

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

PLANET STAGE PRODUCTIONS, LLC
d/b/a PLANET STAGE,

Plaintiff,

vs.

Case No. 2015-3936-CB

MASONIC TEMPLE ASSOCIATION OF
DETROIT, INC., 450 TEMPLE INC.
MICHAEL SMITH, and MATTHEW MAZER,

Defendants.

OPINION AND ORDER

Defendant Matthew Mazer ("Defendant Mazer") has filed a motion for summary disposition of Plaintiff's claims against him pursuant to MCR 2.116(C)(6) and (8). Plaintiff has filed a response and requests that the motion be denied. In addition, Defendant Mazer has filed a reply brief in support of his motion.

I. Factual and Procedural History

This action arises out a dispute over withheld ticket revenue from Plaintiff's concert event held at Detroit Masonic Temple Association of Detroit, Inc.'s ("Defendant Temple") venue in Detroit, Michigan ("Subject Property") on November 23, 2012.

Detroit 450 Temple, Inc. ("Defendant 450") allegedly leases the Subject Property from Detroit Temple. Defendant Temple and Defendant 450 were allegedly managed by non-party Detroit Masonic Temple Theater Company ("DMTTC"). Defendant Mike Smith ("Defendant Smith") is allegedly DMTTC's president, and Defendant Mazer is allegedly DMTTC's vice president.

In late June/early July 2012, Plaintiff contacted Defendants Temple and 450 (collectively, "Temple Defendants"), using a phone number it found on the Temple Defendants' website, to discuss hosting an event at the Subject Property. Following the phone call, Plaintiff representative attended a meeting with DMTTC's events director. Subsequently, Plaintiff and DMTTC entered into a lease agreement to host a concert at the Subject Property ("Lease"). The Lease was executed by Defendant Smith and Plaintiff's representative.

Prior to the event taking place, DMTTC and the Temple Defendants allegedly had a falling out. Approximately two weeks before the event the Temple Defendants' president advised Plaintiff of the falling out but allegedly reassured Plaintiff that its event would not be affected and that the Temple Defendants' would provide the services that were to be provided by DMTTC. While the event was held as scheduled, Plaintiff has allegedly not received \$81,227.25 in ticket sale revenues that it alleges it is entitled to ("Revenues").

On January 4, 2016, Plaintiff filed its complaint in the instant matter asserting claims for: Breach of Contract (Count I), Common Law Conversion (Count II), Statutory Conversion (Count III), Gross Negligence (Count IV), Negligence (Count V), Fraudulent Misrepresentation (Count VI), and Unjust Enrichment (Count VII). On March 17, 2016, Defendant Mazer filed his instant motion for summary disposition of Plaintiff's claims. Plaintiff has since filed a response and requests that the motion be denied. On April 6, 2016, Defendant Mazer filed a reply brief in support of his motion. On April 11, 2016, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standards of Review

Summary disposition under MCR 2.116(C)(6) is appropriate where "another action has been initiated between the same parties involving the same claim." 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 on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

III. Arguments and Analysis

A. Defendant Mazer's Motion for Summary Disposition Pursuant to MCR 2.116(C)(6)

Defendant Mazer first contends that he is entitled to summary disposition pursuant to MCR 2.116(C)(6). Specifically, Defendant Mazer contends that this action is barred because Plaintiff has filed an adversarial action and proof of loss in DMTTC's bankruptcy case. However, Defendant Mazer has failed to provide the Court with any authority that filing an adversarial action in the bankruptcy of a non-party operates to bar a plaintiff from filing a separate action, against different parties, for the same damages. A party may not merely state a position and then leave it to the Court to rationalize and discover the basis for the claim, nor may he leave it to the Court to search for authority to sustain or reject his position. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Based on Defendant Mazer's failure to properly support his position,

the Court is satisfied that his motion for summary disposition pursuant to MCR 2.116(C)(6) must be denied.

B. Defendant Mazer's Motion for Summary Disposition Pursuant to MCR 2.116(C)(8)

In the Complaint, Plaintiff alleges that Defendant Mazer is liable for the Revenues because he and Defendant Smith allegedly abused and disregarded DM TTC's corporate entity by committing a fraud upon Plaintiff and stealing Plaintiff's ticket revenue, thereby causing Plaintiff injury. (See Complaint, at ¶50.) Such allegations seek to state an avenue to relief under the piercing the corporate veil doctrine.

Generally a corporation is treated as an entity separate from its shareholders; this is a legal fiction created to serve the ends of justice. *Foodland Distrib v. Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). The court may ignore the corporate form if it is being used to undermine justice. *Id.* "The entire spectrum of relevant facts forms the background for such an inquiry, and the facts are to be assessed in light of the corporation's economic justification to determine if the corporate form has been abused. *Klager v. Robert Meyer Co.*, 415 Mich 402, 411-412; 329 NW2d 721 (1982).

"In order for a court to order a corporate veil to be pierced, the corporate entity (1) must be a mere instrumentality of another individual or entity, (2) must have been used to commit a wrong or fraud, and (3) there must have been an unjust injury or loss to the plaintiff." *Florence Cement Co. v Vettriano*, 292 Mich App 461, 469; 807 NW2d 917 (2011). "Essentially, where members do not treat an artificial entity as separate from themselves, neither will [the] Court." *Florence Cement Co.*, 292 Mich App at 470.

In the Complaint, Plaintiff alleges that Defendants Smith and Mazer abused and disregarded DM TTC's corporate entity by committing a fraud upon Plaintiff and stealing

the Revenues. (See Complaint, at ¶50.) The Court is convinced that such allegations are sufficient, if proven, to establish a basis for piercing DMTTC's corporate veil. Consequently, the question becomes, for the purpose of this motion, whether Plaintiff's underlying claims are properly stated.

1. Breach of Contract (Count I)

The elements a plaintiff must prove for a breach of contract claim are: (1) the existence of a contract, (2) a party's breach of that contract, and (3) damages suffered as a result of that breach. *Miller-Davis Co. v. Ahrens Const., Inc.* (On Remand), 296 Mich App 56, 71, 817 NW2d 609 (2012). In this case, Plaintiff has alleged that it entered into the Lease with DMTTC. (See Complaint, at ¶¶25-33.) Further, Plaintiff has alleged that the Lease was breached, and that it suffered damages as a result of the breach. (*Id.* at ¶¶54-57.) Accordingly, Plaintiff has sufficiently plead each of the elements to a breach of contract claim against DMTTC. Further, Plaintiff has alleged that Defendant Mazer is liable for DMTTC's breach under the piercing the corporate veil doctrine. (*Id.* at ¶50.) As a result, the Court is satisfied that Plaintiff has sufficiently plead its breach of contract claim against Defendant Mazer.

2. Conversion (Counts II and III)

In its complaint, and in support of its conversion claims, Plaintiff alleges that Defendants committed conversion by knowingly and willfully taking continual possession of Plaintiff's ticket revenue without its knowledge, consent or permission and/or receiving, obtaining, concealing, secreting and/or converting or aiding in the concealment of the ticket revenue. (See Complaint, at ¶¶63-64.)

"Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Citizens Ins Co of America v Delcamp Truck Center, Inc.*, 178 Mich App 570, 575; 444 NW2d 210(1989), quoting *Nelson & Witt v Texas Co*, 256 Mich 65, 70; 239 NW 289 (1931). *Citizens* involved defendant's improper retention/refusal to turn over of the excess proceeds of a check where it was only entitled to retain a portion of the proceeds. In holding that the plaintiff could maintain a conversion claim against the defendant, as well as its agents, the Court provided:

Conversion is an intentional tort in that the defendant's action must be willful, but one can commit the tort unwittingly if unaware of the plaintiff's outstanding property interest. *Warren Tool Co v Stephenson*, 11 Mich App 274, 299, 161 NW2d 133 (1968). Although an action cannot be maintained for conversion of money unless there is an obligation on the part of the defendant to return the specific money entrusted to his care, *Garras v Bekiaries*, 315 Mich 141, 148, 23 NW2d 239 (1946), it is not necessary that the money should be specifically earmarked for its return. The defendant must have obtained the money without the owner's consent to the creation of a debtor and creditor relationship. See *Hogue v Wells*, 180 Mich 19, 24, 146 NW 369 (1914); 89 C.J.S., *Trover and Conversion*, § 23, p. 541. Conversion may be committed by the refusal to surrender a chattel on demand. *Thoma v. Tracy Motor Sales, Inc*, 360 Mich. 434, 438, 104 N.W.2d 360 (1960).

An action for conversion lies where an individual cashes a check and retains the full amount of the check when he is entitled to only a portion of that amount. *Hogue, supra*. In this case, [defendant], converted [plaintiff's] personal property when it cashed [plaintiff's] check and retained the full amount of that check when it was entitled to only a portion of the full amount.

When conversion is committed by a corporation, the agents and officers of the corporation may also be found personally liable for their active participation in the tort, even though they do not personally benefit thereby. *Bush v Hayes*, 286 Mich 546, 549, 282 NW 239 (1938); *Trail Clinic, PC v. Bloch*, 114 Mich App. 700, 709, 319 NW2d 638 (1982), lv. den. 417 Mich 959 (1983).

In this case, as in *Citizens*, Plaintiff allegedly entrusted funds to Defendants above the amount Defendants were entitled to retain. While Plaintiff may have voluntarily allowed Defendants to hold the money in question in connection with the ticket sales operation, Defendants allegedly ultimately retained over \$80,000.00 above what they may have been entitled to retain. Accordingly, the Court is satisfied that Plaintiff's conversion claims are properly stated under *Citizens*.

3. Gross Negligence and Negligence (Counts IV and V)

In its complaint, Plaintiff alleges that Defendants owed it the legal duty to act prudently and with reasonable care, and to otherwise avoid grossly negligent conduct. Further, Plaintiff alleges that Defendants breached their duties owed to Plaintiff in one or more of the following ways: (a) Recklessly dispossessing Plaintiff of the Revenues; (b) Allowing the ticket sales from Plaintiff's event to be directly routed to the accounts of DMTCC; (c) Refusing to surrender the ticket revenues to Plaintiff; and (d) Refusing to compensate Plaintiff for its ticket revenue.

The duty allegedly owing is that which accompanies every contract, a common-law duty to perform with ordinary care the things agreed to be done. *Osman v Summer Green Lawn Care Inc*, 209 Mich App 703, 707-708; 532 NW2d 186 (1995). Such duty of care may be a specific duty owing to the plaintiff by the defendant, or it may be a general one owed by the defendant to the public, of which the plaintiff is a part. *Fultz v Union-Commerce Associates*, 470 Mich 460, 465; 683 NW2d 587 (2004). Moreover, while this duty of care, as an essential element of actionable negligence, arises by operation of law, it may, and frequently does, arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with

ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract. *Id.*

The *Fultz* Court went on to explain that the appellate courts in Michigan have defined a tort action stemming from misfeasance of a contractual obligation as the "violation of a legal duty separate and distinct from the contractual obligation." *Id.* at 467. "Misfeasance" is distinct from "nonfeasance" insofar as misfeasance is the act of negligently performing a contractual duty, whereas nonfeasance is not performing a contractual duty at all. See, *Fultz, supra* at 465. The *Fultz* Court determined that a tort action will not lie when based solely on the nonperformance of a contractual duty. *Id.* at 466.

In this case, Plaintiff's negligence allegations against Defendants are based on their alleged failure to pay the ticket revenues. Accordingly, Plaintiff's claims sound in nonfeasance rather than misfeasance. As a result, Plaintiff's negligence claims are barred under Michigan law.

4. Fraud/Misrepresentation (Count VI)

"The elements of fraudulent representation are: (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known that it was false, (4) the defendant made the representation with the intention that the plaintiff would act on it, and (5) the plaintiff acted on it and suffered damages as a result." *Novak v. Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999).

In its Complaint, Plaintiff alleges that in the Lease DMTTC represented that it would give Plaintiff certain ticket revenue from the event in question within 10 days after

the event. (See Complaint at ¶31.) However, Plaintiff also alleged that it knew two weeks before the event that DMTTC had been fired by the Temple Defendants, but that the Temple Defendants would host the event under the terms of the Lease. (*Id.* at ¶¶ 34-39.) Further, Plaintiff alleges that contrary to their representations, the Temple Defendants failed to comply with the terms of the Lease. (*Id.* at 41.) Accordingly, pursuant to the allegations in the Complaint, Plaintiff knew that DMTTC could not satisfy its obligations under the Lease and allegedly elected to rely on the Temple Defendants' representations that they would satisfy DMTTC's obligations under the Lease. Consequently, Plaintiff's reliance, if any, could only have been reasonable as to the Temple Defendants' alleged representations. As a result, Plaintiff has failed to sufficiently state a viable fraud claim against Defendant Smith or Defendant Mazer.

5. Unjust Enrichment (Count VII)

With respect to Plaintiff's unjust enrichment claim, Plaintiff's breach of contract claims depend on the jury finding that a contract exists. In contrast, Plaintiffs' claim for unjust enrichment depended on the jury finding that no express contract existed. MCR 2.111(A)(2) permits a plaintiff to plead such inconsistent claims. See also *Keywell and Rosenfeld v Bithell*, 254 Mich App 300; 657 NW2d 759 (2002). Should the trier of fact find that there was not a contract, or that the contract is unenforceable, Plaintiff will be able to seek damages under unjust enrichment. Consequently, Defendant Mazer's motion for summary disposition of Plaintiff's unjust enrichment claims must be denied.

IV. Conclusion

For the foregoing reasons, Defendant Matthew Mazer's motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Specifically, Defendant

Mazer's motion for summary disposition is GRANTED with respect to Counts IV (Gross Negligence), V (Negligence) and VI (Fraud/Intentional Misrepresentation). The remainder of Defendant Mazer's motion is DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes the case.

IT IS SO ORDERED

Date: MAY 16 2016

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