

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

JEROME MASAKOWSKI,

Plaintiff,

Case No. 22-193375-CB
Hon. Victoria A. Valentine

v

KRIS KRSTOVSKI; K2-WEST LANSING
PHASE 1, LLC, a Michigan limited liability
company,

Defendants.

**OPINION AND ORDER REGARDING KRSTOVSKI'S MOTION FOR
SUMMARY DISPOSITION UNDER 2.116(C)(8)**

At a session of said Court, held in the
County of Oakland, State of Michigan
September 26, 2024

HONORABLE VICTORIA A. VALENTINE

This matter is before the Court on Krstovski's Motion for Summary Disposition Under MCR 2.116(C)(8). This Court has reviewed the pleadings filed by the parties and the motion, response, and reply. Oral argument was held on the above-entitled motion on September 25, 2024.

OPINION

I.

Overview

This case is one in a series of lawsuits relating to the commercial development in Delta Township, Michigan known as "Delta Crossing" (the "Property").¹ The Plaintiff, Jerome

¹ Amended Complaint ¶ 8.

Masakowski, is a member of K2-West Lansing Phase 1, LLC (“WL1”).² WL1, in turn was a 50% owner of K2-LIP JV West Lansing, LLC (“JV”).³ LIP West Lansing, LLC (“LIP”) owned the other 50% of JV.⁴ JV, through a series of separate LLCs, owned Delta Crossing.⁵

Krstovski served as one of the Co-Managers of JV on behalf of WL1.⁶ The Plaintiff alleges that Krstovski took a number of actions as a Co-Manager of JV without obtaining Masakowski’s consent that interfered with the Plaintiff’s interest as a member of WL1, including causing work to be performed on the Property without the financing in place to pay for the work, directing JV to sell a portion of the Property to BJ’s Wholesale even though there was a verified offer to purchase the property for \$1,000,000 more than the offer that was accepted, altering the books and records of JV for his own benefit, and improperly diverting money to other projects and uses.⁷ The Plaintiff also alleges that Krstovski and his wholly owned entities improperly retained \$661,924.78 of funds belonging to Masakowski pursuant to the JV Operating Agreement.⁸

The Plaintiff filed his Amended Complaint against Krstovski and WL1 in August 2024 which included a single count for member oppression pursuant to MCL 450.4515. Krstovski now moves for summary disposition under MCR 2.116(C)(8).

II.

Standard of Review

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019); *Pawlak v Redox Corp*, 182 Mich

² *Id.* ¶ 34.

³ *Id.* ¶ 8.

⁴ *Id.* ¶ 9.

⁵ *Id.* ¶ 8.

⁶ *Id.* ¶ 13.

⁷ *Id.* ¶¶ 18-24.

⁸ *Id.* ¶ 31.

App 758, 763; 453 NW2d 304 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 360; 466 NW2d 404 (1991).

“All well-pleaded factual allegations are accepted as a true and construed in a light most favorable to the nonmovant.” *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Wade v Dep’t of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App at 360; *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

III.

Analysis

A. The Member Oppression Claim Is Defective Under MCR 2.116(C)(8)

In Count I of the Amended Complaint, the Plaintiff alleges that Krstovski’s actions were “illegal, fraudulent, and/or willfully unfair and oppressive conduct toward Plaintiff” in violation of MCL 450.4515.

a. The Law Regarding Member Oppression

A “member of a limited liability company may bring an action...to establish that acts of the managers or members in control...are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward” the company or a member. MCL 450.4515(1). “[W]illfully unfair and oppressive conduct’ means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member.” MCL 450.4515(2).

Thus, to establish a case for member oppression under MCL 450.4515, a plaintiff must prove the following elements:

1. he was a member of the limited liability company;
2. the defendant was a manager or member in control of the LLC;
3. the defendant engaged in acts; and
4. those acts were “illegal, fraudulent, or willfully unfair and oppressive” to the limited liability company or to the plaintiff as a member.

See, e.g., *Franks v Franks*, 330 Mich App 69, 99; 944 NW2d 388 (2019) (interpreting MCL 450.1489, the analogous provision for shareholder oppression under the Business Corporation Act).

To be found liable, the manager must act with the intent to interfere with the member’s rights. *Id.* If there is no showing of a defendant’s intent to interfere with a member’s rights as a member, or if the defendant can show there was a legitimate business purpose to his or her actions, there will be no liability. *Id.* Further, willfully unfair and oppressive conduct “does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure.” MCL 450.4515(2).

b. The Allegations in the Amended Complaint

In support of his claim for member oppression, the Plaintiff alleges the following:

33. MCL 450.4515 states in relevant part the following:

“(1) A member of a limited liability company may bring an action in the circuit court of the county in which the limited liability company's principal place of business or registered office is located to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or

the member ... the circuit court may issue an order or grant relief as it considers appropriate, including, but not limited to, an order providing for any of the following: ... (c) The direction, alteration, or prohibition of an act of the limited liability company or its members or managers.”

34. Plaintiff is a member of WLL.
35. As fully stated above, Krstovski’s actions were illegal, fraudulent and/or willfully unfair and oppressive conduct toward Plaintiff.
36. The improper, illegal, fraudulent and or willfully unfair and oppressive conduct included, but is not limited to, failing to account for approximately \$4,500,000 in funds, incurring additional liabilities without the consent of Plaintiff, taking specific actions in an attempt to freeze out Plaintiff from participation in the management of the entities as provided in the respective operating agreements, entering into sales agreements relating to property without the consent of Plaintiff and attempting to improperly buy out a member to in an attempt to take control of the entities.
37. Krstovski engaged in a continuing course of conduct and took significant action that substantially interfered with the interests of Plaintiff as a member of WLL.
38. Pursuant to MCL 450.4515 this Court is authorized to grant relief as it considers appropriate to remedy this improper, illegal, fraudulent and or willfully unfair and oppressive conduct includes.

To support his claim for member oppression, the Plaintiff lists a number of factual allegations that focus on Krstovski’s conduct related to JV. For example, the Plaintiff alleges that Krstovski caused more than \$4.5 million of work to be performed on the Property without the consent of the other members and without the financing in place to pay for the work.⁹ Additionally, the Plaintiff alleges that Krstovski directed JV to sell a portion of the Property to BJ’s Wholesale

⁹ Amended Complaint ¶ 19.

even though there was a verified offer from another party to purchase the property for \$1,000,000 over the offer that was ultimately accepted by Krstovski.¹⁰

However, the Plaintiff now argues that most of these factual allegations were included as background, but the real crux of the member oppression claim is that “Krstovski, and his wholly owned entities, improperly retained \$661,924.78 of funds belonging to Masakowski pursuant to the JV Operating Agreement.”¹¹

c. Analysis

i. Amended Complaint Does Not Allege Krstovski was in Control of WL1

To prevail on a claim for member oppression, the Plaintiff must demonstrate that Krstovski is a “manager or member in control of the limited liability company” within the meaning of the statute. MCL 450.4515(1). The Plaintiff’s response to Krstovski’s motion for summary disposition contains a number of relevant allegations, including:

- Krstovski maintained WL1’s funds and made distributions.¹²
- Krstovski was the manager of WL1 and was in charge of the day-to-day activity.¹³
- The individual in charge of making distributions to members at WL1 was Krstovski.¹⁴
- Krstovski was the Manager of WL1 and he failed to disburse funds to Masakowski, instead retaining funds for himself.¹⁵

These allegations are notably missing from the Amended Complaint, however. In the Amended Complaint, the Plaintiff focuses his allegations on Krstovski’s role as the *co-manager*

¹⁰ *Id.* ¶ 20.

¹¹ *Id.* ¶ 31.

¹² Masakowski’s Response to Defendant’s MSD, p 2.

¹³ *Id.*, p 3.

¹⁴ *Id.*, p 5.

¹⁵ *Id.*, p 6.

of JV and details the wrongful acts that Krstovski allegedly committed at JV.¹⁶ Nowhere in the Amended Complaint does the Plaintiff even clarify what Krstovski's relationship to WL1 was, much less allege that he was a "manager or member in control" of WL1. Accordingly, because the Amended Complaint fails to include allegations that address a critical element of a cause of action under MCL 450.4515, it fails to state a prima facie case for member oppression and summary disposition is warranted.

ii. Refusal to Make Distributions is Potentially Actionable Under MCL 450.4515, but Diversion of Funds at the JV Level is Not

Although summary disposition is appropriate for the reason noted above, the Court will briefly address Krstovski's argument that the allegations in the Amended Complaint do not relate to activity within the subject entity (WL1). As Krstovski correctly observes, much of the activity included in the Amended Complaint does not relate to activity within WL1, but instead to activity at JV, an "upstream" entity. As the Court of Appeals recently observed in a related case, "[t]he doctrine of standing provides that a suit to enforce corporate rights or to redress or prevent injury to a corporation, whether arising from contract or tort, ordinarily must be brought in the name of the corporation, not that of a stockholder, officer, or employee." *Krstovski v Kukes*, unpublished per curiam opinion of the Court of Appeals, issued Oct. 19, 2023 (Docket No. 363511) p 4 (quoting *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003)). Thus, any cause of action alleging harm done to the corporate entities at issue would belong to those corporate entities. Additionally, a cause of action under MCL 450.4515 may only be maintained by a "member" of the subject LLC, and here, most of the allegations occurred at the JV level. Because the Plaintiff is not a member of JV, he cannot maintain a cause of action under MCL 450.4515 for

¹⁶ Amended Complaint ¶ 12.

illegal, fraudulent, or willfully unfair and oppressive conduct that Krstovski allegedly committed as the manager of JV.

The Plaintiff acknowledges that many of the allegations in the Amended Complaint are not actionable because they were undertaken within the upstream entities (specifically JV). However, the Plaintiff now points to paragraph 31 of the Amended Complaint in which he alleges:

31. Krstovski, and his wholly owned entities, improperly retained \$661,924.78 of funds belonging to Masakowski pursuant to the JV Operating Agreement.

The sparse wording of this paragraph makes it unclear exactly what is being alleged. If the Plaintiff is alleging that Krstovski, as the manager of JV, personally retained funds and/or diverted funds to his wholly owned entities that should have been distributed to the members of JV (LIP and WL1) pursuant to the JV operating agreement, then this allegation suffers from the same standing defects discussed above. The parties harmed by this alleged diversion of funds would be JV's members—LIP and WL1. The Plaintiff, however, is not a member of JV. The same analysis used by the Court of Appeals in the *Krstovski v Kukes* opinion would bar a suit by the Plaintiff because he lacks standing to seek redress for injuries allegedly suffered by JV's member entities.

However, if the Plaintiff is alleging that the funds flowed from JV to WL1 and Krstovski, as the manager or member in control of WL1, failed to make distributions to WL1's members as required by WL1's operating agreement in order to interfere with the Plaintiff's rights as a WL1 member, this would be sufficient to state a claim under MCL 450.4515. See e.g. *Bromley v Bromley*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued Oct. 4, 2006 (Case No. 05-71798), p 5 (stating that examples of shareholder oppression prohibited by MCL 450.1489 include "investments deemed not to be in the corporation's best interest, denying access to corporate books and records, diverting corporate

opportunities and assets to other entities, removing minority shareholders from positions in management, *refusing to declare dividends*, and diluting minority equity interests”) (emphasis added); see also *Wolding v Clark*, 563 Fed Appx 444, 453 (CA 6, 2014) (holding that the “[r]efusal to declare dividends can be considered willfully unfair and oppressive conduct under § 450.1489,” but not in the absence of bad faith or fraud); see also *Franks*, 330 Mich App at 105-107 (finding an issue of fact as to whether the defendants’ refusal to pay dividends to shareholders was the result of an intentional act to interfere with the plaintiffs’ rights as shareholders or a legitimate business purpose).

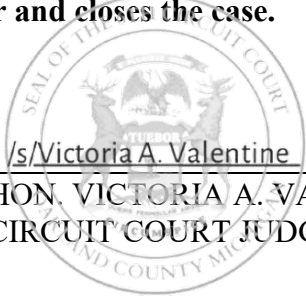
In conclusion, summary disposition is warranted because the Plaintiff failed to state a prima facie case for member oppression under MCL 450.4515. Specifically, the Plaintiff has not alleged that Krstovski was a manager or member in control of WL1. Even if that deficiency is ignored, the Plaintiff’s claim is tenuous. To the extent that the Plaintiff alleges in paragraph 31 of the Amended Complaint that Krstovski, as the manager of JV, diverted funds that should have been distributed to the members of JV pursuant to the JV operating agreement, the Plaintiff does not have standing to challenge these actions because he is not a member of JV.

ORDER

Based upon the foregoing Opinion:

IT IS HEREBY ORDERED that Krstovski’s Motion for Summary Disposition of Count I (Breach of MCL 450.4515) is GRANTED.

This Order resolves the last pending matter and closes the case.



/s/Victoria A. Valentine
HON. VICTORIA A. VALENTINE
CIRCUIT COURT JUDGE

Dated: 9/26/24