

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

JF INDUSTRIAL SERVICES, LLC,

Plaintiff,

vs.

Case No. 2016-801-CB

ANASTACIOS BASSAKOS, JAMES
BRANDIE, ROBERT LABUTTE, and
CANAM INDUSTRIAL, LLC f/k/a JFI
SERVICES, LLC,

Defendants.

OPINION AND ORDER

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

I. Factual and Procedural History

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

In late 2012, Plaintiff JF Industrial Services, LLC ("Plaintiff JF") was formed to solve the problem caused by Electra-Tech's terminated relationship with MTE. Plaintiff JF's initial official members were Electra-Tech, which held a 82% interest, and

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

Upon beginning its operations, Plaintiff JF allegedly hired all of Electra-Tech's field division employees. In addition, Defendant Bassakos allegedly terminated his employment with Electra-Tech and became an employee of Plaintiff JF. The majority of Plaintiff JF's operational costs were allegedly funded via loans from 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, Plaintiff JF was retained by CMF and Paslin in connection with other projects. In order to perform the work for the projects, Plaintiff 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 Plaintiff JF's other members' knowing. S&A allegedly performed the work but was not paid by Plaintiff JF.

In or around July 2015, Electra-Tech allegedly became aware of questionable activities Defendant Bassakos had engaged in. Defendant Bassakos' relationship with Electra-Tech's members allegedly deteriorated, leading to Defendant Bassako's 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 Electra-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. ("Defendant CanAm"). Defendant CanAm allegedly competes with Plaintiff JF.

On March 11, 2016, Plaintiff filed its complaint in this matter ("Complaint"). In the Complaint, Plaintiff JF alleges that Defendants Bassakos, Brandie and LaButte breached their fiduciary duties as members of Plaintiff JF (Count I as to all three, and Count II as to Defendant Bassakos only), that Defendants unfairly competed with Plaintiff JF (Count III), that Defendants tortuously interfered with its business expectancies and/or contractual relationships (Count IV), and engaged in a civil conspiracy (Count V). On March 24, 2016, Defendants filed their instant motion for summary disposition pursuant to MCR 2.116(C)(8). On April 18, 2016, Plaintiff filed its response to the motion. On April 21, 2016, Defendants filed a reply 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." *Radtko 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. Breach of Fiduciary Duty (Counts I and II)

Counts I and II of the Complaint are based on Plaintiff JF's allegation that the individual defendants owed it one or more fiduciary duties despite the fact that they are all minority owners whose collectively interests amount to less than 50% of Plaintiff JF's ownership. The parties' dispute centers on whether an entity may maintain a breach of fiduciary duty claim against a minority shareholder/member if that shareholder/member exercises actual domination and control in directing the entity's affairs. While it does not appear that the Michigan Court of Appeals or Michigan Supreme Court has directly addressed this issue, the United States District Court for the Western District of Michigan has in *Kearney v Jandernoa*, 957 F Supp 116 (WD Mich, 1997).

In *Kearney*, the court, in citing to *Priddy v Edelman*, 679 F Supp 1425, 1430 (ED Mich 1998), *aff'd* 883 F2d 438 (6th Cir 1989), held that: "A controlling shareholder of a corporation has a fiduciary duty to the corporation and its minority shareholders." Further, the Court explained: "A shareholder is a controlling shareholder if 'it owns a majority of the stock ...or has exercised actual domination and control in directing the

corporation's business affairs. *Kearney*, 957 F Supp at 118, quoting *Priddy*, 679 F Supp at 1430-31. The court in *Kearney* ultimately held that while minority owners owe a fiduciary duty if they control the entity, the plaintiffs had failed to allege any facts that would lead to a conclusion that the defendants were in control of the plaintiff entity, and that as a result the plaintiffs' claim must be dismissed.

In the Complaint, Plaintiff JF alleges that Defendant Bassakos managed it and that he and Defendants Brandie and LaButte were in complete control of its operations despite the fact that none of them were listed as the managing member(s) of Plaintiff JF and even though Defendant Bassakos did not even become an official member until January 2013. (See Complaint, at ¶¶30, 34.) While the facts of the case will ultimately be brought forward and determine whether the Defendants were in control of Plaintiff JF, The Court is satisfied that Plaintiff JF has plead facts, that if established, state a claim for breach of fiduciary duty upon which relief can be granted under *Priddy*. As a result, Defendants' motion for summary disposition of Counts I and II must be denied.

B. Unfair Competition (Count III)

The tort of unfair competition may encompass any conduct that is fraudulent or deceptive and tends to mislead the public. *Hayes-Albion v Kuberski*, 421 Mich 170; 364 NW2d 609 (1984). The Michigan Supreme Court has explained the tort of unfair competition as follows:

Unfair competition ordinarily consists in the simulation by one person, for the purpose of deceiving the public, of the name, symbols or devices employed by a business rival, or the substitution of the goods or wares of one person for those of another, thus falsely inducing the purchase of his wares and thereby obtaining for himself the benefits properly belonging to his competitor. The rule generally recognized that no one shall by imitation or unfair device induce the public to believe that the goods he offers for sale are the goods of another, and thereby appropriate to himself

the value of the reputation which the other has acquired for his own product or merchandise.

Clipper Belt Lacer Co v Detroit Belt Lacer Co, 223 Mich 399, 406-407; 194 NW 125 (1923); See also *Janet Travis, Inc. v Preka Holdings, LLC*, 306 Mich App 266; 856 NW2d 206 (2014).

In the Complaint, Plaintiff JF alleges that Defendants have engaged in misconduct by, *inter alia*, using, misappropriating and exploiting its confidential and proprietary information, interfering with, diverting and usurping its business opportunities and using/misappropriating its name and goodwill. (See Complaint, at ¶155.) That Court is convinced that such allegations, if proven, are sufficient to sustain a claim for unfair competition under Michigan law. Consequently, Defendants' motion for summary disposition of Count III pursuant to MCR 2.116(C)(8) 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 JF alleges that it has contractual relationships and/or business expectancies with its customers, including, but not limited to, CMF. Further, Plaintiff JF alleges that Defendants knew about the contractual relationships and/or expectancies, that Defendants interfered with the contracts and/or expectancies, that the interference was intended, that the interference caused disruptions/breaches and/or termination of their expectancies and/or contractual relationships, and that it has been damages as a result of Defendants' actions. (See Complaint, at ¶¶160-166.)

In their motion, Defendants challenge the merits of Plaintiff JF's claim rather than contest whether Plaintiff JF actually plead the requisite elements for a tortious interference claim. However, even if the evidence presented were to establish that the allegations supporting Plaintiff JF's tortious interference claims are not true, the Court could not consider such evidence where the motion is made only under (C)(8). "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' motion do not contest whether Plaintiff JF's allegations are sufficient to state a claim for tortious interference, the Court must deny Defendants' motion for summary disposition of Count IV.

D. Civil Conspiracy (Count V)

Defendants contend that Plaintiff JF's conspiracy claim must be dismissed because a civil conspiracy requires an underlying tort, and that because Plaintiff JF's underlying tort claims should be dismissed its conspiracy claim should also be

dismissed. However, for the reasons discussed above, Defendants' motion for summary disposition of Plaintiff JF's underlying tort claims must be denied. As a result, Defendants' basis for summary disposition of Plaintiff JF's conspiracy claim is without merit.

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