

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

BRAUN DISTRIBUTING, INC.,

Plaintiff,

vs.

Case No. 2014-4497-CB

CARMEN MARCHETTI, THOMAS
DICARLO and AMERICAN PRIDE
JERKY, LLC,

Defendants.

OPINION AND ORDER

This matter is before the Court after a bench trial. The Court will now render findings of fact and conclusions of law.

I. Factual and Procedural History

Plaintiff is engaged in the business of marketing and retail sales. Matthew Braun is Plaintiff's operation's manager who runs Plaintiff's day to day operations. Defendant American Pride Jerky, LLC's ("Defendant American") is an entity that was engaged in the sale of jerky products. Defendant Thomas DiCarlo ran Defendant American's operations, but Defendant American was allegedly owned by Defendant Carmen Marchetti ("Defendant Marchetti"), Defendant DiCarlo's daughter.

In May 2014, Mr. Braun approached Defendant DiCarlo at Defendant American's store. Defendant American's store was engaged in the sale of various types of jerky. During the initial meeting, Mr. Braun expressed an interest in Plaintiff marketing, distributing and selling Defendant American's product. Mr. Braun and Defendant DiCarlo

ultimately agreed that Plaintiff would be Defendant American's exclusive distributor in St. Clair County, MI, and that Plaintiff would sell Defendant American's products at its Algonac, MI store.

The parties' relationship was initially successful, which led to Plaintiff's decision, after obtaining Defendant American's permission, to open up a second retail location within Great Lakes Crossing Mall in Auburn Hills, MI. In September 2014, Plaintiff entered into a lease to obtain retail space at Great Lakes Crossing. However, Plaintiff subsequently terminated the lease after only a month.

From June to October 2014, Plaintiff and Defendant American, through Mr. Braun and Defendant DiCarlo, discussed expanding their relationship to allow Plaintiff to be Defendant American's exclusive distributor throughout the continental United States. While draft agreements were exchanged, no written contract was ever executed.

In November 2014, agents from the United States Department of Agriculture ("USDA") came to Plaintiff's Algonac store. The agents allegedly examined the product Plaintiff had purchased from Defendant American, determined that the product did have the proper USDA inspection certifications, and required Defendant American to destroy the product. The parties' relationship ended shortly thereafter.

On November 19, 2014, Plaintiff filed its complaint in this matter ("Complaint"). The Complaint contains the following three claims: Count I- Breach of Contract, Count II- Fraud and Misrepresentation, and Count III- Unjust Enrichment. On March 10, 2016, the Court held a bench trial in connection with this matter. Having concluded the trial and reviewed the materials and testimony presented by the parties, the Court is now prepared to render its decision.

II. Arguments and Analysis

A. Breach of Contract (Count I)

In this case, Plaintiff Mr. Braun testified that there were three contracts between the parties. The first contract was an agreement that Plaintiff would serve as Defendant American's exclusive distributor in St. Clair County. The second contract was the parties' alleged agreement to have Plaintiff serve as Defendant American's exclusive distributor throughout the continental United States. The third contract was merely Defendant American's agreement to sell its products to Plaintiff in exchange for payment. While Plaintiff has identified three alleged contracts, the only asserted breach involves the third contract. Specifically, Plaintiff's sole alleged basis for Defendants' breach is their sale of products that were not USDA inspected and approved.

The elements a plaintiff must prove for a breach of contract claim are: (1) the existence of a contract, (2) a party's breach of that contract, and (3) damages suffered as a result of that breach. *Miller–Davis Co v. Ahrens Const, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). In this case, both sides provided testimony that Defendant American agreed to sell its products to Plaintiff in exchange for payment. However, neither side provided any testimony whatsoever that indicated that any of the Defendants warranted that the products Defendant American was selling were inspected or approved by the USDA, nor has Plaintiff provide the Court with any authority providing that such a term would be implied. Consequently, the Court is convinced that Plaintiff has failed to satisfy its burden of establishing that the term allegedly breached was contained in any of the parties' contracts. As a result, the Court is convinced that Plaintiff has not met its

burden in connection with its breach of contract claim, and that as a result it is not entitled to recover any damages in connection with that claim.

B. Fraud and Misrepresentation (Count II)

Plaintiff second claim is that Defendants engaged in fraudulent conduct and made fraudulent statements which ultimately caused Plaintiff to be harmed. "Michigan's contract law recognizes several interrelated but distinct common-law doctrines—loosely aggregated under the rubric of 'fraud'—that may entitle a party to a legal or equitable remedy if a contract is obtained as a result of fraud or misrepresentation." *Titan Ins Co v. Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012). "These doctrines include actionable fraud, also known as fraudulent misrepresentation; innocent misrepresentation; and silent fraud, also known as fraudulent concealment." *Id.* The elements of actionable fraud are as follows:

(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he [sic] thereby suffered injury. [*Id.* (quotation marks and citations omitted).]

During the trial, Mr. Braun testified that both of the individual defendants falsely represented that: (1) Defendant American obtained its products from a smokehouse it held a 10% ownership interest in, and (2) that it was under a land contract to become the sole owner of the smokehouse. Further, Plaintiff contends that Defendant American placed forged USDA approval markings on their products that falsely represented that the products had been inspected and approved by the USDA.

With respect to the first two statements, Defendant DiCarlo testified that he did not make a statement that Defendant American was an owner of a smokehouse or that it was

attempting to purchase the smokehouse. Defendant Marchetti did not provide any testimony. Accordingly, the Court is left with only Mr. Braun's testimony on the issue of whether Defendant Marchetti made the alleged statements, and is presented with conflicting testimony as to whether Defendant DiCarlo made the alleged statements.

When a case is heard as a bench trial, the Court is obligated to determine the weight and the credibility of the evidence presented. *Wright v Wright*, 279 Mich App 291, 299; 761 NW2d 443 (2008). With regards to the first two statements, the Court finds Mr. Braun's testimony more credible than Defendant DiCarlo's with respect to whether Defendant DiCarlo represented that Defendant American obtained its products from a smokehouse it was a partial owner of, and that Defendant American was attempting to purchase the smokehouse. Accordingly, the Court is satisfied that Plaintiff has met its burden of establishing that Defendant DiCarlo, on behalf of Defendant American, made the first two statements at issue.

While the Court finds Mr. Braun's testimony credible with respect to whether Defendant DiCarlo made the above-referenced statements, the Court does not find his testimony that Defendant Marchetti also made the statements in question to be credible. At trial, Defendant DiCarlo testified that Defendant Marchetti's involvement in Defendant American was limited to periods of time that he was sick and that she was listed as the sole owner of Defendant American only so that she could take it over if something were to happen to him, which was quite possible given his poor health. While Mr. Braun testified that Defendant Marchetti also made the alleged statements, his testimony on that issue was indecisive and he testified that his recollection on that issue was not good. Further, the Court's holding that Defendant Marchetti did not make the alleged statements

is also supported by Defendant DiCarlo's testimony that he ran Defendant American on a day to day basis and was the contact between Defendant American and Plaintiff. For all of these reasons, the Court is convinced that Defendant Marchetti did not make the statements at issue. Consequently, Plaintiff has failed to satisfy its burden with respect to its fraud claim against Defendant Marchetti.

Having found that Defendant DiCarlo made the first two alleged representations, the question becomes whether the remaining elements have been met. With respect to falsity, Defendant DiCarlo conceded at trial that Defendant American was not an owner of the smokehouse in question, that Defendant American did not obtain all of its product from the smokehouse, and Defendant American was not in the process of purchasing the smokehouse. Consequently, the Court is satisfied that the second and third elements have been satisfied.

The fourth and fifth elements require that the defendant made the statement(s) with the intention that the plaintiff rely upon them, and that the defendant did rely upon them. *Titan Ins Co v. Hyten*, 491 Mich at 555. In this case, Mr. Braun testified that Mr. DiCarlo's false representations were made during the parties' negotiations. The Court is convinced that by making the statements during the negotiation process, Defendant DiCarlo intended Plaintiff to rely on those statements by entered into an agreement. Further, Plaintiff did in fact rely on the representations by agreeing to purchase Defendant American's products and to act as Defendant American's distributor. Accordingly, the Court is convinced that the fourth and fifth elements have been satisfied. Consequently, the only remaining element to be addressed with respect to the first two statements is damages, which the Court will address below.

The remaining basis for Plaintiff fraud claim is Defendant American's forgery and mislabeling of the USDA inspection/approval label. In this case, Defendant DiCarlo conceded that the label was false as Defendant American's products were not inspected or approved by the USDA after they were repackaged. While Defendant DiCarlo testified that he was not aware that products had to be re-approved/re-inspected by the USDA if the products were approved prior to repackaging, a statement made without knowledge of whether the statement is true is sufficient to form the basis for a claim for fraudulent misrepresentation. *Hammond v Matthes*, 109 Mich App 352, 360; 311 NW2d 357 (1981); citing *Callihan v Talkowski*, 372 Mich 1, 4; 124 NW2d 788 (1963). Accordingly, the fact that that labels were used without having knowledge of whether the statements within the label were true is sufficient to form the basis for Plaintiff's claim.

The Court is also satisfied that the labels were used with the intention that Plaintiff rely on upon them. Section 10 of the Federal Meat Inspection Act (21 USC 610) and section 9 of the Poultry Products Inspection Act (21 USC 458) require the types of products at issue in this case to be inspected and approved by the USDA. By putting labels on the products indicating that the products had been so inspected and approved, Defendant American was intended to represent that the products were fit for sale. Further, Plaintiff relied on those representations by selling the products at issue. As a result, the fourth and fifth elements are also met with respect to the fraudulent labeling.

While Plaintiff concedes that Defendant DiCarlo engaged in the activities in question on behalf of Defendant American, it maintains that Defendant DiCarlo is liable for the fraudulent conduct individually under the piercing the corporate veil doctrine. "In general, the law treats a corporation as an entirely separate entity from its

stockholders....” *Lakeview Commons v Empower Yourself*, 290 Mich App 503, 509; 802 NW2d 712 (2010). “However, the courts can ignore this corporate fiction when it is invoked to subvert justice.” *Id.* In certain cases, courts pierce the corporate veil protecting shareholders and hold offending shareholders liable. *Dutton Partners, LLC v. CMS Energy Corp.*, 290 Mich App 635, 642 n. 4; 802 NW2 717 (2010). “Piercing the corporate veil requires the following elements: (1) the corporate entity is a mere instrumentality of another individual or entity, (2) the corporate entity was used to commit a wrong or fraud, and (3) there was an unjust injury or loss to the plaintiff.” *Lakeview Commons*, 290 Mich App at 510.

Concerning the first element, where a shareholder does not treat an artificial entity as separate from himself, neither will the court. *Florence Cement Co v Vettraino*, 292 Mich App 461, 470; 807 NW2d 917 (2011). However, “[t]here is no single rule delineating when a corporate entity should be disregarded, and the facts are to be assessed in light of a corporation's economic justification to determine if the corporate form has been abused.” *Rymal v Baergen*, 262 Mich App 274, 294; 686 NW2d 241 (2004). In this case, Plaintiff has not provided the Court with any evidence that Defendant DiCarlo disregarded Defendant American’s corporate form. While Defendant DiCarlo conceded that he was Defendant American’s day to day manager and that he made all of the material decisions on behalf of Defendant American, Plaintiff has not provided any evidence that Defendant American’s corporate form was disregarded. Consequently, the Court is satisfied that Plaintiff has failed to meet its burden of meeting the first element needed in order to pierce the corporate veil. Moreover, Plaintiff has not presented any evidence contesting that Defendant DiCarlo took the actions forming the basis for the

claims in this case on behalf of Defendant American. For these reasons, the Court is convinced that Plaintiff's may not recover in connection with its claims against Defendant DiCarlo in his individual capacity.

While Plaintiff, for the reasons discussed above, may not recover against the individual defendants, Plaintiff remains entitled to a judgment against Defendant American for those damages suffered as a result of the fraudulent conduct addressed above. "In a fraud and misrepresentation action, the tortfeasor is liable for injuries resulting from his wrongful act, whether foreseeable or not, provided that the damages are the legal and natural consequences of the wrongful act and might reasonably have been anticipated." *Phinney v. Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997). In this case, Plaintiff have asserted multiple bases for damages.

First, Plaintiff seeks to recover the cost of the product that was destroyed by the USDA. While Mr. Braun testified at trial that approximately 400lbs of product was destroyed, he conceded that he did not know what types of product were destroyed, and that he was not sure how much Plaintiff paid for the product. "A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision." *Unibar Maintenance Servs, Inc v. Saigh*, 283 Mich App 609, 634; 769 NW2d 911 (2009) (quotation marks and citation omitted). "The type of uncertainty which will bar recovery of damages is uncertainty as to the fact of the damage and not as to its amount ... [since] where it is certain that damage has resulted, mere uncertainty as to the amount will not

preclude the right of recovery." *Bonelli v. Volkswagen of America, Inc*, 166 Mich App 483, 511; 421 NW2d 213 (1988).

In this case, it cannot be disputed that Plaintiff was damaged as a result of Plaintiff's failure to have its product properly inspected and approved by the USDA, and it placing fake labels on its products. As a result, Plaintiff is entitled to recover damages despite its failure to establish the amount of such damages with any certainty. However, the amount of damages awarded must be determined. Plaintiff has presented Defendant American's price sheet in support of its request for damages. (See Trial Exhibit 6d.) The price sheet shows that the lowest value the lost product could have had was \$2.24 per pound, which is based on the cost of jalapeno/garlic/pickles summer sausage. *Id.* While the Court recognizes that all of the product that was destroyed was likely not all purchased for \$2.24 per pound, it also notes that Plaintiff has failed to provide the Court with any formula by which a more accurate amount can be determined. Since it is Plaintiff's burden to establish the amount of damages it incurred, and in light of Plaintiff failure to provide much assistance in determining a damage figure for the destroyed product, the Court is convinced that Plaintiff should be awarded damages for the product at a rate of \$2.24 per pound, for a total of \$896.00 (440lbs X \$2.24 per pound).

The second basis for damages is Plaintiff's request for \$2,500.00 it incurred in upgrading its website in October 2014. In support of its request, Plaintiff relies on an October 1, 2014 invoice it received from Computer, Inc. to implement certain upgrades, which shows a cost of \$2,500.00. (See Trial Exhibit 4.) Mr. Braun testified that he was not aware that Defendant American was repackaging its product instead of making its own product until sometime in October 2014, and that the USDA did not become involved until

November 2014. Accordingly, Plaintiff was still operating under its belief that the false statements were true at the time it chose to invest \$2,500.00 into upgrading the website in question. The Court is convinced that a distributor/seller investing money to improve its marketing efforts is a foreseeable type of reliance damage given the facts present in this case. Consequently, the Court is satisfied that Plaintiff is entitled to recover the \$2,500.00 it spent on the website.

The third type of damage Plaintiff seeks to recover is the \$2,673.31 it spent for promotional materials between August 17, 2014 and November 9, 2014. In support of its request, Plaintiff relies on the invoices it received in connection with its orders. (See Trial Exhibits 5a-e.) While a portion of the materials were purchased after Plaintiff learned that the Defendant American's product was repackaged, Mr. Braun testified that he still believed that the relationship could be profitable given the past sales of the product. However, Plaintiff's ability to sell the product was still based on its belief that it could legally sell the product, which is a belief that was destroyed in November 2014 when the USDA intervened. Just as it was foreseeable that a customer would invest in improving its website to promote sales, the Court is also convinced that investing in promotional materials in an effort to improve sales is a foreseeable consequence of engaging the fraudulent conduct present in this case. As a result, the Court is satisfied that the \$2,673.31 Plaintiff spent on promotional materials is recoverable as damages in this matter.

Next, Plaintiff seeks to recover the amount of money it lost in connection with its decision to open up a kiosk at Great Lakes Crossing. Mr. Braun testified that these damages were caused by Defendant American's failure to provide the products Plaintiff

ordered as fast as Plaintiff wanted them. However, Plaintiff has not provided the Court with any evidence whatsoever that Defendant American was contractually bound to provide the product within a certain timeframe. Moreover, Plaintiff has failed to establish that the failure of its kiosk had anything to do with the fraudulent statements/actions at issue in this case. For these reasons, the Court is convinced that Plaintiff's request to recover the amounts of money it lost in connection with the kiosk must be denied.

Plaintiff also seeks to recover the legal fees it has incurred in this matter. However, Plaintiff has failed to provide any basis for its request. Attorney fees are not recoverable as an element of damages or costs unless expressly allowed by court rule, statute, common-law exception, or contract. *Talmer Bank & Trust v Parikh*, 304 Mich App 373; 848 NW2d 408 (2014), vacated in part on other grounds, 497 Mich 857 (2014). Based on Plaintiff's failure to provide any authority in support of its request, its request will be denied.

Plaintiff's final request for damages is its request for compensation for the time Mr. Braun spent in connection with Plaintiff's relationship with Defendant American, including the cost of the mileage he drove. However, once again Plaintiff has failed to provide the Court with any authority establishing that such damages are recoverable. Consequently, its request will be denied.

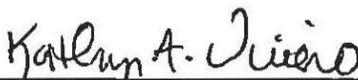
IV. Conclusion

Based upon the reasons set forth above, the Court find No Cause of Action with respect to Plaintiff's breach of contract claim and Plaintiff's fraud claims against the Defendant Carmen Marchetti and Thomas DiCarlo. With respect to Plaintiff's fraud claim against Defendant American Pride Jerky, LLC, the Court finds, for the reason discussed

above, in favor of Plaintiff, and that Plaintiff is entitled to a judgment against Defendant American Pride Jerky, LLC in the amount of \$6,069.31. Plaintiff shall submit a judgment consistent with this Opinion and Order within 14 days of the date of this Opinion and Order. In compliance with MCR 2.602(A)(3), the Court states this matter remains OPEN pending the entry of a judgment consistent with this Opinion and Order.

IT IS SO ORDERED.

Date: MAY 11 2016



Hon. Kathryn A. Viviano, Circuit Court Judge