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

AMERICANA ASSOCIATES, LLC,

Plaintiff,

v

Case No. 2021-187702-CB
Hon. Michael Warren

THOMAS A. DUKE CO., d/b/a THOMAS DUKE COMMERCIAL REAL ESTATE, ANDREW BATTERSBY, AMERICANA PARTNERS, LLC, JASON CURIS, JMC MANAGEMENT, LLC,

Defendants.

OPINION AND ORDER GRANTING DEFENDANT AMERICANA PARTNERS, LLC'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND (10) IN RESPONSE TO PLAINTIFF'S COMPLAINT

At a session of said Court, held in the County of Oakland, State of Michigan
October 6, 2021

PRESENT: HON. MICHAEL WARREN

OPINION

I
Overview

The present cause of action arises out of the sale of certain commercial real property, commonly known as Americana Office Plaza at 28475 Greenfield Road in Southfield, Michigan (the "Property"). Seller Americana Associates, LLC (the "Plaintiff")

alleges that the Defendants conspired to defraud the Plaintiff into selling the Property for $285,000.00 and then subsequently sold the Property one month later for $550,000.00. In particular, the Plaintiff alleges Unjust Enrichment (Count I), Negligence Misrepresentation (Count II), Intentional Misrepresentation (Count III), Innocent Misrepresentation (Count IV), Breach of Fiduciary Duty (Count V), Silent Fraud (Count VI), Breach of Contract (Count VII), and Civil Conspiracy (Count VIII). Counts I and VIII are alleged against all Defendants. Counts II-VII are alleged against Defendants Thomas A. Duke Co., dba Thomas Duke Commercial Real Estate ("Thomas Duke") and Andrew Battersby, only.

Before the Court is Defendant Americana Partners, LLC ("Partners") Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (10). Oral argument is dispensed as it would not assist the Court in its decision-making process.[1]

At stake in the Motion is whether summary disposition of the Plaintiff's claim for Unjust Enrichment (Count I) against Partners is warranted under MCR 2.116(C)(8)?

[1] MCR 2.119(E)(3) provides courts with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court's Scheduling Order clearly and unambiguously set the time for asserting and raising arguments, and legal authorities to be in the briefing – not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties' positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties' have received the process due.

Because a written contract governs the transaction between the Plaintiff and Partners, the answer is "yes," and the Motion is granted under MCR 2.116(C)(8).

Also, at stake is whether summary disposition of the Plaintiff's claim for Unjust Enrichment (Count I) against Partners is independently warranted under MCR 2.116(C)(10)? Because there has been no evidence presented that Partners retained a benefit which resulted in an inequity to the Plaintiff, the Motion is independently granted under MCR 2.116(C)(10).

Finally, at stake is whether summary disposition of the Plaintiff's claim for Civil Conspiracy (Count VIII) against Partners is warranted? Because the Plaintiff has not pled an underlying actionable tort against Partners to sustain a claim for civil conspiracy, the answer is "yes," and the Motion is granted under MCR 2.116(C)(8).

II
The Sale and the Complaint

The Plaintiff[2] alleges to have owned the subject Property since approximately July 1987. For several years, Andrew Battersby and other agents of Thomas A. Duke, Co. d/b/a Thomas Duke Commercial Real Estate "Thomas Duke"), a commercial real estate broker, sought to list, market, and sell the subject Property. In late 2019, Bellaw expressed

[2] Richard Bellaw is the principal of the Plaintiff.

interest in selling the Property and informed Battersby that he would like to begin the process when he returned to Michigan in April or May 2020.

On or about May 8, 2020, Battersby presented Bellaw with a letter of intent ("LOI") expressing Michigan Asset Holding, LLC's ("Michigan Asset") intent to purchase the Property for $260,000.00. The LOI was signed by Jason Curis as Manager of Michigan Asset.[3] In email correspondence sent from Battersby to Curis on May 12, 2020, Battersby presented a counteroffer:

> The Seller, Richard (cc'd), and I spoke this morning in depth, and the plan would be to take the property to market in the mid $300's.
> Based on that, we are responding with the attached counter of $335K.
>
> There is certainly interest and I do believe you're the strongest buyer for an asset like this, but we need to get the price up a bit.
> I figure including everybody on this email chain works best as we discuss this potential transaction further.
>
> * * *
>
> [Exhibit C to Complaint.]

On or about May 26, 2020, Bellaw provided confidential information to Battersby regarding the Property for use by JMC and Curis only pursuant to the express terms of a confidentiality agreement ("Confidentiality Agreement") signed by Bellaw, Curis on behalf of JMC and Battersby:

[3] The LOI identifies the Buyer as "Michigan Asset Holdings, LLC as agent on behalf of an entity to be formed."

> The enclosed information, and any additional information provided, is strictly CONFIDENTIAL and is being provided solely for review and analysis. By accepting receipt of this information, you agree to keep the information confidential and to request our permission prior to discussing it with any prospective purchaser or third parties. Further, visit(s) to the building concerning the potential Building Sale and/or discussions with Employees, Tenants or other parties shall not be untaken by you, or any persons you may provide information to, without our express permission for each occasion.
>
> We hereby grant you permission to provide the enclosed information to:
> Jason M. Curis
> JMC Management LLC
>
> * * *
>
> [Exhibit D to Complaint.]

Thereafter, the Plaintiff and Michigan Asset signed an Offer to Purchase for $285,000.00 ("Offer to Purchase"). The Offer to Purchase was signed by Michigan Asset on June 2, 2020 and the Plaintiff on June 3, 2020. [Exhibit E to Complaint.][4] Michigan Asset subsequently assigned its interest in the Offer to Purchase to Partners.

One day later, on June 4, 2020, Battersby sent correspondence to Saul Quinn about the subject Property:

> Anyway, I've got a building I just listed on Greenfield I wanted to run by you before taking to market.
>
> I know Greenfield is your preference, and I should be able to deliver this at pretty much the same price per foot we had on 10 Mile before the fire.
>
> * * *

[4] Michigan Asset subsequently assigned its interest in the Offer to Purchase to Partners, an entity created by Curis for the purposes of this transaction.

[Exhibit F to Complaint.]

On June 24, 2020, Battersby sent correspondence to Saul Quinn regarding Quinn's offer to purchase the Property:

> Spoke with the Seller for over a half hour this morning (not exactly pleasant) and he is not at all thrilled with the offer at $550,000, especially based on your initial verbal offer around $670K.
>
> At $550K this is SUB $38 PSF which is extremely cheap at 12 Mile and Greenfield. ESPECIALLY with a brand new $60K HVAC upgrade ... but we understand you are firm at this number.
>
> That being said, I've made you aware of some of the reasons **why** this group is Selling, and because of that they would be willing to move forward on your offer with a few conditions:
>
> * * *
>
> The Sellers do really want to move forward with you on this, but after the new HVAC unit, and the initial suggestion of $670K, this is absolutely their **FIRE SALE** price and will not drop a penny from this number.
>
> * * *
>
> This is a really strong deal... at 38 PSF and nearly at 15-cap, I'd buy this if I had the cash. This is a layup and could easily be sold for $700K quickly to an area investor.
>
> * * *

[Exhibit K to Complaint.]

On or about July 3, 2020, Partners entered a Commercial Real Estate Purchase Agreement ("Quinn Purchase Agreement") with Quinn to sell the subject Property for $550,000. [Exhibit N to Complaint.]

The Plaintiff alleges Unjust Enrichment (Count I) and Civil Conspiracy (Count VIII) against Partners.[5] In its claim for Unjust Enrichment (Count I), the Plaintiff alleges as follows:

> 45. Michigan law provides that if a defendant receives a benefit from the plaintiff and that an inequity resulted to the plaintiff as a consequence of defendant's retention of that benefit, then the defendant has been unjustly enriched.
>
> 46. Michigan law further provides that a party who has been unjustly enriched at the expense of another may be required to make restitution to the other party, even if no contract may exist between the two parties.
>
> 47. As a result of Defendants' failures, misrepresentations and breaches, Plaintiff was tricked into selling the Property at a fraction of its actual cost, resulting in a benefit to all Defendants.
>
> 48. Equity dictates that Defendants must pay Plaintiff for the benefit received.
>
> [Complaint.]

In its claim for Civil Conspiracy (Count VIII), the Plaintiff alleges as follows:

> 89. JMC, Curis and Partners acted in concert with Battersby and Thomas Duke in connection with the Front End PSA transaction and the Back End PSA transaction.
>
> 90. The goal of the concerted action was to use the trust Plaintiff had placed in Plaintiff's fiduciaries, Battersby and Thomas Duke, as a means to get Plaintiff to act on incorrect, incomplete and faulty information knowingly supplied, and to act without important and valid information consciously withheld, as the case may be, so that Plaintiff would sell the Property to Partners at an obscenely low price, with the end goal of Partners/JMC/Curis making an immediate gross profit of $265,000.00 and

[5] The only factual allegations that reference Partners are paragraphs 22, 35 and 37.

Battersby and Thomas Duke receiving commissions, and possibly other compensation, on two transactions instead of one.

91. Curis/JMC/Partners furthered the civil conspiracy when upon being questioned by Plaintiff as to why someone named Saul (Quinn) visited the Property and informed office staff that he was buying it, Curis/JMC/Partners denied knowing anyone named Saul, said the Property was not for sale and then instructed Battersby to email Quinn that no further walkthroughs would be allowed until after closing so as to make sure that Bellaw and Plaintiff would not figure out what was really going on. See, Exhibit O.

92. Curis/JMC/Partners had a working relationship with Battersby and Thomas Duke as they had done deals together in the past. See, Exhibit C.

93. Upon information and belief, the Defendants identified a "soft target" and worked in concert to use the trust Plaintiff placed in its fiduciaries against Plaintiff, resulting in financial gain for all Defendants and damage to Plaintiff.

[Complaint.]

III
The Arguments

Partners moves for summary disposition pursuant to MCR 2.116(C)(8) and (10). Partners argues that the Plaintiff has not identified how Partners was enriched by the Plaintiff and there is no basis for the Court to imply a contract when a fully executed contract exists. Partners further argues that the Plaintiff cannot sustain a claim for civil conspiracy because there is no allegation Partners participated in tortious conduct and amendment is futile because the Plaintiff cannot identify how Partners allegedly acted in a tortious manner to support a claim for civil conspiracy.

The Plaintiff argues that it has sufficiently alleged that Partners participated in tortious conduct and discovery regarding the extent of the relationships and communications among the parties precludes summary disposition. The Plaintiff further argues that it has alleged that its arrival at a mutually agreeable price was tainted by breaches of fiduciary duty and fraud, which makes the benefit received by Partners unjust.

IV
Standards of Review

A
MCR 2.116(C)(8)

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 (2019); *Pawlak v Redox Corp*, 182 Mich App 758 (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 (2013); *Parkhurst Homes, Inc* v *McLaughlin*, 187 Mich App 357 (1991). Exhibits attached to pleadings may be considered under MCR 2.116(C)(8) because they are part of the pleadings pursuant to MCR 2.113©. *Id.* At 163.

"All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119 (1999); *Wade v Dep't of Corrections*, 439 Mich 158, 162 (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 357; *Spiek v Dept of Transportation*, 456 Mich 331, 337 (1998).

"[T]he mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395 (1994).

B
MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). Accordingly, "[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden,* 461 Mich at 119-120 (1999); MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto,* 451 Mich at 358. The moving party "must specifically identify the issues" as to which it "believes there is no genuine issue" of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Quinto,* 451

Mich at 361. If the moving party properly supports its motion, the burden "then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto*, 451 Mich at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also *Meyer v City of Center Line*, 242 Mich App 560, 575 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

In all cases, MCR 2.116(G)(4) squarely places the burden on the parties, not the trial court, to support their positions. A reviewing court may not employ a standard citing mere possibility or promise in granting or denying the motion. *Maiden*, 461 Mich at 121-120 (citations omitted), and may not weigh credibility or resolve a material factual dispute in deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161 (1994). Rather, summary disposition pursuant to MCR 2.116(C)(10) is appropriate if, and only if, the evidence, viewed most favorably to the non-moving party(ies), fails to establish any genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto,* 451 Mich at 362, citing MCR 2.116(C)(10) and (G)(4); *Maiden,* 461 Mich at 119-120 (1999). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *El-Khalil v Oakwood Healthcare, Inc,* 504 Mich 152, 160 (2019) (citation omitted).

V
Summary Disposition is of the Plaintiff's claim for Unjust Enrichment (Count I) is warranted because a written agreement governs the subject matter and there is no showing that Partners received an unjust benefit

A
The Law of Unjust Enrichment

"The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Barber v SMH (US), Inc.*, 202 Mich App 366, 375 (1993) (citation omitted). In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense. *Morris Pumps v Centerline Piping Inc,* 273 Mich App 187, 195 (2006).

Our Court of Appeals has summarized unjust enrichment as follows:

> 'The essential elements of a quasi contractual obligation, upon which recovery may be had, are the receipt of a benefit by a defendant from a plaintiff, which benefit it is inequitable that the defendant retain.' *MEEMIC* [v Morris, 460 Mich 180,] 198 [(1999)], quoting *Moll v Wayne Co,* 332 Mich 274, 278-279 (1952). Thus, in order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Barber v SMH (US), Inc,* 202 Mich App 366, 375 (1993). In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense.
>
> [*Morris Pumps, 273* Mich App at 195-196.]

The doctrine of unjust enrichment does not apply "when an express contract already addresses the pertinent subject matter." *Liggett Restaurants Group, Inc v City of*

Pontiac, 260 Mich App 127, 137 (2003). See also *Landstar Express America, Inc v Nexteer Auto Corp*, 319 Mich App 192, 202-203 (2017) (dismissal was proper as there was an express contract covering the same subject matter as the equitable claims); *Hudson v Mathers*, 283 Mich App 91, 98 (2009) (a "contract may not be implied under a theory of unjust enrichment" when the parties have "an express contract in place"); *King v Ford Motor Credit Co*, 257 Mich App 303, 327 (2003) ("a contract will not be implied under the doctrine of unjust enrichment where a written agreement governs the parties' transaction").

B
Because a written agreement addresses the same subject matter, the claim for unjust enrichment must fail

The Plaintiff does not refute (or even address Partners' argument) that a written contract governs the transaction between the Plaintiff and Partners. Because the Offer to Purchase executed by the Plaintiff and Partners governs the subject matter, summary disposition of the Plaintiff's claim for Unjust Enrichment (Count I) against Partners is warranted under MCR 2.116(C)(8) for this reason alone. See, e.g., *Martin v East Lansing School Dist,* 193 Mich App 166, 177 (1992); *Belle Isle Grille Corp v Detroit,* 256 Mich App 463 (2003).

C
Because Partners did not receive an unjust benefit, the claim for unjust enrichment must fail

Furthermore, the Plaintiff has failed to present evidence that Partners received an unjust benefit. The Plaintiff alleges that "[a]s a result of Defendants' failures, misrepresentations and breaches, Plaintiff was tricked into selling the Property at a fraction of its actual cost, resulting in a benefit to all Defendants." [Complaint, ¶47.] The Plaintiff argues the purchase price was "tainted by breaches of fiduciary duty and fraud," but fails to identify Partners' alleged breaches or fraudulent conduct with supporting evidence. In fact, the Plaintiff has not even pled breach of fiduciary duty or fraud against Partners.

Under MCR 2.116(G)(4), the party opposing a motion for summary disposition is required to "set forth specific facts showing that there is a genuine issue for trial" and if the party fails to do so, "judgment, if appropriate, shall be entered against him or her" (emphasis added). "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Smith v Globe Life Ins Co*, 460 Mich 446, 455; (1999) (internal quotation omitted). As such, summary disposition of the Plaintiff's claim for Unjust Enrichment (Count I) against Partners is independently warranted under MCR 2.116(C)(10).

VI
Summary Disposition of the Plaintiff's claim for Civil Conspiracy (Count VIII) is warranted because there is no underlying tort

A
Law and Analysis

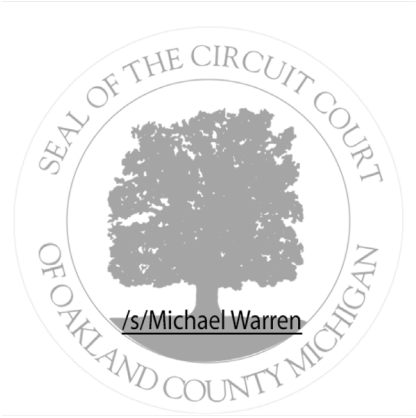
"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Swain v Morse*, 332 Mich App 510, 530 (2020) (quotation marks and citation omitted). "Liability does not arise from a civil conspiracy alone; rather, it is necessary to prove a separate, actionable tort." *Id*. at 530 n 13 (quotation marks and citation omitted). In the absence of an underlying tort, a civil conspiracy claim must fail. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384 (2005) ("a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort."); *Levitt v Bloem*, unpublished per ciruam opinion of the Court of Appeals, issued May 21, 2019 (Docket No. 343299) ("Plaintiff's claim for civil conspiracy is based on his claims of defamation, false light, IIED, and tortious interference with business expectancy. Because the circuit court properly dismissed all of these claims and no underlying tort exists in this case, the circuit court also properly dismissed the civil conspiracy claim.").

Here, the Plaintiff has not pled an underlying actionable tort against Partners to sustain a claim for civil conspiracy. The Plaintiff's argument that "[i]t is inconsequential that not all the Defendants themselves independently committed fraud or breach of

fiduciary duty" is simply inapposite. Because no underlying tort exists, summary disposition of the Plaintiff's claim for Civil Conspiracy (Count VIII) against Partners is appropriate under MCR 2.116(C)(8).[6]

ORDER

Based on the foregoing Opinion, Defendant Americana Partners, LLC's Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and (10) in Response to Plaintiff's Complaint is **GRANTED**.



[6] The Plaintiff does not bother to address Partners' argument that amendment is futile. "Trial Courts are not the research assistants of the litigants; the parties have a duty to fully present legal arguments for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388 (2008). By failing to cite appropriate authority or cogently apply analysis of the same, any argument for amendment is deemed abandoned. *Houghton v Keller*, 256 Mich App 336, 339-340 (2003) ("failure to properly address the merits of [one's] assertion of error constitutes abandonment of the issue;" a party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . nor may he give issues cursory treatment with little or no citation of supporting authority" (citations omitted)); *Mitcham v City of Detroit*, 355 Mich 182, 203 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and rationalize the basis for his arguments, and then search for authority either to sustain or reject his position"); *Wilson v Taylor*, 457 Mich 232, 243 (1998) ("A mere statement without authority is insufficient to bring an issue before this Court").