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

TONY ZAYA, and
ANGELA DALLO,

Plaintiffs, **Case No. 23-199955-CB**

Hon. Victoria A. Valentine

v.

ROCKY NORTH, LLC,
938 E. 10 MILE, LLC,
ROCKY DENHA, and
BRUCE KELLO,

Defendants.
_____/

OPINION AND ORDER REGARDING MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7) AND (8)

At a session of said Court held on the
day of March 4, 2024, in the County of
Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court on Defendants' Motion for Summary Disposition under MCR 2.116(C)(7) and (8). This Court has reviewed the pleadings, as well as the motion, response and reply brief. Oral argument was held on the motion.

OPINION

I.

Overview

Plaintiffs allege that Plaintiff Tony Zaya (Zaya) assisted Defendant Rocky North, LLC (Rocky North), in obtaining marijuana licenses in the City of Hazel Park in 2021 (Second

Amended Complaint ¶¶ 11-12). Plaintiffs also allege that each Plaintiff provided funds toward the purchase of real property owned by Defendant 938 E 10 Mile, LLC (938 E 10 Mile), which property directly relates to the marijuana licenses (Second Amended Complaint ¶¶ 24-26). Plaintiffs allege they were and are members of 938 E. 10 Mile (Second Amended Complaint ¶¶ 38-39). Plaintiffs also allege that Defendants Rocky Denha (Denha) and Bruce Kello (Kello) are members responsible to manage and control the marijuana business and the real property and who changed the locks to the property and refused Plaintiffs' access to the property (Second Amended Complaint, ¶¶ 40, 43, 44, 45, 47, 49, 50, 51, 54, 56 and 57).

In 2021, Zaya filed a prior action against Rocky North, Dehna, and Kello.[1] The prior action was dismissed under MCR 2.116(C)(8) on February 25, 2022. Plaintiff Angela Dallo (Dallo) was not a party to the prior lawsuit, nor was 938 E. 10 Mile.

Plaintiffs filed this action in April 2023. Plaintiffs allege claims of member oppression and quantum meruit/unjust enrichment and sought an equitable lien. Defendants move for dismissal of all counts under MCR 2.116(C)(8). Rocky North, Denha, and Kello also seek the dismissal of Zaya's claim under MCR 2.116(C)(7). Plaintiffs oppose the motion.

II.

Standard of Review

MCR 2.116(C)(7) provides for summary disposition where a claim is barred by a prior judgment.

> Under MCR 2.116(C)(7) . . . this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the

[1] *Tony Zaya v. Rocky North, LLC, et al.*, Oakland County Circuit Court Case No. 2021-190761-CK, Hon. Denise Langford Morris.

> documentary evidence in the light most favorable to the nonmoving party. 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. If a factual dispute exists, however, summary disposition is not appropriate.

RDM Holdings, LTD v Continental Plastics Co, 281 Mich App 678, 687 (2008) (citations omitted.)

A motion for summary disposition under 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; 934 NW2d 665 (2019); *Pawlak v Redox Corp*, 182 Mich App 758, 763; 453 NW2d 304 (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; 835 NW2d 413 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 360; 466 NW2d 404 (1991).

"All well-pleaded factual allegations are accepted as a true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (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 at 360; *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

III.

Analysis

Dismissal under MCR 2.116(C)(7)

Defendants seek dismissal of Zaya's claims against Rocky North, Denha, and Kello based upon the doctrine of *res judicata*.

The doctrine of *res judicata* bars a second action when: 1) a prior action was decided on the merits; 2) the same parties or their privies are included in both actions; and 3) the claims in the second action were, or could have been, brought in the first action. *Washington v. Sinai Hosp*, 478 Mich 412, 418 (2007).

Decision on the Merits

Both parties agree that there was a prior decision on the merits, but the prior action does not involve every party that is in this present action. Plaintiffs argue that *res judicata* is not applicable. Plaintiffs provide no legal authority for this position, so the argument is abandoned. "A party may not merely announce its position and leave it to this Court to discover and rationalize the basis for [its] claims, or give issues cursory treatment with little or no citation to supporting authority." *Wolfe v Westland Community Schs*, 267 Mich App 130, 139 (2005).

Under MCR 2.504(B)(3), unless otherwise specified in an order for dismissal, an involuntary dismissal (such as summary disposition), other than lack of jurisdiction or failure to join a party, is a dismissal with prejudice. Additionally, Defendants expressly request the dismissal of only Zaya's claims against the same defendants in the prior action. The prior action constituted a decision on the merits as to the parties involved in the prior action, so this factor is met.

Same Parties or their Privies

Plaintiffs again argue that because the parties are not identical in each proceeding, *res judicata* cannot bar any of the claims. But, again, Plaintiffs provide no authority for this argument. Defendants have limited their request for dismissal based upon *res judicata* to only those parties that were involved in the prior action. As to those parties seeking dismissal, the prior action included the same parties, so this factor is met.

Claims Were or Should have been Raised in Prior Action

Res judicata does not only bar those claims actually raised, but also claims that could have been or should have been brought in the prior action. *Washington*, 478 Mich App at 420. Courts use a transactional test to determine whether the different theories or claims for relief will constitute a single cause of action. *Id.* Where the facts are related in time, space, origin or motivation will determine whether *res judicata* will apply. *Id.*

Defendants argue that Zaya could have brought all of the claims raised in the instant lawsuit in his prior lawsuit. Plaintiffs only rebuttal to this argument is that Plaintiffs were unaware of the wrongdoing alleged in this lawsuit when they initiated the prior lawsuit. This argument is unpersuasive because each of the allegations in the prior action and the instant action took place in the same time frame between the same parties. Plaintiffs also argue that differing legal advice and other professionals revealed the cause of action. Plaintiffs do not cite any authority to establish those excuses as the basis to avoid *res judicata*.

Finally, Plaintiffs argue that Defendants' assertion of *res judicata* is untimely because Defendants did not include *res judicata* as an affirmative defense in their Answer to Plaintiff's First Amended Complaint. Under MCR 2.116(D)(2), a defense based upon *res judicata* must be included in the party's first responsive pleading. Defendants Affirmative Defense at paragraph 19 states that the "claims are barred, in whole or in part, because another action has been initiated between the parties involving the same claims." To the extent that affirmative defense does not articulate a prior judgment, Defendants argue that this Court has discretion to hear the dispositive motion because Plaintiffs have not articulated any prejudice or unfair surprise, citing to *Meridian Mut Ins Co v Mason-Dixon Lines, Inc,* 242 Mich App 645, 648 (2000).

Plaintiffs did not articulate any unfair surprise or prejudice in their Response to the Motion for Summary Disposition, nor did they articulate any during oral argument. This Court finds that there was no prejudice by the failure to articulate a prior judgment in the initial Answer filed with the Court. The final element of *res judicata* is also met.

Therefore, this Court finds that *res judicata* bars Zaya's claims against Rocky North, Denha, and Kello asserted in this action.

Dismissal under MCR 2.116(C)(8)

Count I – Membership Oppression

Under MCL 450.4515, a member of a limited liability company may bring an action to establish that a manager or member of that company is acting in a way that is willfully unfair or oppressive to the member. *See*, MCL 450.4515(1). The statute defines willfully unfair and oppressive conduct as a continuing course of conduct or significant action or series of actions that substantially interfere with the member's interests as a member. *See*, MCL 450.4515(2).

Defendants seek dismissal of Plaintiffs' claims for member oppression because the Second Amended Complaint includes an allegation that Plaintiffs are managers of 938 E 10 Mile. Defendants argue that because the Second Amended Complaint alleges Plaintiffs are managers, they necessarily have control over that entity. Defendants' argument ignores the many allegations that Plaintiffs have never had control over the entity.[2]

Defendants do not cite any authority for their conclusion (argued in their Brief, Reply Brief, or during oral argument) that the title of manager precludes a member oppression claim. Defendants do not argue that because they are managers, they are no longer members. Having cited to no authority, this argument is abandoned.

[2] Defendants cite to the allegations regarding Plaintiffs' lack of control over the company in their Brief, covering nearly an entire page. However, Defendants' arguments ignore those allegations entirely.

Defendants also argue that the Lease attached to the Second Amended Complaint is invalid. But this Court does not need to address the Lease because Plaintiffs' claims for membership oppression do not rely solely upon the Lease being valid.

Accepting Plaintiffs' well-pleaded allegations as true and construing them in the light most favorable to the non-moving party, the Court does not find that Plaintiffs' claim for member oppression is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Plaintiffs were members of 938 E 10 Mile, contributed funds to the entity, and have been prohibited from obtaining any information from the other members of the organization. Those facts are sufficient to create a claim for member oppression. Therefore, the Court concludes that Plaintiffs stated a valid claim of member oppression and summary disposition under MCR 2.116(C)(8) is denied as to Count I of the Second Amended Complaint.

Count II – Quantum Meruit/Unjust Enrichment

The equitable theory of unjust enrichment (also known as quantum meruit)[3] is based on the theory that the law will imply a contract in order to prevent the unjust enrichment of another party. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478 (2003). As the Court of Appeals observed in *Belle Isle Grill Corp, supra* at 478, a claim for unjust enrichment requires that the plaintiff 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.

[3] *See Spartan Distributions v Golf Coast International,* unpublished per curiam of the Court of Appeals, issued May 17, 2011 (Docket No. 295408) (stating that "the elements of unjust enrichment or quantum meruit are: '(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'" *quoting Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478 (2003)).

However, a contract to prevent unjust enrichment will be implied "only if there is no express contract covering the same subject matter." *Id.* When there is an express contract covering the same subject matter, summary disposition of the unjust enrichment claim is properly granted. *Id.* at 479.

Plaintiffs assert that each Plaintiff provided funds to purchase real property that is owned by 938 E 10 Mile.

Defendants seek dismissal of these claims because Plaintiffs failed to create a nexus between the claims and the individual Defendants. Defendants are correct that Plaintiffs failed to establish a basis for the individual Defendants' liability related to the payments made to purchase the real property.

Accepting Plaintiffs' well-pleaded allegations as true and construing them in the light most favorable to the non-moving party, this Court does not find that Plaintiff's claim for quantum meruit is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Defendants seek dismissal as to all Defendants because Plaintiffs failed to articulate specific damages under MCR 2.111(B)(2). However, the court rule specifically states that "a specific amount may not be stated, and the pleading must include allegations that show that the claim is within the jurisdiction of the court. Plaintiffs have done so. As noted above, Zaya's claims for quantum meruit with respect to obtaining licenses for any of the Defendants could have been brought in the original lawsuit, and those claims are dismissed. The Second Amended Complaint is devoid of any argument that Dallo had any role in obtaining the licenses.

Count III – Equitable Lien

The doctrine of equitable lien, in its most general form, arises from an agreement between parties that both identifies particular property and evidences an intention that the property will

serve as security for an obligation. *Warren Tool Co v Stephenson*, 11 Mich App 274, 281 (1968). "Equity will create a lien only in those cases where the party entitled thereto has been prevented by fraud, accident or mistake from securing that to which he was equitably entitled." *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 53 (1993), quoting *Cheff v Haan*, 269 Mich 593, 598 (1934). Merely advancing funds to improve real property, even with the understanding that a lien would be given later, is insufficient to create an equitable lien. *Eastbrook Homes Inc v Dep't of Treasury*, 296 Mich App 336, 352-3 (2012). A party who has an adequate remedy at law is not entitled to an equitable lien. *Yedinak v Yedinak*, 383 Mich 409, 415 (1970).

Defendants seek dismissal of Count III as to all Defendants because an equitable lien is not a cause of action, and Plaintiffs failed to establish they are entitled to this equitable remedy because they have an adequate remedy at law. Plaintiffs failed to address Defendants' arguments and did not specify why they are entitled to this remedy.

Accepting Plaintiffs' well-pleaded allegations as true and construing them in the light most favorable to the non-moving party, this Court finds that Plaintiffs' equitable lien claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Plaintiffs have adequate remedies at law, namely Counts I and II of their Second Amended Complaint, which bars granting an equitable lien.

To the extent Plaintiffs sought to plead an equitable lien in the alternative, Plaintiffs have failed to state a claim for an equitable lien. Plaintiffs' Second Amended Complaint does not allege any intention of the parties to secure a liability with a lien on property, nor does it allege fraud, accident or mistake that prevented security for a lien. Plaintiffs' Response to the Motion for Summary Disposition indicates only that Plaintiffs "would have secured their investment with a mortgage, promissory note, or other finance documents" (Response Brief, p 11). That allegation

is insufficient to meet the requirement that there was an intention between the parties that the property would act to secure a lien. This Court finds no basis to award an equitable lien on the property. Therefore, the Court finds that Plaintiffs' request for an equitable lien fails to state a claim and summary disposition pursuant to MCR 2.116(C)(8) is granted as to Count III of the Second Amended Complaint.

Request for Sanctions

If a court finds that a claim is frivolous, it may award attorney fees. *Bourne v Farmers Ins Exch*, 449 Mich 193, 202-203 (1995). MCR 1.109(E) governs sanctions related to the filing of frivolous claims and defenses and the impact of the signatures of attorneys and parties on the pleadings. MCL 600.2591 provides in pertinent part:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> * * *
>
> (3) As used in this section:
>
> (a) "Frivolous" means that *at least 1* of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii The party's legal position was devoid of arguable legal merit.

(Emphasis added).

Defendants have failed to show that the Second Amended Complaint met at least one of the required criteria because this Court has found Plaintiffs have articulated valid claims under two counts of the Second Amended Complaint. Therefore, Defendants' request for sanctions is DENIED.

ORDER

Based upon the foregoing Opinion:

IT IS HEREBY ORDERED that Defendants' Motion for Summary Disposition under MCR 2.116(C)(7) is **GRANTED** as to Plaintiff Tony Zaya's claims against Defendants Rocky North, LLC, Rocky Denha, and Bruce Kello in Count I, Count II, and Count III of the Second Amended Complaint;

IT IS FURTHER ORDERED that Defendants' Motion for Summary Disposition under MCR 2.116(C)(8) is **DENIED** as to Count I of the Second Amended Complaint (Member Oppression);

IT IS FURTHER ORDERED that Defendants' Motion for Summary Disposition under MCR 2.116(C)(8) is **DENIED** as to Plaintiff Angela Dallo's claims in Count II of the Second Amended Complaint (Quantum Meruit);

IT IS FURTHER ORDERED that Defendants' Motion for Summary Disposition under MCR 2.116(C)(8) is **GRANTED** as to Count III of the Second Amended Complaint (Equitable Lien);

IT IS FURTHER ORDERED that Defendants' request for sanctions is denied;

IT IS SO ORDERED.

This Order does NOT resolve the last pending matter and does NOT close the case.

/s/Victoria A. Valentine

HON. VICTORIA A. VALENTINE
CIRCUIT COURT JUDGE

Dated: 3/4/24