STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

ARTLAND DEVELOPMENT, LLC,
a Michigan limited liability company,

Plaintiff/Counter-Defendant,

v

File No. 08-8396-CK
HON. PHILIP E. RODGERS, JR.

EDWIN PORTER,

Defendant,

v

PORTER BUILDERS, INC., a
Michigan corporation,

Defendant/Counter-Plaintiff,

and

PORTER BUILDERS an assumed name
for C.T.F. Corporation, a Michigan corporation,

Defendant/Third-Party Plaintiff,

v

ALBERT SCAGLIONE and DAVID SCHULTZ,

Third-Party Defendants.
_____/

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DECISION AND ORDER REGARDING
CROSS MOTIONS FOR SUMMARY DISPOSITION

On October 18, 2004, Plaintiff Artland Development, LLC ("Artland") entered into a contract with Defendant Edwin Porter of Porter Builders, Inc.[1] The contract was prepared by Artland's counsel. Artland agreed to purchase two parcels of land on Torch Lake and Porter agreed to construct a spec home on each parcel at cost. When the properties were later sold, the parties agreed to share the profits 50/50. The homes remain unfinished.

On June 27, 2008, Artland filed this action. In Count I, Artland seeks a judgment declaring that any losses realized on the sale of the properties are to be shared by the parties 50/50. In Count II, Artland seeks damages for negligent construction. In Count III, Artland seeks damages for Porter's breach of fiduciary duties. In Count IV, Artland seeks damages for breach of contract.

On October 15, 2008, Artland filed a Motion for Summary Disposition, pursuant to MCR 2.116(C)(10), claiming that there is no genuine issue of material fact that the parties were joint adventurers and, therefore, it is entitled to a declaratory judgment under Count I that, as a matter of law, Porter is required to share any losses on the same basis that it would share profits. Porter filed a Motion for Summary Disposition, pursuant to MCR 2.116(C)(8), claiming that it is entitled to judgment on all counts because Artland has failed to state any claim upon which relief can be granted.

The motions were heard on Monday, December 15, 2008. The Court took the matter under advisement and now issues its written Decision and Order.

STANDARDS OF REVIEW

MCR 2.116(C)(10)

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no

[1] The contract was between "Porter and Artland" and provided under Representation and Warranties of Porter that "(a) Porter is a corporation duly organized, validly existing and in good standing under the laws of the State of Michigan. Porter has full power and authority to execute, deliver and perform this Agreement. The person executing this Agreement on behalf of Porter has full power and authority to execute this Agreement." The Agreement was executed by Defendant Edwin Porter in no particular representative capacity. Plaintiff sued Edwin Porter and Porter Builders, Inc.

genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

A motion filed under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rely on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence filed in the action. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any inferences which may fairly 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. *Mills v White Castle System, Inc*, 167 Mich App 202, 205; 421 NW2d 631 (1988). 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). See also, *Roberts v Pinkins*, 171 Mich App 648, 651; 430 NW2d 808 (1988).

Count I
Declaratory Judgment

Artland states that it is marketing the subject properties (Exhibit E - Listing Agreement) and that it anticipates that they will sell at a loss (Exhibit D - Affidavit of Dennis L. Irelan). Artland further alleges that Porter has denied responsibility for any part of the losses that may be realized on the sale. Therefore, Artland is asking this Court for a declaratory ruling regarding whether the parties' agreement established a joint venture which obligates Porter to share in the losses.

Porter counters that the doctrine of ripeness precludes the Court from entering a declaratory judgment regarding Porter's obligation to share in any losses which have not yet been and may never be realized. In addition, Porter contends that it never intended to enter into a joint venture with Artland. Instead, their agreement was nothing more than an arms-length business contract (Exhibit C - Affidavit of Edwin B. Porter).

MCR 2.605 provides, in pertinent part, as follows:

> (1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is sought or could be granted.

Most recently, in *City of Huntington Woods v City of Detroit*, 279 Mich App 603; ____ NW2d ____ , 2008 WL 2743924, the plaintiff sought a declaratory ruling regarding whether defendant's sale of property and the terms and conditions of the sale would violate certain deed restrictions. No sale had yet taken place. The Court of Appeals said:

> The existence of an actual controversy is a condition precedent to invocation of declaratory relief and this requirement prevents a court from deciding hypothetical issues. *Detroit v Michigan*, 262 Mich App 542, 550; 686 NW2d 514 (2004) (internal quotation marks and citations omitted). However, it is the purpose and intent behind the grant of declaratory relief to provide litigants with court access in order to 'preliminarily determine their rights.' *Id* at 550-551; MCR 2.605(A)(1). An actual controversy is deemed to exist in circumstances where declaratory relief is necessary in order to guide or direct future conduct. In such situations, courts are 'not precluded from reaching issues before actual injuries or losses have occurred.' *Id* at 551 (citation omitted) . . . Hence, the primary issue asserted by plaintiff regarding the right and authority of defendant to sell the property, and pursuant to what terms, comprised an issue that was not hypothetical. '[D]eclaratory relief is designed to resolve questions like the one at issue before the parties change their positions or expend money futilely.' *Detroit, supra* at 551. As a result, plaintiff's request for declaratory relief properly seeks a

> determination regarding defendant's authority to sell the property. Merely because a sale had not yet been effectuated, the trial court was not precluded from ruling whether the sale was authorized and under what conditions.

Therefore, it is appropriate for this Court to issue a declaratory ruling regarding the rights of the parties with respect to any losses that might be realized upon the sale of the subject properties.

The subject contract was between Artland and one or both of the Porter corporate entities, Porter Builders, Inc. or CTF Corporation d/b/a Porter Builders. This is evident from the fact that the contract states that "Porter and Artland shall be collectively referred to herein as the 'Parties'"; Porter represented that it "is a corporation"; and Edwin Porter is referred to individually as Ed Porter in the Construction Costs paragraph which reads, in pertinent part, as follows: "Artland and Porter further agree that Ed Porter shall not bill to Artland, nor shall Artland be responsible to pay for, any of Ed Porter's time spent on, or services provided with respect to, the Construction of the Residences." Therefore, Edwin Porter is not individually liable for any cause of action arising under this contract.

The pertinent parts of the parties' contract for deciding whether they entered a joint venture that requires them to share losses are as follows:

> * * *
>
> WHEREAS, the parties hereto desire to enter into a joint arrangement whereby Artland will provide the funding for the purchase of the Lots and the construction of a single-family residence on each Lot, and Porter will perform, or arrange for and oversee the performance of, the construction of a single-family residence on each Lot at cost.
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> * * *
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> Profit Sharing. Artland and Porter shall each be entitled to receive 50% of the Profit (defined below) resulting from a sale of each of the Properties. For purposes of this Agreement, the term "Profit" shall mean the Net Sale Proceeds (defined below) from the sale of Property less (i) the amount paid by or on behalf of Artland to acquire the Property (exclusive of any carrying costs such as interest on any loan received to provide financing for the purchase of the property and any other closing costs with respect to such a loan), and (ii) all costs incurred in constructing the residences on the Property. For purposes of this Agreement, the term "Net Sales Proceeds" from the sale of a Property shall mean the gross proceeds from such sale less the sum of (i) all brokerage fees paid by or on behalf of Artland in connection with such sale and (ii) all closing costs paid by Artland in connection with such sale (including but not limited to any and all

> transfer taxes and lien and title search fees). Artland shall remit to Porter its 50% share of the Profit from the sale of a Property upon receipt of the funds at closing.
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> * * *
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> Construction Costs. Porter shall provide all construction services to Artland at cost. Porter shall charge the services of its employees in the Construction of the Residences at an average hourly rate to be mutually agreed upon in good faith by Artland and Porter after the execution of this Agreement. Artland and Porter further agree that Ed Porter shall not bill to Artland, nor shall Artland be responsible to pay for, any of Ed Porter's time spent on, or services provided with respect to, the Construction of the Residences.

The contract does not specifically mention losses.

Artland claims that the parties entered a joint venture and, therefore, as a matter of law, Porter is required to share any losses on the same basis that it would share profits, to-wit: 50% to Artland and 50% to Porter. Artland primarily relies upon *Hathaway v Porter Royalty Pool, Inc*, 296 Mich 90; 295 NW 571, amended 296 Mich 733; 299 NW 451 (1941) and *Kay Inv Co v Brody Realty No 1, LLC*, 273 Mich App 432; 731 NW2d 777 (2006).

Porter claims that its agreement with Artland was nothing more than an arms-length business deal, it never intended to enter into a joint venture with Artland and there was no community interest or joint control. Rather, "Porter was merely the vehicle by which Plaintiff could construct the homes."

"A joint venture is an association to carry out a single business enterprise for a profit." *Id* at 214. The elements of a joint venture are: (1) an agreement indicating an intention to undertake a joint venture; (2) a joint undertaking; (3) a single project for profit; (4) a sharing of profits and losses; (5) contribution of skills or property by the parties; and (6) community interest and control over the enterprise. *Id* at 214-215. "The key consideration is that the parties intended a joint venture." *Id* at 215.

Two or more persons, who through their contribution of property or labor, carry on a single business transaction are joint venturers. *Hathaway, supra* at 101-102. In a joint venture, each party must share profits and losses, contribute to the enterprise and have a community of interest as well as some control over the subject matter or property right of contract. *Id* at 103. A joint adventure is undertaken only when the parties intend to associate themselves in this manner and this intention is governed by the same law as that of contracts.

Id. See, *Davis v LaFontaine Motors, Inc,* 271 Mich App 68, 73; 719 NW2d 890 (2006). "Whether the parties to a particular contract have thereby created, as between themselves, the relation of joint adventurers or some other relation depends upon their actual intent . . . and such relationship [the joint venture] arises only when they intended to associate themselves as such. This intention is to be determined in accordance with the ordinary rules governing the interpretation and construction of contracts." *Hathaway, supra* at 103.

The main goal in interpreting a contract is to honor the parties' intent. *Mahnick v Bell Co,* 256 Mich App 154, 158-159; 662 NW2d 830 (2003). Courts must discern the parties' intent from the words used in the contract and must enforce an unambiguous contract according to its plain terms. *Id* at 159, 662 NW2d 830. "If the contract language is clear and unambiguous, then its meaning is a question of law for the court to decide." *Conagra, Inc v Farmers State Bank,* 237 Mich App 109, 132; 602 NW2d 390 (1999). Whether a joint venture exists is a question for the Court. *Berger v Mead,* 127 Mich App 209, 214; 338 NW2d 919 (1983).

In the instant case, the parties' agreement provides that it is their "desire to enter into a joint arrangement." A "joint arrangement," however, is not necessarily a "joint venture."[2]

> [A] joint adventure contemplates an enterprise jointly undertaken; that it is an association of such joint undertakers to carry out a single project for profit; that the profits are to be shared, as well as the losses, though the liability of a joint adventurer for a proportionate part of the losses or expenditures of the joint enterprise may be affected by the terms of the contract. [*Goodwin v SA Healy Co,* 383 Mich 300, 308-309; 174 NW2d 755 (1970).]

The contract between Artland and Porter embodies characteristics of a joint venture. There was "a single project for profit" - the purchase, development and sale of two lots on Torch Lake. The profits, after expenses, were to be divided 50 percent to Artland and 50 percent to Porter. Artland contributed capital and Porter contributed time, skill and supervision

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[2] See *First Public Corp v Parfet,* 468 Mich 101; 658 NW2d 477 (2003) in which our Supreme Court chastised the Court of Appeals for recognizing a "joint enterprise" as a distinct commercial business relationship, saying:

> In the commercial business law context, the term 'joint enterprise' is loosely synonymous with the terms 'joint venture' and 'joint adventure,' or generally describes a relationship that is either a 'joint venture' or 'partnership.' (Footnote omitted). However, the parties have not identified, nor have we located, any Michigan case law that recognizes a 'joint enterprise' that is distinct from a 'joint venture' or 'partnership' in the context of a legally recognized commercial business relationship. (Footnote omitted). As a result, Michigan case law does not provide any foundation for the Court's proposed recognition of a 'joint enterprise' as a distinct commercial business entity.

of the construction. Artland was the record owner of the land, while Porter physically improved the land.

Porter claims that the parties did not have "community interest and control over the enterprise," but that it was "merely the vehicle by which Plaintiff could construct the homes." Porter points to the fact that Artland bought the properties in its name alone, unilaterally stopped the construction in 2005, and controls the sales. However, any property acquired on behalf of a joint venture, by law, is held in trust for all members, each of whom may acquire an equitable interest in the land or the proceeds on performance of his obligations. *Summers v Hoffman*, 341 Mich 686, 696; 69 NW2d 198 (1955).

According to the contract, Artland was to "provide funding for the purchase of the Lots and the construction of a single-family residence on each lot at cost." Porter was to "perform or arrange for and oversee the performance of, the construction of a single-family residence on each Lot at cost." In addition, the parties agreed that "Ed Porter shall not bill to Artland, nor shall Artland be responsible to pay for, any of Ed Porter's time spent on, or services provided with respect to, the Construction of the Residences."

Based on these provisions and a thorough review of the entire contract, the Court concludes that the parties had an agreement by which each contributed either funds or services to the joint undertaking of a single project for profit. Therefore, they were engaged in a joint venture.

This does not mean, however, that Porter will be responsible for 50% of the loss. 'Loss' does not necessarily mean actual 'monetary loss.' As the Court held in *Summers, supra:*

> If the land was eventually sold at a loss the result would be that plaintiff's expenditure of time would have been for naught as would defendants' monetary investment. If the title litigation had been decided adversely then plaintiff would have lost large out-of-pocket expenses and the value of the time which he had theretofore spent on the project which, while not quite as concrete or measurable as defendants' cash investment, is nevertheless a loss. It cannot be said that the plaintiff did not share any risk of loss, for as we said in *Hathaway v Porter Royalty Pool, Inc, supra*:
>
> * * * the liability of a joint adventurer for a proportionate part of the losses or expenditures of the joint enterprise may be affected by the terms of the contract.

The nature and extent of the loss that may be suffered by each party is determined by the formula in their contract. Pursuant to their contract, when the properties are sold, the

brokerage fees and closing costs paid by Artland are reimbursed first. Then, Artland is reimbursed for the amounts it paid to purchase the properties and all of the costs of constructing the residences.[3] At this point, Artland breaks even - it recovers all of the capital that it expended on the venture. Porter, on the other hand, receives nothing for Ed Porter's services. This is Porter's loss. If there are more proceeds realized, Artland and Porter split them 50/50. Porter may still not be fully compensated for Ed Porter's services which again will be its loss. If there are less proceeds realized, Artland is not fully reimbursed and Porter will again not be compensated for Ed Porter's services. Thus, the contract provides for the sharing of losses because it contains a formula for determining the nature and extent of the loss to each party.

Count II
Negligent Construction

Porter seeks summary disposition pursuant to MCR 2.116(C)(8) on Count II of Artland's Complaint which is entitled Negligent Construction. A plaintiff in a negligence case must establish four elements: 1) that the defendant owed plaintiff a duty; 2) a breach of that duty; 3) an injury proximately resulting from the breach; and 4) damages. *Hughes v PMG Building, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997).

A duty of care "may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract." *Fultz v Union Commerce Assoc*, 470 Mich 460, 465; 683 NW2d 587 (2004), quoting *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967). However, a defendant must owe a duty to the plaintiff that exists independent of the contract. *Id.* "No tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made." *Id* at 470. Here, Artland does not allege that Porter breached any duty owed to Artland independent of the contract.

Artland alleges that Porter owed it a duty to "exercise reasonable care in the construction of the residences," citing *Baranowski v Strating*, 72 Mich App 548, 556; 250 NW2d 744, 747 (1976). But, in *Baranowski*, the Court found that the builder owed the plaintiff

[3] Because Artland is reimbursed for the cost of construction before the amount of the net profits or losses is determined, any outstanding invoices for construction costs are an outstanding liability of Artland and must be paid regardless of whether the project nets a profit or loss.

a duty independent of the contract to build the house. Under the particular facts of that case, the builder owned the plaintiff a duty to perform soil borings before construction to make sure that the house was being built on stable soil.

Artland also alleges that Porter's work was subject to an implied warranty of habitability and implied warranty of workmanship and that Porter breached these warranties. To state a claim for breach of warranties, the plaintiff must allege existence of warranties, their breach, and damages as a proximate result of the breach. See e.g., *Borman's Inc v Lake State Development Co*, 60 Mich App 175, 180-181; 230 NW2d 363 (1975). Artland alleges that Porter breached implied warranties that are actually conditions of the contract and not separate warranty agreements giving rise to a cause of action other than for breach of contract. Therefore, Artland has failed to state a cause of action for negligent construction. Summary disposition on Count II for Porter should be and hereby is granted. Count II should be and hereby is dismissed.

Count III
Breach of Partner's Fiduciary Duties

In Count III of its Complaint, Artland alleges that the joint venture undertaken by Artland and Porter constitutes a partnership under the Uniform Partnership Act, MCL 449.6 and 449.7, and Porter breached its fiduciary duties.

Porter seeks summary disposition on Count III because it contends that the agreement between the parties was a simple arms-length business contract and not a joint venture or partnership.

As discussed above, this Court has determined that the relationship between Artland and Porter was a joint venture. "The name given the enterprise, whether partnership or joint adventure, is, with respect to the duty of the trust reposed, unimportant. The fiduciary duties are parallel." *Van Stee v Ransford*, 346 Mich 116; 77 NW2d 346 (1956).

Artland alleges that Porter breached fiduciary duties: (1) to "contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his or her share in the profits"; (2) to "render on demand true and full information of all things affecting the partnership"; (3) to "account to the partnership for any benefit, and hold as trustee for any

profits derived by him without the consent of the other partners;" and (4) through its "negligent construction of the residences."

Whether Porter breached a fiduciary duty to contribute toward losses is answered under the discussion of Count I. Whether Porter breached a fiduciary duty by negligently constructing the residences is a matter of contract, not tort, liability as discussed under the discussion of Count II. Artland has failed to allege any facts that would support a breach of fiduciary duty claim for failing to "render on demand true and full information of all things affecting the partnership" or failing to "account to the partnership for any benefit, and hold as trustee for any profits derived by him without the consent of the other partners." Thus, Artland has failed to plead a cause of action for breach of fiduciary duties. Summary disposition for Porter on Count III should be and hereby is granted. Count III should be and hereby is dismissed.

Count IV
Breach of Contract

In Count IV, Artland claims that Porter breached the parties' contract (1) by "the conduct described in prior paragraphs of this complaint," (2) by representing itself as a corporation while relying on Edwin Porter's individual builder's license to obtain the building permits, and (3) by representing that it held a residential builder's license as a corporation while relying on Edwin Porter's individual builder's license to obtain the building permits.

As indicated above, the allegations in Count II which is titled "Negligent Construction" will not support a tort claim, but will support a claim for breach of contract. Plaintiff may amend this Count, however, to make it clear that its claim is one for breach of contract for failure to perform his obligations under the contract to construct the residences in a good and workmanlike manner.

As for whether Porter breached the contract because he was not a corporation with a builder's license, Porter relies upon MCL 339.2405 which requires a business entity that applies for a license to designate a qualifying officer to take the exam and obtain a license so that he can act on behalf of the business entity. Porter neglects to mention, however, that this statutory provision also requires the qualifying officer to obtain and maintain a license as an individual. It is undisputed that Porter had an individual builder's license but not a corporate builder's license.

While Porter's representation that he was a corporation with full power and authority to execute, deliver and perform the agreement may have been false because the corporation did not have a builder's license, the Court is hard pressed to figure out how the use of Porter's individual builder's license was a breach of the contract that proximately caused any damages to Artland. Whether Edwin Porter, Porter Builders, Inc., or C.T.F. Corporation d/b/a Porter Builders held the residential builder's license is irrelevant and immaterial to whether Porter provided construction services to Artland at cost. It is also irrelevant and immaterial to whether the construction work was defective. The lack of a builder's license alone cannot be a proximate cause of defective construction.

Porter's lack of a corporate residential builder's license may preclude Porter from seeking compensation for his work. MCL 339.2405 and 339.2412*; Bernard F. Hoste, Inc v Kortz*, 117 Mich App 448; 324 NW2d 46 (1982). But, it does not give Artland a cause of action against Porter for breach of contract.

Therefore, Artland has stated a claim for breach of contract in Count IV, but only for (1) failure to construct the residences in a good and workmanlike manner. Summary disposition for Porter is denied as to those allegations, but is granted as to allegations of breach of contract for (2) representing itself as a corporation while relying on Edwin Porter's individual builder's license to obtain the building permits, and (3) representing that it held a residential builder's license as a corporation while relying on Edwin Porter's individual builder's license to obtain the building permits.

CONCLUSION

The parties' business arrangement was that of a joint venture. The joint adventurers were Artland and one or both of the Porter corporate entities. Edwin Porter, individually, was not a party to the agreement.

The agreement contains a formula for determining net profits and the nature and extent of the losses that may be suffered by each party. In its Second Amended Complaint, Artland failed to properly allege causes of action for negligent construction, breach of fiduciary duties and breach of contract other than breach of contract for shoddy construction. Therefore, summary disposition for Porter on Counts II and III and in part IV is granted and they are dismissed. If it chooses to do so, Artland may, within 14 days of the date of this decision and

order, amend Count IV to more clearly allege breach of contract for failure to construct the residences in a good and workmanlike manner.

IT IS SO ORDERED.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: S/ 12/18/08