

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

K&W DOO, INC., 11th FRAME
LOUNGE, INC., and PSS
INVESTMENTS, LLC,

Plaintiffs/Counter-Defendants,

vs.

Case No. 2015-1008-CB

CHRISTINE WISSINGER,

Defendant/Counter-Plaintiff
and Third-Party Plaintiff,

and

PATRICK KLINE and
HEATHER KLINE,

Third-Party Defendants.

OPINION AND ORDER

Plaintiffs/Counter-Defendants and Third-Party Defendants (collectively, "Movants") have filed a motion for summary disposition of Defendant's counter/third-party complaint pursuant to MCR 2.116(C)(8) and (10). Defendant has filed a response and requests that the motion be denied.

In addition, Movants have filed a separate motion for summary disposition pursuant to MCR 2.116(C)(7) with respect to a portion of Defendant's minority oppression claim. Defendant has filed a response and requests that the motion be denied.

I. Factual and Procedural History

Defendant and Third-Party Defendants are shareholders/members of the

Plaintiffs. Specifically, Third-Party Defendants each own 32.5% of Plaintiffs, Defendant owns 17.5%, and Defendant's late aunt owned the remaining 17.5%. Plaintiffs are three entities which own and operate a bowling alley known as Shelby Lanes in Shelby Township, MI.

On August 28, 2014, Plaintiffs allegedly held their annual meeting. At the meeting, a resolution was approved requiring each shareholder to contribute a pro rata share of money to be used for update and repairs to the bowling alley. Defendant and Third-Party Defendants subsequently attempted to reach a buy-out of Defendant's interests in Plaintiffs. Those attempts have been unsuccessful. In addition, Defendant has allegedly refused to make her required contribution.

On March 25, 2015, Plaintiffs filed their complaint in this matter ("Complaint"). In the Complaint, Plaintiffs seek specific performance with respect to an alleged agreement to buy-out Defendant's interest in Plaintiffs (Count I), and specific performance with respect to Defendant's alleged duty to contribute (Count II).

On April 29, 2015, Defendant filed her counter and third party complaint ("Counter-Complaint"). In the Counter-Complaint, Defendant purports to state claims for statutory minority shareholder oppression pursuant to MCL 450.1489 (Count I), breach of fiduciary duty (Count II), an accounting (Count III), civil conspiracy (Count IV), and fraudulent concealment (Count V).

Movants have since filed two motions for summary disposition as to the Counter-Complaint. Defendant has filed responses to both motions and requests that the motions be denied. The Court has since held hearings in connection with both motions and taken the matters under advisement.

II. Standard of Review

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id.*

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. Movants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(7).

Movants' motion for summary disposition pursuant to MCR 2.116(C)(7) is limited to one portion of Defendant's claim for minority oppression. Specifically, Movants' contend that Defendant's oppression claim is barred by the statute of limitations to the extent it is based on her alleged termination. In particular, Movants aver that the three year statute of limitations set forth in MCL 450.1489(1)(f) applies to claims brought under MCL 450.1489. Indeed, MCL 450.1489(1)(f) provides that an action under that section seeking damages must be commenced "within three years after the cause of action has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first." In this case, Plaintiff has alleged that the alleged termination occurred in 2010. As this case was not commenced until 2015, Defendant's oppression claim is clearly barred by MCL 450.1489(1)(f) to the extent based on the alleged termination.

B. Movants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and

1. Minority Oppression

Defendant's shareholder oppression claims are based upon MCL 450.1489, which provides:

(1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of

the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder.

(3) 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 shareholder as a shareholder. 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 shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

In their motion, Movants contend that Defendant does not have any evidence to support her oppression claim. The first basis for Defendant's claim is her allegation that Third-Party Defendants have deprived her of access to corporate information. In their motion, Movants assert that Defendant has been provided access to Plaintiffs' annual financial statements and that Defendant has not requested any additional financial information. In support of their position, Movants rely on the affidavits of the Third-Party Defendants. (See Movants' Exhibits 5 & 6.) In their affidavits, the Third-Party Defendants testified that Defendant was provided with Plaintiffs' annual financial documents and that Defendant did not request any additional information. (*Id.*)

In response, Defendant avers that Third-Party Defendants have denied her detailed information regarding the businesses while providing it to themselves. In support of her position, Defendant relies on her exhibit 4. However, exhibit 4 consists of meeting minutes of Plaintiff's board meeting, all of which Defendant attended. (See Defendant's Exhibit 4.) Moreover, none of the meeting minutes indicate that Defendant was deprived access to any document(s) whatsoever. Based on Defendant's failure to provide any evidence contradicting Third-Party Defendants' testimony, the Court is

convinced Defendant has failed to provide any evidence that she was deprived of any documents, or that such action(s) could form the basis for her claim.

Next, Defendant contends that Third-Party Defendants negotiated the sale of half of Plaintiff's assets without a meeting. Defendant has testified that she is not aware of any corporate document that would allow Third-Party Defendants to engage in such activities without a vote. (See Defendant's Exhibit 1.) However, neither side has presented the Court with any evidence as to whether a vote was required prior to engaging in the activity at issue. Consequently, neither side has established that they are entitled to summary disposition on the issue of whether the alleged negotiation without a vote can form the basis for Defendant's oppression claim.

Defendant also avers that Third-Party Defendants imposed a capital call without any authority, and that Third-Party Defendants have not made their share of the capital call. In support of her position, Defendant relies on the minutes of the 12/19/2013 annual shareholder meeting. (See Defendant's Exhibit 7.) However, while the minutes in question referenced that additional shareholder capital "injections" would likely be needed, the minutes do not evidence that any formal capital call was initiated. (*Id.*) However, at the annual meeting held on August 28, 2014 that was only attended by the Third-Party Defendants, capital call was approved in the total amount of \$110,000.00. (See Movants' Exhibit 1.) While Movants' exhibit 1 evidences that a capital call was instituted, neither side has cited to any evidence as to whether Third-Party Defendants were authorized to institute the capital call, whether any of the shareholders made the required contributions, or whether the action was willfully unfair and oppressive.

Consequently, the Court is convinced that neither side is entitled to summary disposition of the portion of Defendant's oppression claim related to the alleged capital call.

Finally, Defendant contends that Third-Party Defendants approved the repayment of loans Plaintiffs owed to them in a preferential manner. While Defendant has provided evidence that loans from Third-Party Defendants were to begin being repaid in January 2014 (See Defendant's Exhibit 7), she has not provided any evidence whatsoever that this decision was preferential, much less willfully unfair or oppressive. Moreover, Third-Party Defendants, as well as Plaintiffs' accountant have testified that Plaintiffs nor their shareholders have made any preferential payments to themselves or their entities. (See Movants' Exhibits 5, 6 and 7.) Based on the testimony Movants have presented, and Defendant's failure to provide any conflicting evidence, or to establish that additional discovery is needed on this issue, the Court is convinced that Movants are entitled to summary disposition of this portion of Defendant's oppression claim.

2. Breach of Fiduciary Duty

In their motion, Movants contend that there is no genuine issue of material fact that the bases for Defendant's allegation that Third-Party Defendants have breached their fiduciary duties to her are untrue.

In the Counter-Complaint, Defendant alleges that Third-Party Defendants have breached their fiduciary duties to her by: 1) draining corporate earnings, 2) failing and refusing to properly and timely issue K-1s, 3) destroying Plaintiffs' goodwill, 4) refusing to respond to her requests to inspect Plaintiffs' financial accounting and bank records, 5) committing waste of Plaintiffs' assets, and 6) causing Plaintiffs to make preferential payments to themselves or entities which they control. (See Counter-Complaint, at ¶36.)

In support of their motion, Movants rely on Third-Party Defendants' testimony in which they summarily testify that they have not drained any of Plaintiffs' corporate earnings, have not failed or refused to properly and timely issue K-1s to Defendant, have not refused to provide Defendant with any of Plaintiffs' books and records, have not destroyed Plaintiffs' goodwill, have not committed waste, and have not made preferential payments to themselves. (See Movants' Exhibits 5 & 6.) In response, Defendant has not cited to any evidence whatsoever that contradicts the Third-Party Defendants' testimony. As a result, Defendant have failed to create a genuine issue of fact with respect to her breach of fiduciary duty claim. As a result, Movants' motion for summary disposition of Defendant's breach of fiduciary duty claim must be granted.

3. Accounting

An accounting is an equitable remedy under the common law. *Basinger v Provident Life & Accident Ins Co*, 67 Mich App 1, 6; 239 NW2d 735 (1976). An accounting is not needed where discovery is sufficient to determine the amounts at issue. *Boyd v Nelson Credit Centers*, 132 Mich App 774, 779; 348 NW2d 25 (1984). In this case discovery is ongoing. Consequently, it is unclear at this time whether an accounting will be appropriate. As a result, Movants' motion to dismiss Defendant's request for an accounting will be denied at this time.

4. Civil Conspiracy to Usurp Corporate Opportunity

Defendant's civil conspiracy to usurp a corporate opportunity claim is based on her allegation that Third Party Defendants have closed one of Plaintiffs' locations and diverted all of the business operations to themselves. (See Counter-Complaint, at ¶45.) In their motion, Movants contend that they have never operated any business that

competes with Plaintiffs. In support of their position, Third-Party Defendants rely on their affidavits in which they testify that they have not and are not engaged in any activities which compete with Plaintiffs. (See Movants' Exhibits 5 & 6.) Defendant has not responded to Movants' position in any way. Based on Third-Party Defendants' testimony, and Defendant's failure to respond in any manner, the Court is convinced that Movants are entitled to summary disposition of Count IV of the Counter-Complaint.

5. Fraudulent Concealment

In her response, Defendant concedes that fraudulent concealment is not an independent cause of action. See *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309, 316; 760 NW2d 699 (2008). Rather, fraudulent concealment is a mechanism by which a party may avoid the statute of limitations in certain situations. *Id.* Accordingly, the Court is convinced that Movants' are entitled to summary disposition of Count V to the extent that it is pled as an independent cause of action. However, should the situation present itself where the statute of limitations is implicated, Defendant retains the opportunity to establish her fraudulent concealment theory.

IV. Conclusion

For the reasons discussed above, Movants' motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Specifically:

- (1) Movants' motion for summary disposition of Defendant's oppression claim is GRANTED with respect to the portions of Defendant's claim based on her alleged termination, the denial of access to corporate books and records, and the making of allegedly preferential payments. Movants' motion for summary disposition as to the remainder of Defendant's oppression claim is DENIED.

- (2) Movants' motion for summary disposition of Defendant's breach of fiduciary duty claim is GRANTED;
- (3) Movants' motion for summary disposition of Defendant's request for an accounting is DENIED.
- (4) Movants' motion for summary disposition of Defendant's civil conspiracy claim is GRANTED; and
- (5) Movants' motion for summary disposition of Defendant's fraudulent concealment claim is GRANTED to the extent Defendant seeks to pursue fraudulent concealment as an independent cause of action.

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: MAR 10 2016

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