

STATE OF MICHIGAN
SAGINAW COUNTY CIRCUIT COURT

SARGENT DOCKS AND TERMINAL, INC,
SARGENT SAND COMPANY, LLC, and
WILLIAM WEBBER,

Plaintiffs,

v

THOMAS WEBBER,
AVANT LOGISITCS, LLC,
f/k/a SARGENT LOGISTICS, LLC,
MARCELLUS ENERGY SERVICES, LLC,
and ERIC STRANG,

Defendants.

Thomas J. McGraw (P48817)
McGraw Morris PC
Attorneys for Plaintiff
2075 W. Big Beaver Road, Suite 750
Troy, Michigan 48084
Telephone: (248) 502-4000

Byron J. Walker, pro hac vice
The Rose Law Firm
Attorneys for Avant Logistics and
Marcellus Energy Systems
120 E. Fourth Street
Little Rock, Arkansas 72201-2893
Telephone: (501) 375-9131

Case No. 11-014229-CB

Judge: M. Randall Jurrens (P27637)

OPINION AND ORDER
RE: DEFENDANTS'
MOTION FOR SUMMARY
DISPOSITION No. 4
(Conspiracy / Tortious Interference
with Economic Business Relationships)

Peter A. Poznak (P27948)
Poznak Dyer Kanar Garchow PLC
Attorneys for Defendants Webber and Strang
and co-counsel for Avant Logistics and
Marcellus Energy Systems
143 McDonald Street
Midland, Michigan 48640
Telephone: (989) 832-1770

The plaintiffs' amended complaint states several causes of action related to a failed business venture.

In the present motion for summary disposition, the defendants seek dismissal of Count IV, *Conspiracy*, and Count V, *Tortious Interference with an Economic Business Expectancy*.

For the reasons stated in this opinion, the court concludes that factual issues preclude the requested relief.

Background / Standards

The Factual Background, Procedural Background, and Summary Disposition Standards included in the court's Opinion and Order re: Defendants' Motion for Summary Disposition No. 1 are adopted and incorporated by reference.

Analysis

Conspiracy

In Count IV of their amended complaint, the plaintiffs allege the defendants conspired (1) to usurp business opportunities and compete against the LLC (i.e. breach their fiduciary duties), and (2) to dissipate the LLC's assets (Amended Complaint, ¶¶ 65-68).

“A civil conspiracy is a combination between 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.” *Cleary Trust v Muzyl Trust*, 262 Mich App 485, 507; 686 NW2d 770 (2004), overruled on other grounds in *Titan Ins Co v Hyten*, 491 Mich 547, 556, n 4; 817 NW2d 562 (2012). “A claim of civil conspiracy must be based on an underlying actionable tort”. *Id.*

With discovery now complete, the defendants assert that there is no genuine issue of material fact that they did not pursue an unlawful purpose or employ unlawful means and, therefore, pursuant to MCR 2.116(C)(10), they are entitled to dismissal of Count IV, *Conspiracy*, as a matter of law.

Pointing out that the defendants do not contest they acted in concert, only that the underlying actions were not unlawful, the plaintiffs argue that genuine issues of material fact remain regarding the underlying torts. It follows, therefore, that if there are viable actions against the defendants, the motion to dismiss the conspiracy claim should be denied.

Given the court's Opinion and Order re: Defendants' Motion for Summary Disposition No. 1, subpart 2, partially sustaining Count 1, *Breach of Fiduciary Duty*), and the apparent lack of dispute whether the defendants acted in concert, the court concludes that material questions of fact preclude summary disposition of Count IV, *Conspiracy*.

Tortious Interference with an Economic Business Relationship

Count V of the plaintiffs' amended complaint, *Tortious Interference with an Economic Business Relationship on Behalf of Sargent Sand Company, LLC*, alleges the defendants were aware of business expectancies the LLC had with Cudd and Universal, but obtained for themselves opportunities the LLC could have otherwise pursued (Amended Complaint, ¶¶ 71-76).

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).

With discovery completed, the defendants argue there is no persuasive evidence that they interfered with the LLC’s business relationships and/or expectancies and, therefore, that they are entitled to dismissal of this claim as a matter of law pursuant to MCR 2.116(C)(10)¹.

Specifically, the defendants argue that they engaged in the “transloading and warehousing” only after Bill declined to pursue “logistics” when presented with the opportunity, and that there is no evidence they attempted to dissuade Cudd or Universal from utilizing the LLC’s products and service (Defendants’ Brief in Support, p 8).

The plaintiffs counter, as they did in response to the Defendants’ Motion for Summary Disposition No. 1, that the defendants did not even present various business opportunities to the LLC for consideration, much less receive consent or ratification (Plaintiffs’ Response, pp 40-41). Additionally, at oral argument, the plaintiffs highlighted a 5-year Sand Purchase Agreement that Eric signed with Cudd (Plaintiffs’ Ex 7; Trans March 23, 2015, p 40; Trans March 25, 2015, p 27), as evidence of the LLC’s ongoing business expectancy.

Consistent with the court’s Opinion and Order re: Defendants’ Motion for Summary Disposition No. 1 (particularly subpart 2, partially sustaining Count 1, *Breach of Fiduciary Duty*)

¹ The defendants’ also argue that Count V should be dismissed under MCR 2.116(C)(8) because, to the extent it is intended to state a cause of action for tortious interference with contractual relations, the plaintiffs’ complaint fails to allege a critical element: breach of contract. *Knight Enterprises v RPF Oil Co*, 299 Mich App 275, 280; 829 NW2d 345 (2013). But a fair reading of the plaintiffs’ pleadings (both the title of Count V and the content of ¶¶ 70-77), as well as their written response (Plaintiffs’ Response, pp 40-41) indicate that they assert the separate and distinct cause of action of tortious interference with a business relationship or expectancy.

the court concludes there are genuine issues of material fact that preclude summary dismissal of Count V, *Tortious Interference with an Economic Business Relationship*.

Conclusion

The plaintiffs' amended complaint states several causes of action related to a failed business venture. In the present motion for summary disposition, the defendants seek dismissal of Count IV, *Conspiracy*, and Count V, *Tortious Interference with an Economic Business Expectancy*.

Since both claims are substantially extensions of Count I, *Breach of Fiduciary Duty* -- which the court partially declined to dismiss in its Opinion and Order re: Defendants' Motion for Summary Disposition No. 1, subpart 2, Disclosure/Consent/Ratification, because of unresolved factual issues -- the court concludes that Defendants' Motion for Summary Disposition No. 4 should be similarly **DENIED**.²

IT IS SO ORDERED.

Date: August 7, 2015

_____/s/_____
M. Randall Jurrens, Circuit Judge (P27637)

² While the plaintiffs' claims of conspiracy and tortious interference survive the defendants' present attack, they are, of course, subject to any limitation affected by other court order, including court's Opinion and Order Re: Defendants' Motion for Summary Disposition No. 2, subpart 1.