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

TELEGRAPH MICHIGAN, LP,

Plaintiff,

Case No. 24-204823-CB
v **Hon. Michael Warren**

FRIEDMAN MANAGEMENT COMPANY,
FRIEDMAN REAL ESTATE MANAGEMENT NE, LLC,
FRIEDMAN REAL ESTATE MANAGEMENT PA, LLC, and
DAVID FRIEDMAN
D/B/A FRIEDMAN REAL ESTATE MANAGEMENT,

Defendants.

OPINION AND ORDER REGARDING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the
County of Oakland, State of Michigan
November 13, 2024

PRESENT: HON. MICHAEL WARREN

OPINION

I
Overview

The claims in this matter arise out of a Management Agreement entered into on April 19, 2021, between Friedman Management Company ("Friedman") and Telegraph Michigan, LP ("Telegraph"). Friedman acted as Property Manager for Telegraph's property. Telegraph alleges that all of the Defendants improperly transferred $78,199.01 from its general operating account to Friedman.

Before the Court is the Plaintiff's Motion for Summary Disposition under MCR 2.116(C)(8),[1] (9), and (10). Oral argument is dispensed as it would not assist the Court in its decision-making process.[2]

At stake is whether the Defendants are entitled to summary disposition under MCR 2.116(I)(2) because Telegraph does not have standing to bring the claims asserted under the Management Agreement at issue when it was assigned after the claims in this matter were filed? Although much of the Plaintiff's argument on this issue is disingenuous, because the affirmative defenses do not currently assert lack of standing, summary disposition in favor of the Defendants on this basis is denied.

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[1] Plaintiff seeks dismiss under MCR 2.116(C)(8) only as to its own Count III for embezzlement. Because a Motion under (C)(8) relates to a failure to state a claim upon which relief may be granted, and because it is Plaintiff's own claim, the Court presumes inclusion of MCR 2.116(C)(8) as to embezzlement was in error. There is no other reference to (C)(8) in discussion of any other Count. Accordingly, the Court will not address arguments under this standard made by the Plaintiff.

[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.

Also at stake is whether Telegraph is entitled to summary disposition of any of its claims pursuant to MCR 2.116(C)(9)? Because the Answer to Complaint includes denials as to all allegations raised, the answer is "no" and summary disposition is denied on this basis.

Further at stake is whether either party is entitled to summary disposition on their respective breach of contract claims pursuant to MCR 2.116(C)(10)? Because there are genuine issues of material fact regarding the breach, the answer is "no" and summary disposition is denied on this basis.

Additionally at stake is whether the non-contracting Defendants are entitled to summary disposition on Telegraph's claims for breach of contract pursuant to MCR 2.116(I)(2)? Because Telegraph provided no evidence or authority to support its allegations as to why the non-contracting parties should be liable, the answer is "yes" and summary disposition in favor of the non-contracting Defendants is granted.

Further at stake is whether the parties are entitled to summary disposition on their respective unjust enrichment claims pursuant to MCR 2.116(C)(10)? Because there can be no claim for unjust enrichment where there is an express contract between the parties, the answer is "yes" and both claims for unjust enrichment must be dismissed.

Also at stake is whether summary disposition is warranted in Telegraph's favor pursuant to MCR 2.116(C)(10) as to its claims for fraud, embezzlement, conversion, or breach of fiduciary duty? Because, among other things, the claims require a determination as to a party's subjective intent, and because Telegraph has provided only conclusory allegations, the answer to each is "no" and summary disposition on this basis is denied.

Finally at stake is whether summary disposition is warranted for the Defendants under MCR 2.116(I)(2) as to Telegraph's claim for Successor Liability/Alter Ego (Count VII)? Because Telegraph has provided no evidence or legal authority for its position, the answer is "yes" and summary disposition on this basis is granted.

II
Background

The background and relationship between the parties is largely agreed upon. Telegraph owned real property for which it hired Friedman to manage operations. Telegraph and Friedman entered into a Management Agreement on April 19, 2021. The Management Agreement required a general account to be opened to which both Telegraph and Friedman had control and authority. Friedman assumed the operation, maintenance, leasing, construction, management, and supervision of Telegraph's property. The general account was opened, and there were no problems between the parties until November 2023.

In September 2023, Telegraph received an invoice from Huntington Construction, a general contractor, in the amount of $80,620 for services on the property. On November 13, 2023, Telegraph alleges that it authorized a draw request for funds from the lender to pay the invoice. $80,260 was deposited into the general account on November 27, 2023. On November 29 and 30, 2023 Friedman paid itself a total of $79,614.01 for reimbursements and management fees. Telegraph contends that these payments violated the Management Agreement, while Friedman contends that the payments were authorized by the Management Agreement.

The Management Agreement provides:

> 5.1 **<u>Bank Accounts</u>**. Managing Agent shall establish a separate "**General Account**", in the name of the Owner and satisfactory to Owner, into which Managing Agent shall deposit all rents, security deposits and other funds collected from the operations of the Property. Managing Agent shall promptly deposit all revenues as same are collected in the General Account. The funds of the General Account shall be used to pay the normal and reasonable expenses incident to the operation and maintenance of the Property pursuant to **Section 5.2.1** of this Agreement and as requested by Owner, including without limitation, payment of Managing Agent's management fees, leasing commissions, construction fees and any and all other compensation as provided for in this Agreement. Owner shall immediately provide sufficient funds for the payment of all costs and expenses (including Management Agent's compensation) of the Property if the monies collected or received by Managing Agent with respect to the Property are not sufficient to pay the same as and when due. Each month Managing Agent shall submit to Owner a copy of the monthly statement of the General Account. Managing Agent shall not commingle any of its own funds with the funds of Owner. All funds deposited in the General Account are the property of Owner held in trust for Owner by Managing Agent. The General Account shall be subject to the control of both Managing Agent and Owner, subject to the following:

(a) Either Managing Agent or Owner may draw checks or funds from the General Account;

(b) At least seventy-two hours prior to drawing checks or funds from the General Account the Owner shall notify Managing Agent of such draw in writing ("**Owner Withdrawal**") to ensure that the General Account holds sufficient funds for such Owner Withdrawal; and

(c) If Owner completes an Owner Withdrawal without notifying Managing Agent or if such Owner Withdrawal will cause the General Account to be overdrawn or have limited funds for the operations and needs of the Property, then Owner shall indemnify and hold harmless Managing Agent from same, and Owner shall immediately provide sufficient funds to balance the General Account and for payment of all delinquent fees, costs and expenses.

. . .

5.2.2 **<u>Costs to be Reimbursed to Managing Agent</u>**. To the extent included in the Approved Operating Budget, except as otherwise specifically provided in this Agreement, everything done by Managing Agent in the performance of its obligations under this Agreement and all expenses incurred pursuant to this Agreement shall be for and on behalf of Owner and for its account and all debts and liabilities incurred to third parties in the ordinary course of business of the Property are and shall be obligations of Owner. Managing Agent shall not be liable for such obligations by reason of its management, supervision and operation of the Property for Owner. Managing Agent shall not be obligated to advance any of its own funds to or for the account of the Property

[Management Agreement, p 12, Article V, Section 5.1 (emphasis in original); p 15, Article V, Section 5.2 (emphasis in original)]

Telegraph makes reference to violations of mortgage documents, and it attaches the Loan Agreement to its Motion. Unhelpfully, Telegraph does not reference any particular portion of the 142-page Loan Agreement except to say the agreement authorized it to enter into a Management Agreement.

III
Standard of Review

A
MCR 2.116(C)(9)

MCR 2.116(C)(9) permits summary disposition when "the opposing party has failed to state a valid defense to the claim against him or her." A motion for summary disposition under MCR 2.116(C)(9) tests the sufficiency of the defendant's pleadings and is decided by the pleadings alone. *In re Smith Estate*, 226 Mich App 285, 288 (1997). All well-pled allegations must be accepted as true, and only if the non-moving party's defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery, should the motion be granted. *Grebner v Clinton Charter Twp*, 216 Mich App 736, 740 (1996).

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 v Rozwood,* 461 Mich 109, 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." *Id.* 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 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). Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

IV
Standing to Bring the Complaint

Relying on an assignment executed on February 29, 2024 (the "Assignment"), the Defendants argue that Telegraph does not have standing to pursue the Complaint. However, this argument is raised for the first time as the very last argument in their Response. Instead of filing its own motion for summary disposition on this basis, the Defendants cursorily cite MCR 2.116(I)(2) for the proposition that all of the Telegraph's counts should be dismissed. The entirety of the argument approximates a single page.

In response, Telegraph argues that it had standing when the claims were filed (January 8, 2024), simply concludes that it is still a real party of interest, and argues Friedman has waived this argument because it was not included as an affirmative defense when the Defendants filed the Answer to Complaint on February 5, 2024. With regard to the waiver/pleading deficiency, the Assignment was entered into by Telegraph AFTER both the Answer and the Counter Complaint were filed. Although Telegraph knew of the assignment when it executed the Assignment on February 29, 2024, unless the Defendants were prophets, possessed a crystal ball, or were time travelers, they could not have possibly raised the affirmative defense on February 5, 2024, because the Assignment did not exist. Telegraph's argument on this issue is disingenuous and flabbergasting.

On the other hand, Friedman has not sought to amend its Affirmative Defenses. Based on the state of the pleadings, Telegraph has standing.[3]

V
Summary Disposition in Plaintiff's favor under MCR 2.116(C)(9) as to all Claims is not Warranted

Telegraph argues that it should be entitled to summary disposition under MCR 2.116(C)(9) as to all its claims except unjust enrichment. But Friedman has categorically denied each of the material allegations contained in the Complaint and has pled affirmative defenses. Summary disposition under MCR 2.116(C)(9) is not warranted because Friedman has denied material allegations of material fact in its Answer to Complaint. See, e.g., *Nasser v Auto Club Ins Ass'n,* 435 Mich 33, 48 (1990); *Fancy v Egrin*, 177 Mich App 714, 724 (1989); *Heligman v Otto*, 161 Mich App 735, 738 (1987) (summary

[3] The Court will not speculate as to whether an amendment to the affirmative defenses is proper as the issue is not before the Court.

disposition for failure to state a valid defense held improper where defendants categorically denied some of plaintiff's material allegations).

VI
Summary Disposition under MCR 2.116(C)(10) and MCR 2.116(I)(2) as to Breach of Contract is not Warranted for either the Plaintiff or Friedman, but is warranted as to non-parties to the Contract

A
Allegations

Telegraph makes the following allegations in its Complaint as to the Defendants' breach of contract:

> 37. Plaintiff had a Management Agreement with Defendants.
>
> 38. Pursuant to the Agreement, Defendants agreed to remit payments for operating expenses related to the Subject Property on behalf of Plaintiff.
>
> 39. Article V of the Management Agreement provides, in pertinent part: "The funds of the General Account shall be used to pay the normal and reasonable expenses incident to the operation and maintenance of the Property pursuant to Section 5.2.1 of this Agreement and as requested by Owner, including without limitation, payment of Managing Agent's management fees, leasing commissions, construction fees, and all other compensation as provided for in this agreement." (Exhibit B).
>
> 40. Defendants breached the Management Agreement by refusing or otherwise failing to remit the payment owed on Plaintiffs outstanding invoice to Huntington Construction, or in the alternative, by refusing or otherwise failing to return Plaintiffs money to the General Account.
>
> 41. The contract between the parties provided, inter alia, that Defendants were to act as Telegraph Michigan LP's Managing Agent, and in doing so, represent Telegraph LP's best interests.

42. Defendants breached the contract when it intentionally and knowingly made a series of unauthorized withdrawals from the General Account.

43. As a result of Defendants' breach of the Management Agreement, Plaintiff has sustained injuries including, but not limited to, severe financial loss.

[Complaint, pp. 5-6.]

Friedman makes the following allegations in its Counter Complaint relating to Telegraph's breach of contract:

26. FREM [Friedman Management Company] and Telegraph entered into the Management Agreement.

27. FREM materially performed its obligations under the Management Agreement.

28. Without limit, Telegraph has materially breached the Management Agreement for its failure to sufficiently fund the General Account, failure to pay FREM its compensation, and its failure to reimburse FREM the normal and reasonable expenses incident to the operation and maintenance of the Property.

29. Under the Management Agreement, FREM is entitled to recover any and all of its costs and expenses in pursuing its counterclaim, including reasonable attorney fees and costs.

30. As a direct and proximate result of Telegraph's various breaches of the Management Agreement, FREM has suffered damages in an amount to be determined, together with its attorney's fees and costs incurred in pursuing this counterclaim, plus interest.

[Counter Complaint, pp. 5-6.]

B
Law

A claim for breach of contract lies when the following elements are established: "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422 (1991). A plaintiff may recover in a breach of contract action when it proves that the defendant's breach was the proximate cause of the harm the plaintiff suffered. *Chelsea Inv Group LLC v City of Chelsea*, 288 Mich App 239, 254 (2010).

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). Courts "must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency Inc*, 468 Mich 459, 468 (2003). Courts may not strain to find ambiguity and must read contracts to avoid an absurd or unreasonable result. *Scott v Farmers Ins Exchange,* 266 Mich App 557, 561 (2005); *Miller v Van Kampen,* 154 Mich App 165, 168 (1986). Ultimately, courts must strive to enforce the agreement intended by the parties.

Whether contract language is ambiguous is a preliminary question of law. *UAW-GM Human Resource Center v KSL Rec Corp*, 228 Mich App 486, 491 (1998) (citation omitted). A contract is unambiguous when it fairly admits of but one interpretation. *Holmes v Holmes*, 281 Mich App 575, 594 (2008). If the language of the contract is clear and unambiguous, it must be enforced as written. *Smith Trust*, 480 Mich at 24. A written contract is ambiguous if after reading the entire document its language reasonably can be understood in differing ways (i.e., the language is susceptible to more than one reasonable interpretation). *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 70 (1991). "A provision in a contract is ambiguous if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715 (2005) (citation omitted). In making this determination, contractual language is to be construed according to its plain and ordinary meaning. In fact, published Michigan jurisprudence has long held that the terms of contracts are to be enforced as written unless it violates Michigan public policy. *Rory v Cont'l Ins Co,* 473 Mich 457, 461, 468 (2005) ("[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. . . . [T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of reasonableness"; "A fundamental tenant of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*" [emphasis in original]). See also

Little v Kin, 468 Mich 699, 700 (2003) ("Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted"). Furthermore, the court is required to read the contract as a whole, giving harmonious effect, if possible, to each word and phrase in order to avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp*, 468 Mich at 468. Ultimately, courts must strive to enforce the agreement intended by the parties.

C
Analysis

Telegraph argues that Friedman breached the Management Agreement by failing to apply $80,620 to a particular invoice. Telegraph repeatedly argues that this transfer violated the Management Agreement and infers that it violated the Loan Agreement. However, Telegraph fails to substantiate its arguments by detailing the exact breach. It repeatedly argues that Friedman's allegations that the Management Agreement supported the payment are false. However, again, Telegraph fails to detail how those allegations are false. Telegraph may not announce its position in the form of conclusions and leave it to the Court to make the connection or find the authority. *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)); *People v Bennett*, unpublished Opinion of the

Court of Appeals decided April 8, 2008, Docket No. 274390, p 3 (2008 Mich App LEXIS 715) ("We similarly decline to address whether the application of MCL 768.27a in this case violated defendant's right to due process. . . . [H]e devotes a single, short paragraph to this issue with no analysis and little citation to relevant authority. A party cannot assert a position and then leave it to this Court to search for authority to sustain or reject that position. (*sic*) or to unravel and elaborate for him his arguments." (citations omitted)). *Bennett*, p 3. After all, "[t]rial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388 (2008). Simply put, Telegraph has failed to present its arguments, and the Court need not divine the analysis or advocate on its behalf.

Likewise, Friedman argues that Telegraph was the first to breach the Management Agreement by its failure to maintain a sufficient balance in the General Account. But Friedman offers no evidence to support this allegation. There are no Affidavits attached to the Response, and Friedman provided no bank statements or other evidence to support its position that the allegations were true. A party cannot rely on conclusory allegations without evidence when requesting a summary disposition ruling. *Walters*, 481 Mich at 388.

Finally, Telegraph has named as Defendants Friedman Real Estate Management Company, Friedman Real Estate Management NE, LLC, Friedman Real Estate

Management PA, LLC, and David Friedman d/b/a Friedman Real Estate Management. The contract between the parties is between only Telegraph and Friedman Real Estate Management Company. Telegraph's only allegations regarding the remaining Defendants is that they may share common ownership and work out of the same address. Telegraph provides no legal authority for its argument, and Telegraph failed to provide any documentary evidence whatsoever in support of its allegation that the Defendants (other than Friedman) should be liable for the contract to which they are not parties. The Defendants, in Response, request dismissal of the remaining Defendants for Telegraph's failure to provide evidence to support its claim. Telegraph chose not to address the issue in its Reply. Because the moving party has failed to cite any authority to support its argument, the argument is deemed abandoned. See, e.g., *Mitcham v City of Detroit*, 355 Mich 182, 203 (1959); *Houghton v Keller*, 256 Mich App 336, 339-340 (2003); *People v Odom*, 327 Mich App 297, 311 (2019) ("As a preliminary matter, defendant has failed to identify any authority that requires a trial court to consider a motion for substitute counsel before it may consider any subsequently filed motion by the attorney who was the subject of the motion for substitution. Accordingly, defendant has abandoned this issue. See *People v Martin*, 271 Mich App 280, 315 (2006)"); MCR 2.119(A)(2) ("A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based"). After all, judges "are not like pigs, hunting for truffles" that might support a party's position. *Dibrell v City of Knoxville,* 984 F3d 1156, 1163 (CA 6 2021).

Based on the foregoing, summary disposition as to Friedman for Telegraph's breach of contract and as to Telegraph on Friedman's breach of contract pursuant to MCR 2.116(C)(10) is denied because there are genuine issues of material fact. Friedman's Motion pursuant to MCR 2.116(I)(2) as to Telegraph's claims for breach of contract against Friedman Real Estate Management NE, LLC, Friedman Real Estate Management PA, LLC, and David Friedman d/b/a Friedman Real Estate Management is granted.

VII

Summary Disposition under MCR 2.116(C)(10) of Telegraph's Claim for Unjust Enrichment (Complaint, Count V) and Friedman's Claim for Unjust Enrichment (Counter Complaint, Count II) is Warranted

A
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").

B
Analysis

The parties both agree that there are express contracts between the parties. Neither party makes any allegations in the Complaint or the Counter Complaint as to their unjust enrichment claims that are separate or unique from their respective claims under breach of contract. Accordingly, summary disposition of both claims for unjust enrichment is warranted.

Based on the foregoing, Telegraph's claim for unjust enrichment (Count V of the Complaint) and Friedman's claim for unjust enrichment (Count II of the Counter Complaint) are both dismissed under MCR 2.116(C)(10).

VIII
Summary Disposition under MCR 2.116(C)(10) as to Fraud is Not Warranted

A
Allegations

Telegraph makes the following allegations in its Complaint as to the Defendants' fraud:

> 45. Defendants, FRIEDMAN MANAGEMENT COMPANY, FRIEDMAN REAL ESTATE MANAGEMENT NE, LLC, FRIEDMAN REAL ESTATE MANAGEMENT PA, LLC, AND DAVID FRIEDMAN D/B/A FRIEDMAN REAL ESTATE MANAGEMENT, have intentionally, maliciously and without just cause engaged in misrepresentation of the contractual obligations and commitment to lawful and ethical business practices of Defendant corporations and limited liability companies.
>
> 46. Defendants intentionally made false representations of material facts to Plaintiff regarding the use of Plaintiff's funds to pay the Huntington Invoice.
>
> 47. Defendants knowingly and intentionally facilitated the transfer of Plaintiff's money to their control in the General Account but had no intention of using the money for its intended purpose.
>
> 48. Defendants' representations were false when they were made, or they were made recklessly, without knowing whether they were true.

> 49. Defendants knew their representations were false when they were made.
>
> 50. Defendants' actions and conduct were deliberate and committed with malice aforethought.
>
> 51. Defendants intended that Plaintiff rely on said representations and conduct.
>
> 52. Plaintiff relied on Defendants' representations and deceptive acts in authorizing the transfer of money to the General Account.
>
> 53. As a direct and proximate result of Defendants' false representations and deceptive conduct, Plaintiff suffered severe economic damages for the fraud procured as well as having to retain counsel to pursue this matter.
>
> [Complaint, pp 6-7.]

B
Law

"As a general rule, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew 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." *M&D, Inc. v McConkey*, 231 Mich App 22, 27 (1998).

C
Analysis

Telegraph asserts conclusory allegations that the Defendants committed fraud. Nowhere in the Complaint or in their Motion does Telegraph detail who specifically made a misrepresentation upon which Telegraph relied. Telegraph attaches emails to its Complaint and Motion, but it fails to identify any specific representation or individual from those emails. Telegraph also makes conclusory statements in its Motion that are simply untrue, such as: "There is no dispute that Defendants intentionally made false representations of material facts to Plaintiff regarding the use of Plaintiff's funds to pay the Huntington Invoice." [Motion, p 9.] Telegraph knows this statement to be false because the Defendants specifically denied these allegations in their Answer to the Complaint. Telegraph does not attach any evidence whatsoever to support their allegations. As noted above, Telegraph cannot leave it to this Court to find the evidence to support its allegations.

Even if Telegraph had submitted evidence as to specific representations, the intent of the person making the representation cannot be determined through summary disposition. A reviewing court may not weigh credibility or resolve a material factual dispute in deciding a dispositive motion. *Skinner v Square D Co*, 445 Mich 153, 161 (1994).

Because Telegraph has failed to establish that there is no issue as to any material fact, summary disposition under MCR 2.116(C)(10) as to Count II is not warranted.

IX
Summary Disposition under MCR 2.116(C)(10) as to Embezzlement is not Warranted

A
Allegations

Telegraph makes the following allegations in its Complaint as to the Defendants' embezzlement of Telegraph's funds:

> 55. As Managing Agent for Plaintiff, Telegraph Michigan LP, Defendants had a relationship of trust with Plaintiff, to manage the Subject Property in a manner not inconsistent with its legitimate business interests.
>
> 56. Defendants, deceitfully and without the consent of Plaintiff, converted assets of Plaintiff Telegraph Michigan LP for Defendants' own use and enjoyment.
>
> 57. Defendants wrongfully diverted funds from the General Account to themselves for unauthorized expenses.
>
> 58. Defendants acted with specific intent of defrauding and cheating Plaintiff out of funds which rightfully belonged to Plaintiff.
>
> 59. As a direct and proximate result of Defendants' illegal, wrongful, or tortious acts, Plaintiff has suffered severe damages.
>
> 60. Defendants are liable to Plaintiff for all of the injuries and damages sustained.
>
> [Complaint, p 8.]

B
Law

MCL 600.2919a[4] provides that "(1) a person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees: (a) Another person's stealing or embezzling property or converting property to the other person's own use."

C
Analysis

Again, Telegraph makes conclusory allegations that "Defendants have no valid defense" and "Defendants acted with specific intent." Yet Telegraph offers no documentary evidence to support its allegations. Telegraph does not address Friedman's defense that it was permitted to transfer funds under the Management Agreement. As noted above, simply telling the Court that the statement is false without explaining how or why the statement is false is insufficient. This Court is not the research assistance for the parties. Additionally, as noted above, this Court cannot assess credibility or subjective intent through summary disposition. Telegraph has failed to establish that there is no issue as to any material fact.

Based on the foregoing, Telegraph's Motion for Summary Disposition under MCR 2.116(C)(10) as to Count III for embezzlement is denied.

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[4] Telegraph improperly cites this statute as MCL 600.2919(1).

X
Summary Disposition under MCR 2.116(C)(10) as to Conversion is not Warranted

A
Allegations

Telegraph makes the following allegations in its Complaint as to the Defendants' conversion of Telegraph's funds:

> 62. Defendants wrongfully took control of Plaintiff's money in the General Account when the money was wrongfully misappropriated to Defendants.
>
> 63. The amount transferred to the General Account was for the sole and express purpose of paying the Huntington Construction Invoice.
>
> 64. Defendants have not distributed the money to Huntington Construction or returned it to Plaintiff; instead, they have converted the money to their own use and benefit.
>
> 65. Plaintiff has repeatedly demanded repayment of the money to which Plaintiff is entitled.
>
> 66. Defendants have both expressly and by silence, refused to return the subject money to Plaintiff.
>
> 67. The acts described above constitute an unlawful convers10n of Plaintiff's property, resulting in damages to Plaintiff for the balance owed on the Huntington Invoice.
>
> 68. Plaintiff is also entitled to treble damages pursuant to Michigan law.
>
> 69. As a direct and proximate result of Defendants' unlawful conversion, Plaintiff has suffered damages that were reasonably foreseeable by the Defendants and is entitled to recover a sum certain with treble damages.
>
> [Complaint, p 9.]

B
Law

"Under the common law, conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 346 (2015) (quotation marks and citations omitted).

C
Analysis

Again, Telegraph makes an assertion in its Motion that it knows to be false: "Defendants admitted to wrongfully taking control of Plaintiff's funds in the General Account and misappropriating the funds to themselves." [Motion, p 13.] While Telegraph categorizes the transactions as misappropriation, Friedman has categorically denied any wrongdoing. Representing to the Court that the Defendants have admitted this wrongdoing is not appropriate. Once again, Telegraph provides no evidence to support its allegations and does not address Friedman's defense to the allegation beyond stating it is untrue. Telegraph has failed to establish that there is no genuine issue as to any material fact.

Based on the foregoing, Telegraph's Motion for Summary Disposition under MCR 2.116(C)(10) as to Count IV for conversion is denied.

XI
Summary Disposition under MCR 2.116(C)(10) as to Breach of Fiduciary Duty is not Warranted

A
Allegations

Telegraph makes the following allegations in its Complaint as to the Defendants' breach of fiduciary duty:

> 75. Following Plaintiff's engagement of Defendants as Managing Agent for Plaintiff, Defendants became a fiduciary to Plaintiff and, as such, had a duty to act for Plaintiff's benefit.
>
> 76. Defendants have all operated in bad faith and have violated the confidence, trust, and reliance that a fiduciary owes to its principals.
>
> 77. Defendants' improper conduct has damaged Plaintiff, whose benefit they are obligated to serve, causing severe money damages.
>
> 78. Defendants are jointly and severally liable to Plaintiff for all their injuries and damages under the financial transactions in which they served as a fiduciary to Plaintiff.
>
> [Complaint, pp 10-11.]

B
Law

"To establish a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages caused by the breach of duty." *Highfield Beach at Lake Michigan v Sanderson*, 331 Mich App 636, 666

(2020). “A fiduciary owes a duty of good faith to his principal and is not permitted to act for himself at his principal’s expense during the course of his agency.” *Central Cartage Co v Fewless*, 232 Mich App 517, 524-25 (citations omitted).

C
Analysis

Much like Telegraph’s other claims, Telegraph makes conclusory allegations without evidence to support the allegations and fails to address Friedman’s defenses. Telegraph asserts that the relationship has been broken by the Defendants’ conduct, “thus establishing liability.” [Motion, p 11.] But Telegraph provides no authority for the conclusory assertion that breaking a relationship equates to liability for breach of fiduciary duties. Despite Friedman’s request to dismiss all but Friedman, and its denial of all material allegations, Telegraph again tells this Court that “Defendants” have admitted to this wrongdoing. Telegraph has failed to establish that there is no genuine issue as to any material fact.

Based on the foregoing, Telegraph’s Motion for Summary Disposition under MCR 2.116(C)(10) as to Count VI for breach of fiduciary duty is denied.

XII
Summary Disposition in Friedman's favor under MCR 2.116(I)(2) as to Successor Liability/Alter Ego (Count VIII) is Warranted

A
Allegations

Telegraph makes the following allegations in its Complaint as to the Defendants' successor liability or alter ego:

> 80. Defendants FRIEDMAN MANAGEMENT COMPANY, FRIEDMAN REAL ESTATE MANAGEMENT NE, LLC, FRIEDMAN REAL ESTATE MANAGEMENT PA, LLC AND DAVID FRIEDMAN D/B/A FRIEDMAN REAL ESTATE MANAGEMENT are merely agents or instrumentalities of Defendant FRIEDMAN MANAGEMENT COMPANY.
>
> 81. At all times relevant to this matter, all Defendants were operated out of the same address as Friedman Management Company.
>
> 82. As a business entity, "Friedman Real Estate Management" and Friedman Real Estate Management NE LLC are being used to commit a fraud or wrong.
>
> 83. There exists such a unity of interest and ownership between all Defendants that the separate personalities of the LLC Defendants, FRIEDMAN REAL ESTATE MANAGEMENT NE, LLC AND FRIEDMAN REAL ESTATE MANAGEMENT PA, LLC and corporate Defendant FRIEDMAN MANAGEMENT COMPANY no longer exist.
>
> 84. As such, an adherence to the fiction of a separate LLC existence would promote injustice or inequitable consequences: (*sic*)
>
> 85. Plaintiff has suffered injury and/or loss.
>
> 86. Defendants are jointly and severally liable to Plaintiff for all of its injuries and damages.
>
> [Complaint, pp 11-12]

B
Analysis

Telegraph provides no authority whatsoever as to its request that this Court deem non-parties to the contract liable as successors or alter egos. Not only does Telegraph fail to provide legal authority, but it also failed to provide any evidence whatsoever. Its conclusory statements are insufficient to establish liability, as noted by the Defendants in their Response. Telegraph did not address the argument in its Reply. Telegraph provided no authority and does not even assert any allegations of the non-contracting parties' actions.

Based on the foregoing, the Defendants' request for judgment under MCR 2.116(I)(2) is GRANTED.

ORDER

In light of the foregoing Opinion,

Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(9) as to all Counts is DENIED;

Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) and Defendants' request for dismissal under MCR 2.116(I)(2) as to Count I of Plaintiff's Complaint is DENIED, except that the Defendants' Motion under (I)(2) is GRANTED as to Friedman Real Estate Management NE, LLC, Friedman Real Estate Management PA, LLC, and David Friedman;

The Plaintiff's claims for unjust enrichment (Count V of the Complaint) and the Defendant's claims for unjust enrichment (Count II of the Counter Complaint) are each dismissed under MCR 2.116(C)(10);

Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) as to Counts II, III, IV, and VI is DENIED;

The Defendant's Motion for Summary Disposition pursuant to MCR 2.116(I)(2) as to the Plaintiff's claims for successor liability/alter ego (Count VII) is GRANTED; and

To the extent either party has requested an award of legal fees in their respective filings, such requests are denied for failure to provide any argument regarding such fees.

/s/ Michael Warren

HON. MICHAEL WARREN
CIRCUIT COURT JUDGE

SEAL OF THE 6TH CIRCUIT COURT
OAKLAND COUNTY MICHIGAN