

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

S&A SOLUTIONS, INC.,

Plaintiff,

vs.

Case No. 2016-148-CB

ELECTRA-TECH MANUFACTURING, LLC
and TIM DOTZENROTH,

Defendants.

OPINION AND ORDER

Defendants have filed their instant motion for partial summary disposition pursuant to MCR 2.116(C)(8). Plaintiff filed its response and requests that the motion be denied. Defendants have also filed a reply brief in support of their motion.

I. Factual and Procedural History

Defendant Electra-Tech Manufacturing, LLC ("Defendant Electra-Tech") was founded in 2005 and currently has three equal members: John Polisenta, Frank Soresi and Defendant Tim Dotzenroth ("Defendant Dotzenroth"). Defendant Electra-Tech manufactures electronic control panels, but does not install the panels; rather, Defendant Electra-Tech traditionally had a relationship with MTE Controls, LLC ("MTE") pursuant to which MTE would install Defendant Electra-Tech's panels. However, in 2011/2012 MTE began to manufacture its own panels, thereby ending its relationship with Defendant Electra-Tech.

In late 2012, JF Industrial Services, LLC ("JF") was formed to solve the problem caused by Defendant Electra-Tech's terminated relationship with MTE. JF's initial

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official members were Defendant Electra-Tech, which held a 82% interest, and James Brandie and Robert Labutte, who each held an 8.5% interest. In or around January 2013, an amended operating agreement for JF was allegedly executed which formally made Mr. Bassakos a 30% member of JF, thereby reducing Defendant Electra-Tech's membership interest in JF to 52%.

In or about February 2015, JF was engaged as a subcontractor in connection with projects for CMF Group, Inc. ("CMF") and Paslin. Upon completion of the original projects, JF was retained by CMF and Paslin in connection with other projects. In order to perform the work for the projects, JF needed subcontractors, which it obtained from Plaintiff S&A Solutions, Inc. ("Plaintiff"), a corporation engaged in staffing. On or about March 2, 2015, Plaintiff entered into a service agreement with JF ("Service Agreement") pursuant to which Plaintiff agreed to provide contract laborers to JF in exchange for payment. JF has since allegedly failed to pay for the laborers Plaintiff has provided.

On January 15, 2016, Plaintiff filed its complaint in this matter ("Complaint"). In the Complaint, Plaintiff alleges that Defendants are alter egos of JF, and that as a result they are liable for JF's breach of contract (Count I). In addition, Plaintiff alleges that Defendant Dotzenroth fraudulently conveyed monies out of JF that were owed to Plaintiff (Count II). Further, Plaintiff alleges that Defendants have been unjustly enriched by the alleged transfer of assets from JF to Defendant Electra-Tech (Count III). Finally, Plaintiff alleges that Defendants tortuously interfered with Plaintiff's contractual relationship with JF (Count IV).

On February 8, 2016, Defendants filed their instant motion for partial summary disposition pursuant to MCR 2.116(C)(8). On February 28, 2016, Plaintiff filed its

response. Defendants have also filed a reply brief in support of their motion. On June 6, 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 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

In their motion, Defendants contend that counts II, III and IV of the Complaint fail to state claims upon which relief can be granted. I will address each of the claims in turn.

A. Fraudulent Conveyance (Count II)

In their motion, Defendants contend that Plaintiff's fraudulent conveyance claim fails as a matter of law because the alleged transferor, JF, is not a party to this matter, and because Plaintiff has not established that JF is liable to it. These issues were addressed by the Michigan Court of Appeals in *Mather Investors, LLC v Larson*, 271 Mich App 254; 720 NW2d 575 (2006).

In *Mather*, the plaintiff was a nursing home in which the decedent had resided prior to her death. Prior to her death, the decedent transferred all of her assets to the defendant. The plaintiff sought to recover the funds it was owed for the services it provided to the decedent by filing a fraudulent conveyance claim against the defendant. In opposing the fraudulent conveyance claim, the defendant argued that plaintiff's claim failed because it did not join the decedent, or her estate, as a party. Regarding this issue, the Court of Appeals held that the UFTA does not contain any language requiring joinder of the debtor transferor. *Id.* at 259. However, that fact is not dispositive; rather, "the dispositive inquiry is whether the circumstances of the individual case permit complete adjudication without joining the debtor transferor. *Id.* The Court then went on to hold that where the transferor's liability to the plaintiff is clear their presence as a party is unnecessary. *Id.*

With regards to this matter, JF has previously conceded that it is liable to Plaintiff. (See Plaintiff's Exhibit 2.) Consequently, JF's liability to Plaintiff is not at issue, making JF's presence in this matter unnecessary. As a result, Defendants' bases for summary disposition of Plaintiff's fraudulent conveyance claim are without merit.

B. Unjust Enrichment (Count III)

In their motion, Defendants contend that Count III of the Complaint fails to state a viable claim for unjust enrichment. Specifically, Defendants aver that Plaintiff's claim fails because it does not allege that Defendants received a direct benefit from Plaintiff. In the Complaint, Plaintiff alleges that Defendants ultimately received the benefit given to JF by transferring the funds it paid to JF to Defendant Electra Tech.

To sustain an action for unjust enrichment, plaintiff must “establish (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party.” *Karaus v Bank of New York Mellon*, 300 Mich. App 9, 22–23; 831 NW2d 897 (2012). However, “[b]ecause this doctrine vitiates normal contract principles, the courts employ the fiction with caution.” *Kammer Asphalt Paving Co, Inc. v East China Twp Schs*, 443 Mich 176, 183; 504 NW2d 635 (1993). With respect to whether the benefit must be delivered directly from the plaintiff to the defendant, the United States District Court for the Eastern District of Michigan, in *In re Cardizem CD Antitrust Litig.*, 105 F Supp 2d 618, 669 (ED Mich 2000), held that “the critical inquiry is not whether the benefit is conferred directly on the defendant, but whether the plaintiff can establish the relationship between his detriment and the defendant’s benefit flow from the challenged conduct.” In this case, Plaintiff alleges that Defendants’ were directly benefitted by their wrongful transfer of the funds to themselves that should have been utilized to compensate Plaintiff. Based on these allegations, the Court is convinced that Plaintiff has sufficiently plead its unjust enrichment claim and that as a result Defendants’ motion for summary disposition of Count III must be denied.

C. Tortious Interference (Count IV)

Tortious interference with a contract and tortious interference with a business relationship or expectancy are separate and distinct torts under Michigan law. *Health Call of Detroit v Atrium Home & Health Care Services, Inc.*, 268 Mich App 83, 89; 706

NW2d 843 (2005). The Court in *Health Call* summarized the elements needed to establish the torts as follows:

The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted.

Id., at 89-90 [internal citations omitted]

In the Complaint, Plaintiff alleges that Defendant Dotzenroth personally, and through Defendant Electra-Tech, knew of, and intentionally interfered with, JF's contractual relationship with Plaintiff. (See Complaint, at ¶¶77-81). Further, Plaintiff alleges that due to Defendants' conduct JF has breached, and continues to breach, its contract with Plaintiff. (*Id.* at ¶82.)

In their motion, Defendants contend that Plaintiff's tortious interference claim fails as a matter of law because Plaintiff has not identified an alleged act that was wrongful per se. To plead either type of tortious interference, a plaintiff must "allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Derderian v. Genesys Health Care Sys*, 263 Mich App 364, 382; 689 NW2d 145 (2004). An act is wrongful per se if it is inherently wrongful or can never be justified under any circumstances. *Badiee v. Brighton Area Sch.*, 265 Mich App 343, 367; 695 NW2d 521 (2005). "To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity,

affirmative acts by the defendant that corroborate the improper motive of the interference." *Mino v. Clio. Sch. Dist.*, 255 Mich App 60, 78; 661 NW2d 586 (2003) (citation omitted).

In this case, Plaintiff has alleged that Defendant Dotzenreth forged invoices and purchase orders in order to transfer funds to Defendant Electra Tech and altered/attempted to alter JF's books and records to cover up the fraudulent transactions (See Complaint, at ¶¶30-32, 39) The Court is satisfied that such allegations, if proven, are sufficient to establish actions that are wrongful per se. As a result, Plaintiff has sufficiently met its pleading requirements.

Finally, Defendants contend that Plaintiff's claim fails because their actions, if proven, were justified and not for their own benefit. However, Plaintiff has alleged that Defendants engaged in a fraudulent scheme to funnel money out of JF, and into Defendant Electra Tech, in order to prevent having to JF's creditors. Such actions, if proven, can certainly be found to be self-serving and unjustified. Consequently, the Court is not persuaded by Defendant's position.

IV. Conclusion

For the reasons discussed above, Defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) 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: AUG 02 2016

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