STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Street
Grand Haven, MI 49417
616-846-8315
* * * * *

PATRICK BULLIS and **BECKY BULLIS,**

Plaintiff,

v

PRIVAMD, INC., and **PRIVAMD OF GRAND HAVEN, INC.,**

Defendants.
_____/

File No. 21-6661-CB

OPINION AND ORDER ON MOTION FOR SUMMARY DISPOSITION

Hon. Jon A. Van Allsburg

At a session of said Court, held in the Ottawa County Courthouse, in the City of Grand Haven, Michigan, on the 4th day of April, 2022:
PRESENT: HONORABLE JON A. VAN ALLSBURG, Circuit Judge

Plaintiffs filed this action to recover damages for alleged breach of contract and investment fraud, alleging that they were defrauded into investing $100,000 in PrivaMD, Inc. (hereinafter referred to as "Priva 1.0") in exchange for stock in Priva 1.0, into loaning $120,000 to Priva 1.0 and into guaranteeing another $200,000 in Priva 1.0 corporate debt and conveying a mortgage against their residence to secure such debt. Plaintiffs assert that Mark and Heidi Naperala were the majority stockholders of Priva 1.0, and knew the corporation was insolvent when they represented otherwise to the plaintiffs. Mr. and Mrs. Naperala subsequently filed a Chapter 7 bankruptcy action and have not been named as parties in this action.

Plaintiffs assert several claims against Priva 1.0: breach of contract (Count I), minority shareholder oppression (Count II), statutory minority shareholder oppression under MCL 450.1489 (Count III), civil conspiracy (Count V), fraud in the inducement and/or silent fraud (Count VI), fraudulent conveyance (Count VII), and violation of MCL 450.2501 & 450.2509 (Count VIII). A default was entered against Priva 1.0 on December 17, 2021. No further action has been taken against Priva 1.0.[1]

[1] Defendant Priva 2.0's counsel, who formed and later dissolved Priva 1.0, and who never completed the formation of Priva 2.0, submitted an unsworn affidavit dated February 21, 2022, in support of these allegations. Plaintiff's motion to disqualify defendant's counsel was denied without prejudice, as it is not yet clear whether defendant's counsel will be a necessary witness in this case (MRPC 3.7(a)).

Plaintiff also asserts a tortious interference with a contract claim against PrivaMD of Grand Haven, Inc. (hereinafter "Priva 2.0") (Count IV), civil conspiracy (Count V), and fraudulent conveyance (Count VII), alleging that the assets of Priva 1.0 were transferred to Priva 2.0 without fair consideration. Plaintiff also alleges, without evidentiary support, that the assets of Priva 1.0 may currently be in the hands of Adam Sobczak or of an entity controlled by Mr. Sobczak, W.M. Medical Supply, LLC.[2]

Defendant Priva 2.0 moves for summary disposition pursuant to MCR 2.116(C)(8) and (10), asserting that plaintiffs have failed to state a claim against Priva 2.0, there is no genuine dispute as to any material fact, and Priva 2.0 is entitled to judgment as a matter of law, as well as an award of sanctions pursuant to MCR 1.109(E) and 2.625(A)(2).

Standard of Review

Defendant's motion under MCR 2.116(C)(8) tests the legal sufficiency of the Complaint, and may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When ruling on a motion for summary disposition under MCR 2.116(C)(8), a court must look only at the pleadings, and must accept as true all factual allegations. *Dolan v Continental Airlines/Continental Express,* 454 Mich 373, 380-381; 563 NW2d 23 (1997), *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). The motion should be granted only if no factual development could possibly justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

Defendant's motion under MCR 2.116(C)(10) tests the factual basis for plaintiffs' Complaint. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Haliw v City of Sterling Heights*, 464 Mich 297; 627 NW2d 581 (2001), *citing Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In reviewing such a motion, this Court must consider the pleadings, affidavits, depositions, admissions, and any other admissible evidence in favor of the nonmoving party. MCR 2.116(G)(5). Granting the nonmoving party, the Defendants in the instant case, the benefit of any reasonable doubt regarding material facts, this Court must then determine whether a factual dispute exists to warrant a trial. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). A party moving for summary disposition has the initial burden of supporting his position with affidavits, depositions, admissions, or other documentary evidence. "[T]he substance or content of the supporting proofs

[2] See plaintiff's Brief in Partial Opposition to Defendant's Motion for Summary Disposition and Sanctions, p 3. Defendant concedes that in the fall of 2020, Priva 1.0 approached Mr. Sobczak for financial assistance and that it was contemplated that Mr. Sobczak would purchase the assets of Priva 1.0. However, defendant contends that said purchase "never came to fruition." See defendant's "Brief in Opposition to Disqualify," p 1.

must be admissible in evidence." *Maiden*, 461 Mich at 109. The moving party is required to present "... either admissible documents or attested testimony, such as found in depositions or in affidavits ...." *Maiden*, 461 Mich at 124, n 6. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. If the burden of proof at trial would rest on the nonmoving party, the nonmoving party may not rely on mere allegations or denials in his pleadings but must set forth specific facts which show that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Quinto, supra.*

Affidavits offered in support of or in opposition to a motion for summary disposition must be considered to the extent that the content or substance would be admissible in evidence to establish or deny the grounds stated in the motion. See *Maiden*, 461 Mich at 119. The evidence contained in the affidavits need not be admissible in form but must be admissible in content. *Id.* at 124. An affidavit filed in support of or in opposition to a motion must be made on personal knowledge, state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion, and show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit. MCR 2.119; *Dextrom v Wexford County,* 287 Mich App 406 (2010), lv den 488 Mich 853; 787 NW2d 508 (2010). In this case, counsel's affidavit is unsworn, and it is not yet clear whether counsel "can testify competently" while acting as defendant Priva 2.0's counsel.

Generally, a motion for summary disposition is premature if granted before the completion of discovery regarding a disputed issue, but a party opposing a motion for summary disposition on the ground that discovery is incomplete must assert that a dispute does exist and support that allegation by some independent evidence. Mere conjecture does not entitle a party to discovery. If the party opposing summary disposition fails to provide minimal evidence in support of its position, summary disposition is not premature. *Davis v Detroit,* 269 Mich App 376; 711 NW2d 462 (2005). "A motion under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position." *Liparoto Constr, Incv Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). No case preparation order has been entered in this case. Therefore, no discovery deadlines have been established, making it impossible to say at this point in time whether or not there is a "fair likelihood" that further discovery will yield support for the plaintiff's position regarding defendant Priva 2.0's (C)(10) motion.

Analysis

It is unfortunately clear through the correspondence and emails between counsel that much argument has occurred between the parties, but very little exchange of facts. The court has been provided with no documents regarding the alleged facts – by either party – and the arguments do not provide the court with a basis for ruling on the pending motions. Defendant asserts that "[a] simple due diligence investigation would have disclosed that no entity would

have purchased Priva 1.0's assets after it was discovered that Priva 1.0's assets were collateral for a nearly $400,000 loan from NI as disclosed in Ottawa County Court Case."[3] Aside from the apparent fact that this allegation was not previously disclosed in defendant's Answer and Affirmative Defenses filed December 2, 2021, or in Defendant's Initial Disclosures filed March 4, 2022, the court cannot draw the conclusion that "no entity would have purchased" the assets of Priva 1.0 based upon the discovery of a $400,000 outstanding loan. This assertion, like many of the assertions made to date by both of the attorneys in this case, is simply unsupported by any substantively admissible documentary evidence. Naked assertions are not sufficient to either support or defeat a (C)(10) motion. Moreover, plaintiffs allege that they purchased a 4% stake in the company for $100,000, suggesting that the agreed value of the company was then $2,500,000. A $400,000 debt would thus have represented only 16% of the company's value. Such a debt-to-asset ratio – without more – does not support the conclusion that defendant asserts.

The court cannot conclude that "no factual development could possibly justify recovery," and defendant's motion pursuant to MCR 2.116(C)(8) is DENIED, without prejudice. The court further cannot rely on an unsworn affidavit citing conclusory opinions signed by counsel as a basis for concluding that there is no genuine issue of any material fact, and that defendant is entitled to judgment as a matter of law. The law requires the submission of substantively admissible documentary evidence; no such evidence has yet been submitted. Defendant's motion pursuant to MCR 2.116(C)(10) is DENIED, without prejudice.

IT IS SO ORDERED.

Dated: April 4, 2022

Hon. Jon A. Van Allsburg, Circuit Judge

[3] The referenced case is *Northern Great Lakes Initiative dba Northern Initiatives ("NI") v PrivaMD, Inc., et al.*, 20th Circuit Case No. 21-6447-CB.