

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

DECARTO DRAPER,

Plaintiff/Counter-Defendant,

Case No. 14-04755-CBB

vs.

HON. CHRISTOPHER P. YATES

JOSH IRVING,

Defendant/Counter-Plaintiff.

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OPINION AND ORDER DENYING DEFENDANT'S MOTION  
FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

On July 8, 2015, the Court rendered a comprehensive 17-page opinion resolving competing motions for summary disposition. At that point, the Court expected that the case would proceed to trial, but Defendant Josh Irving filed another motion for summary disposition on February 12, 2016, and the parties thereafter buried the Court in briefs, exhibits, and supplemental filings. Irving argues this time around that Plaintiff DeCarto Draper's claims are barred by the wrongful-conduct rule and that "there is no genuine issue of material fact or any credible evidentiary support for the claims that Draper is entitled to one-half of the profits owned by Irving as an individual employee of Neville's Electric Service ("NES") in connection with the Job Corp [sic] project which is the subject of this litigation." Although the Court finds that both parties freely used various corporate forms whenever the need arose or the mood struck them, there exists no basis to throw out Draper's claims because of the wrongful-conduct rule. Beyond that, the record contains sufficient evidence to require a trial regarding Draper's remaining claims. Therefore, the Court shall deny Irving's motion for summary disposition and set the case for trial.

## I. Factual Background

Defendant Irving has moved for summary disposition on Plaintiff Draper's remaining claims under MCR 2.116(C)(10), so the Court must consider "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." Maiden v Rozwood, 461 Mich 109, 120 (1999). In its previous opinion, the Court offered a detailed description of the factual context of the parties' dispute. Thus, the Court once again shall repair to that explanation of the case.

More than a decade ago, Plaintiff Draper and Defendant Irving began a business relationship in the construction industry. "Draper is an African American" who "has sought to take advantage of various programs offered by the federal and local government for minority contractors . . . ." See Plaintiffs' Second Amended Verified Complaint, ¶ 2. Irving was interested in becoming involved in "work set aside for a minority contractor such as Draper." Id., ¶¶ 9-10. On March 31, 2006, the two men entered into a purchase membership contract whereby Irving tendered \$25,000 to Draper in exchange for a 49-percent interest in Draper's company as security for the loan, but neither party has produced a partnership agreement between the two men.

In 2008, Plaintiff Draper and Defendant Irving learned of the Job Corps Project, which "was a complex renovation of a job training center in Grand Rapids, Michigan." See Plaintiffs' Second Amended Verified Complaint, ¶ 37. Because the Job Corps Project was defined as a "Historically Underutilized Business Zone ("HUBZone") project," see id., ¶ 38, and neither Draper nor Irving had an entity that had HUBZone certification, see id., ¶ 39, Irving enlisted the assistance of a HUBZone-certified entity named Nevilles Electric Service ("NES") owned by North Carolina resident Neville Blanton. The terms of that arrangement were memorialized in a management agreement signed on

December 15, 2009, by Blanton and Irving. Because of Blanton's impending Army deployment, Irving agreed to manage the business and affairs of NES "in connection with the [Job Corps] Project until the Project is completed." As a result, Irving became authorized to conduct business on behalf of NES with respect to the Job Corps Project.

Plaintiff Draper and Defendant Irving both played roles in the Job Corps Project that ended in a formal modification on February 7, 2014, authorizing a final payment of \$1,876,166.62 to NES. The electronic transfer of funds by the United States Department of Labor for final payment touched off a legal battle between Irving and NES. That dispute ended in a settlement, placed on the record on May 13, 2014, permitting Irving to obtain the money sent by the Department of Labor for the Job Corps Project. See Irving v Nevilles Electric Service, 17th Cir Case No 14-03615, Hearing Tr at 4-7 (May 13, 2014). Meanwhile, Draper commenced this case against Irving, seeking a significant share of the pay-out that Irving received from the Department of Labor. In his second amended complaint, Draper demanded a declaratory judgment that he and Irving had a partnership or a joint venture, and Draper also presented claims against Irving for breach of fiduciary duties, conversion, and unjust enrichment, as well as a request for a constructive trust. Irving responded with counterclaims against Draper for statutory and common-law conversion, unjust enrichment, breach of a promissory note, claim and delivery, and a claim for profit. Irving also filed a third-party complaint against the Draper Group on a claim involving an allegation of a subcontract breach. On July 8, 2015, the Court issued a written opinion that left the following claims and counterclaims in issue: (1) Counts One, Three, Five, and Seven of Draper's second amended complaint; and (2) Counts Three, Five, Six, and Seven of Irving's counterclaims. The Court must now resolve Irving's second summary-disposition motion requesting dismissal of every single one of Draper's four remaining claims.

## II. Legal Analysis

In addressing Defendant Irving's latest motion for summary disposition, the Court must bear in mind that "[s]ummary disposition is appropriate under MCR 2.116(C)(10) 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 consider Irving's contentions that the wrongful-conduct rule bars Plaintiff Draper's claims and that no genuine issue of material fact exists with respect to Draper's claim to an entitlement to one-half of the profits obtained by Irving as an employee of NES.

### A. The Wrongful-Conduct Rule.

Defendant Irving contends that Plaintiff Draper cannot proceed on any of his claims because Draper's conduct implicates the wrongful-conduct rule. "When a plaintiff's action is based, in whole or in part, on his own illegal conduct, a fundamental common-law maxim generally applies to bar the plaintiff's claim: [A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party." Orzel v Scott Drug Co, 449 Mich 550, 558 (1995). The wrongful-conduct rule has two important limitations. First, "the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute." See id. at 561. Second, "a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages." See id. at 564. Thus, "the wrongful conduct rule only applies if a plaintiff's wrongful conduct is a proximate cause of his injuries." See

Cervantes v Farm Bureau General Ins Co of Michigan, 272 Mich App 410, 417 (2006). Here, even assuming, *arguendo*, that Draper engaged in illegal conduct in the manner in which he structured and represented his business ventures, Irving cannot establish that such illegal conduct was a proximate cause of Draper's injuries.

Plaintiff Draper's remaining claims against Defendant Irving include partnership, breach of fiduciary duty, conversion of books and records, and unjust enrichment. Draper's basic theory is that he and Irving must share profits derived from the Job Corps project amounting to nearly \$2 million. According to Irving, however, "Draper is admittedly guilty of wrongful conduct, including perjury and misrepresentation to the SBA, MDOT, and IRS" concerning the existence of a partnership. The flaw in Irving's argument for invocation of the wrongful-conduct rule is this: any misrepresentations by Draper have no bearing upon Draper's alleged damage flowing from Irving's decision to keep the Job Corps profits all to himself. To be sure, Irving's opposition to Draper's claims may be built on Draper's statements – both formal and informal – disclaiming any involvement or financial interest in a partnership. But Draper's statements to that effect are not "an integral and essential part of his case." See Cervantes, 272 Mich App at 417, quoting Manning v Bishop of Marquette, 345 Mich 130, 136 (1956). To the contrary, Draper's statements will be fodder for the defense, rather than for the plaintiff, at the trial.<sup>1</sup> Consequently, the Court concludes that the wrongful-conduct rule does not bar Draper's claims because any wrongful conduct on Draper's part was not "a proximate cause of his injuries." See Cervantes, 272 Mich App at 417.

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<sup>1</sup> This simple point matters a great deal because "if a complete cause of action can be shown without the necessity of proving the plaintiff's illegal act, the plaintiff will be permitted to recover notwithstanding that the illegal act may appear incidentally and may be important to the explanation of other facts in the case." Hashem v Les Stanford Oldsmobile, Inc, 266 Mich App 61, 90 (2005), quoting Poch v Anderson, 229 Mich App 40, 49 (1998).

B. Evidence of a Partnership.

Defendant Irving demands summary disposition because “there is absolutely no evidence to support the partnership claimed in this matter as shown by the exhibits, sworn testimony of Draper, the affidavit of Irving, and the sworn deposition testimony of [Kim] Mauric[.]” The Court rejected that very argument in its previous lengthy opinion, expressly stating that “[t]he record is replete with evidence of a partnership between Plaintiff Draper and Defendant Irving.” See Opinion and Order on Cross-Motions for Summary Disposition at 6 (July 8, 2015). The Court need not repeat all of the evidence supporting that statement, notwithstanding Irving’s reference to “new deposition testimony and documentary evidence made available to Irving since the prior summary disposition motion in this case.”<sup>2</sup> Nothing in Irving’s “new” evidence undermines the Court’s determination that genuine issues of material fact preclude summary disposition on Draper’s remaining claims.

III. Conclusion

For all of the reasons set forth in this opinion, the Court must reject Defendant Irving’s latest motion for summary disposition. Simply stated, the remaining claims must be resolved at trial. The Court shall schedule a final settlement conference and then a trial in this matter.

IT IS SO ORDERED.

Dated: July 7, 2016



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

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<sup>2</sup> In the Specialized Business Docket, the Court routinely must deal with serial motions for summary disposition based upon an evolving record, which demonstrates the wisdom of deferring consideration of relief pursuant to MCR 2.116(C)(10) until discovery has closed.