

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 SCHAUMAN,
and JORDAN DICE,

Defendants.

Case No. 20-042482-CB

Judge: M. Randall Jurrens (P27637)

**OPINION AND ORDER
GRANTING DEFENDANT DICE'S
MOTION FOR SUMMARY
DISPOSITION**

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Plaintiffs have sued defendants on various claims related to a failed marijuana grow venture. Defendant Dice requests all claims against him be summarily dismissed.

For the reasons stated in this opinion, the court concludes Dice is entitled to the requested relief.

BACKGROUND

The Organilife Group, LLC (OLG) was organized May 1, 2015 (Dice Brief, Ex B)¹, and by early 2018 plaintiff Parmenter was a member/manager (Dice Brief, Ex D, ¶ 11).

Parmenter additionally owns plaintiff Elite Excavation LLC (Elite) (Plaintiffs' Response, Ex E, ¶ 2) which, in turn, owns a parcel of commercial property located in the Village of Chesaning commonly described as 15403 Sharon Road (the Property) (Plaintiffs' Response, Ex E, ¶ 3). Effective November 27, 2018 (although not signed until April 15, 2019), Elite entered into a written agreement to sell, and OLG to buy, the Property, "contingent on [OLG]'s ability to obtain a mortgage loan in an amount not less than \$5,000,000.00", with closing to occur no later than December 1, 2019 (Plaintiffs' Brief, Ex C). The closing never occurred.

On June 3, 2019, Chesaning Products Corporation (CPC) was incorporated. The incorporator appointed seven directors, including Parmenter and defendant Dice (together with co-defendants Foulds and Schauman, plus three others) (Dice Brief, Ex F).

One of CPC's stockholders is plaintiff OrganiLife Ventures No. 17 (OLV 17) (Amended Complaint, ¶ 14)². Parmenter is a member of OLV 17 (Amended Complaint, ¶ 14)³.

In July 2019, OLG merged into CPC (Amended Complaint/Dice Answer, ¶ 17).

¹ Originally "Plant Life Group, LLC", the name was changed by restated articles of organization filed May 14, 2018.

² The court is aware that Dice challenges OLV 17's stockholder status (Dice Answer, ¶ 14; Dice Brief, p 7), but for present purposes will assume its legitimacy.

³ The court is aware that Dice challenges Parmenter's membership status (Dice Answer, ¶ 14), but for present purposes will assume his status.

CPC's currently effective restated articles of incorporation (filed August 27, 2019) state, "The business and affairs of the corporation shall be managed by a board of not less than 5 nor more than 7 directors as shall be fixed from time to time by the board of directors" (Plaintiffs' Response, Ex F, Article VIII).

On November 30, 2019, Foulds emailed other board members (including Parmenter and Dice):

After the resignation of two other Board Members earlier in the week – Pat Greenfelder and Zachary Chludil – and the anticipated simultaneous resignation of James Schauman, I too realize that in the spirit of harmony and as part of a restructuring plan proposed to me, I hereby submit my resignation effective immediately. [(Plaintiffs' Brief, Ex G)].

The anticipated resignation of director Schauman did not occur (Dice Brief, Ex O).

On December 11, 2019, upon two-days electronic notice (Dice Brief, Ex T), Dice, Schauman, and Foulds attended a CPC board meeting (but Parmenter and another CPC director, Sam McLaren, did not) and adopted a resolution authorizing CPC (OLG's successor by merger) to sue Elite to enforce the purchase agreement for the Property and to engage the law firm of Shinnery & Cook to prosecute the litigation (Dice Brief, Ex O; Plaintiffs' Response, Ex H). Later that same day, Shinnery & Cook filed a complaint against Elite for breach of contract and specific performance (Saginaw County Case No. 19-041204-CB) (the "Property Litigation")⁴. The next day, December 12, 2019, Shinnery & Cook recorded a notice of lis pendens with the Saginaw County Register of Deeds regarding the Property Litigation (Dice Brief, Ex U) (the "Notice").

⁴ The Property Litigation also includes claims by CPC (together with two stockholders and a related limited liability company) against Elite, and/or Parmenter, for breach of fiduciary duties, tortious interference, promissory estoppel, shareholder derivative action, minority shareholder oppression, reformation of a lease agreement, unjust enrichment, fraud in the inducement, and conversion.

On December 26, 2019, fifteen (of twenty-one) stockholders demanded the board take action against Elite (and Parmenter) necessary for the protection of CPC's interests, based, in part, on Elite's alleged failure to sell the Property as promised (Dice Brief, Ex A).

In January 2020 (specifics unknown), Parmenter resigned his position as director of CPC (Amended Complaint/Dice Answer, ¶ 57).

On January 3, 2020, Elite counterclaimed in the Property Litigation, requesting a declaratory judgment that the OLG/CPC purchase agreement for the Property was unenforceable (i.e. the mortgage loan contingency was never satisfied, and closing did not occur within the allotted time), and for slander of title (premised on CPC's recordation of the Notice).⁵ Elite then moved for summary dismissal of CPC's breach of contract/specific performance claim and discharge of the recorded Notice. However, following notice and hearing, the court denied the motion on the basis that plaintiffs' pleadings were legally sufficient and fact discovery had not yet begun (see Property Litigation, March 20, 2020 Order Denying Defendants' Motion for Partial Summary Disposition).⁶

On July 2, 2020, OLG 17, Parmenter, and Elite filed this action asserting claims for breach of fiduciary duty, fraud and conspiracy to commit fraud, tortious interference with a business relationship, and slander of title.

⁵ The counterclaim also includes claims for breach of contract/quantum meruit (requesting compensation for improvements made to the Property) and breach of contract (involving a lease agreement).

⁶ Discovery in the Property Litigation has now concluded, the dispositive motion deadline has expired, and a trial date is nearing the horizon.

On August 20, 2020, following a special CPC shareholders meeting to fill two board vacancies (Dice Brief, Ex P), the reconstituted board ratified the prior decision to bring and maintain the Property Litigation (Dice Brief, Ex Q).

After the discovery period in this case expired, Dice filed the present motion for summary disposition under MCR 2.116(C)(5), (6), and (10), together with a brief and documentary evidence. Plaintiffs submitted a responsive brief, with their own documentary evidence. Oral arguments were held May 11, 2022, but without conclusion. The court subsequently received Dice's reply brief and attachments (which had been previously filed but not forwarded to the court for review), as well as a written supplemental response from plaintiffs. Given the motion's piecemeal evolution, the court continued the hearing on July 11, 2022 to receive any final input before formally taking the matter under advisement.

SUMMARY DISPOSITION STANDARDS

Dice's motion is premised on MCR 2.116(C)(5), (6), and (10).

A motion under MCR 2.116(C)(5) challenges a plaintiff's legal capacity to sue. In determining such a motion, courts must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties, MCR 2.116(G)(5); *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 493; 815 NW2d 132 (2012).

Under MCR 2.116(C)(6), a claim may be dismissed if "[a]nother action has been initiated between the same parties involving the same claim". Importantly,

MCR 2.116(C)(6) does not require that all the parties and all the issues be identical. Rather, the two suits must be "between the same parties" and "involving the same claims". Thus, complete identity of the parties is not necessary, and the two suits must be based on the same or substantially the same cause of action. [*JD Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986) (cleaned up)].

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 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

I. Breach of Fiduciary Duty

Count 1 of the amended complaint alleges Dice, a CPC director, breached fiduciary duties he owed OLV 17 as a CPC stockholder.⁷

⁷ In addition to OLV 17, Parmenter initially alleged that he too suffered damage as a result of

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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*, __ Mich __, __; __NW2d __ (2022) (Docket No. 161454). See also MCL 450.1541a.

Dice argues that, his fiduciary duties to stockholders notwithstanding, OLV 17’s claim cannot prevail for several reasons.⁸

a. Direct vs. Derivative Action

Dice argues that OLV 17’s breach of fiduciary duty claim cannot be brought directly but, rather, must be brought as a derivative action, *MCL 450.1491a* and *MCL 450.1492a* (Dice Brief, p 7). As recently observed by our Supreme Court in *Murphy* (cleaned up):

Dice’s alleged breach of fiduciary duty (Amended Complaint ¶ 65). However, there is no evidence (and the court does not believe there is any serious assertion) that Parmenter, individually, is a CPC stockholder. Accordingly, this opinion assumes that, notwithstanding the passing mention of Parmenter’s name, the breach of fiduciary claim is brought solely by OLV 17.

⁸ One objection Dice raised – implicating MCR 2.116(C)(5) (“The party asserting the claim lacks the legal capacity to sue”) – was that “OrganiLife No. 17”, the originally named co-plaintiff, was not a validly formed entity. This was resolved at the May 11, 2022 oral argument by application of the misnomer rule, *Miller v Chapman Contracting*, 477 Mich 102, 106-107; 730 NW2d 462 (2007), and an agreement that the case caption would be amended to reflect the correct name, “OrganiLife **Ventures** No. 17”; and an Order Amending Caption to this effect was recently entered. Accordingly, the court need not further address application of the misnomer rule or MCR 2.116(C)(5).

[A] suit to enforce corporate rights or to redress injury to the corporation is a derivative suit; although it may be brought by the shareholder, the action itself belongs to the corporation. If a claim is derivative, a shareholder has no standing to sue except on behalf of the corporation. Further, a shareholder bringing a derivative action must comply with numerous statutory requirements before bringing that action, including making a showing that the corporation has refused to proceed after suitable demand by the shareholder, which plaintiff has undisputedly not done here. A direct action, on the other hand, belongs to the shareholder; it seeks redress for harm done to the shareholder or to enforce a personal right belonging to the shareholder independently from the corporation.

* * *

[I]n order to distinguish between direct and derivative actions brought by shareholders of a corporation in Michigan, courts must ask (1) who suffered the alleged harm, and (2) who would receive the benefit of any remedy recovered.

* * *

In answering the first question, the relevant inquiry is: “Looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?”

* * *

The second question logically follows from the first. If the answer to both questions is the corporation, the action is derivative. If the shareholder suffers the harm independent of the corporation and receives the remedy rather than the corporation, the action is direct.^[9]

Looking at the body of the complaint, OLV 17 alleges Dice breached fiduciary duties he owed as a director –

A. By causing a lawsuit to be filed without proper authority, which was not in the best interest of CPC and its shareholders.

⁹ Prior to *Murphy*, Michigan law distinguished between direct and derivative actions via a general rule with exceptions: i.e. “a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer, or employee”, *Michigan Nat’l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989), unless (1) the individual “has sustained a loss separate and distinct from that of other stockholders generally,” *Christer v Anderson, Nietzsche & Co, PC*, 433 Mich 1, 9; 444 NW2d 779 (1989) (quotation marks omitted,), or (2) the individual shows a “violation of a duty owed directly to the individual that is independent of the corporation,” *Belle Isle Grill, Corp v City of Detroit*, 256 Mich App 463, 474; 666 NW2d 2003). While acknowledging the similarities, *Murphy* opined that, “rather than focusing strictly on the duty allegedly breached and asking to whom that duty is owed”, the new framework “streamlines the inquiry by asking (1) who suffered the harm, and (2) who will receive the benefit of any remedy.”

- B. By misleading CPC and its shareholders as to their actual authority and in taking several actions, including causing a lawsuit to be filed, when they did not have authority to do so.
- C. By otherwise acting in their own best interests rather than the best interests of CPC while they were directors.
- D. By excluding other valid members of the Board of Directors from their deliberations.
- E. By permitting [a director who had resigned] to act as a member of the Board of Directors when in fact he had no authority to do so.
- G. ¹⁰ By failing to ensure that CPC took the necessary steps under the Purchase Agreement to close on the purchase.
- H. By failing to abide by the relevant law for the cultivation of marijuana and therefore putting all shareholders at risk.
- J. ¹¹ By agreeing to several contracts and agreements and undergoing several expenses on behalf of the company that they did not have the authority to undertaken and that were not in the best interests of the company.
- K. Other breaches of fiduciary duty. [Amended Complaint, ¶ 64]

Applying *Murphy*'s framework, the court asks, (1) who suffered the alleged harm, and (2) who would receive the benefit of any remedy recovered"? With the exception of "K", "Other" unstated breaches of fiduciary duty, OLV 17's allegations expressly or implicitly complain of harm to CPC or its shareholders generally. OLV 17 has not alleged, must less factually supported, breach of a duty uniquely owed to it or an injury independent of any injury to CPC. Accordingly, without more, the court concludes OLV 17 cannot pursue Dice directly on its breach of fiduciary duty claim.¹²

¹⁰ "F." is similarly omitted in original.

¹¹ "I." is similarly omitted in original.

¹² OLV 17 initially failed to address Dice's argument that its breach of fiduciary duty claim could not be pursued directly (Plaintiffs' Response, pp 1-16). More recently, OLV attempted to fill the void by arguing "a shareholder demand made pursuant to MCL 450.1493a does not absolve defendant of his duties as a director pursuant to MCL 450.1541a" (Plaintiffs' Supplemental Response, p 3 et seq.). OLV 17 misapprehends the issue. It's not a matter of absolving a director of duties but, rather, how and by whom a claim for breach of directors' duties may be brought.

b. Business Judgment Rule

Assuming OLV 17 has a direct cause of action against him for breach of fiduciary duties, Dice seeks safe harbor in the business judgment rule (Dice Brief, p 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).¹³ 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.

Application of the business judgment rule encompasses three elements: “a threshold review of the objective financial interest of the board whose decision is under attack (i.e. independence), review of the board’s subjective motivation (i.e. good faith,), and an objective review of the process by which it reached the decision under review (i.e. due care).” *Id.* at 148.¹⁴ “Independence” means directors can not appear on both sides of a transaction, nor expect to derive any personal financial benefit (as opposed to a benefit which devolves upon the corporation or all stockholders generally),

¹³ “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).

¹⁴ *Detwiler* also recognizes one commentator’s description of the rule as having five elements: “a business decision, disinterestedness, due care, good faith, and no abuse of discretion.” *Detwiler* at 148, citing Block, Barton & Radin, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors and Officers* (2d ed 1988), pp 12-22.

nor take an action for the sole or primary purpose of retaining control. *Id.* at 148-149. “Good faith” requires directors act in good faith and in the honest belief that their actions are in the corporation’s best interest. *Id.* at 150. “Due care” requires directors inform themselves of all material information reasonably available to them prior to making a business decision, and not act in a grossly negligent manner. In fulfilling this duty, officers and directors are entitled to rely on the advice of financial and legal advisors, *MCL 450.1541a(2)*, provided they do not do so blindly. *Id.* at 150.

Here, OLV 17 asserts Dice cannot “hide behind” the business judgment rule because he breached fiduciary duties by exposing CPC to liability by authorizing, as a member of a purportedly undersized board of directors, the Property Litigation against Elite to enforce a purportedly unenforceable purchase agreement for the Property and then cloud Elite’s title by recording the Notice (Plaintiffs’ Response, pp 14-15). With due respect, the court believes OLV’s objections are misplaced.

First, even if vacancies on CPC’s board brought its number below the restated articles of incorporation five-director minimum¹⁵, the court doesn’t perceive the issue to be one of directors’

¹⁵ OLV 17’s argument that CPC’s board did not have the five-director minimum assumes the effectiveness of director Foulds’s November 30, 2019 emailed resignation that, although “effective immediately”, “anticipated [the] simultaneous resignation of [director] James Schauman” (Plaintiffs’ Response, Ex G).

According to *MCL 450.1505(2)*, “A director may resign by written notice to the corporation. The resignation is effective upon its receipt by the corporation or a later time as set forth in the notice of resignation.”

Assuming Schauman’s “anticipated” resignation is encompassed by the statute’s phrase, “or a later time as set forth in the notice of resignation”, and the later time never arrived, then Foulds’s resignation would seemingly be inoperative.

But this opinion assumes, without deciding, that Foulds’s resignation was effective.

fiduciary duties but, rather, a corporation's capacity or power to act. In this regard, Michigan's business corporation act provides that, "[a]n act of a corporation [], otherwise lawful, is not invalid because the corporation was without capacity or power to do the act []", *MCL 450.1271*¹⁶.

Second, assuming the issue is properly framed as one of fiduciary duty, as Dice points out, directors are entitled to rely on opinions of legal counsel, *MCL 450.1541a(2)(b)* (Dice Brief, pp 7-8), and that was his basis for agreeing to the December 11, 2019 board resolution to commence the Property Litigation (Dice Brief, Ex O; Dice Reply Brief, Ex V, ¶¶ 12-16¹⁷). And aside from the

¹⁶ MCL 450.1271 goes on to provide that the lack of capacity or power may nonetheless be asserted:

- (a) In an action by a shareholder against the corporation to enjoin the doing of an act or the transfer of real or personal property by or to the corporation.
- (b) In an action by or in the right of the corporation to procure a judgment in its favor against an incumbent or former officer or director of the corporation for loss or damage due to his unauthorized act.
- (c) In an action or special proceeding by the attorney general to dissolve the corporation or to enjoin it from the transacting of unauthorized business.

The court understands that, to date, none of these actions have been taken relative to CPC's acts.

¹⁷ Dice's May 7, 2022 affidavit (Dice Reply Brief, Ex V) avers:

- 12. The actions I took involving legal matters as a board director of CPC were only at the advice of CPC's counsel. I regularly relied on the opinion, advice, and direction of CPC's counsel and reasonably believed counsel to be reliable and competent in the matters presented.
- 13. The CPC board meeting held December 11, 2019 was recommended, directed in subject matter, and attended to by CPC's counsel at the time, Scot Putzig. The resolution and minutes prepared for said meeting were prepared by CPC's counsel. This included an item on the agenda I was directed to vote on to formally retain Scot Putzig and Robert Miller of Shinnors & Cook to commence litigation on behalf of CPC and its shareholders against Beau Parmenter and his business entities.
- 14. At the CPC board meeting of December 11, 2019, I was advised by CPC's

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apparent disagreement with CPC's counsel's legal analysis underlying the ongoing Property Litigation against Elite (likewise owned by Parmenter), OLV 17 has not documented evidence of Dice's lack of independence, good faith, or due care.¹⁸ Accordingly, OLV 17 has not undermined the business judgment rule's presumption that in voting to commence the Property Litigation, Dice acted consistent with his fiduciary duties.

c. Ratification

Finally, even if vacancies deprived the board of power to act on December 11, 2019, Dice argues that the Property Litigation was subsequently ratified (Dice Brief, p 8).

Although in a different context, OLV 17 argues "the assertion that any action [Dice] may have taken was subsequently ratified by a new Board[] does not excuse the[] actions if they are done in bad faith and based on false pretenses (Plaintiffs' Response, p 11). But, other than exceptions not applicable here¹⁹, unauthorized corporate actions can be ratified by shareholders

counsel that a quorum was present, we could proceed in regular session, and that Foulds proposed resignation as a board director was withdrawn by him and that we should not receive Foulds resignation at the meeting.

15. The cause of action filed in CPC's lawsuit against Parmenter and his business entities were formulated and decided by CPC's counsel in their professional judgement, after said counsel spent numerous hours reviewing the large amounts of documentary evidence and engaging in diligent inquiry.

16. CPC's counsel advised me, Foulds and Schauman that the \$5 million mortgage contingency was arguably unenforceable for Elite, if not construed as a buyer's contingency.

¹⁸ The court notes that the Property Litigation has already survived Elite's motion for summary disposition and is currently on track for trial.

¹⁹ Illegal, void (not merely voidable), and fraudulent corporate acts cannot be ratified. Mich Civ Jur, Corporations, § 138. But cf. Am Jur 2d, Corporations, § 1390 ("On the other hand, there is authority that a disinterested majority of the shareholders of a corporation have the power to ratify fraudulent acts of directors or officers provided there was no actual fraud in either inducing or effecting such ratification").

and/or boards of directors. See Mich Civ Jur, Corporations, §§ 135 et seq. and Am Jur 2d, Corporations, §§ 1383 et seq. Particularly relevant here, an act may be ratified by stockholders even after suit is filed, and the doctrine of ratification can even preclude claims for breach of fiduciary duty attacking that action. Am Jur 2d, Corporations, § 1384.

Here, Dice produced evidence that his actions were ratified by both a subsequent board (Dice Brief, Ex Q) and the stockholders (Dice Brief, Ex A), and OLV 17 has not submitted evidence to the contrary.

Accordingly, for the reasons stated above, the court concludes that Dice is entitled to dismissal of OLV 17's claim that he breached directors' fiduciary duties.

2. Fraud and Conspiracy

Parmenter and OLV 17 allege Dice 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 Dice 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.²⁰

M & D, Inc v W B McConkey, 231 Mich App 22, 27; 585 NW2d 33 (1998). Additionally, to

²⁰ Dice correctly points out (Dice Brief, p 8) that fraud must be pleaded with particularity. MCR 2.112(B)(1); *Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014). Here, although the complaint does generally allege that "defendants personally made or conspired to

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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.*

Dice asserts that the allegations of financial misrepresentation (Amended Complaint ¶ 68(A)(i) thru (iii)) are “impossible” to prove inasmuch as Parmenter was involved with CPC’s predecessor, OLG, and then continued on with CPC as an initial director, a bank account signatory, an investor solicitor, and an employer identification number application “responsible party” (Dice

make” representations (Amended Complaint ¶ 68), it fails to particularize “Who?”, “What?”, “Where?”, “When?”, and “How?”. Without the requisite specificity, fraud claims are legally insufficient and subject to dismissal. However, Dice’s motion is not premised on MCR 2.116(C)(8) (“The opposing party has failed to state a claim on which relief can be granted”) but, rather, MCR 2.116(C)(10) (“there is no genuine issue of any material fact”).

Brief, pp 8-9; Dice Reply Brief, p 5; Dice Brief Exs C²¹, D²², E²³, F²⁴, G²⁵, I²⁶; Dice Reply Brief Exs W²⁷ and Y²⁸). Conversely, although Parmenter and OLV 17 assert they relied on

²¹ By affidavit, Robert Zelle, the organizer of CPC's antecedent, Plant Life Group LLC, avers:

8. To my knowledge, Beau Parmenter was a board member of OrganiLife, actively participated in the business operations, attended company meetings, and was regularly briefed on the company's financial state, including investments being made.

²² The affidavit of James E. Foulds states:

11. OrganiLife created a board of five managers to carry out the business plan and Mr. Parmenter became one of those managers in or around February 2018.

14. Financial accounts were setup in May 2018 and Mr. Parmenter became a signatory and account owner with full authority of the bank accounts established for OrganiLife entities, along with myself and Jim Schauman as co-signatories.

26. Prior to the July 2019 meetings, Mr. Dice was not involved with OrganiLife or Mr. Parmenter in any capacity and had no knowledge or information of OrganiLife, its members, or board, managers.

27. At all relevant times, Mr. Parmenter had access and authority over the bank accounts for OrganiLife, regularly attended board meetings and was provided financial reports by the board treasurer, Mr. Schauman.

²³ Deposition of Jordan Dice, pp 26, 44-45.

²⁴ Select CPC formation documents, including the signed written action of the incorporator appointing initial directors, including Parmenter and Dice, and the [unsigned] written consent of the board of directors appointing Parmenter president.

²⁵ OLG Comprehensive Business Plan that identifies (p 20) Parmenter as "Founding Member" and "Director of Real Estate Development".

²⁶ Business Signature Card for OLG account at Citizens Bank authorizing Parmenter as signer (together with Foulds and Schauman).

²⁷ OLG application to IRS for employer identification number identifying Parmenter as the "responsible party".

²⁸ OLG written presentation identifying Parmenter as a "committed" investor.

representations Dice made regarding CPC's financial viability when investing in CPC and the Property (Plaintiffs' Response, p 13), they provided no supporting documentary evidence.

Without more, no reasonable person could conclude that Parmenter and, through him, OLV 17, relied on whatever Dice might have said regarding the financial condition of CPC, a business Parmenter knew longer and more intimately than Dice.

Dice also argues allegations he misrepresented directors' authority (Amended Complaint ¶ 68(B)(i) thru (v)) are misplaced since he simply acted upon legal advice given by CPC's corporate counsel (Dice Brief, p 9; Dice Brief Exs E²⁹, O³⁰, and V³¹). OLV 17 and Parmenter have provided no meaningful contrary argument or evidence.³² Accordingly, even if Dice did misstate his

²⁹ Deposition of Jordan Dice, pp 60-62.

³⁰ Minutes and resolutions of the December 11, 2019 CPC board meeting.

³¹ See *supra*, p 12 n 17.

³² The court is not unaware of OLV 17's argument that "Dice represented to the stockholders of the company that they had a valid lawsuit against Mr. Parmenter based on an alleged "buyer's contingency" in the purchase agreement[, but t]his statement was proven false when Mr. Dice testified at his deposition that Mr. Parmenter insisted on the mortgage contingency, meaning that it was not in fact a buyer's contingency" (Plaintiff's Supplemental Response, pp 5-6). But this is unavailing for a couple of reasons.

First, although OLV 17 cites p 54 of Dice's deposition (Dice Brief, Ex E; Plaintiffs' Response, Ex L) as the source of his testimony "that Mr. Parmenter insisted on enforcing the 5 million dollar contingency" (Plaintiffs' Response, p 8), the deposition actually says:

Q. Okay, And Beau insisted that [the mortgage contingency] was satisfied?

A. He insisted in using it as a reason to not close, yes.

That rather leaves open whether it was truly a seller's contingency that Dice was misrepresenting or a buyer's contingency that the seller was misusing.

Second, even if OLV 17/Parmenter are factually correct, the allegation does not appear in the amended complaint (specifically, ¶ 68(A) regarding representations of CPC's financial condition

cont'd

authority to act on behalf of CPC as alleged, OLV 17 and Parmenter have failed to demonstrate that Dice “knew that [the representation] was false, or made [] recklessly, without knowledge of its truth”, *M & D, Inc*, 231 Mich App at 27.

Moreover, the complaint is that Dice misrepresented his authority “to the shareholders of CPC” and that the “shareholders” relied on the representation of authority, and that, as a result, the “stockholders” suffered damage (Amended Complaint ¶ 68(B)(i) thru (v)). Under the framework our Supreme Court adopted in *Murphy, supra*, discussed above, the court asks, (1) who suffered the alleged harm, and (2) who would receive the benefit of any remedy recovered”? Clearly, in the context of the allegations, the answer to both questions is CPC’s stockholders, making it a derivative claim that OLV 17 cannot bring against Dice directly.

Under the circumstances, the court concludes Dice is entitled to dismissal of Parmenter and OLV 17’s claims of fraud and conspiracy to commit fraud.³³

3. 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, the

and ¶ 68(B) regarding representations of corporate authority) and, therefore, lend no support for Parmenter and/or OLV’s fraud claim (“A party is bound by its pleadings, and it is not permissible to litigate issues or claims that were not raised in the complaint,” *Lenawee Co v Wagley*, 301 Mich App 134, 160; 836 NW2d 13 (2013) (cleaned up)).

³³ The court is not unaware of the assertion that Dice committed fraud by reneging on a purported promise to invest \$800,000 (Plaintiffs’ Supplemental Response, p 6). However, even if factually true, the allegation does not appear in the amended complaint and, therefore, can lend no support for Parmenter and/or OLV 17’s fraud claim. *Lenawee Co*, 301 Mich App at 160.

Moreover, “an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or existing fact. Future promises are contractual and do not constitute fraud”, *Hi-Way Motor Co v Int’l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). “A mere broken promise does not constitute fraud, nor is it evidence of fraud”, *Marrerro v McDonnell Douglas Capital Corp*, 200 Mich App 438, 444; 505 NW2d 275 (1993).

defendants, including Dice, 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).

Here, Dice points out that in the previously filed Property Litigation, Elite counterclaimed for slander of title. Specifically, Elite alleged that CPC, with knowledge of having “no right to the subject premises and no right to enforce either the Purchase Agreement or the Lease Agreement”, and “for the sole purpose of harassing, intimidating and causing harm” to Elite, recorded the Notice (Property Litigation Counterclaim ¶¶ 42-43).

Accordingly, Dice argues he is entitled to dismissal of the slander of title claim in this case pursuant to MCR 2.116(C)(6) (“Another action has been initiated between the same parties involving the same claim”) (Dice Brief, p 11). Importantly, “MCR 2.116(C)(6) does not require that all the parties and all the issues be identical. Rather, [] complete identity of the parties is not necessary”, and the two suits “must be based on the same or substantially the same cause of

action”. *J D Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986) (cleaned up). Since the allegations in the Property Litigation appear identical and the identity of CPC and Dice (the latter being sued for actions taken as a CPC director) is sufficiently similar, and in the absence of any contrary argument from Elite (Plaintiffs’ Response, pp 9-12), the court concludes that dismissal of the slander of title claim here is appropriate under MCR 2.116(C)(6).

Moreover, as Dice asserts (Dice Brief, p 11; Dice Reply Brief, pp 2-3), and as supported by his documentary evidence (Dice Brief, Exs D³⁴ and Ex V³⁵), the Notice was recorded by corporate counsel on behalf of CPC, not by Dice or even with his knowledge. And Elite has not submitted any contrary evidence, much less identified an expression of malice by Dice. Therefore, based on un rebutted evidence negating essential elements of Elite’s claim, Dice is also entitled to summary dismissal of the slander of title claim under MCR 2.116(C)(10).

³⁴ The affidavit of James E. Foulds states:

40. There was a Notice of Lis Pendens filed as to the Sharon Road property and as supported by OrganiLife’s litigation. None of the board directors, including myself, Mr. Dice, or Mr. Schauman were personally involved in the decision, drafting or recording of the Lis Pendens. As the record will support, the Lis Pendens was filed by OrganiLife’s corporate counsel of the time, Scot Putzig of Shinnors & Cook.

³⁵ Dice’s May 7, 2022 affidavit states:

18. As the public record reflects, the lis pendens recorded on the subject property was executed by CPC’s counsel on December 12, 2019. The decision to draft, execute, and record the lis pendens was at the legal discretion of CPC’s counsel and I was not aware of this action until January 2020.
19. I did not participate in the drafting, decision making, execution or recordation of the lis pendens made against the subject property, nor did I have knowledge of the same until after the action was done. At all relevant times, I relied upon CPC’s counsel to exercise legal discretion in CPC legal matters.

4. Tortious Interference With A Business Relationship

In Count 3 of the amended complaint, Elite alleges that Dice 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).

Elite’s claim here fails for a couple of reasons.

First, Dice argues (Dice Brief, p 10) that the ongoing Property Litigation involves similar claims and parties (Dice Brief, p 10), and Elite has offered no contrary argument (Plaintiffs’ Response, p 12). Without more, *Hughes v Almena Twp*, 284 Mich App 50, 71; 771 NW2d 453 (2009) (“Court[s] will not search for authority to sustain or reject a party’s position”), summary dismissal of this claim is justified under MCR 2.116(C)(6).

Second, other than a disagreement with legal advice CPC’s attorney gave to Dice and other directors, Elite has presented no evidence of a per se wrongful act or malice (Dice Brief, p 4; Dice Reply Brief, p 3). Rather, recording a notice of lis pendens is a lawful act, *MCL 600.2701*, and, here, it was recorded incidental to litigation commenced in reliance of corporate counsel’s recommendation (see *supra*, p 12 n 17).

Third, as discussed above, and as supported by un rebutted documentary evidence, the Notice was recorded by corporate counsel, on behalf of CPC, not Dice, individually, or even with his knowledge (see *supra*, p 20 n 35).

Fourth, Elite has not alleged (Amended Complaint, ¶¶ 72-78) much less offered proof of a then-existing business relationship or expectancy for Dice to have interfered with, much less that he actually induced or caused its breach or termination (Dice Brief, p 10).

Accordingly, the court concludes that Dice is entitled to summary dismissal of Elite’s tortious interference claim.

CONCLUSION

OLV 17, Parmenter, and Elite have sued Dice for actions taken as a director of a business corporation. Dice requests summary dismissal of all claims against him on multiple grounds.

The court concludes that, because another action has been initiated between similar parties involving similar claims and/or because there is no genuine issue as to any material fact, all claims against Dice should be dismissed.

IT IS SO ORDERED.

Date: August 3, 2022

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