STATE OF MICHIGAN
IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

HEATHER SPITLER, individually and as Successor Trustee of the Todd M. Spitler Trust dated July 25, 2006, and Personal Representative of the Estate of Todd Spitler, an individual, and derivatively in the right of BRIGHTON FORD, INC.,
Plaintiff,

Case No. 19-030330-CB
Hon. Suzanne Geddis

v

GERALD SPITLER, SCOTT SPITLER, AND BRIGHTON FORD, INC.,
Defendants.

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OPINION & ORDER

At a session of the 44th Circuit Court,
held in the City of Howell, County of Livingston,
State of Michigan, on the 1st day of October, 2019.

PRESENT: HONORABLE SUZANNE GEDDIS
CIRCUIT COURT JUDGE

THIS MATTER HAVING COME BEFORE THE COURT on Defendants' motion for a protective order regarding Scott and Gerald Spitler, Defendants' motion for a protective order regarding Catalyst Solutions, Plaintiff's motion to compel Defendants' depositions, and Plaintiff's motion to compel discovery, and all four motions being scheduled for hearing on September 19, 2019, and all four motions regarding the same general topics and arguments, and the parties' respective counsel having briefed the matter, and the parties' respective counsel having appeared for the scheduled hearing on September 19, 2019, and this Court being otherwise fully advised in the premises now GRANTS both of Plaintiff's motions regarding discovery and determines both of Defendants' motions for protective orders have been rendered moot for the reasons that follow.

I. Relevant Facts and Procedural History

Gerald Spitler was, for many years, the sole owner of the stock of Brighton Ford, Inc. (hereinafter "Brighton Ford"), but over many years he gifted most of the stock to his sons, Scott and Todd, themselves employees of Brighton Ford.

On September 4, 2018, Todd Spitler committed suicide. He had been the general manager of the dealership during a time when the financial condition of the dealership was in decline. At the time of his death, Todd Spitler owned 50% of the non-voting stock, and 25% of the voting stock. Scott Spitler owned 49% of the non-voting stock, and 24% of the voting stock. Gerald Spitler continued to own 1% of the non-voting stock, and 51% of the voting stock. Todd Spitler's

trust holds his shares of stock, and following his death, Plaintiff Heather Spitler became successor trustee of his trust.

A Buy-Sell Agreement (hereinafter "the Agreement") executed in 2006 by Todd, Scott, and Gerald Spitler granted the other shareholders an option to buy out a member's stock upon, *inter alia*, that member's death. The Agreement also laid out how the purchase price of the stock would be determined. If the other shareholders declined to exercise the option to purchase, the Agreement states that the corporation "shall redeem" the decedent's stock.

Brighton Ford had obtained and paid premiums for a $6 million policy on Todd Spitler, the proceeds of which appear, from the language of the Agreement, to have been intended to purchase his shares from his trust. However, the $6 million was paid out to Scott Spitler, as the primary beneficiary of the policy, and Scott Spitler has not used this money to buy Todd Spitler's stock.

Following Todd Spitler's passing, Plaintiff and Defendants began discussions about valuation of decedent's stock and on what terms Defendants may purchase it. The parties proceeded according to the Agreement, hiring professionals to evaluate the proper price of the stock Todd Spitler's estate owned. The professionals sought to interview Gerald Spitler as part of that process, but he refused to be interviewed until Plaintiff agreed to use nothing from the valuation in any subsequent action involving the shares. After the stock valuation process broke down, Plaintiff filed a six count Complaint for Declaratory Relief, Specific Performance by Defendants, Breach of Contract, Shareholder Oppression, Shareholder Derivative Action, and Unjust Enrichment. Defendants' first responsive pleading was this motion for summary disposition.

Defendants filed a joint motion for summary disposition of the Complaint, which has been decided in a separate written opinion. Plaintiff subsequently filed two motions to compel the depositions and discovery.

II. Argument

Defendants filed a motion seeking protective orders for Gerald and Scott Spitler to prevent depositions being taken, along with a motion seeking a protective order to prevent discovery of records Plaintiff has subpoenaed from Catalyst Solutions Group. Defendants' first responsive pleading was the aforementioned motion for summary disposition scheduled for hearing on September 19, 2019. Prior to this hearing date, Plaintiff sent notices of taking depositions to Gerald and Scott Spitler's counsel. Plaintiff also sent a subpoena for records regarding the life insurance policies to Catalyst Solutions Group. Defendants argued that no discovery should be allowed until the motion for summary disposition is decided because, if Defendants win the motion in its entirety, it would have been a waste of money to conduct discovery. Plaintiff responds that nothing in the court rules prohibits discovery before a dispositive motion is decided, and in fact, depositions would be important evidence to bring before the Court in support or in opposition to a dispositive motion.

In addition, Plaintiff filed a motion seeking to compel the depositions of Scott and Gerald Spitler before the motion for summary disposition, as the information gained through deposition would be highly probative to the dispositive motion. Finally, Plaintiff filed a motion to compel discovery, seeking more complete and specific answers to interrogatories. Defendants responded that depositions should not be taken prior to the decision on the dispositive motion because it would be a waste of time and expense if the dispositive motion was granted. Defendants continued that to compel more complete responses to interrogatories would be over burdensome.

III. Analysis

A. Defendant Brighton Ford's Motion for Protective Order re: Scott and Gerald Spitler and Defendant Brighton Ford's Motion for Protective Order re: Catalyst Solutions

Defendant Brighton Ford relies on MCR 2.302(C) in their motions for protective orders to prevent depositions and to prevent delivery of the documents subpoenaed from Catalyst Solutions.

MCR 2.302(C) states that a moving party requesting a protective order must show good cause to issue such an order. The purpose of a protective order is to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. *See id.* Here, Defendants have not shown good cause why depositions or delivery of the subpoenaed documents should be prevented until the dispositive motion has been decided. However, Plaintiff should include a "due date" on the subpoena. Defendants' asserted reason – that discovery may not be needed or may be limited if their motion for summary disposition is granted – assumes the motion will be granted. If the motion is denied, discovery will still be needed. Seeking to avoid the expense of deposition or the production of documents until Defendants see if they will win their motion is not good cause to prohibit discovery.

Further, even if this Court had granted Defendants' motion for summary disposition in its entirety, under MCR 2.116(I)(5), this Court must give Plaintiff a chance to amend the Complaint Therefore, deposition of the two shareholders in the business and delivery of the subpoenaed documents would still be needed, even if Defendants' motion for summary disposition had been granted. That being said, the motions regarding discovery were scheduled for hearing on the same date as Defendants' motion for summary disposition, and these opinions are being rendered contemporaneously. For that reason, Defendant Brighton Ford's motions for protective orders to prevent depositions and to prevent production of documents Plaintiff subpoenaed until the

dispositive motion has been decided have been rendered moot. Simply due to the scheduling of the motions, deposition and production of documents has been prevented until the dispositive motion has been decided.

This Court finding that the motions for protective orders are rendered moot, neither grants nor denies Defendant Brighton Ford's motions. Therefore, this Court need not award attorney fees to either side under MCR 2.313.

B. Plaintiff's Motion to Compel Depositions

Plaintiff is correct in stating that depositions are important evidence the Court considers on a C(10) motion. However, Defendants moved primarily under C(8), with only Count V and Count VI being subject to a C(10) motion. "[B]ecause a motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the pleadings alone and is properly granted only when a claim is so clearly unenforceable that no factual development could justify recovery," a plaintiff may not avoid summary disposition under MCR 2.116(C)(8) by arguing that "discovery was incomplete." *Lett v Henson*, 314 Mich App 587, 604 (2016). Therefore, the taking of depositions has no bearing on the bulk of Defendants' motion for summary disposition.

The C(10) motions as to Counts V and VI are based on the timing of the written demand Plaintiff made on Brighton Ford and whether such written demand complied with MCL 450.1493a. Depositions will not be necessary to decide whether the demand letter was sent ninety days before suit was filed. All this Court needs for that portion of the motion is the date the demand was made, the date suit was filed, and possibly an affidavit, if one exists, as to whether demand was rejected before suit was filed. The written demand was attached as an exhibit, and it bore the date it was issued. The Complaint was stamped May 8, 2019 by the clerk at the time of filing. An affidavit regarding rejection of the written demand must not exist, as Plaintiff concedes in her Response

that demand was not made ninety days before suit was filed. Therefore, the depositions are not needed for this Court to decide Defendants' motion for summary disposition, and accordingly, the motion for summary disposition need not be rescheduled until depositions can be had.

Though the failure to attend depositions does not require this Court to postpone the decision on Defendants' motion for summary disposition, Defendants should still be compelled to attend deposition. Plaintiff properly noticed up depositions for Gerald and Scott Spitler under MCR 2.306(B) by serving a notice of deposition on Scott and Gerald's attorney at the time, Mr. Bachand. Under MCR 2.306(A)(1)(e) it was a permissible to take deposition of Defendants on June 21, 2019 because the Complaint was served on May 15, 2019, and more than 28 days would have elapsed from the service of the Complaint to the time of deposition.

Defendant Scott Spitler's argument that notice of deposition was not properly served on him because his attorney had not entered an appearance falls flat both because his attorney accepted service on his behalf, and his attorney at the time (also the attorney for Brighton Ford) was representing him and Brighton Ford during the negotiations for valuation of the stock. MCR 2.117(B)(1) states that an attorney may appear by any act that indicates he represents a party in an action. Accepting service is an act that a party does, unless his attorney accepts the same. Scott's attorney accepting service on his behalf indicates he was representing Scott Spitler under MCR 2.117(B). The notice of taking of deposition was properly served.

The reason presented by Defendants to prevent depositions until after the dispositive motion – that holding off the depositions to see if they will be needed so as to save time and costs – is not good cause to issue a protective order, as discussed above. There being no good cause to delay depositions, and notice of depositions being properly served, it is appropriate to compel Defendants to attend deposition.

C. Plaintiff's Motion to Compel Discovery

A party served with interrogatories is obligated to respond to each question separately and to do so under oath, within 28 days of service or within 42 days after being served with the summons and complaint. MCR 2.309(B)(1), (4). In addition, a party served with a request for production of documents or a request for entry on land must serve a written response within 28 days of service or within 42 days after being served with the summons and complaint. MCR 2.310(C)(2). A nonparty must respond within 14 days. MCR 2.310(D)(4).

Here, Defendants responded to the interrogatories and requests for production of documents with the same or similar broad, generic objections being copy and pasted for nearly all responses. Defendants boilerplate objections that the requested information is overly broad or not relevant does not hold water, since Defendants made the exact same objections to nearly all the interrogatories, even ones that are clearly relevant and specific. Further, Defendants have not shown the burden of deriving the answers from the business records is substantially the same for Plaintiff as it is for Defendants. *See* MCR 2.309(E). The opposite appears to be true here where Defendants are the corporation, the officer of the corporation, and the former officer of the corporation, and Plaintiff is merely the trustee of a trust that holds shares in the corporation. Defendants have full access to the business records and know where to look, whereas Plaintiff would not know where to look.

Michigan law supports "far-reaching, open, and effective discovery practice." *Shinkle v Shinkle*, 255 Mich App 221, 225 (2003). The interrogatories and documents requested appear to be relevant and do not appear to be an attempt to harass Defendants or go rummaging through the Defendants' files to determine if anything of interest might be found. Information need not be admissible at trial for it to be discoverable. It is sufficient that requested information may lead to

the discovery of admissible evidence. *See id.* The interrogatories and requests to produce documents in this case are not of the type that a court will protect a party from under *VanVorous v Burmeister*, 262 Mich App 467, 476 (2004).

D. Attorney Fees

In the discovery motions brought before this Court, as well as Defendants' motion for summary disposition, the moving parties ask for attorney fees.

1. Attorney Fees for Discovery Motions

Pursuant to MCR 2.313(A)(5) if this Court grants a party's motion to compel discovery, the Court must award attorney fees to the moving party, unless the Court sees there are some circumstances that would make an award of attorney fees unjust. While this Court grants Plaintiff's motions to compel depositions and to compel discovery, this Court also finds that Plaintiff presented no evidence to this Court regarding the amount of fees incurred, the hourly rate charged, or the hours expended. Without that information, this Court cannot make an informed determination as to the proper amount and reasonableness of attorney fees. *See generally Adair v State of Michigan*, 301 Mich App 547 (2013). There being no way to reasonably compute the amount of attorney fees that should be awarded, this Court finds circumstances exist here that would make it unjust to award attorney fees in an indefinite amount. Therefore fees are not awarded to Plaintiff on her discovery motions.

2. Attorney Fees for the Motion for Summary Disposition

In Defendants' joint motion for summary disposition, Defendants ask for attorney fees and costs to be awarded pursuant to MCR 2.625 and MCR 1.109(E)(6). This Court's determination to deny that request was implicit in its reasoning and opinion rendered in a separate document. However, this Court now expressly addresses that attorney fees and costs request.

This Court granted Defendants' dispositive motion in part and denied in part, finding that Plaintiff had validly stated a claim in Counts I-IV of the Complaint, but had failed to make written demand timely as to Counts V and VI. This Court did not reach the merits of Counts V and VI, as the counts were dismissed due to a procedural failure on Plaintiff's part under MCL 450.1493a. Accordingly, this Court did not find that Plaintiff's Complaint was frivolous within the meaning of MCL 600.2591, and so costs should not be assessed against Plaintiff under MCR 2.625. Furthermore, this Court does not find that Plaintiff's Complaint was not well-grounded in fact and law, and therefore Plaintiff has committed no violation of MCR 1.109 in signing and filing the Complaint. Accordingly, no attorney fees shall be awarded to Defendants under MCR 1.109(E)(6).

IV. Conclusion

For the reasons stated above, Defendants' motions for protective orders have been rendered moot, Plaintiff's motions to compel depositions and to compel discovery are hereby GRANTED, and all requests for attorney fees and costs are hereby DENIED.

IT IS SO ORDERED.

/s/Suzanne Geddis_____
Hon. Suzanne Geddis (P35307)
Circuit Court Judge