STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

STEPHEN SUTHERLAND, BARBARA SUTHERLAND, SUTHERLAND OIL, INC., a Michigan corporation,

Plaintiffs,

-v-

File No. 93-11623-CK
HON. PHILIP E. RODGERS, JR.

CRYSTAL FLASH LIMITED PARTNERSHIP OF MICHIGAN, a Michigan partnership, and MICHIGAN CRYSTAL FLASH PETROLEUM CORPORATION, a Michigan corporation,

Defendants.

-and-

CRYSTAL FLASH LIMITED PARTNERSHIP OF MICHIGAN, a Michigan Partnership,

Counter and Third-Party Plaintiff,

-v-

STEPHEN SUTHERLAND, SUTHERLAND OIL, INC., a Michigan corporation, and FUEL RECYCLERS, INC., a Michigan corporation,

Counter and Third-Party Defendants.

---/

Mark R. Dancer (P47614)
Attorney for Plaintiffs

Jon G. March (P17065)
David C. Sarnacki (P42654)
Attorneys for Defendants

DECISION AND ORDER RELATING TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY DISPOSITION OF FIRST AMENDED COMPLAINT

Defendants filed a Motion for Partial Summary Disposition of [the] First Amended Complaint in which they seek this Court's order

to dismiss Count I -- Breach of Contract, and Count II -- Fraud. Plaintiffs filed a brief in opposition to the motion. Defendants filed a reply to Plaintiffs' response. The parties presented their oral arguments to this Court on May 1, 1995. This Court has reviewed the motion, the briefs, the affidavits and transcripts[1], and the Court file.

Defendants' motion is made pursuant to MCR 2.116(C)(8) and (10). The standard of review for a (C)(8) motion is set forth in Mitchell v General Motors Acceptance Corp. 176 Mich App 23; 439 NW2d 261 (1989).

> A motion for summary disposition brought under MCR 2.116 (C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. Beaudin v Michigan Bell Telephone Co, 157 Mich App 185, 187; 403 NW2d 76 (1986). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. NuVision v Dunscombe, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). [Roberts v Pinkins, 171 Mich App 648, 651; 430 NW2d 808 (1988).]

---

[1] The parties provided comprehensive evidentiary materials to support their respective arguments, including but not limited to the following:

1) Excerpts of transcripts of depositions of Tom Fehsenfeld, President of Defendant Crystal Flash; Plaintiff Stephen Sutherland; and Linda Hays, Bookkeeper for Sutherland Oil Company;

2) Affidavits of Patrick Delaney, Controller of Defendant Crystal Flash, and Plaintiff Stephen Sutherland; and

3) The Employment Agreement between Plaintiff Stephen Sutherland and the Defendant, and copies of documents showing (some of) the history of the parties' pre-sale negotiations.

The standard of review for a (C)(10) motion is set forth in Ashworth v Jefferson Screw, 176 Mich App 737, 741; 440 NW2d 101 (1989).

> A motion for summary disposition brought under MCR 2.116 (C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G)(5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer, 389 Mich 363, 371-372; 207 NW2d 316 (1973).
>
> The party opposing an MCR 2.116 (C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116 (G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372.

Count I

Plaintiffs sold their business, Sutherland Oil Company, to Defendants. This action represents Plaintiffs' effort to gain compensation for profits which they contend are due them pursuant to the Employment Agreement and other alleged "understandings" between the parties. As to Count I, Defendants make a two-pronged argument which can be summarized as follows:

1) Plaintiffs' allegations in Count I that, pursuant to the terms of the Employment Agreement, Plaintiff Stephen Sutherland was to have control of the operation and management of the Traverse City Department of the Northern Division of Crystal Flash, are not supported by facts or the law.

2) Plaintiffs' claim that Defendants failed to fulfill oral promises that Plaintiff would have control of the department is barred by the parol evidence rule.

The Employment Agreement sets forth Mr. Sutherland's relationship to the Defendants and his responsibilities as follows:

1. Employment. Crystal Flash agrees to employ Sutherland, and Sutherland accepts employment with Crystal Flash, to serve as a Bulk Plant Manager for the Traverse City Department of the Northern Division of Crystal Flash, upon the terms and conditions set forth in this Agreement.

* * *

3. Duties. During the employment term, Sutherland will perform such duties and provide such services as are commensurate with his position as a Bulk Plant Manager. Sutherland shall also perform such incidental duties and services as specified from time to time by Robert Vugteveen or such other individual as Crystal Flash shall from time to time require. Sutherland understands that for his compensation as set forth in Paragraph 4, below, he will be expected to work a minimum number of forty (40) hours per week and may be expected to work more hours for the same compensation whenever the fulfillment of his duties reasonably demands it.

4. Compensation. Crystal Flash shall pay Sutherland as follows:

   a. The sum of Forty Thousand Dollars ($40,000) per year;

   b. twenty-five percent (25%) of the annual net profits of the fuel oil bulk plant under the management of Sutherland until the earlier of:

      i. five (5) years after the date of this Agreement;

      ii. Sutherland terminates his employment.

Net profits shall be calculated according to the normal accounting procedures of Crystal Flash. Net profits shall be net of the amounts to be paid to Sutherland Oil, Inc. for a covenant not to compete, any salary and bonus payable to Sutherland, and all other expenses allocable to the Traverse City Division, including Division Overhead and Lease allocation. This percentage shall be paid only on the types of petroleum products sold as of the date of this agreement, and shall not be paid for any new product lines.

The integration clause reads as follows:

> 10. Entire Agreement. This instrument constitutes the entire Agreement between the parties. No modification of this Agreement shall be valid unless it is in writing and signed by both parties.

The parties set forth divergent views of the extent to which Mr. Sutherland was to control the operation of the department and the factors which would be used to determine net profit. In paragraph 13 of the First Amended Complaint, Plaintiffs allege the following:

> At all times prior to and through signing of the employment agreement, Plaintiff Stephen Sutherland was told that he would have discretion and control in the operation and management of the facility during his employment.

Paragraph 17 of the Amended Complaint, which follows, represents Plaintiffs' expectation that Stephen Sutherland would be centrally involved in and would control the department:

> During Stephen Sutherland's management of the facility, Defendant Crystal Flash's upper management took various actions without consulting Sutherland, without his approval, or after insisting upon his authorization. Those actions caused the facility to lose customers, fail to acquire new customers, and have negative profitability[.][2]

Plaintiffs contend, inter alia, that Defendants charged unrelated and unwarranted expenses to the department and made numerous management decisions which eroded the department's profitability.

This Court finds merit in the following conclusions, related to the parties contractual agreement, presented on page 11 of Defendants' brief:

> [T]he express terms of the Employment Agreement rebut any notion that Mr. Sutherland was to have control. Paragraph 1 expressly describes the position, "Bulk Plant Manager for the Traverse City Department of the Northern Division of Crystal Flash," as one within an organizational hierarchy. In paragraph 3, Mr. Sutherland agreed to "perform such duties and provide such services

---

[2] Omitted for purposes of this Order are 9 sub-paragraphs 17(a - i) which allege various actions or acts of the Defendants officers and agents.

as are commensurate with his position as Bulk Plant Manager" and to "also perform such incidental duties and services as specified from time to time by Robert Vugteveen or such other individual as Crystal Flash shall from time to time require." Clearly, Crystal Flash retained the legal right to control its own Department and its assigned managerial employee, Mr. Sutherland. (Emphasis supplied.)

Mr. Sutherland has himself described his duties as merely to "oversee the day to day operations" (S. Sutherland, 177-178), something far less than having the total control he now claims. There is simply nothing in the Employment Agreement which either gives Mr. Sutherland the total control he now claims he was to have or exempts him from the supervision and direction of his superiors. Instead, the Employment Agreement says just the opposite. Mr. Sutherland has admitted that nothing in any of the sales documents signed on October 9, 1991 in any way limits Crystal Flash in how it will run its business. (S. Sutherland, 178)

The inherent self-contradiction in Mr. Sutherland's claim that as an employee he was to have discretion and control, free from the involvement of Crystal Flash's management, is apparent in his own Amended Complaint. In subparagraph 17(h), he complains that Crystal Flash failed to provide him "any orientation or training. . .as a manager."

It is clear to this Court that Mr. Sutherland, as part of the sale of Sutherland Oil Company, entered into a contractual relationship with Defendants as their employee. Plaintiff's relationship with Defendant, then, is one of employee-employer. Plaintiffs failed to show that Defendants breached the Employment Agreement by denying Mr. Sutherland "greater control" of his department or other aspects of the business. As an employee, Plaintiff had no inherent, legal or contractual right of control vis a vis his employer.

In its consideration of whether the parol evidence rule bars Plaintiffs' claims of other understandings, this Court finds the following explanation from Court of Appeals in Ditzik v Schaffer Lumber Co, 139 Mich App 81, 87; 360 NW2d 876 (1984) to be helpful and instructive:

The parol evidence rule operates to exclude evidence of prior contemporaneous agreements, whether oral or written, which contradict, vary or modify an unambiguous

> writing intended as a final and complete expression of the agreement. NAG Enterprises, Inc, All State Industries, Inc, 407 Mich 407, 410; 285 NW2d 770 (1979). Where a binding agreement is integrated, it supersedes inconsistent terms of prior agreements and previous negotiations to the extent that it is inconsistent with them. Union Oil Co of California v Newton, 397 Mich 486, 488 fn 1; 245 NW2d 11 (1976), reh den 398 Mich 952 (1976).

Here, the parties' agreement is written, unambiguous and contains an integration clause. The parol evidence rule applies as Defendants suggest it does.

With regard to the calculation of net profits, Plaintiffs argue that the history of the negotiations must be taken into account. Plaintiffs, on pages 10 and 11 of their brief, describe the function of the percentage of profit which was due Mr. Sutherland as follows:

> Under the Employment Agreement, Mr. Sutherland was to receive 25% of the profit from the Traverse City Department for a period of five years. This was not a bonus to Mr. Sutherland, but was actually part of the compensation to be paid by Crystal Flash for the purchase of Sutherland Oil's assets. (See attached Fehsenfeld Depo. Excerpts, Page 89.) The purchase of Sutherland's assets was structured in this way so as to benefit both Crystal Flash and Sutherland Oil with respect to the tax consequences of the sale. The parties agreed to assign a low, depreciated book value to the assets, with the idea that Mr. Sutherland would receive a fair market purchase price after he received 25% of the profits of the Traverse City Department for five (5) years, as projected by the parties.

Yet, Plaintiffs' submission of a memorandum signed by Stephen Sutherland addressed to Dick Pollie and Pat Delaney [Crystal Flash agents] provides evidence that the genesis of the split profit came from Mr. Sutherland's expressed desire to avoid taxes. See Plaintiffs' Exhibit C which reads, in pertinent part, as follows:

> Sutherland Oil's proposal using CF's [Crystal Flash's] formula for net profit has exceeded the minimum requirement of 50% Lease (as shown on the line CF % Lease). After consulting with our CPA the original CF offer would have cost Steve Sutherland in excess of $200,000 in taxes upon signing the agreement. This is the reason for changing the formula to purchasing all

> assets for only book value of approximately $830,000 which would show a capital loss rather than capital gain. It is my understanding that by paying all excess in salary rather than thru purchase agreements it will also be beneficial to your tax base. (Emphasis added.)

Plaintiffs also argue that during negotiations the profits which were projected were greater than the profits as calculated by Crystal Flash after the sale. Plaintiffs submit, as Exhibit B, a Purchase Offer For Sutherland Oil Company dated June 26, 1991. Plaintiffs argue that the projected profit shown on that document is far greater than the net profit as calculated by Crystal Flash and paid to Mr. Sutherland.[3] Plaintiffs, in their response to Defendants' motion, did not dispute the following summary of the relevant profit history:

> Under the management of Mr. Sutherland, the Traverse city Department of Crystal Flash had been extremely unprofitable in 1992, losing in excess of $80,000. (See Affidavit of Tom Fehsenfeld[4], ¶ 3, submitted in support of Crystal Flash's first motion for summary disposition, a copy of which is attached.) Mr. Sutherland agreed that there were losses, but he disagreed as to the amount. (S. Sutherland, 296) Although the Traverse City Department did return a profit in 1993, it was extremely modest. (Delaney[5] Affidavit, ¶ 6, attachment 93)

Defendants' brief, p 4.

Speculative or projected profits cannot form the basis of a legally cognizable damage remedy. Defendants well describe Stephen

---

[3] The Purchase Offer includes the following provision:

> 7. An annual bonus based on 25% of the net profit of the Sutherland Crystal Flash department for a period of 5 years. This figure should reach $218,861.00 based on Crystal Flash's 5-year-- projected sales and margins. This amount is not a guaranteed figure, but could be substantially greater based upon Steve's projected sales during the next 5 years.

[4] President of Defendant Crystal Flash Limited Partnership of Michigan and Michigan Crystal Flash Petroleum Corporation.

[5] Patrick Delaney, Controller of Michigan Crystal Flash Petroleum Corporation and Crystal Flash Limited Partnership of Michigan.

Sutherland's expectations and their contractual obligations, as follows:

> [H]e wants 25% of the hoped-for profits which the parties had forecast when they entered into the Employment Agreement. Clearly plaintiff is not entitled to such a recovery as a matter of contract. He admits that there were no promises that the business would be profitable, and he himself has labeled the pro formas as "guesstimates." (S. Sutherland, 250, 90, 279)[.] The law does not allow a contractual recovery on such a speculative basis. In order to be enforceable, a contractual obligation must be definite and cannot be speculative. Hammel v Foor, 359 Mich 392; 102 NW2d 196 (1960), Vandeneries v General Motors Corp, 130 Mich App 195; 343 NW2d 4 (1983); Walker v Consumers Power Co, 824 F2d 499 (6th Cir 1987). Guesstimates are an insufficient basis on which to claim breach of contract.

Plaintiff's brief, p 9. The integration clause of the Employment Agreement limits the parties' compensation and obligations to that which is found within the four corners of the contract. As shown above, Plaintiffs' expectations that Mr. Sutherland should be compensated based on "projected" profits is inconsistent with the express terms of the Employment Agreement and barred by the parol evidence rule and without a basis in a legally cognizable damage remedy. Ditzik, supra.

In the opinion of this Court, the Employment Agreement is unambiguous. Plaintiffs' effort to be compensated for projected profits is nullified by the terms of the unambiguous contract. Moore v Campbell, Wyant & Cannon Foundry, 142 Mich App 363; 369 NW2d 504 (1985). There was no breach of the Employment Agreement. Defendants argue that factual issues exist as to whether Defendants performed in good faith under the terms of the Employment Agreement. This Court finds no evidence that Defendants breached the omnipresent obligation of commercial good faith and fair dealing or that any reasonably certain damage remedy could ever be proximately connected to such a breach.[6]

---

[6] It must not be forgotten that Plaintiff would only receive 25% of the profits and Defendant would earn 75%. The sheer perversity Plaintiff attributes to Defendants such that Defendants

Plaintiffs strongly object to a number of Defendants' business decisions and their impact on profits. To proceed on Plaintiffs' theory, this Court must second guess the soundness of those decisions. Defendants assert the following argument in response to Plaintiffs' theory:

> [I]t is a fundamental principle of Michigan law that business judgments are left to the discretion of the ultimate managers of the business, free from second guessing by courts. See Michigan Business Corporation Act, MCL 450.1501[; MSA 21.200(501)] Uniform Partnership Act, MCL 449.18(e)[; MSA 20.18(e)]; Revised Uniform Limited Partnership Act, MCL 449.1403(a)[; MSA 20.1403(a)]. "In the absence of bad faith or fraud, a court should not substitute its judgment for that of the corporate directors" and "should be most reluctant to interfere with the business judgment and discretion of directors in the conduct of corporate affairs.: In re Butterfied Estate, 418 Mich 241, 255; 341 NW2d 453(1983). "It is not the function of the court to manage a corporation nor to substitute its own judgment for that of the officers thereof." Reed v Burton, 344 Mich 126, 131; 73 NW2d 333 (1955).

This Court finds no justification, in law or in fact, to second guess Defendants' business decisions, including the allocation of expenses charged to Stephen Sutherland's department. Reed, supra.

Count II

This Court now turns to Plaintiffs' claims of fraud. As stated in Kassab v Michigan Basic Property Ins Ass'n, 441 Mich 433, 442; 491 NW2d 545 (1992):

> The elements constituting actionable fraud or misrepresentation are well-settled:
>
> > The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation, (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in

---

would bite off their nose to spite their face has no support in the evidentiary record before this Court.

> reliance upon it; and (6) that he thereby suffered injury. [Hi-Way Motor Co v Int'l Harvester Co, 398 Mich 330; 336; 247 NW2d 813 (1976), quoting Chandler v Heigho, 208 Mich 115, 121; 175 NW 141 (1919).]

The relevant court rule, MCR 2.112(B)(1) entitled **Fraud, Mistake, or condition of Mind**, states that "[i]n allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity.

Plaintiffs, in their brief on page 18, addressed Defendants' assertions that "there is no allegation of fraudulent knowledge or intent on the part of defendants." Referring to paragraphs 23 through 33 of the First Amended Complaint, Plaintiffs state, "Implicit in these allegations is fraudulent intent on the part of Plaintiffs." The applicable court rule requires "particularity" in pleading the circumstances of fraud not the "implication" that fraud was intended. Having thoroughly reviewed the First Amended Complaint, this Court finds that Plaintiffs have not pled the circumstances constituting fraud with particularity as required by MCR 2.112(B)(1).[7] Plaintiffs failed to state a cause of action for fraud. MCR 2.116(C)(8). Plaintiffs have also failed to demonstrate a factual issue regarding fraudulent intent and the claim is defective for that reason too. MCR 2.116(C)(10).
For the foregoing reasons, Defendants' motion for summary disposition is hereby granted as to Counts I and II. MCR 2.116(C)(8) and (10).

This Court in its Order Granting In Part Motion for Summary Disposition signed October 4, 1994 allowed Plaintiffs "to amend their complaint as it pertains to Count VI". Count VI was entitled **Tortious Interference with Business Relationship or Expectancy.** The five counts within the First Amended Complaint exceeded the

---

[7] This Court takes judicial notice of the following plea made on page 19 of Plaintiffs' brief, "Plaintiffs respectfully request that Count II be deemed amended to specifically allege that 'Defendants intended to defraud Plaintiffs.'" This assertion is inadequate to avoid summary disposition. Count II is not deemed amended as the proposal is inherently defective.

scope of the amendment allowed by this Court. The allegations found within Counts III - V of the First Amended Complaint were included within the original complaint and were dismissed in their entirety in this Court's prior Decision and Order. On its own motion, then, this Court similarly dismisses the remaining counts of the First Amended Complaint.

This Court allows amendments when necessary to permit access to a just result. MCR 2.118(A)(2). In the opinion of this Court, justice requires no further amendments to these pleadings. Plaintiffs' complaint is hereby dismissed with prejudice. The case shall proceed on the counter and third-party complaints.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/29/95