

STATE OF MICHIGAN
SAGINAW COUNTY CIRCUIT COURT
BUSINESS COURT

BEAU PARMENTER,
ORGANILIFE VENTURES NO. 17 LLC,
a Michigan limited liability company,
and ELITE EXCAVATION, LLC,

Plaintiffs,

vs.

JAMES FOULDS, JAMES SCHAUUMAN,
and JORDAN DICE,

Defendants.

Case No. 20-042482-CB

Judge: M. Randall Jurrens (P27637)

**OPINION AND ORDER GRANTING
IN PART AND DENYING IN PART
DEFENDANTS FOULDS AND
SCHAUUMAN'S MOTION FOR SUMMARY
DISPOSITION**

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Plaintiffs have sued defendants Dice, Foulds, and Schauman on various claims related to a failed marijuana grow venture. Dice having previously succeeded in obtaining summary disposition, Foulds and Schauman request all claims against them be similarly dismissed.

Having reviewed defendants' motion and supporting exhibits, as well as plaintiffs' response and accompanying exhibits, and having elected to dispense with oral arguments, the court is granting defendants' motion in small part but otherwise denying the requested relief.

BACKGROUND

This case was commenced July 24, 2020. Plaintiffs' amended complaint asserts four claims:

- *Breach of Fiduciary Duties* (Count 1) – defendants are current or former directors of Chesaning Products Corporation (CPC); plaintiff Parmenter owns the other two plaintiffs, Organilife Ventures No. 17 LLC (OLV 17) and Elite Excavation, LLC (Elite); defendants took corporate action during an improper CPC directors' meeting that included authorizing legal proceedings (the "Property Litigation") against Parmenter and Elite to enforce a purchase agreement regarding a parcel of real property Elite had agreed to sell to CPC (the "Property"); and their actions constitute a breach of fiduciary duties due stockholders
- *Fraud and Conspiracy to Commit Fraud* (Court 2) – defendants misrepresented the financial condition of CPC and its ability to operate a successful marijuana cultivation business and, further, misrepresented to CPC's shareholders their authority to act on behalf of the corporation
- *Slander of Title* (Court 4) – incidental to the Property Litigation, defendants caused a notice of lis pendens (the "Notice") to be recorded against the Property
- *Tortious Interference in a Business Relationship* (Count 3) – CPC's recorded notice of lis pendens interfered with Elite's ability to sell the Property to others

On January 22, 2021, the court entered a Case Management Order that, among other things, required motions testing the legal sufficiency of claims or defenses (i.e. MCR 2.116(C)(8) and (9)), to be filed within 14 days and motions testing the factual sufficiency of claims or defenses (i.e. MCR 2.116(C)(10)) to be filed within 14 days following the discovery deadline. By

subsequent Orders, discovery was permitted through November 26, 2021, and the deadline for then-available dispositive motions (e.g. MCR 2.116(C)(10)) was further extended through March 18, 2022.

On March 18, 2022, defendants filed a motion for summary disposition under MCR 2.116(C)(8) and (10). After some delay (including time the court spent focusing on a similar motion Dice had filed), oral arguments were scheduled for July 18, 2023.

However, having studied defendants' brief and supporting documents¹, together with plaintiffs' response and accompanying evidence, the court has elected to dispense with oral arguments, MCR 2.119(E)(3).

SUMMARY DISPOSITION STANDARDS

Defendants' motion is premised on MCR 2.116(C)(10)².

Summary disposition under MCR 2.116(C)(10) is appropriate if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law". In reviewing such motions, courts consider the pleadings, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). The moving party has the initial burden of supporting its position with documentary evidence. *Id.* This burden may be satisfied by "submitting affirmative evidence that negates an essential element of the nonmoving

¹ Defendants' "Statement of Facts" is generally devoid of references to documentary evidence (Defendant's Brief, pp 1-4), and the exhibits they did provide are limited to an unfiled third amended complaint, Dice's counterclaim, two pages from Foulds's deposition transcript, and four pages from Parmenter's deposition (Defendants' Brief, Exs 1-4).

² Defendant's motion states it is also brought under MCR 2.116(C)(8). However, the court's January 22, 2021 Case Management Order requires "[m]otions for summary disposition under MCR 2.116(C)(8) and (9) [] be filed no later than [] 14 days following the date of this Order". Defendant's motion was not filed until March 18, 2022 (i.e. more than a year after the cut-off date for (C)(8) motions). This leaves MCR 2.116(C)(10).

party's claim, or by demonstrating 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, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016) (cleaned up). Once the moving party meets its burden, the burden shifts to the nonmoving party to establish that a genuine issue of disputed fact exists. *Quinto*, 451 Mich at 362. “Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, 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.*; MCR 2.116(G)(4). “If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.” *Id.*; MCR 2.116(G)(4).

ANALYSIS

Plaintiffs’ amended complaint asserts causes of action for breach of fiduciary duties, fraud and conspiracy to commit fraud, tortious interference with a business relationship, and slander of title. Defendants challenge the factual sufficiency of each of these claims.

Breach of Fiduciary Duty

Count 1 of the amended complaint alleges defendants, both CPC directors, breached fiduciary duties owed OLV 17 as a CPC stockholder.

A “fiduciary relationship” is “a relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship”. *In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003), quoting Black's Law Dictionary (7th ed) (cleaned up).

Importantly, directors are recognized as occupying a fiduciary relation toward their corporation and its stockholders. *Thomas v Satfield Co*, 363 Mich 111, 118; 108 NW2d 907 (1961).

Accordingly, “directors are required to act with due care, with loyalty, [] in good faith[,]
[with] candor[, and] disclose all material facts within their knowledge that may influence

shareholder action”. *Murphy v Inman*, 509 Mich 132, 148; 983 NW2d 354 (2022) (Docket No. 161454). See also MCL 450.1541a.

Here, defendants argue that, their fiduciary duties to stockholders notwithstanding, OLV 17’s claim is barred by the business judgment rule (Defendants Brief, pp 6-7), which generally protects corporate directors from liability for honest mistakes in judgment. See Mantese and Fields, *The Business Judgment Rule*, Michigan Bar Journal, January 2020, p 30.

“The business judgment rule creates a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company.” *Estate of Detwiler v Offenbecher*, 728 F Supp 103, 148 (SD NY 1989)(cleaned up).³ Accordingly, “[a] court should be most reluctant to interfere with the business judgment and discretion of directors in the conduct of corporate affairs”, *In re Estate of Butterfield v Page*, 418 Mich 241, 255; 341 NW2d 543 (1983), and should “not substitute its judgment for that of the board if the latter’s decision can be attributed to any rational business purpose”, *Detwiler* at 156.

Whatever the potential application and merit of this defense, defendants have failed to provide supporting affidavits, depositions, admissions, or other documentary evidence, or to otherwise develop their argument. Rather, defendants merely offer assertions that they were acting “[in] the corporation’s interest”, “in good faith”, “in the due course of business”, and “in the best interest of the corporation” (Defendant’s Brief, p 7). Without more, the court cannot even begin to consider granting summary disposition under MCR 2.116(C)(10), *Quinto*, 451 Mich at 362 (“the initial burden of production is on the moving party”).

³ “Though not binding on state courts, federal precedent is generally considered highly persuasive when it addresses analogous issues.” *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 360; 597 NW2d 250 (1999).

Fraud and Conspiracy to Commit Fraud

Parmenter and OLV 17 allege defendants personally made, or conspired to make, materially false statements regarding CPC's financial condition, which caused them to invest in and do business with CPC (Amended Complaint ¶ 68(A)), and that defendants further misrepresented to CPC's shareholders, including OLV 17, authority to act on behalf of CPC (Amended Complaint ¶ 68(B)).

Actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that 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 that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *M & D, Inc v W B McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Additionally, to establish a claim of fraudulent misrepresentation, the plaintiff must have reasonably relied on the false representation. *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). "There can be no fraud where a person has the means to determine that a representation is not true." *Id.*

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Org for Patients & Providers v Auto Cub Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003). A claim of civil conspiracy must be based on an underlying, separate, actionable tort. *Id.* Proof of a civil conspiracy may be established through circumstantial evidence and may be premised on inference. *Temborius v Slatkin*, 157 Mich App 587, 600; 403 NW2d 821 (1986). Direct proof of an agreement need not be shown, nor is it necessary to show a

formal agreement. “It is sufficient if the circumstances, acts and conduct of the parties establish an agreement in fact.” *Id.*

Here, defendants assert generally that plaintiffs have not identified what representation(s) defendants made were false and relied on (Defendant’s Brief, p 7). However, with added specificity, defendants counter plaintiffs’ allegation they misrepresented CPC’s financial condition (Amended Complaint, ¶ 68(A)) with evidence that –

- representations by Foulds were based on information from others (Defendants’ Brief, p 8), specifically, “Zach and Jeff” who would be “doing their magic in horticulture” (Defendants’ Brief, p 8, referencing Ex 3, Foulds dep, p 30)
- plaintiffs cannot demonstrate reliance on representations by Foulds at a meeting he did not attend (Defendants’ Brief, p 8), citing Foulds’s deposition testimony that infers he was not at a meeting due to illness (Defendants’ Brief, p 8, referencing Ex 3, Foulds’s dep, p 43)
- Parmenter well-knew about CPC’s financial condition and, therefore, could not have relied on defendants’ representations (Defendants’ Brief, pp 8-9), referencing Parmenter’s deposition testimony that “As a board, we agreed we had to have the minimum of the \$5 million contingency in there to make sure that we’re going to have money to fund this and it wasn’t going to sit stalled” (Defendants’ Brief, Ex 4, Parmenter dep, p 41), and “I disagreed with [entering into an agreement with Dice] and voted no for it on the board because they did not have enough money to fund the project and it was just going to drag another person into the equation and bring another person down when they did not have the money to complete the project” (Defendants’ Brief, Ex 4, Parmenter dep, p 53)
- Parmenter did not rely on defendants’ representations because he proceeded to offer ownership in the land, despite a signed purchase agreement (Defendants’ Brief, p 9, referencing Ex 4, Parmenter dep at 55-56)

In response, plaintiffs assert “the evidence, when taken in the light most favorable to Plaintiffs, shows that Defendants made continual misrepresentations as to the financial viability of the company when, in fact, the company was underfunded and [] essentially broke (Plaintiff’s Brief, p 13), albeit without provided supporting documentary evidence. Once a moving party meets its burden of supporting its position with documentary evidence, the burden shifts to the

nonmoving party to establish that a genuine issue of disputed fact exists. *Quinto*, 451 Mich at 362. Here, plaintiffs failed to meet the challenge; at least to the extent of defendants' proffered evidence. Accordingly, the court is granting defendants' motion to dismiss plaintiffs' fraud and conspiracy claim to the extent it is premised on false representations regarding CPC's financial condition (Amended Complaint ¶ 68(A)).

However, defendants have not addressed the other operative allegation of plaintiffs' fraud claim, that defendants misrepresented their authority to CPC's shareholders (Amended Complaint ¶ 68(B)). Accordingly, to the extent defendants' motion purposed to dismiss this portion of plaintiffs' fraud/conspiracy claim, it is being denied.

Slander of Title

Elite alleges that, despite knowing CPC had no arguable interest in the Property, and without authority, and for the sole purpose of harassing, intimidating and causing harm, defendants recorded the Notice against the Property (Amended Complaint, ¶¶ 16, 80-86).

Whether pursued under the common law or under MCL 565.108, a party must prove three essential elements to prevail regarding a claim of slander of title: (1) the publication of a "false statement[]" that disparaged a plaintiff's right in property," (2) malice, and (3) special (or pecuniary) damages. *Wells Fargo Bank v Country Place Condo Ass'n*, 304 Mich App 582, 595; 848 NW2d 425 (2014) (quotation marks and citation omitted). Malice is the "crucial element." *Id.* at 596 (quotation marks and citation omitted). The malice must be "express"; it "may not be inferred merely from the filing of an invalid lien", but must be shown by the defendant's knowing filing of "an invalid lien with the intent to cause the plaintiff injury." *Id.* (quotation marks and citation omitted). A party's slander-of-title claim necessarily fails if the alleged publication was made "in

good faith, upon probable cause, or was prompted by a reasonable belief that [the defendant] had rights in the real estate in question”, *Glieberman v Fine*, 248 Mich 8, 12; 226 NW 669 (1929).

Defendants argue the Notice was filed in good faith and without malice (Defendants’ Brief, pp 10-11) but, unfortunately, without any documentary evidence to support their position. Without more, the court cannot even begin to consider granting summary disposition under MCR 2.116(C)(10), *Quinto*, 451 Mich at 362 (“the initial burden of production is on the moving party”).

Tortious Interference with A Business Relationship

Finally, in Count 3 of the amended complaint, Elite alleges that defendants tortiously interfered with a business relationship by wrongfully recording the Notice, which prevented Elite from selling the Property to one of several interested buyers (Amended Complaint, ¶¶ 73-78).

The elements of tortious interference with a business relationship or expectancy are “the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff.” *Cedroni Association, Inc v Tomblinson, Harburn Associates, Architects & Planners Inc*, 492 Mich 40, 45-46; 821 NW2d 1 (2012). “The expectancy must be a reasonable likelihood or probability, not mere wishful thinking.” *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341 (1984). And, the interference must be improper, meaning that it lacked justification. *Advocacy Org for Patients & Providers v Auto Club Ins*, 257 Mich App 365, 383; 670 NW2d 569 (2003). “The ‘improper’ interference can be shown either by proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiff’s contractual rights or business relationship.” *Id*. “One is liable for commission of this tort who interferes with business relations

of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another.” *Northern Plumbing & Heating, Inc v Henderson Bros, Inc*, 83 Mich App 84, 93; 268 NW2d 296, 299 (1978), quoting 45 Am Jur 2d, Interference, § 50, p. 322. “Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.” *Dalley v Dykema Gossett*, 287 Mich App 296, 324; 788 NW2d 679 (2010).

Here, defendants assert the Notice “was put on the property as it is the subject matter of a lawsuit[,] was created because all or almost all of the investors have lost their money[,] and there was no other feasible way to secure their lost (sic) without putting a lis pendens on the property” (Defendants’ Brief, pp 9-10). However, again, defendants have failed to submit affirmative evidence that negates an essential element of Elite’s claim or demonstrates that Elite’s evidence is insufficient to establish an essential element of its claim.” *Lowrey*, 500 Mich at 7. So, again, without more, the court cannot even begin to consider granting defendants’ motion, *Quinto*, 451 Mich at 362 (“the initial burden of production is on the moving party”).

CONCLUSION

Plaintiffs have sued defendants for actions they took as directors of a business corporation. Arguing there is no genuine issue as to any material fact, defendants request the court summarily dismiss all claims against them.

The court concludes that, at least as presented, there are genuine issues of material fact regarding all of plaintiffs’ claims, save for a fraud/conspiracy claim premised on defendants’ alleged representations regarding the corporation’s financial condition.

Accordingly, the court is dismissing plaintiffs' claim defendants misrepresented the financial condition of the company (Amended Complaint ¶ 68(A)) but is otherwise denying defendants' motion.

IT IS SO ORDERED.

This order does not resolve the last pending claim and does not close the case.

Date: July 17, 2023

/s/ (P27637)
M. Randall Jurens, Business Court Judge