

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

DART CONTAINER OF MICHIGAN, LLC,
d/b/a DART DEVELOPMENT, a Michigan
limited liability company, and ATLAS USA
HOLDINGS LLC, a Delaware limited
liability company,

Plaintiffs,

Case No. 20-000333-CB-C30

v

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
REGARDING DAMAGES**

STEVEN A. MILLS, an individual, MILLS
REAL ESTATE CONSULTING, LLC, a
Michigan limited liability company, JOHN
ROBERT HUGHES, an individual, and
J.R. HUGHES MANAGEMENT CO., a
Michigan corporation,

Defendants.

At a session of said Court held in Lansing, Ingham
County, Michigan, on October 11, 2022

PRESENT: Honorable Joyce Draganchuk
Circuit Judge

This matter is before the Court to assess damages against Steven A. Mills and Mills Real Estate Consulting, LLC (the Mills Defendants), following entry of a default. Although liability is established by the default, some background is necessary for this complex case. To determine damages, the Court must assess whether damages are proven and, if so, in what amount. Plaintiffs and various Dart entities will be referred to collectively as Dart.

Between 1997 and 2012, Mr. Mills was an employee of Dart. After working in various departments, he was promoted to Real Estate Manager. From 2012 to 2016, Mr. Mills' relationship with Dart changed. He left his Dart employment and formed a real estate consulting firm, Mills Real Estate Consulting, LLC (MREC). Mr. Mills was the sole member of MREC. MREC and Dart then entered into Real Estate Consulting Agreements that provided that MREC would review and recommend sales and purchases for Dart's real estate portfolio. Mr. Mills' and MREC's role was to acquire, develop, and manage real estate for Dart. Throughout this case, this time period has been referred to as the "non-officer period."

In 2016, Mr. Mills returned to Dart as the Vice-President of Dart Development and President of Dart Properties Incorporated (a Dart-related entity). He was a Dart employee in these capacities until 2020, when he was terminated. Throughout this case, this time period has been referred to as the "officer period."

Mr. Mills' work with Dart put him in direct contact with Mr. Hughes. Mr. Hughes provided real estate broker or other real estate services to Dart. He provided services to Dart at all times either through non-party Newmark Real Estate of Michigan, LLC, d/b/a Newmark Knight & Frank or through his own company, JR Hughes Management Co (Mr. Hughes and JR Hughes Management Co will be referred to as the Hughes Defendants).

Dart was alerted to a problem with Mr. Mills when it was approached by the IRS regarding substantial payments Mr. Mills had received between 2012 and 2019 that were not declared as income on Mr. Mills' tax returns. After lengthy investigation, it was learned that Mr. Mills had received substantial payments from the Hughes Defendants over both the non-officer and the officer time periods.

Mr. Hughes generated a spreadsheet of all Dart related real estate transactions where he or JR Hughes Management Co. provided services to Dart and received a commission. He also made a list of all payments the Hughes Defendants made to Mr. Mills (Hughes Trial Ex. 2). Dart acknowledges that 2 transactions on Ex. 2 should be disregarded – the \$4,443.75 payment on 5/7/12 and the \$9,000 payment on 5/30/19. With those deletions, the Court finds that during the non-officer period, Mr. Hughes paid \$633,823.74 to Mr. Mills. During the officer period, he paid \$395,791.34 to Mr. Mills.

During the investigation of Mr. Mills, another individual who had been making payments to him surfaced. Gerald Conrad was a California-based real estate developer who was seeking to do business with Dart. Mr. Mills admitted that his company, MREC, received payments from Mr. Conrad. Mr. Mills testified at his deposition that in 2013, Mr. Conrad paid him \$40,000, which he used to buy a cottage. Mr. Conrad made a \$60,000 payment to Mr. Mills in April 2015. Mr. Conrad testified that he made 5-10 other payments to the Mills Defendants totaling between \$50,000 and \$100,000. Upon reviewing the Conrad and Mills deposition testimony, the Court concludes that a reasonable, more-likely-than-not estimate of payments made by Mr. Conrad to Mr. Mills is \$135,000.

Mr. Mills could provide little reason why Mr. Conrad would be making payments to him. Although he described performing services for Mr. Conrad, there was no negotiation for payment and Mr. Mills could not explain how the amount paid was determined. He acknowledged that Mr. Conrad was seeking to do business with Dart. Mr. Mills also acknowledged that during the officer period, Dart policy was that he was to accept no gifts or other compensation from anyone seeking to do business with Dart.

Mr. Conrad testified that he never expected the Mills Defendants to pay the money back and Mr. Mills never performed any work for Mr. Conrad's business. The payment amounts were based on Mr. Mills' needs and Mr. Conrad's cash flow situation. Rather than being for any services, the payments were intended to "open doors" for Mr. Conrad to get additional business. In particular, Mr. Conrad wanted business with Dart or Dart-related entities. Mr. Conrad did meet Dart, but only because Mr. Mills brought Dart to the table.

At no time did Mr. Mills inform Dart of the payments that he received from Mr. Hughes or Mr. Conrad. Dart never knew about the payments and never authorized the payments. Dart *did* know that it was paying commissions to the Hughes Defendants, but it did not know that Mr. Hughes was sharing his commission by making payments to Mr. Mills.

Dart filed a 10-count Complaint alleging breach of fiduciary duty, violation of the so-called anti-kickback law (MCL 750.125), breach of contract, fraud, and unjust enrichment. Dart also included a count alleging that the corporate veil of MREC should be pierced to reach Mr. Mills personally.

In November 2021, counsel for the Mills Defendants withdrew. The Court gave the Mills Defendants 45 days to obtain new counsel and noted as well that Mr. Mills could opt to proceed in *pro per*, while MREC would have to obtain counsel to proceed. Months went by and neither Mr. Mills nor new counsel ever appeared or contacted the Court despite being given notice of all proceedings. Consequently, a default was entered against the Mills Defendants in March 2022.

A default establishes liability as to well-pled allegations in the Complaint. It precludes the defaulting party from litigating liability, but it is not an admission regarding damages. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 78-79, 618 NW2d 66 (2000). Pursuant to MCR 2.603(B)(3)(b), the Court may conduct hearings it deems necessary and proper and it must accord a right of jury trial to the extent required by the constitution.

The Court held open Mr. Mills' right to a jury trial on damages until the day of trial came and he failed to appear. The jury trial proceeded as to the Hughes Defendants. Following the verdict, the Court received additional exhibits to determine damages to be awarded to Dart from the Mills Defendants. Those exhibits included the deposition of Steven A. Mills, the deposition of Gerald Conrad, and the deposition of John Robert Hughes. In addition, the Court requested a brief from Dart and gave Mr. Mills a period of time to file his own responsive brief, despite his complete absence from and participation in all proceedings. The Court received only Dart's brief and will proceed accordingly to determine damages.

Count I is for breach of fiduciary duty during the officer period. The Court previously found as a matter of law that Mr. Mills was acting as a fiduciary during the officer period.

It is beyond dispute that in Michigan, directors and officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation which they serve.

The well settled and salutary principle that a person who undertakes to act for another shall not, in the same matter, act for himself, results also in the other rule, that all profits made and advantage gained by the agent in the execution of the agency belong to the principal. And it matters not whether such profit or advantage be the result of the performance or of the violation of the duty of the agent if it be the fruit of the agency.

If an agent acquires any pecuniary advantage to himself from third parties by means of his fiduciary character, he is accountable to his employer for the profit made. *Production Finishing Corp v Shields*, 154 Mich App 479, 486-487, 405 NW2d 171 (1987) (cleaned up).

Mr. Mills stood in a fiduciary relationship with Dart and he used that fiduciary relationship to his own monetary advantage. He did so without the knowledge or approval of Dart. The fact that Dart was satisfied with the Hughes Defendants transactions and knowingly made the commission payments to Mr. Hughes is of no consequence. Mr. Mills used his fiduciary relationship with Dart to profit personally. He did the same with respect to the payments from Mr. Conrad. Mr. Mills is accountable to Dart for the profits that were the fruit of his agency with Dart.

Liability is also established for Count VIII, violation of MCL 750.125, the anti-kickback statute. It is therefore admitted by Mr. Mills that while acting as an employee of Dart he took gifts from Mr. Hughes under an agreement to steer Dart real estate business to Mr. Hughes. There is no precedent on damages for this claim, but it is similar to breach of fiduciary duty. Mr. Mills should disgorge his profit to Dart.

Plaintiff claims damages in for Count VII, aiding and abetting the Hughes Defendants' breach of fiduciary duty. This claim is for the non-officer period, when Mr. Mills acted as an independent contractor through MREC's Consulting Agreements with Dart.

The jury found that the Hughes Defendants breached their fiduciary duties to Dart. The Mills Defendants' liability is established by default for aiding and abetting breach of the Hughes Defendants' fiduciary duty.

When a person in a fiduciary relation to another violates his duty as fiduciary, a third person who participates in the violation of duty is liable to the beneficiary. If the third person makes a profit through such participation,

he is chargeable as constructive trustee of the profit so made. *Hayes-Albion v Kuberski*, 421 Mich 170, 187, 364 NW2d 609 (1984) (cleaned up).

Dart should recover the amount of money received by the Mills Defendants from the Hughes Defendants. This amount reflects the amount that the Mills Defendants actually profited from the undisclosed and unauthorized payments.

Dart has an alternate theory of damages for Ct. X, breach of contract, that this Court cannot accept. The argument is that Dart entered into contracts with MREC during the non-officer period to provide consulting services. Those agreements provided that MREC would be compensated a fixed amount of money on a monthly basis. The secret payments to Mr. Mills resulted in overcompensation. Dart requests expectation damages to place it in as good a position as it would have been in had the promised performance been rendered. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 98, 443 NW2d 451 (1989).

Although liability is established for breach of contract, Dart still has to prove damages. The Court rejects the theory for breach of contract damages. Dart received the performance that was promised under the Real Estate Consulting Agreements. MREC had no obligation under the contract to ensure that it was only paid its monthly amount and no more. There are no expectation damages needed to place Dart in as good a position as it would have been in had the promised performance been rendered.

For Count XVI, Dart is entitled to damages for unjust enrichment. Mr. Mills never disclosed to Dart that he was receiving payments from the Hughes Defendants or Mr. Conrad. The only reason he was able to receive these secret payments was because of his position with Dart. He used his position with Dart during the officer period to unjustly receive a benefit to himself. During the time that Mr. Mills was an independent contractor for Dart, he used MREC's contract with Dart to unjustly receive a benefit to himself.

A third party is unjustly enriched when he receives a benefit from a contract between two other parties and he has misled those parties. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 196, 729 NW2d 898 (2006). Mr. Mills misled both Dart and Mr. Hughes. He misled Dart by not disclosing that he was receiving unauthorized payments from Mr. Hughes. He misled Mr. Hughes by leading him to believe that he was authorized to receive payments under the Consulting Agreements. Mr. Mills was unjustly enriched by the payments made by the Hughes Defendants and Mr. Conrad.

To the extent that the Court has analyzed the damages for the non-officer period as damages that Mr. Mills is liable for, it is because Dart is asking to pierce the corporate veil. Piercing the corporate veil is appropriate when (1) the corporate entity is a mere instrumentality of another individual or entity, (2) the corporate entity was used to commit a wrong or fraud, and (3) there was an unjust injury or loss to the plaintiff. *Lakeview Commons v Empower Yourself*, 290 Mich App 503, 510, 802 NW2d 712 (2010) (cleaned up).

Mr. Mills exploited his relationship with Dart to wrongfully and unjustly obtain undisclosed payments from others. Since Mr. Mills was the sole member of MREC, those payments directly and solely benefitted Mr. Mills personally. He used his corporate entity to carry out his scheme during the non-officer period. Mr. Mills is not entitled to seek shelter behind his corporate entity and he should be individually liable for damages.

For the above reasons, the Court finds as follows:

1. Dart has proven its damages by a preponderance of the evidence.
2. Dart is entitled to damages in the amount of \$768,823.74 from the Mills Defendants.

3. Dart has established individual liability for Steven A. Mills.

IT IS HEREBY ORDERED that Dart shall submit a judgment in the amount of \$768,823.74, together with any interest, costs, and attorney fees (if applicable) against the Mills Defendants within 14 days of receipt of this order.

/S/

Joyce Draganchuk (P39417)
Circuit Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the above Findings of Fact and Conclusions of Law upon the attorneys of record by placing said document in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on October 11, 2022.

/S/

Michael Lewycky
Law Clerk/Court Officer