

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

LOUIS J. PERRY,

Plaintiff,

vs.

Case No. 2015-2417-CB

ANTARES, INC.,
INVO-SPLINE, INC., and
PRO ARES, LLC,

Defendants.

OPINION AND ORDER

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

I. Factual and Procedural History

In 1988, Defendant Antares, Inc. ("Defendant Antares") purchased Defendant Invo Spine, Inc. ("Defendant Invo") from Clayton Scott for \$2,500,000.00 in the form of a promissory note ("Invo Note"). As a result, Defendant Invo became a wholly owned subsidiary of Defendant Antares.

Antares was originally owned in equal 1/3 interests by Clayton Scott, John Malasky, and Vince Spica, all of whom are now deceased. Upon his death, Mr. Scott's interest passed to his wife, and then to Plaintiff following Mrs. Scott's death. Mr. Malasky's interest passed to his children, who then formed Defendant Pro Ares, LLC ("Defendant Pro Ares") and passed their interests in Defendant Antares to that entity. Mr. Spica sold his interest in Defendant Antares to Defendant Pro Ares prior to his

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death. As a result, Defendant Pro Ares now holds a 2/3 interest in Defendant Antares, with Plaintiff holding the remaining 1/3 interest.

In addition to the \$2,500,000.00 debt to Mr. Scott represented by the Invo Note, Defendant Antares also allegedly became indebted in connection with several other transactions as set forth below:

- \$600,000.00 loan given by Mr. Malasky to Antares ("Malasky Loan") in 1991. The Malasky Loan was guaranteed by Clayton Scott and his wife;
- \$1,600,000.00 liability Antares owed to Security Bank ("Security Bank Debt"). The Security Bank debt was guaranteed by Mr. Malasky;
- \$250,000.00 ("Spica Debt") owed to Mr. Spica;
- Defendant Invo entered into a consulting agreement with Mr. Scott in 1988, pursuant to which Defendant Invo became indebted to Mr. Scott for services he rendered. ("Consulting Agreement").

In 1991, Antares' obligation to repay the Malasky Loan matured, but Antares was unable to make the payment. Antares' inability to make the required payment allegedly left the Scotts responsible for the payment pursuant to their guaranties. In order to avoid that liability, the Scotts, Mr. Spica, Mr. Malasky and Defendant Invo entered into a debt restructuring arrangement made up of three separate documents. The first is an "Agreement of First Amendment to Consulting Agreement" between Defendant Invo and Mr. Scott, which amended the terms of the Consulting Agreement ("Amended Consulting Agreement"). The second document is a "Non-Negotiable Promissory Note" between Defendant Antares and Mr. and Mrs. Scott ("Amended Note") amended the terms of the Invo Note. The final document is a "Subordination Agreement" between Defendant Antares, Defendant Invo, Mr. and Mrs. Scott, Mr. Spica and Mr. Malasky ("Subordination Agreement")(Amended Consulting Agreement, Amended Note and

Subordination Agreement collectively, as "Restructuring Documents"). Pursuant to the Subordination Agreement, Antares' debts to the Scotts and Mr. Spica and Defendant Invo's obligations under the Consulting Agreement were allegedly subordinated to the Malasky Loan, and the Scotts' guarantee was released.

On July 13, 2015, Plaintiff filed his complaint in this matter ("Complaint"). In the Complaint, Plaintiff asserts five claims. The first claim seeks a declaration determining the amounts Defendants Antares and/or Defendant Invo owe to him (Count I). The second claim seeks a declaration determining whether payment(s) to Plaintiff may be suspended pursuant to the Subordination Agreement (Count II). The third count seeks a declaration that Defendant Antares has breached an obligation of good faith and fair dealing owed to Plaintiff, and seeks an award of the damages caused by Defendant Antares' alleged breach (Count III). Count IV alleges a breach of good faith and fair dealing against Defendant Invo. Finally, Count V seek the production of certain corporate records under the Michigan Business Corporation Act.

On January 7, 2016, Defendants filed their instant motion for summary disposition. On February 22, 2016, Plaintiff filed his response to the motion and requests that it be denied. On February 25, 2016, Defendants filed a reply brief in support of their motion. On February 29, 2016, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

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

The first dispute between the parties is the disagreement as to what amounts are due under the Amended Note and Amended Consulting Agreement. With respect to the Amended Note, the Subordination Agreement provides that as of January 1, 1991 the remaining balance on the Amended Note was \$800,948.00. (See Defendants' Exhibit D.) Defendants assert that payments have since been made from January 3, 1991 through March 31, 2000 that have reduced the balance to \$218,316.02. In support of their position, Defendants rely on a check register documenting various payments, as well as the reduction of the principal due under the Amended Note to \$218,316.02. (See Defendants' Exhibit G.) In addition, Defendants point to ¶19 of the Complaint in which Plaintiff acknowledges that the principal owed on the Amended Note is \$218,316.00. Indeed, Plaintiff appears to concede that the principal balance owed under the Amended Note is \$218,316.00. Neither party has addressed what amount, if any, in interest is owed pursuant to Amended Note. As a result, that issue remains open.

The parties also dispute what amount is owed to Plaintiff pursuant to the Amended Consulting Agreement. In their motion, Defendants contend that pursuant to the Subordination Agreement, Defendant Invo's obligation to make payments under the Amended Consulting Agreement was deferred until after Defendant Antares had satisfied its obligations to Mr. Malasky and Mr. Spica, as well as its obligations under the Amended Note.

The parties' obligations under the Consulting Agreement are governed by the Amended Consulting Agreement. The Amended Consulting Agreement provides that the Consulting Agreement is amended to provide that Mr. Scott shall be compensated in the following manner:

As full and complete compensation for any and all services which [Mr. Scott] may render to [Defendant Invo], in consecutive weekly installment, the sum of (\$2,885) Dollars commencing in the week following the date determined below (the "Commencement Date").

The Commencement Date shall be the first Monday following the full performance by [Defendant Invo] of its obligations under an interest bearing Nonnegotiable Promissory Note issued by [Defendant Invo] to [Mr. Scott] dated January 1, 1991, in the principal amount of Eight Hundred Thousand Nine Hundred Forty-Eight (\$800,948) Dollars.

Upon the death of the [Mr. Scott], if [Defendant Invo] is then making payments pursuant to the foregoing, such payments shall reduce to monthly payments, payable on the first day of each month, in the amount of Eight Thousand Three Hundred Thirty-Three (\$8,333) Dollars, and such payments shall continue for the life of [Mrs. Scott]. Upon the death of the last to survive of [the Scotts], all obligations of [Defendant Invo] to make payments hereunder shall cease and shall have been deemed fully paid, satisfied and discharged.

Upon the death of [the Scotts], [Defendant Invo] shall nevertheless be obligated to pay an amount determined as the difference between (x) the sum of Three Hundred Thirteen Thousand Five Hundred (\$313,500) Dollars and (y) the sum of all payments made hereunder by [Defendant Invo] to [Mr. Scott].

(See Defendants' Exhibit C.)

"The cardinal rule in interpretation of contracts is to ascertain the intention of the parties." *D'Avanzo v. Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). Contractual language that is clear and unambiguous must be interpreted and applied as written. *Lentz v. Lentz*, 271 Mich App 465, 472–473; 721 NW2d 861 (2006). "If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous." *Woodington v. Shokoohi*, 288 Mich App 352, 374; 792 NW2d 63 (2010). Unless otherwise defined in the contract, contractual terms are given their plain and ordinary, i.e., dictionary, definitions. *Cole v. Auto–Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006).

In this case, the Amended Consulting Agreement unambiguously provides all of Defendant Invo's payment obligations ceased to exist and were discharged upon the death of the Scotts. (See Defendants' Exhibit C.) While Plaintiff focuses on his contention that Defendant Invo was obligated to make payments prior to the Scotts' death, that dispute is immaterial as such obligations were discharged upon the Scotts' death. Indeed, the provision in question does not limit the discharge to Defendant Invo's future obligations, nor does it exempt payments that were already due; rather, the Amended Consulting Agreement provides that all of Defendant Invo's payment obligations were discharged. Consequently, the Court is convinced that upon the Scotts' death, Defendant Invo's payment obligations under the Amended Consulting Agreement were reduced to those provided in the fourth quoted provision above.

The fourth above-referenced provision unambiguously requires Defendant Invo to pay "an amount determined as the difference between (x) the sum of Three Hundred

Thirteen Thousand Five Hundred (\$313,500) Dollars and (y) the sum of all payments made hereunder by [Defendant Invo] to [Mr. Scott]." (See Defendants' Exhibit C.) In this case, it is undisputed that Defendant Invo did not make any payments to the Scotts under the Amended Consulting Agreement prior to their deaths. As a result, Defendant Invo remains obligated to pay Plaintiff, as the Scotts' successor in interest, \$313,500.00.

The second dispute between the parties requires the Court to determine when Defendants will be required to make payments to Plaintiff under the Amended Consulting Agreement and Amended Note. It appears undisputed that the timing of Defendants' payment obligations is determined by the Subordination Agreement. The Subordination Agreement provides that:

2. Any and all indebtedness of [Defendant Antares] and [Defendant Invo] to Malasky shall be fully paid and discharged before Defendant Antares or Defendant Invo may make, without Malasky's written consent or before the Scotts or Spica may require, payment to any indebtedness of [Defendant Antares] and [Defendant Invo] to the Scotts or Spica respectively.

(See Defendants' Exhibit D, at 2.)

Consequently, under paragraph 2 of the Subordination Agreement, Defendants obligations to make payments to the Scotts, or Plaintiff as the Scotts' successor in interest, are not triggered until Defendant Antares' and/or Defendant Invo's payment obligations to Mr. Malasky/Pro Ares are satisfied. In this case, it appears undisputed that the debts to Mr. Malasky/Pro Ares have not been fully repaid and have not been discharged. Consequently, the Court is satisfied that the Subordination Agreement does not require Defendants to begin making payments to Plaintiff at this time.

The parties also dispute whether Plaintiff's payment rights under the Amended Note and Amended Consulting Agreement are subordinated to the debts owed to Mr.

Spica. However, neither party has cited to any specific provision of the Subordination Agreement or any of the other Restructuring Documents that determines whether the Scotts' or Mr. Spica's right to repayment has priority. Consequently, the Court is unable to determine which party has a higher payment priority as a matter of law.

Next, the parties dispute whether Plaintiff's counts III and IV state viable claims under Michigan law. Counts III and IV of the Complaint allege that Defendant Antares and Defendant Invo breached their duty of good faith and fair dealing "that is part of the Subordination Agreement." (See Complaint, at ¶¶ 37, 40.) Michigan law does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing. *Fodale v Waste Mgt. of Michigan, Inc.*, 271 Mich App 11, 35; 718 NW2d 827 (2006). Nevertheless, Plaintiff contends that his claims are viable because the Subordination Agreement specifically requires Defendants Antares and Invo to use their discretion in good faith. However, while the Subordination Agreement provides that Mr. Malasky shall exercise his discretion in certain circumstances in good faith (See Defendants' Exhibit D, at 4.), the Subordination does not expressly require Defendants Antares and/or Invo to operate in such a manner. Accordingly, because the Subordination Agreement does not expressly require Defendant Antares and/or Defendant Invo to operate in good faith, the rule under Michigan law barring a plaintiff from maintaining an action for breach an implied duty of good faith and fair dealing operates to require this Court to dismiss Counts III and IV of the Complaint.

Finally, Defendants contend that Count V should be dismissed. In Count V of the Complaint, Plaintiff seeks the production of documents in accordance with his rights as

a shareholder of Defendant Antares. MCL 450.1487 governs a shareholder's right to access corporate books and records, and provides, in pertinent part:

(2) Any shareholder of record, in person or by attorney or other agent, shall have the right during the usual hours of business to inspect for any proper purpose the corporation's stock ledger, a list of its shareholders, and its other books and records, if the shareholder gives the corporation written demand describing with reasonable particularity his or her purpose and the records he or she desires to inspect, and the records sought are directly connected with the purpose. A proper purpose shall mean a purpose reasonably related to such person's interest as a shareholder. The demand shall be delivered to the corporation at its registered office in this state or at its principal place of business. In every instance where an attorney or other agent shall be the person who seeks to inspect, the demand shall be accompanied by a power of attorney or other writing which authorizes the attorney or other agent to act on behalf of the shareholder.

In this case, Plaintiff has alleged that Defendants denied his August 12, 2014 verbal request to inspect some of Defendant Antares' internal documents. (See Complaint, at ¶¶43-44.) However, Plaintiff has not alleged that his request complied with MCL 450.1487, or that he is otherwise entitled to inspect the documents. Consequently, the Court is satisfied that Plaintiff has failed to state a claim for production of documents under MCL 450.1487. Consequently, Defendants' motion for summary disposition of Count V must be granted.

IV. Conclusion

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

(1) As to Count I, the Court hereby holds that the remaining balances owed under Amended Note and Amended Consulting Agreement are \$218,316.00, plus interest in an amount to be determined, and \$313,500.00, respectively.

The issue as to the amount of interest, if any, under the Amended Note remains open;

(2) With regards to Count II, the Court holds that the payment obligations under the Amended Note and Amended Consulting Agreement are not triggered until, at the earliest, the obligations under the Malasky Note are satisfied in full. Further, the issue as to priority between the debts owed to Mr. Spica and Plaintiff remains open.; and

(3) Defendants' motion for summary disposition of Count III-V of the Complaint is GRANTED.

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: APR 29 2016

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