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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
Plaintiff

Case No: CV-16-865052

Judge: CASSANDRA COLLIER-WILLIAMS

MMCO, LLC, ET AL
Defendant

JOURNAL ENTRY

96 DISP.OTHER - FINAL

MEDICAL MUTUAL'S MOTION FOR SUMMARY JUDGMENT, FILED 06/08/2018, IS GRANTED.

MEDICAL MUTUAL OF OHIO'S MOTION FOR PARTIAL SUMMARY JUDGMENT, FILED 01/31/2018, IS GRANTED.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED 06/08/2018, IS GRANTED IN PART AND DENIED IN PART.

FINAL OPINION AND ORDER IS SIGNED AND ORDERED RECORDED. ORDER ATTACHED. OSJ. FINAL.

IT IS SO ORDERED.

COURT COST ASSESSED TO THE DEFENDANT(S).

PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER
PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL
PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

OSJ

Judge Signature

Date

CLERK OF COURTS
CUYAHOGA COUNTY,

2019 DEC 20 P 4: 22

FILED

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

U.S. BANK NATIONAL ASSOC., AS)
TRUSTEE FOR THE REGISTERED)
HOLDERS OF BANC OF AMERICA)
COMMERCIAL MORTGAGE INC.,)
COMMERCIAL MORTGAGE PASS-)
THROUGH CERTIFICATES, SERIES)
2006-1,)

Plaintiff,)

vs.)

MMCO, LLC, *et al.*)

Defendants.)

Case No. CV-16-865052

JUDGE CASSANDRA COLLIER-WILLIAMS

MEDICAL MUTUAL OF OHIO, *et al.*)

Intervening Defendant,)
Counterclaimant, Cross-Claimant)
and Third-Party Plaintiff,)
vs.)

FINAL OPINION AND ORDER

U.S. BANK NATIONAL ASSOC., AS)
TRUSTEE FOR THE REGISTERED)
HOLDERS OF BANC OF AMERICA)
COMMERCIAL MORTGAGE INC.,)
COMMERCIAL MORTGAGE PASS-)
THROUGH CERTIFICATES, SERIES)
2006-1,)

Counterclaim Defendant,)
and)

MMCO, LLC, *et al.*)

Cross-Claim Defendants,)
and)

BFG HOLDINGS 2000, LLC, *et al.*)

Third-Party Defendants.)

JUDGE C. COLLIER-WILLIAMS:

This cause came for consideration upon Intervening Defendant, Counterclaimant, Cross-Claimant, and Third-Party Plaintiff Medical Mutual of Ohio (hereinafter "Medical Mutual") and Defendants BFG Holdings 2000, LLC, Bentley Forbes Group, LLC, GFW II Trust, C. Frederick Wehba, Susan D. Wehba, C. Frederick Wehba II, MMCO, LLC and GFW Trust (collectively hereinafter "Defendants") cross-motions for summary judgment. Medical Mutual's motions request judgment, as a matter of law, on its claims for Breach of Promissory Note, Fraud and Fraudulent Concealment, Unjust Enrichment and Breach of Guaranty. For the reasons set forth more fully below, this Court hereby GRANTS Medical Mutual's Motions for Summary Judgment and GRANTS-IN-PART and DENIES-IN-PART Defendants' Motion for Summary Judgment.

Factual and Procedural Background

Pursuant to the attendant briefs and record, on July 1, 2016, Medical Mutual filed its Verified Counterclaim, Cross-Claim and Third-Party Complaint for Temporary Restraining Order, Preliminary and Permanent Injunction, Damages, Declaratory and Other Relief against Plaintiff/Counterclaim Defendant U.S. Bank National Association (hereinafter "Plaintiff U.S. Bank") and Defendants. Plaintiff U.S. Bank's Complaint and Medical Mutual's Counterclaim against Plaintiff were previously resolved.

In 2000, Medical Mutual agreed to sell the real property which housed its building headquarters in Cleveland to Defendant MMCO, LLC for over \$47 Million. \$12,370,00.00 of that amount was financed by way of a twenty-year Promissory Note by Defendant BFG

Holdings, executed by Defendant Fred Wehba Jr., in favor of Medical Mutual, to be paid in monthly installments of \$97,769.51.

At the same time Medical Mutual entered into a lease for its headquarters and agreed to pay rent of \$419,968.33 per month, for a twenty-year term, to complete this sale-leaseback transaction. The transaction also involved a lockbox arrangement whereby a part of each rent payment made by Medical Mutual would return to Medical Mutual as payment on the Note, leaving enough for Defendants to satisfy the amount owed to the primary lender.

On September 29, 2000, Third-Party Defendant BFG Holdings 2000, LLC (hereinafter "BFG Holdings") obligations under the Promissory Note were guaranteed by several of the other Defendants, jointly and severally, including Defendant The GFW Trust, who was later replaced on the Guaranty by Third-Party Defendant The GFW II Trust. In the Guaranty, the guarantors expressly acknowledged that they "have a financial interest, either directly or indirectly, in both [MMCO] and [BFG Holdings] and shall benefit from the closing of [MMCO's] acquisition of the Property." The Guaranty promised that as long as the Promissory Note remained unpaid, the GFW Trust would "have a minimum net worth of \$25,000,000.00 determined in accordance with generally accepted accounting principles."

The facts surrounding the relationship between the parties and the financial status of the various Defendants remain somewhat unclear. However it is undisputed that Defendants defaulted on their obligations to the primary lender, instigating the instant foreclosure action. On or about April 7, 2016, Defendant Fred Wehba Sr. informed Medical Mutual that no further payments would be forthcoming, and that the trust that was to be maintained with at least \$25Million in net worth to guarantee payment of the Promissory Note was insolvent. Medical

Mutual made demand upon the guarantors to pay the remaining balance. However, Wehba Sr. also informed Medical Mutual that the other guarantors were insolvent.

On May 27, 2016, Medical Mutual sent notice to BFG Holdings declaring its default under the Promissory Note and sent notices to the guarantors, accelerating the Promissory Note and demanding payment. Medical Mutual received payments for May and June of 2016, but nothing thereafter. The outstanding principal on the Promissory Note is \$4,351,679.00. As of January 16, 2018, interest in the amount of \$516,031.63 had accrued on the Promissory Note, for a total outstanding amount owed by BFG Holdings and the guarantors of \$4,867,710.63.

The Court takes judicial notice that several of Defendants entered into a stipulated judgment in a California proceeding in October, 2016, wherein they admitted they were the alter egos of one another.

On January 31, 2018, Medical Mutual filed a Motion for Partial Summary Judgment as to Count Three of its Verified Counterclaim, Cross-Claim, and Third-Party Complaint for breach of guaranty against Third-Party Defendants The Bentley Forbes Group, LLC, The GFW II Trust, C. Frederick Wehba, Susan D. Wehba, individually and in her capacity as Co-Trustee of the GFW II Trust, and C. Frederick Wehba II, in his capacity as Co-Trustee of the GFW II Trust. On June 8, 2018, Medical Mutual also filed a Motion for Summary Judgment against all Defendants on its remaining claims for Breach of Promissory Note (Count 2), Fraud and Fraudulent Concealment (Count 4) and Unjust Enrichment (Count 6). On June 8, 2018, Defendants filed their Motion for Summary Judgment on all of Medical Mutual's claims as pled in their Verified Counterclaim, Cross-Claim, and Third-Party Complaint.

Applicable Law and Analysis

Civ. R. 56(C) Summary Judgment

Summary Judgment is a procedural device engineered to expeditiously and economically dispose of legal claims with no factual foundation. *Dresher v. Burt*, 75 Ohio St. 3d 280. Underpinning this device is the belief that litigation should promptly be terminated where no issues remain to be tried. *Norris v. Ohio Standard Oil Co.*, 70 Ohio St.2d 1 (1982). Rule 56(C) of the Ohio Rules of Civil Procedure governs summary judgment motions and provides in pertinent part:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In construing Civil Rule 56(C), the Supreme Court of Ohio has stated summary judgment may be granted when “(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317 (1977).

“The burden of showing no genuine issue as to any material fact exists falls upon the moving party in requesting summary judgment.” *Harless v. Willis Day Warehousing Co.*, 54 Ohio St. 2d 64. The party seeking summary judgment “bears the initial burden of informing the trial court of the basis of the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the non-moving party’s claims.” *Dresher v. Burt*, 75 Ohio St. 3d 280. If the moving party satisfies

this initial burden, a non-moving party must set forth specific facts showing there exists a genuine issue of material fact for trial. *Id.* If the non-moving party fails to prove the existence of an element essential to that party's case, there can be no genuine issue as to any material fact and all other facts are rendered immaterial. *Celotex, supra.*

Breach of Promissory Note and Guaranty

A Promissory Note is a contract. *Cranberry Fin., LLC v. S&V P'ship*, 6th Dist. Huron No. H-09-004, 2010-Ohio-464. A Promissory Note is simply an instrument that evidences an agreement to pay a monetary obligation. *Bank of Am., N.A. v. Smith*, 2014-Ohio-2845.

A guaranty is a promise by one person to pay the debts of another. *SMS Fin. 30, L.L.C. v. Frederick D. Harris, M.D., Inc.*, 2018-Ohio-2064. A personal guaranty agreement is reviewed under the law of contracts and a reviewing court should give the contract's language its plain and ordinary meaning unless some other meaning is evidenced within the document. *Id.*

To prevail on a claim for breach of a contract, a party must demonstrate the following elements: (1) the existence of a contract; (2) [its] performance under the contract; (3) breach by the other party; and (4) damages resulting from the breach. *Chattree v. Chattree*, 2011-Ohio-1925.

Defendant BFG Holdings 2000, LLC does not dispute its default on the Medical Mutual loan and therefore its breach of the Promissory Note. *Defendants' Response to Motion for Summary Judgment* at p. 19. The question of whether all Defendants should be held liable for breach of the Promissory Note shall be analyzed under the law of alter ego liability.

Defendants The Bentley Forbes Group, LLC, the GFW II Trust, C. Frederick Wehba, Susan D. Wehba, individually and as Co-Trustee of the GFW II Trust, and C. Frederick Wehba

II, as Co-Trustee of the GFW II Trust do not dispute that they breached the guaranty. *Defendants' Response to Motion for Partial Summary Judgment at p. 8.* In fact the first paragraph of the Guaranty provides:

THIS GUARANTY, dated as of September 29, 2000 ("Guaranty"), is made by C. FREDERICK WEHBA II and SUSAN D. WEHBA, as Trustees ("Trustees") of the GFW TRUST, C. FREDERICK WEHBA, individually, SUSAN D. WEHBA, individually, THE BENTLEY FORBES GROUP, LLC, a Delaware limited liability company (the foregoing are hereinafter sometimes referred to individually as "Guarantor" and collectively as the "Guarantors), in favor of MEDICAL MUTUAL OF OHIO, and Ohio mutual insurance company("Lender").

Fraud and Fraudulent Concealment

The elements of fraud are: (1) a representation (or concealment of a fact when there is a duty to disclose); (2) that is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with intent to mislead another into relying upon it; (5) justifiable reliance on the representation or concealment; and (6) resulting injury proximately caused by the reliance. *Citibank, N.A. v. Katz*, 2013-Ohio-1041.

Medical Mutual sets forth its facts regarding the series of transactions between itself and Defendants. These Defendants represented to Medical Mutual that as long as a balance was owed on the Promissory Note, they would ensure that the GFW II Trust maintained at least \$25 Million in net worth. The Defendants also had a duty to disclose that the GFW II Trust no longer had \$25 Million in assets. Unfortunately, Defendants failed to participate in meaningful discovery throughout the pendency of this matter. Defendants failed to provide evidence regarding when and by whom the trust's assets were drained. Medical Mutual in its Verified

Third-Party Complaint sufficiently pled its reasonable reliance on the Defendants' representations and concealments to their detriment.

This Court finds the required disregard and recklessness in the Defendants' corporate governance (or lack thereof) and accounting principles such that they knew or should have known of falsity. The actions taken by Medical Mutual and the resulting damage (with liability admitted by numerous Defendants) evidences the material nature of the representation/concealment and proximate cause thereof.

Alter Ego Liability

Alter ego is a separate remedy under Ohio law. *Slone v. Lorenz (In re Lorenz)*, 2011 Bankr. LEXIS 738. In Ohio, the courts may consider a number of nonexclusive factors in deciding whether to disregard the corporate fiction under the alter ego theory. *Brennan v. Slone (In re Fisher)*, 296 Fed. Appx. 494. Those factors include: 1) grossly inadequate capitalization; 2) failure to observe corporate formalities; 3) insolvency of the debtor corporation at the time the debt is incurred; 4) shareholders holding themselves out as personally liable for certain corporate obligations; 5) diversion of funds or other property of the company property for personal use; 6) absence of corporate records; and 7) the fact that a corporation was a mere façade for the operations of the dominant shareholder(s). *Id.*

In applying the alter ego test, not all of the seven factors must be met. *Id.* In order to satisfy the requirements of alter ego doctrine a plaintiff must prove that the individual and the corporation are fundamentally indistinguishable. *Id.*

As noted above, the Court utilizes its discretion in taking judicial notice of a prior judgment in California wherein many of these Defendants stipulated to, and the Court held, them to be the alter ego of one another. *Mitsua Corporation v. C. Frederick Wehba, et al.*, Case No.

BC463929. However not all current Defendants were Defendants in the California matter, and the facts in this case differ from those which culminated in a finding of alter ego liability.

In viewing the facts of this case and analyzing the Ohio law, this Court finds the above factors 1, 3, 4, 6 and 7 weigh in favor of a finding of alter ego liability against the Wehba family of Defendants. Defendants failure to participate in good faith in discovery of this matter precludes an analysis as to the second factor (failure to observe corporate formalities) and the fifth factor (diversion of funds or other property of the company for personal use).

Unjust Enrichment

Having determined all Defendants are liable for breach of the Promissory Note in this matter, this Court finds Medical Mutual's Motion for Summary Judgment as to Count Six for Unjust Enrichment as moot.

Defendants' Motion for Summary Judgment

In viewing Defendants' Motion, Medical Mutual has not raised genuine issues of material fact and has not opposed Defendants' Motion as to Declaratory Judgment (Count 1), Fraudulent Transfers (Count 5) and Set-Off (Count 7). Therefore the Court hereby GRANTS Defendants' Motion for Summary Judgment on said claims.

Conclusion

Medical Mutual's Motion for Partial Summary Judgment against Third-Party Defendants, filed on January 31, 2018, is hereby GRANTED.

Medical Mutual's Motion for Summary Judgment against the Wehba Enterprise Defendants for Breach of Promissory Note, Fraud and Fraudulent Concealment and Unjust Enrichment, filed on June 8, 2018, is hereby GRANTED-IN-PART.

Defendants' Motion for Summary Judgment, filed on June 8, 2018, is GRANTED-IN-PART and DENIED IN PART.

Pursuant to Civ. R. 56(C), the Court, having considered all of the evidence and having construed the evidence in a light most favorable to the non-moving party, determines that reasonable minds can come to but one conclusion, that there are no genuine issues of material fact and that Medical Mutual is entitled to summary judgment as a matter of law on its Verified Counterclaim, Cross-Claim and Third-Party Complaint for its claims of breach of Promissory Note, fraud and fraudulent concealment and breach of guaranty.

Defendants are entitled to summary judgment as a matter of law on Medical Mutual's Verified Counterclaim, Cross-Claim and Third-Party Complaint for the claim of fraudulent transfers.

Medical Mutual's claims for declaratory judgment, unjust enrichment and set-off are moot.

Therefore it is ordered, adjudged and decreed that judgment is hereby entered in favor of Intervening Defendant, Counterclaimant, Cross-Claimant, and Third-Party Plaintiff Medical Mutual of Ohio and against Third-Party Defendants The Bentley Forbes Holding Group, LLC, The GFW II Trust, C. Frederick Wehba, Susan D. Wehba, individually and as Co-Trustee of the GFW II Trust, and C. Frederick Wehba II, as Co-Trustee of the GFW II Trust, jointly and severally, in the principal sum of \$4,351,679.00, plus interest at the Promissory Note rate of 7.25% per annum from July 1, 2016 until the judgment is paid in full.

It is further ordered, adjudged and decreed that judgment is hereby entered in favor of Intervening Defendant, Counterclaimant, Cross-Claimant, and Third-Party Plaintiff Medical Mutual of Ohio and against Cross-Claim Defendant MMCO, LLC, and Third-Party Defendants

BFG Holdings 2000, LLC, The Bentley Forbes Group, The GFW Trust, The GFW II Trust, C. Frederick Wehba, Susan D. Wehba, individually and in her capacity as Co-Trustee of the GFW II Trust, and C. Frederick Wehba II, in his capacity as Co-Trustee of the GFW II Trust, jointly and severally, in the principal amount of \$4,351,679.00, plus accrued interest in the amount of \$516,031.63, plus interest at the Promissory Note rate of 7.25% per annum from the date of January 16, 2018 to the present, and costs of this action.

It is further ordered, adjudged and decreed that judgment is hereby entered in favor of Defendants on Medical Mutual's claim of Fraudulent Transfers. Count Five of Medical Mutual's Verified Counterclaim, Cross-Claim and Third-Party Complaint is hereby dismissed.

Counts One (Declaratory Judgment), Six (Unjust Enrichment) and Seven (Set-Off) of Medical Mutual's Verified Counterclaim, Cross-Claim and Third-Party Complaint are hereby dismissed as moot. Final.

IT IS SO ORDERED.


JUDGE CASSANDRA COLLIER-WILLIAMS