

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

SARMAD BRIKHO,

Plaintiff,

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

Defendants Gary Cunningham and Gary H. Cunningham,
(collectively, "Cunningham Defendants") have filed a motion for summary
disposition pursuant to MCR 2.116(C)(5), (8) and (10). Plaintiff has filed a
response and requests that the motion be denied. In addition, the Cunningham
Defendants have filed a reply brief in support of their motion.

I. Factual and Procedural History

On September 18, 2015, Plaintiff filed his second amended complaint in
this matter ("Complaint"). The Complaint contains the following claims against
the Cunningham Defendants: Breach of Fiduciary Duty (Count III) and civil
conspiracy (Count X). On June 28, 2016, the Cunningham Defendants filed their
instant motion for summary disposition pursuant to MCR 2.116(C)(5), (8) and
(10). On July 21, 2016, Plaintiff filed his response to the motion. On July 22,
2016, the Cunningham Defendants filed their reply brief in support of their

FILED
2016 SEP 30 AM 11:22
CARMELLA SARGENT
MACOMB COUNTY CLERK
MT. CLEMENS, MICHIGAN

motion. On July 25, 2016, the Court held a hearing in connection with the motion and took the matter under advisement

II. Standard of Review

MCR 2.116(C)(5) provides that summary disposition is appropriate if the party asserting the claim lacks the legal capacity to sue. In reviewing such a motion, a court must consider the affidavits, together with the pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties. MCR 2.116(G)(5); *George Morris Cruises v Irwin Yacht & Marine Corp*, 191 Mich App 409, 413; 478 NW2d 693 (1991).

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.

III. Arguments and Analysis

A. Count III- Breach of Fiduciary Duty

Count III of the Complaint is a claim for breach of fiduciary duty. In the Complaint, Plaintiff alleges that the Cunningham Defendants owe him a fiduciary duty as his agent and legal counsel. (See Complaint, at ¶¶95.) The only transaction in which Defendant Cunningham allegedly represented Plaintiff was a “real estate transaction” involving the “Kendall Property”. (Id. at ¶¶61, 65.) In connection with that transaction, Defendant Cunningham allegedly had various meetings with Plaintiff and Defendant Shirinian. (Id. at ¶64.) Plaintiff alleges that while the parties agreed to purchase the Kendall Property on behalf of CAG, Defendant Cunningham facilitated the purchase on behalf of Defendant Shirinian. (Id. at ¶68.) Additionally, Plaintiff alleges that Defendant Cunningham did not follow the instructions he was given. (Id.) Finally, Plaintiff alleges that Defendant Cunningham breached his fiduciary duty by utilizing CAG’s dealer license without authorization. (Id. at ¶¶ 70-80.)

In their motion, the Cunningham Defendants first assert that Plaintiff lacks the capacity to pursue the portion of Count III seeking to recover damages caused to CAG. In order to bring a derivative action on behalf of an LLC, a member must comply with MCL 450.4510, which requires, in part, that the member make a written demand on the managers or members with the authority to make the decision requesting that the managers or members cause the LLC to take suitable action [MCL 450.4510(b)], and that the member wait 90 days after making the demand unless the members is notified earlier that the demand has

been rejected, unless irreparable harm will occur as a result of the delay [MCL 450.4510(c)]. In this case, it appears undisputed that Plaintiff did not comply with MCL 450.4510 prior to commencing the portion of his claims brought on behalf of CAG. Consequently, those portions of Count III must be dismissed.

The only remaining portion of Count III in which the Cunningham Defendants allegedly represented Plaintiff in his individual capacity is in connection with the real estate transaction involving the Kendall Property. The Cunningham Defendants do not specifically address the merits of those allegations other than a blanket statement that Plaintiff has not admissible evidence to support his allegations. However, merely arguing that Plaintiff do not have sufficient evidence, without providing evidence in support of their own position, is insufficient to warrant summary disposition. See *Granberry-Lovette v Garascia*, 303 Mich App 566, 581, n.3; 844 NW2d 178 (2014)(An assertion by the moving party of their belief that plaintiff will be unable to establish the elements of their claim(s) is insufficient to meet its burden in seeking summary disposition). Based on the Cunningham Defendants' failure to provide any admissible evidence establishing that the elements of Plaintiff's remaining breach of fiduciary duty claim are not met in this case, Defendants' motion must be denied as to the portion of Count III based on the Shirinian Defendants' involvement with the Kendall Property transaction.

As to Count X, the Cunningham Defendants' sole purported basis for summary disposition is that a civil conspiracy requires an underlying tort and that no such tort exists since Count III should be dismissed. However, for the

reasons discussed above, the Cunningham Defendants have failed to establish that they are entitled to summary disposition of a portion of Count III. As a result, their motion for summary disposition of the portion of Count X related to the Kendall Property transaction must be denied.

III. Conclusion

Based upon the reasons set forth above, the Cunningham Defendants' motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Specifically, the Cunningham Defendants' motion for summary disposition is GRANTED as the portions of Plaintiff's claim not related to the Kendall Property transaction. The remainder of the Cunningham Defendants' motion 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: SEP 30 2016

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