

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

GRAND POINTE PROPERTY, L.L.C.,

Plaintiff,

vs.

Case No. 12-07912-CZB

HON. CHRISTOPHER P. YATES

JOHN P. OOSTERBAAN; DAMION
FRASIER; GOLDEN HORSESHOE
HOLDINGS, LLC, a Michigan limited
liability company; MASS HOLDINGS,
LLC, a Michigan limited liability company;
MAS DEVELOPMENT, LLC, a Michigan
limited liability company; and SPOHN
CONSTRUCTION SERVICES, LLC, a
Michigan limited liability company,
jointly and severally,

Defendants.

OPINION AND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

With trial just three weeks away, the remaining defendants have made one last effort to fend off this lawsuit through summary disposition. Specifically, Defendant Golden Horseshoe, LLC (“Golden Horseshoe”) has moved for summary disposition on the claim for civil conspiracy, and Defendants Golden Horseshoe and John Oosterbaan requested summary disposition on the claim for violations of the Uniform Fraudulent Transfer Act (“UFTA”), MCL 566.31, *et seq.* But the defendants have made it difficult for the Court to finally resolve this matter on summary disposition because they have failed to recognize several claims that are still in play. When informed of this oversight, the defendants renewed their motion to dismiss the fraud claims pursuant to MCR 2.116(C)(8). Because the defendants have raised this issue on several prior occasions, the Court shall address the two motions for summary disposition as well as the request to dismiss the fraud claims pursuant to MCR 2.116(C)(8).

I. Procedural Posture

As the Court has explained in earlier opinions, this case is a reprise of a prior lawsuit in which Plaintiff Grand Pointe Property, L.L.C. (“Grand Pointe”) prevailed against SEC Grand Pointe, L.L.C. (“SEC”) for fraudulent misrepresentation of the facts underlying the sale of a shopping center. Thus, the Court need not delve into the nuances of this case, but the Court must explain the procedural posture of this case to ensure that the litigants know which claims are still at issue. On August 24, 2012, after the prior lawsuit had been tried and appealed, Grand Pointe filed a complaint against six defendants – John Oosterbaan; Jeffrey Smith; Damion Frasier; Golden Horseshoe; Mass Holdings, LLC (“Mass Holdings”); and Spohn Construction Services, LLC (“Spohn Construction”) – alleging five claims: silent fraud; fraudulent misrepresentation; innocent misrepresentation; constructive trust; and civil conspiracy. In the first round of summary disposition motions, the Court dismissed all claims against Oosterbaan and Smith, see Opinion and Order Granting, In Part, Defendants’ Motion to Dismiss the Complaint Pursuant to MCR 2.116(C)(7) and 2.116(C)(8) (Aug 26, 2013), and dismissed counts one through four against Frasier, leaving only a claim for civil conspiracy against Frasier.¹ See Opinion and Order Granting, In Part, Defendant Damion Frasier’s Motion for Summary Disposition (Aug 29, 2013).

Following the initial case conference, during which the defendants raised the issue of whether the fraud claims were pleaded with adequate specificity, the Court granted Plaintiff Grand Pointe leave to amend the complaint. Grand Pointe filed an amended complaint addressing these concerns, but also adding MAS Development, LLC (“MAS Development”) as a defendant in counts one through five and adding claims for violation of the UFTA, MCL 566.31, *et seq*, as well as MCL 450.4307 and 450.4308 against Defendants Oosterbaan and Golden Horseshoe. See First Amended Complaint (Sept 20, 2013).

¹ The parties have advised the Court that the remaining claim against Defendant Frasier has been settled, but the parties have yet to submit the settlement to the Court.

The addition of these claims produced quite a kerfuffle. First, the defendants asked the Court to strike the claims against Oosterbaan based on the doctrine of *res judicata*. The Court agreed that Grand Pointe could not bring counts one through five against Oosterbaan, but ruled that Grand Pointe could assert the new UFTA claim against Oosterbaan. See Order Denying Motion to Strike (Jan 15, 2014). Second, the defendants filed a motion to dismiss the fraud and civil-conspiracy claims because those claims were not pleaded with specificity. The Court agreed and granted the motion to dismiss, but also afforded Grand Pointe another chance to amend its pleadings. See Order Granting Motion to Dismiss (Jan 15, 2014).² Grand Pointe took advantage of the leave to amend and filed a Third Amended Complaint on January 24, 2014, that restated the claims for fraud and civil conspiracy. Finally, the defendants requested summary disposition as to each of the claims against MAS Development and the claims against Oosterbaan and Golden Horseshoe for violations of the UFTA as well as MCL 450.4307 and 450.4308. The Court granted summary disposition in favor of MAS Development and dismissed all claims against it. See Order Granting In Part, and Denying In Part, Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(7). The Court also dismissed the claim for violation of MCL 450.4307 and 450.4308 based upon the statute of limitations, but denied summary disposition on the UFTA claim. See id.

As a result of the Court's rulings, the remaining claims are as follows: silent fraud (count one) against Golden Horseshoe, Mass Holdings, and Spohn Construction; fraudulent misrepresentation (count two) against Golden Horseshoe, Mass Holdings, and Spohn Construction; innocent misrepresentation (count three) against Golden Horseshoe, Mass Holdings, and Spohn Construction; constructive trust (count four) against Golden Horseshoe, Mass Holdings, and Spohn Construction; civil

² Defendant Golden Horseshoe incorrectly presumes that the Court intended, by way of that order, to dismiss counts one through four (the fraud and constructive trust claims), leaving only the civil-conspiracy claim.

conspiracy (count five) against Golden Horseshoe, Mass Holdings, and Spohn Construction; and violations of the UFTA (count six) against Oosterbaan and Golden Horseshoe.³

II. Fraud Claims

Although the defendants did not file a motion for summary disposition on the fraud claims, the Court will nevertheless address whether the claims for fraud survive summary disposition under MCR 2.116(C)(8) because the defendants have raised this issue on several previous occasions. “A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint.” Michigan ex rel Gurganus v CVS Caremark Corp, No 146791, slip op at 15 (Mich June 11, 2014) (for publication). “When reviewing a motion brought under MCR 2.116(C)(8), the Court considers only the pleadings[,]” id., and “summary disposition is properly granted if ‘[t]he opposing party has failed to state a claim upon which relief can be granted.’” Id. “[C]onclusory statements that are unsupported by allegations of fact on which they may be based will not suffice to state a cause of action.” Id. at 16. Further, when the plaintiff’s claims “are based on alleged fraudulent activity, the heightened pleading standard for fraud claims” applies, id., so the fraud claims “must be stated with particularity.” See MCR 2.112(B)(1). Under this standard, the pleaded facts must “permit the court to infer more than the *mere possibility* of misconduct[.]” Gurganus, No 146791, slip op at 17 n 41.

First, count one of the Third Amended Complaint sets forth a claim for silent fraud, which is a tort of omission. To “prove silent fraud, also known as fraudulent concealment, the plaintiff must show that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure.” Lucas v Awaad, 299 Mich App 345, 363-364 (2013). Here, Plaintiff Grand Pointe alleges several specific acts Defendants Golden Horseshoe, Mass Holdings,

³ Plaintiff Grand Pointe has admitted that Mass Holdings is likely not a proper party to this action, but it has yet to dismiss Mass Holdings from the case.

and Spohn Construction took to conceal information regarding the stability of Atlanta Bread, the anchor tenant of the shopping center sold to Grand Pointe. See Third Amended Complaint, ¶ 19. But Grand Pointe has failed to allege that any of these defendants owed a duty of disclosure to Grand Pointe. Thus, Grand Pointe has failed to state a claim for silent fraud, and the Court must dismiss that claim.

Second, count two pleads a claim for fraudulent misrepresentation, which “entails a defendant making a false representation of material fact with the intention that the plaintiff would rely on it, the defendant either knowing at the time that the representation was false or making it with reckless disregard for its accuracy, and the plaintiff actually relying on the representation and suffering damages as a result.” See Alfieri v Bertorelli, 295 Mich App 189, 193 (2012). Here, Plaintiff Grand Pointe has specifically alleged that Defendants Golden Horseshoe, Mass Holdings, and Spohn Construction took actions to conceal Atlanta Bread’s instability. For example, according to Grand Pointe, Golden Horseshoe and Mass Holdings made rent payments on behalf of Atlanta Bread, see Third Amended Complaint, ¶ 19(A)(i), (iv), and (vi), and all three defendants concealed their knowledge that Atlanta Bread would be terminating its lease. See id., ¶ 19(B). Further, Grand Pointe has alleged that the three defendants persuaded Atlanta Bread to conceal its financial situation from Grand Pointe. See id., ¶ 19(G)-(K). Grand Pointe has not alleged, however, that Golden Horseshoe, Mass Holdings, or Spohn Construction actually made a false representation to Grand Pointe, so Grand Pointe has failed to state a claim for fraudulent misrepresentation.

Finally, count three sets out a claim for innocent misrepresentation, which “requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.” See Barclae v Zarb, 300 Mich App 455, 476 (2013). As the Court has previously noted, Plaintiff Grand Pointe has failed to allege that Defendants Golden Horseshoe, Mass Holdings, or Spohn Construction owed any duty of care to Grand Pointe. Thus,

Grand Pointe has also failed to state a claim for innocent misrepresentation. Consequently, the Court must grant summary disposition under MCR 2.116(C)(8) in favor of the defendants on each of the three fraud claims.

III. Civil Conspiracy

Next, the defendants request summary disposition on the claim for civil conspiracy.⁴ Although the defendants do not indicate the rule upon which they base this request, they contend that the claim for conspiracy must be dismissed because Plaintiff Grand Pointe has not pleaded facts sufficient to support this claim. Thus, the Court must review this motion under the standards prescribed by MCR 2.116(C)(8), which “tests the legal sufficiency of the complaint.” See Gurganus, No 146791, slip op at 15. Such a motion for summary disposition is properly granted if “[t]he opposing party has failed to state a claim upon which relief can be granted.” See MCR 2.116(C)(8).

Here, the defendants contend that Grand Pointe has not adequately alleged facts to establish that the defendants were involved in a civil conspiracy. Under Michigan law, “[a] civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.” Advocacy Org for Patients & Providers v Auto Club Ins Ass’n, 257 Mich App 365, 384 (2003). A “claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort.” Id. But as the Court indicated in a previous order, Grand Pointe’s claim for civil conspiracy against the defendants stands on firm legal footing even though the Court has granted summary disposition in favor of the defendants on the underlying tort claims. That is because once a plaintiff has established a “civil wrong,” the claim of conspiracy, “by reason of the connection it involves among the conspirators, may cause individuals to

⁴ Although this motion was filed only by Defendant Golden Horseshoe, the Court shall also consider the motion as to Defendants Mass Holdings and Spohn Construction because the defendants incorrectly presumed that this claim remained only as to Golden Horseshoe.

be responsible, who, but for the conspiracy, would not be responsible at all.” See Roche v Blair, 305 Mich 608, 614 (1943). Here, SEC was found liable for fraudulent misrepresentation in the previous lawsuit. Thus, because Grand Pointe has alleged that the defendants conspired with SEC to commit the fraud, the defendants may be held liable for civil conspiracy. Therefore, the Court cannot grant the defendants’ motion for summary disposition as to this claim.

IV. UFTA Violations

Finally, Defendants Golden Horseshoe and John Oosterbaan seek summary disposition under MCR 2.116(C)(7) on the UFTA claim. When addressing a motion for summary disposition pursuant to MCR 2.116(C)(7), the Court must review “affidavits, depositions, admissions, or other documentary evidence” submitted by the parties, Maiden v Rozwood, 461 Mich 109, 119 (1999), but the complaint should be “accepted as true unless contradicted by documentation submitted by the movant.” Id. “If there is no factual dispute, whether a plaintiff’s claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide.” RDM Holdings, Ltd v Continental Plastics Co, 281 Mich App 678, 687 (2008). Here, Plaintiff Grand Pointe has alleged that Golden Horseshoe and Oosterbaan violated the UFTA by accepting member distributions from SEC between May 5, 2007, and December 31, 2007, in connection with the sale of the shopping center. See Third Amended Complaint, ¶ 64.

As the Court noted in a previous order, an UFTA claim must be commenced within six years of the violation or within two years of the discovery of the violation if the violation was fraudulently concealed. See MCL 566.39(a), citing MCL 600.5813 and 600.5855. Grand Pointe first pleaded the UFTA claim on September 20, 2007, and Grand Pointe has not presented any proof indicating that Golden Horseshoe or Oosterbaan fraudulently concealed the wrongful transfer. Thus, the two-year discovery rule does not apply, so the UFTA claim must have accrued after September 20, 2007, to fall

within the six-year statute of limitations. Golden Horseshoe has submitted proof that the transfer of funds from SEC to Golden Horseshoe and Oosterbaan took place on May 10, 2007. See Renewed Motion as to Golden Horseshoe Holdings, LLC, and Motion as to John P. Oosterbaan to Dismiss Count VI of the Plaintiff's Third Amended Complaint, Violation of the Uniform Fraudulent Transfer Act (UFTA), Exhibit A and Exhibit B (Affidavit of John P. Oosterbaan, ¶¶ 3-4). Thus, the UFTA claim against Golden Horseshoe and Oosterbaan is barred by the six-year statute of limitations.

IV. Conclusion

For the reasons set forth in this opinion, the Court must dismiss Plaintiff Grand Pointe's claims for silent fraud, fraudulent misrepresentation, and innocent misrepresentation against Defendants Golden Horseshoe, Mass Holdings, and Spohn Construction pursuant to MCR 2.116(C)(8). But the Court cannot dismiss the claim against those defendants for civil conspiracy, which is based upon the fraud that has already been found to have been committed by SEC. Additionally, Defendants Golden Horseshoe and Oosterbaan have made a persuasive showing that the UFTA claim is barred by the statute of limitations, so the Court must grant summary disposition under MCR 2.116(C)(7) on the UFTA claim. Consequently, the following claims will be at issue during the trial scheduled for July 21, 2014: constructive trust (count four) and civil conspiracy (count five) against Defendants Golden Horseshoe, Mass Holdings, and Spohn Construction.⁵

IT IS SO ORDERED.

Dated: July 3, 2014



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

⁵ This opinion contains only a passing reference to Grand Pointe's constructive-trust claim because the defendants have not challenged this claim in their motion for summary disposition.