

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Michigan Circuit Court.

PINNACLE EXPRESS, INC., a Michigan corporation, and
 Craig Faiman, an
 individual, Plaintiffs,
 v.
 Bogar TROUT, Jr., individually, and d/b/a Bogie's Express,
 an individual,
 Bogie's Express, Inc., a Michigan corporation, and Carl
 Trout, individually and
 d/b/a Trout Truck & Expediting, and individual, jointly and
 severally,
 Defendants.

No. 01-441 CZ.

June 26, 2002.

David J. Shea, Marc L. Newman, Jayson E. Blake, Mantese Miller and Shea, P.L.L.C., Troy, for plaintiffs.

James R. Cmejrek, Law Offices of James r. Cmejrek, Ann Arbor, for defendants.

OPINION AND ORDER GRANTING IN PART
 PLAINTIFFS' MOTIONS FOR SUMMARY
 DISPOSITION;

DENYING DEFENDANTS' MOTION FOR SUMMARY
 DISPOSITION OF COUNTER-CLAIM; AND
 GRANTING IN PART DEFENDANTS' MOTION FOR
 SUMMARY DISPOSITION

MORRIS, Circuit J.

*1 Plaintiffs filed this action against defendants asserting claims of breach of fiduciary duties (Count I of plaintiffs' complaint); conspiracy to violate fiduciary duties (Count II); conversion (Count III); tortious interference with contracts/business expectancy (Count IV); breach of contract (Count V); unjust enrichment (Count VI); and seeking an accounting (Count VII). Defendants have filed a counter-complaint, which includes claims for breach of

contract (Count I); wrongful discharge (Count II); and promissory estoppel (Count III). Plaintiffs have moved for summary disposition, seeking dismissal of all defendants' counter-claims and judgment in plaintiffs' favor on Counts I and III of their complaint. Defendants have moved for summary disposition, seeking dismissal of plaintiffs' Counts II, IV and V, and judgment in defendants' favor on Count III of defendants' counter-complaint. For the reasons stated below, plaintiffs' motions are granted in part; defendants' motion for summary disposition of plaintiffs' claims is granted in part; and defendants' motion for summary disposition of defendants' Count III is denied.

I. BACKGROUND

In 1995, defendant Bogar Trout and plaintiff Craig Faiman formed and began operating Pinnacle Express, a trucking business. Trout became the president and Faiman the secretary and treasurer of the company. The parties disagree as to the circumstances under which it was formed. Faiman claims that he formed the company and simply hired Trout to run it. Trout claims that Faiman agreed to finance the start-up of a trucking business that Trout would operate and eventually own; and, in return, Faiman's fuel company would receive discounts on Pinnacle Express services.

Trout states that while he was president of Pinnacle, he operated the entire business except for the accounting. He started the business from scratch, compiled the entire customer base, served as the customer contact and directed trucking. Trout characterizes Faiman's role as that of a silent partner. According to Trout, before the inception of the corporation in 1995 and until Trout left the company in March 2001, Trout and Faiman had an agreement that at some point in time, Faiman would transfer all Pinnacle stock to Trout, making the latter 100% shareholder. Trout states in his affidavit that Faiman continuously postponed the consummation of the transfer.

Sometime in 2000, Faiman and Trout again discussed a possible transfer of ownership of Pinnacle. Trout testifies that although Faiman told him the transfer would occur at the end of the calendar year, for tax reasons, Faiman stalled yet again in January 2001, saying it would happen within the next few months. Faiman, on the other hand, asserts that

in August 2001, he and Trout discussed a potential purchase by Trout of Faiman's shares, but that Trout was unhappy with Faiman's asking price.

On August 17, 2000, Trout filed an assumed name certificate in the name of "Bogie's Express." Trout did not inform Faiman that he was forming Bogie's Express. Trout began operating Bogie's Express, using vehicles belonging to Pinnacle to service customers of Pinnacle's, while still acting as a director and president of Pinnacle. Faiman terminated Trout's employment with Pinnacle on March 28, 2001.

*2 Trout explains his formation and operation of Bogie's Express while continuing to run Pinnacle as being a business strategy to minimize the liability insurance Pinnacle had to pay, which could be done by separating dry freight from liquid freight and having a separate business, with separate accounting, carry each. Trout has testified that when he started running Bogie's Express, he was under the belief that he was going to become the sole owner of Pinnacle Express, and that Pinnacle would benefit from the creation and operation of Bogie's Express. He states that he never intended to usurp a corporate opportunity, nor did he divert any trucking jobs from Pinnacle to Bogie's for his own personal gain.

Plaintiffs point out that Trout has admitted that Bogie's had no trucks of its own and therefore used Pinnacle's; that Pinnacle paid the lease and insurance payments on the truck; and paid the driver. Trout, they say, diverted the receivables due to Pinnacle to Bogie's, issuing invoices in the name of Bogie's even though Pinnacle's assets were used to service the customers. Once he received payment on a given invoice, he deposited the checks into an account he had set up for Bogie's. He continued this practice until he left Pinnacle in March 2001. Trout used some of the money to purchase a truck for Bogie's and to pay attorneys who were negotiating on his behalf for the purchase of Pinnacle.

II. STANDARD OF REVIEW

MCR 2.116 permits a party to move for dismissal of or judgment on all or part of a claim where 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. MCR 2.116(B)(1), 2.116(C)(10). Such a motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *St Paul Fire & Marine Ins Co v Quintana*, 165 Mich.App 719, 722, *lv denied*, 430 Mich. 885 (1988). The moving party must specifically identify the issues as to which there is no genuine issue as to any material fact, and must support the motion with admissible evidence.

The adverse party must respond with affidavits or other evidence, setting forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). If the pleadings and/or proofs show that there is not genuine issue of material fact, the court shall render judgment without delay. MCR 2.116(I)(1). The test is whether the kind of record which might be developed giving the benefit of reasonable doubt to the nonmoving party, would leave open an issue upon which reasonable minds might differ. *Linebaugh v. Berdish*, 144 Mich.App 750, 754 (1985), *Kivela v. Dept of Treasury*, 200 Mich.App 545 (1993). As the party opposing the motion, plaintiff is entitled to the benefit of any reasonable doubt. *Wolfe v. Employer's Health Ins Co*, 194 Mich.App 172 (1992).

III. ANALYSIS

The claims at issue in the parties' motions for summary disposition include Counts I, II, IV and V of plaintiffs' complaint; and Counts I, II and III of defendants' counter-complaint.

A. Plaintiffs' Count I (against Bogar Trout): breach of fiduciary duty

*3 Plaintiffs and defendants have filed cross motions for summary disposition of plaintiffs' claim against Bogar Trout for breach of fiduciary duty.

An officer or director of a corporation has fiduciary duties of both care and loyalty to the corporation and its shareholders. Included within each of these duties--both care and loyalty--is the director's obligation to make full disclosure to the corporation/shareholders of information the director knows or should know is relevant to the affairs of

the corporation, and which the director knows or should know the corporation/shareholders would desire to have. *Monty v. Peterson*, 85 Wash 2d 956, 960; 540 P.2d 1377 (1975), *Lindland v United Business Investments, Inc.*, 298 Or 318; 693 P.2d 20 (1984), citing Restatement (2nd) Agency § 381 at 182 (1958). This duty may be breached by intentionally concealing information, as where a director engages in self-dealing and conceals the relevant information from the corporation; or by negligently failing to disclose information that the director knows or should know was relevant and material to the corporation.

Plaintiffs contend that the undisputed facts prove that defendant Bogar Trout violated his fiduciary duties to Pinnacle by usurping a corporate opportunity, a violation of the duty of loyalty. This violation is established, they argue, by defendant Bogar Trout's own testimony, in which he admits using Pinnacle assets to serve Pinnacle customers while collecting receivables and depositing them in an account for Bogie's Express. Defendants argue that because Trout engaged in this conduct with the intent of benefiting Pinnacle, and because Trout did so believing the corporation would soon belong to him as sole shareholder, it does not constitute a breach of Trout's fiduciary duty to Pinnacle.

Neither party has provided authority regarding the question whether a director may unintentionally usurp a corporate opportunity, although there is some indication in *Production Finishing Corp v. Shields*, 158 Mich.App 479, 488- 90 (1987), that the director's intent is not material. It is not necessary to resolve that question, however, nor does the factual dispute between the parties as to Trout's intent preclude summary disposition on this claim. Although Trout may not have intended to usurp an opportunity belonging to Pinnacle, it is clear nonetheless that he violated either his duty of loyalty or his duty of care, or both. His failure to disclose information regarding his activities under the name Bogie's Express was at least negligent: a reasonable director or officer, standing in Trout's shoes, would or should have known that the principal shareholder would desire that information. The information was indisputably relevant to the corporation's affairs. Because the duty of care necessarily includes a duty of disclosure, Trout violated that duty even if he did not intend to usurp a corporate

opportunity and even if he did not realize he should have disclosed the information to plaintiffs. Unfortunately, even an innocent intent does not protect a director in these circumstances. Plaintiffs' motion for summary disposition is granted as to their claim against Bogar Trout for breach of fiduciary duty.

B. Plaintiffs' Count II (against Bogar Trout and Carl Trout): conspiracy to violate fiduciary duties

*4 Plaintiffs have moved for summary disposition of Count II of their complaint, seeking a ruling that defendants are liable for conspiracy to violate Bogar Trout's fiduciary duties. Defendants have moved for summary disposition of the same claim, seeking dismissal for lack of a genuine issue of material fact in dispute.

To establish that a party conspired in, or aided and abetted, a director/officer's fiduciary duty to a corporation, plaintiffs must prove that the party knew of the intended violation and participated in it. *See L A Young Spring & Wire Corp v Falls*, 307 Mich. 69, 106 (1943), *Hayes-Albion Corp v. Kuberski*, 421 Mich. 170, 187 (1984), *Rapistan Corp v. Michaels*, 203 Mich.App 301, 317 (1994) (Delaware law), *Central Cartage Co v. Fewless*, 232 Mich.App 517, 529-30 (1998), *In re Estate of Goldman*, 236 Mich.App 517, 522 (1999).

Where a person in a fiduciary relation to another violates his duty as fiduciary, a third person who participates in the violation of duty is liable to the beneficiary.

* * *

[O]ne who knowingly joins a fiduciary in an enterprise where the personal interest of the latter is or may be antagonistic to his trust becomes jointly and severally liable with him for the profits of the enterprise.

Where a person merely knew or should have known of the wrongful conduct, it is not sufficient to impose liability for conspiracy. *In re Estate of Goldman*, 236 Mich.App at 522-23.

Defendants contend that plaintiffs have no evidence to support their claim that Carl Trout and Bogar Trout conspired to violate Bogar Trout's fiduciary duty to Pinnacle. Plaintiffs, of course, disagree, and point to

evidence that: both Bogar and Carl Trout obtained d/b/a certificates at the same time; Carl Trout received tens of thousands of dollars from Bogie's Express from September 2000 to March 2001; this money was derived from receivables due to Pinnacle; Carl received this money while knowingly driving a truck belonging to Pinnacle; the presence of Carl Trout's business card, as the contact person for Pinnacle, in a Pinnacle customer's file; and the Pinnacle fax number's presence on Carl Trout's business card, which card is in the name of Trout Trucking and Expediting.

Whether plaintiffs have created a genuine issue of material fact as to the existence of a conspiracy between Carl and Bogar Trout depends on extent to which one can infer intent and participation from the circumstantial evidence plaintiffs have produced. Although it is possible, given the above evidence, for Carl Trout to have knowingly aided and abetted in Bogar's breach of fiduciary duty, it is equally possible that he did not, and plaintiffs have produced no evidence to make the former more probable than the latter. It would be sheer speculation for a trier of fact to conclude from the evidence described above that Carl conspired in Bogar's breach. Defendants' motion for summary disposition is granted as to plaintiffs' claim for conspiracy to violate, or aiding and abetting a violation of, Bogar's fiduciary duty to plaintiffs.

*5 Plaintiffs briefly refer, in passing, to Carl Trout's fiduciary duty to Pinnacle and breach thereof. Plaintiffs do not cite any authority for the proposition that an independent contractor or an employee has a fiduciary duty to the other party to the contract, nor any other possible source of such a duty. To the extent plaintiffs are asserting such a claim against Carl Trout, that claim is also dismissed.

C. Plaintiffs' Count III (against all defendants): conversion

In *Citizens Ins Co v. Delcamp*, 178 Mich.App 570, 575-76 (1989), the Michigan Court of Appeals summarized Michigan case law on the tort of conversion:

In *Nelson & Witt v. Texas Co*, 256 Mich. 65,70; 239 NW 289 (1931), our Supreme Court ... defined conversion as follows: " 'Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.' "

Conversion is an intentional tort in that the defendant's action must be willful, but one can commit the tort unwittingly if unaware of the plaintiff's outstanding property interest. *Warren Tool Co v. Stephenson*, 11 Mich.App 274, 299; 161 NW2d 133 (1968).

Although an action cannot be maintained for conversion of money unless there is an obligation on the part of the defendant to return the specific money entrusted to his care, *Garras v. Bekiares*, 315 Mich. 141, 148; 23 NW2d 239 (1946), it is not necessary that the money should be specifically earmarked for its return. The defendant must have obtained the money without the owner's consent to the creation of a debtor and creditor relationship. See *Hogue v. Wells*, 180 Mich. 19, 24; 146 NW 369 (1914); 89 CJS, Trover and Conversion, § 23, p 541....

An action for conversion lies where an individual cashes a check and retains the full amount of the check when he is entitled to only a portion of that amount. *Hogue, supra*. In this case, Delcamp Truck Center, Inc., converted Citizens' personal property when it cashed Citizens' check and retained the full amount of that check when it was entitled to only a portion of the full amount.

Plaintiffs argue that they are entitled to summary disposition in their favor on their claim of conversion against Bogar Trout, Carl Trout and Bogie's Express. Bogar Trout has admitted that he caused checks to be issued to Bogie's Express for services performed by Pinnacle; deposited the checks in a Bogie's Express account (*i.e.*, an account not belonging to Pinnacle); and thereby converted the checks to Bogie's Express and his use. Plaintiffs also contend that undisputed facts establish that Carl Trout conspired with Bogar and Bogie's Express to convert Pinnacle's receivables.

Defendants argue that a genuine issue of material fact does exist as to plaintiffs' conversion claim. To recover on a *statutory* claim of conversion (claim of statutory conversion?), defendants assert, citing *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich.App 94, 111 (1999), there must be proof that a defendant knowingly bought, received or aided in the concealment of any stolen, embezzled or converted property. In *Hovanessian v. Nam*, 213 Mich.App 231 (1995), the Court of appeals held that a landlord, who retained a tenant's security deposit after the

tenant vacated the apartment, did not convert the security deposit, because he did not know that he had wrongfully retained it.

*6 The Court disagrees. Plaintiffs are not asserting a claim of statutory conversion, which requires the element of knowledge and provides a remedy of treble damages. See M.C.L. § 600.2929a. They are asserting a claim of common law conversion, which is an intentional tort only to the extent that the defendant must have intentionally done whatever act constituted the conversion. The defendant need not have known that the converted property belonged to the plaintiff or that he was exercising dominion over the property wrongfully. *Warren Tool, supra, Citizens Ins, supra*.

The Court finds that there is no material fact in dispute as to plaintiffs' claim of conversion against Bogar Trout. He has admitted taking receivables due to Pinnacle and depositing them in an account that did not belong to Pinnacle, over which Pinnacle had no control and to which Pinnacle did not have access. He did so without intending to return or forward the receivables to Pinnacle; he used the money to fund a separate entity. Even though he created the separate entity with good intent, the fact remains that it was a breach of his fiduciary duty to Pinnacle and, therefore, wrongful. Plaintiffs' motion for summary disposition is granted as to their claim of conversion against Bogar Trout, and, because Bogie's Express was the means of conversion, it is granted against Bogie's Express as well.

Plaintiffs have not submitted evidence to support their claim that Carl Trout had the knowledge or intent necessary to hold him liable for conspiracy, with Bogar and Bogie's Express, to convert Pinnacle's assets or receivables. Plaintiffs' motion for summary disposition is denied and defendants' motion for summary disposition is granted as to plaintiffs' claim of conversion against Carl Trout.

D. Plaintiffs' Count IV (against all defendants): tortious interference

Defendants have moved to dismiss plaintiffs' claim of tortious interference with contract or business expectancy, which is Count IV of plaintiffs' complaint.

To establish a claim of tortious interference with contract, plaintiffs must show that (1) Pinnacle had a contract or advantageous business relationship with a third party; (2) defendants knew of this contract or relationship; (3) defendants intentionally and improperly interfered with it, inducing or causing a breach of the contract or termination of the relationship; and (4) damages. *Mich Podiatric Medical Ass'n v Nat'l Foot Care Program, Inc*, 175 Mich.App 723, 735 (1989), *Northern Plumbing & Heating, Inc v Henderson Bros, Inc*, 83 Mich.App 84, 93 (1978) (plaintiff can recover where business relationship has been terminated even without evidence of enforceable contract). Improper interference can be established by showing defendants committed an inherently wrongful act, or a lawful act with malice. *Feldman v. Green*, 138 Mich.App 360, 369 (1984).

Plaintiffs argue that defendants are liable for tortious interference. First, they say, when Bogar Trout set up a fictitious company to issue invoices to Pinnacle's customers for jobs performed by Pinnacle employees (including Carl Trout), with Pinnacle's assets, he wrongfully interfered with Pinnacle's business expectancies with those customers. This wrongful interference, plaintiffs point out, occurred during his employment with Pinnacle, and not only afterwards as defendants argue. Second, defendants continued to interfere with Pinnacle's customer relationships after Bogar's termination by collecting receivables rightfully belonging to Pinnacle and using the money to set up a competing venture and solicit Pinnacle's customers. Third, Trout continued to interfere with Pinnacle's customer relationships after he left Pinnacle, by wrongfully using Pinnacle's proprietary information and making disparaging remarks about Pinnacle. These actions are not merely post-termination, competitive use of the general knowledge he gained while working for Pinnacle, which would be permissible.

*7 Defendants contend that Bogar Trout's, and hence, all defendants,' actions were not wrongful, and, therefore, plaintiffs cannot establish a claim for tortious interference. [FN1] Trout, defendants state, developed Pinnacle's business with the intent of becoming sole shareholder; began Bogie's Express with the intent of benefiting Pinnacle by minimizing its insurance rates; only did the latter when

"it finally seemed that the transfer of the stock was certain to occur"; and only began operating Bogie's Express as a separate entity after Faiman terminated him and he had no other means of support. Defendants point out that a former employee may compete with his former employer, absent an agreement to the contrary, by establishing his own business and communicating with customers for whom he has formerly done work in his previous employment. *Hayes-Albion v. Kuberski*, 421 Mich. 170 (1984). Although an employee may not disclose or use a trade secret, *F F Gladding & Co v. Scientific Anglers, Inc*, 245 F.2d 722 (CA 6 1957), he may freely use general knowledge, skills and experience acquired under his former employer. According to defendants, Pinnacle's customer list was not a trade secret because it was already known to, or could easily be acquired by, outsiders. There is no genuine issue of material fact in dispute that Bogar Trout's conduct was not improper in any way, defendants conclude, and he therefore cannot be found liable for tortious interference.

FN1. Plaintiffs correctly observe that defendants' argument is difficult to decipher. In addition, defendants do not cite a single case involving a claim of tortious interference, but leave the identification of the elements of such a claim to plaintiffs and the Court.

Under defendants' characterization of Trout's conduct as perfectly legitimate and innocent, they are correct that plaintiffs could not establish an essential element of their claim of tortious interference, *i.e.*, that Trout, aided by Carl Trout and Bogie's, intentionally and *improperly* interfered with Pinnacle's advantageous business relations. Defendants' argument, however, is premised on the assumption that Trout's conduct did not constitute a breach of fiduciary duty. As discussed above, Trout's conduct, even if innocent in intent, was at a minimum a negligent violation of his fiduciary duties to Pinnacle and Faiman. Moreover, it appears indisputable that Trout intentionally began serving Pinnacle's clients with, and diverted at least some of Pinnacle's business to, Bogie's Express. The Court finds that there is a genuine issue of material fact in dispute as to plaintiffs' claim of tortious interference, and defendants' motion for summary disposition is denied as to this claim.

E. Count V: breach of contract (against Bogar Trout and Carl Trout)

Defendants seek dismissal of plaintiffs' claim against Bogar and Carl Trout for breach of their respective employment contracts with Pinnacle. Plaintiffs respond that the same facts that establish Bogar's breach of fiduciary duty to Pinnacle establish a breach of the employment contracts between the parties.

Defendants argue that, as plaintiffs deny the existence of an employment contract between Bogar Trout and Pinnacle in the context of their motion for summary disposition of Bogar Trout's counterclaim for wrongful discharge, they cannot very well assert that Bogar breached a non-existent contract.

*8 Defendants are correct that plaintiffs deny the existence of a for-cause employment contract between the parties, in that plaintiffs argue that the relationship between Bogar and Pinnacle was merely an at will relationship rather than a contractual one. It is self-evident, however, that even an at-will employee has an implied contractual duty not to "steal" (as plaintiffs characterize it) monies due to Pinnacle. Indeed, this is what plaintiffs argue in their motion for summary disposition of Bogar's wrongful discharge counterclaim. What is less clear, however, is whether Bogar did *steal* the receivables, given his testimony that his intent was innocent. Because doubts and credibility issues are resolved in plaintiffs' favor for purposes of this (C)(10) motion, there is a genuine issue of material fact in dispute. Defendants' motion for summary disposition of plaintiffs' Count V is denied.

F. Defendants' Count I (against Faiman): breach of contract

Defendant Bogar Trout has asserted a claim against Faiman for breach of a contract to sell Pinnacle to Bogar. In defendants' response to plaintiffs' motion for summary disposition of defendants' counterclaims, however, defendants appear to have conceded the breach of contract claim, in that they do not argue in its defense but rely on the promissory estoppel claim only. The Court, therefore, grants plaintiffs' motion for summary disposition as to Bogar Trout's breach of contract claim against Faiman (Count I of

the countercomplaint). [FN2]

FN2. In any event, even assuming defendants' allegations regarding the formation of a contract are true, they are insufficient to support the existence of a contract. Essential terms of a contract--such as price, time of performance, etc.--were discussed, perhaps, extensively and in detail-- but no agreement was ever reached regarding those terms. To the extent defendants argue that the alleged agreement made before the formation of Pinnacle was a contract, that agreement was too vague and open-ended to constitute an oral contract. Summary disposition would be appropriate on this claim, based on the lack of a genuine issue of material fact in dispute, even if defendants had not essentially waived or conceded it.

G. Bogar Trout's Count II (against Pinnacle): wrongful discharge

In Michigan, employment is presumed to be terminable at will. *Clement-Rowe v. Michigan Health Corp*, 212 Mich.App 503, 505 (1995). For an oral statement of job security to give rise to a just cause employment contract, the statement must be clear and unequivocal. *Rowe v. Montgomery Ward & Co*, 437 Mich. 627, 645 (1991). To determine whether such a just cause agreement has been made, a court must look to the parties' expressed words and visible acts, and determine the meaning reasonable persons might have attached to the language, given the circumstances presented. *Id.*

Defendants argue that the evidence is sufficient to create a question of fact in dispute regarding Bogar Trout's wrongful discharge claim. The facts they say support the existence of a just cause employment contract include: Pinnacle Express was started by Faiman and Trout together, with the intention that Faiman would finance it and eventually transfer full ownership to Trout; they discussed this agreement many times over the years, including terms such as price, timing, financing, transfer of corporate assets and debt, etc.; and Faiman kept assuring Trout that the sale would occur. The purpose of Bogar Trout's employment at Pinnacle,

defendants contend, was to become the sole owner of the company. He had a reasonable expectation, therefore, that he would not be terminated before that occurred.

*9 The Court agrees with plaintiffs that these facts do not create a dispute as to any genuine issue of material fact. Although Bogar Trout may have had personal expectations of continued employment, even reasonable expectations, he has presented no evidence of any discussion or oral statements by either himself or Faiman regarding the term of his employment with Pinnacle. As plaintiffs observe, discussions of a future purchase of stock are not discussions of future employment; and an oral agreement for the purchase of stock, even if one had been reached, would not constitute a just cause employment contract unless specific terms of employment were included and agreed upon. Defendants do not claim any such specific terms were discussed, and the evidence they offer does not establish the "clear and unequivocal" oral statements that may give rise to an oral just cause employment contract. Plaintiffs' motion for summary disposition of defendants' Count II is granted.

H. Defendants' Count III (against Faiman): promissory estoppel

To establish a claim of promissory estoppel, defendants must prove that: (1) there was a promise; (2) the promisor reasonably expected the promise to cause the promisee to act in a definite and substantial matter; (3) the promisee did in fact rely on the promise by acting in accordance with its terms; and (4) the promise must be enforced to avoid injustice. *Crown Technology Park v. D & N Bank*, 242 Mich.App 538, 548-49 (2000), *Novak v. Nationwide Mutual Ins Co*, 235 Mich.App 675, 686-87 (1999). To determine whether a promise existed, a court must examine objectively the words, actions and circumstances surrounding the situation, as well as the nature of the relationship between the parties. *Novak, supra* at 687. The promise must be definite and clear, *Schmidt v. Bretzlaff*, 208 Mich.App 376, 379 (1995), and reliance on the promise is reasonable only if that reliance is induced by an actual promise. *Ypsilanti Twp v. General Motors Corp*, 201 Mich.App 128, 134 (1993). In addition, a mere statement of opinion, prediction of future events or a person's wish or desire are not enough to support a promissory estoppel claim. *First Security*

Saving Bank v. Aitken, 226 Mich.App 291, 312 (1997), *overruled on other grounds, Smith v Globe Life Ins Co*, 460 Mich. 446 (1999).

Plaintiffs argue that the alleged promise made by Faiman was anything but definite and clear, as required for promissory estoppel. According to plaintiffs, Bogar Trout testified to at least five different alleged agreements between Faiman and him, each with different, and vague, terms. In addition, plaintiffs say, Trout did not rely on the alleged promise--the work he performed for Pinnacle was compensated by a generous salary, benefits and stock dividends, and he did nothing more than he was required to do as president and director of Pinnacle. Because Trout cannot prove the existence of a promise or reliance upon it, plaintiffs conclude, his promissory estoppel claim fails.

*10 Defendants claim that Bogar Trout's testimony provides evidence of a promise, which was Faiman's promise to Bogar Trout that if the latter would manage Pinnacle and dedicate himself to building up and running the business, Faiman would turn the business over to Trout. In return, Faiman's fuel business would receive transport discounts from Pinnacle. Trout also testified that he relied on this promise by dedicating himself to the business, promoting it and putting his best efforts into performing his duties. He did so because of Faiman's promise that Trout would some day own 100% of the shares of the corporation.

Resolving all questions of credibility and all doubts in defendants' favor, the Court finds there is a genuine issue of material fact in dispute as to Bogar Trout's claim against Faiman of promissory estoppel. While plaintiffs may be correct that Trout has given five different versions of the alleged promise Faiman made to him, that seems to this Court to be a question of credibility, not lack of certainty of terms or lack of evidence. Furthermore, Trout's testimony that he worked for Pinnacle and dedicated his efforts to making the company profitable is evidence of reliance: had the promise not been made, he might have decided not to become involved with Pinnacle at all, work as hard as he did, take the initiative in developing a customer base, etc.

Plaintiffs also argue (not in their discussion of the promissory estoppel claim, but of defendants' breach of

contract claim) that defendant may not recover on this equitable claim because a person seeking equity must do equity. Bogar Trout's diversion of thousands of dollars of Pinnacle receivables and theft of Pinnacle's business, plaintiffs contend, is wrongdoing that precludes him from seeking equity. Because equity is a more flexible remedy, and because the injustice alleged by defendants far outweighs, if true, the negligent wrongdoing by Bogar Trout (assuming he was merely negligent), this Court will not preclude Bogar Trout from pursuing this claim on this basis. Plaintiffs' motion for summary disposition of defendants' Count III is denied.

The same factual uncertainties that preclude summary disposition in plaintiffs' favor on defendants' promissory estoppel claim also preclude summary disposition in defendants' favor on this claim, and defendants' motion for summary disposition of defendants' Count III is also denied.

IV. CONCLUSION

For the reasons stated above: plaintiffs' motion for summary disposition of plaintiffs' Count I (breach of fiduciary duty against Bogar Trout) is granted; plaintiffs' motion for summary disposition of plaintiffs' Count III (conversion) is granted as to defendant Bogar Trout and denied as to defendant Carl Trout.

Plaintiffs' motion for summary disposition of defendants' counterclaims is granted as to defendants' Counts I (breach of contract) and II (wrongful discharge), and denied as to defendants' Count III (promissory estoppel).

*11 Defendants' motion for summary disposition of plaintiffs' Count II (conspiracy to breach fiduciary duty, against all defendants) is granted; defendants' motion for summary disposition of plaintiffs' Count IV (tortious interference, against all defendants) is denied; defendants' motion for summary disposition of plaintiffs' Count V (breach of contract, against Bogar Trout and Carl Trout) is denied.

Defendants' motion for summary disposition in their favor on defendants' Count III is denied.

2002 WL 1547540 (Mich.Cir.Ct.)

END OF DOCUMENT