STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

GEORGE SLATER and MARGARET SLATER, individually and d/b/a G.M. & ASSOCIATES,

Plaintiffs/Counter-Defendants,

v

File No. 98-18414-PD
HON. PHILIP E. RODGERS, JR.

PATRICK DUKE, AMERACALL , INC., NATIONAL WIRELESS, INC., RUSSELL MADSEN, DAVID NICKERSON, PAMELA NICKERSON, JAMES SCHOPIERAY, and MARY SCHOPIERAY,

Defendants,

and

PATRICK DUKE,

Defendant/Cross-Plaintiff,

v

AMERACALL, INC., RUSSELL MADSEN, and DAVID NICKERSON,

Defendants/Cross-Defendants,

and

PATRICK DUKE,

Defendant/Cross-Plaintiff/
Counter-Plaintiff,

v

GEORGE SLATER and MARGARET SLATER, individually and d/b/a G.M. & ASSOCIATES,

Plaintiffs/Counter-Defendants,

and

DAVID NICKERSON,

Defendant/Counter-Plaintiff,

v

GEORGE SLATER,

Plaintiff/Counter-Defendant,

and

AMERACALL, INC.,

Defendant/Cross-Plaintiff,

v

PATRICK DUKE and NATIONAL WIRELESS,

Defendants/Cross-Defendants,

and

RUSSELL MADSEN,

Defendant/Cross-Defendant/Counter
Cross-Plaintiff,

v

PATRICK DUKE,

Defendant/Cross-Plaintiff/Counter
Cross-Defendant.

_____/

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National Wireless, Inc.
Defendant and Cross-Defendant in Pro Per

Patrick Duke
Defendant/Counter and Cross-Plaintiff
Cross-Defendant and Counter Cross-Defendant in Pro Per

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Plaintiff David Nickerson

DECISION AND ORDER OF THE COURT ON
PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION AND SANCTIONS

INTRODUCTION

The Plaintiffs (hereinafter collectively referred to as "Slater") filed this action in December of 1998. Among other things, Slater alleged that the Defendants Patrick Duke and National Wireless, Inc. (hereinafter collectively referred to as "Duke"), usurped Ameracall, Inc.'s corporate opportunities and squandered its corporate assets. In response, Duke filed a counterclaim alleging that he was deceived into investing in Ameracall, Inc. Duke claims that he was deceived because he was unaware of certain documents, namely the Articles of Incorporation of Ameracall, Inc., the Voting Trust Agreement, and the Buy-Sell Agreement. At paragraphs 11 and 12 of the counter-complaint, Duke states that he did not discover the existence of these documents until December of 1998.

On June 8, 1999, the Plaintiffs filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) and a motion for sanctions pursuant to MCR 2.114. On July 12, 1999, Duke filed a timely response to these motions. The Court heard oral arguments on July 20, 1999 and took the matter under advisement. The Court now issues this written Decision and Order and for the reasons stated herein grants the Plaintiffs' motion for summary disposition brought under MCR 2.116(C)(10) and awards the Plaintiffs sanctions and costs pursuant to MCR 2.114(E) and (F).

I

MCR 2.116(C)(8)

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).]

Slater contends that Duke's claim for fraud contained in Count I should be dismissed pursuant to MCR 2.116(C)(8). Slater claims that Duke fails to state a claim upon which relief can be granted because Duke did not plead the fraud claim with sufficient "particularity." Slater cites MCR 2.112(B)(1) and *Zimmerman v Merrill Lynch*, 151 Mich App 566; 391 NW2d 353 (1986) in support of his position.

Duke responds that his counterclaim for fraud is plead with sufficient particularity to apprise Slater of the nature of the case he must defend and satisfies the requirements of MCR 2.112(B)(1). Duke relies on the allegations contained in paragraphs 9, 10 and 18 of the counterclaim and, alternatively requests leave to amend pursuant to MCR 2.116(I)(2).

The Court agrees with the Plaintiffs. Under Michigan's rule of general fact-based pleading, MCR 2.111(B)(1), the only facts and circumstances that must be pleaded "with particularity" are claims of "fraud or mistake." MCR 2.112(B)(1). In other situations, MCR 2.111(B)(1) provides that the allegations in a complaint must state "the facts, without repetition, on which the pleader relies," and "the specific allegations necessary reasonably to inform the adverse party" of the pleader's claims. See, *Dacon v Transue*, 441 Mich 315, 330; 490 NW2d 369 (1992). A complaint is sufficient under MCR 2.111(B)(1) as long as it "contain[s] allegations that are specific enough reasonably to inform the defendant of the nature of the claim against which he must defend." *Porter v Henry Ford Hosp*, 181 Mich App 706, 708; 450 NW2d

37 (1989); see also, *Goins v Ford Motor Co*, 131 Mich App 185, 195, 347 NW2d 184 (1983). *County of Iron v Sunberg, Carlson & Assoc Inc*, 222 Mich App 120, 124; 564 NW2d 78 (1997). The counter-complaint in the instant case may be "specific enough reasonably to inform [Slater] of the nature of the claim against which he must defend," but it does not contain the particular facts and circumstances necessary to adequately allege fraud.

Consequently, Slater's motion for summary disposition brought pursuant to MCR 2.116(C)(8) should be and hereby is granted. The issue of whether Duke should be granted leave to amend is rendered moot by this Court's further decision set forth below granting Slater's motion for summary disposition brought pursuant to MCR 2.116(C)(10).

II

MCR 2.116(C)(10)

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* at 372.
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> A motion for summary disposition pursuant to MCR 2.116(C)(10) is appropriately granted where, "[e]xcept as to the amount of damages, there is no

> genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." The motion tests whether there is factual support for the claim. *Dumas v Auto Club Ins Ass'n*, 168 Mich App 619, 626; 425 NW2d 480 (1988). The nonmovant bears the burden of showing that a genuine issue of disputed fact exists, Id, and that the disputed factual issues are material to dispositive legal claims, *Belmont v Forest Hills Public Schools*, 114 Mich App 692, 696; 319 NW2d 386 (1982), lv den 422 Mich 891, 368 NW2d 234 (1985). Giving the benefit of reasonable doubt to the nonmovant, the court must determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Dumas, supra*. All inferences are to be drawn in favor of the nonmovant. *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987), lv den 430 Mich 887 (1988). Before judgment may be granted, the court must be satisfied that it is impossible for the claim asserted to be supported by evidence at trial. *Peterfish v Frantz*, 168 Mich App 43, 48-49; 424 NW2d 25 (1988).

Duke's counterclaim contains three counts: Count I - fraud and misrepresentation, Count II - unjust enrichment, and Count 3 - breach of fiduciary duty. The factual allegations underlying each of these counts are stated in paragraphs 9 through 12 of the counterclaim. Briefly stated, Duke alleges that he did not know about the existence of Article IX of the Articles of Incorporation of Ameracall, the Buy and Sell Agreement, and the Voting Trust Agreement; that Slater allowed him to enter into stock purchase agreements knowing these transactions were prohibited by these documents; that Slater caused him to believe that he was an officer and shareholder of Ameracall when Slater knew that these documents prohibited Duke from becoming either; and that he did not discover the existence of these documents until December of 1998.

In support of the motion for summary disposition, Slater submitted to the Court copies of the three documents in question, as well as copies of correspondence between the parties, excerpts from Duke's deposition, and other documentary evidence. Duke filed a response with various attachments, including his affidavit.

Having reviewed the motion, response, affidavit, pleadings, deposition excerpts, and other documentary evidence and having heard the arguments of counsel, the Court finds that the allegations contained in paragraphs 9 through 12 of Duke's counterclaim are false in so far as Duke claims that he was unaware of Article IX of the Articles of Incorporation, the Buy and Sell Agreement, and the Voting Trust Agreement when he purchased stock and invested in Ameracall. Further, the Court finds that the allegations of fraud contained in Duke's

counterclaim are false in so far as Duke claims that because he was unaware of these three documents, Slater was able to and did make material misrepresentations which induced Duke to purchase stock and invest in Ameracall.

Duke testified at his deposition that, in April or May of 1996, he requested certain documents before he decided to invest in Ameracall. He testified that the document attached to Slater's motion and brief in support as Exhibit K is a list of those documents. The three documents in question are specifically referred to in Exhibit K. In addition, the correspondence, other documents and deposition excerpts attached to Slater's motion and brief in support, clearly indicate that Duke knew about Article IX, the Buy and Sell Agreement, and the Voting Trust Agreement prior to his entering into any agreement to purchase stock or invest in Ameracall. For example, the initial draft of the Stock Purchase Agreement which was sent to Duke in July of 1997, a copy of which is attached to Slater's motion and brief in support as Exhibit L, expressly refers to the Buy and Sell Agreement. Furthermore, the Stock Purchase Agreement that Duke entered into with Russell Madsen in November of 1997 states:

> **Section 4. Representations of Both Seller and Purchaser.** Seller and Purchaser hereby represent, warrant, acknowledge and agree to the following:
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> * * * * * *
>
> 4.4 Seller and Purchaser have had an opportunity to review the recent financial statements of Corporation and to investigate any financial or other information pertaining to Corporation appropriate for purposes of selling Seller's Shares.
>
> 4.5 Seller and Purchaser have had the opportunity to meet with representatives of Corporation, and have had the opportunity to ask questions of, and receive answers from, those representatives concerning the terms and conditions of this transaction and the operations of Corporation.
>
> 4.6 Seller and Purchaser are relying solely on their independent investigation and upon their own tax and legal counsel in entering into this Agreement. **Seller and**

> **Purchaser are not relying upon the advice, statement, or counsel of George Slater** or James Schopieray in entering into this Agreement. (Emphasis supplied.)

Thus, Duke has failed to show that Slater could have or did make any material misrepresentations that induced him to purchase stock or invest in Ameracall. Duke has failed demonstrate that there is a genuine issue for trial. There are no material factual issues upon which reasonable minds could differ. Slater's motion for summary disposition pursuant to MCR 2.116(C)(10) should be and hereby is granted. Duke's counterclaim against Slater is dismissed with prejudice.

III

MCR 2.114 SANCTIONS

The Plaintiffs rely upon MCR 2.114 in their brief in support of their motion for sanctions. MCR 2.114 provides in pertinent part as follows:

> (D) **Effect of Signature.** The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
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> (1) he or she has read the pleading;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the pleading is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the pleading is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.
>
> (E) **Sanctions for Violation.** If a pleading is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may included an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including reasonable attorney fees. The court may not assess punitive damages.
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> (F) **Sanctions for Frivolous Claims and Defenses**. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

In order to determine whether the Plaintiffs' Complaint violated MCR 2.114, this Court must determine whether at least one of the following conditions is met:

(a) The Plaintiffs' primary purpose in initiating the action was to harass, embarrass, or injure the opposing party; or

(b) The Plaintiffs had no reasonable basis to believe that the facts underlying their legal position were in fact true; or

(c) The Plaintiffs' legal position was devoid of arguable legal merit.

MCR 2.114(F); *Broadway Coney Island, Inc v Commercial Union Ins Co*, 217 Mich App 109, 116-117; 550 NW2d 838 (1996).

This Court has conducted an independent review of the entire record. This Court finds that condition (b) has been met. Duke had no reasonable basis to believe that the facts underlying his legal position were in fact true. The Plaintiffs are entitled to sanctions.

CONCLUSION

Duke filed a counterclaim against Slater alleging that because Duke was unaware of Article IX of the Articles of Incorporation of Ameracall, the Buy and Sell Agreement, and the Voting Trust Agreement, Slater was able to and did make material misrepresentations to him which induced him to purchase stock and invest in Ameracall. As a result, Duke claims he lost a large sum of money and that Slater was unjustly enriched. The underlying factual allegations contained in the counterclaim are false. The factual allegations that Duke did not know about Article IX of the Articles of Incorporation, the Buy and Sell Agreement, and the Voting Trust Agreement and that he was therefore fraudulently induced into purchasing stock and investing in Ameracall are false.

The counterclaim was prepared and signed by counsel for Duke. The accompanying affidavit was signed by Duke. It is evident that counsel relied upon information supplied by Duke in preparation of the counterclaim. Counsel, then, shall not be responsible for the payment of sanctions and Duke personally must pay the amount of reasonable attorneys fees and expenses incurred by Slater because of the filing of the counterclaim. MCR 2.114(E). In addition, all costs of the proceedings made necessary by the filing of the counterclaim are taxed against the Defendant Duke. MCR 2.114(F).

Plaintiffs' counsel shall submit an affidavit of fees and expenses claimed as sanctions within 14 days of the date signed below or the request for monetary relief shall be deemed to have been waived. Specific and detailed objections to the reasonableness and necessity of the claimed sums shall be due within 28 days of the date signed below or the Court will deem the sanctions request to be agreed upon. *No* motion for reconsideration shall toll these deadlines.

IT IS SO ORDERED.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____