

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

KATHLEEN KARCZEWSKI, an individual;
and TANYA CRAIG, an individual,

Plaintiffs/Counter-Defendants,

vs.

Case No. 13-04651-CBB

HON. CHRISTOPHER P. YATES

MARKET CENTER TITLE COMPANY,
LLC, a Michigan limited liability company,

Defendant/Counter-Plaintiff,

and

JON A. JACKSON, an individual; KAROL
COOLEY, an individual; MICHELE T.
BROWN, an individual; and CHARLES
FAST, an individual,

Defendants.

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OPINION AND ORDER GRANTING SUMMARY DISPOSITION TO
DEFENDANTS ON COUNT THREE AND BOTH COUNTERCLAIMS

The Court has already resolved the central issues in this dispute between two successful real-estate agents (Plaintiffs Kathleen Karczewski and Tanya Craig) and Defendant Market Center Title Company, LLC (“Market Center”), but there remain a few loose ends that the Court must tie up in order to finally resolve the case. Specifically, Market Center and its principals have sought summary disposition on the plaintiffs’ remaining claim alleging denial of access to financial information and Market Center’s two counterclaims for breach of contract. The Court concludes that the defendants have established a right to summary disposition on each of those claims, but the Court must conduct a hearing to determine the amount of attorney fees that the plaintiffs must pay to two defendants.

I. Factual Background

The defendants have moved for the entry of summary disposition under MCR 2.116(C)(8) and (10). When addressing the defendants' request for relief under MCR 2.116(C)(8), the Court may consider "only the pleadings." See Maiden v Rozwood, 461 Mich 109, 120 (1999). In contrast, the Court "considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties" in weighing the defendants' summary-disposition request pursuant to MCR 2.116(C)(10). See id. Accordingly, the Court shall present the facts by discussing the pleadings in the first instance and supplementing those allegations with the evidence presented "in the light most favorable to the part[ies] opposing the motion." See id.

As the Court has already explained, Plaintiffs Karczewski and Craig worked as real-estate agents under the broker's license of Keller Williams East, which offered its best real-estate agents the opportunity to become "Series B Members" in Defendant Market Center. Karczewski and Craig both exercised that option for a modest per-unit purchase price, and they both received the benefits of substantial pay-outs from Market Center during their tenure with Keller Williams East. But when Karczewski and Craig voluntarily left Keller Williams East on October 23, 2012, and began working with an entirely different Keller Williams broker, Market Center acted on March 29, 2013, to execute assignments of the Series B units that Karczewski and Craig had purchased, thereby stripping both of the plaintiffs of their interests in Market Center. In exchange, Market Center tried to reimburse the plaintiffs for the full amounts of their respective contributions for their Series B units.

In an opinion published on August 25, 2014, and an order denying reconsideration issued on December 18, 2014, the Court determined that the defendants neither breached any fiduciary duties to the plaintiffs nor engaged in unfair or oppressive conduct because "the plaintiffs' voluntary exit

from Keller Williams East justified the repurchase of their membership units in Market Center[.]” Having reached that conclusion, the Court left unresolved three competing claims. First, the Court did not decide whether the plaintiffs could prevail on their remaining claim for denial of access to the books and records of Market Center in January of 2013. Second, the Court did not consider the counterclaims of Market Center demanding the return of the plaintiffs’ Series B units and repayment of all distributions that the plaintiffs received from Market Center after the plaintiffs voluntarily left Keller Williams East on October 23, 2012. Third, the Court did not address Market Center’s claim for reimbursement of costs and attorney fees under the contract governing the relationship between the two sides. Thus, the Court must now resolve those matters.

II. Legal Analysis

The defendants’ summary-disposition request pursuant to MCR 2.116(C)(8) “tests the legal sufficiency of the complaint.” Maiden, 461 Mich at 119. Such relief may be awarded “only where the claims alleged are ‘so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.’” Id. In contrast, the defendants’ demand for summary disposition under MCR 2.116(C)(10) “tests the factual sufficiency of the complaint” and the counterclaims. Id. at 120. Therefore, the Court may grant relief under that provision if “the proffered evidence fails to establish a genuine issue regarding any material fact[.]” Id. “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 those standards, the Court shall address, in turn, the plaintiffs’ remaining claim, Defendant Market Center’s two counterclaims, and Market Center’s demand for costs and attorney fees.

A. Plaintiffs' Claim for Access to Books and Records.

In Count Three of their complaint, Plaintiffs Karczewski and Craig allege that the defendants denied a written demand the plaintiffs made on January 10, 2013, for access to the books and records of Defendant Market Center. Michigan law states that a member of an LLC is entitled, upon written request, to the LLC's "most recent annual financial statement and its most recent federal, state, and local income tax returns," see MCL 450.4503(1), as well as "true and full information regarding the current state of a limited liability company's financial condition." See id., 450.4503(2). In this case, the plaintiffs made a demand in a letter dated January 10, 2013. See Complaint, Exhibit H. At this point, however, the Court has concluded that Market Center had the contractual right to repurchase the plaintiffs' Series B units as soon as the plaintiffs left Keller Williams East on October 23, 2012, and Market Center has furnished the requested materials to the plaintiffs in discovery on August 16, 2013. See Brief in Support of Defendants' Motion for Summary Disposition, Exhibit R. Therefore, the Court deems Count Three both unfounded, see MCL 450.4503(1)-(5) (only "a member" of LLC has right to disclosure), and moot. See Kendall v Paw Paw Township, No 270115, slip op at 3 (Mich App Dec 28, 2006) (unpublished decision observing that "the fact that defendant later provided the document through discovery may have rendered any request for disclosure moot"). Thus, the Court shall grant summary disposition to the defendants on Count Three of the plaintiffs' complaint.

B. Market Center's Counterclaims.

Defendant Market Center's two counterclaims against Plaintiffs Karczewski and Craig seek relief for the plaintiffs' refusal to tender their Series B units to Market Center upon their departure from Keller Williams East. Count One of Market Center's counterclaim demands an order directing

the plaintiffs to “turn over all Units to Market Center for repurchase[.]” As the Court’s prior opinion and order clearly explain, Market Center has established a contractual right to an order directing the plaintiffs to tender all of their Series B units back to Market Center. But because Market Center has already exercised its contractual right by executing assignments of those Series B units on March 29, 2013, the Court need not provide any further declaratory relief to Market Center. Instead, the Court shall simply ratify Market Center’s execution of the assignment by stating that such action fell well within Market Center’s contractual authority.

Count Two of Market Center’s counterclaim seeks recoupment of payments made to both of the plaintiffs by Market Center after the plaintiffs left Keller Williams East on October 23, 2012. According to the counterclaim, Market Center paid \$8,652 to Plaintiff Karczewski and \$2,163 to Plaintiff Craig after their departure from Keller Williams East.¹ Given the Court’s conclusion that both plaintiffs had to surrender their Series B units upon their departure from Keller Williams East, the Court readily concludes that both plaintiffs must repay Market Center for the full amounts of the distributions they received from Market Center after October 23, 2012. But in setting those amounts for the plaintiffs, the Court recognizes that each plaintiff is entitled to credit for the full amount she paid for her Series B units.² With that caveat, the Court shall grant summary disposition to Market Center on its counterclaim seeking recompense for distributions made to the plaintiffs.

¹ There appears to be some uncertainty about precisely how much of those payments should be recaptured by Market Center. Footnote 2 in the defendants’ brief in support of their motion for summary disposition indicates that Plaintiff Karczewski “is entitled to \$2,163 and Plaintiff Craig \$540.75” as the portions of those distributions attributable to the time period before they left Keller Williams East on October 23, 2012. With the assistance of the parties, the Court must reach a final understanding with respect to each plaintiff’s credit before entering judgment in this case.

² The first amended counterclaim acknowledges in paragraph 28 that Plaintiff Karczewski paid \$18,500 for her Series B units and Plaintiff Craig paid \$1,500 for her Series B units.

C. Market Center's Demand for Costs and Attorney Fees.

Count One of Market Center's counterclaim includes a demand for "a money judgment in the amount of all costs and attorney fees incurred by Market Center and its Manager in enforcing the Agreement" between Market Center and the plaintiffs. Under Michigan law, costs ordinarily should "be allowed to the prevailing party in an action," see MCR 2.625(A)(1), so the Court concludes that Market Center and the other defendants are entitled to tax costs as the prevailing parties. Indeed, the Court "is not required to justify awarding costs to the prevailing party; rather, the court must justify the failure to award costs." See Blue Cross and Blue Shield of Michigan v Eaton Rapids Community Hospital, 221 Mich App 301, 308 (1997). But the defendants' request for attorney fees presents a much more difficult issue.

Under Michigan law, attorney fees generally "are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." See Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club, 283 Mich App 264, 297 (2009). Here, the defendants have cited the following contractual language as the justification for their demand for attorney fees:

Indemnification. The subscriber recognizes that the offer and sale of the Series B Units to the subscriber was and will be based upon the representations, warranties, acknowledgments, and agreements of the subscriber contained in paragraphs 3(a) through 3(l) above, inclusive, and hereby agrees to indemnify and hold harmless the LLC and the Manager from and against all damages, losses, costs and expenses (including reasonable attorneys' fees) they may incur by reason of the failure of the subscriber to fulfill any of the terms or conditions of this subscription, or by reason of any breach of the representations and warranties made by the subscriber herein or in connection with the Operating Agreement, or in any document provided by the subscriber to the LLC or the Manager.

See Brief in Support of Defendants' Motion for Summary Disposition, Exhibit A (various versions

of Subscription Agreement, § 5). This litigation resulted from the plaintiffs’ refusal to tender their Series B units back to Market Center upon their departure from Keller Williams East, so the Court must determine whether such litigation falls within the ambit of the indemnification clause.

The indemnification clause exposes subscribers such as the plaintiffs to liability for attorney fees that Market Center and its manager “incur by reason of the failure of the subscriber to fulfill any of the terms or conditions of this subscription, or by reason of any breach of the representations and warranties made by the subscriber herein or in connection with the Operating Agreement, or in any document provided by the subscriber to the LLC or the Manager.” See id., Exhibit A (Subscription Agreement, § 5). The defendants contend that the plaintiffs committed a “breach . . . in connection with the Operating Agreement,” see id., so they must pay the defendants’ attorney fees. As the Court has explained in its Opinion and Order Granting Summary Disposition to the Defendants on Counts One and Two of Plaintiffs’ Complaint issued on August 25, 2014, and its Order Denying Plaintiffs’ Motion for Reconsideration issued on December 18, 2014, the plaintiffs breached section 6.2(g)(ii) of the 2007 Market Center operating agreement by refusing to tender their Series B units upon their voluntary departure from Keller Williams East. That breach serves as a proper basis for the recovery of attorney fees under the indemnification clause in the plaintiffs’ subscription agreements. But as the plaintiffs correctly note, only “the LLC and the Manager” can recover their attorney fees pursuant to the indemnification clause in the subscription agreements, so Defendants Market Center and Jon Jackson – but not the other defendants – are entitled to their attorney fees. The Court shall conduct an evidentiary hearing to set the reasonable attorney fees payable to those two defendants.³

³ The plaintiffs are entitled to an evidentiary hearing where the defendants must justify their attorney-fee request, see B&B Investment Group v Gitler, 229 Mich App 1, 15-17 (1998), and the defendants can only recover “reasonable” attorney fees. See Smith v Khouri, 481 Mich 519 (2008).

III. Conclusion

For the reasons stated in this opinion, the Court shall grant summary disposition to all of the defendants pursuant to MCR 2.116(C)(10) on the plaintiffs' claim in Count Three of their complaint as well as both of the counterclaims presented by Market Center. In light of these rulings, Market Center and the other four defendants may submit a bill of costs to be taxed, and Defendants Market Center and Jon Jackson may submit a request for a specific amount of attorney fees within 14 days of entry of this order.⁴ **The Court shall then conduct a hearing on that request for attorney fees at 2:00 P.M. on Friday, May 1, 2015.**

IT IS SO ORDERED.

Dated: March 30, 2015



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

⁴ The Court recognizes that the defendants have presented, as Exhibit S to their motion and brief, an itemized list of the components of their claim for attorney fees. Thus, the defendants may simply resubmit that itemized list, or they may add to that list if they have incurred additional fees since they filed their motion for summary disposition.