

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

DECARTO DRAPER,

Plaintiff/Counter-Defendant,

vs.

JOSH IRVING,

Defendant/Counter-Plaintiff
and Third-Party Plaintiff,

vs.

UNIVERSAL DEVELOPMENT OF MICHIGAN,
LLC d/b/a DRAPER GROUP USA,

Third-Party Defendant.

Case No. 14-04755-CBB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER ON CROSS-MOTIONS FOR SUMMARY DISPOSITION

Confucius observed that “life is really simple, but we insist on making it complicated.” The same can be said of this dispute, which the parties have turned into a cornucopia of complexity. In simple terms, Plaintiff DeCarto Draper and Defendant Josh Irving share a history in the construction industry, including their participation in a Gerald R. Ford Job Corps Project (“Job Corps Project”). Draper insists that he should receive a share of the profits from the Job Corps Project for his role as Irving’s general partner, whereas Irving contends that Draper was merely a subcontractor on the Job Corps Project who has no right to any share of the profits from that project. Irving has also dragged Draper’s enterprise, Universal Development of Michigan, LLC d/b/a Draper Group USA (“Draper Group”), into the fray. Although the Court can engage in some modest pruning of claims in response to the parties’ summary-disposition motions, the Court cannot end the case at this juncture.

I. Factual Background

The Court's first sign of trouble came in the form of the parties' reliance upon no fewer than four subsections of MCR 2.116(C) in their competing motions for summary disposition. According to the parties' submissions, the Court should consider summary disposition under MCR 2.116(C)(5), (7), (8), and (10). First, the Court must address the availability of summary disposition under MCR 2.116(C)(5), which is warranted if the plaintiff lacks the capacity to sue and should be assessed by considering the "pleadings, depositions, admissions, affidavits and other documentary evidence to determine whether the defendant is entitled to judgment as a matter of law." *In re Quintero Estate*, 224 Mich App 682, 692 (1997). Second, the Court must consider summary disposition under MCR 2.116(C)(7), which should be granted if a legal bar forecloses a claim and depends upon analysis of "affidavits, depositions, admissions, or other documentary evidence" to the extent those materials contradict the allegations in the pleadings. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). Third, the Court must weigh summary disposition under MCR 2.116(C)(8), which simply turns upon the "the legal sufficiency of the complaint" and requires the Court to review "[a]ll well-pleaded factual allegations" in that pleading. *Id.* Finally, the Court must decide whether summary disposition under MCR 2.116(C)(10) is appropriate at this early stage of the proceedings, *see Liparoto Construction, Inc v General Shale Brick, Inc*, 284 Mich App 25, 33-34 (2009), and whether "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . establish a genuine issue regarding any material fact[.]" *Maiden*, 461 Mich at 120.

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, see Irving Master Exhibit B, but neither side 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. See Irving Master Exhibit S. Significantly, 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." Id. As a result, Irving became authorized to conduct business on behalf of NES with respect to the Job Corps Project. See id. ("Agreement" § 3 entitled "Authority").

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. See Irving Master Exhibit F4. The electronic transfer of funds by the United States Department of Labor for the 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 funds 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 action against Irving, seeking a significant share of the pay-out that Irving received from the Department of Labor. In a second amended complaint, Draper has demanded a declaratory judgment that he and Irving had a partnership or a joint venture, and Draper has also presented claims against Irving for breach of fiduciary duties, conversion, and unjust enrichment, as well as a request for a constructive trust. Not to be outdone, Irving has made counterclaims against Draper for statutory and common-law conversion, unjust enrichment, breach of a promissory note, claim and delivery, and a claim for profit. Beyond that, Irving has filed a third-party complaint against the Draper Group on a claim that appears to involve an allegation of a subcontract breach. In short order, the parties filed a passel of motions seeking summary disposition on the various claims, counterclaims, and third-party claims. As a result, the Court must wade into the swamp of pleadings and evidence to determine whether anyone is entitled to summary disposition on anything.

II. Legal Analysis

To the extent that either side seeks summary disposition under MCR 2.116(C)(5) based upon a real-party-in-interest theory, see In re Beatrice Rottenberg Living Trust, 300 Mich App 339, 354-357 (2013), the Court must determine whether any party “lack[s] the capacity to sue.”¹ See Quintero Estate, 224 Mich App at 692. With regard to the requests for summary disposition pursuant to MCR

¹ The second amended complaint listed three corporate entities – Diversified Solutions Group USA, Inc., Enviro-Tech Services, LLC, and Midwest HR Solutions, LLC – in addition to DeCarto Draper as plaintiffs. Defendant Irving challenged the corporate plaintiffs’ right to pursue this action, which prompted those parties to agree to dismissal of their claims in a stipulated order entered on June 5, 2015, so the Court need not consider those three corporate plaintiffs’ claims against Irving in resolving the parties’ competing motions for summary disposition.

2.116(C)(7), the Court may grant relief only if “there is no factual dispute[.]” RDM Holdings, Ltd v Continental Plastics Co, 281 Mich App 678, 687 (2008). With respect to the demands for the entry of summary disposition under MCR 2.116(C)(8), the Court may award 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. And in addressing the parties’ motions for summary disposition under MCR 2.116(C)(10), the Court must provide relief only if “the proffered evidence fails to establish a genuine issue regarding any material fact[.]” Id. at 120. Using these standards, the Court must sort through a myriad of claims, counterclaims, and third-party claims advanced by Plaintiff Draper and Defendant Irving.

A. Plaintiff Draper’s Claims.

Plaintiff Draper’s second amended complaint includes seven claims against Defendant Irving, but all of those claims proceed from the premise that Draper and Irving formed a partnership. Thus, the Court shall focus first and foremost upon the evidence supporting the existence of a partnership, and then the Court shall turn to the consequences of any partnership that may exist.

1. Count 1 – Partnership

In Count One, Plaintiff Draper contends that he and Defendant Irving formed a partnership, which Irving failed to honor in disbursing funds from the Job Corps Project. Under Michigan law, “[a] partnership is an association of 2 or more persons . . . to carry on as co-owners of a business for profit[.]” See MCL 449.6(1). The “statute does not require partners to be aware of their status as ‘partners’ in order to have a legal partnership.” Byker v Mannes, 465 Mich 637, 646 (2002). Indeed, the “statutory language is devoid of any requirement that the individuals have the subjective intent

to create a partnership,” *id.*, so “it is unimportant whether the parties would have labeled themselves ‘partners.’” *Id.* at 638-639. “Instead, the focus is on whether individuals intended to jointly carry on a business for profit within the meaning of the Michigan Uniform Partnership Act, MCL 449.1 *et seq.*, regardless of whether they subjectively intended to form a partnership.” *Id.* at 639. Thus, the Court must assay the evidence to determine whether Draper and Irving intended to jointly carry on a business for profit.

The record is replete with evidence of a partnership between Plaintiff Draper and Defendant Irving. In 2006, Irving provided a \$25,000 loan to Draper in exchange for a 49-percent interest in one of Draper’s entities. *See* Irving Master Exhibit B. In 2008, Irving obtained advice from counsel about a new management structure for his financial dealings with Draper. *See* Plaintiff’s Brief in Opposition to Defendant’s Combined Motion for Summary Disposition, Exhibit 5. In 2009, Irving signed a management agreement as “Vice President” of “Draper Group U.S.A.” with NES. *See id.*, Exhibit 9. That management agreement, which encompassed the Job Corps Project, allowed Irving and the Draper Group to obtain HUBZone status. *See id.* Although that agreement was superseded on December 15, 2009, by a new management agreement between Irving and NES, *see* Irving Master Exhibit S, Draper and Irving worked together on the Job Corps Project with the understanding that the two men would share the “profits from the Job Corps Project as 50/50 partners.” *See* Plaintiff’s Brief in Opposition to Defendant’s Combined Motion for Summary Disposition, Exhibit 6 (Affidavit of DeCarto Draper, ¶ 14).

Defendant Irving insists that he never entered into a partnership with Plaintiff Draper, whom Irving describes as a mere subcontractor on the Job Corps Project. Irving contends that a response from Draper to the United States Small Business Administration (“SBA”) conclusively proves that

Draper denied his involvement in any partnership, but Draper's response to the SBA's inquiry about the issue is, at best, ambiguous and, at worst, inscrutable. Specifically, Philip Barambani of the SBA sent an e-mail to Draper on November 22, 2010, asking for "[i]dentification of the owners/partners, including each owner's ownership percentage." See Defendant Josh Irving's Supplementary Exhibit and Supplement to Pending Summary Disposition Motions, Exhibit V4 (e-mail correspondence from Philip A. Barambani, Question 4(c)). In a two-page signed response, Draper explained that "[t]he four businesses listed are businesses that my wife, Patrice Ann Draper, owns and controls all or parts of[,] but Draper did not mention any partnership with Irving. See id. To be sure, the omission of a partnership with Irving could lead a rational trier of fact to conclude that Draper recognized he had no partnership with Irving, but a rational trier of fact could just as readily conclude that Draper did not recognize the precise nature of his relationship with Irving, so a partnership could still exist. As our Supreme Court has explained, "one analyzes whether the parties acted as partners, not whether they subjectively intended to create, or not to create, a partnership." Byker, 465 Mich at 649. Thus, genuine issues of material fact concerning the existence of a partnership between Draper and Irving preclude the Court from awarding summary disposition to either party on Draper's partnership claim in Count One of his second amended complaint.

2. Count Two – Joint Venture

Plaintiff Draper asserts in Count Two of his second amended complaint that if his business relationship with Defendant Irving cannot be treated as a partnership, then it must be recognized as a joint venture. Under Michigan law, joint ventures "have been defined as associations to carry out a single business enterprise for profit." See Alfieri v Bertorelli, 295 Mich App 189, 199 (2012). "A

joint venture has six elements: (a) an agreement indicating an intention to undertake a joint venture; (b) a joint undertaking of (c) a single project for profit; (d) a sharing of profits as well as losses; (e) contribution of skills or property by the parties; (f) community interest and control over the subject matter of the enterprise.” Kay Investment Co, LLC v Brody Realty No 1, LLC, 273 Mich App 432, 437 (2006). Because “a joint venture differs from a partnership[,]” see id. at 439, the existence of genuine issues of material fact concerning Draper’s partnership claim does not necessarily foreclose summary disposition on Draper’s joint-venture claim.

Unlike a partnership, a joint venture “arises only when [the participating parties] intend to associate themselves as such.” Kay Investment, 273 Mich App at 439, quoting Hathaway v Porter Royalty Pool, Inc, 296 Mich 90, 103 (1941). “This intention is to be determined in accordance with the ordinary rules governing the interpretation and construction of contracts.” Id. A joint venture can only involve “the parties to a particular contract,” see id., but no such contract between Draper and Irving exists, so the Court concludes that Draper cannot proceed on a joint-venture claim against Irving. Unlike a partnership, which can come into existence even “absent an express agreement,” see Byker, 465 Mich at 652, the existence of a joint venture depends upon “a particular contract,”² see Kay Investment, 273 Mich App at 439, so the Court must grant summary disposition to Irving pursuant to MCR 2.116(C)(8) on Draper’s joint-venture claim in Count Two.

² Nearly all forms of business organization depend upon the existence of some document to define the entity’s nature and structure. Partnerships constitute an exception to this general rule. If participants in a business organization fail to follow the requirements for forming a corporation, the resulting entity is treated as a partnership unless it can secure the benefits of incorporation through a doctrine such as corporation by estoppel or *de facto* corporation. See Duray Development, LLC v Perrin, 288 Mich App 143, 152-153 (2010). From this perspective, a joint venture is no different than any other business organization in that it depends for its existence upon a document that defines its nature and structure. It would be hopelessly confusing if a business organization could be either a partnership or a joint venture in the absence of such a document.

3. Count Three – Breach of Fiduciary Duties

Count Three of Plaintiff Draper’s second amended complaint accuses Defendant Irving of breach of fiduciary duties. Michigan law imposes fiduciary obligations upon partners in business ventures, including a duty to render information, see MCL 449.20, and a duty to account for benefits and hold profits of the partnership. See MCL 449.21(1). Moreover, Michigan “courts universally recognize the fiduciary relationship of partners and impose on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs.” Band v Livonia Assocs, 176 Mich App 95, 113 (1989). By all accounts, Irving distributed funds from the Job Corps Project without regard for Draper’s interest in those funds as Irving’s partner, but the Court has determined that genuine issues of material fact remain as to the existence of a partnership, so the Court cannot yet declare a winner on Draper’s claim for breach of fiduciary duties. If a partnership existed, then Draper’s success on that claim seems inevitable. But if no partnership existed, then Irving owed no fiduciary duties to Draper, who would therefore have no right to recourse on his claim for breach of fiduciary duties. Accordingly, the Court must deny summary disposition to both parties on Count Three of Draper’s second amended complaint.

4. Count Four – Conversion of Funds

Count Four of the second amended complaint rests upon the allegation that Defendant Irving agreed to pay three of Plaintiff Draper’s corporate entities “monies related to the Job Corps Project.” See Plaintiffs’ Second Amended Verified Complaint, ¶ 115. Count Four characterizes the inaction of Irving in failing to pay those entities as statutory conversion under MCL 600.2919a, see Aroma Wines & Equipment, Inc v Columbia Distribution Services, Inc, Nos 148907 & 148909, slip op at

17-23 (Mich June 17, 2015), but plaintiffs' counsel not only admitted at oral argument that all of the corporate entities have been paid in full, but also submitted a stipulated order of dismissal regarding all of the corporate entities' claims. Because the Court signed and entered that stipulated dismissal on June 5, 2015, the Court need not grant summary disposition to Irving on Court Four of the second amended complaint. But the Court notes in passing that the corporate entities have acknowledged payment in full, so they can no longer pursue their statutory-conversion claim against Irving.

5. Count Five – Conversion of Books and Records

In a terse claim set forth as Count Five of the second amended complaint, Plaintiff Draper contends that Defendant “Irving took books, records and other papers from Plaintiffs including some personal tax returns of Draper and lease agreements between Draper Group and its landlord which Irving is clearly not entitled to possess.” See Plaintiffs' Second Amended Verified Complaint, ¶ 122. Irving's request for summary disposition on this claim proceeds from the false premise that Draper has alleged conversion of corporate documents claimed by Diversified Solutions Group USA, Inc., but the second amended complaint clearly refers to Draper's personal papers. As a result, the Court has no basis to award summary disposition to Irving on the conversion claim set forth in Count Five. To be sure, the claim seems like nothing more than a tempest in a teapot, but the Court cannot award summary disposition on the principle of *de minimis non curat lex*.

6. Count Six – Constructive Trust

Count Six of the second amended complaint sets forth a claim styled as “Injunctive Relief – Constructive Trust.” In simple terms, that count asks the Court to order Defendant Irving not to transfer any of the proceeds of the Job Corps Project. But our Court of Appeals recently explained:

“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). Just as 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., so too must the Court hold that Plaintiff Draper’s claim in Count Six that seeks to impose a constructive trust fails to state a cognizable claim. Consequently, the Court must grant summary disposition to Irving on Draper’s constructive-trust claim.

7. Count Seven – Unjust Enrichment

Plaintiff Draper’s unjust-enrichment claim set forth in Count Seven of the second amended complaint seems redundant because it merely seeks Draper’s share of the Job Corps Program funds. But venerable precedent suggests that Draper’s unjust-enrichment claim does not stand or fall on his partnership claim. Our Court of Appeals has held that a plaintiff who fails to establish a partnership may obtain compensation “under a theory of *quantum meruit* or quasi-contract of employment” for services rendered in aid of the business venture. Rhoades v Barcal, 65 Mich App 315, 321 (1975). Thus, the Court must deny summary disposition to Irving on Draper’s unjust-enrichment claim and permit that cause of action to proceed in tandem with Draper’s partnership claim unless Irving can establish that Draper performed no uncompensated services for the business venture.

B. Defendant Irving’s Counterclaims.

Acting on the assumption that the best defense is a good offense, Defendant Irving has made seven counterclaims against Plaintiff Draper. For his part, Draper has chosen to challenge only four of those counterclaims at this juncture, leaving the other three counterclaims arising from partnership

concerns to another day. Therefore, the Court shall follow Draper's lead and limit its analysis of the counterclaims to Counts One, Two, Four, and Seven in "Defendant's Counterclaim Against Plaintiff DeCarto Draper."

1. Counts One and Two – Conversion

Counts One and Two, which allege statutory and common-law conversion respectively, rest on the allegation that Plaintiff Draper transferred \$30,000 on May 20, 2014, from a Fifth Third Bank account of Enviro-Tech Services, LLC ("Enviro-Tech"). See Irving Master Exhibit V. Draper does not contest his involvement in that transfer of funds, but he insists Irving has no ownership interest in Enviro-Tech, so Irving lacks standing to present the claims of Enviro-Tech. A document entitled "Enviro-Tech, LLC Assignment of Membership Interest of Member" demonstrates that Irving has no ownership interest in Enviro-Tech, see Brief in Support of Plaintiffs' Motion for Partial Summary Disposition on Defendant's Counterclaim, Exhibit 1, but Irving contends that "the funds did not at all belong to Enviro-Tech, but rather . . . belonged to Irving and were held in trust to pay Dewberry." The records from Fifth Third Bank make clear that the account from which Draper made the transfer belonged to Enviro-Tech. See Irving Master Exhibit V. Thus, every piece of evidence in the record belies Irving's claim that the \$30,000 in the Fifth Third Bank account belonged to him, as opposed to Enviro-Tech. Accordingly, although Enviro-Tech may have claims against Draper for the \$30,000 transfer, Irving cannot present those claims for Enviro-Tech. Because Irving lacks the legal capacity to assert any conversion claims concerning the transfer, the Court must award summary disposition to Draper under MCR 2.116(C)(5) on Counts One and Two of the counterclaims advanced by Irving. See Rottenberg Trust, 300 Mich App at 356-357.

2. Count Four – Breach of Promissory Note

By all accounts, Plaintiff Draper and Defendant Irving entered into a purchase membership contract on March 31, 2006, whereby Irving tendered \$25,000 to Draper in exchange for a 49-percent interest in Draper's company as security for the \$25,000 loan. See Irving Master Exhibit B. Along with the contract, Draper signed a promissory note on March 31, 2006, obligating himself to pay the sum of \$25,000 plus interest to Irving. See id. The promissory note expressly stated that the "unpaid principal balance of the Note together with the accrued interest shall be due and payable no later than June 30, 2006." Id. That date came and went without payment, but Irving undertook no collection effort until he filed his counterclaims on September 22, 2014. Not surprisingly, Draper has moved for summary disposition under MCR 2.116(C)(7) based upon the expiration of the six-year statute of limitations for breach-of-contract claims. See MCL 600.5807(8). Although Irving contends that the promissory note did not come due until May of 2014 when Draper acknowledged that "certain conditions precedent" were "unfulfilled and incapable of being fulfilled[,]" the promissory note's language flatly contradicts Irving's description of when the note came due. Because the note itself clearly states that Draper's obligation came due in full on June 30, 2006, yet Irving waited more than eight years before formally seeking redress for Draper's breach of his obligation on the promissory note, Irving's counterclaim is barred by the six-year statute of limitations, so the Court must award summary disposition to Draper under MCR 2.116(C)(7) on Count Four of the counterclaims.

3. Count Seven – Claim and Delivery

Count Seven of Defendant Irving's counterclaims includes a mélange of demands for items that Plaintiff Draper purportedly took from Irving, such as cement mixers, computers, and a copier.

According to Draper, all of the office equipment was purchased with funds from NES, so Irving has no right to that equipment. In contrast, Irving insists that he “purchased the computers and copier with his own funds borrowed from Triangle” Associates, Inc. Obviously, the Court cannot resolve this disagreement on the pleadings, so the Court cannot award summary disposition to either party under MCR 2.116(C)(8). Beyond that, although an equipment use agreement between Draper and NES dated June 30, 2014, appears to give Draper authority to use the office equipment, see DeCarto Draper’s Answer to Josh Irving’s Counterclaim, Exhibit A, the Court cannot yet say with confidence that that letter agreement resolves the issue of Draper’s right to possession of the office equipment at issue in Count Seven of Irving’s counterclaims. Thus, the Court must deny summary disposition to both sides under MCR 2.116(C)(10) on Count Seven.

C. Defendant Irving’s Third-Party Claim.

In a third-party claim against Plaintiff Draper’s company, the Draper Group, Defendant Irving alleges that a subcontract agreement between the Draper Group and NES obligates the Draper Group to defend and indemnify Irving – as the representative of NES – in connection with the instant case. This claim seems ludicrous because it involves two noncombatants, *i.e.*, NES and the Draper Group, in a partnership dispute between Irving and Draper. Nevertheless, the Court must consider the terms of the subcontract agreement in order to resolve Irving’s third-party claim against the Draper Group for defense and indemnification.

The 15-page “Subcontract Agreement Between Nevilles Electric Service and Draper Group, U.S.A.,” which Defendant Irving signed on behalf of NES and Plaintiff Draper signed on behalf of the Draper Group on July 12, 2010, defines the terms of the relationship between the two entities as

general contractor and subcontractor on the Job Corps Project. See Brief in Support of Third-Party Defendant's Motion for Summary Disposition on Third-Party Plaintiff's Complaint, Exhibit A. In Article 5 of that agreement, entitled "Insurance and Indemnity," the Draper Group agreed to:

defend, indemnify [sic] and hold harmless Contractor, Owner, Architect and all of their agents, employees and representative[s] . . . from and against any and all claims, losses, damages, suits, causes of action and liabilities of any kind including reasonable attorney fees and costs of litigation for (1) injuries, disease or death of any person, (2) for damage to or destruction of any property, (3) for damages associated with any breach of the contract, arising out of, resulting from or in connection with Draper Group U.S.A.[']s performance of this Subcontract.

Id., Exhibit A (Subcontract Agreement, § 5.7). Thus, the Draper Group agreed to shoulder all of the legal expenses in three distinct circumstances. First, the Draper Group must cover the legal expenses arising from "injuries, disease or death of any person," but no such calamity forms the basis for the instant case. Second, the Draper Group must pay the legal expenses resulting from "damage to or destruction of any property," but no such damage is claimed in this case. Finally, the Draper Group must reimburse NES for the legal expenses flowing from "damages associated with any breach of the contract, arising out of, resulting from or in connection with Draper Group['s] performance of this Subcontract." Nothing in the instant case arises from the Draper Group's "performance of this Subcontract." Indeed, the Draper Group apparently performed its duties under the subcontract and received payment from NES for its work, then the dispute underlying this case arose after the Draper Group finished its performance of the subcontract.³ Thus, section 5.7 of the subcontract agreement provides no justification for Irving's third-party claim for his defense costs and indemnification.

³ On March 4, 2014, Plaintiff Draper and Defendant Irving executed an agreement resolving all of the Draper Group's outstanding claims arising from the Job Corps Project. See Irving Master Exhibit E. Although that agreement did not resolve the dispute about Draper's individual right to a partnership share of the proceeds from the Job Corps Project, the agreement marked the conclusion of the Draper Group's participation as a subcontractor on the Job Corps Project.

As a fallback position, Defendant Irving insists that a separate provision – section 5.8 of the subcontract agreement – affords him the right to defense costs and indemnification from the Draper Group. Close review of that contract language, however, reveals just how much Irving must torture the English language to support such a third-party claim. Section 5.8, which merely expounds upon the obligation set forth in section 5.7, states as follows:

In any and all claims against Nevilles or any of its agents or employees by any employee of the Draper Group U.S.A., anyone directly or indirectly employed by the Draper Group U.S.A. or anyone for whose acts it may be liable, the indemnification obligation *under the previous paragraph* [i.e., section 5.7] shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Draper Group U.S.A. under workers' compensation acts, disability benefit acts or other employee benefit acts.

See Brief in Support of Third-Party Defendant's Motion for Summary Disposition on Third-Party Plaintiff's Complaint, Exhibit A (Subcontract Agreement, § 5.8) (emphasis added). This language simply provides that, if defense and indemnification are required under section 5.7, reimbursement of NES shall not be limited to workers' compensation caps or similar restrictions. No reading of that language can support Irving's third-party claim, so the Court must award summary disposition under MCR 2.116(C)(8) and (10) to the Draper Group on the third-party complaint.⁴

III. Conclusion

When hunting big game, it is far better to use a high-powered rifle than a blunderbuss. That lesson, unfortunately, has been lost on the parties, who have chosen to pick up all the rocks they can find and throw them at one another. Hopefully, the Court's Herculean effort to distill this case down

⁴ Although the third-party complaint purports to include a copy of the subcontract agreement as Exhibit S, the electronically filed pleading includes no attachments. Thus, the Court had to review a copy of the subcontract agreement attached to the Draper Group's motion for summary disposition, so the Court technically must award summary disposition under MCR 2.116(C)(10).

to its viable claims will guide the parties as this litigation moves forward. To summarize the Court's rulings, Plaintiff Draper may proceed on Counts One, Three, Five, and Seven of his second amended complaint, but Draper may no longer pursue the claims presented in Counts Two, Four, and Six. On the other side of the case caption, Defendant Irving may pursue Counts Three, Five, Six, and Seven of his counterclaims, but the Court must award summary disposition to Draper on Counts One, Two, and Four of Irving's counterclaims. Finally, the Court must grant summary disposition to the Draper Group on Irving's third-party complaint, so Irving may no longer pursue his third-party claim against the Draper Group for defense costs and indemnification.

IT IS SO ORDERED.

Dated: July 8, 2015



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