

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**KIMBERLY A. NIELSEN,
Plaintiff,**

Case No. 23-202411-CB

Hon. Victoria A. Valentine

v.

**WILLIAM J. NIELSEN, JR., and
SHELLBACK MANUFACTURING COMPANY, INC.,
Defendants.**

**OPINION AND ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY
DISPOSITION IN LIEU OF ANSWER TO THE FIRST AMENDED COMPLAINT**

At a session of said Court, held in the
County of Oakland, State of Michigan
May 3, 2024

HONORABLE VICTORIA A. VALENTINE

This matter is before the Court on Defendants' Motion for Summary Disposition in Lieu of Answer to the First Amended Complaint. This Court has reviewed the pleadings as well as the motion, response, and reply brief. Oral argument was held on the motion.

OPINION

I.

Overview

Plaintiff is one of four non-voting shareholders of Shellback Manufacturing Company, Inc. ("Shellback"). Her three siblings are the remaining non-voting shareholders. The William Nielsen Sr. Revocable Living Trust (the "Trust") is the only voting shareholder of Shellback. Defendant Nielson is the Trustee of the Trust. Both Plaintiff and Defendant are members of Shellback's Board

of Directors. Shellback was created by the siblings' father in 1963.¹ After their father's passing in 2020, Plaintiff's relationship with her siblings became strained. Plaintiff first initiated a decedent's estate and trust action in probate court.² Those matters were mediated. Although it is clear that the mediation resulted in Plaintiff being permitted access to the corporate records for Shellback, a review of the Petitions in each case reveal that neither case actually involved Shellback.

The probate and trust matters resulted in a Settlement Agreement that permitted any co-owner to review corporate documents on site at the corporation (Exhibit E to Motion).

In August 2023, Plaintiff brought outstanding issues back to the arbitrator, including the request to review corporate records and the failure to sell the business (Exhibit H to Motion). The Arbitrator issued a ruling regarding the personal property, the failure to provide support for trust expenses, the listing of Shellback for sale, and the failure to record deeds (Exhibit J to Motion).

Plaintiff filed this action against Shellback and William Nielsen, Jr. Plaintiff alleged claims of Violation of MCL 450.1487 (Count I); Shareholder Oppression (Count II); Breach of Fiduciary Duties (Count III); Corporate Waste (Count IV); Negligence and Breach of Care (Count V); Appointment of a Receiver (Count VI); and Declaratory Judgment (Count VII). Defendants move for dismissal of Counts I, II, III and VII of Plaintiff's claims under MCR 2.116(C)(6), (7), (8) and (10). Defendants move for dismissal of Counts IV and VI under MCR 2.116(C)(8) and (10). Finally, Defendants move for dismissal of Count V of Plaintiff's Complaint under MCR 2.116(C)(8). Plaintiff opposes summary disposition.

II.

Standard of Review

¹ Complaint, ¶¶ 6-14.

² Decedent's Estate Case No. 2020-397,349-DE; Trust Action Case No. 2021-404063-TV. *See*, Motion, p 3.

MCR 2.116(C)(6) provides that summary disposition may be granted where “[a]nother action has been initiated between the same parties involving the same claim.” MCR 2.116(C)(6).

[S]ummary disposition cannot be granted under MCR 2.116(C)(6) unless there is another action between the same parties involving the same claims currently initiated and pending at the time of the decision regarding the motion for summary disposition. *See, Fast Air, Inc v Knight*, 235 Mich App 541, 549 (1999).

[U]nder well-established Michigan jurisprudence, the “same parties” language of MCR 2.116(C)(6) requires that relevant parties, i.e., the moving and the opposing party, be the exact same in both actions. Because the Supreme Court conditioned MCR 2.116(C)(6)’s applicability on the other action involving the same parties in addition to the same claim, we must enforce the rule’s plain and unambiguous language as written. The rule that complete identity of the parties is not required is only triggered when one or both actions name an additional party not found in the other action, or when the parties’ respective positions as a defendant or a plaintiff are reversed.

Dairyland Ins Co v Mews, ___ Mich App ___ (Docket No. 359855, July 20, 2023), p 7 (citations omitted).

MCR 2.116(C)(7) provides for summary disposition where a claim is barred by an agreement to arbitrate or to litigate in a different forum. The Court of Appeals has explained the standard of review:

Under MCR 2.116(C)(7) . . . this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in the light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff’s claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate.

RDM Holdings, LTD v Continental Plastics Co, 281 Mich App 678, 687 (2008) (citations omitted).

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil v Oakwood*

Healthcare, Inc., 504 Mich 152, 159-160; 934 NW2d 665 (2019); *Pawlak v Redox Corp.*, 182 Mich App 758, 763; 453 NW2d 304 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 360; 466 NW2d 404 (1991).

“All well-pleaded factual allegations are accepted as a true and construed in a light most favorable to the nonmovant.” *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Wade v Dep’t of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App at 360; *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co.*, 451 Mich 358, 362 (1996). Accordingly, “[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion.” *Maiden v Rozwood*, 461 Mich 109, 119-120 (1999); MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto*, 451 Mich at 358. The moving party “must specifically identify the issues” as to which it “believes there is no genuine issue” of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim. *Quinto*, 451 Mich at 361. If the

moving party properly supports its motion, the burden “then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Id.* at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also *Meyer v City of Center Line*, 242 Mich App 560, 575 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

In all cases, MCR 2.116(G)(4) squarely places the burden on the parties, not the trial court, to support their positions. A reviewing court may not employ a standard citing mere possibility or promise in granting or denying the motion. *Maiden*, 461 Mich at 121-120 (citations omitted), and may not weigh credibility or resolve a material factual dispute in deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161 (1994). Rather, summary disposition pursuant to MCR 2.116(C)(10) is appropriate if, and only if, the evidence, viewed most favorably to the non-moving party, fails to establish any genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362, citing MCR 2.116(C)(10) and (G)(4); *Maiden*, 461 Mich at 119-120 (1999). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160 (2019) (citation omitted). Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

III.

Analysis

MCR 2.116(C)(6) – Counts I, II, III and VII

Under *Dairyland*, MCR 2.116(C)(6) is only applicable where there is an action pending at the time of ruling on summary disposition, and that other action involves the same parties and the same claims. Defendants allege that Counts I, II, III, and VII “are entirely based upon an alleged refusal to allow Plaintiff to inspect Shellback records” (Motion, p 11). Defendants further allege that “Plaintiff’s access to Shellback records was **specifically mediated**, **arbitrated**, and **resolved**” (Motion, p 11). Defendants do not attach the Petitions in the Trust or Decedent’s Estate matters, nor do they attach the written statements.

Plaintiff argues that none of the claims for failure to produce records were brought in the arbitration of the Decedent’s Estate and Trust matters. Additionally, Plaintiff argues that the allegations in Counts II and III contain allegations beyond only the failure to produce corporate documents. As evidence that the mediation did not include the claims in this matter, Plaintiff attaches the Arbitration Statement filed on September 11, 2023 (Exhibit 3 to Response). The Statement does not include any argument regarding corporate records and does not request any relief relating to corporate records (Exhibit 3 to Response). Additionally, the Arbitration Statement evidences that Shellback is not a party to the arbitration, but rather only The William J. Nielsen Revocable Living Trust and the Estate of William J. Nielsen (Exhibit 3 to Response) appear to be parties to those matters.

Based upon the foregoing, the Court finds that MCR 2.116(C)(6) is inapplicable to this matter, and summary disposition under MCR 2.116(C)(6) is denied.

MCR 2.116(C)(7) – Counts I, II, III and VII

Defendants argue that the Settlement Agreement entered in the Decedent’s Estate and Trust matters, which came about through mediation of those claims, is an agreement to arbitrate relating

to all the claims pled in this matter. Defendants offer only three words contained within a five-page Arbitration Opinion as their support for the argument.

The Court finds that there is no agreement to arbitrate the claims raised in the First Amended Complaint. Summary disposition under MCR 2.116(C)(7) is denied.

MCR 2.116(C)(8) – Counts I, II, III, IV, V, VI and VII

Defendants first argue that the claims should be dismissed generally under (C)(8) because Plaintiff has suffered no injury in fact. This portion of the argument addresses only the allegation regarding a failure to produce records and ignores Plaintiff's many other allegations. It is assumed this argument is made with respect to Counts I, II, III, and VII because there are no other arguments for dismissal of these claims under (C)(8) in the Brief. Because damages are possible from the claims alleged, dismissal of Counts I, II, III, and VII is denied.

Defendants next argue that Count IV alleging corporate waste should be dismissed because "[i]t alleges, without any proof" various inactions and "none of the[] allegations are supported by affidavit" (Motion, p 17). Defendants also seek dismissal by arguing that Defendant Nielsen did not do these things (Motion, p 17). Defendants make no argument that Plaintiff failed to allege the elements of a corporate waste cause of action. Defendants' Motion for Summary Disposition under (C)(8) as to Count IV is denied.

Next, Defendants argue that Count V should be dismissed under (C)(8) because "the claim is inaccurate." Count V of the First Amended Complaint incorporates the facts and allegations set forth in all paragraphs. Paragraphs 85, 86, 87, and 88 then set forth the elements of the cause of action relying upon the factual allegations made in the First Amended Complaint. The factual

allegations are sufficient to state the claim. The factual allegations used by Defendants to argue for dismissal are not proper in a motion under (C)(8).

Finally, Defendants argue for dismissal of Count VI under (C)(8) because there is “no good cause” for a Receiver, again citing a failure to “proffer evidence.” Defendants cite MCR 2.622(A) for the argument that Plaintiff must establish “good cause.” There is no Motion before the Court requesting the appointment of a Receiver, so the court rule is not applicable.

MCR 2.116(C)(10)

Because a Motion under (C)(10) is only appropriate after discovery has been taken and completed, the Motion under (C)(10) in this matter is premature. Defendants have not filed an Answer to the First Amended Complaint and have not engaged in any discovery. For that reason, the Motion under (C)(10) is denied.

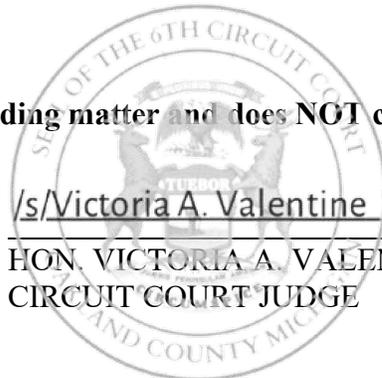
ORDER

Based upon the foregoing Opinion:

IT IS HEREBY ORDERED that Defendants’ Motion for Summary Disposition is **DENIED** in its entirety.

IT IS SO ORDERED.

This Order does NOT resolve the last pending matter and does NOT close the case.



/s/Victoria A. Valentine

HON. VICTORIA A. VALENTINE
CIRCUIT COURT JUDGE

Dated: 5/3/24