

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

SALVATORE POLIZZI,
an individual,

Plaintiff/Counter-Defendant,

vs.

Case No. 15-4609-CB

DAMIANO DIMERCURIO,
an individual, DILUSSO BUILDING
VILLAS OF GRANDEUR, LLC, a
Michigan limited liability company,
DAMIANO & ASSOCIATES, LLC, a
Michigan limited liability company,
jointly and severally,

Defendants/Counter-Plaintiffs.

_____/

OPINION AND ORDER

FILED
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CARNELLA SABAUGH
MACOMB COUNTY CLERK
MT. CLEMENS, MICHIGAN

This matter is before the Court on defendants' motion for partial summary disposition pursuant to MCR 2.116(C)(10) and plaintiff's motion for leave to amend complaint to add a new defendant and count.

I. Factual and Procedural Background

In early 2011, plaintiff and defendant Damiano DiMercurio ("DiMercurio") each paid half of the purchase price of property situated in Shelby Township.¹ In May 2011, plaintiff and DiMercurio formed Villas of Grandeur, LLC, and transferred title of the property to the newly formed LLC. The operating agreement for the LLC named plaintiff and DiMercurio as equal 50% members and managers. The parties allegedly agreed

¹ Defendants/counter-plaintiff's arguments are collectively represented in the position of defendant Damiano Dimercurio.

orally that the property would be developed into the condominium project known as Villas of Grandeur ("Condo Project"). There was nothing in writing as to the parties' alleged agreement to purchase and develop the property and share in the proceeds. As a result of the Condo Project's success, plaintiff received about \$100,000 in profit per condo unit, over \$1,000,000 in total.

After the Condo Project was finished, DiMercurio purchased the parcel to the south of the Villas of Grandeur during March 2014. Plaintiff filed his amended complaint on February 24, 2016, asserting various claims involving DiMercurio's purchase of the parcel to the south of the Villas of Grandeur, including breach of common law fiduciary duty (Count I), oppression (Count II), misrepresentation (Count III), promissory estoppel (Count IV), unjust enrichment (Count V) and accounting (Count VI).

On April 15, 2016 defendants filed for a motion for partial summary disposition. On May 4, 2016, plaintiff filed a motion for leave to amend complaint to add a new defendant and count. On May 9, 2016, plaintiff filed a motion in opposition to defendants' motion for partial summary disposition. On May 12, 2016, defendants filed replies to plaintiff's motion for leave to amend and plaintiff's opposition to defendants' motion for partial summary disposition. The Court heard the parties' arguments on May 16, 2016, and took the matters under advisement.

II. Standard of Review

MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence,

when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. Defendant’s Motion for Partial Summary Disposition

A. Breach of Common Law Fiduciary Duty (Count I)

DiMercurio argues that the operating agreement provided that both parties were equal members in the LLC. Thus, DiMercurio claims that there is no evidence that either partner had superior influence or control in the LLC. DiMercurio also asserts that the evidence does not establish that he took advantage of plaintiff, especially because plaintiff was able to sell all of his units and obtained over \$1,000,000 in profit. In response, plaintiff argues that while the operating agreement provides for equal membership rights in the LLC, DiMercurio’s actions demonstrate that he exercised actual control and discretion over the LLC. According to plaintiff, DiMercurio failed to act in good faith and thus violated his fiduciary duty to plaintiff.

A “fiduciary relationship is a legal term of art” in “which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship.” *In re Estate of Karmey*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003) (quotation marks and internal citations omitted). “A controlling shareholder of a corporation is a fiduciary.” *Kearney v Jandernoa*, 979 F Supp 576, 579 (WD Mich 1997) (internal citations omitted). If a minority shareholder or equal shareholder “exercises actual domination and control

over the corporation's business affairs," then that shareholder is deemed to be a controlling shareholder, and held to a fiduciary standard. *Id.* Courts have imposed a fiduciary duty if a shareholder exercises actual control and direction over corporate management and direction over corporate conduct. *Id.* In order to establish that a shareholder is a controlling shareholder, "[t]here must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships the directors are beholden to the controlling person." *Id.* "Shareholders, however, unless they are majority or controlling shareholders, owe no fiduciary duty towards other shareholders." *Id.*

In this case, although the parties were equal 50% shareholders in the LLC, plaintiff alleges that DiMercurio was the "controlling shareholder" because he allegedly exercised actual control and direction over the LLC. For example, DiMercurio allegedly appointed himself as the person to receive all of the LLC's mail and made unilateral decisions regarding subcontractors without informing or consulting plaintiff. As a result, plaintiff alleges that DiMercurio actually controlled the day-to-day operations of the LLC. Furthermore, discovery remains open at this time. DiMercurio's motion is premature. Accordingly, DiMercurio's motion for summary disposition on this count must be denied.

B. Breach of MCL 450.4515 — Oppressive Conduct (Count II)

In plaintiff's first amended complaint, plaintiff alleges that DiMercurio's conduct was "willfully unfair and oppressive" and it substantially interfered with the interests of plaintiff as a member of the LLC, in violation of MCL 450.4515. Specifically, plaintiff relies on the fact that DiMercurio purchased the southern parcel as an individual asset and not an asset of the LLC.

“Willfully unfair and oppressive conduct’ means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member.” MCL 450.4515(2). Furthermore, “[w]illfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other member interests disproportionately as to the affected member.” *Id.*

In the instant motion, DiMercurio argues that he could not have oppressed plaintiff because the operating agreement required unanimous agreement between the parties in order to acquire real estate. DiMercurio avers that no such agreement existed, and therefore no offer could be made to the owner of the southern parcel binding the LLC. However, DiMercurio has failed to support his position with any evidence. Consequently, DiMercurio motion for summary disposition as to this count must be denied.

C. Misrepresentation (Count III)

In his first amended complaint, plaintiff claimed that DiMercurio represented to him that the parties would jointly pursue the southern parcel as a company asset and for the benefit of the LLC. In the instant motion, DiMercurio argues that plaintiff’s misrepresentation claim relies on an alleged verbal discussion which concerned future conduct. According to DiMercurio, the alleged future conduct went no further than approaching the owner of the southern parcel about a willingness to sell. Additionally, defendant avers that the parties never agreed on any specific terms with respect to the acquisition of the southern parcel. In response, plaintiff claims that DiMercurio’s representation was either false or made recklessly.

To establish a prima facie claim of fraudulent misrepresentation, a plaintiff must prove (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth or falsity, and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered damage. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 378; 689 NW2d 145 (2004). "Generally, a claim of fraud cannot be based on a promise of future conduct." *Id.* Moreover, "evidence of a broken promise is not evidence of fraud." *Id.* at 379.

In this case, plaintiff's misrepresentation claim is based on an alleged oral promise that the parties would jointly purchase the southern parcel. However, such allegations cannot amount to fraudulent misrepresentation because the alleged oral promise was based on future conduct. Therefore, plaintiff's claim of fraudulent misrepresentation must fail. Furthermore, even if plaintiff could show evidence of a broken promise, it would not amount to evidence of fraud. As previously mentioned, "evidence of a broken promise is not evidence of fraud." *Id.* Thus, DiMercurio's motion for partial summary disposition shall be granted with regard to fraud.

D. Promissory Estoppel (Count IV)

Defendant argues in the instant motion that plaintiff's claim of promissory estoppel must fail because there was no detrimental reliance. Defendant also asserts that there is no evidence of substantial and expensive improvements to the northern parcel installed solely for the benefit of the southern parcel. Finally, defendant claims

that section 7.3 of the operating agreement required unanimous consent of both parties on the purchase price for acquisition of real property. In response, plaintiff argues that he relied to his detriment as evidenced by the fact that he refrained from speaking to the owner of the southern parcel. Therefore, plaintiff claims that he was estopped from purchasing the southern parcel.

Promissory estoppel arises when (1) one party makes a promise, (2) which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person, (3) which does in fact induce such action or forbearance, and (4) in circumstances in which the promise must be enforced in order to avoid injustice. *State Bank of Standish v Curry*, 442 Mich 76, 83; 500 NW2d 104 (1993); *Ypsilanti Twp v Gen Motors Corp*, 201 Mich App 128, 132-133; 506 NW2d 556 (1993). A claim for breach of contract accrues when the promisor fails to perform under the contract. *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 245-246; 673 NW2d 805 (2003). By analogy, a claim for promissory estoppel accrues when the promisor fails to perform the alleged promise. *Alliance Assoc, LC v Alliance Shippers, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 1, 2006 (Docket No. 265101).

Plaintiff alleges that DiMercurio made a promise to plaintiff that the parties would jointly pursue acquisition of the southern parcel. Plaintiff also alleges that he relied to his detriment on this alleged promise by refraining from even speaking to the owner of the southern parcel's property owner. As a result of the Condo Project on the northern parcel, plaintiff achieved over \$1,000,000 in profit. See Polizzi Dep at 73. Discovery remains open at this time. Defendant has simply failed to establish that he is entitled to

dismissal of Plaintiff's claim as a matter of law. Defendant's motion is premature. Accordingly, defendant's motion for summary disposition concerning promissory estoppel must fail.

E. Unjust Enrichment (Count V)

In his first amended complaint, plaintiff asserts a claim of unjust enrichment and alleges that DiMercurio was able to achieve higher profits from the southern parcel because of the LLC's development of the northern parcel. In the instant motion, DiMercurio argues that there is no evidence in support of plaintiff's claim for unjust enrichment because that road servicing the property had to be installed south of the condo project. Additionally, as DiMercurio asserted in aforementioned arguments, the cost of the condo project did not increase due to a hidden motive of potentially acquiring the southern parcel. DiMercurio also reiterates his argument that section 7.3 of the operating agreement required unanimous consent of both parties on the purchase price for acquisition of real property. In response, plaintiff asserts that DiMercurio saved approximately \$400,000 in the development of the southern parcel as a result of the ability to connect to the underground utilities of the northern parcel. According to plaintiff, DiMercurio's cost savings amounts to increased profits which were to be shared equally between the parties pursuant to their alleged oral agreement.

A plaintiff may establish a claim of unjust enrichment by showing: "(1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006).

Here, the parties do not dispute that the road servicing the property had to be installed south of the Condo Project. There is no evidence that the cost of the condo project increased as a result of any expectancy of potentially acquiring the southern parcel. Additionally, DiMercurio's alleged cost savings on the development of southern parcel does not satisfy the elements of unjust enrichment. Thus, there is no benefit to DiMercurio *from* plaintiff. Therefore, plaintiff's unjust enrichment claim must fail. Accordingly, DiMercurio's motion for partial summary disposition shall be granted with regard to unjust enrichment.

IV. Plaintiff's Motion to Amend Complaint

Plaintiff requests to amend its pleadings pursuant to MCR 2.118. Specifically, plaintiff requests leave to amend the caption and add a claim for breach of an oral contract. In response, defendants do not object to correcting the caption of the case to reflect Villas of Splendor, LLC. However, defendants do object the addition of a claim. Specifically, defendants argue that plaintiff's breach of an oral contract claim is futile.

"Leave [to amend a complaint] shall be freely given when justice so requires." MCR 2.118(A)(2). "A motion to amend a complaint should be denied only for such specific reasons as futility, failure to cure deficiencies by amendments previously allowed, undue delay, prejudice to the nonmoving party, or bad faith or dilatory motive by the movant." *Executone Business Systems Corp v IPC Communications, Inc*, 177 Mich App 660, 671; 442 NW2d 755 (1989) (citation omitted). An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990).

In their motion, defendants argue that plaintiff's proposed claim for breach of an oral contract is futile because oral contract was formed. However, defendants' argument requires the Court to make findings of fact, which is not permitted. See *McNees, supra* at 103. Consequently, defendants' futility argument is inappropriate. Therefore, plaintiff's motion for leave to amend his complaint to add a new defendant and a count is granted.

V. Conclusion

For the reasons set forth above, defendants' partial motion for summary disposition is GRANTED IN PART and DENIED IN PART. Specifically, defendants' motion is GRANTED with respect to misrepresentation (Count III) and unjust enrichment (Count V) and DENIED on all other counts.

For the reasons set forth above, plaintiff's motion for leave to amend is GRANTED. Plaintiff must file his amended complaint within 14 days from the date of this *Opinion and Order*.

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

IT IS SO ORDERED.

Date: SEP 30 2016

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