

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

---

LEELANAU FRUIT COMPANY, a  
Michigan Corporation,

Plaintiff/Counter-Defendant,

vs

File No. 93-3248-CK  
HON. PHILIP E. RODGERS, JR.

LEELANAU STRAWBERRY GROWERS  
CO-OPERATIVE, a Michigan corporation;  
and BRUCE PRICE, individually,

Defendants/Counter-Plaintiffs,

and

GEORGE E. DENT SALES, INC., a  
Michigan Corporation,

Defendant.

---

Peter H. Shumar (P20411)  
Attorney for Plaintiff/Counter-Defendant

Thomas L. Phillips (P23106)  
Attorney for Defendants/Counter-Plaintiffs

W. Peter Doren (P23637)  
Attorney for Defendant George E. Dent Sales

---

DECISION AND ORDER

In this action Plaintiff seeks to recover more than \$20,000.00 from Defendant/Counter-Plaintiff Strawberry Growers and Defendant George E. Dent Sales, Inc. Defendant Dent Sales filed a Motion for Summary Disposition in lieu of an answer. The Defendant brought the motion pursuant to MCR 2.116(C)(7), claiming that Plaintiff is barred by the Statute of Frauds from seeking the relief described in Counts I, II and IV. Plaintiff/Counter-Defendant Leelanau Fruit Company timely responded to this Court's Pre-Hearing Order which was entered on June 10, 1993. Defendant timely replied. Defendants/Counter-Plaintiffs Leelanau Strawberry Growers Co-

operative and Bruce Price have not filed a response to the instant motion and it is not directed at them.

The Court has reviewed the motion, the briefs, affidavits and the court file, including the Verified Amended Complaint<sup>1</sup> which Plaintiffs filed on August 6, 1993. Pursuant to MCR 2.119(E)(3), the Court dispenses with oral argument.

The standard of review for a (C)(7) motion is set forth in Moss v Pacquing, 183 Mich App 574, 579 (1990).

In considering a motion for summary disposition under MCR 2.116(C)(7), a court must consider any affidavits, pleadings, depositions, admissions, and documentary evidence then filed or submitted by the parties. MCR 2.116(G)(5). In this case, all of Plaintiffs' well-pled factual allegations are accepted as true and are to be construed most favorably to Plaintiffs. Wakefield v Hills, 173 Mich App 215, 220; 433 NW2d 410 (1988). If a material factual question is raised by the evidence considered, summary disposition is inappropriate. Levinson v Sklar, 181 Mich App 693, 697; 449 NW2d 682 (1989); Hazelton v Lustig, 164 Mich App 164, 167; 416 NW2d 373 (1987).

The Court will now review the factual allegations made against Defendant Dent Sales in Counts I, II and IV of this action. In Count I there is no allegation of wrongdoing made as to Defendant Dent Sales; the only reference to this Defendant is the statement that the corporation does business in Leelanau County. No relief may be gained from Defendant Dent Sales in Count I and a judgment may be entered dismissing this Count.

In Count II, the paragraphs which contain allegations of agreements, acts or actions, and failures to act on the part of Defendant Dent Sales, states as follows:

14. That Defendant George E. Dent Sales Inc. is a fruit broker with its principal place of business located at 3094 Niles Road, St. Joseph, Michigan 49085, and conducted business with the parties related to this transaction in Leelanau County, Michigan. As a part of its business, Defendant Defendant [sic] George E. Dent

---

<sup>1</sup>This Court's Civil Scheduling Conference Order entered on July 13, 1993 allowed the parties to file amendments to their pleadings on or before August 6, 1993.

Sales Inc. brokers [sic] the sale of fruit for compensation. In 1991, George E. Dent Sales, Inc. brokered the sale of Defendant Leelanau Strawberry Growers Co-Operative's strawberries".

15. That in return for Plaintiff's agreement to contract fruit processing and storage with Defendant Leelanau Strawberry Growers Co-Operative in 1991, Plaintiff and all Defendants mutually agreed to have Defendant George E. Dent Sales Inc. issue checks due Defendant Leelanau Strawberry Growers Co-Operative to be jointly payable to both Plaintiff and Defendant Leelanau Strawberry Growers Co-Operative until Plaintiff was paid in full.

\* \* \*

18. That Defendant George E. Dent Sales Inc. has informed Plaintiff that it held funds due Defendant Leelanau Strawberry Growers Co-Operative pursuant to the sales of fruit processed in 1991 in excess of funds remaining due Plaintiff. On information and belief, checks were made payable to Plaintiff and Defendant Leelanau Strawberry Growers Co-Operative in the matter previously agreed upon, but Defendant Leelanau Strawberry Growers Co-Operative refused to endorse said checks and returned them to Defendant George E. Dent Sales Inc.

19. That Plaintiff recently made demand of George E. Dent Sales Inc. for release of funds which it was holding subject to the above agreement, but Defendant George E. Dent Sales Inc. had already released all funds it received, in violation of said agreement, to Defendant Bruce Price and Farmers Home Administration at their request, without knowledge or consent of Plaintiff and in breach of the above agreement between all parties.

20. That by virtue of the above actions of all Defendants, Defendants breached their agreement with Plaintiff as to payment.

\* \* \*

23. That the deliberate actions of Defendant Dent in violation of the escrow agreement and its fiduciary capacity thereto, by the payment of monies directly over the Defendants Leelanau Strawberry Growers Co-Operative and/or Bruce Price and/or FHA, without the consent or approval of Plaintiff, constitute an act of fraud as to Plaintiff and renders Defendant Dent liable for exemplary damages and/or compensatory damages.

Count IV allegations which refer to (unspecified) Defendants'

or Defendant Dent Sales' agreements, acts or actions or failure to act read, as follows:

31. That Defendants deliberately and intentionally defrauded and/or misappropriated money from Plaintiff by agreeing among [sic] themselves, to the detriment upon [sic] Plaintiff, to pay Defendant Bruce Price before Plaintiff when Defendants knew of [sic] should have known that the checks were to be issued jointly as above described and that Plaintiff was to be paid first.

32. Defendants knew that their actions seriously impaired the possibility of Plaintiff collecting on its debt herein and further will, at the very least, cause substantial delay in Plaintiff receiving its money.

33. That Defendants proceeded to misappropriate said monies to Plaintiff's detriment without ever notifying or telling Plaintiff of its [sic] actions.

34. Plaintiff first learned of said actions on January 15, 1993, when counsel for Plaintiff called Tim Dent, of Defendant George E. Dent Sales Inc., to attempt to possibly settle the matter.

35. That Defendants had no intention of ever notifying Plaintiff of this misappropriation of funds.

\* \* \*

38. That the deliberate actions of Defendant Dent in violation of the escrow agreement and its fiduciary capacity thereto, by the payment of monies directly over the Defendant Leelanau Strawberry Growers Co-Operative and/or Bruce Price and/or FHA, without the consent or approval of Plaintiff, constituted an act(s) of fraud as to Plaintiff and renders Defendant Dent Liable for exemplary and/or compensatory damages.

The parties argue divergent theories of contract law in support of their respective positions. Plaintiff argues that Defendant Dent Sales, acting in a fiduciary capacity, made an original promise to pay certain monies to Plaintiff. Defendant Dent Sales claims that Plaintiff's allegations in Counts II and IV cannot be sustained because there is no agreement in writing between the parties. Defendant's assertion that there is no agreement in writing is uncontroverted. The Defendant Dent Sales also notes that "no consideration to Dent is alleged." Further, the Defendant Dent Sales contends that, "clearly the promise of

Dent is collateral and the obligation of Strawberry (and Price) is the primary obligation."

The Plaintiff in its response to the instant motion denies that its claim is barred by the Statute of Frauds. Plaintiff sets forth its review of the facts as follows:

George E. Dent Sales, Inc. was simply an escrow agent, acting in a fiduciary capacity. Defendant Dent only agreed to hold funds due Leelanau Strawberry Growers Co-Operative and disperse the funds according to an agreement reached between Plaintiff, on the one hand, and Defendants Bruce Price and Leelanau Strawberry Growers Co-operative. Therefore, there was no agreement made by Defendant Dent to answer for the debt, default, or misdoings of any of the other Defendants. Dent's agreement to be an escrow agent was original and limited to the above purpose. As a result, the Statute of Frauds, MCLA 566.132; MSA 26.922, is inapplicable.

Pursuant to Moss, supra, this Court must accept the Plaintiff's well-pled factual allegation as true and, further, must construe them most favorably to Plaintiff. Each allegation of a pleading must be clear, concise, and direct. MCR 2.111(A)(1). Fraud must be pled with particularity. MCR 2.112(B)(1). Further, MCR 2.111(B)(1) sets forth the following criteria for pleadings:

A statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]

It is the finding of this Court that the allegations made in Counts II and IV of the Verified Amended Complaint do not adequately describe "the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction." Temborius v Slatkin, 157 Mich App 587 (1986). Plaintiff pleads conclusions of law, specifically breach of contract and fraud, but fails to provide a factual description of the circumstances or conduct of specific individuals attributable to Defendant Dent Sales with the necessary particularity and concomitant notice. Meier v Schulte, 327 Mich 206; 41 NW2d 351 (1950); MCR 2.111(B)(1); and MCR 2.112(B)(1).

Paragraph 17 of the Verified Amended Complaint is

illustrative of this deficiency. There, Plaintiff alleges,

That checks were received pursuant to this agreement on August 22, 1991, November 20, 1991 and November 22, 1991 reducing Defendant Leelanau Strawberry Growers Co-Operative's revolving account with Plaintiff by \$52,293.59. However, a balance remains due Plaintiff in the amount of \$22,236.49.

While the parties may understand this allegation, the Court does not find that the facts regarding these checks and their application towards the debt owed Plaintiff or other creditors to be stated with particularity so as to make sense of the transactions and identify their relationship to legal claims. This is also true as to facts supporting consideration to Defendant Dent Sales or which might support a partial performance argument. It is not the Court's role to redraft one party's pleadings or to speculate as to their meaning.

The Michigan Court Rules Practice Text, Author's Comment, pertaining to MCR 2.111, sets forth the following pleading standards:

2(d)(iii). If a pleading is so vague or ambiguous that a party cannot reasonably be expected to frame a responsive pleading, the appropriate remedy is a motion for more definite statement, under MCR 2.115(A). Only if a pleader fails or refuses to make his pleading more definite in response to an order should it be dismissed for vagueness.

Martin, Dean, and Webster, Text, MCR 2.111, p 186. This Court finds that the Plaintiff failed in the amended complaint to sufficiently plead facts to support inferences that rise to the level of material factual issues. The allegations in Count II and IV remain vague and ambiguous as to Defendant Dent Sales.<sup>2</sup>

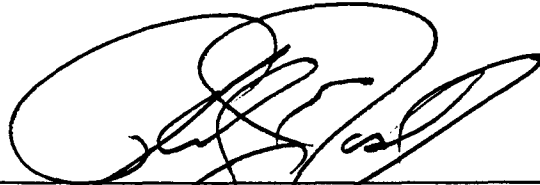
For the reasons discussed above, Plaintiff may amend its complaint within fourteen (14) days of the entry of this order. The failure to do so will cause this Court to grant Defendant

---

<sup>2</sup>While the Defendant Dent has not complained as to the vagueness of the pleadings, the Court has had significant difficulty in fairly resolving these motions with reference to them and raises this issue on its own motion.

Dent's motion as to Counts II and IV. MCR 2.115(A); MCR 2.116(C)(7). Count I is dismissed as to Defendant Dent Sales only.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.  
Circuit Court Judge

Dated: \_\_\_\_\_

12/30/93