

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

CONSUMERS CONCRETE CORPORATION,

Plaintiff,

Case No. 13-10498-CZB

vs.

HON. CHRISTOPHER P. YATES

BAY BLOCK, LLC; and WILLIAM BOOTH
HUNT, jointly, individually, and severally,

Defendants.

ORDER GRANTING DEFENDANT WILLIAM B. HUNT'S MOTION FOR
SUMMARY DISPOSITION, BUT PERMITTING LEAVE TO AMEND

Plaintiff Consumers Concrete Corporation (“Consumers”) extended a \$40,000 line of credit to Defendant Bay Block, LLC (“Bay Block”) so that Consumers could supply Bay Block with concrete construction materials on credit and Bay Block could pay Consumers after it received payment from its end customers. Consumers concluded that Bay Block defaulted on the line of credit, so Consumers filed this lawsuit against Bay Block and its principal, Defendant William Hunt. The Court dismissed the claims against Bay Block on July 2, 2014, for want of personal service, and Defendant Hunt now requests summary disposition under MCR 2.116(C)(8) on all of the claims against him. A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. See Michigan ex rel Gurganus v CVS Caremark Corp, 496 Mich 45, __ (2014). In addressing such a motion, “the court considers only the pleadings[,]” id., and the motion “is properly granted if ‘[t]he opposing party has failed to state a claim on which relief can be granted.’” Id. Applying this standard, the Court must dismiss all claims against Hunt, but the Court shall nonetheless afford Consumers leave to amend its complaint pursuant to MCR 2.116(I)(5).

Plaintiff Consumers has advanced five claims against Defendant Hunt: (1) breach of contract; (2) open account and account stated; (3) unjust enrichment; (4) violation of the Michigan Builders' Trust Fund Act ("MBTFA"), MCL 570.151, *et seq.*¹; and (5) conversion. First, Consumers concedes that Count One for breach of contract and Count Two for open account and account stated must fail as a matter of law because those claims are based upon the contract between Consumers and Bay Block. Defendant Hunt was not a party to that contract, nor did he guaranty Bay Block's performance of the contract. See Complaint, Exhibit A. Under well-established Michigan law, "a shareholder or officer of a corporation is generally not personally liable for debts or liabilities of the corporation arising from a breach of contract." Burrows v Bidigare/Bublys, Inc, 158 Mich App 175, 189 (1987), *superseded in part on other grounds by* MCL 600.5839; see also MCL 450.1317(4). Consequently, the Court must dismiss Count One and Count Two under MCR 2.116(C)(8).

The Court must also dismiss Count Three alleging unjust enrichment. Defendant Hunt argues that Consumers cannot maintain this claim because Consumers and Bay Block entered into an express contract covering the same subject matter. See Morris Pumps v Centerline Piping, Inc, 273 Mich App 187, 194 (2006). "[A]n implied contract may not be found if there is an express contract *between the same parties* on the same subject matter[.]" see id., so the fact that an express contract existed between Consumers and Bay Block does not bar the claim for unjust enrichment against Hunt. See id. at 195. Nevertheless, Consumers has failed to adequately plead facts to allege unjust enrichment. "In order to sustain the claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." See Belle Isle Grill Corp v City of Detroit, 256 Mich App 463, 478 (2003). Although

¹ Although this statutory scheme is formally entitled the "Building Contract Fund," Michigan courts commonly refer to it as the Michigan Builders' Trust Fund Act. See BC Tile & Marble Co, Inc v Multi Bldg Co, Inc, 288 Mich App 576, 579 (2010).

Consumers alleges that Hunt “inequitably used and retained Consumers materials without payment[.]” see Complaint, ¶ 16, “conclusory statements that are unsupported by allegations of fact on which they may be based will not suffice to state a cause of action.” Gurganus, 496 Mich at ___. Accordingly, the Court must dismiss the claim for unjust enrichment under MCR 2.116(C)(8).

Next, the Court must grant summary disposition pursuant to MCR 2.116(C)(8) on Count Four alleging violations of the MBTFA. “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.” See Livonia Bldg Materials Co v Harrison Constr Co, 276 Mich App 514, 519 (2007). A corporate officer may be held liable for a violation of the MBTFA “as long as defendant personally misappropriated the funds after they had been received by the corporation[.]” See BC Tile & Marble Co, Inc v Multi Bldg Co, Inc, 288 Mich App 576, 587 (2010). Here, Plaintiff Consumers has alleged that Bay Block was engaged in the construction industry, that Bay Block was paid for materials provided on particular construction projects, and that Hunt personally retained funds for purposes other than paying materialmen. But Consumers has failed to allege that it was engaged by Bay Block to “perform labor or furnish materials for the specific construction project.” Livonia Bldg Materials, 276 Mich App at 519. Therefore, Consumers has failed to state a claim for violation of the MBTFA, so the Court must dismiss that claim under MCR 2.116(C)(8).

Finally, the Court must dismiss Count Five alleging statutory conversion. “Conversion, both at common law and under the statute, is defined as ‘any distinct act of domain wrongfully exerted over

another's personal property in denial of or inconsistent with the rights therein.” See Aroma Wines & Equipment, Inc v Columbian Distribution Services, Inc, 303 Mich App 441, 447 (2013). To support a claim “for conversion of money, the defendant ““must have obtained the money without the owner’s consent to the creation of a debtor-creditor relationship”” and ‘must have had an obligation to return the specific money entrusted to his care.’” See Lawsuit Financial, LLC v Curry, 261 Mich App 579, 591 (2004). Plaintiff Consumers alleges that “the actions of Defendants in violation of MCL 570.151 and defalcation of trust funds, amount to an act to convert the property for their own use and benefit and to the detriment of Consumers[,]” see Complaint, ¶ 36, and the “acts of the Defendants constitute conversion of Consumers’ property without Consumers’ consent.” See id., ¶ 37. These conclusions, “unsupported by allegations of fact, will not suffice to state a cause of action[,]” see Curry, 261 Mich App at 592, so the Court must grant summary disposition pursuant to MCR 2.116(C)(8) on the claim for statutory conversion.

In sum, Defendant Hunt is entitled to summary disposition pursuant to MCR 2.116(C)(8) on each of the claims asserted against him, but the Court must afford Plaintiff Consumers an opportunity to amend its pleadings “unless amendment would not be justified.” See MCR 2.116(I)(5). Therefore, the Court shall grant Consumers leave to file an amended complaint by September 19, 2014, setting forth claims for unjust enrichment, violations of the MBTFA, and conversion.²

IT IS SO ORDERED.

Dated: September 3, 2014


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

² With respect to the conversion claim, the Court advises the parties to review the unpublished decision of our Court of Appeals in Windrush, Inc v VanPopering, No 315958 (Mich App June 19, 2014), which suggests that Consumers will be hard-pressed to find factual support for the proposition that Hunt obtained the disputed funds without consent. See id., slip op at 7-9.