

STATE OF MICHIGAN  
OAKLAND COUNTY CIRCUIT COURT

JOHN HOLDINGS, LLC,  
A Michigan Limited Liability Company,

Case No. 2023-198219-CB  
Hon. Victoria A. Valentine

Plaintiff,

v.

GABRIEL SCHUCHMAN, an Individual, and  
OKEMOS RETAIL MANAGEMENT, LLC,  
A Michigan Limited Liability Company,

Defendants,

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At a session of said Court held on the  
9<sup>th</sup> day of March 2023 in the County of  
Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court on Defendants' GABRIEL SCHUCHMAN ("Schuchman") and OKEMOS RETAIL MANAGEMENT LLC ("ORM") motion for summary disposition under MCR 2.116(C)(8). Plaintiff, JOHN HOLDINGS LLC ("John Holdings") in turn filed a response that seeks summary disposition under MCR 2.116(I)(2) to which Defendants filed a reply. The parties appeared for oral argument on March 8, 2023, at which time the Court took the matter under advisement. After reviewing the motion and briefs, after hearing oral argument, and otherwise

being advised in the premises, the Court respectfully DENIES both parties' motion for the reasons set forth below.

*Facts as alleged in the Complaint:*

- Plaintiff owns the 13,500 square foot commercial building and real property located at 4800 Okemos Road, Okemos, Michigan ("Property"). (¶ 6 of Complaint).
- Defendants wished to complete some electrical work involving the relocation of a transformer for the benefit of a new retail building that they had recently constructed and requested that Plaintiff agree to allow such work to be completed by Consumers Energy Company. (¶ 7 of Complaint).
- Because the electrical work planned by Defendants would impact Plaintiff's Property since the electrical power would be disconnected, Plaintiff was concerned that such work would be done properly and its Property would be protected. (¶ 8 of Complaint).
- On **November 19, 2020**, Defendant Schuchman filed a certificate of Dissolution of ORM. (¶ 24 of Complaint)(a fact Plaintiff alleges it did not learn about until it prepared this case).
- On **March 5, 2021**, Plaintiff and Defendant ORM entered into a contract regarding terms and conditions to allow Defendants to complete transformer and electrical work. (¶ 9 of Complaint), which is signed by ORM but which does **NOT** disclose that ORM is a dissolved LLC (Exhibit A attached to Complaint :

**Okemos Retail Management LLC**  
30200 Telegraph Road, Suite 205  
Bingham Farms, MI 48025

March 5, 2021

Ms. Sharon M. Chapman  
205 Orangewood Lane  
Largo, FL 33770

***Re: 4800 Okemos Road, Okemos, Michigan***

Dear Mrs. Chapman,

With respect to the February 17, 2021 estimate from Consumers Energy ("Consumers") regarding electrical work to be performed at the captioned property (the "Property") (see copy of estimate attached) (collectively "Consumers Work"), please be advised that Okemos Retail Management LLC ("ORM") will pay all such costs involved with such work promptly upon being billed for same. Neither you, nor John Holdings LLC (collectively, "You") will have any

obligation to pay any such costs. In the event that there are any additional costs incurred as a result of Consumers Work, including but not limited to, subcontractor costs, overages, costs for unanticipated conditions, events and/or contingencies, ORM will pay such costs within ten (10) days of its receipt of an invoice for the same. In addition, pertaining to Consumers Work, ORM will do the following:

- a. ORM agrees not to permit any liens to be filed against the Property arising out of the work to be performed by Consumers. ORM shall, within thirty (30) days after receiving notice of any such lien, discharge such lien, either by payment of the indebtedness due to the mechanic's lien claimant or by filing a bond (as provided by statute) as security therefor. In the event ORM shall fail to discharge such lien as provided above, you shall have the right to procure such discharge by filing such bond and ORM shall pay the cost of such bond to you upon written request therefor.
- b. ORM shall, at its sole cost and expense, promptly repair any damage to the Property caused by Consumers or its employees, contractors, subcontractors or agents that Consumers does not repair. ORM shall take all necessary measures to minimize any damage, disruption, interference with, or inconvenience to your business operations or any tenant occupying the Property caused by the construction activities and shall make adequate provision for the safety and convenience of all persons affected thereby.
- c. ORM shall indemnify, defend (with qualified legal counsel acceptable to you; provided that legal counsel appointed by ORM's responding insurance company (if any) shall be presumed to be qualified and acceptable to you) and hold you and any tenant occupying any part of the Property free and harmless from any and all claims, actions, damages, liabilities and expenses (including, without limitation, reasonable attorneys' fees and costs of litigation) which arise from or are in any way related to Consumer's construction activities on the Property.

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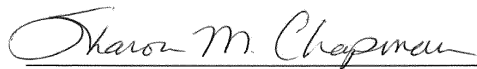
If you are in agreement with the above, please sign below in the space provided.

Very truly yours,

OKEMOS RETAIL MANAGEMENT LLC

By: 

ACKNOWLEDGED AND AGREED:



Sharon M. Chapman, individually and on behalf of  
John Holdings LLC

- Pursuant to this Contract, ORM agreed that it would:
  - Promptly repair any damage to the Property at its sole cost and expense;
  - Take all necessary and reasonable measures to minimize any damage, disruption or interference with, or inconvenience to Plaintiffs business operations;

- Indemnify and hold Plaintiff harmless from any and all claims, actions, damages, liabilities and expenses (including without limitation reasonable attorneys' fees and costs of litigation) which arise from or are in any way related to Consumers' construction activities on the Property. (§ 10 of Complaint).
- As a result of the Consumers' work, the Property's power was disconnected and the Property was without electrical power from approximately May 21, 2021, to January 19, 2022. (§ 11 of Complaint).
- During the time that the power was disconnected, the Property was unoccupied, as known to Defendants. (§ 12 of Complaint).
- After the work was apparently completed by Consumers, Defendants did not notify Plaintiff or take any steps to restore full power to the Property. (§ 13 of Complaint).
- As a result of the loss of power, the Property's pipes froze, burst and flooded the Property, thereby causing extensive damage to the Property that required remediation, demolition and repair/reconstruction. (§ 14 of Complaint).
- Plaintiff discovered the damage on January 19, 2022, after a prospective buyer had noticed the damage on January 18, 2022. (§ 15 of Complaint).
- Plaintiff engaged emergency remediation and repair services for the damage to the Property to attempt to mitigate the damages and loss at the Property. (§ 16 of Complaint).
- Plaintiff had been unaware that the power remained shut-off at the Property as winter approached because the thermostats were lit, the temperature was set at 60 degrees, and Plaintiff continued to receive and pay gas and electric bills for the Property during the relevant period. (§ 17 of Complaint).
- Defendants had employees and subcontractors present to supervise the work done by Consumers at the Property but they failed to notify Plaintiff that the power remained shut off to the Property or the Property was in any danger of freezing. (§ 18 of Complaint).
- Upon investigation after the damage occurred, Plaintiff was told that full power had not been restored to the Property as of at least February 4, 2022, and additional work was required by Consumers to restore full power to the Property as such power capacity had existed prior to the electrical work performed by Consumers for Defendants. (§ 19 of Complaint).
- Prior to Defendants' electrical project, there were no issues with the heating system or pipes at the Building. (§ 20 of Complaint).
- Plaintiff to date has paid \$91,339.48 for the emergency remediation, heating and demolition at the Property. (§ 21 of Complaint).
- Additional repairs are needed at the Property since the work completed was done to remove wet drywall and flooring, repair burst pipes, restore heat and electrical service at the Property and otherwise mitigate and prevent any further damage such as mold. (§ 22 of Complaint).

- Plaintiff requested that ORM provide and pay for the repairs to Plaintiffs Property but ORM refused. (¶ 23 of Complaint).
- Upon review of the corporate status of ORM when preparing this case, Plaintiff learned that Defendant Schuchman had filed a Certificate of Dissolution of ORM on November 19, 2020 (several months before Plaintiff signed the Contract purportedly with ORM). (¶ 24 of Complaint).
- Defendant Schuchman failed to notify Plaintiff and, instead, affirmatively represented to Plaintiff, that ORM was an operating, valid entity as shown by the Contract, but such representations were knowingly false when made. (¶ 25 of Complaint).

Plaintiff filed a 3-count complaint alleging:

- breach of contract against both **Defendants**;
- fraud and misrepresentation against **Defendant Schuchman**; and
- negligence against both **Defendants**.

Defendants argue that:

- Counts II (fraudulent misrepresentation) & Count III (negligence) should be dismissed because Plaintiff does not allege any specific duties of ORM separate and distinct from performing under the contract.
- Defendants further argue that Defendant Schuchman should be dismissed because he was a member of Defendant ORM and is thus insulated from personal liability under MCL 450.4501(4) unless ORD had completed its wind up.

Plaintiff, in turn, seeks summary disposition under MCR 2.116(I)(2) on its breach of contract claim.

### *Standard of Review*

Summary disposition under MCR 2.116(C)(8) may be granted where “[t]he opposing party has failed to state a claim on which relief can be granted.” When deciding a motion on this ground, a court may consider only the parties’ pleadings. MCR 2.116(G)(5). “[A]ll well-pleaded allegations are accepted as true and construed most favorably to the non-moving party.” *Wade v Dep’t of Corrections*, 439 Mich 158, 162-163 (1992). Because Michigan is a notice-pleading jurisdiction, a complaint is required to contain only enough information “reasonably to inform the defendant of the nature of the claim against which he must defend.” *Veritas Auto Machinery*,

*LLC v FCA Int'l Operations, LLC*, 335 Mich App 602, 615; 968 NW2d 1 (2021); MCR 2.111(B)(1).

Under MCR 2.116(l)(2), "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

Based on the reasons set forth below, the Court denies both parties' motions.

### *Analysis*

First as an initial matter, it is undisputed that prior to the parties entering into the contract on March 5, 2021, Defendant ORM had filed a Certificate of Dissolution in November of 2020. It is also undisputed that the March 5, 2021, contract, signed by ORM, did not disclose that ORM was a dissolved LLC.

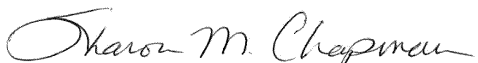
If you are in agreement with the above, please sign below in the space provided.

Very truly yours,

OKEMOS RETAIL MANAGEMENT LLC

By: 

ACKNOWLEDGED AND AGREED:



Sharon M. Chapman, individually and on behalf of  
John Holdings LLC

MCL 450.4805 provides:

(1) Except as otherwise provided in the articles of organization, an operating agreement, or this section, **the members or managers that have not wrongfully dissolved a limited liability company may wind up the company's affairs**, but the circuit court for the county in which the registered office is located may wind up the limited liability company's affairs on application of, and for good cause shown by, any member or legal representative or assignee of a member.

(2) **The members or managers that are winding up a limited liability company's affairs shall continue to function, for the purpose of winding up, in accordance with the procedures established by this act, the articles of organization, and operating agreements, shall not be held to a greater**

**standard of conduct than that described in section 404, and are not subject to any greater liabilities than would apply in the absence of dissolution.**

**(3) A dissolved limited liability company may sue and be sued in its name and process may issue by and against the company in the same manner as if dissolution had not occurred. An action brought by or against a limited liability company before its dissolution does not abate because of the dissolution.** (Emphasis added)

Accordingly, upon ORM's dissolution in November of 2020, it was only authorized to conduct business to the extent necessary to wind up its affairs. Based on the pleadings, however, it is unknown whether the parties' contract, subsequently entered into in March of 2021, related to the winding up of ORS's affairs; whether ORM had the capacity to sue or be sued in connection with the transaction at issue; whether ORM was wrongfully dissolved; and when and if the winding up has been completed.

Second, Defendants argue that Plaintiff cannot maintain an action in tort for nonperformance of a contract. Defendants argue:

- "The key here, then, is whether **ORM's** duties toward John Holdings differ from **ORM's** contractual obligations," (Defendant's brief p 3; emphasis added).
- "Because John Holdings does not allege any specific duties of **ORM** separate and distinct from performing on the contract, Counts II and III are not actionable and must be dismissed." (Defendants' Brief, p 3)(Emphasis added).

Plaintiff's fraudulent misrepresentation count (Count II), however, seeks relief *only* against Defendant Schuchman, not against Defendant ORM, who Defendants argue entered into the contract.

Plaintiff's complaint alleges:

25. Defendant Schuchman failed to notify Plaintiff and, instead, affirmatively represented to Plaintiff, that ORM was an operating, valid entity as shown by the Contract, but such representations were knowingly false when made.

**COUNT II: FRAUD AND MISREPRESENTATION**

35. Plaintiff incorporates all previous allegations as if fully restated herein.

36. Defendant Schuchman filed a Certificate of Dissolution for ORM on November 19, 2020 and, as a result, had actual knowledge that ORM was dissolved and was not an existing entity and could not legally conduct any business.

37. Although Defendant Schuchman knew that ORM as not in valid existence because he had filed the Certificate of Dissolution months earlier, Defendant Schuchman signed the Contract on March 15, 2021 and represented that ORM was a valid, existing entity that would pay for any and all repairs at the Property, indemnify and hold Plaintiff harmless from any and all damages and claims and was bound to other obligations and undertakings as stated in the Contract.

38. Defendant Schuchman made such representations regarding ORM knowing them to be false when made.

39. If Plaintiff had known that ORM had been dissolved, Plaintiff would not have entered into the Contract, would not have allowed the electrical work to be performed without sufficient contractual undertakings and indemnification by a valid entity or by bond, and Plaintiff would not have suffered the damages claimed herein.

40. Plaintiff suffered damages in excess of \$25,000 as a direct and proximate result of Defendant Schuchman's actions.

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment in favor of Plaintiff against Defendant Schuchman in an amount in excess of \$25,000 to fully compensate Plaintiff for all damages so wrongfully sustained, including costs, interest and reasonable attorney fees.

Accordingly, because the fraudulent misrepresentation claim only seeks relief against Defendant Schuchman, not against Defendant ORM, the Court agrees with Plaintiff, who argues as follows:<sup>1</sup>

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<sup>1</sup> Plaintiff's Brief, p 7.



Importantly, as argued by Schuchman, he is not a party to the Contract. Schuchman argues that ORM is the contracting party, not himself. He cannot have it both ways. He is either a party to the Contract, and therefore liable under the Contract (and the tort claims would be only alternative claims), or he is not a party to the Contract (as he argues) and the Contract provides him with no basis to try to avoid liability for his tortious conduct.

Additionally, Schuchman is liable personally for his personal wrongs – which were his misrepresentations that ORM was an existing entity. There was a duty independent from the Contract for Schuchman to disclose to Plaintiff that ORM was no longer in existence and no longer owned the ORM Property, and Schuchman breached that duty to Plaintiff. As a result of that breach of duty by Schuchman, it caused Plaintiff to enter into a contract with a dissolved, non-existent entity. For these reasons, Plaintiff's tort claims should not be dismissed.

Therefore, the Court denies Defendants' motion to dismiss Count II; this Count only relates to Defendant Schuchman, who Defendants argue is not liable under the contract. Therefore, at this point in the proceedings, the fact that there is a contract does not preclude Plaintiff's tort claim of fraudulent misrepresentation *against Defendant Schuchman*. And this count does allege wrongdoing by Defendant Schuchman independent of Defendants' breach of contract claim.

Third, the Court similarly denies Defendants' motion to dismiss Count III. To state a viable action in tort, the plaintiff must assert a breach of duty separate and distinct from a breach of contract. *Hart v. Ludwig*, 347 Mich. 559, 563 (1956). A claim that is based on a breach of a promise is an action in contract, not in tort. *Hart v Ludwig*, 347 Mich at 563.

Plaintiff's negligence Count does allege a duty separate from the contract—"a duty to preserve and protect Plaintiff's Property." (¶ 43 of Complaint). As a result, the Defendants' Motion for Summary Disposition is denied as to Count III. While the damages for the counts of Breach of Contract and Negligence may be the same, Plaintiff is entitled to plead alternatively.

MCR 2.111(A).

Next, as to Defendants' motion to dismiss Defendant Schuchman, the Court has already denied Defendants' motion as to the fraudulent misrepresentation and negligence counts. As to the contract count, Defendants argue that under MCL 450.4501(4), Defendant Schuchman is not personally liable for the actions of ORM-unless ORM had completed the winding up process. MCL 450.4501(4) provides:

(4) Unless otherwise provided by law or in an operating agreement, a person that is a member or manager, or both, of a limited liability company is not liable for the acts, debts, or obligations of the limited liability company.

Neither party provides authority on point as to the specific issue/facts here--whether Defendant Schuchman, who entered into a contract in the name of ORM, a dissolved LLC, may be individually liable for breach of that contract where the LLC has not been reinstated.

Defendant cites to *Bergy Brothers, Inc v Zeeland Feeder Pig, Inc.*, 415 Mich 286 (1982) where the Michigan Supreme Court analyzed, under a since revised statute, liability of an individual officer for debts incurred in the name of a corporation during the period in which the corporation was in default for failing to file annual reports and failing to pay fees. There the Court found that because the dissolved corporation was reinstated, personal liability against a corporate officer was precluded and all contracts entered into before reinstatement were valid and enforceable.

And Plaintiff cites to *Duray Dev, LLC v Perrin*, 288 Mich App 143 (2010), which involved personal liability for a contract signed *before* the LLC was established.

As previously stated, based on the pleadings, however, it is unknown whether the parties' contract related to the winding up of ORS's affairs; whether ORM had the capacity to sue or be

sued in connection with the transaction at issue; whether ORM was wrongfully dissolved; and when and if the winding up has been completed. Therefore, based on the pleadings, Defendants' motion regarding dismissing Defendant Schuchman is also denied with regard to the Breach of Contract count.

Finally, at this point in the proceedings and for the same reasons above, Plaintiff's motion is denied. Defendants have not yet answered the complaint and discovery has not begun. Further, Defendants' motion is a (C)(8), which addresses whether Plaintiff stated a claim upon which relief can be granted; it does not address the factual issues.

IT IS SO ORDERED.

