

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

2024 JAN 22 PM 5:00

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

EZRA SCHOOLCRAFT,

Plaintiff,

v.

Civil Action No. 22-C-910

Presiding Judge: Joseph K. Reeder

Resolution Judge: Paul T. Farrell

JEFFREY ISNER and
PBC ENERGY, LLC,

Defendants.

**ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court this 22nd day of January 2024, upon Defendant Jeffrey Isner's Motion for Summary Judgment. The Plaintiff, Ezra Schoolcraft, by counsel, Michael B. Hissam, Esq., and the Defendant, Jeffrey Isner, by counsel, Steven R. Ruby, Esq., have fully briefed the issues. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This cause of action stems from disputes between Plaintiff Ezra Schoolcraft (hereinafter "Plaintiff" or "Schoolcraft") and Defendant Jeffrey Isner (hereinafter "Defendant" or "Isner") concerning a series of oil and gas companies they formed (along with other individuals). See Def's Mem., p. 1, 2. Relevant to the motion and to this civil action, those companies include Pillar Energy, LLC ("Pillar Energy"), Pillar Enterprises, LLC

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("Pillar Enterprises"), PBC Energy, LLC ("PBC"), Pillar Fund 1, LLC ("PF1"), Pillar Fund 2, LLC ("PF2"), and Sycamore Midstream, LLC ("Sycamore")(collectively, "the Companies").

2. Plaintiff and Defendant each own 50% of PBC and are PBC's only two employees. *See* Def's Resp., p. 3; *see also* Pl's Mem. in Supp. Of Mot., for Summ. J., p. 2. PBC has no operating agreement. *See* Pl's Mem. in Supp. Of Mot., for Summ. J., p. 2.
3. By way of background, in 2009, Plaintiff and Defendant incorporated their first oil and gas company, Pillar Energy. *See* Def's Mem., p. 2; *see also* Pl's Mem. in Supp. Of Mot., for Summ. J. In 2016, Plaintiff and Defendant formed PBC to acquire Blue Creek Gas Company ("Blue Creek"). *See* Def's Mem., p. 5.
4. Also in 2016, Pillar Energy acquired wells from Rubin Resources in a seller-financed transaction. *See* Def's Mem., p. 3-4. Under the agreement for the Rubin Resources transaction, the purchase price was \$4 million and Pillar Energy was to execute a promissory note for debt owed under the seller-financing. *See* Def's Mem., p. 4.
5. Relevant to this case are two promissory notes Defendant executed on behalf of Pillar Energy for the aforementioned Rubin Resources transaction: one executed July 7, 2016 (the "July Note") and one executed October 6, 2016 (the "October Note"). Under the July Note, Pillar Energy had the ability to defer any payments at its discretion, but was obligated to make a balloon payment of the unpaid amount after 15 years. The October Note, which Defendant avers Rubin Resources asked Defendant to sign, did not permit Pillar Energy to defer payments. *See* Def's Mem., p. 4. In July 2020, the holders of the October Note sent a letter to Pillar Energy claiming it was in default for failing to make certain payments. *Id.* at 5.

6. In an effort to resolve the alleged default, Pillar Energy executed an Amendment to Promissory Note and Agreement (the "Amendment"). See Def's Mem., p. 6. As part of that agreement, Pillar Energy had to tender \$200,000.00 and make annual payments. *Id.* However, Pillar Energy did not have the required \$200,000.00. See Def's Mem., p. 6; see also Pl's Mem. in Supp. Mot. for Summ. J., p. 5-6. To cover this amount, Defendant transferred \$400,000.00 from PBC to Pillar Energy, and returned it less than two months later. See Def's Mem., p. 6-7.
7. On a prior day, Defendant filed the instant Defendant Jeffrey Isner's Motion for Summary Judgment, moving this Court to enter summary judgment in his favor and dismiss Plaintiff's Complaint with prejudice. See Def's Mot., p. 1.
8. On November 3, 2023, Plaintiff filed Plaintiff's Response in Opposition to Defendant Jeffrey Isner's Motion for Summary Judgment, arguing disputes of material fact exist as to Defendant's conduct that prevent summary judgment. See Pl's Resp., p. 1. Further, Plaintiff avers there are no genuine issues of material fact concerning Defendant's PBC-related conduct, and summary judgment should instead be found in favor of Plaintiff. *Id.* at 20.
9. On a prior day, Defendant filed his Reply in Support of Defendant Jeffrey Isner's Motion for Summary Judgment.
10. The Court finds the issue is now ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for summary judgment. Motions for summary judgment are governed by Rule 56, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c). West Virginia courts do “not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law.” *Alpine Property Owners Ass’n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

Therefore, “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied “even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then “the burden of production shifts to the nonmoving party ‘who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).’” *Id.* at 60.

CONCLUSIONS OF LAW

Here, Plaintiff Defendant seeks summary judgment in his favor on Plaintiff’s Complaint. First, Defendant seeks summary judgment with regard to Counts I (Breach of Fiduciary Duties

Concerning Pillar Energy and Pillar Enterprises) and VI (Breach of Contract). *See* Def's Mem., p. 11-14. Next, Defendant seeks summary judgment as to Count II (Breach of Fiduciary Duties Concerning PBC). *Id.* at 14-15. Then, Defendant seeks summary judgment as to Counts IV (Aiding and Abetting Breach of Fiduciary Duties) and XI (Civil Conspiracy). *Id.* at 15-16. Also, Defendant seeks summary judgment as to Counts VIII (Fraud) and IX (Intentional Misrepresentation). *Id.* at 17-19. Next, Defendant argues summary judgment should be awarded in his favor as to Count X (Unjust Enrichment). *Id.* at 19. Finally, Defendant seeks summary judgment as to Counts XII (Statutory Dissociation from PBC) and XIII (Statutory Dissolution of PBC). *Id.* at 19-20. The Court will take the issues up in turn.

Counts I (Breach of Fiduciary Duties Concerning Pillar Energy and Pillar Enterprises) and VI (Breach of Contract)

First, the Court examines Counts I (Breach of Fiduciary Duties Concerning Pillar Energy and Pillar Enterprises) and VI (Breach of Contract). *See* Def's Mem., p. 11-14.

West Virginia Code § 31B-4-409 is part of the Uniform Limited Liability Company Act, and governs general standards of a member's and manager's conduct. West Virginia Code § 31B-4-409(c) provides:

A member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law.

W. Va. Code § 31B-4-409.

The Pillar Energy and Pillar Enterprises operating agreements provide, at §7(b), that members and managers are not liable for any act or omission performed in good faith in a manner reasonably believed to be within the scope of authority granted by the operating

agreements, provided that the member or manager was not guilty of gross negligence, willful misconduct, or breach of fiduciary duty. Section 7(b) states that "[a]ny act or omission performed or omitted by such Member or Manager in good faith on advice of counsel to the Company shall be conclusively deemed to have been performed or omitted in good faith. See Def's Mem., Exs. B and C; *see also* Def's Mem., p. 12.

Defendant argues Defendant and Pillar Enterprises invoked the involuntary transfer provisions on the advice of the Companies' counsel and Advisory Board, providing citations to the evidentiary record, including written communications drafted by counsel and documents effectuating the transfer drafted by counsel, of these individuals' involvement in the decision. See Def's Mem., p. 12. Further, Defendant provided evidence from the record of Plaintiff declaring he wants out of the Companies, decreasing his participation in the businesses, and stating that he would not resume his prior level of participation.

Here, the Court considers issues of fact remain as to whether or not Defendant's actions were violative of the fiduciary duties owed to Pillar Energy and Pillar Enterprises and whether they were in good faith, as required by the subject agreement. Specifically, here, issues of fact remain as to whether Defendant's acts were reasonable given the circumstances, where record evidence supports the argument that Plaintiff stated he wanted out of the Companies, reduced his level of participation, and refused to resume his prior level of participation. Likewise, the jury could hear evidence surrounding the Blue Creek Agreement, including the transfer of funds from PBC to Pillar Energy and the return of such funds, in evaluating whether or not Defendant acted in the best interest of PBC in violation of West Virginia Code or the applicable agreement. It is appropriate for the jury, as factfinder, to determine whether Defendant committed misconduct

and if so, if it was committed willfully, or if the Defendant acted in good faith. Accordingly, this motion is DENIED as to Counts I and VI.

Count II (Breach of Fiduciary Duties Concerning PBC)

Next, the Court examines Count II. Like in the previous section, the Court applies West Virginia Code § 31B-4-409.

West Virginia Code § 31B-4-409 is part of the Uniform Limited Liability Company Act, and governs general standards of a member's and manager's conduct. West Virginia Code § 31B-4-409(c) provides:

A member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law.

W. Va. Code § 31B-4-409.

Here, Count II surrounds Plaintiff's allegations that Defendant took away Plaintiff's access to PBC bank accounts and the cessation of Plaintiff's monthly payments, described by Plaintiff as guaranteed payments and by Defendant as payments paying him as an employee of PBC. Defendant avers the removal from the bank accounts was done on the advice of counsel and the Advisory Board after Plaintiff announced he wanted to leave the companies. See Def's Mem., p. 14. Defendant further avers the cessation of monthly payments was done on the advice of counsel because Plaintiff was no longer active in the company. *Id.*

Taking into consideration the positions of the parties, and the evidence in the record, the Court cannot conclude that no genuine issue of material fact exists. Like the Court's conclusion in Plaintiff's Motion for Partial Summary Judgment regarding Count II, the Court concludes that the evidence regarding Defendant's relying on the advice of counsel and an advisory board could

be evidence against acting in a manner that is "grossly negligent", reckless, or constituting "intentional misconduct" or a "knowing violation of law". A fact finder could also consider evidence in the record that Plaintiff stated he wanted out of the Companies, drastically reduced his level of communication and coordination with Defendant, and refused to resume his prior level of participation. Accordingly, the Court finds the record presents issues of fact as to Count II and the motion is DENIED as to Count II.

Counts IV (Aiding and Abetting Breach of Fiduciary Duties) and XI (Civil Conspiracy)

Next, the Court examines Counts IV (Aiding and Abetting Breach of Fiduciary Duties) and XI (Civil Conspiracy).

Evidence in the record, Plaintiff's own deposition testimony, supports summary judgment as to these claims. Plaintiff testified that he does not believe that anyone affiliated with the Companies did anything wrong except for Defendant Isner. See Reply, p. 10. The Court concludes it would be impossible to claim that Isner aided and abetted another's fiduciary duty or conspired with others to wrongfully deprive him of his interests while claiming that others did nothing wrong.

Although Plaintiff argues that "not every member of a conspiracy must be aware of every action taken in furtherance of it", each member must share a common plan to do something unlawful. *Dunn v. Rockwell*, 689 S.E.2d 255, 268-69 (2009); see also Reply, p. 10. Because evidence in the record shows that Plaintiff claims Isner is the only person who did anything wrong, others could not have shared a requisite common plan to do something unlawful, and summary judgment must be granted as to his claims for aiding, abetting, and conspiracy. Accordingly, the Court finds the Defendant's Motion for Summary Judgment must be

GRANTED as to Counts IV (Aiding and Abetting Breach of Fiduciary Duties) and XI (Civil Conspiracy).

Counts VIII (Fraud) and IX (Intentional Misrepresentation)

Next, the Court examines Counts VIII (Fraud) and IX (Intentional Misrepresentation). See Def's Mem., p. 17-19. In addition to challenging the causes of action on the merits, Defendant argues these counts are time-barred under the applicable two-year statute of limitations. *Id.* at 19. Fraud claims have a two-year statute of limitations. *Dunn v. Rockwell*, 689 S.E.2d 255, 268 (2009). "[S]tatutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception." *Adkins v. Clark*, 247 W. Va. 128, 875 S.E.2d 266 (2022).

Plaintiff argues the continuing tort doctrine, the doctrines of equitable tolling and estoppel excuse his failure to file suit within the two-year statute of limitations, arguing Plaintiff made Defendant aware of potential claims as early as November 2021 and that he and Defendant Isner engaged in possible resolutions. See Pl's Resp., p. 19.

A continuing tort requires a showing of a repetitious tortious conduct, not just alleged continuing harm. The West Virginia Supreme Court of Appeals has held that "a wrongful act with consequential continuing damages is not a continuing tort." *Ricottilli v. Summersville Mem'l Hosp.*, 188 W. Va. 674, 677, 425 S.E.2d 629, 632 (1992) citing *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990).

The West Virginia Supreme Court of Appeals has differentiated equitable tolling from equitable estoppel:

"[T]wo types of equitable modification [regarding the statute of limitations] are generally recognized: '(1) equitable tolling, which often focuses on the plaintiff's excusable ignorance of the

limitations period and lack of prejudice to the defendant and (2) equitable estoppel, which usually focuses on the actions of the defendant.' "... "As to equitable estoppel, we have held that '[i]n order to create an estoppel to plead the statute of limitations the party seeking to maintain the action must show that he was induced to refrain from bringing his action within the statutory period by some affirmative act or conduct of the defendant or his agent and that he relied upon such act or conduct to his detriment'".

Adkins v. Clark, 247 W. Va. 128, 134, 875 S.E.2d 266, 272 (2022).

Further, "[t]he general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice." Syl. pt. 2, *Hunter v. Christian*, 191 W. Va. 390, 391, 446 S.E.2d 177, 178 (1994) citing Syl. pt. 6, *Stuart v. Lake Washington Realty Corp.*, 141 W. Va. 627, 92 S.E.2d 891 (1956). The doctrine of estoppel should be applied cautiously and only when equity clearly requires it to be done." Syl. Pt. 1, *Hunter v. Christian*, 191 W. Va. 390, 391, 446 S.E.2d 177, 178 (1994) citing Syl. pt. 3, *Humble Oil & Refining Co. v. Lane*, 152 W. Va. 578, 165 S.E.2d 379 (1969).

The fraud and misrepresentation counts surround the October 2016 Note. Defendant has provided evidence from the record wherein Defendant admitted Plaintiff disclosed the October 2016 Note to him on or before July 1, 2020. See Def's Mem., p. 19; see also Def's Mem., Exs. J, K. Defendant did not file this action until November 2022, several months after the statute of limitations had expired. The Court therefore examines whether Plaintiff's failure to file within this time frame should be excuse under the aforementioned doctrines.

First, the Court concludes Plaintiff has shown no continuous tortious conduct, merely alleging the harm stemming from the October 2016 Note is continuing, making the continuing tort doctrine inapplicable here. Further, with regard Plaintiff's argument that its failure to file suit within the two-year statute of limitations is excused by equitable tolling and estoppel, the Court concludes Plaintiff did not present any evidence to show excusable ignorance of the limitations period, making equitable tolling inapplicable. Rather, Plaintiff engaged legal counsel as early as November 2021. *See* Reply, p. 15. With regard to equitable estoppel, Plaintiff has provided no evidence that the conduct of Defendant induced Plaintiff to refrain from bringing his action within the statutory period. *Adkins v. Clark*, 247 W. Va. 128, 134, 875 S.E.2d 266, 272 (2022). Plaintiff averred the two were in settlement negotiations until the time of the filing of the suit, but there is no evidence that Defendant ever offered to waive the statute of limitations to allow negotiations to continue or asked Defendant to refrain from filing suit. *See* Reply, p. 15.

The Court does not find Plaintiff's argument with regard to equitable tolling and presuit resolution discussions persuasive. For all of these reasons, the Court finds the Defendant's Motion for Summary Judgment must be GRANTED as to Counts VIII (Fraud) and IX (Intentional Misrepresentation).

Count X (Unjust Enrichment)

Defendant argues Plaintiff's unjust enrichment count is based on an express contract, the operating agreement of Pillar Energy, which Defendant invoked the voluntary transfer provision of. *See* Def's Mem., p. 19. Plaintiff argues there is at least a genuine issue of material fact remaining concerning whether or not Defendant has "inequitably retained his portion" of the "deferred salary owed to [Plaintiff]". *See* Pl's Resp., p. 17. Plaintiff argues that one of the reasons Defendant gave him for not paying Plaintiff "that money [was] because of Pillar

Energy's "financial position", but that evidence in the record shows that Defendant permitted Pillar Energy to recently pay more than \$1 million in deferred management fee payments to Pillar Enterprises and that Pillar Energy still has millions of dollars in cash reserves. *Id.*

Like this Court found in its analysis of Count X in Plaintiff's Motion for Partial Summary Judgment, here, the Court considers that PBC, not Defendant, was the payor of the salaries and retains the money at issue here. Although Plaintiff's employee or salary payments or deferred compensation payments (the Court notes the parties refer to these payments differently) were discontinued, there has been no evidence proffered that Defendant personally has retained any deferred compensation. See Reply, p. 15-16. For this reason, the Court finds there can be no unjust enrichment to Defendant. Accordingly, Defendant's motion is GRANTED as to Count X.

Counts XII (Statutory Dissociation from PBC) and XIII (Statutory Dissolution of PBC)

Defendant argues he is entitled to summary judgment on Counts XII and XIII, because there is no conduct that would justify expelling Defendant from or dissolving PBC, as there is no evidence that Defendant has done anything that has adversely and materially affected the company's business. See Def's Mem., p. 19-20. Defendant also argues there are less drastic remedies available, such as awarding Plaintiff backpay plus interest from PBC if a determination is made that Plaintiff is entitled to monthly salary payments from PBC. See Def's Resp. to Pl's Mot. for Summ. J., p. 14. In response, Plaintiff incorporates his own motion for summary judgment. See Pl's Resp., p. 15. Plaintiff argues Defendant's conduct, including hiding money and transferring money he knew risked the agreement under which PBC acquired its primary assets, materially affected PBC's business. See Pl's Mem. in Supp. of Summ. J., p. 13. Plaintiff also argues in support his argument as to Count XII that Defendant has breached the duties he owes to Plaintiff and to PBC. *Id.* In support of his argument as to Count XIII, Plaintiff argues

because of the actions discussed in the memorandum and Defendant's alleged refusal to permit Plaintiff to be involved with PBC, statutory dissolution is appropriate under West Virginia Code §31B-8-801(5)(v), because Defendant's actions makes is not reasonably practicable to carry on PBC's business with Defendant. *Id.* at 16.

West Virginia Code § 31B-6-601(6) provides that "[o]n application by the company or another member, the member's expulsion by judicial determination..." W. Va. Code § 31B-6-601 (West). Likewise, West Virginia Code § 31B-8-801 provides that a limited liability company may be dissolved upon a judicial determination that "[a] member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member". W. Va. Code § 31B-8-801 (West).

Defendant argues no genuine issue of material fact remains as to these counts. Specifically, Defendant argues that summary judgment should be granted in his favor and that this Court should not make the judicial determination to expel Defendant from PBC under § 31B-6-601(6) or to dissolve PBC under § 31B-8-801. *See* Def's Mot., p. 20.

The Court concludes that there are issues of fact, as described in this Order, for the factfinder to determine. The Court cannot make a judicial determination on the pleadings that Defendant's conduct necessitates his removal from PBC or the dissolution of PBC when so many issues to the heart of that claim are to be decided by the jury. For this reason, the motion is **DENIED** as to these counts.

CONCLUSION

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Defendant Jeffrey Isner's Motion for Summary Judgment is hereby **GRANTED IN PART AND DENIED IN PART**.

The Clerk is directed to enter this Order as of the date first hereinabove appearing, and send attested copies to all counsel of record, as well as to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 21st day of January 2024.

JUDGE JOSEPH K. REEDER
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION

1/23/2024
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