

STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

DJ CONSTRUCTION & REMODELING,
LLC, a Michigan Limited Liability
Company, and DYAR ILIA, an
individual,

Plaintiffs/Counter-Defendants,

vs.

Case No. 2020-004193-CB

UTICA HOSPITALITY CORP., a
Michigan Corporation, and
THOMAS GUASTELLO, an individual.

Defendants/Counter-Plaintiffs.

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OPINION AND ORDER

This matter is before the Court on Defendant/Counter-Plaintiff Thomas Guastello's motion for summary disposition under MCR 2.116(C)(10) filed February 22, 2022, and Plaintiffs, DJ Construction & Remodeling and Dyar Ilia's, joint motion for summary disposition under MCR2.116(C)(10) and motion to disqualify Ronald Estes from serving as Defendants' trial counsel filed February 18, 2022.

I. Background

Defendant Utica Hospitality Corp. ("UHC") operates the Comfort Inn Utica hotel in Utica, Michigan. Defendant Thomas Guastello ("Guastello") is the sole shareholder and officer of UHC, and he purportedly owns the land underlying the hotel. Plaintiff DJ Construction & Remodeling ("DJ Construction") is allegedly managed by Plaintiff Dyar Ilia ("Ilia"). In January 2019, DJ Construction and UHC entered a contract (the "first contract") under which DJ Construction would remodel guest rooms and common areas of the hotel.

(Defs.' Mot., Ex. 2.) The remodeling was purportedly required as a part of UHC's franchise agreement. Under the first contract, UHC was to pay DJ Construction a deposit of \$33,900.00 followed by four equal installments of \$58,750.00 as work was completed on each floor. (Id.) UHC paid the down payment on January 16, 2019 and DJ Construction began work on the hotel. (Id., Ex. 3.) However, on February 8, 2019, DJ Construction stopped work on the hotel because UHC allegedly didn't provide the required building materials. UHC and DJ Construction subsequently entered into a second contract purportedly covering the same work as the first contract. (Id., Ex. 4.) The second contract required another deposit of \$50,000 followed by four equal installments in the same amount as the first contract. (Id.) DJ Construction then resumed work on the hotel.

According to Plaintiffs, DJ Construction was paid by UHC for work it completed on the third floor of the hotel, but after completing work on the second floor UHC, failed to make the required installment payment. Plaintiffs thereafter filed this action against Defendants for breach of contract (Count I) and unjust enrichment (Count II). Defendants subsequently filed six counterclaims for breach of contract (Count I), fraudulent misrepresentation (Count II), interference with a business relationship or expectancy (Count III), negligence (Count IV), indemnification (Count V), and unjust enrichment (Count VI). The gravamen of Defendants' counterclaims is that the DJ Construction's work was substandard, faulty, and not performed in a good and workmanlike manner, which caused Defendants damages.

Plaintiffs moved for partial summary disposition on Counts II, III, V, and VI of Defendants' counterclaims on February 18, 2022, and in the same motion, it moved to disqualify Ronald Estes as Defendants' trial counsel. Defendants filed their response on

March 7, 2022. Defendant Guastello moved for summary disposition on Plaintiffs' claims against him on March 22, 2022. Plaintiffs filed their response on March 4, 2022, and Guastello subsequently replied on March 10, 2022. The Court held oral arguments on both motions on March 14, 2022. At oral arguments, the Court granted Plaintiffs' motion as to Defendants' counterclaim for unjust enrichment (Count VI) and granted Guastello's motion as to Plaintiffs' claim for breach of contract (Count I) against him. The Court took the remaining issues in the motions 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*, 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 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*, 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.

However, where the moving party is challenging the non-movant'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). In the latter, the movant "is not required to go beyond showing the insufficiency of [the non-movant's] evidence." *Id.* at 9. So it doesn't have "to proffer evidence to negate one of the elements of [the non-movant's] claim." *Id.* To survive summary disposition, "the 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.* at 7. "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. Defendant Guastello's Motion for Summary Disposition on Plaintiffs' Claims

In his motion challenging Plaintiffs' claims, Guastello argues that he is not personally liable for the actions of UHC related to two the construction contracts and remodeling work performed by DJ Construction. As noted earlier, the Court granted Guastello's motion as to Plaintiffs' breach of contract claim (Count I), but took the motion under advisement as to the unjust enrichment claim (Count II). On its unjust enrichment claim, Plaintiffs argue that because Guastello owns the hotel property and the hotel property was improved by the renovation work performed by Plaintiffs, Guastello has been unjustly enriched by UHC's failure to pay.

To sustain an action for unjust enrichment, a plaintiff must "establish (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to

the complaining party because of the retention of the benefit by the other party.” *Karaus v Bank of New York Mellon*, 300 Mich App 9, 22–23; 831 NW2d 897 (2012).

As an initial matter, Plaintiffs appear to contend that Guastello owns the real property of the hotel, i.e., both the land and the structure, but the evidence doesn’t support this contention. The only evidence on this issue is Guastello’s deposition testimony where he acknowledged personally owning the “the land where the [hotel] operates.” (Pltf.s’ Resp., Ex. 2, p 65.) There’s no evidence Guastello also owns the structure.

The issue then is whether Guastello’s ownership of the land underlying the hotel makes him personally liable under a theory of unjust enrichment because the land purportedly benefits from the renovations to the hotel. Beyond the conclusory statement that “Guastello received a benefit from the renovation work performed to the hotel [and] . . . [i]t would be inequitable for [Guastello] to retain this benefit,” (Id., p 6), Plaintiffs haven’t cited any evidence or authority to substantiate this statement. See *Houghton v Keller*, 256 Mich App 336, 339-340 (2003) (“[A party] may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . nor may he give issues cursory treatment with little or no citation of supporting authority.”) Nor has the Court located any such authority. Indeed, given the Supreme Court’s admonition that unjust enrichment be “employed with caution” because it “vitiates normal contract principles,” *Kammer Asphalt Paving Co, Inc v East China Twp Schs*, 443 Mich 176, 183; 504 NW2d 635 (1993), Michigan courts only allow unjust enrichment claims against a non-contracting third-party in narrow circumstances. Specifically, the third party must have engaged in some misleading act beyond the mere non-performance of the contracting parties. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 196; 729

NW2d 898 (2006). Here, Plaintiffs haven't provided any evidence or argument that Guastello, in his personal capacity, engaged in any type misleading conduct. Thus, Plaintiffs have failed to demonstrate a genuine issue of material fact that Guastello was unjustly enriched, and Guastello is entitled to judgment as a matter of law on Plaintiffs' claim of unjust enrichment in Count II of their complaint.

B. Plaintiffs' Motion for Summary Disposition on Defendants' Counterclaims

1. Fraudulent Misrepresentation (Count II)

In their fraudulent misrepresentation counterclaim, Defendants allege that "[w]hen entering into the Contract for the remodeling of the hotel, [Plaintiffs] represented that they would and could complete the work pursuant to the terms of the contract, in a workman like manner and within a timely manner," and they further allege that these "representations were false when they were made." (First Am. Ctrclaim, ¶¶59, 61.) Plaintiffs argue that these representations are future promises that are contractual and do not constitute fraud as a matter of law.

To establish a claim for fraud, a plaintiff must prove: "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." *M & D v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). "Fraud will not be presumed but must be proven by clear, satisfactory and convincing evidence." *Hi-Way Motor Co v Intl Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

“An action for fraudulent misrepresentation must be predicated on a statement relating to a past or an existing fact. Future promises are contractual and cannot constitute actionable fraud.” *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 208–09; 544 NW2d 727 (1996). The Plaintiffs’ alleged fraud here is based on three misrepresentations: that the work would be done pursuant to the terms of the contract, in a workmanlike manner, and within a timely manner. All of these statements refer to what Plaintiffs “would” do in the future and are not statements of an existing fact. *Baker*, 215 Mich App 208-09. Thus, they are contractual and relate to the performance of the contracts. This conclusion is support by Defendants’ breach of contract counterclaim, which relies on these same misrepresentations but characterizes them as promises Plaintiffs’ breached when they “fail[ed] to complete the work as agreed,” “fail[ed] to perform the work in an appropriate, safe and workmanlike manner,” and “fail[ed] to correct substandard workmanship.” (First Am. Ctrclaim, ¶¶56.) So even by Defendants’ own allegations, the misrepresentations were contractual promises related to future conduct. Accordingly, the alleged misrepresentations by Plaintiffs do not constitute actionable fraud. Defendants’ counterclaim for fraudulent misrepresentation in Count II must be dismissed.

2. Tortious Interference with Business Relationships or Expectancies (Count III)

In their tortious interference with business relationships or expectancies counterclaim, Defendants allege Plaintiffs intentionally and wrongfully interfered with UHC’s business relationships and expectancies with its franchisor and hotel guests when Plaintiffs failed to complete the renovations and performed substandard work rendering the hotel rooms unrentable. In their motion, Plaintiffs argue that Defendants cannot produce any evidence that Plaintiffs intentionally interfered with Defendants’ business

relationships or expectancies. In response, Defendants contends the evidence raises questions of fact that preclude summary disposition on this counterclaim.

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). Plaintiffs only challenge the third element—intentional interference. To satisfy this element, the intentional interference must be improper; that is, the claimant must demonstrate “the intentional doing of a per se wrongful act or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiff’s . . . business relationship” or expectancy. *Feldman v Green*, 138 Mich App 360, 369-370; 360 NW2d 881 (1984).

Here, Defendants argue that when Plaintiffs abandoned the project they “clearly knew the rooms would be left in various stages of demolition and could not be rented” and leaving the rooms “unable to be rented hindered [the franchisor’s] compliance requirement.” (Resp., p 15.) According to Defendants, Plaintiffs “intentionally leveraged this position” to get more money from Defendant. (Id., pp 14-15.) In support of this argument, Defendants cite to the deposition testimony of Plaintiff Ilia and Deborah Jaffray, the hotel’s general manager. Ilia’s testimony indicates Plaintiffs were aware they needed to get the work completed so that the hotel could sell those rooms. (Defs.’ Resp., Ex. 4, pp 17, 52-53.) Jaffray testified she gave Ilia a copy of the property improvement plan from

the hotel's franchisor, which set the standards for the renovations. (Defs.' Resp., Ex. 3, pp 42,123.) However, Ilia denies ever receiving the plan. (Id., Ex. 4, pp 20, 44.)

While Ilia and Jaffray's testimony indicates Plaintiffs knew that uncompleted rooms couldn't be sold to guests and the renovations had to be complete per the franchisor's requirement, Defendants have not provided any evidence that shows Plaintiffs' breached the contracts, performed substandard work, and leveraged their position, with the intention to make the rooms unsellable or to jeopardize UHC's franchise agreement. Accordingly, Defendants have failed to demonstrate a genuine issue of material fact whether Plaintiffs intentionally interfered with Defendants business relationship with UHC's franchisor or with their business expectancies with potential customers. Plaintiffs' motion for summary disposition as to Count III must be granted.

3. Indemnification (Count V)

In Count V of their counterclaim, Defendants seek indemnification. They allege hotel guests "have alleged" they were injured by broken shower doors installed by Plaintiffs. According to Defendants, "[i]f [they] are held liable as to any guest allegations, [they] will be entitled to indemnification from [Plaintiffs] for all amounts they are required to pay as to the guest allegations." (First Am. Ctrclaim., ¶93.) So, Defendants seek indemnification against Plaintiffs for any guest injuries due to Plaintiffs' work. Plaintiffs argue this counterclaim is not ripe for litigation because there's no evidence of an actual controversy between Defendants and hotel guests. Defendants contend, in response, that they are seeking a declaratory judgment, so ripeness doesn't preclude adjudication of this issue.

Under MCR 2.605(A)(1), "In a case of actual controversy within its jurisdiction, a

Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.” The grant of a declaratory judgment is within the trial court's discretion and can only be granted where there is an actual controversy. *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978). Without an actual controversy, the court lacks subject-matter jurisdiction to enter a declaratory judgment. *Genesis Ctr, PLC v Fin & Ins Services Com'r*, 246 Mich App 531, 544; 633 NW2d 834 (2001).

Though it's unclear whether Defendants' indemnification counterclaim was pled as seeking a declaratory judgment, even if the Court were to construe it as such, Defendants failed to allege or demonstrate the existence of an actual controversy. *Fieger v Commr of Ins*, 174 Mich App 467, 471; 437 NW2d 271 (1988). An actual controversy exists when a declaratory judgment is necessary to guide the plaintiff's future conduct in order to preserve his legal rights. *Id.* An actual controversy does not exist, however, where the issue sought to be addressed is merely hypothetical. *Shavers*, 402 Mich at 588; *UAW v Cent Michigan Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012).

Here, Defendants indemnification counterclaim is based solely on the allegation the hotel guests have alleged they were injured by broken shower doors installed by Plaintiffs. There is no allegation or evidence that those guests have filed suit against Defendants or that they intend to or are likely to do so. The potential claims from hotel guest are merely speculative and rest upon contingent future events that may not occur. This is not a case where a declaratory judgment is necessary to guide Defendants' future conduct in order to preserve its legal rights. See *Farm Bureau Mut Ins Co v Graphics House Sports, Inc*, unpublished opinion of the Court of Appeals, issued June 17, 2008

(Docket No. 277659), p *4 (finding no actual controversy in insurer's declaratory judgment action regarding its indemnification obligations for potential lawsuits against policyholder where there had been only threats of potential litigation and there was no evidence any lawsuits would ever be filed). Accordingly, Plaintiffs' motion for summary disposition as to Defendants' counterclaim for indemnification in Count V must be granted.

4. Plaintiffs' Motion to Disqualify Ronald Estes

Plaintiffs have also moved to disqualify Defendants' counsel, Ronald Estes, from serving as trial counsel because he is a necessary witness in this case based on his prior representation of Plaintiffs. In response, Defendants contend Plaintiffs have failed to demonstrate Estes is a necessary witness and that the information sought from Estes cannot be obtained from another source.

A party seeking to disqualify opposing counsel on the grounds that the attorney is a necessary witness bears the burden of showing that the attorney's testimony is necessary and that the substance of the attorney's testimony is unavailable from other witnesses. *In re Susser Estate*, 254 Mich App 232, 238; 657 NW2d 147 (2002). In this case, Plaintiffs allege Estes represented Defendants in a previous suit against another contractor for loss of revenue from the hotel's inability to rent first-floor hotel rooms. Plaintiffs haven't explained how Estes' prior representation of Defendants is relevant to this action, nor have they addressed, let alone demonstrated, that there are no other witnesses (such as Estes' clients in the prior lawsuit) who could give the same substantive testimony about Defendants' prior lawsuit as Estes. Thus, Plaintiffs have failed to demonstrate Estes is a necessary witness and their motion to disqualify him must be denied.

IV. Conclusion

For the reasons set forth above: (1) Defendant Guastello's motion for summary disposition is GRANTED and Plaintiffs' Complaint against Defendant Guastello is DISMISSED in its entirety, (2) Plaintiffs' motion for partial summary disposition is GRANTED and Counts II, III, V, and VI of Defendants' counterclaim are DISMISSED, and (3) Plaintiffs' motion to disqualify Ronald Estes is DENIED. This Opinion and Order neither resolves the last pending claim nor closes this case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: 03/29/2022



Signed by KATHRYN VIVIANO 03/29/2022 01:39:31 cYU3mKKh

Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge