

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

FD@WYOMING, LLC, a Michigan limited liability company,

Plaintiff/Counter-Defendant,

vs.

WYOMING 44, INC, a Michigan corporation;  
PERAZZA REALTY & DEVELOPMENT,  
INC., a Michigan corporation; and JOSEPH  
PERAZZA,

Defendants/Counter-Plaintiffs.

---

Case No. 12-07540-CHB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER RESOLVING CROSS-MOTIONS FOR  
SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

This relatively simple contract dispute illustrates the tendency toward complexity when the law places too many arrows in each side's quiver. Plaintiff FD@Wyoming, LLC ("FDW"), which owns real property in Wyoming, enlisted Defendants Wyoming 44, Inc ("Wyoming 44") and Perazza Realty & Development, Inc. ("PRD") to serve as the developer and general contractor with respect to the construction of a Family Dollar store. In the middle of the project, the defendants walked off the job site, identifying disputes over payments as the justification for their departure. FDW hired a new general contractor, paid outstanding claims by several subcontractors, and filed suit against the defendants for breach of contract, violation of the Michigan Builders Trust Fund Act, conversion, and fraud. The defendants responded with three counterclaims. After granting summary disposition on two of the counterclaims on May 28, 2013, the Court now can further streamline the action by awarding summary disposition with respect to all of the remaining claims.

## I. Factual Background

Both sides have requested summary disposition under MCR 2.116(C)(10), “which tests the factual sufficiency” of the parties’ competing claims. See Maiden v Rozwood, 461 Mich 109, 120 (1999). Accordingly, the Court must “consider[] affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties” in resolving the competing summary-disposition motions. Id. Thus, the Court shall set forth the underlying facts by considering all of the materials supplied by the parties in connection with their cross-motions.

On June 3, 2011, the parties entered into a contract for the construction of a Family Dollar store in Wyoming, Michigan. See Plaintiff FD@Wyoming’s Brief in Support of Motion for Partial Summary Disposition, Exhibit 1. That contract required the defendants to “execute the entire Work described in the Contract Documents” and “achieve Substantial Completion of the entire Work not later than six months after construction commencement.” See id. (Articles 1 & 2). In exchange, the contract obligated Plaintiff FDW to “pay the Developer” \$1,091,800 “inclusive of land purchase.” See id. (Article 3). Moreover, the contract prescribed a schedule for “progress payments” and set forth a payment process involving the submission of “Applications for Payment . . . to the Architect by the Developer . . . .” See id. (Article 4). Finally, the contract anticipated that payments would be made in a series of draws, ending “upon completion” of the project. See id.

In fact, the parties’ conduct varied from the payment system laid out in the contract. First, Plaintiff FDW financed the project through a construction loan from New Buffalo State Bank, which furnished periodic payments to the defendants. Second, the defendants submitted sworn statements for payment to the bank in amounts that differed from the draw schedule in the contract. As a result, neither side hewed precisely to the payment terms of the contract, but the process seemed to work

well for a period of time as construction progressed. That is, New Buffalo State Bank official Brent Sorenson effectively filled the role of the architect in the payment process, and the defendants gave Sorenson periodic sworn statements of costs that resulted in prompt payment on each of those sworn statements.

But over time, friction developed. As Brent Sorenson put it, Defendant Joseph Perazza, who was the principal of the corporate defendants and a signatory to the contract, “didn’t like to do the sworn statements” because Perazza “thought the contract called for a different method of payment, though he was familiar with [the New Buffalo State] bank process.” See Plaintiff FD@Wyoming’s Brief in Support of Motion for Partial Summary Disposition, Exhibit 2 (Brent Sorenson Deposition at 5). In October and November 2011, Perazza submitted two sworn statements that resulted in the disbursement of funds for the defendants and several subcontractors, see id., (Exhibits 3 & 4), but the defendants failed to pay the subcontractors. Instead, the defendants walked off the job, leaving Plaintiff FDW to compensate the subcontractors and retain a new general contractor to take over the defendants’ roles. Ultimately, the new general contractor oversaw the completion of the construction project, and FDW filed this action against the defendants on August 15, 2012.

Plaintiff FDW’s frustration with the defendants is reflected in the nature and the number of claims asserted in its complaint. Specifically, FDW not only alleged breach of contract, but also set forth claims for violation of the Michigan Builders Trust Fund Act, MCL 570.151, *et seq*, statutory conversion, see MCL 600.2919a, and common-law fraud. The defendants responded in kind, filing three counterclaims on February 22, 2013. The Court pared down those counterclaims on May 28, 2013, granting summary disposition to FDW on the counterclaims for foreclosure of a construction lien and unjust enrichment. Consequently, the Court left the defendants with only one counterclaim

for breach of contract. That core legal theory, asserted by FDW and the defendants alike, turns upon which side committed the first significant breach of the construction contract. In addition, the Court must consider the other claims advanced by FDW in order to comprehensively resolve the parties' competing motions for summary disposition under MCR 2.116(C)(10).

## II. Legal Analysis

In resolving the cross-motions for summary disposition under MCR 2.116(C)(10), the Court must decide whether there remains any “genuine issue as to any material fact[.]” When “there is no genuine issue regarding any material fact,” then “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 well-established standards, the Court must review each remaining claim and counterclaim in turn.

### A. Breach of Contract.

Count One of the complaint and the third counterclaim both present claims for breach of the construction contract. Plaintiff FDW contends that the defendants breached the contract when they walked off the job site without justification. The defendants, in contrast, assert that FDW breached first by failing to make the payments required under the contract. Therefore, the parties' competing breach-of-contract claims turn upon which side breached the contract first. “The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform.” Able Demolition, Inc v City of Pontiac, 275 Mich App 577, 585 (2007). “However, the rule only applies if the initial breach was substantial.” Id. “To

determine whether a substantial breach occurred, a trial court considers ‘whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive.’” Id.

The defendants’ argument that Plaintiff FDW breached the construction contract first rests upon the timing and methodology of progress payments. By all accounts, the parties relied upon a banker, *i.e.*, Brent Sorenson of New Buffalo State Bank, rather than an architect as contemplated by Article 4 of the construction contract, to serve as the clearinghouse for progress payments. Compare Plaintiff FD@Wyoming’s Brief in Support of Motion for Partial Summary Disposition, Exhibit 2 (Brent Sorenson Deposition at 4) with id., Exhibit 1 (Article 4 of contract). The record confirms that the defendants received an initial “draw per contract” in the amount of \$450,000. See id., Exhibit 9 (Developer/Contractor First Draw Statement). After that, on August 11, 2011, Defendant Perazza submitted a sworn statement for \$115,500, which the bank approved for full payment on August 12, 2011. See id., Exhibit 10; see also id., Exhibit 2 (Deposition of Brent Sorenson at 8-9). In similar fashion, Perazza submitted a sworn statement for \$100,050 on October 20, 2011, and the bank then furnished \$95,830.47 to the defendants and issued a check for the balance of \$4,219.53 to the City of Wyoming.<sup>1</sup> Id., Exhibit 3. Finally, on November 18, 2011, Perazza submitted a sworn statement for \$252,200, which caused the bank to pay the defendants \$181,647 on November 22, 2011.<sup>2</sup> See id., Exhibit 4. After accepting that payment, the defendants walked off the job, contending that they had not been properly compensated under the terms of the construction contract.

---

<sup>1</sup> Although the record does not clearly reflect the basis for the payment of \$4,219.53 to the City of Wyoming, that payment in the form of a check coupled with the \$95,830.47 provided to the defendants adds up to precisely the amount of the sworn statement, *i.e.*, \$100,050.

<sup>2</sup> Brent Sorenson’s note of November 22, 2011, reflects that New Buffalo State Bank made a deposit of “\$252,200 - 70,553.00 = 181,647.” See Plaintiff FD@Wyoming’s Brief in Support of Motion for Partial Summary Disposition, Exhibit 4.

The defendants have offered a passel of arguments to justify their abandonment of the job site, but the Court need only concern itself with the basic contention that the defendants had a right to quit because Plaintiff FDW failed to compensate them as required by the construction contract.<sup>3</sup> The record reflects that, with one small and one large exception, the defendants' sworn statements were paid in full by New Buffalo State Bank. Accordingly, if the reductions made by the bank for the check to the City of Wyoming in the amount of \$4,219.53 with respect to the October 14, 2011, sworn statement and the reduction of \$70,553 taken from the November 15, 2011, sworn statement were justified, the defendants have no compelling argument that they were deprived "of the benefit which [they] reasonably expected to receive." See Able Demolition, 275 Mich App at 585. After careful review, the Court concludes that both reductions were entirely appropriate. The check issued to the City of Wyoming covered an outstanding obligation for taxes related to the property sale. See Plaintiff FD@Wyoming's Brief in Support of Motion for Partial Summary Disposition, Exhibit 8 (Deposition of Joseph Perazza at 49-50). The reduction of \$70,553 reflected a payment made by New Buffalo State Bank directly to a subcontractor,<sup>4</sup> which reduced the defendants' obligation to disburse the funds they received by a corresponding amount. See id. (Deposition of Joseph Perazza at 48-49). Therefore, FDW is entitled to summary disposition on the competing claims for breach of the construction contract.

---

<sup>3</sup> The defendants rely upon concerns about the use of a construction loan by Plaintiff FDW as the source of payments and the fatuous claim of Defendant Perazza that he had no obligations under the construction contract even though he signed both as the "developer" and "personally as an individual," see Plaintiff FD@Wyoming's Brief in Support of Motion for Partial Summary Disposition, Exhibit 1, but such assertions do not approach the level of a "substantial breach."

<sup>4</sup> The sworn statement of November 15, 2011, reflects an "amount currently owing" to "VP & Michiana Erectors" of \$110,000, see Plaintiff FD@Wyoming's Brief in Support of Motion for Partial Summary Disposition, Exhibit 4, which the bank largely paid directly to the subcontractor.

B. Michigan Builders Trust Fund Act.

Plaintiff FDW's claim that the defendants violated the Michigan Builders Trust Fund Act ("MBTFA"), MCL 570.151, *et seq*, rests upon the assertion that New Buffalo State Bank disbursed \$81,308 to the defendants to compensate subcontractors, but the defendants instead kept all of that money. The sworn statement dated November 15, 2011, plainly states that A-1 Asphalt was owed \$23,200, Roossien Masonry was owed \$22,000, Hoonhorst Concrete was owed \$8,000, and "VP & Michiana Erectors" was owed at least \$27,300. Notwithstanding the payment made by New Buffalo State Bank to the defendants on that sworn statement, the record establishes that the subcontractors did not receive their shares of the funds from the defendants. Instead, FDW ultimately had to make the subcontractors whole by expending an additional \$81,308 beyond the money that New Buffalo State Bank had given to the defendants to compensate the subcontractors. As a result, FDW claims that the defendants manifestly violated the Michigan Builders Trust Fund Act by misappropriating the money disbursed to them for payment of outstanding obligations to the subcontractors.

The MBTFA "'imposes a trust on funds paid to contractors and subcontractors for products and services provided under construction contracts.'" BC Tile & Marble Co, Inc v Multi Building Co, Inc, 288 Mich App 576, 583 (2010). "Officers of a corporation may be held individually liable when they personally cause their corporation to act unlawfully." Livonia Building Materials Co v Harrison Construction Co, 276 Mich App 514, 519 (2007). Therefore, both the corporate defendants and Defendant Perazza can potentially face civil liability for a violation of the MBTFA. Moreover, because "the MBTFA is a remedial statute, designed to protect people of the state from fraud in the construction industry, it should be construed liberally for the advancement of the remedy." BC Tile, 288 Mich App at 583. "To establish a claim under the MBTFA, a plaintiff must show: (1) that the

defendant is a contractor or subcontractor engaged in the building construction industry, (2) that the defendant was paid for labor or materials provided on a construction project, (3) that the defendant retained or used those funds, or any part of those funds, (4) that the funds were retained for any purpose other than to first pay laborers, subcontractors, and materialmen, and (5) that the laborers, subcontractors and materialmen were engaged by the defendant to perform labor or furnish material for the specific construction project.” Livonia Building Materials, 276 Mich App at 519. Here, the defendants’ liability under the MBTFA is beyond peradventure.

On November 22, 2011, based upon the sworn statement of Defendant Perazza signed and submitted on November 18, 2011, New Buffalo State Bank disbursed \$181,647 to the defendants. See Plaintiff FD@Wyoming’s Brief in Support of Motion for Partial Summary Disposition, Exhibit 4. Then, based upon directions from Defendant Perazza’s wife, Susan Perazza, the bank transferred \$190,000 from the recipient account of Defendant Wyoming 44 into a separate account in the name of Defendant PRD. See id., Exhibit 2 (Deposition of Brent Sorenson at 14). Despite the reference in the sworn statement of Defendant Perazza that he had engaged several subcontractors who should be paid specific amounts from that draw, those subcontractors did not receive their payments from the defendants. Instead, Plaintiff FDW ultimately had to make those subcontractors whole. As our Court of Appeals has consistently concluded, “a reasonable inference of appropriation arises from the payment of construction funds to a contractor and the subsequent failure of the contractor to pay laborers, subcontractors, materialmen, or others entitled to payment.”” BC Tile, 288 Mich App at 588. Here, that inference runs in favor of FDW and stands un rebutted by the defendants. Thus, the Court concludes that FDW is entitled to an award of summary disposition under MCR 2.116(C)(10) on its MBTFA claim against all of the defendants.

C. Statutory Conversion.

Plaintiff FDW accuses the defendants of statutory conversion, which consists of “stealing or embezzling property or converting property to [one]’s own use.” MCL 600.2919a(1)(a). Statutory conversion, like common law conversion, requires proof of “any distinct act of domain wrongfully exerted over another’s personal property in denial of or inconsistent with the rights therein.” Aroma Wines and Equipment, Inc v Columbia Distribution Services, Inc, 303 Mich App 441, 447 (2013). And beyond that, statutory conversion obligates the plaintiff to prove “that the conversion was to defendant’s ‘own use’ as required by MCL 600.2919a(1)(a).” See id. In this context, the “term ‘use’ requires only that a person ‘employ [the converted item] for some purpose,’” id. at 448, as opposed to merely giving it away or abandoning it. Finally, the plaintiff must have an ownership interest in the item superior to that of the defendant. See Foremost Ins Co v Allstate Ins Co, 439 Mich 378, 391 (1992).

Here, Plaintiff FDW’s statutory-conversion claim fails because FDW cannot demonstrate that it had an ownership interest in the funds destined for the subcontractors that was superior to that of the defendants. FDW authorized New Buffalo State Bank disburse funds to the defendants with the expectation that the defendants would, in turn, distribute those funds to the subcontractors. But by all accounts, the subcontractors had completed the work and thereby earned the money, so they – and not FDW – enjoyed the superior right to the funds as against the defendants. Accordingly, although the subcontractors may well have viable statutory conversion claims to assert, FDW cannot simply stand in their shoes and present their statutory conversion claims just because FDW ultimately paid those subcontractors in order to make them whole. Thus, the Court must grant summary disposition to the defendants under MCR 2.116(C)(10) on FDW’s statutory-conversion claim.

D. Common-Law Fraud.

Plaintiff FDW accuses each defendant of fraud, which requires proof that: “(1) the defendant made a material misrepresentation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury.” Roberts v Saffell, 280 Mich App 397, 403 (2008); see also Titan Ins Co v Hyten, 491 Mich 547, 555 (2012). Although Count Four of the complaint does not clearly identify the nature of the alleged fraud, FDW’s response to the defendants’ motion for summary disposition explains that the defendants purportedly “made representations in the sworn statements that subcontractors were being paid, and those representations were, in many instances, untrue.”

When the defendants submitted sworn statements in order to obtain progress payments, those sworn statements accurately documented the subcontractors’ work. When the defendants received funds in response to their final sworn statement, the defendants deprived the subcontractors of their shares of the allotment. That action, which occurred after submission of the final sworn statement, cannot render the assertions in that final sworn statement false at the time the assertions were made. “[A]n action for fraud must be predicated upon a false statement relating to a past or existing fact[.]” Cummins v Robinson Twp, 283 Mich App 677, 696 (2009). In this instance, the defendants did not include in any sworn statement a false assertion relating to a past or existing fact; they simply made representations about the work that had been performed. The defendants ultimately deprived the subcontractors of their money, but that development cannot support a fraud claim. As a result, the Court must grant summary disposition to the defendants on FDW’s common-law fraud claim.

### III. Conclusion

Plaintiff FDW has established to the Court's satisfaction two ironclad claims for relief based upon the defendants' actions in requesting funds through submission of sworn statements and then failing to distribute money rightfully earned by subcontractors. In reaching this conclusion, however, the Court has laid to rest not only the defendants' competing counterclaim for breach of contract, but also two claims pleaded by FDW that are ill-suited to these circumstances. Consequently, the Court shall schedule a hearing to determine the appropriate measure of damages on the claims for breach of contract and violation of the Michigan Builders Trust Fund Act.<sup>5</sup>

IT IS SO ORDERED.

Dated: April 23, 2014



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

---

<sup>5</sup> The court file does not reflect that either side made a timely request for trial by jury, so the Court shall take up the matter of damages as the assigned fact-finder in this case.