCL 450.4515. MCL 450.4515 provides:

- (1) 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 in control of the limited liability

company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member.

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- (2) As used in this section, “willfully unfair and oppressive conduct” means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other member interests disproportionately as to the affected member. The term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure.

In his complaint and other pleadings, Plaintiff relies on a series of actions Defendants have taken since the Shoham Defendants purchased MAF. The first action was MAF’s unilateral decision, by consent resolution, to increase the management fee that MAF was to be paid by Filter Depot from 2% to 14%. Specifically, Plaintiff alleges that MAF’s action violated Filter Depot’s operating agreement (“Operating Agreement”) and oppressed his membership interests.

As a preliminary matter, a violation of the Operating Agreement, such as a refusal to allow a member to exercise his right to vote on certain matters, can be a basis for a shareholder oppression claim. *Madugula v Taub*, 496 Mich 685; 853 NW2d 75 (2014). In this case, the Operating Agreement requires any transaction involving a conflict of interest to be submitted to a vote of the members. (See Plaintiff’s Exhibit A, at ¶6.1) The Court is convinced that MAF clearly had a conflict of interest with respect to how much the Filter Depot would pay it in connection with its management services. Accordingly, Plaintiff had a membership right to vote on whether the fees would be increased. Further, Plaintiff’s membership right to vote was clearly oppressed by the

fact that MAF, through Mr. Shoham, approved the increase without providing Plaintiff an opportunity to vote. While the Shoham Defendants may ultimately establish that the increase was not unfair and was justified, the Court is satisfied that a genuine issue of fact exists which precludes summary disposition. Accordingly, the Defendants' motion for summary disposition on the issue of management fees must be denied.

In addition, by increasing the management fee it would be paid, MAF, and by extension the Shoham Defendants, could divert the Filter Depot's assets and lower Filter Depot's profitability. It is undisputed that the distributions received by the members is based on the net profits of Filter Depot. By reducing the profitability of Filter Depot by increasing the fees it was paying to MAF, Plaintiff's membership interest in receiving distributions was negatively impacted. Further, Plaintiff's interest was disproportionately impacted because while MAF's distributions as a member of the Filter Depot would also be decreased, its own profitability would be increased by receiving the higher management fees. The Court is satisfied that such actions could potentially form the basis for Plaintiff's shareholder oppression claim.

Plaintiff also alleges that his membership rights were oppressed when the Shoham Defendants decided, without a vote, to terminate his employment. MCL 450.4515 provides that termination may constitute willful and oppressive conduct "to the extent the actions interfere with distributions or other member interests."

The Michigan Court of Appeals addressed the issue as to whether a minority shareholder/member can be oppressed by activities including termination of the member/shareholder's employment in *Berger v Katz*, unpublished per curiam opinion of the Court of Appeals, decided July 28, 2011 (Docket Nos. 291663, 293880). In *Berger*,

the trial held that the defendants engaged in willfully unfair and oppressive conduct by: (1) the way they eliminated plaintiff's salary and gave themselves raises; (2) terminated rental payments to plaintiff that were normally made to all three shareholders; (3) issuing a capital call when the corporation was doing fairly well; and (4) engaging in other actions with the intention to "squeeze out" plaintiff rather than give him his fair share. *Id.* at 4. In affirming the trial court's decision, the Court of Appeals held that "MCL 450.1489(3)" now allows a minority shareholder to claim willfully unfair and oppressive conduct as a result of reductions in salary and other employment benefits." *Id.* at 5. Further, the Court reasoned that defendants' actions were designed to prevent the corporation from showing a profit, and thereby eliminate any need to make distributions to plaintiff. *Id.*

In this case, as in *Berger*, Plaintiff has alleged that the Defendants have engaged in a series of actions with the intention of squeezing him out of the Filter Depot without giving him his fair share. As discussed above, and in the contemporaneously entered Opinion and Order regarding the capital call at issue, the Court is convinced that genuine issue of fact exists as to whether the decisions to increase the management fees and/or issue a capital call constitute willfully unfair and oppressive conduct within the meaning of the statute. The Court is also satisfied that a genuine issue of fact exists as to whether Defendants' decision to terminate Plaintiff's employment without allowing him to vote was oppressive and unfair.

When reviewing a claim under MCL 450.4515(3), the Court is required to take into account the entire factual landscape, not one particular action, as the statute provides that oppression can be formed through "a continuing course of conduct." In

this case, Plaintiff allegations with respect to his termination provide additional support to his position that Defendants' actions were intended to squeeze him out of Filter Depot. As such, the Court is convinced that Defendants attempt to carve out Plaintiff's allegations with respect to his termination must be rejected, as the circumstances surrounding his termination are relevant to the trier of fact's ultimate decision as to whether Defendants' entire course of conduct constitutes willfully unfair and oppressive conduct within the meaning of the statute.

Finally, Defendants contend that the doctrine of laches bars Plaintiff from bringing the portion of his oppression claim based on the increased management fees. "Laches is an equitable tool used to provide a remedy for the inconvenience resulting from the plaintiff's delay in asserting a legal right that was practicable to assert." *Knight v. Northpointe Bank*, 300 Mich App 109, 115; 832 NW2d 439 (2013). If a plaintiff does not act with "good faith and reasonable diligence" in pursuing a claim, and the defendant is prejudiced by the plaintiff's delay in bringing the claim, laches will bar the claim. *Id.* at 114–115. However, one who seeks equity must first offer to do equity, and since laches is an equitable doctrine, a defendant with unclean hands may not assert the defense. *Atty Gen v Thomas Solvent Co*, 146 Mich App 55, 66; 380 NW2d 53 (1985). In this case, the claim at issue is Plaintiff's shareholder oppression claim. An oppression claim is an equitable claim. *Madugula*, 496 Mich at 696-704. Consequently, if Plaintiff is successful in establishing his claim he will have established that Defendants acted in an inequitable manner. Consequently, the Court is convinced that Defendants may not utilize the doctrine of laches to defeat Plaintiff's shareholder oppression claim.

#### IV. Conclusion

For the reasons discussed above, Defendants' motions for summary disposition as to the portions of Plaintiff's claims related to his termination and the increased management fee are DENIED.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

Date: JAN 21 2016

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