

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)(7). 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.

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CLERK OF COURT
MACOMB COUNTY, MICHIGAN

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"). The result was Defendant Invo becoming a wholly owned subsidiary of Defendant Antares.

Antares was originally owned in equal 1/3 interests by Mr. 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, following Mrs. Scott's death, to Plaintiff. 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 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, which is represented by the Invo Note, Defendant Antares also allegedly became indebted in connection with several other transactions. One such transaction was a 1991 \$600,000.00 loan given by Mr. Malasky to Antares ("Malasky Loan"). The Malasky Loan was guaranteed by Clayton Scott and his wife. The next debt is a \$1,600,000.00 liability Antares owed to Security Bank ("Security Bank Debt"). The Security Bank debt was guaranteed by Mr. Malasky. Finally, Antares allegedly owed Mr. Spica \$250,000.00 ("Spica Debt").

In addition, in 1988 Defendant Invo entered into a consulting agreement with Mr. Scott, 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 a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). On April 29, 2016, the Court issued its Opinion and Order in connection with the motion in which it held: (1) With respect to Count I, the remaining balance owed under the Amended Note and Amended Consulting Agreement are \$218,316.00 plus interest in an amount to be determined, and \$315,500.00, respectively, (2) With regards to Count II, 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, and (3) That Defendants' motion

for summary disposition of Counts III-V is granted. Further, the Court identified two remaining issues that remain open: (1) The amount of interest, if any, under the Amended Note and (2) The issue of priority between the debts owed to Mr. Spica and Plaintiff.

On April 15, 2016, Defendants filed their instant motion for summary disposition pursuant to MCR 2.116(C)(7). On May 9, 2016, Plaintiff filed his response. On May 11, 2016, Defendants filed a reply brief in support of their motion. On May 16, 2016, the Court held a hearing in connection with the motion and took the matter 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.*

III. Arguments and Analysis

In their motion, Defendants assert that Plaintiff's claims are barred by the statute of limitations because Plaintiff knew of the facts giving rise to his claims in 2004. Specifically, Defendants assert that Plaintiff's claim sound in contract, that the statute of limitations for claims arising in contract is 6 years under MCL 600.5807(8), and that Plaintiff filed his complaint in this matter well after the statute elapsed by waiting until 2015 to file his claims.

As a preliminary matter, claims III-V have already been dismissed. Consequently, the Court's review the Defendants' motion will be limited to Counts I and II.

In his response, Plaintiff avers that Counts I and II seek declaratory relief, and that statutes of limitations do not apply to claims for declaratory relief. Whether statutes of limitation apply to claims for declaratory relief was addressed by the Michigan Supreme Court in *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119; 537 NW2d 696 (1995). Specifically, the Court in *Taxpayers Allied* held that when a claim pursues an action for declaratory relief after a substantive harm has already occurred, "declaratory relief may not be used to avoid the statute of limitations for substantive relief." *Id.* at 129. However, when a claimant uses a claim for declaratory relief as a shield from a threat of future or potential harm, "the statute of limitations [does] not bar an otherwise valid claim for declaratory relief because it would derive from a claim for injunctive relief, which is not barred." *Id.*

In this case, there are two issues that remain open: (1) whether the debt owed to Mr. Spica has priority over those owed to Plaintiff, and (2) the amount of interest owed

under the Amended Note. The Court is convinced Plaintiff's request for a declaration with regards to those issues is a request for a shield rather than substantive relief. The Court's decisions on those issues will not grant Plaintiff any substantive relief; rather, resolution of those issue will merely determine what must happen before Plaintiff's rights to payment mature, and the amount of interest that is currently owed under the Amended Note. Consequently, the Court is convinced that the 6 year statute of limitations applicable to actions arising out of contracts does not apply to the remaining portions of Plaintiff's claims.

IV. Conclusion

For the reasons discussed above, Defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) is DENIED. 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: _____

JUL 12 2016

Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge