STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

BENJAMIN M. KEEL,

Plaintiff/Counter-Defendant,

vs. Case No. 2021-000691-CB

UNIVERSAL LOGISTICS,

Defendant/Counter-Plaintiff.
_____/

OPINION AND ORDER

This matter is before the Court on Defendant/Counter-Plaintiff Universal Logistics' motion for summary disposition under MCR 2.116(C)(10) on Plaintiff/Counter-Defendant Benjamin Keel's complaint and on its counterclaims.

I. Background

Benjamin Keel began working as an operations manager for Universal in March 2012. In August 2017, Keel and Universal (operating as Logistics Insight Corp.) entered a "Cognovit Promissory Note/Forgivable Loan Schedule" (the Keel Loan). The Keel Loan provided Keel with an interest-free loan of $20,000.00 in exchange for his continued employment with Universal for 36 months. It also provided that Keel would only be deemed in default if he voluntarily resigned or was terminated for just cause.

Keel alleges he was terminated without cause from his employment with Universal on September 3, 2019. Following his termination, on October 4, 2019, while Keel was purportedly about to be hired by non-party Comprehensive Logistics, Universal sent a letter to Comprehensive erroneously informing it that Keel was subject to a non-compete and non-solicitation agreement with Universal. According to Keel, Universal's erroneous letter delayed his employment with Comprehensive by one week.

On August 17, 2020, Keel filed suit against Universal in the 37th District Court.[1] Venue was subsequently changed to this Court on February 29, 2021 after Keel filed his first amended complaint alleging damages in excess of $25,000. Keel alleges five claims against Universal: breach of contract (Count I); tortious interference with contractual relations (Count II); unjust enrichment (Count III); common law conversion (Count IV); and statutory conversion (Count V.) Universal filed counterclaims and subsequently filed first amended counterclaims on March 5, 2021 alleging breach of contract (Counts I and II) and common law indemnity (Count III) based on Keel's failure to repay the Keel Loan and another loan (the Maple Loan) he received while employed with Universal.

On December 6, 2022, Universal filed a motion for summary disposition under MCR 2.116(C)(10) seeking judgment as a matter of law in its favor on all the claims in Keel's complaint and on all of its counterclaims. Keel filed his response on December 27, 2022. The Court heard oral arguments on January 3, 2022. During oral arguments, Keel conceded his unjust enrichment claim should be dismissed. The Court took the remaining issues under advisement.

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 Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing such motions, a court considers the documentary evidence submitted by the parties in the light most favorable to the non-moving party. *Maiden*, 461 Mich at

[1] Before Keel filed this action, Universal (as Logistics Insight Corp.) filed a petition in this Court in January 2020 seeking a confession judgment for $20,150.00 from Keel for his alleged default under the terms of the Loan. On March 13, 2020, this Court dismissed Universal's petition finding questions of fact precluded the petition. Universal did not appeal the ruling.

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 Co*, 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.

Where the moving party is the defendant challenging the plaintiff'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). "[T]he nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Id.* If the non-moving party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Id.*

III. Law and Analysis

a. Keel's Claims

i. Count I: Breach of Contract (the Keel Loan)

In his breach of contract claim, Keel alleges the parties entered into the Keel Loan, under the terms of which Universal agreed to provide a forgivable loan to Keel in the amount of $20,000. (First Am. Compl., ¶¶ 7, 17.) The Keel Loan unambiguously conditions Keel's default on whether Keel "voluntarily leaves the employ of [Universal] or is terminated for just cause." (Keel Loan,

§2.) Keel alleges Universal terminated him without cause, and thus breached the Loan when it withheld his wages as a setoff against the balance of the loan. (Id., ¶¶ 23, 24, 30-36.)

"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,* 495 Mich 161, 178; 848 NW2d 95 (2014). Whether a breach has occurred is a question of fact. *State-William Pship v Gale*, 169 Mich App 170, 176; 425 NW2d 756 (1988).

The parties don't dispute the existence or applicability of the Keel Loan, their sole dispute is whether Keel was terminated without cause or whether he voluntarily resigned from Universal. Universal asserts, "The overwhelming weight of [the] admissible, documentary (and unrebutted) evidence confirms that Keel resigned and is, therefore, obligated to repay the balance of the Keel Loan." (Mot., p 7.) In response, Keel contends that his deposition testimony and affidavit where he denies voluntarily resigning establish a genuine issue of material fact whether he was terminated without cause or voluntarily resigned.

In support of its contention that Keel voluntarily resigned, Universal relies first on the affidavit of Donald Berquist, Sr., Keel's supervisor at Universal. (Mot. Ex. D.) According to Berquist, Keel had "appeared disinterested with, and unfocused in, his employment" in the weeks leading up to his resignation. (Id.) Keel discussed his resignation with Berquist prior to resigning, and offered his resignation directly to Berquist. (Id.) According to Berquist, he didn't immediately accept Keel's resignation because he did not want Keel to resign, so he tried to talk Keel out of resigning. (Id.) Berquist states he accepted Keel's resignation during a face-to-face conversation on September 3, 2019; neither he nor anyone else from Universal fired or terminated Keel. (Id.) Text messages purportedly between Berquist and a human resources employee at Universal

corroborate Berquist's representation that he told Keel he didn't want him to resign. (Id., Ex. E.) The text messages show that a human resources employee allegedly stated to Berquist, "I kept reiterating to [Keel] that you don't want him to resign as discussed on the call." (Id.)

Universal also relies on an email from Seth Kohman, a Universal employee and colleague of Keel. (Id., Ex. G.) Kohman delivered Keel's personal belongings to Keel on September 6, 2019. (Id.) His email outlines his conversation with Keel and includes a passage about the conversation Keel had with Berquist on the day his employment ended. (Id.) According to Kohman, Keel said that he got into a "very heated" conversation with Berquist "and he could not take it anymore" and "ended up throwing his phone" and "wasn't going to do it anymore." (Id.)

In his response, Keel relies on his own deposition testimony and affidavit to support his assertion that he did not voluntarily resign but was instead terminated by Universal. (Resp., Exs. D and E.) According to Keel, on September 4, 2019, he was in Alabama to launch a new facility. (Id., Ex. E, p 34.) Berquist and other Universal employees were also at the facility. (Id., pp 35-36.) Keel showed Berquist around the facility, after which Berquist called Ryan Heath in Universal's HR department. (Id. p 38.) With Heath on speakerphone, Heath told Keel that he would be accepting his resignation. (Id.) Keel asked, "What resignation?" and Heath responded "You resigned." (Id.) Keel then stated, "I did not resign, I don't even know what you're talking about." (Id., pp 38-39.) In response, Heath said, "Well, I'm accepting it and I need your laptop and your phone and all -- the keys to the company car." (Id., p 39.) Keel was then taken back to his hotel before going to the airport for his flight home. (Id.) According to Keel, Universal never explained why the terminated him. (Id.) Though they sent him a letter stating he voluntarily resigned, he testified that he sent an email to Ryan Heath stating he did not resign. (Id.) Keel further testified he never texted Berquist "about potentially resigning." (Id., p 39.) According to Keel,

> The only text message that had anything about resigning was when [Berquist] was extremely upset with Nissan and the movement of that business. He was very vulgar and belligerent on group text messages, and I asked him, I was like "If you're trying to force me to resign, give me some time. If you're wanting my resignation, if you're trying to force me into this, I don't know what you want," and he responded "No, I don't know why you'd think that," and that was the only thing that went back and forth.

(Id.)

In his affidavit, Keel averred that he had been employed by Universal for seven years prior to his termination and had been promoted six times and never been informed of any deficiencies in his performance. (Resp., Ex. D.) He states that he did not voluntarily resign but was terminated by Universal. (Id.) According to Keel, he was not given an exit interview nor has he been provided a reason for his termination. (Id.)

The conflicting evidence from the parties gives two very different pictures about the circumstances of Keel's departure from Universal. Universal's evidence indicates Keel wanted to voluntarily resign and though Universal tried to talk him out of it, it ultimately accepted his resignation. Keel's evidence, on the other hand, indicates he never intended to resign, never expressed any intent to resign, and was shocked when he was terminated by Universal. Determining whom to believe turns on evaluating the credibility of the witnesses. That evaluation is for the trier of fact, not this Court. *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999) ("The court may not make findings of fact or weigh credibility in deciding a summary disposition motion.") Construing the evidence in a light most favorable to Keel, reasonable minds could differ whether Keel voluntarily resigned or was terminated. Accordingly, Universal's motion for summary disposition on Keel's breach of contract claim in Count I must be denied.

ii. Count II: Tortious Interference

Count II is entitled "Tortious Interference with Contractual Relations," but its allegations only relate to Keel's "existing and/or prospective business relationship with Comprehensive." (First Am. Compl., ¶¶22-27.) It makes no mention of any existing contractual relationship between Keel and Comprehensive. Thus, it is properly considered a claim for tortious interference with a business relationship or expectancy. See *Health Call of Detroit v Atrium Home & Health Care Services, Inc.*, 268 Mich App 83, 89; 706 NW2d 843 (2005) (explaining that tortious interference with a contract and tortious interference with a business relationship or expectancy are separate and distinct torts). The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff. *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003).

In its motion, Universal argues this claim fails because Keel cannot establish a valid business relationship or expectancy existed between him and his future employer, Comprehensive Logistics ("Comprehensive"), on October 4, 2019, when Universal sent the letter to Comprehensive. This argument has merit.

To prevail on a tortious interference claim, the "expectancy must be a reasonable likelihood or probability, not mere wishful thinking." *First Pub Corp v Parfet*, 246 Mich App 182, 199; 631 NW2d 785 (2001), vacated in part on other grounds, 468 Mich 101, citing *Trepel v Pontiac Osteopathic Hosp.*, 135 Mich App 361, 377 (1984). Here, the evidence shows Universal sent a letter to Comprehensive on October 4, 2019, stating it had learned Keel was seeking employment

with Comprehensive. (Resp., Ex. H.) It warned comprehensive that Keel had signed a non-compete and non-solicitation agreement with Universal. (Id.) The evidence also shows that on October 10, 2019—six days after Universal's letter to Comprehensive—Comprehensive sent an offer letter to Keel indicating his start date with Comprehensive would be October 15, 2019. (Id., Ex. I.) In his deposition, Keel testified his start date was delayed a week past October 15 because Comprehensive had to confer with Universal that Keel did not sign a non-compete while employed with Universal. (Id., Ex. E, p 47.)

Although Keel was given an offer of employment by Comprehensive less than a week after Universal sent its letter to Comprehensive, Keel hasn't provided any evidence that at the time Universal sent the letter, there was a reasonable likelihood or probability that he was going to be offered a job. "[A]n employer's decision whether to hire an employee is highly discretionary." *Ukpai v Cont'l Auto Sys*, per curiam unpublished opinion of the Court of Appeals, issued Dec. 22, 2020 (Docket No. 350294), at *3.[2] There's no evidence Comprehensive made any promises or conditional offers of employment before the October 4 letter. *See id.* Keel's subjective belief that he was going to get that job on October 4, 2019 "is nothing more than the sort of 'wishful thinking' that is not sufficient to establish a business expectancy." *Id.* Keel has therefore failed to establish a genuine issue of material fact on the existence of a valid business relationship or expectancy. Consequently, Universal is entitled to judgment as a matter of law on Keel's tortious interference with a business relationship or expectancy claim in Count II.

iii. Counts IV and V: Common Law and Statutory Conversion

In Counts IV and V, Keel alleges common law and statutory conversion based on Universal's wrongful withholding of his wages as a set off against the balance of the Keel Loan.

[2] Though *Ukpai* is a non-binding unpublished opinion precedent, the Court finds its analysis persuasive and directly applicable here.

At common law, conversion is "any distinct act of domain wrongfully exerted over another's property in denial of or inconsistent with the rights therein." *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004) (citation omitted). It occurs "at the point such wrongful dominion is asserted." *Trail Clinic, PC v Bloch*, 114 Mich App 700, 705; 319 NW2d 638 (1982). Statutory conversion under MCL 600.2919a(1)(a) adds an additional element to common law conversion and covers a narrower swath of conduct, as "someone alleging conversion to the defendant's 'own use'. . . must show that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose." *Aroma Wines & Equipment, v Columbian Distribution Services*, 497 Mich 337, 359; 871 NW 2d 136 (2015).

Universal asserts the conversion claims are barred by the economic loss doctrine because Keel has not alleged Universal violated a duty separate and distinct from its obligations under the Keel Loan. In response, Keel maintains Universal had no authority to retain his wages because he was not in default under the Keel Loan, so Universal's conduct "constitute[d] an unlawful and unwarranted deprivation of [Keel's] property interest in his wages . . . taken by [Universal] for the benefit of [Universal]," which amounts to common law and statutory conversion. (Resp., p 11.)

In Michigan, a plaintiff cannot bring a tort claim where the legal duty breached arises out of a contractual promise. *Rinaldo's Const Corp v Michigan Bell Tel Co*, 454 Mich 65, 83; 559 NW2d 647 (1997). Sometimes referred to as the "economic loss doctrine," its purposes is "to avoid confusing contract and tort law." *Huron Tool & Engg Co v Precision Consulting Services*, 209 Mich App 365, 374; 532 NW2d 541 (1995). In determining whether a party may pursue a tort action against another party where the parties' relationship is governed by a contract, the Supreme

Court in *Neibarger v Universal Cooperatives*, 439 Mich 512, 521; 486 NW2d 612 (1992), focused on whether the duty allegedly breached arises from tort or contract:

> The purpose of a tort duty of care is to protect society's interest in freedom from harm, i.e., the duty arises from policy considerations formed without reference to any agreement between the parties. A contractual duty, by comparison, arises from society's interest in the performance of promises. Generally speaking, tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.

"[T]he threshold inquiry is whether the plaintiff alleges a violation of a legal duty separate and distinct from the contractual obligation." *Rinaldo's*, 454 Mich at 84. Where the plaintiff's allegations are that a defendant failed to perform according to the terms of its promise, plaintiff has no cause of action in tort. *Id.* at 85; see *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004) ("If no independent duty exists, no tort action based on a contract will lie.")

In his conversion claims, Keel alleges Universal "wrongfully withheld [Keel's] wages . . . set the wages off against the balance of the [Keel] Loan" and "failed to remit any portion of [Keel's] withheld wages despite being requested to return said wages." (First Am. Compl., ¶¶37, 38, 42, and 43.) These allegations are nearly identical to the allegations in Count I that Universal breached the Keel Loan when it "wrongfully withheld Plaintiff's wages when it terminated [Keel's] employment without just cause and set the wages off against the balance of the [Keel] Loan." (Id., ¶18.) All three of these claims are based on Universal's withholding of Keel's wages—an action that is governed by the terms of the Keel Loan. See e.g., *J.L. Lewis & Associates v Magna Mirrors of America*, unpublished opinion of the Court of Appeals, issued April 23, 2020 (Docket No. 347057), at *11, vacated in part on other grounds, 507 Mich 934 (2021) (affirming dismissal of conversion claims where those claims stem from the same allegations that are the basis of the

breach of contract claim); *Cnty. of Ingham v Michigan Cnty. Rd. Comm'n Self-Ins. Pool*, unpublished opinion of the Court of Appeals, Issued July 14, 2022 (Docket No. 334077), at *5 (same); *Llewellyn-Jones v Metro Prop Group, LLC*, 22 F Supp 3d 760, 789 (ED Mich, 2014) (same); *Sudden Serv v Brockman Forklifts*, 647 F Supp 2d 811, 816 (ED Mich, 2008) (same).[3] In fact, Keel's own arguments in his response reveal as much when he relies exclusively on the assertion that he wasn't in default of the Keel Loan to support his contention that Universal had no right to retain his wages. (Resp., p 11.) Whether Keel was in default and whether Universal had the right to retain his wages turn on the parties' rights and duties under the Keel Loan—not on any independent duty, separate and distinct from the contract.

Based on the allegations in the first amended complaint and Keel's own arguments in these proceedings, Keel's conversion claims are his breach of contract claim by another name. Those claims are premised on Universal's improper retention of Keel's wages under the Keel Loan. He has not alleged a violation of a legal duty in his conversion claims that is separate and distinct from Universal's contractual obligation. Accordingly, Universal is entitled to judgment as a matter of law on Keel's common law and statutory conversion claims in Counts IV and V.

b. Universal's Counterclaims

i. Count I: Breach of the Keel Loan

Universal seeks summary disposition on its counterclaim for breach of the Keel Loan. As with its request for summary disposition on Keel's claim for breach of the Keel Loan, summary disposition turns on whether Keel voluntarily resigned or was terminated. As explained earlier in denying summary disposition on Keel's breach of contract claim, there is a genuine issue of

[3] Though the cited cases are non-binding, their analysis of the "separate and distinct duty" issue is consistent with Michigan caselaw, thus the Court finds them persuasive here. MCR 7.215(C)(1); *Kern v Kern-Koskela*, 320 Mich App 212, 241; 905 NW2d 453 (2017); *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

material fact on that issue. Accordingly, summary disposition on Universal's counterclaim for breach of the Keel Loan must also be denied.

ii. Count II: Breach of the Maple Loan

In Count II of its counterclaims, Universal alleges a breach of the Maple Loan. According to Universal, there is a second loan between Keel and Universal that was administered by Maple Financial Corporation (Maple Financial), hence the designation "Maple Loan." Universal alleges that this loan was not forgivable, always required Keel to repay it via weekly payroll deductions, and upon his termination of employment for any reason, Keel was obligated to "pay off the entire amount to Maple Financial." (Mot., p 5.) Universal alleges there's no dispute Keel failed to pay off the entire amount of the Maple Loan when he ceased working for Universal, so it is entitled to judgment as a matter of law that Keel breached the Maple Loan. Keel did not address this claim in his response.

"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,* 495 Mich 161, 178; 848 NW2d 95 (2014). The "main goal in the interpretation of contracts is to honor the intent of the parties." *Kyocera Corp v Hemlock Semiconductor,* 313 Mich App 437, 446; 886 NW2d 445 (2015). "When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties, or to consider extrinsic testimony to determine the parties' intent." *Id.*

The Maple Loan documents attached to Universal's motion show the loan was between Maple Financial (as lender) and Keel (as borrower). (Mot., Ex. C.) Under the terms of the loan, Keel "agree[d] to payoff the entire loan amount to Maple Financial upon [Keel's] resignation,

retirement or termination." (Id.) Keel personally guaranteed repayment of the loan. (Id.) Additionally, it repeatedly states Keel "agrees [Universal] will withhold outstanding loan amount and unpaid interest thereon from [Keel's] final payroll, expense, or other checks upon Applicant's resignation, retirement or termination and forward such amount to Maple Financial for loan payoff." (Id.) Consistent with the agreement that Universal would deduct payments from Keel, Keel executed an "Authorization for Wage Deduction and Assignment [4] Maple Loan" in which he authorized Universal to

> deduct from my wages and/or other sums due me by my Employer and to Transfer such sums to any corporation making such advance or making such payment on my behalf such portion of my wages or other sums due to me from my Employer as may be necessary to repay such sums so advanced or paid.

(Id.)

The unambiguous language of the Maple Loan documents show that the loan was between Maple Financial and Keel. Nothing in the language of the loan documents indicates Maple Financial assigned its right to pursue claims for breach of the Maple Loan. Universal was only authorized to "withhold [any] outstanding amount and unpaid interest" from "wages and or other sum due [Keel] by [Universal]." (Id.) Universal's hasn't cited to any language in the Maple Loan documents or any other legal basis to establish that it, rather than Maple Financial, has authority to maintain this action to collect unpaid loan amounts from Keel after his employment has ended. 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.'") Until it establishes it has authority to sue Keel for breach

[4] Although that document uses the word "assignment" in its title, there's not language of assignment in the document.

of the Maple Loan, Universal's motion for summary disposition on its breach of the Maple Loan counterclaim must be denied.

iii. Count III: Common Law Indemnity

In Count III of its crossclaims, Universal alleges a claim of common law indemnity. It alleges that under the Maple Loan, Universal is obligated to repay the outstanding balance on the loan. It further alleges that because Universal has incurred the debt of the Maple Loan that Keel personally guaranteed, Keel is obligated to repay it. Universal seeks summary disposition on this counterclaim; however, its motion only address the parties' respective breach of contract claims and counterclaims. It didn't provide provided any arguments or analysis to establish why Universal is entitled to judgment as a matter of law on its common law indemnity counterclaim. See *Wilson*, 457 Mich at 243. Additionally, the Court notes Universal hasn't provided any evidence that shows Universal is obligated to repay Maple Financial for the unpaid balance of the Maple Loan. Accordingly, Universal's request for summary disposition on its common law indemnity counterclaim is denied.

IV. Conclusion

For the reasons set forth above, Universal's motion for summary disposition is GRANTED IN PART as to Keel's claims of tortious interference (Count II), common law conversion (Count IV) and statutory conversion (Count V). Counts II, III, IV, and V of Keel's first amended complaint are DISMISSED. The motion is DENIED IN PART in all other respects. This Opinion and Order neither resolves the last pending claim nor closes the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

DATED: February 2, 2023

Hon. Jennifer M. Faunce
Circuit Court Judge