STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

ROZA, LLC, a Florida limited liability company, and NINA ALON, individually and as a member manager of Roza, LLC,

Plaintiffs,

vs. Case No. 2022-001443-CB

GSA ELITE REALTY LLC, a Michigan limited liability company, GIOVAN AGAZZI, individual and licensed real estate salesperson, GREG BONHAM, individual and licensed real estate salesperson, BAILEY BONHAM, individual and licensed real estate salesperson, TITLE PARTNERS, LLC, a Michigan limited liability company, and ROBERT A. CARROLL a/k/a BOB CARROLL, an individual acting in the capacity as a Notary Public,

Defendants.
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OPINION AND ORDER

This matter is before the Court on the parties' cross-motions for summary disposition on Plaintiffs' complaint.

I. Background

Plaintiff Nina Alon ("Nina") is the sole member and authorized representative of Plaintiff Roza, LLC ("Roza"), (collectively "Plaintiffs"). Nina is resident of Israel and has lived there since 2010. Defendant GSA Elite Realty, LLC ("GSA") is owned by Giovan Agazzi ("Agazzi"), who is a licensed real estate agent. Defendant Bailey Bonham ("Bailey") is a licensed real estate agent who purportedly works as an independent contractor for GSA. Greg Bonham ("Greg") is Bailey's father and is also a licensed real estate agent who purportedly works as an independent contractor for GSA. Robert Carroll

("Carroll") is a notary who worked out of GSA's office, but allegedly had no formal agreement to work on behalf of GSA.

Plaintiffs allege that in 2017, Nina, in her capacity as sole member of Roza, retained the services of GSA, Agazzi, Bailey, and Greg to purchase real estate property in Macomb County as income-producing investment property. Roza ultimately purchased five residential properties, three of which are at issue in this case: 16844 Toepfer Drive, Eastpointe, Michigan 48021 (the "Toepfer Property"); 21496 Cyman Avenue, Warren, Michigan 48091 (the "Cayman Property"); and, 7552 Ford Avenue, Warren, Michigan 48091 (the "Ford Property"), (collectively, "the properties"). According to Plaintiffs, the properties were consistently vacant and so were not bringing in any rental income. So, in 2019, Plaintiffs allege Nina informed Bailey, Greg, and Agazzi that she wanted to sell that property, but she wanted to do so only by "enter[ing] into a lease with an option to purchase with any prospective purchaser." (Compl., ¶23.) Nina purportedly wanted to pursue a lease with a purchase option so that Roza could "continue to have a revenue stream from the income derived from a lease with an option to purchase, before the ultimate sale of the property could occur; and which would thereby, have more control over the terms and conditions, and related matters of any such transaction." (Id.)

Plaintiffs allege that contrary to Nina's instruction to pursue a lease with an option to purchase, Bailey, Greg, Agazzi sold the properties in April and May 2019 using land contracts. According to Plaintiffs, Bailey, Greg, and Agazzi, used a falsified corporate resolution from Roza to sign the closing documents on behalf of Roza. Plaintiffs further allege that the corporate resolution was improperly notarized by Carroll because Nina was not physically present when he notarized it.

Plaintiffs further allege that Nina paid Bailey and Greg for services, repairs, improvements, and expenses for the properties under the belief that such costs and expenses were necessary and required expenditures. However, according to Plaintiffs Bailey and Greg misrepresented the necessity of the expenditures and retained the funds for their own benefit.

On April 14, 2022, Plaintiffs filed suit against GSA, Agazzi, Greg, Bailey, Title Partners, LLC,[1] and Carroll. The complaint does not identify any specific causes of action but instead contains six unidentified "counts," which appear to be only five causes of action: (1) breach of contract, (2) breach of fiduciary duty, (3) fraud, and (4) unjust enrichment against only Bailey and Greg.[2]

On October 6, 2023, Bailey and Greg filed a motion for summary disposition under MCR 2.116(C)(10) challenging all Plaintiffs' claims ("Bonhams' motion"). That same day, GSA, Agazzi, and Carroll did the same ("GSA's motion"). On October 10, 2023, Plaintiffs filed a cross-motion for summary disposition under MCR 2.116(C)(10) on all their claims. The parties filed their respective responses to the cross-motions on October 23, 2023. Bailey and Greg filed their reply brief on October 26, 2023, as did GSA, Agazzi, and Carroll. The Court heard oral arguments on the cross-motions on October 30, 2023 and took them under advisement.

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[1] According to the complaint, Title Partners, LLC, provided the title insurance and prepared the closing documents for the sales of the properties in 2019. It also serves as the escrow agent for the closings. According to Plaintiffs' counsel, the only purpose for naming Title Partners as a defendant was because of its status as escrow agent for purposes of Plaintiffs' request for injunctive relief.

[2] Two of the "counts" alleged in the complaint are for preliminary and permanent injunctions. Neither of which have been sought by Plaintiffs since filing the complaint, including in their motion for summary disposition.

II. Standard of Review

A motion filed under MCR 2.116(C)(10) "tests the factual sufficiency of a claim." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors*, 469 Mich 177, 183; 665 NW2d 468 (2003). The court considers the documentary evidence submitted by the parties in the light most favorable to the non-moving party. *Maiden*, 461 Mich at 120. "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." *West*, 469 Mich at 183. The initial burden is on the moving party to support its position "by affidavits, depositions, admissions, or other documentary evidence." *Smith v Globe Life Ins*, 460 Mich 446, 455; 597 NW2d 28 (1999). The burden then shifts to the opposing party to set forth specific facts via admissible evidence that establish a genuine issue of disputed fact exists. *Maiden*, 461 Mich at 121.

However, where the moving party is challenging the non-movant's claims, it may satisfy its burden under MCR 2.116(C)(10) in one of two ways: (1) by "submit[ting] affirmative evidence that negates an essential element of the nonmoving party's claim," or (2) by "demonstrat[ing] to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Lowrey v LMPS & LMPJ*, 500 Mich 1, 7; 890 NW2d 344 (2016). In the latter, the movant "is not required to go beyond showing the insufficiency of [the non-movant's] evidence." *Id. at* 9. It doesn't have "to proffer evidence to negate one of the elements of [the non-movant's] claim." *Id.*

III. Law and Analysis

A. Nina's Standing

Defendants first argue in their respective motions that Nina lacks standing to pursue the claims against them because the claims are based solely on the sale of real property owned by Roza and the alleged receipt of funds from Roza's bank account. Plaintiffs did not address this argument in either their response or cross-motion.

MCL 600.204118 and MCR 2.201(B) require legal actions to be "prosecuted in the name of the real party in interest" *Rohde v Ann Arbor Pub Sch*, 265 Mich App 702, 705 (2005), citing MCL 600.2041 and MCR 2.201(B). "A real party in interest is one who is vested with a right of action in a given claim, although the beneficial interest may be with another." *Id*. A person who is not the real party in interest lacks standing to bring a cause of action. *See City of Kalamazoo v Richland Tp*, 221 Mich App 531, 534; 562 NW2d 237 (1997).

A limited liability company (LLC) is a separate and distinct legal entity from that of its members. *Dawley v Hall*, 319 Mich App 490, 497; 902 NW2d 435 (2017), vacated on other grounds, 501 Mich 166 (2018). "A member has no interest in specific limited liability company property." *Id.* quoting MCL 450.4504(1). Consequently, a member of an LLC does not own or have any personal rights to or interests in the personal or real property of the LLC. *Id.*

Here, the evidence, including Nina's deposition testimony, demonstrates the properties were purchased and owned as property of Roza. (Bonham Mot., Ex. 1, pp 32-33; Exs. E, G, H, and I.) There's no evidence Nina had any independent ownership interest in the properties. Similarly, with respect to the funds Nina sent to Bailey and Greg

that form the basis of the unjust enrichment claim, evidence from Defendants shows that the funds were paid out of Roza's bank account. (Id., Exs. DD, EE.) Plaintiffs have not provided any arguments or evidence to establishes the funds were Nina's property. Accordingly, Plaintiffs have failed to establish a genuine issue of material fact that Nina had any rights or interest in the properties or funds at issue. Therefore, Nina is not a real party in interest to this action and, as such, lacks standing.

B. Breach of Contract

Defendants argue that Plaintiffs have failed to establish the existence of any contract between them and Roza. "A party asserting a breach of contract 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 Const, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014).

Plaintiffs allege a claim of breach of contract against Defendants. However, the allegations are unclear regarding what the specific terms of the alleged contract. In their motion for summary disposition and during oral arguments, Plaintiffs argue that the breach of contract is based on a "Disclosure Regarding Real Estate Agency Relationship" (the 2017 Agency Disclosure) signed by Bailey and Nina in her capacity as sole member of Roza in August 2017 and based on a series of messages and phone calls between Bailey and Nina in 2019 regarding the sale of the properties. During oral arguments, Plaintiffs' counsel conceded that under the agreements, Roza agreed to sell the properties; however, Plaintiffs argue that this agreement was not "open-ended" as they did not agree to sell the properties by using land contracts. Instead, Plaintiffs allege Nina only agreed to lease the properties with the option to purchase so she could continue

collecting rent. Plaintiffs further argue that the corporate resolution used by Bailey to establish his capacity to execute the closing documents for the properties was forged by Bailey and Greg because it was improperly notarized by Carroll. Thus, they assert Bailey lacked authority to execute the land contracts on behalf of Roza.

The 2017 Agency Disclosure relied on by Plaintiffs is between Bailey and Roza. (Pltfs.' Mot., Ex 7.) It is a statutorily mandated disclosure of the agency relationships available to a potential buyer and a real estate licensee and a disclosure of the licensee's duties before the potential buyer discloses confidential information to the licensee. (Id.) See MCL 339.2517(1). Nothing in the disclosure indicates it is a contract: there is no language indicating any intent by Roza and Bailey to be bound by mutual agreement and obligation. See *Barclae v Zarb*, 300 Mich App 455, 471; 834 NW2d 100 (2013) ("A valid contract requires: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.") It does not contain any language reflecting an agreement between Roza and Bailey in which they agreed the properties would be sold under a lease with purchase option. Notably, the disclosures states in bold typeface just above the signature line, "THIS IS NOT A CONTRACT." (Id.)

Moreover, the disclosure identifies Bailey as "Buyer's Agent" and Roza as "Buyer." So even if the Court were to construe it as a contract, it only applied to Roza's purchases of the properties in 2017. Nothing in the 2017 Agency Disclosure indicates that it would apply to the 2019 sales of the properties, and Plaintiffs fail to explain how it relates at all to the sale of the properties. Accordingly, the Court finds as a matter of law that the 2017 Agency Disclosure was not a contract related to the 2019 sales of the properties.

The other alleged contract Plaintiffs rely on is an alleged agreement reached via text messages, WhatsApp messages,[3] email, and phone calls in which Nina purportedly told Bailey she only wanted to sell the properties via lease with a purchase option. According to Plaintiffs, Nina made it "known and did communicate to Bailey Bonham, as well as other Defendants, her intent to only enter into a lease with an option to purchase . . . and not to engage in a land contract transaction." (Pltfs.' Mot., p 13.) As Bailey and Greg correctly argue in their motion and response, the evidence does not support this argument.

In her deposition, Nina denied ever discussing with or telling Bailey to sell the properties. (Bonham Mot. Ex. A, p 80.) Instead, she testified that she "told him to rent them." (Id.) When asked, "So you didn't want a sale of any kind; you just wanted to rent them month to month?" She replied, "Yeah, I wanted the properties to be my grandkids', my inheritance to my grandkids." (Id.) Nina later acknowledged that Bailey explained the structure of the land contract, but she stated she still did not understand it. (Id., p 133.) However, when asked whether she told Bailey not to go through with the sales after he explained them to her, she testified that she told him, "I don't like it" but she never indicated that she told him she did not want to go through with the sales. (Id., p 133.) And notably absent from her deposition is any testimony that she told Bailey or any Defendant that she only wanted to lease the properties with a purchase option.

The messages and emails between Nina and Bailey directly contradict Nina's testimony that they never discussed selling the properties with Defendants. On January 31, 2019, Nina messaged Bailey, "Sell now at least one house so I won't be homeless.

[3] WhatsApp is an online messaging application, like text messaging. Plaintiff did not dispute the authenticity of the WhatsApp messages attached to the Bonhams' motion.

Thanks." (Bonham Mot., Ex K, Bonham 1483). Later that day, she told Bailey, "Try to sell at least one house. I know it's very cold and I hope you stay home but, put them all on sites. Please. Don't wait. Please." (Id.) On February 5, 2019, she again instructed Bailey, "Please put all the houses for sale on sites." (Id). She reiterated later the same day, "put all houses for sale." (Id.) The next day she told Bailey, "Get rid of all the houses." (Id.) She later said, "The only thing I want is to sell the houses. I trust you. No one else." (Id. at Bonham 1484). On February 11, 2019, Bailey confirmed that the Ford and Toepfer properties were listed for sale. (Id.) In response, Nina told him to list Cyman as well. (Id. at Bonham 1485).

On February 12, 2019, Nina e-mailed Bailey informing him she had seen the Zillow listings for the Ford and Toepfer properties. (Id., Ex. L, Bonham 1209). She inquired why the Cyman and Tennyson properties[4] were not listed. (Id.) In the same e-mail, Nina specifically stated, "Please list them. I need to sell. I didn't know it's so hard to find people clients to rent." (Id.). On February 14, 2019, Nina again told Bailey, "Please put all the houses for sale. Don't keep me in the dark. I mean ALL of them. Send me the postings." (Id., Ex. K, Bonham 1485). The next day, February 15, 2019, she indicated that the Ford price had to be "reduced." (Id., Ex. M, Bonham 1212). She told Bailey to "post all the houses. Rent or sell. All." (Id.) When Bailey informed her of an offer on Ford that would provide monthly payments without expenses (i.e., a land contract), Nina responded, "Love you. Love you." (Id., Bonham 1212-1213). In March 2019, Nina discussed providing a $1,000 credit to a potential buyer of the Toepfer property so "the house will sell faster." (Id., Ex. K, Bonham 1486).

[4] The sale of the Tennyson property is not at issue in this litigation.

While "[a] party's own testimony, standing alone, can be sufficient to establish a genuine question of fact," conflicting evidence may be removed from the trier of fact's consideration if "it is based on testimony that is contradicted by unassailable and objective record evidence." *Jewett v Mesick Consol Sch Dist*, 332 Mich App 462, 476; 957 NW2d 377 (2020) citing *Scott v Harris*, 550 US 372, 380; 167 L.Ed.2d 686 (2007). For a factual dispute to be genuine, the dispute must be one over which reasonable jurors could reach different conclusions. *Dextrom v Wexford Co*, 287 Mich App 406, 415-416; 789 NW2d 211 (2010). In *Scott*,[5] a case cited in *Jewett* and *Dextrom*, the United States Supreme Court, considering summary disposition under FRCP 56(c), which is parallel to MCR 2.116(C)(10), held that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary disposition." *Id*. In those circumstances, a "genuine" issue of material fact does not exist. *Id*.

Here, Nina's testimony that she never discussed selling the property with Bailey is directly contradicted by the messages and emails she sent to Bailey. The correspondence clearly shows that Nina repeatedly demanded that Bailey sell the properties. While she occasionally mentioned he could list the properties for rent, there is no evidence that she told him she only wanted to lease the properties with a purchase option. Additionally, a review of the correspondence between Bailey and Nina after receiving offers to purchase

[5] "In the absence of Michigan precedent, courts of this state routinely seek guidance from federal cases construing a similar federal rule." *Alberto v Toyota Motor Corp*, 289 Mich App 328, 336-337; 796 NW2d 490 (2010). Michigan Courts have relied on Federal cases construing FRCP 56 when considering motions brought under the MCR 2.116(C)(10). See *McCart v J. Walter Thompson*, 437 Mich 109, 123; 469 NW2d 284 (1991); *Maiden*, 461 Mich at 123-124.

the properties under land contracts reveals that after reviewing the terms of the land contract, she had questions about the length of the contract, but she never objected to the sale of the properties via land contract. (Bonham Mot., Ex. V, Bonham 1197-1199.)

Plaintiffs' assertion that Nina only wanted to lease the properties with a purchase option is further belied by the corporate resolution (the validity of which is addressed below) that granted Bailey the authority "to perform on behalf of [Roza] any and all such acts as he/she may deem necessary or advisable in order to sell and convey real property in connection therewith . . . ." (Id., Ex. P, Bonham 718-719). Nothing in the language of the resolution demonstrates an intent to limit Bailey's authority to only lease the properties with a purchase option or that it prevented Bailey from selling them via a land contract. Had Nina intended to limit Bailey's authority, she could have easily done so using more restrictive language in the resolution. In the absence of such restrictive language, the Court will not read a restriction into the resolution that is not there.

Given this evidence, no reasonable juror could conclude that Nina and Bailey or any other Defendant had an agreement that the properties would only be leased with a purchase option and not sold under a land contract. Accordingly, the Court finds as a matter of law that no such agreement existed based on Nina and Bailey's communications. Defendants are therefore entitled to summary disposition on Plaintiffs' breach of contract claim.

C. Nina's Understanding of a Land Contract

Plaintiffs also argues that Nina did not understand the nature of a land contract or the legal consequences of entering one and thus could not have validly consented to a land contract. To the extent Nina asserts she did not sufficiently understand English so

she could not understand the land contract, this assertion is belied by her own testimony in which she admitted she understands English and has been speaking it since 1974. (GSA Motion, Ex. 1, pp. 7, 19.) She sat for multiple depositions in this case that were conducted in English, and she never indicated she could not understand the questions. Additionally, she communicated to Bailey solely in English and never indicated she could not understand English.

As for Nina's asserted inability to understand the legal significance of a land contract, Plaintiffs have not cited any authority that stands for the proposition a party's lack of understanding about the legal significance of a contract renders the contract void. *See Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) ("It is not sufficient for a party 'simply to announce a position . . . then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'") Additionally, the evidence shows numerous conversations where Bailey explained the structure of the land contracts to Nina. (Bonham Mot., Ex. K, Bonham 01487; Ex. M, Bonham 01212; Ex. V.) Though Nina testified that she still did not understand the land contracts, she never told him to not proceed with the sales, (Id., Ex. A, pp 133), and instead proceeded to sign the corporate resolution granting Bailey broad authority to sell the properties. While Nina may not have understood the legal nature of the land contracts, it was her responsibility to seek the legal advice of an attorney before allowing Bailey to proceed with the sale. See *Galea v FCA US LLC*, 323 Mich App 360, 369; 917 NW2d 694 (2018) ("Michigan law presumes that one who signs a written agreement knows the nature of the instrument so executed and understands its contents.") Her alleged lack of understanding does not

negate her repeated statements clearly consenting to the sale of the properties via land contract.

D. The Corporate Resolution

Concerning the corporate resolution that authorized Bailey to sell the properties, Plaintiffs argue the resolution was forged by Bailey and Greg and was improperly notarized by Carroll, and thus, Bailey lacked authority to execute the land contracts on behalf of Roza. Defendants on the other hand argue Nina repeatedly acknowledged signing the corporate resolution and that any defect in the notary did not render the resolution void.

During oral arguments, Plaintiffs' counsel conceded that Nina signed two identical versions of the corporate resolution. (See also Bonham Mot., Ex. A, p 112; Ex Q; Ex. W, pp 87-89; Ex. R; Ex. K, Bonham 1489.) He argued, however, that because the resolution used in the closings, which is identical to the two signed by Nina, was improperly notarized, the resolution is void under the Michigan Notary Public Act, specifically MCL 55.285.[6] This argument lacks merit.

MCL 55.285 governs a notary's services, including under what circumstances a notary can witness or attest to the signature. Nothing in that statute indicates that a defective or improper witness or attestation by a notary voids the underlying document. As GSA correctly argues in its motion, the Court of Appeals has held that a notary's failure to properly acknowledge and verify signatures does not invalidate the document, it only removes the presumption that the document was validly signed. See *McConnell v McConnell*, unpublished opinion of the Court of Appeals, issued October 30, 2012

[6] Plaintiffs have not argued that the corporate resolution was legally required to be notarized.

(Docket No. 304959), p *1.[7] Given Plaintiffs' concession that Nina signed the corporate resolution, the defect in the Carroll's notarization did not invalidate the resolution.

E. Breach of the Implied Covenant of Good Faith and Fair Dealing

In their response to Bailey and Greg's motion, Plaintiffs assert that Bailey, Greg, and Agazzi breached the implied covenant of good faith and fair dealing when Bailey entered the land contracts for the properties despite Nina informing them her "intent to only enter into a lease with an option to purchase, to maintain sole ownership of the subject properties, and not engage in any land contract transaction." (Pltfs.' Resp. to Bonham, p 14.) This claim is not alleged in the complaint. Nonetheless, this argument lacks merit for the reasons explained above in granting Defendants summary disposition on Plaintiffs' breach of contract claim—specifically, there is no evidence that Nina ever expressed her "intent to only enter into a lease with an option to purchase, to maintain sole ownership of the subject properties, and not engage in any land contract transaction."

F. Breach of Fiduciary Duty

Plaintiffs argue that GSA, Bailey, and Greg had a fiduciary relationship with Roza, which they breached when the three properties were sold via land contract contrary to Plaintiffs' wishes. In their respective motions and responses, Defendants argue that because this claim is based on the same conduct and arguments Plaintiff use as the basis for their breach of contract claim, it should be dismissed for the same reasons as the breach of contract claim. The Court agrees.

[7] Though *McConnell* is an unpublished opinion, given its analysis and application of the Notary Public Act, MCL 55.261 *et seq.*, to a case where the notary public notarized documents without witnessing or verifying the signatures, the Court finds its analysis persuasive.

"To establish a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty and (3) damages caused by the breach of duty." *Highfield Beach at Lake Mich v Sanderson*, 331 Mich App 636, 666 (2020). Relevant here, a "real estate agent is a fiduciary and it is not permissible for him to act in opposition to his principal." *Mackey v Baker*, 327 Mich 57, 65 (1950).

The substance of Plaintiffs' arguments concerning the breach fiduciary duty claim are identical to those for their breach of contract claim: Nina instructed Defendants to only lease the properties with a purchase option and not the sell them via land contract, Nina did not understand the land contracts, and the corporate resolution Bailey used to close on the land contracts was void because it was improperly notarized. As explained above in granting Defendants summary disposition on the breach of contract claim, each of these arguments is factually and legally meritless. There's no evidence Nina told any Defendant that she only wanted the properties to be leased with a purchase option and not sold under a land contract. There's no evidence Bailey failed to explain the material terms of the land contract to Nina. And given Plaintiffs' concession that Nina signed the corporate resolution, the defect in Carroll's notarization did not invalidate the resolution. Indeed, the broad language of the resolution granting Bailey the authority "to perform on behalf of [Roza] any and all such acts as he/she may deem necessary or advisable in order to sell and convey real property in connection therewith," (Bonham Mot., Ex. P, Bonham 718-719), demonstrates Plaintiffs' intent to grant Bailey broad authority to sell the property "as he may deem necessary," which necessarily included sale via land contract. Accordingly, Plaintiffs have failed to establish a genuine issue of material fact

whether Defendants breached their fiduciary duty. Defendants are therefore entitled to summary disposition on this claim.

G. Fraud

Plaintiffs further assert Defendants engaged in fraudulent misrepresentation and silent fraud. Their argument as to this claim is vague, but as best the Court can tell, Plaintiffs assert that Bailey's use of the corporate resolution and Nina's lack of understanding of a land contract constituted to fraud and silent fraud. In their responses and respective motions, Defendants argue Plaintiffs have failed to establish any of the elements of either type of fraud.

To establish a claim for fraudulent misrepresentation, a plaintiff must prove: "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." *M & D v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). "Fraud will not be presumed but must be proven by clear, satisfactory and convincing evidence." *Hi-Way Motor Co v Intl Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). Fraudulent misrepresentation "denote[s] a standard fraud claim based on an *affirmative statement*. In contrast, 'silent fraud' involves a failure to disclose information where there is a duty to do so." *Hord v Envtl Research Inst of Michigan*, 228 Mich App 638, 641 n1; 579 NW2d 133 (1998) (emphasis added). "[T] to prove a claim of silent fraud, a plaintiff must show some type of representation by

words or actions that was false or misleading and was intended to deceive." *Roberts v Saffell*, 280 Mich App 397, 404; 760 NW2d 715 (2008).

As explained throughout this Opinion and Order, Nina acknowledged (and her attorney conceded) that she signed two copies of the corporate resolution. Despite the improper notary, the corporate resolution was valid and, given its broad language, authorized Bailey to sell the properties via land contract. Plaintiffs have failed to elucidate any argument demonstrating that Bailey's valid use of the corporate resolution to effectuate Nina's repeated requests to sell the property satisfies any of the elements of fraudulent misrepresentation or silent fraud. As for Nina's lack of understanding of a land contract, Plaintiffs have not argued or provided evidence to support any claim that Defendants concealed information from Plaintiffs concerning the land contracts that they had a duty to disclose. See *Roberts*, 280 Mich App at 403-404. Nor have they provided any arguments or evidence that Defendants intended to deceive them. See *Id*. Moreover, Plaintiffs have not provided any legal argument or authority that establishes that Nina's lack of understanding about land contracts constitutes a material misrepresentation by Defendants as required to support an actionable fraud claim. See *M & D*, 231 Mich App at 27. Plaintiffs, therefore, have failed to establish a genuine issue of material fact on their fraud claim and Defendants are entitled to summary disposition on this claim.

H. Unjust Enrichment

Plaintiffs allege a claim of unjust enrichment against Bailey and Greg related to their alleged improper transfer of funds to themselves from Roza's bank account for repairs and maintenance to the properties. In their motion for summary disposition, Bailey

and Greg argue Plaintiffs lack sufficient evidence to support this claim. Plaintiffs did not address this claim in their response or in their own motion.

To sustain an action for unjust enrichment, a plaintiff must "establish (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party." *Karaus v Bank of New York Mellon*, 300 Mich App 9, 22–23; 831 NW2d 897 (2012).

Bailey and Greg filed bank records from Roza's bank account and Bailey's bank account that show numerous transfers from Roza's account to Bailey's. (Bonham Mot., Exs. DD and EE.) Bailey provided his own affidavit in which he states that the bank records filed with his motion "reflect expenses owned by Roza, LLC, which I reimbursed to myself from Roza, LLC's bank account with the consent of Nina Alon." (Id., Ex. T, ¶3.) He further states that "the only transfers from Roza, LLC's bank accounts to mine were to reimburse myself for expenses incurred for the properties owned by Roza, LLC." (Id., ¶5.) In failing to address this claim in either their motion or response, Plaintiffs have failed to meet their burden to set forth specific facts via admissible evidence that establish a genuine issue of disputed fact exists. *Maiden*, 461 Mich at 121. Specifically, Plaintiffs have failed to provide any evidence that establishes a factual dispute whether the funds transferred from Roza's bank account were used for Bailey and Greg's benefit and that their retention of the funds would be inequitable. Accordingly, Bailey and Greg are entitled to summary disposition on Plaintiff's unjust enrichment claim.

I. Unpled Negligence Claim

In their motion and in response to GSA's motion, Plaintiffs allege a claim of negligence against Bailey and Agazzi that was not in their complaint. Defendants argue

that this new claim is procedurally improper and Plaintiffs lack any evidence to support it.

Plaintiffs have not explained why it is appropriate for them to raise an unpled claim for the first time during summary disposition proceedings, nor is the Court aware of any authority that allows them to do so. Nonetheless, as explained below, Defendants are entitled to summary disposition on this unpled claim.

In a negligence action, it is the plaintiff's burden to prove "(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Diem v Sallie Mae Home Loans*, 307 Mich App 204, 214; 859 NW2d 238 (2014).

In their motion, Plaintiffs merely discuss certain facts from Bailey and Agazzi's depositions and cite a single case referencing the threshold inquiry about whether a duty is owed. (Pltfs.' Mot., pp. 22-26). They did not elucidate any argument to support a negligence claim against Bailey or Agazzi. In their response to GSA's motion, Plaintiffs appear to base this claim on Bailey and Agazzi's violation of the Occupational Code, MCL 339.2512f. However, as GSA correctly argues, the Michigan Court of Appeals has held that the Occupational Code does not provide a private right of action. this approach has been rejected by the Court of Appeals. *Claire-Ann Co v Christenson & Christenson, Inc,* 223 Mich App 25, 30; 566 NW2d 4 (1997). Thus, even assuming Bailey and Agazzi violated the Occupational Code, no cause of action based on the statute may be maintained by Plaintiffs. *Clair-Ann*, 223 Mich App 25. Accordingly, Defendants are entitled to summary disposition on Plaintiffs' unpled negligence claim.

In sum, Nina's correspondence with Baily and her execution of the corporate resolution granted Bailey the authority to sell the properties via land contract. Because he was permitted to sell the properties, Plaintiffs have not met their burden of establishing genuine issues of material facts on regarding their breach of contract, breach of fiduciary duty, fraud, and negligence claims. Plaintiff likewise failed to establish a genuine issue of material fact on their unjust enrichment claim against Bailey and Greg. Defendants are therefore entitled to judgment as a matter of law on all Plaintiffs' claim. Because the issues addressed above are dispositive, it is unnecessary to address the parties' other arguments.

IV. Conclusion

For the reasons set forth above, Defendants' respective motions for summary disposition are GRANTED. All of Plaintiffs' claims against all Defendants are DISMISSED WITH PREJUDICE. This Opinion and Order resolves the last pending claim and closes this case. MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: February 27, 2024

COUNTY OF MACOMB STATE OF MICHIGAN

Kathryn A. Viviano

signed by KATHRYN VIVIANO 02/27/2024 02:58:41 D0mM72Zy

Hon. Kathryn A. Viviano, Circuit Court Judge