

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT

**JOHN MATOUK and  
MATOUK INVESTMENTS OF NOVI, LLC,  
Plaintiffs,**

v.

**Case No. 14-143447-CB  
Hon. James M. Alexander**

**THE ROBERT L. BARRICK TRUST, ET AL,  
Defendants.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Defendants' motion for summary disposition. Plaintiffs brought this case on claims that Plaintiff John Matouk was in "financial distress" when he sought help to pay some outstanding debt obligations. Matouk claims that he went to Defendant Robert Barrick, who agreed to a series of loans, which would "park" certain of Matouk's assets until such time that he could reacquire title to the same. Specifically, this case revolves around the "Fidelity Property" – commercial real property located at 43420 Grand River in Novi.

Plaintiffs claim these "loan agreements" were memorialized in an October 17, 2008 "Global Agreement," and a subsequent July 23, 2009 "First Amendment to Global Agreement." Despite that the express terms of said Agreements refer to the transactions as a "sale and transfer" or "purchase" of the identified real and personal property, Plaintiffs claim that the agreements were really loans, secured by said property as collateral. And, Plaintiffs claim,

Defendants wrongfully disposed of the “collateral” instead of holding the same for Matouck to redeem at some point in the future.

This foundation serves as the basis for Plaintiffs’ First Amended Complaint, which alleges claims for: (Count I) breach of contract, (Count II) equitable mortgage, (Count III) fraudulent misrepresentation, (Count IV) innocent misrepresentation, (Count V) breach of fiduciary duty, (Count VI) unjust enrichment, (Count VII) common law conversion, (Count VIII) statutory conversion, (Count IX) accounting, (Count X) negligence, and (Count XI) constructive trust.

Defendants now move for summary disposition of said Complaint under MCR 2.116(C)(10) because all claims alleged therein “fail based on the content of the written agreements between the parties and the factual record.”

A (C)(10) motion tests the factual support for a plaintiff’s claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In presenting such a motion, “the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiffs have advanced their loan theory before. In 2014, in Wayne County Circuit Court, Matouk faced eviction from another property identified in the parties’ Agreements (the Sunningdale Property) by the then owners, who purchased the property from Barrick. Matouk argued that he could not be evicted because he still owned the property, and Barrick’s interest was merely as collateral to a loan. Judge David Allen rejected that argument, finding that Matouk **sold** said property to Barrick in October 2008.

Plaintiffs' original Complaint in this case again made allegations about the Sunningdale Property, but in January 2015, the Court's predecessor, Judge Michael Warren, dismissed all claims for the Sunningdale Property by giving collateral estoppel effect to the prior ruling of Judge Allen.<sup>1</sup>

Matouk next argued his loan theory to Judge Kathleen MacDonald of the Wayne County Circuit Court. In 2014, pursuant to a seizure order from this Court on another case (Case No. 08-092459-CR), a court officer seized personal property of Matouk, who then sued the court officer in Wayne County. In that case, Matouk argued that Barrick only held a security interest in the personal property and never owned it.

In February 2015, Judge MacDonald disagreed, finding that Matouk had no interest in the seized personal property since 2008. She also granted sanctions.

Then in May 2015, Barrick moved for summary disposition in this case before Judge Warren. Among other things, Barrick argues that all claims relating to personal property were barred by Judge MacDonald's ruling of February 2015. Matouk apparently agreed and voluntarily dropped all claims relating to that property.

In October 2015, Plaintiffs were permitted to file their First Amended Complaint, which included claims that brought this case into the jurisdiction of the Business Court, where it now resides.

### **1. Breach of Contract (Count I).**

As stated, Plaintiffs' breach of contract claim is founded on allegations that the Global Agreement and the First Amendment to Global Agreement actually represented a series of loans from Barrick to Matouk.

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<sup>1</sup> January 29, 2015 Opinion and Order.

Michigan law is well-established that “a court must construe and apply unambiguous contract provisions as written.” *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

Paragraph 8 of the October 2008 Global Agreement provides:

Matouk and Barrick both expressly understand that, notwithstanding the terms and conditions of this agreement, the transactions contemplated by this agreement and the agreements attached as exhibit hereto are not intended to be, and shall not in any way construed as, a loan from Barrick to Matouk.

The Fidelity Property was not specifically mentioned in the Global Agreement. A month later, in November 2008, Matouk’s attorney (Greg Cooksey) emailed Barrick a list of properties to see if he had any interest. The email stated that the focus was for Bob (Barrick) to get clean title to the properties. The Fidelity Property was on this list.

Matouk had mortgaged that Property to Huntington Bank, defaulted on the secured loan, and the Property was sold at sheriff’s foreclosure auction on September 2, 2008. On February 27, 2009, Plaintiffs executed an Assignment of Rights to Barrick Properties. The Assignment acknowledged that, as partial consideration, Barrick paid a Matouk Comerica debt. Barrick also paid approximately \$1.7 million to redeem the Property from the holder of the sheriff’s deed, which is evidenced by a March 2, 2009 Acknowledgment of Redemption. By doing so, Barrick Properties acquired fee simple title to the Fidelity Property.

Matouk also executed a March 2, 2009 Warranty Deed conveying the property to Barrick Properties. Both the Acknowledgment of Redemption and Warranty Deed were properly recorded with the Oakland County Register of Deeds.

Several months later, on July 23, 2009, the parties executed the First Amendment to the Global Agreement. This Amendment expressly incorporated the Global Agreement at paragraph 7:

Except as otherwise provided herein, all other terms and condition (sic) of the original Global Agreement, and any subsequent financing related agreement between the Parties, shall remain in full force and effect.

As a result, the First Amendment incorporated the Global Agreement's provision that all transactions considered therein were not loans. The First Amendment further provided:

1. On or before August 15, 2009, Matouk shall pay the sum of \$3,000,000 to Barrick.
2. Upon receipt of the payment called for in paragraph 1 above, Barrick shall transfer the Fidelity Investments of Novi Building to Matouk or an entity to be formed by Matouk.

Defendants first argue that they are entitled to dismissal of Plaintiffs' breach of contract claim because Plaintiffs were the first to breach the same by failing to pay the \$3,000,000 by August 15, 2009. As a result, Plaintiffs' alleged 2012 breach of selling the Fidelity Property cannot serve as the basis for their breach of contract claim.

Indeed, “[t]he rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform. However, that rule only applies when the initial breach is substantial.” *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994) (internal quotations and citations omitted).

In response, Plaintiffs claim that the August 15, 2009 payment was simply an “option” payment on a loan that Matouk did not exercise. And Plaintiffs claim that the only consequence

of his failure to exercise this option was that he no longer had the option at that price. But, Plaintiffs claim, in no event did the First Amendment give Barrick the right to sell the Fidelity Property. The Court disagrees for several reasons.

First, Matouk assigned his right to redemption following a Sheriff's Sale on the Fidelity Property to Barrick on February 27, 2009, and executed a Warranty Deed conveying all interest in said Property to Barrick on March 2, 2009. Barrick paid a Matouk Comerica loan as partial consideration for the Assignment and paid the redemption price to the holder of the sheriff's deed.

Additionally, the July 2009 Amendment provided that “[o]n or before August 15, 2009, Matouk shall pay the sum of \$3,000,000 to Barrick.” This provision makes no reference to any loan. While the recitals of the First Amendment reference the Fidelity Property, they do not identify the same as “secured” – thereby inferring a loan (as three of the other four specifically identified items do).<sup>2</sup>

And this is consistent with Barrick's purchase of the Fidelity Property because the Property is identified in the recitals under the following heading: “Since entering the Agreement on October 17, 2008, Barrick has made additional loans, both secured and non-secured, to Matouk and/or **entered into transactions for the benefit of Matouk**, which can be summarized as follows.” It is consistent with the parties' written Agreements that the Fidelity Property was a part of a “transaction,” rather than a loan.

This interpretation is further bolstered by the language in clause 2: “Upon receipt of the payment called for in paragraph 1 above, **Barrick shall transfer** the Fidelity Investments of

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<sup>2</sup> The Court will also note that the Recitals of the First Amendment were not identified as part of the terms and conditions of the Agreement – unlike the Global Agreement, which provided that “the above mentioned recitals are not mere declarations, but rather part of the terms and conditions of this Agreement.” It follows, therefore, that **the Recitals** of the First Amendment are not a part of the terms of the parties' contract.

Novi Building to Matouk or an entity to be formed by Matouk.” If the property was Matouk’s, then Barrick could not transfer it. He would hold no right to do so. But because Barrick held the right to transfer the Fidelity Property, he must have owned the property.

As a result, when Matouk failed to perform under the First Amendment by failing to pay \$3,000,000 by August 15, 2009, Barrick could do with his property what he wished. And Matouk executed the First Amendment. He agreed to these terms.

Finally, the Court rejects any verbal “loan” argument because any agreement that Barrick only had a collateral interest in the Fidelity must be in writing to be enforceable. MCL 566.106. And Plaintiffs identify no writing that supports their loan theory. The Court will note that Plaintiffs appear to concede this point – arguing that they have also alleged equitable theories of equitable mortgage and constructive trust – which are not barred by the statute of frauds.

For all of the foregoing reasons and viewing all evidence in the light most favorable to Plaintiffs, the Court finds that Barrick owned the Fidelity Property when Matouk Investments conveyed all rights therein to Barrick Properties under the February 27, 2009 Assignment and March 2, 2009 Warranty Deed. Barrick redeemed the property from the holder of the sheriff’s deed on March 2, 2009, which is the date that Barrick owned the property. This Property was not subject to any loan.

For the foregoing reasons, the Court finds that Matouk breached the First Amendment when he failed to pay \$3 million to Barrick by August 15, 2009. Therefore, Plaintiffs cannot maintain their futile breach of contract claim.

As a result, Defendants’ motion for summary of Plaintiffs’ Count I is GRANTED under (C)(10), and the same is DISMISSED.

## **2. Unjust Enrichment (Count VI).**

Further, Plaintiffs' Count VI for unjust enrichment fails because the same is pled "in the alternative to the breach of contract claims." But with respect to such a claim, it is well settled that, "A contract will be implied only where no express contract exists. There cannot be an express and implied contract covering the same subject matter at the same time." *Campbell v Troy*, 42 Mich App 534, 537; 202 NW2d 547 (1972), citing *Superior Ambulance Service v Lincoln Park*, 19 Mich App 655; 173 NW2d 236 (1969).

In this case, Plaintiffs claims that it is suing on express contracts – the Global Agreement and the First Amendment. And simply because Plaintiffs misinterpret the meaning of said Agreements, it does not mean that Plaintiffs somehow pled an actionable unjust enrichment claim. Express contracts exist that cover the transfer of the Fidelity Property from Matouk to Barrick. As a result, Plaintiffs' unjust enrichment claim fails as a matter of law, and the same is DISMISSED.

## **3. Equitable Mortgage (Count II) and Constructive Trust (Count XI).**

Defendants' next seek dismissal of Plaintiffs' Count II for equitable mortgage and Count XI for constructive trust. Plaintiffs solely base this claim on their flawed interpretation of the First Amendment and the argument that Barrick's only interest in the Fidelity Property was as collateral for a loan.

But for all the reasons stated above, the Court rejects this argument. Matouk relinquished title to, and Barrick has owned, the Fidelity Property since March 2, 2009. As a result, the Court GRANTS Defendants' motion for summary of Plaintiffs' Count II and Count XI, and the same are DISMISSED.

#### **4. Intentional and Fraudulent Misrepresentation (Counts III and IV).**

Defendants next seek summary disposition of Plaintiffs' intentional and fraudulent misrepresentation claims. Plaintiffs base said claims on the allegation that Barrick represented that Matouk "could reacquire the Fidelity Property once certain loan obligations were repaid, when [in] fact Defendant Robert Barrick never had any intention of allowing Matouk to reacquire the same."

This alleged misrepresentation predated Matouk's March 2, 2009 Warranty Deed to Barrick and induced Matouk to refrain from accepting a lucrative offer at the sheriff's auction and "transfer the redemption rights" to Barrick.

But Plaintiffs' argument is flawed because Barrick did, months later (in the July 2009 First Amendment), provide Matouk the option to repurchase the Fidelity Property. Matouk executed the First Amendment. But he then failed to pay under the very terms that he negotiated and expressly agreed to in the said Amendment. As a result, Plaintiffs' entire misrepresentation argument fails.

For the foregoing reasons, the Court GRANTS Defendants' motion for summary of Plaintiffs' intentional and fraudulent misrepresentation claims (Counts III and IV), and the same are DISMISSED.

#### **5. Breach of Fiduciary Duty (Count V).**

Defendants next move for summary disposition of Plaintiffs' breach of fiduciary duty claim. Generally, "a fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of another." *Prentis Family Fund, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 43; 698 NW2d 900 (2005).

The Court of Appeals has reasoned:

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. Fiduciary relationships—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client—require the highest duty of care. Fiduciary relationships [usually] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.” *Calhoun County v Blue Cross & Blue Shield*, 297 Mich App 1, 20; 824 NW2d 202 (2012); quoting *In re Karmey Estate*, 468 Mich 68, 75 n 2; 658 NW2d 796 (2003).

In this case, the parties’ written agreements evidence that each was a business entity dealing with commercial real property. Initially, Matouk used attorney Greg Cooksey to inquire with Barrick about the Fidelity Property. And according to Plaintiffs’ Complaint, “Matouk hired attorney Michael Holmes and his law firm . . . to effectuate the [alleged] ‘parking’ of his assets with the Defendants.” It appears that Plaintiffs did not repose trust in Barrick, as evidenced by hiring attorneys for the parties’ dealings.

In their Response, Plaintiffs offer little analysis on this issue other than broad conclusions that Barrick breached a fiduciary duty. And the Court rejects Plaintiffs’ reliance on *Smith v Saginaw Sav & L Ass’n*, 94 Mich App 263, 274; 288 NW2d 613 (1979), which found “on the unique facts of this case” that a fiduciary duty may arise in a lender-borrower situation. But our facts are unlike those in *Smith*.

In *Smith*, the defendant bank’s branch manager appeared to take on extra duties of overseeing construction on a summer and retirement home being built for the individual plaintiffs, who lived some 250 miles away. One of the plaintiffs was also in poor health, and the branch manager made repeated assurances about the quality of the construction and never told

the plaintiffs about the builder's severe financial difficulties – despite knowing and protecting his own, ongoing home construction by the same company. On these “unique facts,” the Court found that a duty may exist. But this case does not present such unique facts.

But the Court is unconvinced that Barrick owed Plaintiffs any fiduciary duty. Indeed, none of the aforementioned situations described in *Calhoun County* apply.

For the foregoing reasons, the Court finds that Barrick had no duty to Matouk on which to base Plaintiffs' breach of fiduciary duty claim. As a result, Defendants' motion for summary of the same is GRANTED, and Plaintiffs' Count V is DISMISSED.

## **6. Conversion (Counts VII and VIII).**

Defendants next seek dismissal of Plaintiffs' conversion claims. Plaintiffs base said claims on the allegation that Barrick wrongfully retained rental proceeds from the Fidelity Property while he was holding the same as collateral on a loan. In other words, Plaintiffs' conversion claims again hinge on Plaintiffs' ownership of the property during the time rent was paid.

But, as stated, Barrick has owned the Fidelity Property since March 2, 2009. As a result, any rents received since that date rightfully belong to Barrick, who cannot be liable on a conversion of his own property.

Further, any claim for rents collected before March 2, 2009 would be barred by the three-year statute of limitations that governs conversion claims. MCL 600.5805(10); *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 49-50; 742 NW2d 622 (2007). Because Plaintiffs did not file their original Complaint until October 10, 2014, any possible claims based on a conversion of rental proceeds is time barred.

For the foregoing reasons, the Court GRANTS Defendants' motion for summary of Plaintiffs' conversion claims (Counts VII and VIII), and the same are DISMISSED.

**7. Negligence and Accounting (Counts IX and X).**

Finally, Defendants move for dismissal of Plaintiffs' negligence and accounting claims because Plaintiffs fail to identify any legal duty, on which, to base said claims. In their Response, Plaintiffs argue that they have adequately pled a duty to support said claims (as argued in support of their breach of fiduciary duty claim).

But, as stated, the Court rejected the notion that Defendants owed Plaintiffs any duty in this commercial transaction. As a result, Plaintiffs' negligence and accounting claims fail as a matter of law. Defendants' motion for summary disposition of said claim is GRANTED under (C)(10), and Plaintiffs' Count IX and X are DISMISSED.

**8. Summary.**

To summarize, Defendants' motion for summary disposition is GRANTED, and Plaintiff's Complaint is DISMISSED in its entirety.

This Order is a Final Order that resolves the last pending claim and closes the case.

**IT IS SO ORDERED.**

February 24, 2016  
Date

/s/ James M. Alexander  
Hon. James M. Alexander, Circuit Court Judge