STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

ERIN WELSH,

Plaintiff,

vs. Case No. 2023-003806-CB

WELSH ENTERPRISE INVESTMENTS, LLC, a Michigan Limited Liability Company, STANTON INVESTMENT GROUP, LLC, a Michigan Limited Liability Company, ARIANNA WELSH, an individual, TORY WELSH, an individual, THOMAS WELSH IV, an individual, and PAMELA WELSH, an individual,

Defendants.
_____/

OPINION AND ORDER

Defendants Welsh Enterprise Investments, LLC, Stanton Investment Group, LLC, Arianna Welsh, Tory Welsh, Thomas Welsh IV, and Pamela Welsh, (collectively, "Defendants") have filed a motion for summary disposition pursuant to MCR 2.116(C)(5), (8) and (10). Plaintiff Erin Welsh ("Plaintiff") has filed a response requesting that the motion be denied. Defendants filed a reply in further support of their motion.

I. Factual and Procedural History

Welsh Enterprise Investments, LLC ("WEI") was formed on January 19, 2011. See Defendants' Exhibit A. WEI's Operating Agreement was entered into on November 15, 2010. See Defendants' Exhibit B. Pursuant to the Operating Agreement, the members of WEI are Thomas Welsh IV and Pamela Welsh. *Id.*

On November 7, 2023, Plaintiff filed his eight-count complaint in this matter alleging the following: count I – inspection of books and record, count II – accounting, count III – minority member oppression, count IV – breach of fiduciary duty, count V – fraudulent concealment, count VI – tortious interference with a business expectancy, count VII – civil conspiracy, and count VIII – unjust enrichment.

On December 6, 2023, Defendants filed the instant motion for summary disposition arguing that Plaintiff's claims must be dismissed because Plaintiff is not a member of the company, and all of his claims require such member status. Defendants also argue that they should be awarded sanctions. On January 9, 2024, Plaintiff filed a response arguing that he is a member of WEI and that his claims are proper. On January 12, 2024, Defendants filed a reply in further support of their motion. On January 16, 2024, this Court heard oral argument and took the matter under advisement.

II. Standards of Review

"Review of a determination regarding a motion under MCR 2.116(C)(5), which asserts a party's lack of capacity to sue, requires consideration of the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000). The Court must view the record in the light most-favorable to the plaintiff and determine whether the moving party is entitled to judgment as a matter of law, i.e. whether the plaintiff either pleaded or established facts that would give plaintiff standing to sue. *Id.*; see also *Franklin Historic Dist Study Comm v Vill of Franklin*, 241 Mich App 184, 187; 614 NW2d 703 (2000).

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim on which relief can be granted. *Carter v Ann Arbor City*

Attorney, 271 Mich App 425, 426-427; 722 NW2d 243 (2006). A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Carter*, Mich App at 427. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). The Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). "The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial." *Id.* "Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Greene v AP Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

III. Arguments and Analysis

Defendants argue that Plaintiff's claims should be dismissed because he is not a member of WEI and member status is required for such claims. Defendants also argue that they should be awarded sanctions. In response, Plaintiff argues that he is a member of WEI and that his claims are proper.

A. Whether Plaintiff is a Member of WEI

Defendants argue that they "deny all of Plaintiff's allegations of wrongdoing, but focus upon the fundamental, threshold of Plaintiff's lack of any membership interest in WEI because such defect is fatal to all of Plaintiff's claims as a matter of law." See Defendants' Motion, p. 5, fn. 1. In support of this argument, Defendants point to the Operating Agreement, which clearly lists the only two members as Thomas Welsh IV and Pamela Welsh. See Defendants' Exhibits B. Defendants also rely on the affidavit of Defendant Thomas Welsh IV, which states the following:

> 3. Pamela Welsh and I are the only members of WEI.
> 4. There are no other members of WEI, and there have never been any other members of WEI.
> 5. Erin C. Welsh is not, and has never been, a member of WEI.
> 6. Erin C. Welsh has never received a K-1 from WEI or contributed any capital to WEI.
>
> See Defendants' Exhibit H, p. 2.

Additionally, Defendants note that MCL 450.4501 provides the sole methods by which an individual can be admitted as a member of a limited liability company. MCL 450.4501 reads as follows:

> 450.4501 Members; admission; liability for acts, debts or obligations.
>
> (1) A person may be admitted as a member of a limited liability company in connection with the formation of the limited liability company in any of the following ways:

(a) If an operating agreement includes requirements for admission, by complying with those requirements.

(b) If an operating agreement does not include requirements for admission, if either of the following are met:

(i) The person signs the initial operating agreement.

(ii) The person's status as a member is reflected in the records, tax filings, or other written statements of the limited liability company.

(c) In any manner established in a written agreement of the members.

(2) A person may be admitted as a member of a limited liability company after the formation of the limited liability company in any of the following ways:

(a) If the person is acquiring a membership interest directly from the limited liability company, by complying with the provisions of an operating agreement prescribing the requirements for admission or, in the absence of provisions prescribing the requirements for admission in an operating agreement, upon the unanimous vote of the members entitled to vote.

(b) If the person is an assignee of a membership interest, as provided in section 506.

(c) If the person is becoming a member of a surviving limited liability company as the result of a merger or conversion approved under this act, as provided in the plan of merger or plan of conversion.

(3) A limited liability company may admit a person as a member that does not make a contribution or incur an obligation to make a contribution to the limited liability company.

(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.

In *Haddad v Haddad,* unpublished per curiam opinion of the Court of Appeals, decided September 13, 2014 (Docket No. 316492), the Michigan Court of appeals explained the requirements for admission as a member of a limited liability company pursuant to MCL 450.4501 as follows:

> A "limited liability company" is defined as "an entity that is an unincorporated membership organization formed under this act." MCL 450.4102(2)(k). A "member" is "a person who has been admitted to a limited liability company as provided in [MCL 450.4501]." MCL 450 .4102(2)(p). MCL 450.4501 sets forth the various ways in which a person may be admitted as a "member" of a limited liability company. Under MCL 450.4501(1)(a), a person may be admitted as a member by complying with the requirements for admission set forth in the company's operating agreement. However, if no such requirements for admission are set forth in an operating agreement, a person may be considered admitted as a member of the company if the person signed the initial operating agreement, or if the person's membership status is reflected in the company's records, tax filings, or other written statements. MCL 450.4501(1)(b). Further, MCL 450.4501(1)(c) provides that a person may be admitted as a member in any manner established in a written agreement of the members. *Haddad,* unpub op at 6.

Here, Plaintiff was not listed as an initial member in the Operating Agreement and the Operating Agreement includes specific requirements for admission. Regarding the admission of new or additional members, the Operating Agreement reads as follows:

> 3.6 Admission of Additional Members. The members by unanimous consent may permit the admission of additional Members and determine the Capital Contributions of such members. Any additional Member shall be required to enter into an Admission Agreement which shall by its terms bind the Additional Member to the provisions of this Operating Agreement and set forth the Capital Contributions of the Additional Member.
>
> See Defendants' Exhibit B.

Defendants argue that Plaintiff was never added as an Additional Member because he never entered into an Admission Agreement or made any Capital Contributions to WEI pursuant to the requirements set forth in section 3.6 of the Operating Agreement.

In response, Plaintiff argues that "[t]he Court must reject this document as the operative Operating Agreement for WEI." See Plaintiff's Response, p. 3. In support of this argument, Plaintiff argues that the Operating Agreement is improper because it was entered into on November 15, 2010, approximately two months before the Articles of Organization were filed on January 19, 2011. See Defendants' Exhibits A and B. However, Plaintiff cites no authority in

support of this argument. Rather, he simply cites to MCL 450.4202(2), which states that "the existence of the limited liability company begins on the effective date of the articles or organization as provided in section 104." Contrary to Plaintiff's assertion, this statute does not invalidate the existence of an Operating Agreement that was entered into before the Articles of Organization. Plaintiff also has not provided any evidence that he was ever added as an Additional Member, that he ever entered into an Admission Agreement, or that he ever made any Capital Contributions to WEI. Plaintiff cites to bank records (See Plaintiff's Exhibit D) in an attempt to support his argument that he is a member of WEI, however, his reliance on these records is based on his improper belief that the Operating Agreement is invalid.

In this case, based on the evidence presented, Plaintiff was not a Member of WEI at the time the Operating Agreement was entered into and was never added as an Additional Member. Therefore, pursuant to MCL 450.4501, Plaintiff is not a member of WEI and his claims must fail as a matter of law. Accordingly, for the reasons discussed above, Defendants' motion for summary disposition is granted.

B. Defendants' Request for Sanctions

Defendants argue that they should be awarded sanctions. The purpose of sanctions "is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose." *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 405; 700 NW2d 432 (2005) (quotation marks and citation omitted). A party should not be penalized for asserting a claim that "initially appears viable but later becomes unpersuasive." *Louya v William Beaumont Hosp*, 190 Mich App 151, 163; 475 NW2d 434 (1991). "Not every error in legal analysis constitutes a frivolous position." *Kitchen v Kitchen*, 465 Mich 654, 663; 641 NW2d 245 (2002).

The mere fact that a court rejects a party's legal position does not mean that the party's position was frivolous. *Id.* "The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted." *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003) (citation omitted). "That the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry." *Id.* MCR 2.625(A)(2) provides that: "[I]f a court finds on motion of a party that an action or defense is frivolous, costs shall be awarded as provided by MCL 600.2591." Accordingly, MCR 2.114(F) points to MCR 2.625(A), which turns to MCL 600.2591. Under MCL 600.2591 a court may find that a party's action is frivolous under MCR 2.625(A)(2) when the party (1) initiated the suit for purposes of harassment, (2) had a legal position devoid of arguable legal merit, or (3) lacked a reasonable basis to believe that the facts underlying its legal position were true. MCL 600.2591(3)(a).

In this case, although Defendants' motion for summary disposition is granted and Plaintiff's claims are dismissed, this Court finds that Plaintiff's suit was not frivolous. Therefore, sanctions are not appropriate and Defendants' request for sanctions is denied.

IV. Conclusion

For the reasons set forth above, Defendants' motion for summary disposition is GRANTED, but Defendants' request for sanctions is DENIED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* resolves the last pending claim and closes the case.

IT IS SO ORDERED.

Richard L. Caretti

HONORABLE RICHARD L. CARETTI
Circuit Court Judge

DATE: March 18, 2024

cc: Jeffrey M. Bloom, Esq.
Fatima M. Bolyea, Esq.
Robert D. Ihrie, Esq.