

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT**

**SLS RE HOLDINGS, LLC** et al.,  
a Michigan limited liability company,  
and **COVENTRY SQUARE APTS, LLC**,  
a Michigan limited liability company,  
*Plaintiffs,*

v

**Case No. 23-198776-CB  
Hon. Victoria Valentine**

**SAM SHINA**, an individual, **BEATRICE SHINA**, an individual, **TODD SOLELY**, an individual, and **TANYA SOLEY**, an individual, jointly and severally,  
*Defendants,*

and

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**ERIC LEEVER**, an individual, and **TAMARA LEEVER**, an individual,  
*Plaintiffs/Counter-Defendants,*

v

**Case No. 23-198042- CB  
Hon. Victoria Valentine**

**SAM SHINA** an individual, **BEATRICE SHINA**, an individual, **TODD SOLELY**, an individual, and **TANYA SOLEY**, an individual, jointly and severally,  
*Defendants/Counter-Plaintiffs.*

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**OPINION AND ORDER**  
**FOR CASE NO. 2023-198776-CB**  
**GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY DISPOSITION AS TO BREACH ONLY ON PLAINTIFFS' COUNT I (BREACH OF CONTRACT)**  
**AND**  
**GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8)**

At a session of said Court held on  
the 10<sup>th</sup> day of January 2024 in the  
County of Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter comes before the Court on two motions, addressed separately below. First, Plaintiffs', SLS RE Holdings, LLC ("SLS") and Coventry Square Apts, LLC ("Coventry") (together the "Companies") Motion for Partial Summary Disposition as to Breach Only on Plaintiffs' Count I (Breach of Contract).<sup>1</sup> Second, Defendants Sam Shina, Beatrice Shina ("Mr." or "Ms." "Shina"), Todd Soley, and Tanya Soley ("Mr." or "Ms." "Soley") (collectively the "Majority Members"), Motion for Summary Disposition Pursuant to MCR 2.116(C)(8).

The Court has reviewed the court file and the briefs of both parties and heard oral argument on December 13, 2023. For the reasons set forth below, Plaintiffs' partial motion is **Granted in whole** and Defendants' motion is **GRANTED in part and DENIED in part**.

## **I. PROCEDURAL POSTURE & STATEMENT OF FACTS**

The instant dispute arises out of the ownership and management—and ultimately control—of an apartment building (the "Property")<sup>2</sup>. The First Amended Complaint ("Complaint") recounts that the parties formed SLS Holdings, LLC in 2012, for the purpose of developing real estate. [Complaint, ¶ 19]. The Defendants, Majority Members, own 75% of the voting shares of SLS. [Complaint, ¶ 26].<sup>3</sup> The remaining 25% of SLS is owned by Eric Leever ("Mr. Leever") and Shina Leever ("Ms. Leever"), who each own 12.5% and in addition to being members of SLS are also the managers of the company. [Complaint, ¶¶ 20–21].<sup>4</sup>

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<sup>1</sup> Plaintiffs bring their Motion under MCR 2.116 (C)(10).

<sup>2</sup> The Statement of Facts is drawn entirely from the Pleadings, to aid in considering Defendants' Motion for Summary Judgment under MCR 2.116(C)(8).

<sup>3</sup> Mr. and Ms. Shina each own 25% interest, collectively 50% of SLS. Mr. and Ms. Solely each own 12.5%, collectively 25%. The Shinas and the Soleys together own 75%. [Complaint, ¶¶ 20–25].

<sup>4</sup> Mr. and Ms. Leever are not named parties to the instant case but are Plaintiffs and Counter-Defendants to case number 2023-198042-CB, which was consolidated with the instant case. [See Stipulated Order Extending Scheduling Order Dates and Consolidating Cases for Discovery and Trial dated September 13, 2023].

In, or around, 2012, SLS purchased an apartment building known as the Stonecliffe apartments. Almost a year later, SLS purchased a second apartment building—the Property which is in dispute in the instant case—for \$1.25 million. [Complaint, ¶¶ 27–29]. After a few years, in 2016, the members of SLS formed a new LLC, Coventry, which had an identical management and membership structure to SLS. SLS transferred the Property to Coventry by a quitclaim deed. [Complaint, ¶30].

As the Plaintiffs explains, “[t]he parties’ initial intention for both the Stonecliffe and Coventry properties was to renovate them, obtain cash-out refinancing on the properties, and hold them for cashflow and appreciation purposes.” [Complaint, ¶ 38]. The Plaintiffs claim that all parties were aware that the renovations would “require hundreds of thousands of dollars to renovate and repair before the properties could be refinanced” and that Mr. Shina “agreed to provide the capital necessary to operate and maintain the properties and fund the planned renovations.” The Companies allege that as early as 2017, the Companies were missing mortgage payments on the Property and at the same time vacancies went from just two units to seventeen. [Complaint, ¶ 40 and ¶ 42].

In 2020, the parties executed two promissory notes<sup>5</sup> (“Loan Agreements”) for a total of 2.5 million dollars “that recognized the funding that Defendants Sam Shina and Beatrice Shina had provided SLS” which the Complaint alleges was \$2,171,000 and required Mr. and Ms. Shina to “fund the remaining balance of \$329,000 by November 30, 202[0].” [Complaint, ¶¶ 45–46].

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<sup>5</sup> To the Complaint, Plaintiff attached as Exhibit 1 the Loan Agreement executed between SLS and Mr. and Ms. Shina, which reflects that the loan is for \$1,250,000 and the “balance due” by November 30, 2020, is \$164,500.00. Plaintiffs, to their motion for summary disposition, attach two Loan Agreements, identical but for the addresses listed under section 1 of each agreement: Exhibit 1 (the same exhibit as the First Amended Complaint) lists “1670 E Woodward” while Exhibit 2 lists “1660 E Woodward.” [Pl’s MSD, Exh 1 and 2]. In the Defendants’ Response, the Defendants admit that the total principal of the loan was for \$2,500,000 split between the two buildings on the Property. Indeed, while the parties refer to these separate agreements as one “loan” or a “loan agreement,” the court notes they are two separate, almost identical, agreements.

The Loan Agreement attached to the First Amended Complaint reflects that the loans were executed in late September 2020. [Complaint, Exh 1].

However, the Plaintiffs allege that after executing the Loan Agreements the Shinas failed to pay the remaining balance of \$329,000 by the November 30 deadline. [Complaint, ¶ 47; Complaint, Exh 7].

The Plaintiffs argue that “this failure to meet its contractual obligations to provide the balance of the loan proceeds . . . delayed crucial rehabilitation of the property. [Complaint, ¶ 109]. The Plaintiffs now claim that these delays led to a series of problems which ultimately led the Plaintiffs to file the instant action. The Plaintiffs filed their Complaint on February 10, 2023, which the Defendants filed their Answer to on March 8, 2023. The Plaintiffs filed their First Amended Complaint on March 23, 2023, which alleges: Breach of Contract against Mr. and Ms. Shina (Count I), Breach of Fiduciary Duties against all Defendants (Count II), Aiding and Abetting Breach of Fiduciary Duties against all Defendants (Count III), Appointment of Receiver against all Defendants (Count IV), Unjust Enrichment against all Defendants (Count V), Slander of Title against Mr. and Ms. Shina (Count VI), Tortious Interference with Contract, Business Relationships and Expectancies against all Defendants (Count VII), and Quiet Title under MCL 600.2932 against Mr. and Ms. Shina (Count VIII).

The Property was sold, under Court Order.<sup>6</sup>

## **II. STANDARDS OF REVIEW**

### **MCR 2.116(C)(10)**

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich

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<sup>6</sup> Order to Sell the Real Estate and Escrow Sale Proceeds, March 17, 2023.

358, 362 (1996). Accordingly, “[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion.” *Maiden v Rozwood*, 461 Mich 109, 119-120 (1999); MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto*, 451 Mich at 358. The moving party “must specifically identify the issues” as to which it “believes there is no genuine issue” of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim. *Quinto*, 451 Mich at 361. If the moving party properly supports its motion, the burden “then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Id.* at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4). See also *Meyer v City of Center Line*, 242 Mich App 560, 575 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

In all cases, MCR 2.116(G)(4) squarely places the burden on the parties, not the trial court, to support their positions. A reviewing court may not employ a standard citing mere possibility or promise in granting or denying the motion. *Maiden*, 461 Mich at 121-120 (citations omitted), and may not weigh credibility or resolve a material factual dispute in deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161 (1994). Rather, summary disposition pursuant to MCR 2.116(C)(10) is appropriate if, and only if, the evidence, viewed most favorably to the non-moving party fails to establish any genuine issue regarding any material fact, and the moving party is

entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362, citing MCR 2.116(C)(10) and (G)(4); *Maiden*, 461 Mich at 119-120 (1999). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160 (2019) (citation omitted). Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

Summary disposition under MCR 2.116(I)(2) may be granted “if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law.” *Washurn v Michailoff*, 240 Mich App 669, 672 (2000). Relief under MCR 2.116(I)(2) is not available when a response exceeds the scope of the moving party’s motion and is, therefore, not responsive to the motion. *Church Mut Ins Co v Consumers Energy Co*, unpublished per curiam opinion of the Court of Appeals, issued Oct 30, 2003 (Docket No. 240571), p 3.

#### MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160 (2019); *Pawlak v Redox Corp*, 182 Mich App 758 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357 (1991). Exhibits attached to pleadings may be considered under MCR 2.116(C)(8) because they are part of the pleadings pursuant to MCR 2.113(C). *Id.* at 163. Matters of public record may also be considered. MCR 2.113(C)(1)(a). See also *Dalley v Dykema Gossett*, 287 Mich App 296, 301 n 1 (2010) (court

documents are matters of public record that may be considered on a motion under MCR 2.116[C][8]).

“All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.” *Maiden v Rozwood*, 461 Mich 109, 119 (1999); *Wade v Dep’t of Corrections*, 439 Mich 158, 162 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App 357; *Spiek v Dept of Transportation*, 456 Mich 331, 337 (1998).

“[T]he mere statement of a pleader’s conclusions, unsupported by allegations of fact, will not suffice to state a cause of action.” *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395 (1994).

### III. ANALYSIS

#### A. Plaintiff’s Motion for Partial Summary Disposition as to Breach Only on Count I Breach of Contract Under MCR 2.116 (C)(10)<sup>7</sup>

A party asserting a breach of contract claim must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach. *Miller-Davis co v Ahrens Constr, Inc*, 495 Mich 161, 178 (2014).<sup>8</sup> A plaintiff may recover in a breach of contract action when it proves that the defendant’s breach was the proximate cause of the harm the plaintiff suffered. *Chelsea Inv Group LLC v City of Chelsea*, 288 Mich App 239, 254 (2010).

The cardinal rule when interpreting contracts is to ascertain and give effect to the intention of the parties. *Zurich Ins Co v CCR & Co* (on rehearing), 226 Mich App 599, 603 (1997). “In

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<sup>7</sup> Count I, Breach of Contract is only against Mr. and Ms. Shina.

<sup>8</sup> The Loan Agreements are governed by Michigan law. [Pl’s MSD, Exh’s 1 and 2, § 5].

interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning." *In re Smith Trust*, 480 Mich 19, 24 (2008). Courts "must interpret a contract in a way that gives every word, phrase, and clause meaning, and must avoid interpretations that render parts of the contract surplusage." *Klapp v United Ins Group Agency Inc*, 468 Mich 459, 468 (2003). Courts may not strain to find ambiguity and must read contracts to avoid an absurd or unreasonable result. *Scott v Farmers Ins Exchange*, 266 Mich App 557, 561 (2005); *Miller v Van Kampen*, 154 Mich App 165, 168 (1986). Ultimately, courts must strive to enforce the agreement intended by the parties.

Whether contract language is ambiguous is a preliminary question of law. *UAW-GM Human Resource Center v KSL*, 228 Mich App 486, 491 (1998) (citation omitted). A contract is unambiguous when it fairly admits of but one interpretation. *Holmes v Holmes*, 281 Mich App 575, 594 (2008). If the language of the contract is clear and unambiguous, it must be enforced as written. *Phillips v Homer*, 480 Mich 19, 24 (2008). A written contract is ambiguous if after reading the entire document its language reasonably can be understood in differing ways (i.e., the language is susceptible to more than one reasonable interpretation). *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 70 (1991). "A provision in a contract is ambiguous if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715 (2005). In making this determination, contractual language is to be construed according to its plain and ordinary meaning. In fact, published Michigan jurisprudence has long held that the terms of contracts are to be enforced as written unless it violates Michigan public policy. *Rory v Cont'l Ins Co*, 473 Mich 457, 468-469 (2005) ("[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract

provisions as written. . . . [T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principals of contract law preclude such subjective post hoc judicial determinations of reasonableness as a basis upon which courts may refuse to enforce unambiguous contractual provisions.” *Rory* at 468. “A fundamental tenant of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be enforced as written”). See also *Little v Kin*, 468 Mich 699, 700 (2003) (“Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted”). Furthermore, the court is required to read the contract as a whole, giving harmonious effect, if possible, to each word and phrase in order to avoid an interpretation that would render any part of the contract surplusage or nugatory. *Ziegler v Witherspoon*, 331 Mich 337, 352-354 (1951). Ultimately, courts must strive to enforce the agreement intended by the parties.

The Companies have the burden of establishing that there is a contract. However, the existence or validity of the two contracts is not in dispute. The Companies attach to their motion copies of the Loan Agreements, the terms of which clearly establish two contracts in the form of loan agreements between SLS and Coventry, each listed as a “borrower” respectively, and Mr. and Ms. Shina listed as “Lenders” on both agreements. [Pl’s MSD, Exh’s 1 and 2]. As no challenge to the existence or validity of the Loan Agreements has been raised, the Court finds that the Companies have met their burden to establish there was a contract.

The Companies must establish that Mr. and Ms. Shina breached the contracts. The Companies next allege that the Loan Agreements created a duty to perform under the agreements, requiring Mr. and Ms. Shina to pay \$329,000 (\$164,500 on each Agreement) by the end of November 2020. Section 1 of the Loan Agreement provides:

1. The Lender has loaned \$1,250,000.00 to the Borrower and the Borrower promises to repay this principal amount to the Lender upon the property being a minimum of 90% occupied for 90 days plus accumulated interest of 4.375%, interest only payments as defined in the below Payment section. . . . The current balance of the loan today equals \$1,085,500.00. Samuel and Beatrice Shina agree to put the balance due of \$164,500.00 in the Chase Business Account on or before November 31<sup>st</sup>, 2020. Lender assumes 1<sup>st</sup> lien position on Coventry Square Apts, . . . .

[Pl's MSD, Exh's 1 and 2]. The Loan Agreements clearly and unambiguously require the deposit of loan funds from Mr. and Ms. Shina to "the Chase Business Account on or before November 31st, 2020." The Companies, through bank statements<sup>9</sup> and receipts, show that the Chase Bank Account, mentioned in the Loan Agreement, only received one distribution of the loan principal before the November 30, 2020, deadline. On September 29, 2020, Mr. Shina distributed \$110,000 to the Chase Account, though he distributed another \$100,000 on December 9, 2020, the November 30, 2020, deadline had already passed.

Mr. and Ms. Shina argue first that there was no breach. The Defendants<sup>10</sup> argue that there was no breach because the "funds were accepted" by the Companies and the Manager, Tamara Leever did not include the mention of the alleged breach in emails she sent. Additionally, the Defendants argue that a breach of contract claim arising out of an "alleged 'delay in performance'" must be a "material breach" in order for the moving party to succeed on its motion. In support of their "material breach" theory<sup>11</sup>, the Defendants cite *In re American Gas Co*, 851 F2d 794 (6<sup>th</sup> Cir 1988). In *American*, the delay of payment of a contractor in a construction contract was not a

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<sup>9</sup> The Companies' Chase Bank account statement in Exhibit 7 of the Plaintiff's Motion for Summary Disposition show four "Transactions," or distributions of the loan principal from the Lender to the Borrower, received from Mr. Shina between January of 2020, and March of 2022. The first distribution is for \$110,000 received on September 29, 2020. The second is for \$100,000 received by the Companies on December 9, 2020. The third is for \$100,000, received July 30, 2021, and the fourth is for \$17,000, received February 16, 2022.

<sup>10</sup> In this Section on Breach of Contract, "Defendants" refers only to Mr. and Ms. Shina.

<sup>11</sup> The Companies, by Reply, argue that the affirmative defenses of materiality and waiver have been waived. The Court takes no position on the Companies' waiver argument, instead finding in favor of the Companies on the grounds that the Majority Members' materiality and waiver arguments are unavailing.

sufficient breach to allow the contractor to abandon the contract. *Id.* at 799–800. The Court finds this authority unpersuasive.<sup>12</sup> Additionally, though the Defendants claim that “the loan agreements were not breached,” [Def’s Response, p 10], the statement of facts in Defendants’ Response confirms that “\$117,000 of the total loan amounts were unfunded as of December 9, 2020.” [Def’s Response, p. 8]. Here, the Court finds a breach of the Loan Agreements.

Second, the Defendants argue that the Companies’ ability to bring suit for breach of contract was waived by accepting the late principal distributions made by Mr. Shina after November 30, 2020. The Majority Members rely on *Schnepf v Thomas L McNamara, Inc*, 354 Mich 393 (1958), in which a trucker, who contracted to haul sand a certain distance for a road project, continued to perform under the contract even after the other party potentially breached the contract by increasing the distance the trucker was required to drive to pick up the sand. 354 Mich 393 (1958). In *Schnepf*, the court held that by continuing to perform under the contract the trucker did not waive his right of action for breach, but his continued performance “depriv[ed] him of any excuse for ceasing performance on his own part.” *Id.* at 397. Accordingly, the Companies are not deprived of a cause of action for a potential breach, but by accepting late distributions of the loan principal are deprived of any excuse to cease performance under the Loan Agreements. *Id.* See also *Milenium, Inc v KML Communications Inc*, unpublished per curiam opinion of the Court of Appeals, issued [September 14, 2023] (Docket No. 361876), p 8–10.

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<sup>12</sup> Not only because the facts in *American* are distinguishable from the instant case, but also because the Court was analyzing whether the Contractor’s abandonment of the contract was justified, not whether there was a breach. Furthermore, “[a]lthough decisions of a federal district court interpreting Michigan law are not binding, courts may find the reasoning of the federal court persuasive. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 16 (2005). Here, the reasoning is not persuasive.

Third, the Majority Members argue that the contract was modified and that the Majority Members did not breach the modified agreement. They allege, “[w]hen the Plaintiffs accepted the funds from the Shinas; spent the funds; and confirmed that the Shinas had “first lien position,” they were confirming that the Shinas’s had not breached the Loan Agreements.” [Def’s Response, p. 11]. The Majority Members point to Ms. Leever’s March 4, 2022, email to the parties as proof of modification:

**From:** Tamara Leever  
**Sent:** Friday, March 4, 2022 4:01 PM  
**To:** Sam Shina  
**Cc:** Eric Leever; Tanya Work; Todd Solely  
**Subject:** Summary of 1670 & 1770 E Woodward Heights Loan Agreements/Coventry Square

Hi All,

I hope this all finds you doing well. I'm sending this email as I was the one who worked with Sam to draft the attached loan agreements in July-September of 2020. The numbers below are a summary of the last email from Sam dated September 4, 2020 regarding this topic. We had many calls and emails proceeding, September 4th, however; these are the final numbers that were utilized to draft the loan agreements from that email.

To simplify things at that time, the term "improvements" was utilized and the numbers below are a result of Sam verifying any and all the funds deposited up to that point in time to be included as the first lien position on the properties. Eric will be reiterating and/or breaking down that line item deemed improvements to provide a much more specific breakdown of costs, expenses, etc. as to provide clarity surrounding more specifics of numbers as quickly as possible in a separate email, as I cannot communicate as specifically as he is able. I believe it's important to the progression of this project and for all parties to view a summary snapshot of the past to move forward more clearly into the present. To reiterate; the purpose of having separate loan agreements was to have the funds more equally separated and not all on one building and enable us to have more financing/refinancing options for these properties down the road. Each Property has it's own parcel ID# so we were able to draft separate loan agreements and divide the above amounts in half, more specifically;

Loan (payoff)  
\$ 911,000.00

Improvements

(deposits) \$1,185,000.00

Interest Owed up to 11/2020  
\$ 75,000.00

Subtotal \$2,171,000.00

Funds to be paid into  
\$. 329,000.00  
Chase business account  
On or before 11/30/2020  
To equal Total Amount  
of Loan \$2,500,000.00

\$2,171,000.00 divided 1/2 = \$1,085,500.00

\$329,000.00 divided 1/2 = \$164,500.00

Total of amount of loan agreements 1670 & 1770 E Woodward Heights  
\$1,250,000.00

Summary of Deposits after loan agreements were drafted, signed, notarized and recorded:

September 2020  
\$ 110,000.00

December 2020  
\$ 100,000.00

July 2021 \$ 100,000.00

February 2022  
\$17,000.00

Total to Date  
\$ 327,000.00

**Loan Short from 11/2020**  
**\$. 2,000.00-**

The purpose of providing this information is for us to continue to be all on the same page, continue the communication, and as always, please let me know if you have any questions.

Thank you,  
Tamara Leever

[Def's Response, Exh A (emphasis in original)]. Each Loan Agreement includes the following modification clause:

Amendments

7. This Agreement may only be amended or modified by written instrument executed by both the Borrower and Lender.

As the Majority Members correctly argue, contracts with written modification clauses can be modified because “parties possess, and never cease to possess, the freedom to contract even after the original contract has been executed.” *Quality Products and Concepts Co v. Nagel Precision, Inc*, 469 Mich 362, 372–75 (2003). However, the Supreme Court clarified that modification requires mutuality, which;

is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract. In meeting this clear and convincing burden, a party advancing amendment must establish that the parties mutually intended to modify the *particular* original contract, including its restrictive amendment clauses such as written modification or anti-waiver clauses.”

*Id.* at 373 (emphasis in original). The email in question does not establish the Companies' intent to modify the agreement. In the email, Ms. Leever expresses the purpose of the email, which in part is to present “a summary snapshot of the past.” Furthermore, the email identifies the late principal distributions made in December 2020, July 2021, and February 2022 and crucially notes both “Loan Short from 11/2020” and the amount “\$2,000” in bold type. Here, the Court finds no modification.

Finally, the Companies must establish that the alleged breach of contract was the proximate cause of the harm it suffered. The Companies allege consequential damages, “[t]he Shinas failure to provide the balance of the loan proceeds delayed crucial rehabilitation of the Property, hampering cashflow potential and its value in a potential sale.” [Pl’s MSD, p. 10]. The Majority Members argue that the Motion fails because if there is no damage, a breach of contract claim cannot be established.

However, the Companies seek only partial summary disposition for breach only, leaving the question of damages—if any—unanswered. The Court finds the Companies have met this burden and partial summary disposition finding (1) the existence of a contract and (2) that the contract was breached is appropriate.<sup>13</sup> The Court emphasizes that it makes no finding or judgment as to the issue of damages—the issue of damages remains adjudicated.

Accordingly, the Plaintiffs’ Motion for Partial Summary Disposition as to Breach Only on Plaintiffs’ Count I (Breach of Contract) is GRANTED as to liability for breach.<sup>14</sup>

**B. Defendants’ Motion for Summary Disposition Pursuant MCR 2.116 (C)(8)**

In the First Amended Complaint the Plaintiffs’ plead: Breach of Contract against Mr. and Ms. Shina (Count I), Breach of Fiduciary Duties against all Defendants (Count II), Aiding and Abetting Breach of Fiduciary Duties against all Defendants (Count III), Appointment of Receiver against all Defendants (Count IV), Unjust Enrichment against all Defendants (Count V), Slander of Title against Mr. and Ms. Shina (Count VI), Tortious Interference with Contract, Business

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<sup>13</sup> See MCR 2.116(C)(10) (“**Except as to the amount of damages**, there is no issue as to any material fact, and the moving party is entitled to judgment or **partial judgment** as a matter of law”) (emphasis added).

<sup>14</sup> When referring to summary disposition as to “liability only” the Court is referring to summary disposition as to the elements of the existence of a contract and the breach of that contract. This does not include a determination of the existence of, or the amount of, damages resulting from the breach.

Relationships and Expectancies against all Defendants (Count VII), and Quiet Title under MCL 600.2932 against Mr. and Ms. Shina (Count VIII).

**1. The Plaintiffs Request Entry of Default Against All Defendants and Denial of Defendants' Motion as well as Grant of Summary Disposition in Favor of Plaintiffs on All Counts Under MCR 2.116(I)(2)**

As a threshold matter, in their Response, Plaintiffs argue that “Defendants failed to file a responsive pleading to Plaintiffs’ First Amended Complaint and therefore MCR 2.603 (A)(1) requires the Court to enter defaults against all Defendants.” Furthermore, Plaintiffs argue that the Court should deny this motion entirely and “grant summary disposition in favor of plaintiffs on all counts under MCR 2.116(I)(2).” The Plaintiffs filed their Complaint on February 10, 2023, which the Defendants filed their Answer on March 8, 2023. The Plaintiffs filed their First Amended Complaint on March 23, 2023, and attempted to file requests for entry of default on July 31, 2023. The Plaintiffs argue that “because Defendants are in default, they are deemed to have admitted *all* allegations in Plaintiffs' F[irst] A[mended] C[omplaint].” [Pl’s Response, p 3; (citing *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 554 (2015) (“Entry of a default judgment is equivalent to an admission of every well-pleaded matter in the complaint.”)]]].

However, Courts speak through Orders, *In re Contempt of Henry*, 282 Mich App 656 (2009), as of yet, no default judgment has been entered. Whether or not default is appropriate,<sup>15</sup> the law favors adjudication of claims on the merits. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229 (1999) (citing *Huggins v MIC General Ins Corp*, 228 Mich App 84, 86 (1998)). As the Defendants’ motion is otherwise properly raised, fully briefed by both parties, and oral argument heard, the Court proceeds with weighing the merits of said Motion. At this time, the

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<sup>15</sup> The Court takes no position on the issue as it is not properly before this Court.

Court will not address the Plaintiffs' request for default and will deny the Plaintiffs' request for summary disposition in their favor under MCR 2.116(I)(2).

**2. Breach of Contract against Mr. and Ms. Shina (Count I)**

As to Count I, breach of contract, summary disposition pursuant to MCR 2.116(C)(8) is unwarranted. Here, the Defendants make a similar argument for their motion for summary disposition as they argued in their Response to Plaintiff's MCR 2.116(C)(10) motion. It is unavailing as it fails to establish, or even argue, that the Plaintiffs have inadequately plead breach of contract.<sup>16</sup>

**3. Breach of Fiduciary Duties against all Defendants (Count II) and Aiding and Abetting Breach of Fiduciary Duties against all Defendants (Count III)**

Defendants seek dismissal of Counts II and III. Defendants argue that the claims fail because the Complaint does not state any actions that amount to a breach of fiduciary duty, and that the Defendants are not "in control." However, reviewing the First Amended Complaint, the Court finds that the Plaintiffs *do* allege actions that could amount to a breach of fiduciary duty:

120. The Defendants, as the majority in control, have a fiduciary duty of care, duty of loyalty, duty to account, duty of confidentiality, duty of full disclosure, and duty of good faith and fair dealing to the Companies.

121. Further, the Defendants, as the majority in control, have fiduciary duties that prohibit them from engaging in self-dealing and profiteering to the detriment of the Companies, without full disclosure and approval of all members.

122. By virtue of the conduct described above, the Defendants have breached the fiduciary duties that they owe to the Companies.

[Complaint, ¶ 120–122]. As for the Defendants' "control" argument, the Court agrees with the Plaintiffs' position that the question of control raises an issue of fact. As the Court's analysis is

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<sup>16</sup> To the extent that the Defendants' argument should be considered under the MCR 2.116 (C)(10) framework, see the analysis above.

confined to the pleadings alone, the Defendants' argument is unavailing. Additionally, the Court finds this argument abandoned.<sup>17</sup> Hence, summary disposition is unwarranted.

**4. Appointment of Receiver Against all Defendants (Count IV)**

Defendants seek dismissal of the Plaintiffs' request for Appointment of Receiver as the Property has already been sold to a third-party, rendering this Count moot. The Plaintiffs do not raise the issue by Response. Accordingly, summary disposition is warranted.

**5. Unjust Enrichment against all Defendants (Count V)**

Defendants seek dismissal of the Plaintiffs' claim of unjust enrichment. The Plaintiffs argue that a party may make a plea for relief in the alternative, and Defendants' claim to the entirety of the escrowed funds represents a significant benefit that would be inequitable for Defendants to retain. The Plaintiffs rely on *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 328 (2002) in which the Court of Appeals held "[t]he firm's breach of contract and quantum meruit claims depended on the jury finding that a contract ... existed. In contrast, the firm's claim for unjust enrichment depended on the jury finding that no express contract [existed]. MCR 2.111(A)(2) permitted [the firm] to make these inconsistent claims." As the Court, through this Opinion and Order grants partial summary disposition in favor of the Plaintiffs, finding that a contract exists and that it was breached, the Plaintiffs' alternative claim for unjust enrichment must fail.<sup>18</sup> Here, summary disposition is warranted and Count V, Unjust Enrichment is dismissed.

**6. Slander of Title Against Mr. and Ms. Shina (Count VI)**

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<sup>17</sup> It is the litigant's responsibility to adequately brief its position. *See Walters v Nadell*, 481 Mich 377, 388 (2008) (It is well-settled that "[t]rial courts are not research assistants of the litigants" and that "the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute.").

<sup>18</sup> A Claim of unjust enrichment does not apply if there is an express contract. *Able Demolition v. Pontiac*, 275 Mich 577 (2007) (Citing *Martin v. East Lansing School Dist.*, 193 Mich App 166, 177 (1992)).

Defendants seek dismissal of the Plaintiffs' claim for slander of title against Mr. and Ms. Shina. Plaintiff pled the elements of the tort. This is a (C)(8) Motion, accordingly, summary disposition is unwarranted.

**7. Tortious Interference with Contract, Business Relationships and Expectancies against all Defendants (Count VII)**

Finally, Defendant's seek dismissal of Count VII, tortious interference of both contracts and business expectancies. "In Michigan, tortious interference with a contract or contractual relations is a cause of action distinct from tortious interference with a business relationship or expectancy." *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 89 (2005). "The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant." *Id.* at 89–90. Damages is an element as well. *Id.* at 90.

If no contract exists, an action for tortious interference with contract cannot be maintained. *Williams v DeMan*, 7 Mich App 71 (1967). An action for tortious interference with contract may be maintained if there is a contract, even though plaintiff is not able to enforce it for reasons such as the statute of frauds. *Northern Plumbing & Heating, Inc v Henderson Bros, Inc*, 83 Mich App 84, 92–93 (1978).

The elements of tortious interference with a business relationship are "[1] the existence of a valid business relationship or expectancy, [2] knowledge of the relationship or expectancy on the part of the defendant, [3] an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and [4] resultant damage to the plaintiff." *Dalley v Dykema Gossett*, 287 Mich App 296, 323 (2010).

Business expectancy must be pleaded with specificity regarding the likelihood it would come to fruition and the damages that were caused by the interference. *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 150 (2006).

The Defendants argue that the contracts in question are the operating agreements of the relevant entities of which they are members. Therefore, Defendants argue that “as members of the relevant entities, Defendants are incapable of tortiously interfering with the operating agreements,” [Def’s MSD, p. 11], as only nonparties to a contract may interfere with a contract. *Derderian v. Genesys Health Care Sys*, 263 Mich App 364, 382 (2004). Further, the Defendants argue that, “if Plaintiffs are alleging some other speculative contract with a third party was interfered with, their failure to specifically list said contract is fatal to their claim.” [Def’s MSD, p. 10].

Plaintiffs contend that they do not allege interference with the operating agreements, rather the interference relates to the Companies’ contracts with third-parties. The Companies argue that the Complaint states a valid claim. [See First Amended Complaint, ¶¶ 130–138; Pl’s Response, pp 14–15].

Plaintiffs’ Amended Complaint states:

130. Plaintiffs enjoyed contracts, business relationships and/or expectancies of business relationships with its tenants, potential tenants, suppliers, potential suppliers, and brokers in the market for investment property.
131. Defendants, as majority members of the Companies, had knowledge of these contracts, business relationships and/or expectancies of business relationships.
132. The business relationships and expectancies described above had a likelihood of economic benefit to Plaintiffs.
133. Defendants intentionally used their position as the majority owners and their control over Coventry's finances to interfere with these contracts, business relationships and/or expectancies of business relationships by, *inter alia*, preventing Plaintiffs from renovating the properties and thereby improving their market position for tenants and as a potential investment property.

134. By doing so, Defendants hampered Coventry from increasing the Property's cashflow potential and from increasing the Property's value in a potential sale.
135. This has frustrated the very purpose the members organized Coventry and purchased the property-to rehabilitate the Property and flip it or operate it for cashflow.
136. Further, Defendants' intentional attempt to foreclose on the invalid liens constitutes a per se wrongful act.
137. The aforesaid acts of Defendants were inherently wrongful and could not be justified under any circumstances.
138. Defendants' actions have caused damages to Plaintiffs in the form of lost rental revenues and/or lost profits from a sale of the properties resulting from Defendants' disruption of the business, business relationships, and expectancies between Plaintiffs and its tenants, potential tenants, suppliers, and brokers in the market for investment property.

This Court agrees that Plaintiff failed to provide specificity with regard to this Count and therefore, it does not meet the requirements of pleading. Accordingly, Summary Disposition is Granted. Plaintiff may amend this Count of its Complaint within 14 days of this Opinion.

**8. Quiet Title under MCL 600.2932 against Mr. and Ms. Shina (Count VIII)**

Defendants seek dismissal of the Plaintiffs' Quiet Title Claim as the Property has already been sold to a third-party, rendering this Count moot. The Plaintiffs do not raise the issue by Response. Accordingly, Summary disposition is warranted.

**ORDER**

Based upon the foregoing Opinion **IT IS HEREBY ORDERED** that:

As to Count I of the First Amended Complaint:

- (1) Summary disposition under MCR 2.116(C)(10) based upon breach of the Loan Agreements is **GRANTED** in favor of the Plaintiff as to liability only;<sup>19</sup>
- (2) Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) is **Denied**.
- (3) Defendants' Request for Judgment in their Favor Pursuant to MCR 2.116(I)(2) is **Denied**.

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<sup>19</sup> When referring to summary disposition as to "liability only" the Court is referring to summary disposition as to the elements of the existence of a contract and the breach of that contract. This does not include a determination of the existence of, or the amount of, damages resulting from the breach.

As to Count II and Count III of the First Amended Complaint, Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) is **Denied**.

As to Count IV of the First Amended Complaint, Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) is **Granted**.

As to Count V of the First Amended Complaint Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) is **Granted**.

As to Count VI of the First Amended Complaint Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) is **Denied**.

As to Count VII of the First Amended Complaint, Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) is **Granted**.

As to Count VIII of the First Amended Complaint, Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) is **Granted**.

Finally, Plaintiffs' Request for Summary Disposition on All Counts Under MCR 2.116(I)(2) is **Denied**.



1/10/24