

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

BENINATI CONTRACTING, INC.,

Plaintiff/Counter-Defendant,

vs.

Case No. 2015-1400-CB

PAUL BENINATI,

Defendant/Counter-Plaintiff.

OPINION AND ORDER

Plaintiff has filed a motion for a default judgment, or in the alternative summary disposition pursuant to MCR 2.116(C)(9), against Defendant. Defendant has filed a response and requests that the motion be denied.

I. Factual and Procedural History

Defendant is a 50% shareholder in Plaintiff. Defendant's brother, Mark Beninati ("M. Beninati") is Plaintiff's remaining 50% shareholder. Defendant and M. Beninati's working relationship has allegedly fallen apart, which ultimately has led to this litigation.

On September 28, 2015, Plaintiff filed its first amended verified complaint in this matter ("Complaint"). The Complaint includes the following claims: Count I- Trespass, Count II- Unjust Enrichment, Count III- Statutory Conversion, Count IV- Claim and Delivery, Count V- Breach of Fiduciary Duty, Count VI- Accounting, and Count VII- Dissolution.

On June 28, 2015, Defendant filed its counter-complaint in this case ("Counter-Complaint"). The Counter-Complaint includes a single claim for slander of title.

On August 17, 2015, the parties stipulated to an order allowing Plaintiff to amend the Complaint within 14 days. Plaintiff failed to file an amended complaint within the time frame provided in the August 17, 2015 Order. Nevertheless, the parties agreed to a second stipulated order on September 24, 2015 allowing Plaintiff to file its amended complaint within 14 days.

On October 8, 2015, Plaintiff filed its second amended complaint. ("Amended Complaint"). The Amended Complaint includes the following claims: Count I- Accounting, Count II- Breach of Fiduciary Duty-Usurping Corporate Opportunities, Count III- Breach of Fiduciary Duty, Count IV- Conversion, and Count V- Injunctive Relief. Defendant's counsel was served with a copy of the Amended Complaint on the same day.

On November 12, 2015, Defendant filed his answer to the Amended Complaint. On the same date, the court clerk entered a default against Defendant.

On December 1, 2015, Plaintiff filed his instant motion for entry of default judgment or summary disposition. On January 4, 2016, Defendant filed his response and request to set aside the default. On January 11, 2016, the Court held a hearing in connection with the motion and took the matters under advisement.

II. Arguments and Analysis

A. Request to Set Aside Default and Motion for Default Judgment

"Once the default of a party has been entered, the party may not proceed with the action until the default has been set aside by the court in accordance with [MCR 2.603(D)] or MCR 2.612." MCR 2.603(A)(3). MCR 2.612(A)(1) allows a court to correct clerical mistakes at any time on its own initiative. In this case, the request for default

and the answer to the Amended Complaint were both filed by the clerk's office at the exact same time (8:00 a.m. on 11/12/15). A default may only be entered if the party against whom a default is sought has failed to plead or otherwise defend. MCR 2.603(A)(1). In this case, at the time the default was processed an answer to the Amended Complaint had been filed. As a result, Defendant had defended against the Amended Complaint at the time the default was processed. Consequently, the Court is convinced that the entry of a default was improper and should be vacated/set aside, and Plaintiff's request for a default judgment must be denied.

B. Motion for Summary Disposition Pursuant to MCR 2.116(C)(9)

In his motion, Plaintiff seeks summary disposition pursuant to MCR 2.116(C)(9). A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Id.* If the defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, then summary disposition under this rule is proper. *Id.* Further, a court may look only to the parties' pleadings in deciding a motion under MCR 2.116(C)(9). *Id.*

Plaintiff's entire request for summary disposition is based on two paragraphs of his motion. First, Plaintiff contends that Defendant has admitted that the title to real property described in ¶17 of the Amended Complaint ("Subject Property") should be quieted in its favor. Specifically, Plaintiff avers that ¶¶7, 17 and 18 of Plaintiff's answer establish that such relief is appropriate.

In ¶18 of his response, Plaintiff admits that the Subject Property is Plaintiff's asset and that it should be transferred to Plaintiff. However, in a quiet title action, the

plaintiff has the initial burden of proof and must establish a prima facie case of title. *Beulah Hoagland Appleton Qualified Personal Residence Trust v. Emmet Co. Rd. Comm.*, 236 Mich App 546, 550; 600 NW2d 698 (1999). Accordingly, while the Defendant has failed to provide any defense in support of Plaintiff's allegation that it is the owner of the Subject Property, Plaintiff's pleadings alone do not establish that it is the owner of the Subject Property. Consequently, the Court is satisfied that Plaintiff is not entitled to a judgment quieting title to Subject Property at this time.

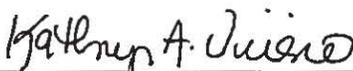
With respect to Plaintiff's claims for monetary damage, its request relies solely on the testimony of Mark Beninati. However, a motion under MCR 2.116(C)(9) may not consider documentary evidence. MCR 2.116(G)(5). Consequently, Plaintiff's motion improperly relies on evidence beyond the scope of the rule upon which relief is sought. As a result, Plaintiff's motion for summary disposition of its claims seeking monetary relief pursuant to MCR 2.116(C)(9) must be denied.

III. Conclusion

Based upon the reasons set forth above, the November 12, 2015 default entered in this matter is VACATED. In addition, Plaintiff's motion for entry of default judgment or summary disposition pursuant to MCR 2.116(C)(9) 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: _____



Hon. Kathryn A. Viviano, Circuit Court Judge