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

COREY POTTER,
Plaintiff, Case No. 21-2653 CB

v HON. BRIAN K. KIRKHAM

JESSE POTTER, LATOSHA POTTER,
And SIMPOTS ENTERPRISES, LLC,
A Michigan limited liability company,
Defendants

FINDINGS OF FACT, CONCLUSION OF LAW AND VERDICT

The within case came before the court pursuant to the Complaint Plaintiff filed on September 24, 2021. The action was filed alleging seven counts. Plaintiff asserted: Count I-Breach of Agreement, Count II-Promissory Estoppel, Count III-Fraud, Count IV- Accounting, Count V-Unjust Enrichment, Count VI-Quantum Meruit, Court VII-Statutory Conversion, and Count VIII-Declaratory Action.

This case was tried on May 26-27, 2022. Considerable exhibits were admitted and testimony was taken. The case stems from an alleged formation of a business partnership, however neither of the parties submitted a contract for the establishment of the business relationship.

This case reflects the old adage; “that an ounce of prevention is worth more than a pound of cure”.

FINDINGS OF FACT

Pursuant to MCR 2.517(A)(1), in an action tried without a jury, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." The Court must render "[b]rief, definite, and pertinent findings and conclusions on the contested matters" that may take the form of a "a written opinion." See MCR 2.517(A)(2)&(3). Accordingly, the Court shall begin with findings of fact, followed by conclusions of law, and ultimately the verdict.

The Plaintiff and Defendant, Jesse Potter (hereinafter "JP"), are brothers. Defendant, Latosha Potter (hereinafter "LP"), is the wife of JP and the sister-in-law of Plaintiff.

The brothers had discussed operating a business together for many years. In 2019, while attending a family wedding, the parties met and discussed operating a marijuana dispensary if personal use marijuana became legal in Michigan. Thereafter, marijuana was legalized in Michigan.

On July 24, 2019, the parties met with attorney, Craig Aronoff and his assistant at a Ruth's Chris Steak House in Ann Arbor to discuss how they would proceed in the formation of a business enterprise. The Defendants engaged Mr. Aronoff to assist them in creating Simpots Enterprises, LLC (hereinafter "Simpots"), and J-Lee Investment Property, LLC (hereinafter "J-Lee"), to obtain the necessary State and local licenses, authorizations and permits to operate a retail marijuana dispensary in the City of Battle Creek.

At the meeting with Mr. Arnoff, there was no discussion about the interest either party was going to hold in the business but, the parties did talk about being partners. Mr. Aronoff testified that he viewed the parties as partners. He did acknowledge that he had no recollection of anyone saying they were 50% partners, however the parties talked as if they were going to be partners. Mr. Aronoff also testified that he thought that the Defendants were going to be investors.

Mr. Aronoff first formed Simpots on August 6, 2019 by filing the Articles of Organization. See Plaintiff's Exhibit 5. An Operating Agreement was filed on the same date listing the Defendants as each 50% owners. Mr. Aronoff then formed J-Lee and prepared an Operating Agreement in November 2019 which listed all

the parties holding a one-third interest in the LLC. The Defendants signed the Operating Agreement but Plaintiff was out of town and JP signed on his behalf, claiming that Plaintiff had authorized him to do so. Plaintiff informed the Defendants that he did not want an interest in J-Lee and was subsequently removed. In the initial filing the parties were listed as having a one-third interest. When Plaintiff was removed, the Defendants each held a one-half interest.

In the initial meeting with Mr. Aronoff, it was disclosed that the Plaintiff had a criminal record and to avoid any problems with prequalification to acquire a license the Plaintiff would not appear as an owner of the business.

It must be noted that in all the State and local filings and the business formation documents, with the exception of the initial Operating Agreement for J-Lee, the Plaintiff does not appear on any of the business documents. See Plaintiff's Exhibits 5,7,13-23.

When the parties first discussed this business venture, it was believed that they could invest $450,000.00 to open the business. The parties soon found out how naive their estimate was and the Plaintiff ultimately invested $302,823.98 and the Defendants invested $577,000.00. Additionally, the Defendants, JP and LP acquired a loan for $435,000.00 and LP acquired a loan for $100,000.00. These loans were reflected in Defendant's Exhibits F and G. The Defendants also borrowed money from LP's mother and grandmother totaling $200.000.00.

At the time the businesses where formed the parties all began to search for suitable property where the business could be located. In March 2020, J-Lee acquired undeveloped land and thereafter the parties commenced to clear the land and construct a building on the property. All the parties were engaged in various parts of the planning, construction, and furnishing of the business.

The Defendants had no prior experience in marijuana operations and the Plaintiff's experience was limited to growing marijuana. It became apparent after the business opened in March 2021 that with the parties' backgrounds, notwithstanding how each were qualified in their own right, they were ill-equipped to operate this business. Each of the parties have pointed fingers at the other for the lack of success in the initial year of operation, but it is blatantly obvious that the deterioration in the parties' relationship had a direct impact on the business.

The parties hired Jayson Prochet, a cannabis consultant, to view their operations and make recommendations to improve profitability. Mr. Prochet testified that most marijuana operations make $10.000.00 per day while the Defendants business was making half that amount. The parties dispute whether Mr. Prochet's recommendations were implemented.

The Plaintiff alleges that he was not provided his one-half interest in the business and filed suit. Defendants assert that the Plaintiff was never promised a one-half interest and further that the Plaintiff failed to perform his obligations to the business.

Unfortunately, a reading of Plaintiff's Exhibits 25-28 and Defendant's Exhibit H, demonstrate not only a deterioration of a business relationship, but worse, the personal relationship of the parties as well.

CONCLUSIONS OF LAW

I. A. Breach of Contract

The Plaintiff's principal claim as contained in Count I alleges a breach of contract cause of action. The essential elements of contract formation are: (1) parties competent to contract, (2) proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Detroit Trust Co v Struggles,* 289 Mich 595 (1939). In the instant case the parties were all of full age, of sound mind and not under any restraints and therefore competent to contract. *In re Meredith's Estate,* 275 Mich 278, (1936).

The court notes that in the instant case neither party has alleged nor produced a written contract. The lack of a written agreement causes substantial problems for the court in determining the aspects of the parties' agreement.

Oral or verbal contracts can be formed and enforced just like written contracts. *Stran-Johnson Const Co v Riverview Furniture Store,* 227 Mich 55, 67 (1924).

Oral agreements may be demonstrated by the course of dealing and performance between the contracting parties. *State Bank of Standish v Curry,* 442 Mich 76, 86 (1993).

As a general rule, contracts do not need to be in writing to be enforceable,

> When the minds of the parties have met, when an offer has been made by one and accepted by the other, a contract is thereby entered into, unless required by some positive law, it need not be reduced to writing in order to be binding on the parties. *Langburn v Sifford,* 216 Mich 153, 154 (1921).

In Michigan, a contract can be either express or implied. An express contract occurs where the parties declare the terms of an express contract either orally or in writing. *See, Rood v General Dynamics Corp,* 444 Mich 107 (1993). When the parties manifest their agreement by conduct, the agreement is an "implied-in-fact" contract. *Dolan v Continental Airlines/Continental Express,* 454 Mich 373 (1997). An implied-in-fact contract arises from circumstantial proof of an agreement, including a meeting of the minds and an intent to contract. *Erickson v Goodell Oil Co.* 384 Mich 207 (1970).

In this case evidence of a contract is both expressed and implied.

There is no dispute that the formation of a business entity is a proper subject matter for the parties to contract.

The parties in this case discussed forming a business entity at the May 2019 wedding meeting and thereafter met with Attorney Craig Arnoff to begin the process and complete the paperwork to get the business formed and operational. For the reason set forth in the Statement of Facts the Plaintiff did not want to appear on the paperwork forming the business. Plaintiff was originally on the Operating Agreement for J-Lee as a member holding a 33.3% interest but asked to be removed from the Operating Agreement.

The formation of a contract requires an offer and acceptance. The parties must have a "meeting of the minds" to form a contract. *Quality Prods &Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 362 (2003). The meeting of the minds

may be established by oral statements and the conduct of the parties. See, Rood, supra at 119. A meeting of the minds is assessed by an objective standard. *Rowe v Montgomery Ward & Co,* 437 Mich 627 (1991).

To determine the intent of the parties, the court can look to the "expressed words of the parties and their visible acts". *Goldman v Century Ins Co,* 354 Mich 528, 535 (1958). This is especially true in oral contracts where the parol evidence rule does not impair consideration of extrinsic facts. *Redinger v Standard Oil Co,* 6 Mich App 74 (1967).

After the Arnoff meeting, the parties took steps to form the business entity, sought a location for the business and all invested money to construct the building. The monies invested by the parties is reflected in Defendant's Exhibit E. It is noted that all monies contributed by the parties are listed as deposits and treated the same. In contrast, money loaned from other family members are designated as loans. On one occasion, Plaintiff was repaid $10.000.00 which was not accounted for as a loan repayment but handled as would a repayment to a business partner.

LP wrote Plaintiff that each of the parties own 1/3 interest in the business. Page 12, Dec. 19, 2019, Defendant's Exhibit H, JP wrote, "It's was just saying we our in agreement to give you 50 percent ownership once things were met bruh that's all. If you want 50 ownership right now than just get a loan for 500k and you will be 50%owner today". Exhibit H pg. 52. JP on April 23, 2021 wrote "Us owners need to meet anyway to see where thing are bruh…..agreed. Exhibit H pg. 96. On May 16, 2021 JP wrote, "We said and I'm talking about me and you, that we would get this loan paid off ASAP then the contract would be drawn up for the 50/50 percent partnership,". Exhibit H pg. 113. On June 1, 2021 JP wrote "do your job to secure your 50% profits". Id. pg. 164.

On June 1, 2021 Plaintiff wrote, "3 partners that need to make some fast decisions." Exhibit H pg. 131. Later JP writes, "you got a sweet deal., only investing less then a third and will be getting 50%of all profits dam bruh." Exhibit H pg. 157.

When the communication of the parties deteriorated and progress was not being made to resolve the disagreements between the parties, Plaintiff sent a Terms Sheet, identified as Defendant's Exhibit I, to Defendants. The Terms Sheet

delineates that Plaintiff will hold a 50 % interest in the business and includes other provisions that all the parties testified had never been discussed. The Defendants rely upon the concluding paragraph of the Terms Sheet as repudiation of any Agreement of the parties. The paragraph provides:

> This Terms Sheet constitutes the binding agreement of the Owners upon execution and acceptance by all Owners; If the parties are unable to reach an agreement on the terms of the Documents described above within thirty (30) days after the Effective Date, the agreement represented by this Terms Sheet shall terminate, and the Owners shall have no further obligation to each other.

The Terms Sheet was sent to the Defendants on October 4, 2020. The parties had brief text discussion concerning the Terms Sheet but never executed nor revised it. Notwithstanding no agreement to the Terms Sheet, the parties continued to operate as they had before. The parties continued to complete construction, ready the business for opening, and contribute money for expenses.

Acceptance sufficient to create a contract arises where the individual to whom on offer is extended manifests an intent to be bound by the offer. *Hergenreder v Biskford Senior Living Group, LLC,* 656 F3d 411, 417 (6th Cir 2011). Acceptance may be made through written or spoken words or by other acts or conduct. *Ludowici-Celadon Co v McKinley,* 307 Mich 149 (1943).

There was clearly conduct that would constitute acceptance sufficient to form a contract.

The more difficult question in this case is, what were the terms of the agreement between the parties. The best evidence of the parties' intent is the language of the contract itself. *Smith v Physicians Health Plan,* 444 Mich 743 (1994). Because the parties do not have a written contract the court must resort to consideration of the parties' actions.

> "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in

the circumstances is supplied by the court."
Rasheed v Chrysler Corp, 445 Mich 109 (1994)
(quoting Restatement (Second) of Contracts section 204).

In *Calhoun County v Blue Cross & Blue Shield,* 297 Mich App 1 (2012), the court of appeals held that a contract's failure to reference a specific dollar amount for a fee does not automatically make the fee unenforceable.

To interpret a contract, a court's obligation is to determine the intent of the contracting parties. *Woodbury v Res-Care Premier Inc,* 295 Mich App 232, 244 (2012).

LP testified that she was not going to give Plaintiff an interest in the business until she knew the total costs. She further testified that she "couldn't give him an interest until knew total dollar amount". LP then testified that she thought Plaintiff would by given 1/3 of the profit. The parties admitted Defendant's Exhibit H, the texts between them. On page 12, Dec. 19, 2019, LP wrote, "If it cost $500,000, then we will say each of own 33.3% of the business. So you come up with $167,000 towards the building and we will come up with $330,000."

Plaintiff responded that the agreement was for 50/50. Plaintiff wrote further, "If I am not 50% of this just drop me what is left out the 50 k and I will just step aside and let u guys do it." Id. at pg 13. JP then questioned whether Plaintiff thought it was fair for him to contribute $150,000 while Defendants were contributing $600,000.

The parties repeatedly addressed and reiterated their positions concerning their shares. However, the parties never came to a meeting of the minds as to the respective interest. The Plaintiff is equally at fault for any confusion on this matter. If the Plaintiff would have withdrawn on Dec. 19, 2019 as he threatened to do the parties would not be in the position they found themselves years later.

In view of the extremely conflicting evidence and the lack of a meeting of the minds as to the percentage interest in the business, the court will utilize its equitable power to determine the intent of the parties.

The parties were initially going to each contribute one-third of the investment in the business but in the end Plaintiff contributed 34% of the cash, while Defendants also acquired $535,000 in loans. The court will determine that the

respective shares of the parties are each 33.3%, consistent with their original agreement and their respective investments.

B. PROMISSORY ESTOPPEL

Plaintiff in Count II claims a cause of action based upon the doctrine of promissory estoppel. The doctrine of promissory estoppel is set forth in Restatement (Second) of Contracts section 90(1) which provides:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Courts have employed a four-prong test to establish whether the doctrine of promissory estoppel applies:

1. Was there a promise?
2. Was the promise one that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promise?
3. Did the promise induce such reliance or forbearance?
4. Will injustice be avoided only by enforcing the promise?

Zeremba Equip v Harcon Nat'l Inc Co, 280 Mich App 16, (2008).

Promissory Estoppel is a substitute for consideration and is not a separate cause of action.

An individual's action or forbearance must be reasonable or promissory estoppel does not apply. *State Bank of Standish v Curry,* 442 Mich 76 (1993). The promisee must have actually relied. Id. Finally, would injustice be avoided only by enforcing the promise? The court considered the doctrine of promissory estoppel in its ruling on Count I and will not reiterate it herein. Suffice it to say

that sufficient promises were made and acted upon to the Plaintiffs detriment if not enforced.

C. FRAUD

A common-law claim of fraud requires:

1. That defendant made a material representation:
2. The representation was false;
3. The defendant knew it was false when it was made or made it recklessly, without knowledge of its truth and as a positive assertion:
4. The representation was made with the intention to induce reliance by the plaintiff;
5. The plaintiff acted in reliance upon it; and
6. The plaintiff suffered injury.

Hord v Environmental Research Inst, 463 Mich 399, 404 (2000); *Kassab v Michigan Basic Prop Ins Ass'n,* 441 Mich 433, 442 (1992).

Michigan has also recognized a claim for innocent misrepresentation for over a century. *United State Fid & Guar Co v Black,* 412 Mich 99 (1981). Michigan also recognizes negligent misrepresentation and silent fraud. Plaintiff has not alleged a claim for innocent, negligent or silent fraud and as a result the court will not address those cause of actions.

As set forth herein, the defendant must have made a representation that was false and known to be false when it was made. Hord, supra. The record in the instant case is devoid of evidence that Defendants made a false statement knowing it to be false when made. At best, it can be alleged that the Defendant, JP, made statements of intention which are not actionable. *Van Camp v VanCamp,* 291 Mich 688 (1939).

Michigan requires that a claim of fraud be proved by "clear, satisfactory and convincing" evidence. *Cooper v Auto Club Ins Ass'n,* 481 Mich 399 (2008). This principle was reiterated by the Supreme Court in *Flynn v Korneffel,* 4521 Mich 186 (1996).

The court required that parties file Proposed Findings of Fact and Conclusions of Law. Plaintiff did file Conclusions of Law but failed to address his claim for Fraud. A party cannot simply announce a position and leave it to the court to find support. "Trial Courts are not the research assistants of the litigants; the parties have a duty to fully present legal arguments for its resolution of their disputes." *Walters v Nadell,* 481 Mich 377, 388 (2008).

Plaintiff has failed to sustain his burden of proof on his claim for fraud.

D. ACCOUNTING

Plaintiff has made a claim for an accounting. The business, Simpots, LLC, was formed under the Michigan limited liability company act, being MCL 450.4101 et. seq.. Pursuant to MCL 450.4503, a member of a limited liability company shall be entitled to a copy of the annual financial statements, a current state of the company's financial condition and may inspect other information regarding the company's affairs.

In view of the court's finding on Count I, Plaintiff would be entitled to an accounting as required under the Michigan limited liability company act.

E. UNJUST ENRICHMENT AND QUANTUM MERUIT

Plaintiff has asserted a claim for Unjust Enrichment in Count V and Quantum Meruit in Count VI. In view of the court finding the existence of a contract in Count I, the claims in Count V and Count VI are moot.

F. STATUTORY CONVERSION

Plaintiff claims that Defendants converted "money and other consideration" as the basis for Plaintiff's claim under MCL 600.2919a(1) which provides that a person damaged as a result of: "Another person's stealing or embezzling property or converting property to the other person's own use" is entitled to treble damages.

The Plaintiff must prove that the Defendants stole, embezzled or converted property to their own use. The Plaintiff must show that the Defendant employed the converted property for some purpose personal to the Defendants. *Aroma Wines & Equip Inc v Columbian Distrib. Servs. Inc.,* 497 Mich 337 (2015).

Plaintiff in his Complaint alleges, "79. Defendants' accepted Mr. Potter's money and other consideration but have not tendered a 50% ownership interest in the dispensary to Mr. Potter." In Defendants' Answer they state, "Defendants admit Plaintiff loaned substantial funds to Simpots, which loan Defendants fully intend to repay with interest." In Defendants' Trial Brief and at trial, they acknowledge that Plaintiff invested monies in the business that would be repaid with interest. Additionally, all parties admit that Plaintiff voluntarily contributed funds and paid expenses on behalf of the business.

Plaintiff asserts, in his Trial Brief, "Mr. Potter gave the Defendants over $300,000 as a capital contribution. The Defendants have denied Mr. Potter ownership of the company and have held Mr. Potter's funds for their own personal and /or business use. In essence, the Defendants have converted Mr. Potter's funds". (Emphasis added).

As set forth herein, there is ample dispute between the parties as to the salient facts in the case. Plaintiff fails to sustain his burden of proof, where he "in essence" asserts a conversion without proof of the same.

The court finds no cause of action on this count.

G. DECLARATORY ACTION

Plaintiff seeks declaratory judgment pursuant to MCR 2.605(A). The court has granted Plaintiff such relief in Count I. The parties shall take all action required to implement the Court's ruling on Count I.

H. AFFIRMATIVE DEFENSES

Defendants allege that the Plaintiff's claim is barred by the Statute of Frauds which requires that certain contracts must be in writing. The court entered a Case Scheduling Order that required that the parties submit a Proposed Findings of Fact and Conclusion of Law. Defendant failed to submit a Proposed Findings of Fact and Conclusion of Law and thus their Statute of Frauds defense is waived.

Additionally, Defendants failed to pursue this Affirmative Defense in their Trial Brief and failed to cite appropriate authority or cogently analyze the same and therefore waived and abandoned this defense. The court has previously held that 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". *Houghton v Keller,* 256 Mich App 336, 339-340 (2003).

Notwithstanding the Defendants' waivers, no evidence was presented to establish a Statute of Frauds defense.

Defendants next assert: "Any alleged agreement whereby Plaintiff was to receive any interest in Simpots is unenforceable as an agreement contrary to public policy as any such agreement was for the purpose of providing Plaintiff with interest in Simpots which Plaintiff was barred from having due to his many criminal convictions." The same argument of waiver could be asserted as to this defense. However, the court will address this Affirmative Defense as evidence was presented at trial.

In Defendants' Trial Brief they correctly cite the Michigan Regulation and Taxation of Marihuana Act, MCL 333,27951 et. seq. Defendants further cite Rule 420.6(3)(a) which would prohibit an individual that "has a pattern of convictions involving dishonesty, theft, or fraud that indicate the proposed marijuana

establishment is unlikely to be operated with honesty and integrity" from holding a license to operate a marijuana dispensary. Initially the parties believed that the Plaintiff did not qualify for a license in Michigan.

At trial Plaintiff submitted Plaintiff's Exhibit 35 and 36, which are prequalification letters from the State of Michigan qualifying Plaintiff to operate a dispensary in Michigan under the name "Potter Farms LLC". Attorney Arnoff testified that Plaintiff was prequalified and capable of being licensed in Michigan. Given this unrefuted evidence, Defendants' Affirmative Defense is denied.

It should be noted that the parties initially provided for this contingency. The parties testified that if and when the Plaintiff qualified for a license he would be added to the business.

II. VERDICT

The court finds that a contract did exist between the parties. Plaintiff is awarded a 33.3% interest in Simpots, LLC.

The court does not find a separate judicable claim under the doctrine of Promissory Estoppel .

The court finds that Plaintiff failed to establish a claim of fraud and finds no cause of action on this Count.

Plaintiff is entitled to an accounting and the same shall be provided pursuant to MCL 450.4503.

In consideration of the court's findings on Count I, Plaintiff's claims of unjust enrichment and quantum meruit are moot.

The Plaintiff failed to establish a claim for Statutory Conversion and the court finds no cause of action on this Count.

The court finds that Plaintiff is entitled to declaratory action as awarded in Count I.

The court has considered Defendants' affirmative defenses and determined they are without merit as previously stated.

Plaintiff shall submit Judgment consistent with this Verdict pursuant to MCR 2.602.

Dated: July 13, 2022

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HON. BRIAN K. KIRKHAM