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

MARCO EADIE, an individual,

Plaintiff/Counter-Defendant,

Case No. 23-199709-CB
Hon. Victoria A. Valentine

v

BOULEVARD AND CO, LLC, a Michigan Limited Liability Company, and **ALOIS GERLACH,** an individual,

Defendants/Counter-Plaintiffs.

_____/

OPINION AND ORDER REGARDING DEFENDANTS/COUNTER-PLAINTIFFS' MOTION FOR PARTIAL SUMMARY DISPOSITION

At a session of said Court, held in the
County of Oakland, State of Michigan
May 8, 2024

HONORABLE VICTORIA A. VALENTINE

This matter is before the Court on Defendants/Counter-Plaintiffs' Motion for Partial Summary Disposition. This Court has reviewed the pleadings filed by the parties and the motion and response briefs. Oral argument was held on the above-entitled motion.

OPINION

I.

Overview

Plaintiff Marco Eadie ("Eadie") and Defendant Alois Gerlach ("Gerlach") formed Boulevard and Co, LLC ("Boulevard") in 2015 to provide investment banking services. Eadie and Gerlach each own 50% of the company and serve as managers of Boulevard. The parties operated Boulevard together until approximately 2020 when each expressed an interest in moving on. The parties disagree as to the facts and legal consequences of that decision, however.

Eadie argues that his and Gerlach's emails in January 2020 expressing a desire to terminate and dissolve Boulevard fulfilled the contractual provision for termination under Article 2 of Boulevard's Operating Agreement:

> **Article 2**
> **Term of Company**
>
> The term of the Company shall be for the period of years beginning on the effective date of this Agreement and ending upon the occurrence of certain specific events as follows:
>
> (a) the termination of the Company under any provision contained elsewhere herein;
>
> (b) *a written agreement to dissolve* the Company signed by all Members whose combined Membership Interests equal 51 % or more of all of the Membership Interests; […]

Consequently, Eadie argues that everything that occurred between the parties after their agreement to dissolve Boulevard in January 2020 was in furtherance of winding up the company. During the period of winding up the company, they were no longer bound by the non-compete provision in the Operating Agreement, and they were free to seek other employment opportunities.

Gerlach, however, disagrees with this interpretation, and argues that although the parties expressed an interest in dissolving the company, they did not formally vote to do so and were still bound by the provisions in the Operating Agreement. Thus, according to Gerlach, Eadie's decision to seek other employment was a breach of the non-complete provision of the Operating Agreement.

In addition to the disagreement about whether the January 2020 emails constituted a written agreement to dissolve Boulevard, the parties also disagree about the payments they were entitled to from Boulevard in 2020 and 2021. Eadie claims that the payments Gerlach received from Boulevard constituted conversion because he made distributions to himself without Eadie's approval in contravention of Article 4.1 of the Operating Agreement. Gerlach believed that he was still entitled to receive his salary from Boulevard because he continued to do work for Boulevard. The parties have also each claimed that they were defamed by their former business partner. The instant suit seeks to resolve these and other issues.

II.

Standards of Review

Defendants move for partial summary disposition pursuant to MCR 2.116(C)(10). 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; 547 NW2d 314 (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; 597 NW2d 817 (1999); *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; 619 NW2d 182 (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 120-121 (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; 516 NW2d 475 (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. 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; 934 NW2d 665 (2019)(citation omitted).

III.

Analysis

A. Count I – Breach of Operating Agreement

Under Michigan law "[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 Constr, Inc*,

495 Mich 161, 178; 848 NW2d 95 (2014). A court's "goal in contract interpretation is to give effect to the intent of the parties, to be determined first and foremost by the plain and unambiguous language of the contract itself." *Wyandotte Elec Supply Co v Electrical Technology Sys, Inc*, 499 Mich 127, 143-144; 881 NW2d 95 (2016). "[I]t has long been the law in this state that courts are not to rewrite the express terms of contracts." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008). See also *Kendzierski v Macomb County*, 503 Mich 296, 311-312; 931 NW2d 604 (2019) (emphasis in original) ("A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*" and a court "will not create ambiguity where the terms of the contract are clear.").

Under Michigan law, contracts are subject to the parol evidence rule which prohibits the use of extrinsic evidence to interpret unambiguous language within the contract. *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). See also *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998) ("[P]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.") (citation omitted).

The question of whether contract language is ambiguous is a question of law. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). A contract is ambiguous if there is an irreconcilable conflict between provisions in the contract or "when a term is equally susceptible to more than a single meaning." *Bodnar v St John Providence, Inc*, 327 Mich App 203, 220; 933 NW2d 363 (2019). Under such circumstances, the ambiguous contract language presents a question of fact. *Klapp*, 468 Mich at 469. "[I]f a contract is ambiguous, then extrinsic evidence is admissible to determine the actual intent of the parties." *Shay*, 487 Mich at

667 (quotation marks and citation omitted). See also *Klapp*, 468 Mich at 469 ("In resolving such a question of fact, i.e., the interpretation of a contract whose language is ambiguous, [trier of fact] is to consider relevant extrinsic evidence").

In the case at bar, Gerlach argues that Eadie cannot maintain a breach of contract claim because Eadie breached the Operating Agreement first by, among other things, accepting employment with O'Keefe without voting to dissolve the company and releasing himself from the non-complete provisions in the Operating Agreement.

The parties disagree as to whether the January 2020 emails constitute "*a written agreement to dissolve* the Company *signed by all Members*" under Article 2 of the Operating Agreement. Eadie argues that the electronic block signatures in the January 2020 emails were the basis of a valid and binding agreement to terminate Boulevard. Both parties cite to the Michigan Uniform Electronic Transactions Act ("UETA") which broadly provides that electronic signatures are binding:

> (1) A record or signature shall not be denied legal effect or enforceability solely because it is in electronic form.
> (2) A contract shall not be denied legal effect or enforceability solely because an electronic record was used in its formation.
> (3) If a law requires a record to be in writing, an electronic record satisfies the law.
> (4) If a law requires a signature, an electronic signature satisfies the law. [MCL 450.837]
> …
>
> An electronic record or electronic signature is attributable to a person if it is the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable. [MCL 450.839].

However, the UETA also states that it "applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to

conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." MCL 450.835(2). Even if a party may agree to conduct one transaction by electronic means, that party "may refuse to conduct other transactions by electronic means." MCL 450.835(3). Additionally, the application of the UETA "may be varied by agreement," such as a contract. MCL 450.835(4).

Here, the Operating Agreement is silent as to whether such electronic signatures are sufficient, and in fact even implies that physical documents may be required:

> **Section 11.2 Notices**
>
> Unless expressly provided otherwise in this Agreement, all waivers, requests, notices, consents, approvals, offers, acceptances, elections, certifications, objections or other official communications permitted or required by this Agreement shall be in writing, duly signed by the person making the official act or request, and *delivered personally or by U.S. mail to the Member or Company receiving the writing at the most current address provided by the Member to the Company*. Correspondence sent by mail shall be deemed to have been delivered on the third day after depositing the correspondence in the mail.

Because the Court finds that the method of written agreement and the signatures required by Article 2 in the Operating Agreement is ambiguous, the Court looks to the conduct of the parties to determine whether they acted as though the January 2020 emails, *in and of themselves*, constituted a termination of Boulevard. The parties' course of conduct after January 2020 seems to demonstrate that both parties anticipated that a dissolution would eventually occur. However, there is conflicting evidence as to whether a dissolution had already taken place as of January 2020 and the company was simply "winding up" its affairs, or whether the parties were continuing with business as usual. Specifically, the evidence demonstrates:

- **Discussion of Need for Formal Dissolution Documents**: In the January 2020 emails, both Eadie and Gerlach mention the need for drafting formal dissolution documents. Gerlach asks "please let me know if you want me to develop the first draft of the dissolution plan. I hope to have a plan established by Friday of this

week." Eadie replies "[p]lease draft the initial proposal to dissolve."[1] Thus, it appears that both parties anticipated that formal dissolution documents would follow this email.

- **New Analyst**: Boulevard hired a new consultant in April 2020.[2]

- **Exploration of Merger/Acquisition**: Eadie emailed Pat O'Keefe in June 2020 (five months after the dissolution emails) and touted the benefits of Boulevard's services in connection with a discussion about O'Keefe & Associates Consulting, LLC merging with or acquiring Boulevard.[3]

- **Took on New Clients**: Gerlach stated in his affidavit that Boulevard not only continued operations in 2020 but signed new retainers in both 2020 and 2021.[4]

- **Offer to Divest**: On November 16, 2020, Eadie sent an email to Gerlach in which he said "My choice would be to shut [Boulevard] down completely but happy to divest my interest if it benefits you."[5]

Consequently, there appear to be material issues of fact as to whether the Operating Agreement was terminated and Boulevard legally dissolved as of January 2020. Thus, Eadie's obligations under the Operating Agreement are also subject to dispute. Because there are material issues of fact underlying Count I – Breach of Contract, Defendants' request for summary disposition pursuant to MCR 2.116(C)(10) is DENIED.

B. Count V: Defamation

Eadie included a claim for defamation in his complaint based on a statement Gerlach allegedly made to Robi and Neil Mitra that Eadie stole $500,000 from Boulevard. Both Robi Mitra and Neil Mitra testified in their depositions that they did not recall Gerlach saying that Eadie stole

[1] Plaintiff's Response in Opposition to Defendants' Motion for Summary Disposition, Ex. 4.
[2] Plaintiff's Response in Opposition to Defendants' Motion for Summary Disposition, Ex. 13.
[3] Defendants' Response to Plaintiff's Motion for Summary Disposition, Exhibit 9.
[4] Defendants' Response to Plaintiff's Motion for Summary Disposition, Exhibit 7.
[5] Defendant's Motion for Partial Summary Disposition, Exhibit 3.

money from Boulevard.[6] Eadie, however, relies upon a text message he received from Robi that said "[Gerlach] told my brother at my moms [mom's sic] service that you swept the cash."[7]

This text message contains multiple levels of hearsay, namely the statement allegedly made by Gerlach to Neil Mitra at the funeral that Eadie "swept the cash," the statement that Neil told his brother Robi about Gerlach's accusation, and the text message from Robi Mitra to Eadie telling him that Gerlach told Neil that he "swept the cash." Although hearsay within hearsay may be admissible, it will only be allowed if "each part of the combined statements conforms with an exception to the rule." MRE 805.

In this case, Eadie seeks to offer this text message for the truth of the matter asserted, namely that Gerlach told *Neil Mitra* that Eadie "swept the cash." If Eadie were offering a text message written by *Neil,* it would be admissible as a recorded recollection under MRE 803(5) because it is a record that "(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge."

However, this text message was sent by *Robi* conveying his brother's statement that Gerlach told him Eadie "swept the cash," which is hearsay within hearsay. Here, the out of court statement that Eadie seeks to admit through the text message is *Neil's* statement, not *Robi's*. See *United States v Severson*, 49 F3d 268, 272 (CA7 1995) ("A third party's characterization of a witness's statement 'does not constitute a prior statement of that witness unless the witness has subscribed to that characterization.'") (citation omitted). Eadie has not provided an exception for the second level of hearsay contained within the text message.

[6] Defendant's Motion for Partial Summary Disposition, Ex. 4, R. Mitra pp. 8-9 and Ex. 5, N. Mitra pp. 6-7.
[7] Plaintiff's Response in Opposition to Defendants' Motion for Summary Disposition, Ex. 37.

Here, the court must examine the substantively admissible evidence to determine whether there is a genuine issue with respect to any material fact. *Quinto*, 451 Mich at 362-363. Both Mitra brothers testified at their depositions that they do not recall Gerlach saying that Eadie stole money from Boulevard.[8] The text message from Robi Mitra to Eadie contains multiple levels of hearsay, and is therefore not admissible under MRE 803(5). Based on the foregoing, Eadie has not presented substantively admissible evidence that supports his claim for defamation.

Consequently, Defendants' Motion for Partial Summary Disposition is GRANTED as to Count V – Defamation.

ORDER

Based upon the foregoing Opinion:

IT IS HEREBY ORDERED that Defendants/Counter-Plaintiffs' Motion for Partial Summary Disposition is **DENIED** as to Count I – Breach of Contract;

IT IS FURTHER ORDERED that Defendants/Counter-Plaintiffs' Motion for Partial Summary Disposition is **GRANTED** as to Count V – Defamation.

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: 5/8/24

[8] Defendant's Motion for Partial Summary Disposition, Ex. 4, R. Mitra pp. 8-9 and Ex. 5, N. Mitra pp. 6-7.