

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

SARMAD BRIKHO, CHOICE AUTOMOTIVE
GROUP, LLC, d/b/a CHASE AUTOMOTIVE
LEASING,

Plaintiffs,

vs.

Case No. 2014-3977-CB

SHANT SHIRINIAN, SHIRINIAN INVESTMENTS,
LLC, VAN 8 COLLISION, INC., GARY
CUNNINGHAM, and GARY H. CUNNINGHAM,
P.C.

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion for partial reconsideration of the Court's May 11, 2015 Opinion and Order.

In the interests of judicial economy the factual and procedural statements set forth in the Court's May 11, 2015 Opinion and Order are herein incorporated.

I. Standard of Review

Motions for reconsideration must be filed within 21 days of the challenged decision. MCR 2.119(F)(1). The moving party must demonstrate a palpable error by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. MCR 2.119(F)(3). A motion for reconsideration which merely presents the same issue ruled upon by the Court, either expressly or by reasonable implication, will not be granted. *Id.* The purpose of MCR 2.119(F)(3) is to allow a trial court to

immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). The grant or denial of a motion for reconsideration is a matter within the discretion of the trial court. *Cole v Ladbrooke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

II. Arguments and Analysis

In his motion, Plaintiff first contends that the Court erred in denying his request for leave to file the following claims: (1) Shareholder oppression against Defendant Shirinian, (2) Breach of fiduciary duty against the Cunningham Defendants, (3) Conversion against Defendant Cunningham, and (4) Conspiracy against the Shirinian Defendants and the Cunningham Defendants.

While a trial court should freely grant leave to amend when justice so requires, leave should be denied where amending the complaint would be futile. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990).

A. Count I - Shareholder Oppression against Defendant Shirinian

Plaintiff's oppression claim is brought pursuant to MCL 450.4515(1), which 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.

- (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.

MCL 450.4515 permits a member to bring an action based on acts of a member and/or manager that were illegal, fraudulent or willfully unfair and oppressive toward a member. In *BSA Mull, LLC v Garfield Inv Co*, unpublished per curiam in the Court of Appeals, decided September 30, 2014 (Docket Nos: 310989, 311911, 315359 and 315544), the Michigan Court of Appeals addressed the scope of a member’s ability to bring a claim under section 515:

The definition of “willfully unfair and oppressive conduct” as “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” in the LLCA mirrors the definition of the same phrase as set forth in the Michigan Business Corporation Act at MCL 450.1489(3) with the word “shareholder” taking the place of “member.” In *Franchino v Franchino*, 263 Mich App 172; 687 NW2d 620 (2004), the Court stated that “willfully unfair and oppressive conduct” refers to conduct that substantially interferes only with rights that automatically accrue to a shareholder by virtue of being a shareholder. By association, only conduct that substantially interferes with rights that automatically accrue to a member by virtue of being a member will be considered for purposes of determining whether such conduct was willfully unfair and oppressive. Shareholder interests typically include actions like

“voting at shareholder's meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends.” *Franchino*, 263 Mich.App at 184. Again, by association, these same interests could be deemed typical of a member in an LLC.

Plaintiff's proposed shareholder oppression claim is based on ¶¶39-40, 43, 45-56, 64-73, and 78-80 of the Proposed Complaint. In paragraph 39 of his proposed amended complaint, Plaintiff alleges that Defendant Shirinian failed to satisfy his obligations under an alleged oral contract between the parties governing the parties' relationship as to the company now known as CAG. Specifically, Plaintiff alleges that Defendant Shirinian has not satisfied certain obligations under their agreement, including his alleged commitment to contribute capital into the business. Although any alleged failure to contribute capital into CAG damages the business as a whole, the Court notes that the impact of such a deficiency would impact Plaintiff's interest in CAG in particular as CAG's only other member, Defendant Shirinian, would have the benefit of retaining the capital. Consequently, the Court is convinced that paragraph 39 may potentially form the basis for Plaintiff's shareholder oppression claim.

Paragraph 40 of the proposed amended complaint provides that Defendant Shirinian controlled the day-to-day operations of CAG which included making self-serving payments to third parties that Defendant Shirinian has an interest in. While the Court notes that entering into poor contracts with third parties damages CAG as a whole, the Court recognizes that when those contracts benefit third parties that Defendant Shirinian has an interest in, the practical effect is that Plaintiff is the member who bears the brunt of those

contracts' consequences. Consequently, the Court is satisfied that paragraph 40 may potentially form a portion of the basis for Plaintiff's shareholder oppression claim.

Paragraphs 43, 45(c) and 46 deal with Plaintiff's position that he has been improperly denied access to CAG's books and records. Paragraph 4.4.2 of the Operating Agreement governs the maintenance and inspection of CAG's books of records, and provides:

[The members] shall maintain complete and accurate books of accounts for [CAG], keeping the books at [CAG's] principal place of business and open to inspection after reasonable notice and request by any Member or his or her authorized representative, at his or her own expense, at any time during ordinary business hours.

In his complaint, Plaintiff alleges that Defendant Shirinian maintained CAG's books and records at Van 8's, rather than CAG's, principal place of business, and that this activity disproportionately affected Plaintiff's membership interest. Indeed, it appears undisputed that CAG's books and records were maintained in manner which made it more difficult for Plaintiff to inspect the document that it was for Defendant Shirinian. Consequently, the Court is convinced that paragraphs 43, 45(c) and 46 may potentially form the basis for Plaintiff's oppression claim.

Paragraph 45 of the Proposed Complaint set forth several alleged breaches of the Operating Agreement that allegedly oppressed Plaintiff's interest in CAG. While Plaintiff will ultimately have to establish how Defendant Shirinian's allegedly breaches of the Operating Agreement disproportionately affected Plaintiff's membership interest in CAG, the Michigan Court of Appeals in *BSA*

Mull recognized that a breach of an operating agreement could arguably be considered significant action that substantially interferes with a member/shareholder's interest. *BSA*, unpub op at 5. Consequently, the Court is convinced that paragraphs 45(a)-(h) may potentially form the basis for Plaintiff's oppression claim.

Paragraphs 47-56, and 68 allege various activities Defendant Shirinian performed in connection with his control of CAG that Plaintiff alleges have disproportionately impacted his interest in CAG. While Plaintiff will have to substantiate these allegations, the Court is convinced that they may potentially form the basis for Plaintiff's oppression claim.

Paragraphs 57-67 and 69-73 of the Proposed Complaint address various actions taken by Defendant Cunningham rather than Defendant Shirinian. It is undisputed that Defendant Cunningham is not, and has never been, a member or manager of CAG. Consequently, actions taken by Defendant Cunningham cannot form the basis for an oppression claim.

Finally, Paragraphs 78-80 address Defendant Shirinian's alleged failure to satisfy his obligations under various contracts. While it is unclear how these actions have disproportionately damaged Plaintiff's interest in CAG, the Court is satisfied that such allegations, on their face, could form the basis for his oppression claim.

B. Count III - Breach of Fiduciary Duty Against the Cunningham Defendants

In his motion, Plaintiff also contends that he should be granted leave to file a breach of fiduciary duty claim against the Cunningham Defendants.

Specifically, Plaintiff contends that Mr. Cunningham owed him a fiduciary duty as a 50% member of CAG. In support of his position, Plaintiff relies on the Michigan Court of Appeals decision in *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509; 309 NW2d 645 (1981).

In *Fassihi*, a shareholder in a closely held corporation brought an action against the corporation's counsel alleging, *inter alia*, that counsel had breached his fiduciary duty to the shareholder. Specifically, the plaintiff alleged that counsel had breached its fiduciary duty by working with the other shareholder to oust him from the corporation.

While the Court in *Fassihi* held that a shareholder of a closely held corporation does not have an attorney-client relationship with the corporation's counsel, the Court also held that the counsel could nevertheless owe the shareholder a fiduciary duty. *Id.* at 514-15. Specifically, the Court held:

A fiduciary relationship arises when one reposes faith, confidence, and trust in another's judgment and advice. Where a confidence has been betrayed by the party in the position of influence, this betrayal is actionable, and the origin of the confidence is immaterial. *Smith v. Saginaw Savings & Loan, Ass'n*, 94 Mich App 263, 274, 288 NW2d 613 (1979). Furthermore, whether there exists a confidential relationship apart from a well defined fiduciary category is a question of fact. See *In re Wood Estate*, 374 Mich 278, 132 NW2d 35 (1965). Based upon the pleadings, we cannot say that plaintiff's claim is clearly unenforceable as a matter of law.

Plaintiff asserts that he reposed in defendant his trust and confidence and believed that, as a 50% shareholder in Livonia Physicians X-Ray, defendant would treat him with the same degree of loyalty and impartiality extended to the other shareholder, Dr. Lopez. In his complaint plaintiff states that he was betrayed in this respect. Specifically, plaintiff asserts that he was not advised of defendant's dual representation of the corporate entity and Dr. Lopez personally. Plaintiff also alleges that he was never informed of the contract between Lopez and St. Mary's which gave Lopez

sole responsibility in the staffing of the radiology department and, more importantly, that defendant actively participated with Lopez in terminating plaintiff's association with the corporation and using the Lopez-St. Mary's contract to his detriment.

In this case, as in *Fassihi*, Plaintiff alleges that the Cunningham Defendants dually represented CAG and the Shirinian Defendants. Further, Plaintiff alleges that the Cunningham Defendants betrayed his trust by failing to treat him with the same degree of loyalty and impartiality as Defendant Shirinian. Under *Fassihi*, counsel of a closely held corporation can potentially owe a shareholder a fiduciary duty, and the issue as to whether a duty is owed is a question of fact. Consequently, the Court is convinced that Plaintiff's breach of fiduciary duty claim against the Cunningham Defendant is not clearly unenforceable as a matter of law under *Fassihi*. As a result, Plaintiff must be permitted to amend his complaint to add his proposed count III.

C. Count IV- Common Law and Statutory Conversion against the Cunningham Defendants.

In his motion, Plaintiff contends that he may maintain a conversion claim despite the fact that he did not own the item allegedly converted. Plaintiff's proposed conversion claim is based on his allegation that Mr. Cunningham took and improperly utilized CAG's dealers' license. (See Proposed Complaint, at ¶¶97-99). However, to the extent a plaintiff asserts a claim of conversion with regard to property owned by a third party, they lack standing to pursue the claim. *Porter v City of Highland Park*, unpublished per curiam opinion of the Court of Appeals, decided February 19, 2015 (Docket No. 318917), citing *Moses Inc v SEMCOG*, 270 Mich App 401, 412; 716 NW2d 278 (2006). In this case, Plaintiff was not the

owner of the property allegedly converted. Consequently, Plaintiff lacks standing to maintain its proposed conversion claim.

In his motion, Plaintiff relies on *Thoma v Tracy Motor Sales, Inc.* 360 Mich 434; 104 NW2d 360 (1960) in support of his contention that conversion can be established not only when the aggrieved party owned the converted property, but when a party is using a chattel in the actor's possession without authority to use it. In *Thoma*, the Court made reference to the different ways that conversion can be committed under the Restatement, Tort §223. *Thoma*, 360 Mich at 438. One way is when a party uses another's property in a manner in which the owner does not authorize. *Id.*, citing Restatement, Torts, § 223(c). However, subsection (c) does not expand the scope of individuals that can bring a claim for conversion. Rather, subsection (c) merely provides another type of behavior that the owner of property can use as the basis for its conversion claim. Accordingly, contrary to Plaintiff's position, *Thoma* does support his assertion that he has standing to bring his proposed conversion claim in this case.

D. Count XI- Civil Conspiracy against all Defendants except CAG.

In its May 11, 2015 Opinion and Order, the Court held that Plaintiff's proposed civil conspiracy failed as a matter of law because Plaintiff had failed to state a tort claim against the Cunningham Defendants. However, given the Court's decision to allow Plaintiff leave to file his breach of fiduciary duty claim against the Cunningham Defendants, the basis for the Court prior ruling no longer exists. Consequently, the portion of Plaintiff's motion related to his civil conspiracy claim must be granted.

E. Receivership Fee Apportionment.

In their motion, Plaintiff challenges the Court's order requiring him to pay 60% of Mr. Caputo's fees that were incurred from December 8, 2014 to March 20, 2015. Specifically, Plaintiff asserts that his wrongful conduct was not the cause of the majority of Mr. Caputo's fees during that period of time, and that requiring him to pay an extra 10% of Mr. Caputo's fees for that period of time is therefore inequitable.

While the Court recognizes that only a small portion of Mr. Caputo's fees were incurred as a direct result of Plaintiff's wrongful conduct, the Court remains convinced that requiring Plaintiff to pay an extra 10% of Mr. Caputo's fees is not excessive. Consequently, the portion of Plaintiff's motion related to the apportionment of receivership fees will be denied.

III. Conclusion

Based upon the reasons set forth above, Plaintiff Sarmad Brikho's motion for partial reconsideration of the Court's May 11, 2015 Opinion and Order is GRANTED, IN PART, and DENIED, IN PART. Specifically, Plaintiff is granted leave to amend his complaint to include an oppression claim to the extent based on paragraphs 39-40, 43, 45-56, 68, and 78-80 of his proposed amended complaint. Further, Plaintiff may amend his complaint to include his proposed breach of fiduciary duty claim against the Cunningham Defendants, and his proposed civil conspiracy claim. The remainder of Plaintiff's motion for reconsideration is DENIED. The Court's May 11, 2015 Opinion and Order

remains in full force and effect to the extent that it is not inconsistent with this Opinion and Order.

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 18 2015

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