

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

CON-SYS-INT. MANUFACTURING
U.S.A., LLC, d/b/a ELECTRA-TECH
MANUFACTURING, LLC, TIM
DOTZENROTH, JOHN POLISTENA,
and FRANK SORESI,

Plaintiffs,

vs.

ANASTACIOS BASSAKOS, JAMES
BRANDIE and ROBERT LABUTTE,

Defendants.

Case No. 2016-505-0

CLERK OF COURT
MACOMB COUNTY

2016 AUG -2 PM 1:45

FILED

OPINION AND ORDER

Defendants have filed their instant motion for summary disposition pursuant to MCR 2.116(C)(8). Plaintiffs filed its response and requests that the motion be denied.

I. Factual and Procedural History

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

In late 2012, JF Industrial Services, LLC ("JF") was formed to solve the problem

caused by Plaintiff Electra-Tech's terminated relationship with MTE. JF's initial official members were Plaintiff Electra-Tech, which held an 82% interest, and Defendants James Brandie and Robert Labutte, who each held an 8.5% interest. Further, Defendant Bassakos allegedly had sole operational control over JF until August 17, 2015. In or around January 2013, an amended operating agreement for JF was allegedly executed which formally made Defendant Bassakos a 30% member of JF, thereby reducing Plaintiff Electra-Tech's membership interest in JF to 52%.

Upon beginning its operations, JF allegedly hired all of Plaintiff Electra-Tech's field division employees. In addition, Defendant Bassakos allegedly terminated his employment with Plaintiff Electra-Tech and became an employee of JF. The majority of JF's operational costs were allegedly funded via loans from Plaintiff Electra-Tech.

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 S&A Solutions, Inc. ("S&A"), a corporation engaged in staffing. S&A was allegedly retained by Defendant Bassakos without JF's other members' knowing. S&A allegedly performed the work but was not paid by JF.

In or around July 2015, Electra-Tech allegedly became aware of Defendant Bassakos' questionable activities. Defendant Bassakos' relationship with Plaintiff Electra-Tech's members allegedly deteriorated, leading to Defendant Bassakos' resigning in August 2015.

S&A has since filed an arbitration action against Plaintiff JF ("S&A Arbitration"),

as well as case no. 2016-148-CB with this Court against Electa-Tech and Mr. Dotzenroth ("S&A Case"). Plaintiffs allege that the claims in the S&A Arbitration and S&A Case were born out of statements Defendant Bassakos made prior to those matters being filed.

On the day that he resigned, Defendants Bassakos, Brandie and LaButte allegedly formed JFI Services, LLC, which has now been formally re-named CanAm Industrial, LLC. ("CanAm"). CanAm allegedly competes with JF.

On March 2, 2016, Plaintiffs filed their first amended complaint in this matter ("Complaint"). The Complaint contains Plaintiff Electra-Tech's claim for member oppression against Defendants Bassakos, Brandie and Labutte (Count I), Plaintiffs Electra-Tech and Dotzenroth's claim for breach of fiduciary duty against Defendants Bassakos, Brandie and Labutte (Count II), Plaintiffs Electra-Tech and Dotzenroth's claim for civil conspiracy against Defendants Bassakos, Brandie and Labutte (Count III), Plaintiff Dotzenroth's claim for defamation against Defendant Bassakos (Count IV), and Plaintiff Soresi's claim for defamation against Defendant Bassakos (Count V), Plaintiffs claim for defamation against Defendant Bassakos (Count VI), and Plaintiffs Electra-Tech and Dotzenroth's claim for a declaratory judgment (Count VII).

On March 21, 2016, Defendants filed their instant motion for summary disposition pursuant to MCR 2.116(C)(8). On April 18, 2016, Plaintiffs filed their response to the motion and request that the motion be denied. On April 21, 2016, Defendants filed a reply brief in support of their motion. On April 25, 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 Plaintiff has failed to state any claim upon which relief can be granted. The Court will address each of the claims in turn.

A. Membership Oppression (Count I)

In Count I of the Complaint, Plaintiff alleges that Defendants oppressed Plaintiff Electra-Tech's membership interest in JF. In their motion, Defendants contend that Plaintiff Electra-Tech may not maintain a claim for membership oppression because it held a majority interest in JF and retained the ability to name or replace JF's managers. MCL 450.4515 provides the authority to file a membership oppression action, and provides, in pertinent part:

- 1) A member of a limited liability company may bring an action in the circuit court of the county in which the limited liability company's principal place of business or registered office is located to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member.

In the Complaint, Plaintiffs allege that Defendants were “in control” of JF. However, Section 5.5 of JF’s operating agreement (“Operating Agreement”) provides that those holding a majority interest in JF may remove JF’s manager by calling a meeting and voting for the current manager’s removal. (See Defendants’ Exhibit A.) Further, Section 5.1B of the Operating Agreement provides that JF’s manager(s) are elected by those holding a majority interest in JF. At all applicable times Plaintiff Electra-Tech held a majority interest in JF. Accordingly, Plaintiff Electra-Tech retained the ability to at any time remove JF’s current manager and to appoint someone that it wanted. Consequently, the Court is convinced that Plaintiff, as the majority member of JF that retained the ability to determine the management of JF, may not maintain a claim for membership oppression pursuant to MCL 450.4515. As a result, Defendants’ motion for summary disposition of Count I of the Complaint must be granted.¹

B. Breach of Fiduciary Duty (Count II)

Count II of the Complaint alleges that Defendant Bassakos, as the manager of JF, and the member in actual control of JF, breached the fiduciary duty he owed to Plaintiffs Electra-Tech and Dotzenroth, one of Plaintiff Electra-Tech’s members. (See Complaint, at ¶¶160-165.) However, the Michigan Court of Appeals has held that the Michigan Limited Liability Company Act’s (LLCA) requirement that a manager discharge duties “in the best interests of the limited liability company,” under MCL 450.4404(1) indicates that a manager’s fiduciary duties are owed to the company, not the individual

¹ While Plaintiffs cite to *DC Mex Holding, LLC v Affordable Land, LLC*, unpublished per curiam opinion of the Court of Appeals, decided May 5, 2015 (Docket No. 318791) in support of their position that a majority member may maintain an oppression action against a minority member, the case itself does not address that issue. Consequently, the case is not informative, much less persuasive.

members. *Frank v Linkner*, 310 Mich App 169, 180; 871 NW2d 363 (2015). JF is not a party to this matter, and Plaintiffs allege that Defendant Bassakos breached a duty towards JF's other members, not JF itself. The Court is satisfied that such allegations cannot form the basis for a breach of fiduciary duty claim, and that as result Defendants' motion for summary disposition of Count II must be granted.

C. Conspiracy (Count III)

Count III of the Complaint purports to state a claim for conspiracy. Specifically, Plaintiffs allege that Defendants conspired to engage in the actions forming the basis for Counts I and II. However, for the reasons discussed above, the Court is convinced that Counts I and II must be dismissed. As a conspiracy claims fails where the tort claims underlying the conspiracy claim fails (See *Urbain v Beierling*, 301 Mich App 114, 132; 835 NW2d 455 (2013)), Count III must also be dismissed.

D. Defamation (Counts IV and V)

Count IV and V contain claims for defamation. The elements of a cause of action for defamation are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Thomas M. Cooley Law Sch v. Doe 1*, 300 Mich App 245, 262; 833 NW2d 331 (2013).

In Count IV of the Complaint, Plaintiffs allege that Defendant Bassakos made false and/or defamatory statements in August 2015, that the statements were not privileged, that Defendant Bassakos knew the statements were false when he made

them, and that they were actionable per se because they falsely accuse Plaintiff Dotzenroth of illegal activity. (See Complaint, at ¶¶ 169-173.)

In Count V of the Complaint, Plaintiffs allege that Defendant Bassakos made false and/or defamatory statements to the same individuals regarding Plaintiff Soresi, that the statements were not privileged, that Defendant Bassakos knew the statements were false when he made them, and that they were actionable per se because they falsely accused Plaintiff Soresi of illegal activity. (See Complaint, at ¶¶178-182.)

In their motion, Defendants contend that the statements at issue were privileged because they were made in the course of previous litigation. In support of their position, Defendants rely on documentary evidence. (See Defendants' Exhibits D & E.) However, even if the evidence presented were to establish that the statements at issue are privileged, and therefore not actionable, Defendants motion is made only under MCR 2.116(C)(8), which bars the Court from considering documentary evidence. "A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions." *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins. Co.*, 308 Mich App 389, 391; 864 NW2d 598 (2014). Because Defendants' proposed basis for summary disposition of Counts IV and V requires the consideration of documentary evidence, there position is inappropriate since the motion is only a (C)(8) motion. As a result, their motion for summary disposition of Counts IV and V must be denied.

E. Defamation (Count VI)

Count VI purports to state yet another defamation claim. Specifically, in Count VI Plaintiffs allege that on September 15, 2015 Defendant Bassakos made defamatory

statements about Plaintiffs Dotzenroth, Polisenta, Soresi and Electra-Tech to CMF Group, Inc. ("CMF"), a company JF subcontracted for. In particular, Plaintiffs allege that Defendant Bassakos stated that:

- (1) Plaintiff Dotzenroth falsely invoiced \$1.8 million to a third party; and
- (2) That JF and Electra-Tech were being audited for fraudulent invoicing.

A plaintiff raising a claim of defamation, must plead with "specificity." *Rouch v. Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 272; 487 NW2d 205 (1992). The plaintiff "must plead with specificity who published the defamatory statement, when it was published, and, most importantly, a plaintiff must identify the precise materially false statement published." *Id.* In this case, Plaintiffs have specifically plead who published the statement (Defendant Bassakos), when the statements were made (September 15, 2015), and have identified what was said. While Defendants assert that Plaintiffs must also plead specifically who within CMF Defendant Bassakos made the statement to, they have failed to cite to any authority supporting that position. Consequently, the Court is persuaded that Defendants have failed to properly support their position and that as a result their request for summary disposition on that basis is denied.

Defendants also contend that Plaintiffs have failed to plead that Defendant Bassako's allegedly defamatory statement have damaged them. Specifically, Defendants assert that Plaintiffs have only plead that JF was damaged by the defamatory statements. In paragraph 192 of the Complaint Plaintiffs allege that "[Plaintiffs] Dotzenroth and Electra-Tech have been damaged by [Defendant] Bassako's defamatory statements, by, including but not limited to, [JF] being sued by CMF..." (See

Complaint, at ¶192.) While Defendants are correct that Plaintiffs may not base their claim on damage done to JF (See *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989)), Plaintiffs have not plead that the only damage caused by the allegedly defamatory statements was suffered by JF; rather, Plaintiffs have merely alleged that JF being sued is a portion of their damage. Consequently, the Court is satisfied that Plaintiffs have sufficiently plead Count VI of the Complaint and that as a result Defendants' request for summary disposition of that claim must be denied.

F. Declaratory Judgment (Count VII)

In Count VII of the Complaint, Plaintiffs seek a declaratory judgment determining that Plaintiffs Electra-Tech and Dotzenroth are entitled to indemnification in other cases from JF pursuant to Section 5.3 of the Operating Agreement. While Count VII seeks to obtain an order declaring that JF must indemnify Plaintiffs Electra-Tech and Dotzenroth, JF is not a party to this matter. Relief cannot be granted against non-parties. *Cicotte v Anciaux*, 53 Mich 227, 237-238; 18 NW 793 (1884). Consequently, Count VII fails to state a claim upon which relief can be granted. As a result, Count VII must be dismissed.

G. Defendants' Brandie and Labutte

As discussed above, the Court is convinced that Counts I-III and VII must be dismissed. The remaining counts (IV-VI) are defamation claims based solely on statements allegedly made by Defendant Bassakos. (See Complaint at ¶¶ 170, 179, 188). Consequently, the remaining counts do not implicate Defendant Labutte and Brandie. As a result, they must be dismissed from this matter.

IV. Conclusion

For the reasons discussed above, Defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) is GRANTED, IN PART, and DENIED, IN PART. Specifically, Defendants' motion for summary disposition of Counts I-III and VII is GRANTED. Defendants' motion for summary disposition of Counts IV-VI is DENIED. Further, as Counts IV-VI only implicate Defendant Bassakos, Defendants Brandie and Labutte are hereby dismissed from this matter. 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