

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

COLBURN HUNDLEY, INC., a Michigan  
corporation,

Plaintiff,

vs.

Case No. 13-01628-CKB

HON. CHRISTOPHER P. YATES

WATERFALL SHOPPES, LLC, a Michigan  
limited liability company; SPENCER/BEST,  
LLC, a Michigan limited liability company;  
and FH PROPERTIES, III, LLC, a Michigan  
limited liability company,

Defendants.

---

OPINION AND ORDER RESOLVING SUMMARY-DISPOSITION MOTIONS

This simple case has required some heavy lifting. On July 9, 2013, and November 12, 2013, the Court issued comprehensive opinions addressing various motions for summary disposition. But the parties have returned with yet another round of requests for summary disposition. This time, the Court shall put an end to all of the claims against Defendant Waterfall Shoppes, LLC (“Waterfall”). In addition, the Court shall sweep away most of the claims against Defendants Spencer/Best, LLC (“Spencer/Best”) and FH Properties, III, LLC (“FH Properties”), leaving only an unjust-enrichment claim for \$1,000. The Court shall decide at a later date how to resolve that fun-size claim.

I. Factual Background

In requesting summary disposition, Defendant Waterfall has cited MCR 2.116(C)(7), (8), and (10), while Defendants Spencer/Best and FH Properties have cited MCR 2.116(C)(8) and (10). A summary-disposition motion under MCR 2.116(C)(8) limits the Court to a review of the pleadings,

see State of Michigan ex rel Gurganus v CVS Caremark Corp, 496 Mich 45, 63 (2014), a request for summary disposition pursuant to MCR 2.116(C)(7) may be supported with “affidavits, depositions, admissions, or other documentary evidence[.]” see Maiden v Rozwood, 461 Mich 109, 119 (1999), and a demand for summary disposition under MCR 2.116(C)(10) enables the Court to consider the full range of materials, including “affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties[.]” See id. at 120. Accordingly, the Court shall consider the entire record in setting the factual background, but the Court shall constrain its analysis of each claim to conform to the governing standards prescribed by the specific subsection of MCR 2.116(C) at issue.

Plaintiff Colburn Hundley, Inc. (“Colburn Hundley”), which acts as a commercial real-estate broker,<sup>1</sup> see First Amended Complaint, ¶ 8, participated in a long-term commercial relationship with the defendants under the terms of a letter agreement signed on November 30, 1999. See id., ¶ 10 & Exhibit 1. During that relationship, Defendant Waterfall developed property located at 5100 28th Street, S.E., in Grand Rapids and made several units available for commercial tenants. Id., ¶¶ 12-13. Similarly, Defendant Spencer/Best developed property at 3108-3310 28th Street in Grand Rapids and made at least two units available for commercial tenants. Id., ¶¶ 14-15. Nobody disagrees that the various units eventually were leased to profitable tenants, but this case involves a dispute about Colburn Hundley’s right to commissions for those leases.

In its first amended complaint, Colburn Hundley alleges that the defendants breached their contractual obligations to pay commissions to Colburn Hundley, received unjust enrichment at the expense of Colburn Hundley, and converted funds that belonged to Colburn Hundley. At bottom,

---

<sup>1</sup> Unfortunately, Plaintiff Colburn Hundley also makes regular visits to court. Remarkably, this case is the eighth action involving Colburn Hundley assigned to the Specialized Business Docket in its relatively brief existence.

the first amended complaint rests upon the contention that the defendants have improperly withheld commissions and other payments relating to the commercial leases for the properties on 28th Street. From the outset of this case, the defendants have hammered away at Colburn Hundley's claims on the bases of the statute of limitations and the statute of frauds. In response, the Court has afforded Colburn Hundley ample opportunity to develop evidence to defeat those defenses. Now, after the close of discovery, the Court must decide, for once and for all, whether Colburn Hundley has enough evidence to survive the defendants' motions for summary disposition.

## II. Legal Analysis

Because the defendants have moved for summary disposition under MCR 2.116(C)(7), (8), and (10), the Court must assess the viability of Plaintiff Colburn Hundley's claims by applying three separate standards. First, in resolving the request for summary disposition under MCR 2.116(C)(8), the Court must accept as true the allegations in the first amended complaint and furnish relief "only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" Maiden, 461 Mich at 119. Second, in addressing the demand for summary disposition under MCR 2.116(C)(7), the Court must accept the contents of the complaint as true "unless contradicted by documentation submitted" by the parties, id., and deny relief unless "there is no factual dispute." RDM Holdings, Ltd v Continental Plastics Co, 281 Mich App 678, 687 (2008). Finally, in assessing the propriety of summary disposition pursuant to MCR 2.116(C)(10), the Court must grant relief if "the proffered evidence fails to establish a genuine issue regarding any material fact[.]" Maiden, 461 Mich at 120. Such 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 General Motors Corp, 469 Mich 177, 183 (2003). Applying these well-established standards, the Court must determine whether the defendants should be granted summary disposition on Colburn Hundley’s claims. The Court shall first address the claims against Defendant Waterfall, and then turn to the claims against the other two defendants.

A. Claims Against Defendant Waterfall.

Counts One and Two of the first amended complaint set forth claims for breach of contract and unjust enrichment against Defendant Waterfall. In moving for summary disposition, Waterfall renews its contention that the commission claims arising from the Waterfall development fall prey to the applicable statute of limitations. A six-year statute of limitations governs the claim for breach of contract. See MCL 600.5807(8); see also Miller-Davis Co v Ahrens Construction Co, 495 Mich 161, 173 (2014). Similarly, “the statute of limitations for unjust enrichment claims is six years[.]” Mercy Services for the Aging v City of Rochester Hills, No 292569, slip op at 4 (Mich App Oct 21, 2010), citing MCL 600.5813 & 600.5815. Here, the two sides agree on the length of the statute of limitations, but they disagree about how that six-year statute of limitations applies in this case.

As a general rule, a claim for breach of contract “accrues when the promisor fails to perform under the contract.” H J Tucker & Associates, Inc v Allied Chucker and Engineering Co, 234 Mich App 550, 562 (1999). Plaintiff Colburn Hundley has predicated its claims for unpaid commissions against Waterfall on a listing agreement that expired in April 2005. See First Amended Complaint, ¶ 53 & Exhibit 2. That listing agreement, which both sides regard as a contract, not only precludes Colburn Hundley from relying upon a theory of unjust enrichment, see Belle Isle Grill Corp v City of Detroit, 256 Mich App 463, 478 (2003), but also dictates the terms and timing of the obligation

on Waterfall's part to pay commissions to Colburn Hundley. The listing agreement clearly required Waterfall to pay half of each commission to Colburn Hundley at the time of closing on each lease, and the other half to Colburn Hundley when each lessee opened for business. See First Amended Complaint. Exhibit 2 (Listing Agreement, § 2). The two tenants at issue – Beautyfirst and Mr. JJ – opened for business on March 1, and October 16, 2006, respectively.<sup>2</sup> Colburn Hundley did not file this action until February 21, 2013. Accordingly, Colburn Hundley failed to assert claims against Waterfall within six years of the dates on which Waterfall neglected to perform its obligations under the listing agreement.

In response to its obvious statute-of-limitations problem, Plaintiff Colburn Hundley asserts that it reached an informal agreement with Defendant Waterfall that enabled Waterfall to postpone commission payments until Waterfall had the money to make those payments. Thus, argues Colburn Hundley, the statute of limitations did not begin to run until Waterfall actually had the money for the outstanding commission payments. Under Michigan law, the parties to a contract may modify their agreement by mutual assent, see Quality Prods and Concepts Co v Nagel Precision, Inc, 469 Mich 362, 372 (2003), and they may further agree that a pay-when-able term triggers a contracting party's obligation to make payments under the contract, see Dewey v Tabor, 226 Mich App 189, 195 (1997), but Colburn Hundley has offered scant evidence to support its contention that Waterfall assented to such a modification of the listing agreement. At best, Colburn Hundley can rely upon a few e-mail exchanges between Jeffrey Hundley and Diane Tomasunas of Waterfall and one exchange between Hundley and Mark Finklestein of Waterfall in 2006 and 2007. See Plaintiff's Response to Waterfall

---

<sup>2</sup> In a previous opinion, the Court explained in detail when each tenant closed on its lease and when each tenant opened for business. See Opinion and Order Granting, in Part, and Denying, in Part, Defendants' Motion for Partial Summary Disposition at 6 n4 (July 9, 2013).

Shoppes, LLC's Motion for Summary Disposition, Exhibit 4. But nothing in that e-mail traffic rises to the level of "clear and convincing evidence" of mutual intent to modify the listing agreement. See Quality Prods, 469 Mich at 373. Accordingly, the Court concludes that the terms and timing of the obligation to make commission payments were never modified, that Colburn Hundley's claim for breach of contract therefore accrued no later than October 16, 2006, when the final tenant opened for business, and that Colburn Hundley's claims against Waterfall for commission payments are all barred by the applicable six-year statute of limitations. Therefore, the Court must award Waterfall summary disposition under MCR 2.116(C)(7) on Counts One and Two.

B. Claims Against Defendants Spencer/Best and FH Properties.

Plaintiff Colburn Hundley's claims against Defendants Spencer/Best and FH Properties flow from events that fall within the statute of limitations, so the Court must consider those claims on the merits. In 2010, the defendants' development of property at 3108-3110 28th Street, S.E., resulted in a commercial lease for which Colburn Hundley demanded \$25,000 in unpaid commissions. See First Amended Complaint, ¶ 41 & Exhibit 11. Count Three of the first amended complaint alleged breach of contract and sought \$25,000 in unpaid commissions, but Colburn Hundley was unable to produce the contract that supported its claim. Michigan law requires that every agreement involving a real-estate commission must be memorialized by a signed writing. See MCL 566.132(1)(e). In addition, MCR 2.113(F)(1) requires that, if "a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit" in nearly every circumstance. See Laurel Woods Apartments v Roumayah, 274 Mich App 631, 635 (2007). The Court pointed out these requirements in its July 9, 2013, opinion resolving motions for summary

disposition and awarded summary disposition to Defendant Spencer/Best under MCR 2.116(C)(10) because of Colburn Hundley's inability to come up with a written instrument to support its breach-of-contract claim. Maiden, 461 Mich at 121 ("A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)"). Thus, the claim for breach of contract in Count Three is no longer at issue.

Count Four, which presents a third-party beneficiary claim against Defendant Spencer/Best, contains even more fatal flaws than the breach-of-contract claim in Count Three. Plaintiff Colburn Hundley characterizes itself as a third-party beneficiary to the missing contract upon which Colburn Hundley tried to build its claim for breach of contract in Count Three. Michigan law does not even recognize an independent cause of action for a third-party beneficiary. Although a Michigan statute grants rights to third-party beneficiaries, see MCL 600.1405, "a person who qualifies under the third-party beneficiary statute gains the right to sue to enforce the contract" at issue. Shay v Aldrich, 487 Mich 648, 666 (2010). As the Court has already explained, Colburn Hundley has failed to produce a written instrument to support its claim, so Colburn Hundley cannot establish a breach of contract for real-estate commissions. See MCL 566.132(1)(e). Moreover, as our Supreme Court has noted, "contracting parties' 'intent' with regard to third-party beneficiaries is to be determined solely from the form and meaning of the contract." Shay, 487 Mich at 665. Without a contract to present to the Court, Colburn Hundley cannot confirm its status as a third-party beneficiary. Thus, the Court must grant summary disposition under MCR 2.116(C)(10) against Colburn Hundley on Count Four.

Count Six takes an entirely different tack, alleging that Plaintiff Colburn Hundley has a right to a settlement fee of \$3,000 from Defendants Spencer/Best and FH Properties. The first amended complaint alleges that "Jeffrey Hundley [of Colburn Hundley] and Mark Finkelstein [on behalf of

Defendant Waterfall] negotiated a confidential settlement agreement with a tenant” that resulted in a \$6,000 fee, but Finkelstein applied Colburn Hundley’s half of that fee “to an alleged unpaid cash call allegedly due from Jeffrey Hundley” to Spencer/Best and FH Properties. See First Amended Complaint, ¶¶ 45-46. Because the fee was earned by Colburn Hundley, rather than Jeffrey Hundley in his individual capacity, Colburn Hundley contends that Spencer/Best and FH Properties engaged in conversion by taking the \$3,000 fee. Id., ¶¶ 47-51, 99-104.

Conversion requires “any distinct act of domain wrongfully exerted over another’s personal property in denial of or inconsistent with the rights therein.” Aroma Wines & Equipment, Inc v Columbian Distribution Services, Inc, 303 Mich App 441, 447 (2013). “Money is treated as personal property, and an action may lie in conversion of money provided that ‘there is an obligation to keep intact or deliver the specific money in question, and where such money can be identified.’” Dunn v Bennett, 303 Mich App 767, 778 (2014). Here, the record suggests that Waterfall still owes \$3,000 to Colburn Hundley,<sup>3</sup> but the record belies Colburn Hundley’s assertion that Spencer/Best and FH Properties converted that “specific money.” See id. To the contrary, the record establishes that, in September 2012, Spencer/Best “applied [the] \$1,000.00 settlement fee coming to” Jeffrey Hundley “for Waterfall Shoppes, LLC towards the cash call in August 2012.” See First Amended Complaint, Exhibit 13. The Court has no idea whether that \$1,000 constitutes a portion of the \$3,000 cited by Colburn Hundley in its conversion claim against Spencer/Best and FH Properties, so the Court must grant summary disposition under MCR 2.116(C)(10) to the defendants on the conversion claim.

---

<sup>3</sup> Plaintiff Colburn Hundley may have a viable claim against Defendant Waterfall for breach of contract based upon that unfulfilled obligation, but the Court need not permit Colburn Hundley to amend its complaint to plead such a cause of action. At most, that claim involves \$3,000, which falls within the exclusive jurisdiction of the appropriate district court, as opposed to the circuit court. See Moody v Home Owners Ins Co, 304 Mich App 415, 426 (2014), citing MCL 600.8301(1).

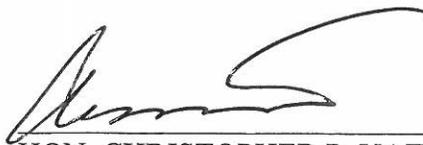
Count Seven recasts the \$3,000 conversion claim as a cause of action for unjust enrichment, alleging that Defendants Spencer/Best and FH Properties received an unjustified benefit in the form of the capital contribution made on behalf of Jeffrey Colburn. The record indicates that Spencer/Best applied a \$1,000 settlement fee to pay a cash call in August 2012. See First Amended Complaint, Exhibit 13. That application of the settlement fee conferred a benefit from Colburn Hundley upon Spencer/Best and FH Properties without any legal authority. As such, the \$1,000 benefit conferred upon those defendants could be viewed as an unjust enrichment. See Belle Isle Grill, 256 Mich App at 478. Although the claim for that amount may fall within the exclusive jurisdiction of the district court, see Moody v Home Owners Ins Co, 304 Mich App 415, 426 (2014), citing MCL 600.8301(1), Plaintiff Colburn Hundley has presented sufficient evidence to create a genuine issue of material fact with respect to its unjust-enrichment claim. Therefore, the Court must deny the defendants' motion for summary disposition on that claim pursuant to MCR 2.116(C)(10).

### III. Conclusion

For all of the reasons set forth in this opinion, the Court shall grant summary disposition to the defendants on all of Plaintiff Colburn Hundley's claims except for the cause of action for unjust enrichment in Count Seven of Colburn Hundley's first amended complaint. The Court shall consider the most appropriate method for resolving that one remaining claim at a status conference.

IT IS SO ORDERED.

Dated: October 20, 2014



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