

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

GRAND POINTE PROPERTY, L.L.C.,

Plaintiff,

vs.

Case No. 12-07912-CZB

HON. CHRISTOPHER P. YATES

GOLDEN HORSESHOE HOLDINGS,
LLC, a Michigan limited liability company;
MASS HOLDINGS, LLC, a Michigan
limited liability company; and SPOHN
CONSTRUCTION SERVICES, LLC,
a Michigan limited liability company,
jointly and severally,

Defendants.

OPINION AND ORDER GRANTING IN PART, AND DENYING IN PART,
DEFENDANTS' SUMMARY-DISPOSITION MOTIONS UNDER MCR 2.116(C)(10)

Those old enough to remember programming in the FORTRAN computer language no doubt recall the problem of the “infinite do loop,” which launched the computer’s central processing unit into a never-ending cycle of repeated steps. From the Court’s perspective, this case has reached that point. Time and time again, the defendants have attempted to eliminate the claims made by Plaintiff Grand Pointe Property, L.L.C. (“Grand Pointe”). Now, for the final time, the Court shall carve away another claim advanced by Grand Pointe. But the Court must leave standing a civil-conspiracy claim against Defendants Golden Horseshoe Holdings, LLC (“Golden Horseshoe”), Mass Holdings, LLC (“Mass Holdings”), and Spohn Construction Services, LLC (“Spohn Construction”). Having arrived at that result, the Court shall now direct the remaining parties to proceed to trial. No more discovery; no more motions for summary disposition; just a trial.

I. Factual Background

The remaining defendants have sought summary disposition under MCR 2.116(C)(10).¹ “In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties[.]” See Maiden v Rozwood, 461 Mich 109, 120 (1999). Accordingly, the Court must assay the entire record in order to determine whether either side is entitled to relief pursuant to MCR 2.116(C)(10).

An entity named SEC Grand Pointe, L.L.C. (“SEC”) owned and operated a shopping center at the heart of the parties’ dispute, and SEC’s revenue from that shopping center depended primarily upon an anchor tenant that went by the trade name of “Atlanta Bread.” Plaintiff Grand Pointe sued SEC and won a jury verdict of \$630,000 based upon the theory that SEC misrepresented the financial status of Atlanta Bread during the negotiations that led to the sale of the shopping center by SEC to Grand Pointe. Our Court of Appeals later affirmed the jury verdict in a 17-page unpublished opinion issued on January 17, 2013. See Grand Pointe Property, LLC v SEC Grand Pointe, LLC, No 301293 (Mich App Jan 17, 2013) (unpublished decision).

The current action essentially relies upon the same facts that supported the first suit brought by Plaintiff Grand Pointe. But in this action, Grand Pointe has advanced claims against three entities – Defendants Golden Horseshoe, Mass Holdings, and Spohn Construction. Although Grand Pointe filed a passel of claims against those entities and several other defendants, the Court has winnowed the case down to two claims against the three remaining defendants. Specifically, Grand Pointe still has claims for civil conspiracy and constructive trust in play. That is, Grand Pointe not only asserts

¹ To be precise, Defendants Golden Horseshoe and Mass Holdings have moved for summary disposition, but Defendant Spohn Construction inexplicably has not joined the other two defendants’ motions.

that the remaining defendants engaged in a conspiracy to deprive Grand Pointe of information about the precarious financial condition of the anchor tenant, Atlanta Bread, before the sale of the shopping center by SEC, but also contends that all of the proceeds of the shopping-center sale should be held in constructive trust for Grand Pointe's benefit.

In an effort to pare down this case, the Court has issued four rulings on motions for summary disposition on August 26, 2013, August 29, 2013, February 24, 2014, and July 3, 2014. The most recent opinion left the claims for constructive trust (Count Four) and civil conspiracy (Count Five) standing. Now, the Court must determine whether the remaining defendants are entitled to summary disposition under MCR 2.116(C)(10) on those two claims.

II. Legal Analysis

The remaining defendants seek summary disposition under MCR 2.116(C)(10), which should be granted if, but only if, "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." West v General Motors Corp, 469 Mich 177, 183 (2003). "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." Id. Applying these standards, the Court shall assess Plaintiff Grand Pointe's claims for constructive trust and civil conspiracy *seriatim*.

A. Constructive Trust.

In Count Four of the third amended complaint, Plaintiff Grand Pointe asserts a claim against the defendants for "Constructive Trust," alleging that all proceeds of the shopping-center sale must be maintained in constructive trust for Grand Pointe's benefit. That claim presents a conundrum for

the Court because of the development of Michigan precedent on that subject. When the Court issued its opinion on August 26, 2013, addressing the defendants' challenge to the constructive-trust claim under MCR 2.116(C)(8), the Court cited Kammer Asphalt Paving Co, Inc v East China Township Schools, 443 Mich 176, 188-189 (1993), for the proposition that a request for constructive trust can be asserted as an independent claim. But nine months later, our Court of Appeals issued a published decision stating unequivocally: "A constructive trust is not an independent cause of action; rather, it is an equitable remedy." See Coalition Protecting Auto No-Fault v Michigan Catastrophic Claims Ass'n, 305 Mich App 301, 325 (2014), citing Kammer Asphalt, 443 Mich at 188. Thus, our Court of Appeals concluded that "the counts in plaintiffs' complaints that sought to impose a constructive trust were legally insufficient to state a claim." Id. In light of that ruling, the Court must retract its previous analysis and award summary disposition under MCR 2.116(C)(8) and (10) to the defendants on Grand Pointe's constructive-trust claim.

B. Civil Conspiracy.

Count Five of Plaintiff Grand Pointe's third amended complaint accuses the defendants of civil conspiracy. Under Michigan law, "a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." Advocacy Organization for Patients & Providers v Auto Club Ins Ass'n, 257 Mich App 365, 384 (2003). Our Court of Appeals has already affirmed a jury verdict against SEC on a claim that can support a civil conspiracy, see Grand Pointe Property, No 301293, slip op at 1-2 (Mich App Jan 17, 2013) (unpublished decision affirming verdict "that the sellers had committed fraud"), but the Court must decide whether there exists sufficient evidence to link each of the defendants to SEC and its misconduct in a civil conspiracy.

The evidence tying Defendant Mass Holdings to a conspiracy with SEC seems quite strong. As our Court of Appeals noted, less than two weeks before Plaintiff Grand Pointe and SEC signed the purchase agreement for the shopping center, Atlanta Bread's principal "signed a promissory note for \$55,972 in favor of an entity called the Mass Development Corporation." Grand Pointe Property, No 301293, slip op at 4 (Mich App Jan 17, 2013) (unpublished decision). "This sum corresponded closely to Atlanta Bread's five months in outstanding rent." Id. "John Oosterbaan, one of SEC's owners, is also a principal member of Mass Development." Id. In other words, "one of Oosterbaan's companies (Mass Development) bankrolled another (SEC) by loaning [Atlanta Bread's principal] \$55,972." Id. "With the \$55,972, Atlanta Bread eliminated its rent indebtedness." Id. "This loan first came to light only after Atlanta Bread closed its doors." Id. As a result, the evidence provides a significant link between Mass Development and SEC's fraudulent conduct, so the Court must deny summary disposition under MCR 2.116(C)(10) to Mass Holdings on the civil-conspiracy claim.

Similarly, the evidence establishes a compelling link between Defendant Golden Horseshoe and SEC's fraudulent conduct. As our Court of Appeals explained, Atlanta Bread's principal and SEC struck a second deal during the course of the shopping-center sale. See Grand Pointe Property, No 301293, slip op at 4 (Mich App Jan 17, 2013 (unpublished decision)). "They agreed to 'write a year guaranty' with [Atlanta Bread's principal] funding the first six months and a company called Golden Horseshoe paying the last six months." Id. "Like Mass Development, Golden Horseshoe is owned by Oosterbaan." Id. "Golden Horseshoe agreed to supply the funds necessary to satisfy the last six months of any indebtedness due pursuant to the guaranty." Id. In fact, "[w]hen Atlanta Bread defaulted, Golden Horseshoe lived up to its part of the bargain by electronically transferring the monthly rent payments to Atlanta Bread's bank account" Id. Notably, Oosterbaan signed

the “personal guaranty agreement on January 23, 2007 – 12 days *after* [Grand Pointe’s principals] signed the purchase and sale contract” for the shopping center, *id.*, yet “[t]he funding agreement for the guaranty” – like the Mass Development promissory note – “remained secret until after Atlanta Bread folded.” *Id.* Consequently, the evidence ties Golden Horseshoe directly to the fraudulent acts of SEC, so the Court must deny summary disposition to Golden Horseshoe on the civil-conspiracy claim pursuant to MCR 2.116(C)(10).

Finally, the Court cannot award summary disposition to Defendant Spohn Construction on the civil-conspiracy claim. Indeed, Spohn Construction did not even file such a motion. Instead, its attorney simply explained at oral argument that Spohn Construction has no assets and essentially no longer exists. Be that as it may, the Court cannot furnish relief to a party without a request for such relief that enables the opposing party to respond to that request, so Spohn Construction will have to defend itself at trial against the civil-conspiracy claim or face a default judgment.

III. Conclusion

For all of the reasons set forth in this opinion, the Court shall grant summary disposition to the defendants under MCR 2.116(C)(8) and (10) on Plaintiff Grand Pointe’s constructive-trust claim, but the Court shall deny summary disposition to all of the defendants on the civil-conspiracy claim, which must be resolved at trial.

IT IS SO ORDERED.

Dated: January 21, 2015



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge