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

AMERICANA ASSOCIATES, LLC,

Plaintiff,

Case No. 2021-187702-CB
v **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, IN PART, DEFENDANTS THOMAS A. DUKE CO., DBA THOMAS DUKE COMMERCIAL REAL ESTATE AND ANDREW BATTERSBY'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the County of Oakland, State of Michigan October 15, 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.[1]

Before the Court is Defendants Thomas A. Duke Co. dba Thomas Duke Commercial Real Estate ("Thomas Duke") and Andrew Battersby's Motion for Summary Disposition. Oral argument is dispensed as it would not assist the Court in its decision-making process.[2]

At stake in the Motion is:

---

[1] By way of Opinion and Order dated October 6, 2021, the Plaintiff's claim against Defendant Americana Partners, LLC were summarily dismissed and by way of Opinion and Order dated October 8, 2021, the Plaintiff's claims against Defendants Jason Curis and JMC Management, LLC were summarily dismissed.

[2] 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.

A. Whether summary disposition of the Plaintiff's claim for Unjust Enrichment (Count I) is warranted? Because the Plaintiff has failed to present evidence that Thomas Duke or Battersby received an unjust benefit, the answer is "no."

B. Whether summary disposition of the Plaintiff's claims for Negligent Misrepresentation (Count II), Intentional Misrepresentation (Count III) and Silent Fraud (Count VI) is warranted? Because whether Thomas Duke and Battersby owe a legal duty to the Plaintiff is a question of fact, the answer is "no."

C. Whether summary disposition of the Plaintiff's claim for Innocent Misrepresentation (Count IV) is warranted where there is no Listing Agreement between the parties? Because there is an absence of privity of contract to sustain a claim innocent misrepresentation, the answer is "yes."

D. Whether summary disposition of the Plaintiff's claim for Breach of Fiduciary Duty (Count V) is warranted? Because whether Thomas Duke and Battersby and the Plaintiff were in a fiduciary relationship is a question of fact, the answer is "no."

E. Whether summary disposition of the Plaintiff's claim for Breach of Contract (Count VII) is warranted where Battersby admits to breaching the Confidentiality Agreement? Because the Plaintiff has not presented evidence of its alleged damages, the answer is "yes."

F. Whether summary disposition of the Plaintiff's claim for Civil Conspiracy (Count VIII) is warranted? Because the Plaintiff's tort claims for misrepresentation and fraud and breach of fiduciary duty remain viable, the answer is "no."

G. Whether the Plaintiff should be required to post a security bond pursuant to MCR 2.109(A) when Thomas Duke and Battersby have failed to demonstrate that imposing such a requirement is "reasonable and proper"? Because the answer is "no," this alternative request is denied.

H. Whether the Plaintiff is entitled to summary disposition in its own favor pursuant to MCR 2.116(I)(2)? Because questions of material fact exist, the answer is "no."

II
The Sale and the Complaint

Richard Bellaw is the principal of the Plaintiff. The Plaintiff alleges to have owned the subject Property since approximately July 1987. For several years, real estate agent Battersby and other agents of Thomas Duke, a commercial real estate broker, sought to list, market, and sell the subject Property. In late 2019, Bellaw expressed 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. [Exhibit B to Complaint.] The LOI is addressed to Battersby and 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.

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

* * *

[Exhibit C to Complaint.][4]

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:

> 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

[4] Thomas Duke and Battersby argue that "a full review of this email reflects that TADC did not have any written agreement and certainly not a listing agreement with Bellaw rather Battersby was working with Curis." [Response, p 3.] This is a misrepresentation because the May 12, 2020 email *does not* reflect either claim.

on June 2, 2020 and the Plaintiff on June 3, 2020. [Exhibit E to Complaint.][5] 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.
>
> * * *
>
> [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:
>
> * * *

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

> 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.]

In connection with the first sale, the Plaintiff paid Thomas Duke a commission of $14,250.00 (5% of the purchase price). [Exhibit P to Complaint; Exhibit R to Complaint.] After the second sale, Battersby received a twenty percent (20%) equity stake in Partners. [Exhibit F to Response, ¶10.]

III
The Arguments

Thomas Duke and Battersby move for summary disposition pursuant to MCR 2.116(C)(8) and (10). Thomas Duke and Battersby argues that the Plaintiff cannot sustain its claims because Thomas Duke and Battersby owed no legal duty to the Plaintiff where there is no Listing Agreement and Thomas Duke and Battersby were neither the broker

nor real estate agent for the Plaintiff. Thomas Duke and Battersby argue the Plaintiff cannot sustain its claims for silent fraud and misrepresentations because Thomas Duke and Battersby did not owe the Plaintiff a legal duty, the market value of the Property was ascertainable to the Plaintiff and Battersby's comments were mere opinion and/or puffing. Thomas Duke and Battersby argue the Plaintiff cannot sustain its claim for innocent misrepresentation because the parties did not have a contract. Thomas Duke and Battersby further argue the Plaintiff cannot sustain its claim for civil conspiracy because the Plaintiff has failed to establish a separate and actionable tort and the Plaintiff cannot sustain its claim for unjust enrichment because Thomas Duke and Battersby did not receive an unjust benefit. Finally, Thomas Duke and Battersby argue that despite that Battersby did breach the Confidentiality Agreement, the Plaintiff cannot sustain its claim for breach of contract because the breach was not material, and the breach did not yield any damage to the Plaintiff. In the alternative to dispositive relief, Thomas Duke and Battersby argue the Plaintiff should be required to post a security bond pursuant to MCR 2.109 in the amount of $50,000.

The Plaintiff argues that Thomas Duke and Battersby were its broker, Battersby communicated as if he represented the Plaintiff, and a Listing Agreement was not necessary evidence and discovery remains ongoing and precludes relief. The Plaintiff argues that Thomas Duke and Battersby engaged in fraud and their fraud and breach of fiduciary duty support the Plaintiff's claim for Civil Conspiracy. The Plaintiff further argues Thomas Duke and Battersby are liable for their unjust enrichment and breach of

the Confidentiality Agreement. Finally, the Plaintiff argues neither sanctions nor a bond is warranted because Battersby's own email provides factual support for the Plaintiff's allegations. The Plaintiff counters that it is entitled to summary disposition pursuant to MCR 2.116(I)(2).

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)(10)

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).

MCR 2.116(I)(2) provides that "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

V
Summary disposition is only partially warranted because questions of fact remain

A
Unjust Enrichment (Count I)

1
The Law

"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").

2
The Analysis

In its claim for Unjust Enrichment (Count I), the Plaintiff alleges:

> 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.]

The Plaintiff joins together all five Defendants without identifying how each or any of the Defendants received a benefit that was unjust. This runs afoul of MCR 2.111(B) requiring "[a] statement of facts, without repetition, on which the pleader relies in stating

the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called upon to defend."

Notwithstanding the foregoing, the Plaintiff has failed to present evidence that Thomas Duke or Battersby received an unjust benefit. In its two-sentence response addressing unjust enrichment, [Response, p 18], the Plaintiff argues "discovery has revealed that Battersby was compensated in connection with the Back End PSA, and accordingly it was received in violation of the TD Defendants' breach of their fiduciary duties to Plaintiff, and therefore constitutes a benefit received unjustly." This bald argument is insufficient. What this exactly means is a puzzle, which the Court need not solve. 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). The Plaintiff has submitted no such evidence to support its puzzling argument. As such, summary disposition of the Plaintiff's claim for Unjust Enrichment (Count I) is warranted under MCR 2.116(C)(10).

B
Negligent Misrepresentation (Count II), Intentional Misrepresentation (Count III), and Silent Fraud (Count VI)

1
The Law

"A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Alfieri v Bertorelli*, 295 Mich App 189, 194 (2012). A claim for negligent misrepresentation "require[s] a defendant to owe a duty to the plaintiff." *Id*.

To establish a claim for intentional misrepresentation, plaintiff must show "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." Bergen v Baker, 264 Mich App 376, 382 (2004) (quotation marks and citation omitted).

"Silent fraud, also known as fraudulent concealment, requires that (1) the defendant suppressed a material fact, (2) the defendant had the duty to disclose the fact, and (3) the plaintiff relied to his or her detriment. A person may be guilty of fraudulent concealment if he or she "remains silent when fair dealing requires him [or her] to speak."

Roskamp v Fremont Insurance Co, unpublished Per curiam opinion of the Court of Appeals, issued March 18, 2021 (Docket No. 348054), p 3 (internal citations omitted).

"A representation regarding what property will sell for in certain market conditions at a given price is a representation of fact." *Foreman v Foreman*, 266 Mich App 132, 143 (2005). Moreover, "statements of opinion made in bad faith 'by one who is possessed of superior knowledge respecting such matters, with a design to deceive and mislead," are actionable in fraud irrespective of whether a fiduciary duty exists. *Id.* at 142.

2
The Analysis

In its claims for Negligent Misrepresentation (Count II), the Plaintiff alleges, in part, as follows:

> 50. Battersby and Thomas Duke had a duty of care to Plaintiff to provide Plaintiff with correct information, advice and services regarding the Property.
>
> 51. Battersby and Thomas Duke made representations of material fact to Plaintiff that the Property value was about half of the amount than it actually was ($285,000 instead of at least $550,000) and that Curis/JMC was the best buyer that was willing to pay Plaintiff the most for the Property (the "Negligent Representations").
>
> 52. The Negligent Representations were false when they were made or they were made without reasonable care as to their accuracy and truthfulness.
>
> 53. Plaintiff did, in fact, reasonably rely upon the Negligent Representations to its detriment and entered into the Front End PSA for a purchase price that was about half of what the actual value was.

54. Plaintiff has been damaged as a result the Negligent Representations.

[Complaint.]

In its claim for Intentional Misrepresentation (Count III), the Plaintiff alleges, in part, as follows:

56. Battersby and Thomas Duke made representations of material fact to Plaintiff that that the Property value was about half of the amount than it actually was ($285,000 instead of at least $550,000) and that Curis/JMC was the best buyer that was willing to pay Plaintiff the most for the Property (the "Intentional Representations").

57. The Intentional Representations were false when they were made.

58. Battersby and Thomas Duke either knew the Intentional Representations were false when they were made or made them recklessly, without knowledge of their truth.

59. Battersby and Thomas Duke made the Intentional Representations with the intention of inducing Plaintiffs reliance on the Intentional Representations.

60. Plaintiff did, in fact, reasonably rely upon the Intentional Representations to its detriment and entered into a contract with, and eventually sold the Property to, JMC/Curis/Partners for about half of the actual value of the Property ($285,000 instead of at least $550,000).

61. Plaintiff has been damaged as a result of the Intentional Representations.

[Complaint.]

In its claim for and Silent Fraud (Count VI), the Plaintiff alleges, in part, as follows:

75. As brokers, Battersby and Thomas Duke had a legal and equitable duty to supply Plaintiff with truthful and accurate information.

> 76. Battersby and Thomas Duke did not disclose the actual market value of the Property to Plaintiff and Battersby and Thomas Duke did not disclose the identity of, or otherwise present to Plaintiff, a buyer (Quinn) who was ready, willing and able to pay about double what Partners paid for the Property.
>
> 77. Battersby and Thomas Duke withheld the information that they failed to disclose so that Plaintiff would sell the Property to Partners, thus further enriching Battersby and Thomas Duke at Plaintiffs expense.
>
> 78. Battersby and Thomas Duke supplied inaccurate information in an attempt to cover up their non-tender of accurate information to Plaintiff.
>
> 79. Battersby and Thomas Duke intended Plaintiff to rely on the representations.
>
> 80. Plaintiff relied on the representations to its detriment and sold the Property to Partners.
>
> 81. Plaintiff suffered damages in reliance on the representations of Battersby and Thomas Duke.
>
> [Complaint.]

In short, the Plaintiff alleges that Thomas Duke and Battersby misrepresented or did not disclose the market value of the Property, and misrepresented that Curis or JMC was the best buyer.

Viewing the evidence in a light most favorable to the Plaintiff, whether Thomas Duke and Battersby owed the Plaintiff a legal duty is clearly a question of material fact where the parties dispute whether Thomas Duke and Battersby were the Plaintiff's broker, were buyer Curis' broker or were a dual agent. Accepting the Plaintiff's arguments, Thomas Duke and Battersby were the Plaintiff's broker. If they were the Plaintiff's broker, accepting the Plaintiff's arguments, they breached their duties owed to

the Plaintiff. Of course, accepting the arguments of Thomas Duke and Battersby, they were not the Plaintiff's broker and breached no duties. Summary disposition of the Plaintiff's claims for Negligent Misrepresentation (Count II), Intentional Misrepresentation (Count III), and Silent Fraud (Count VI) is not warranted.

C
Innocent Misrepresentation (Count VI)

"A claim of innocent misrepresentation is shown where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation." *Roberts v Saffell*, 280 Mich App 397, 404 (2008), aff'd 483 Mich 1089 (2009) (quotation marks and citation omitted). "[F]or liability under a theory of innocent representation to arise there must be privity of contract between the party making the representation and the party claiming to have detrimentally relied on it." *Id*.

In its claim for Innocent Misrepresentation, the Plaintiff alleges:

> 63. Battersby and Thomas Duke had a duty of care to Plaintiff to provide Plaintiff with correct information and professional services.
>
> 64. Battersby and Thomas Duke made representations of material fact to Plaintiff in, inter alia, the Confidentiality Agreement, that the Property information was not to be shared with anyone other than Curis or JMC, and that the Property value was less than half of the amount than it actually was ($285,000 instead of at least $550,000) and that Curis/JMC was the best buyer that was willing to pay Plaintiff the most for the Property (the "Innocent Representations").

65. The Innocent Representations were false when they were made or they were made without reasonable care as to their accuracy and truthfulness.

66. Plaintiff did, in fact, reasonably rely upon the Innocent Representations to its detriment and entered into a contract with, and eventually sold the Property to, JMC/Curis/Partners for about half of the actual value of the Property ($285,000 instead of at least $550,000).

67. Plaintiff has been damaged as a result the Innocent Representations.

* * *

[Complaint.]

The parties agree there is no Listing Agreement. In the absence of privity of contract, the Plaintiff cannot sustain its claim for Innocent Misrepresentation (Count IV) and summary disposition is warranted. Indeed, the Plaintiff does not even address the absence of privity, thereby abandoning any counterargument. After all, "[t]rial 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).

D
Breach of Fiduciary Duty (Count V)

1
The Law

To sustain a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a duty, (2) breach of that duty, (3) a proximate causal relationship between the breach of such duty and an injury to plaintiff, and (4) damages to the plaintiff. *Teadt*

v Lutheran Church Mo Synod, 237 Mich App 567, 580-581 (1990). See also *Delphi Automotive PLC v Absmeier,* 167 F Supp 3d 868, 884 (ED Mich, 2016), citing *Teadt,* 237 Mich App at 580-581. The duty element of a claim for fiduciary duty requires proof of a *fiduciary* relationship. Our Court of Appeals has explained when a fiduciary relationship exists:

> A fiduciary relationship exists when there is a reposing of faith, confidence and trust and the placing of reliance by one upon the judgment and advice of another. *Williams v Griffin*, 35 Mich App 179 (1971). Relief is granted when such position of influence has been acquired and abused, when confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. *Stephenson v Golden*, 279 Mich 710, 739 (1937).
>
> [*Smith v Saginaw Sav & Loan Ass'n*, 94 Mich App 263, 274 (1979).]

See also *Ulrich v Federal Land Bank of St Paul*, 192 Mich App 194, 196 (1991).

> The Michigan Court of Appeals has further elaborated:
>
> A fiduciary duty arises where there is a fiduciary relationship between the parties. Familiar examples are: trustees to beneficiaries, guardians to wards, attorney to clients, and doctors to patients. The duty arises out of the relation subsisting between two persons of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith.
>
> [*Portage Aluminum Co v Kentwood Nat'l Bank,* 106 Mich App 290, 294 (1981), citing Black's Law Dictionary (4th ed) pp 753-754.]

In all circumstances, a breach of fiduciary duty claim "requires that the plaintiff *reasonably* reposed faith, confidence and trust in the fiduciary." *Rose v Nat'l Auction Group,* 466 Mich 453, 469 (2002) (citation omitted) (emphasis in original). Relief is

granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed. *Teadt,* 237 Mich App at 581(citation omitted).

"Under Michigan Law, a real estate broker has a fiduciary relationship with his or her clients. Duties of disclosure, care, loyalty and fidelity can arise either impliedly from the agent's position, or expressly from an agency contract in a listing agreement." (citation omitted). *Schwartz v Real Estate One, Inc*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2017 (Docket No. 328727), p 4; *Parker v Poll*, 16 Mich App 542, 546 (1969) ("A real estate broker is in a fiduciary relationship to his client.")

2
The Analysis

In its claim for Breach of Fiduciary Duty (Count V), the Plaintiff alleges:

> 69. Battersby, as a real estate broker and Thomas Duke as a real estate brokerage company were fiduciaries of Plaintiff, designated to act on Plaintiffs behalf in a prescribed business manner and requiring Plaintiffs trust and confidence.
>
> 70. As Plaintiffs fiduciaries, Battersby and Thomas Duke were required to exercise the utmost good faith, due care and loyalty in the performance of their duties to further Plaintiffs best interests.
>
> 71. Battersby and Thomas Duke breached their duties of care and trust owed to Plaintiff by, without limitation, failing to properly perform the duties of real estate brokers; intentionally failing to provide accurate Property value information to Plaintiff; intentionally providing incorrect Property value information to Plaintiff; falsely representing that Curis/JMC was the best buyer for the Property; intentionally not presenting Quinn to Plaintiff as a buyer for the Property (a buyer who was ready, willing and able to pay about double what Curis/JMC/Partners paid); providing confidential information to Quinn without Plaintiffs knowledge or permission; putting their own financial motivations ahead of

> Plaintiffs in using fraud and deceit in attempting to obtain, and successfully obtaining, two commissions by virtue of orchestrating two transactions (first to Partners than to Quinn); and, covering up their repeated misrepresentations.
>
> [Complaint.]

In the instant action, the parties agree there is no Listing Agreement. Nonetheless, documentary evidence creates a question of fact regarding whether Thomas Duke and/or Battersby were the Plaintiff's broker and owed the Plaintiff a fiduciary duty. That is, Battersby sent emails to purchaser Curis negotiating the purchase price between the Plaintiff and Curis. In email correspondence dated May 12, 2020, Battersby presented a counteroffer to Curis:

> 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 (emphasis added).]

The settlement statement for the first sale identifies the commission as "Listing agent commission to Thomas Duke Company." [Exhibit P to Complaint.] Likewise, a June 3, 2020 email from Curis identifies Battersby as the "Seller Broker."[6] In the Plaintiff's first

[6] Exhibit K of the Plaintiff's Response to the Motion.

set of interrogatories and requests for production of documents to Batterseby, when asked to "describe the relationship between you/Thomas Duke and Plaintiff as it related to the Property," Battersby answered that "It was always understood that Battersby/TADC represented the purchaser and/or as a Transaction Coordinator." [Exhibit F to Response, Interrogatory 14.]

In their Reply, Thomas Duke and Battersby argue they were a dual agent of Curis and the Plaintiff, "[i]n the present case, these Defendants did not have a duty to disclose all information to Plaintiff because these Defendants were acting as dual agents," "As dual agents, neither Battersby nor Duke owed any duties to Plaintiff," "[d]ual Agency is allowable and at best that is what Plaintiff can claim these Defendants were," "because Battersby was a dual agent and if he was not deemed a Dual Agent than he was at all times the agent of the Buyer." [Reply, pp 1, 2, 4, 5.] Pursuant to MCL 339.2517, "[a] real estate licensee can be the agent of both the seller and the buyer in a transaction, but only with the knowledge and informed consent, in writing, of both the seller and the buyer." A "dual agent" is "a licensee who is acting as the agent of both the buyer and the seller and provides services to complete a real estate transaction without the full range of fiduciary duties owed by a buyer's agent and a seller's agent." MCL 339.2517(11)(f). Notwithstanding the foregoing, Thomas Duke and Battersby's argument on dual agency is inconsistent with the representations and positions in their Motion that "they represented Curis and his entities," "[t]hese Defendants were not the Broker or Real Estate Agent for Plaintiff/Seller," "these Defendants did not represent Plaintiff's

interests," "these Defendants did not represent Plaintiff nor Bellaw, rather, they represented the purchaser," "these Defendants did not represent Plaintiff . . . and in fact represented the Buyer Curis and his company," "Plaintiff/Bellaw, was well aware that TADC nor Battersby, represented the Plaintiff's interest," "they did not represent Plaintiff or Bellaw," and "it is clear that neither TADC nor Battersby represented Plaintiff." [Motion, pp 3, 4, 8, 10, 11, 13, 16, 19.]

Whether Thomas Duke and Battersby served as the Plaintiff's broker to create a fiduciary relationship is a question of material fact that precludes summary disposition pursuant to MCR 2.116(C)(10). The function of the Court in the context of a summary disposition motion is to determine if a genuine issue of material facts exists – not to decide it. MCR 2.116(C)(10); *Echelon Homes LLC v Carter Lumber Co*, 261 Mich App 434, 440 (2004), citing *Skinner v Square D Co*, 445 Mich 153, 161 (1994) (courts may not make findings of fact or weigh credibility in deciding a motion for summary disposition).

E
Breach of Contract (Count VII)

1
The Law

A party claiming a breach of contract "must establish by a preponderance of the evidence that (1) there was a contract, (2) which the other party breached, and (3) thereby resulting in damages to the party claiming breach of contract." *Miller-Davis Co v Ahrens Constr, Inc,* 495 Mich 161, 178 (2014). The cardinal rule when interpreting contracts is to

ascertain and give effect to the intention of the parties. *Zurich Ins Co v CCR & Co, (on rehearing)*, 226 Mich App 599, 603 (1997). "In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning." *In re Smith Trust*, 480 Mich 19, 24 (2008). If the language of the contract is clear and unambiguous, it must be enforced as written. *Phillips v Homer*, 480 Mich 19, 24 (2008).

2
The Analysis

In its claim for Breach of Contract (Count VII), the Plaintiff alleges as follows:

> 83. Valid agreements upon good and valuable consideration exist between Plaintiff and Battersby and Thomas Duke, including but not limited to the Confidentiality Agreement. See, Exhibit D.
>
> 84. Battersby and Thomas Duke agreed that they would not disclose the information Plaintiff supplied about the Property to anyone other than JMC or Curis. See, Exhibit D.
>
> 85. Battersby and Thomas Duke disclosed the Property information supplied by Plaintiff to Quinn in violation of the Confidentiality Agreement. See, Exhibits L and M.
>
> 86. Plaintiff performed all expressed and implied duties and obligations under the Confidentiality Agreement.
>
> 87. As a direct and proximate result of Battersby and Thomas Duke's breaches, Plaintiff has suffered damages.
>
> [Complaint.]

The parties agree that the Plaintiff, Battersby and Curis entered a Confidentiality Agreement. The May 26, 2020 Confidentiality Agreement states, in part: "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." [Exhibit D to Complaint.] Battersby admits that he disclosed confidential information about the Property with a third party. ("It is true that *after* Plaintiff entered into the written Purchase Agreement where Plaintiff was bound to sell MAH the subject office Bulding, Batterssby did at the direction of Curis share some of the information with a third party.") [Motion, p 16.]

Notwithstanding the foregoing, the Plaintiff fails to plead or present evidence of damages sustained as a result of the breach of the Confidentiality Agreement. That is, the Plaintiff argues that "Plaintiff[']s damages flow directly from the TD Defendants' admitted breach: disclosure of the confidential information to a potential purchaser is precisely how the TD Defendants secured a second sale, thereby realizing a substantial and unjust profit." This argument is woefully inadequate to establish damages. 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). Summary disposition of the Plaintiff's claim for Breach of Contract (Count VII) is warranted.

F
Civil Conspiracy

1
The Law

"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.").

2
The Analysis

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

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 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.]

For reason that the Plaintiff's underlying torts for negligent and intentional misrepresentation, silent fraud and breach of fiduciary duty remain viable, dismissal of the Plaintiff's claim for Civil Conspiracy (Count VIII) is not warranted at this time.

G
The Court declines to require a security bond

MCR 2.109(A) provides as follows:

> On motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court, or, if the claiming party appeals, by the trial and appellate courts. The court shall determine the amount in its discretion. MCR 3.604(E) and (F) govern objections to the surety.

Requiring such a bond is a matter within the sound discretion of the trial court. *Zapalski v Benton,* 178 Mich App 398, 404 (1989), citing *Belfiori v Allis-Chalmers, Inc.,* 107 Mich App 595, 599-600 (1981). A security bond should not be required in the absence of a "substantial reason" for it. *Zapalski,* 178 Mich App at 404. "The assertion of groundless allegations or a tenuous legal theory of liability may provide sufficient reason for ordering security to be posted." *Id.* citing *Wells v Grauchauf Corp,* 170 Mich App 326, 335 (1998).

In the instant case, there is no "substantial reason" for requiring the Plaintiff to post a security bond. Simply put, requiring the Plaintiff to post a bond in the circumstances of this case would not be "reasonable and proper."

H
Summary disposition in the Plaintiff's favor pursuant to MCR 2.116(I)(2) is not warranted

Questions of material fact preclude summary disposition in favor of the Plaintiff pursuant to MCR 2.116(I)(2).

ORDER

Based on the foregoing Opinion, Defendants Thomas A. Duke Co. dba Thomas Duke Commercial Real Estate and Andrew Battersby's Motion for Summary Disposition is GRANTED, IN PART.

The Plaintiff's claims for Unjust Enrichment (Count I), Innocent Misrepresentation (Count VI) and Breach of Contract (Count VII) are dismissed.

