

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

WARREN INDUSTRIES, INC.,

Plaintiff,

vs.

Case No. 2015-1929-CB

MAGNESIUM ALUMINUM MICHIGAN  
CORP., MAGNESIUM ALUMINUM CORP.,  
COMPASS AUTOMOTIVE GROUP, LLC,  
COMPASS AUTOMOTIVE GROUP,  
COMPASS AUTOMOTIVE and MICHAEL  
CARR,

Defendants.

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OPINION AND ORDER

Plaintiff has filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and (10). Defendant Magnesium Aluminum Michigan Corp (“MAMC”) and Defendant Michael Carr (“Defendant Carr”) have each filed a response and request that the motion be denied. In addition, MAMC and Defendant Carr seek summary disposition in their favor. Plaintiff has filed a response to the request.

Further, Plaintiff has filed a motion to enforce a consent judgment against MAMC and Magnesium Aluminum Michigan Corp d/b/a Compass Auto. MAMC has filed a response and requests that the motion be denied.

I. Factual and Procedural History

Plaintiff is a company engaged in providing CNC machining and sub-assembly services to manufacturers in the automotive industry. On June 4, 2015, Plaintiff filed its complaint in this matter (“Complaint”). The Complaint contains claims for: Account

Stated (Count I), Breach of Contract (Count II), Unjust Enrichment (Count III), Breach of Promissory Note (Count IV), "Personal Liability on Michael Carr" (Count V), "Subsidiary Liability" (Count VI), Fraudulent Conveyance (Count VII), and Violation of the Uniform Fraudulent Transfer Act (Count VIII).

On November 19, 2015, the Court entered its Opinion and Order granting Defendants Compass Automotive Group, LLC, Compass Automotive Group and Compass Automotive's motion for summary disposition with respect to all of Plaintiff's claims against them except for Count III.

On January 26, 2016, Plaintiff filed its instant motion for summary disposition pursuant to MCR 2.116(C)(9) and (10). On February 10, 2016, MAMC and Defendant Carr filed their separate responses to the motion. On February 11, 2016, Plaintiff filed its response to Defendant Carr's request for summary disposition in his favor.

On January 27, 2016, Plaintiff filed its instant motion to enforce a consent judgment allegedly entered into against MAMC and MAMC d/b/a Compass Auto. On February 10, 2016, MAMC filed its response.

On February 16, 2016, the Court held a hearing in connection with the motions and took the matters under advisement.

## II. Standard of Review

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.*

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. Plaintiff's motion to enforce consent judgment against MAMC and MAMC d/b/a Compass Auto

Plaintiff's motion is based on a course of events in January 2016. On January 20, 2016, MAMC's counsel sent an email to Plaintiff's counsel in which he offered to agree to a consent judgment in the full amount demanded due to the fact that MAMC's first priority creditor had allegedly foreclosed and sold all of MAMC's assets. (See Plaintiff's Exhibit A.) In response, on January 21, 2016 Plaintiff's counsel sent an e-mail to which he attached a proposed consent judgment. (See Plaintiff's Exhibits A and C.) Upon receiving and reviewing the proposed consent judgment, MAMC's counsel responded by stating that while the proposed consent judgment was mostly acceptable, the portion of the proposed consent judgment providing that it was against MAMC and the d/b/a Compass Auto was unacceptable as only MAMC was agreeing to a consent

judgment. (See Plaintiff's Exhibits A and D.) In response, Plaintiff's counsel refused to make the requested change. (See Plaintiff's Exhibit A.) Finally, MAMC's counsel responded by making an additional request that the consent judgment be limited to counts I-IV of the Complaint. (Id.)

An agreement to settle a pending lawsuit is a contract, governed by the legal rules applicable to the construction and interpretation of other contracts." *Reicher v. SET Enterprises, Inc*, 283 Mich App 657, 663; 770 NW2d 902 (2009). A party claiming a breach of contract must establish the existence of a contract, that the other party breached the contract, and that it suffered damages as a result. *Dunn v. Bennett*, 303 Mich.App 767, 774; 846 NW2d 75 (2013). In order to form a valid contract, there must be mutual assent or a meeting of the minds on all the essential terms. *Kloian v. Domino's Pizza LLC*, 273 Mich App 449, 453; 733 NW2d 766 (2006). An objective standard is used to determine if there was a meeting of the minds, looking to parties' express words and acts, not their subjective states of mind. *Stanton v. Dachille*, 186 Mich App 247, 256; 463 NW2d 479 (1990).

In this case, MAMC's counsel initially offered to agree to a consent judgment against MAMC for the full amount requested. In response, Plaintiff's counsel provided a proposed consent judgment against MAMC and the d/b/a Compass Auto. A counter-offer is created by additional terms that are added to an acceptance. *Harper Bldg Co v Kaplan*, 332 Mich 651, 655-656; 52 NW2d 536 (1952). Accordingly, by adding a term to MAMC's original offer, Plaintiff's action resulted in it making a counter-offer, not it accepting MAMC's original offer. Moreover, the additional correspondences between the parties' counsel continued to present different terms than those previously proposed

by the other side. As a result, no meeting of the minds occurred. Consequently, no consent judgment was entered and Plaintiff's motion must be denied.

B. Motions for summary disposition

1. Counts I-IV

The only remaining defendant with respect to Counts I-IV is MAMC. MAMC stipulated to a consent judgment in Plaintiff's favor for the full amount demanded in connection with those counts and does not oppose Plaintiff's request for summary disposition on those counts. As a result, the Court is satisfied that summary disposition on those counts is appropriate as against MAMC.

2. Count V

Count V seeks to impose personal liability on Defendant Carr. Specifically, Count V is based on Plaintiff's allegations that Defendant Carr is the owner and operator of MAMC and that Defendant Carr is not entitled to the protection afforded by MCL 450.1317(4). MCL 450.1317(4) provides:

Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he or she may become personally liable by reason of his or her own acts or conduct.

The protection afforded by MCL 450.1317(4) has been explained by the Michigan Court of Appeals as follows:

A corporation—or other artificial entity—is a legal fiction. It is “an artificial being, invisible, intangible, and existing only in contemplation of law.” “[A]bsent some abuse of corporate form,” courts honor this fiction by indulging a presumption—often referred to as the corporate veil—that the entity is separate and distinct from its owner or owners. Courts will honor this presumption even when a single individual owns and operates the entity.

Count V of the Complaint alleges that Defendant Carr is liable for MAMC, Compass Automotive and Compass Automotive Group because none of those businesses are properly formed corporations under Michigan law. In response, Defendant Carr relies on, *inter alia*, a Michigan Department of Licensing and Regulatory Affairs that shows MAMC as an active foreign profit corporation in good standing, a certification from the State of Delaware that MAMC is “duly incorporated under the laws of the State of Delaware and is in good standing and has a legal corporate existence” (See Defendant Carr’s Exhibit A.) Plaintiff’s only response to Defendant Carr’s evidence is that discovery is incomplete in this case and an unsupported statement that Defendant Carr may have violated the Michigan Corporations Statutes.

A motion for summary disposition is generally premature if granted before discovery on a disputed issue is complete. *Oliver v Smith*, 269 Mich App 560, 567; 715 NW2d 314 (2006). However, a party opposing summary disposition on the grounds that further discovery is required must “at least assert that a dispute does indeed exist and support that allegation by some independent evidence.” *Bellows v Delaware McDonald’s Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). In this case, Plaintiff has not provided that Court with any evidence bringing into question whether Defendant Carr is shielded from liability by forming a proper legal entity. Rather, the only evidence before the Court indicates that MAMC was a properly formed Delaware corporation licensed to operate in Michigan. Based on Plaintiff’s failure to present any independent evidence supporting its assertion that a dispute exists, the Court is convinced that Defendant Carr’s motion for summary disposition of Count V is not premature and should be granted.

In addition, the Court notes that the only evidence before the Court evidences that non-party Talon Holding Company, LLC (“Talon”) is MAMC’s sole shareholder, not Defendant Carr. While Defendant Carr is the sole shareholder of Talon, Plaintiff has not presented any evidence that Defendant Carr would not be afforded protection under MCL 450.1317(4) as the sole shareholder of Talon. Consequently, even if Plaintiff were to establish that MAMC were not properly formed, Plaintiff would nevertheless be unable to enforce MAMC’s obligations against Defendant Carr without first piercing Talon’s corporate veil, which is something that Plaintiff has not attempted to accomplish. Accordingly, Talon’s ownership of MAMC is a second basis for granting Defendant Carr’s motion for summary disposition of Count V.

### 3. Count VI

Count VI is titled “subsidiary liability”. In Count VI, Plaintiff alleges that Magnesium Aluminum Corp. (“MAC”) is liable under a successor liability theory for the acts of Compass Automotive Group (“CAG”). Indeed, the only entity Plaintiff seeks relief against in Count VI is MAC. The only basis for successor liability referenced in Count VI is that CAG is an alter ego of MAC. (See Complaint, at ¶48.) However, in order to establish an alter ego theory, a plaintiff must satisfy three elements: (1) the corporate entity must be an instrumentality of another, (2) the corporate entity was used to commit a fraud or wrong, and (3) there must have been an unjust loss or injury to the plaintiff. *Nogueras v Maisel & Assoc of Michigan*, 142 Mich App 71, 86; 369 NW2d 492 (1985). In the Complaint, Plaintiff has failed to plead that CAG was used by MAC to commit a fraud or wrong. Consequently, the Court is satisfied that Plaintiff has failed to

properly plead a claim for successor liability against CAG. As a result, Count VI of the Complaint must be dismissed.

#### 4. Counts VII and VIII

Counts VII and VII are based on Plaintiff's allegation that one of the defendant entities transferred a division of their company to Defendant Carr and their alleged transfer of the proceeds of an auction of some of MAMC's assets to Defendant Carr. (See Complaint, at ¶¶52, 56.) However, Plaintiff has not provided any evidence in support of its position, and has not even mentioned a possible transfer of any division of MAMC to any of the other Defendants.

In response, Defendants contend that the while a portion of MAMC's assets were auctioned off, the proceeds of the sale were received by one of its secured creditors, Loeb Term Solutions, LLC ("Loeb"). In support of their position, Defendants rely on their exhibit G, which is a "Guaranteed Sales Agreement" ("Auction Agreement") pursuant to which Loeb Winternitz Industrial Auctioneers ("Loeb Auction") agreed to sell the assets in question on behalf of MAMC and Capital Equipment Solutions, LLC ("Capital"). (See Defendants' Exhibit G.) The Auction Agreement provides that Loeb Auction was to pay Capital all of the auction proceeds, less Loeb Auction's fees, in exchange for Capital's agreement to release its security interest in the assets being sold. (Id.) While the Auction Agreement evidences that certain assets were sold, and that the proceeds were supposed to be distributed to Capital and Loeb Auction, the document does not support Defendants' position that the auction proceeds were given to pay off Loeb's secured debt. Further, Defendants have failed to provide any evidence as to how the proceeds were actually disbursed. Consequently, the Court is not persuaded that Defendants

have established that the sale of the assets did not involve a fraudulent conveyance or a violation of the Uniform Fraudulent Transfer Act. As a result, their requests for summary disposition of Counts VII and VIII must be denied. Moreover, due to Plaintiff's failure to provide any evidence in support of their request for summary disposition of Counts VII and VIII, its motion for summary disposition must also be denied.

#### IV. Conclusion

For the reasons set forth above, Plaintiff's motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Specifically, Plaintiff's motion for summary disposition of Count I-IV is GRANTED with respect to the portion of those claims directed towards Defendant Magnesium Aluminum Michigan Corp. The remainder of Plaintiff's motion is DENIED.

In addition, Defendants requests for summary disposition are GRANTED, IN PART, and DENIED, IN PART. Specifically, Defendants' requests for summary disposition of Count V and VI are GRANTED. Defendants' requests for summary disposition of Counts VII and VIII are DENIED.

Additionally, Plaintiff's motion to enforce consent judgment is DENIED.

Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor does it close the case.

IT IS SO ORDERED.

Date: APR 22 2016

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