STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT
COUNTY OF WAYNE

JAMES SHAKE,
An individual,

Plaintiff,

v.

INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW)

Defendant.

Case No. 19-016384-NZ

Hon. Kevin J. Cox

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. INTRODUCTION

In this case, Plaintiff alleges that he was duped into paying "dues" to "Local X" – a local union that neither exists nor served as his collective bargaining representative. The Complaint badly, and knowingly, mischaracterizes the facts.

Plaintiff James Shake was employed as an actuary by Defendant International Union, UAW from about 2008 until he retired in 2018.[1] (Complaint, ¶¶ 7, 8, 18)[2] In 2014, Plaintiff was provided with a dues withholding authorization form (Ex. A) which stated, in part, that "I wish to avail myself of the monthly dues checkoff for International Union Staff." (Ex. A) The blank form he was provided included a formula for regular dues, and a separate section to add an amount for local union dues in addition to regular dues. In that section, the amount for local union dues was left blank, so that the form provided that the amount for local union dues was zero. (*Id.*) Next to the separate section for zero additional local union dues, Plaintiff hand wrote "***N/A – no UAW local dues***." (Ex. A; ¶10)[3]

The vast majority of the Defendant's staff are members of a UAW local union. Article 12, Section 13 of the UAW Constitution provides, however, that the Union may employ non-members with special expertise, such as accountants, actuaries and lawyers.[4] These types of employees are often not eligible for membership because they are not employed at a workplace where the UAW

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[1] For purposes of this motion, Defendant takes the allegations of the Complaint as true, as required by MCR 2.116(C)(8). However, except for purposes of this motion Defendant does not admit and in fact disputes many if not most of the allegations.

[2] References to Plaintiff's Complaint will be designated herein by paragraph numbers, i.e., " ¶ ___." Exhibits to the Complaint will be designated as "Exhibit ___" or "Ex. ___."

[3] As a result of signing the authorization, over 5 years, $7,541 was withheld from the nearly $700,000 in earnings the UAW paid Plaintiff. (Exs. B – F, 2014-2018 W-2 forms)

[4] https://uaw.org/wp-content/uploads/2019/01/2018-UAW-Constitution.pdf

serves as their collective bargaining representative. The Union believes that it is nonetheless important that they – like other members of the International staff – contribute their fair share. The authorization form signed by Plaintiff is the administrative mechanism by which those contributions are made. They are deposited into the Union's general fund along with ordinary dues payments.

Although Plaintiff was aware of this arrangement during his employment, he now asserts that it was improper under various legal theories, all of which fail as a matter of law. Plaintiff asserts that the Union obtained authorization for the deductions at issue by fraudulently misrepresenting that "Local X" would act as his collective bargaining representative. But he does not – as the law requires – state this claim with particularity, alleging the time, place or substance of the alleged misrepresentation. More importantly, Exhibit A to the Complaint shows that the Plaintiff himself understood that the deductions were not for membership in a local union; as he noted on the deduction form, ***"NA no UAW Local dues"*** were being paid. This acknowledgement undermines both his fraud and breach of contract claims. His conversion claim is based on the same alleged fraud, and it must therefore be dismissed. And it is, in any event, time barred. This Court should dismiss the Complaint in its entirety.

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. A motion under 2.116(C)(8) is properly granted if the opposing party has failed to state a claim on which relief can be granted. When reviewing the motion, the court considers only the pleadings, and must accept all factual allegations in the complaint as true, along with all reasonable inferences or conclusions that can be drawn from them. However, conclusory statements that are unsupported by allegations of fact on which they are based will not suffice to state a cause of action. *State ex rel. Gurganus v. CVS Caremark Corp.*, 496 Mich 45, 63; 852 NW2d 103 (2014).

Where as here, Plaintiff's claims are based on alleged fraudulent activity, the heightened pleading standard for fraud claims applies. MCR 2.112(B)(1) provides, "In allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity." This heightened pleading standard applies to all claims based on fraudulent activity, not just those specifically asserting a cause of action for fraud. *Gurganus, Id.* Here, that includes Plaintiff's conversion and contract claims, as well as his fraud claim.

Under MCR 2.116(C)(7), a party may move for summary judgment on the ground that the statute of limitations bars the claim. Under 2.116(C)(7), a movant is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint must be accepted as true unless the movant contradicts such evidence with documentation. *Maiden v Rozwood*, 461 Mich 109, 119; 587 NW2d 817 (1999)

III. ARGUMENT

A. Plaintiff Has Failed To Plead His Fraud Claim With Particularity And Has Failed To State A Claim For Fraud

MCR 2.116(B)(1) imposes a heightened pleading requirement for fraud allegations and requires that "the circumstances constituting fraud . .. must be stated with particularity." To plead fraud with particularity, "the plaintiff must allege (1) the time, place and content of the alleged misrepresentation, (2) the fraudulent scheme, (3) the defendant's fraudulent intent, and (4) the resulting injury." *In re Doman Estate*, 2012 WL 1368138 at *3 (Mich App, No. 301260, April 19, 2012)[5] (citation and internal quotation marks omitted). In *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254 n.8; 701 NW2d 144 (2005), the Supreme Court specified the necessary elements of a fraud claim:

> The elements of fraud are: (1) that the charged party made a material representation; (2) that it was false; (3) that when he or she made it he or she knew it was false, or

[5] Unpublished cases are attached as exhibits.

> made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he or she made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury. (citation omitted)

The vague, boilerplate allegations in Plaintiff's complaint simply do not meet this standard. Plaintiff has essentially simply restated the bare elements of a fraud claim. These allegations are insufficient under the minimal pleading standards of MCR 2.116(C)(8), let alone the heightened requirements for fraud under MCR 2.116(B(1).

Plaintiff understood that he was being asked to make payments to the International Union because he specifically alleges that he "objected to the requirement that he pay dues to a union." (¶10) Then Plaintiff makes the wholly conclusory allegation that "Defendant" "made material representations that Plaintiff was part of a bargaining unit represented by a local union and that dues for this local union had to be deducted from his pay check." (¶41) *Plaintiff does not even allege with specificity the time, place or content of the allged misrepresentation on which his claim is premised: namely, that a local union would serve as his collective bargaining representative.* (¶42) Similarly, Plaintiff can only allege "on information and belief" that "Defendant" made the representations with the intention that Plaintiff would act on them. (¶44) As the Sixth Circuit has explained under the analogous federal rule, Fed. R. Civ. P. 9(b):[6]

> [G]eneralized and conclusory allegations that the defendant's conduct was fraudulent do not satisfy Rule 9(b). It necessarily follows that allegations of [fraud] cannot be based on "information and belief," except where the relevant facts lie exclusively within the knowledge and control of the opposing party, and even then, the plaintiff must plead a particular statement of fact upon which his belief is based.

Craighead v E.F. Hutton & Co, Inc, 899 F.2d 485, 489 (6th Cir 1999) (citations omitted). Here, Plaintiff has not (and cannot) allege that the relevant information is exclusively in Defendant's

[6] Michigan courts often cite to analogous federal precedent under Fed. R. Civ. P. 9(b) when analyzing claims under MCR 2.116(B)(1). See, e.g., *In re Doman Estate, supra.*

possession, nor does Plaintiff allege any particularized facts upon which his misrepresentation claim is based. Obviously, these allegations on "information and belief" are pure speculation.

The fatal flaw in Plaintiff's fraud claim is that he never identifies any individual who made the alleged representations, nor does he specify when the representations were made or precisely what was said. Although Plaintiff describes in some detail a meeting he had with Chuck Browning in November 2014 (¶11), Plaintiff conspicuously fails to allege that Browning, or anyone else, ever said anything about membership in any local union, told him that his dues would be going to any local union or a "Local X," or that he would be represented by any local union.

More important, Plaintiff cannot state a claim for fraud because the complaint on its face shows that his reliance on the alleged misrepresentation was not reasonable. From the beginning, Plaintiff knew that there was no local union representing him and that his dues would not be going to any local union. This is obvious from Exhibit A itself, which is attached to and part of the complaint. This "Authorization For Dues Checkoff" form presented to Plaintiff states that "This is to advise you that I wish to avail myself of the monthly dues checkoff for *International Union* staff. (emphasis supplied) It is understood that the monthly deduction will be based on the following formula." After describing the formula, a *second* part of the form refers to *additional* local union dues and states that "My local union has local dues in the amount of _____ per month. Please *add* this amount to my regular deduction." (emphasis supplied) This blank was not filled in and remained blank. In other words, *no amount, i.e. zero,* was identified as local union dues. Similarly, at the top of the form, no local union's number was placed in the blank for "Local Union No. ___." As Plaintiff concedes, "It only had an "x" marked in the blank after "Local." (¶12) Thus, on its face, the form cannot possibly be read to say what Plaintiff alleges: that the form states he was represented by a local union and that his dues would be going to a local union.

But there is more. Plaintiff himself wrote on the form by hand, next to the second section referencing the additional local union dues (and showing zero local union dues):

"N/A - <u>no</u> UAW Local dues."

Obviously, Plaintiff knew there was no local union and no local union dues, as clearly reflected in his own handwriting. (Ex. A) Accordingly, as a matter of law, Plaintiff could not have reasonably relied on any misrepresentation that he "was part of a bargaining unit represented by a local union and that dues for this local union had to be deducted from his paycheck." (¶41). Thus, Plaintiff cannot establish reasonable reliance -- even if he had specifically identified (he has not) the person or persons who made these supposed representations, or identified specifically what was said and when it was said, as required by MCR 2.116(B)(1). As the Court of Appeals explained in *Cummins v Robinson Twp,* 283 Mich App 677, 696; 770 NW2d 421 (2009):

> [T]o establish a claim of fraudulent misrepresentation, the plaintiff must have reasonably relied on the false representation. *Nieves v. Bell Industries, Inc.*, 204 Mich. App. 459, 464; 517 NW2d 235 (1994). "There can be no fraud where a person has the means to determine that a representation is not true." *Id.* [7]

[7] Even if Plaintiff had been unaware that there was no "Local X" acting as his collective bargaining representative, this knowledge was a matter of public record and available to him, as it was to anyone. Every labor organization subject to the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§453, *et seq.*, must file a financial report, Form LM-2, LM-3 or LM-4, each year with the Office of Labor-Management Standards ("OLMS") of the U.S. Department of Labor. The OLMS makes these documents readily available to the public, https://olms.dol-esa.gov/olpdr/. Here, any member of the public can find Forms LM-2, LM-3, LM-4, Simplified Labor Organization Financial Reports, as well as union Constitutions and Bylaws. As Plaintiff concedes, he has researched this information and "found no union which could be the mysterious Local X by that or any other name." (¶22) Thus Plaintiff in his complaint tacitly concedes that he had the means to discover that "Local X" is not a labor organization representing him. Whether or not he knew this at the time he signed the form, he reasonably should have known, and thus his fraud claim fails because he cannot establish reasonable reliance.

B. Plaintiff has Failed to State a Claim for Breach of Contract

In Count IV of the Complaint, Plaintiff alleges that the dues authorization form he signed (Ex. A)[8] was a contract (¶48), that the contract required Defendant to deduct and forward dues to Local X for the purpose of paying bargaining unit dues (¶¶49, 50), and that Defendant breached the contract by not forwarding dues to Local X or any local union representing Plaintiff in a bargaining unit. (¶51) For essentially the reasons explained in Section A above regarding the fraud claim, Plaintiff's breach of contract claim fails as a matter of law.

Simply put, the contract -- Exhibit A -- is not reasonably susceptible, on its face, to the meaning Plaintiff ascribes to it. Moreover, Plaintiff concedes that he knew before and at the time he signed this contract that it did not mean what he now says he thought it meant.

As explained *supra,* Exhibit A, after setting out the dues formula for "*International Union* staff," contains another, additional, section stating that "My local union has dues in the amount of _____ per month," and to "Please add this amount" to the regular dues deduction. The amount for local dues was left blank. At the top, there was a designation for "Local Union No. ___," but the blank did not have a local union number filled in, but only an "X" in the blank space. It is simply not possible to interpret this document as a contract requiring that "deducted funds will be forwarded to Local X for the purpose of paying bargaining unit dues." (¶50) Finally, Plaintiff's handwritten notes stating **"N/A - <u>no</u> UAW Local dues"** show without a doubt that he knew the "contract" did not mean what he now says he thought it meant.

In short, because Exhibit A on its face and as a matter of law shows that there was no such contract as Plaintiff describes in Count IV of the Complaint, Plaintiff has failed to state a claim for breach of contract.

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[8] Although Plaintiff does not have a copy of the unaltered dues authorization form he signed, the form he signed is "identical to Exhibit A except for the Plaintiff's hand-written changes." (¶11)

C. Plaintiff's Conversion Claims Fail For the Same Reason As His Fraud Claim -- The Wrongfulness Element Of Each Conversion Claim Is Premised On Defendant's Alleged Fraud, But Plaintiff Cannot Establish Fraud As A Matter Of Law

Plaintiff claims that Defendant committed common law and statutory conversion when, in November 2014, he was made to sign a form authorizing "the monthly dues checkoff for International Union staff." (Ex. A) Plaintiff alleges in Count I (Common Law Conversion) that Defendant wrongfully asserted dominion over his money (wages) by "falsely alleging that it was being taken from him as dues to pay a local union he supposedly belonged to." (¶32) Similarly, in Count II (Statutory Conversion), he alleges that Defendant engaged in conversion "[b]y taking the alleged dues deduction, which had ostensibly been for the purpose of paying local union dues, and then keeping it for his own use." (¶38)

An essential element of conversion is that it must be premised on wrongful conduct. Conversion claims are based on "dominion *wrongfully* exerted over another's personal property..." *Citizens Ins Co of America v Delcamp Truck Center Inc*, 178 Mich App 570, 576; 444 NW2d 210 (1989) (emphasis supplied). For claims involving conversion of money, "[t]he defendant must have obtained the money without the owner's consent to the creation of a debtor and creditor relationship." *Id.*

Here, Plaintiff attempts to establish the wrongfulness element on the same basis as his fraud claim: that he signed the authorization form, Exhibit A, based on alleged misrepresentations that his deducted dues would go to a local union representing him. But as explained *supra* with respect to Plaintiff's fraud claim, Plaintiff cannot establish wrongfulness based on such alleged misrepresentations, because as a matter of law he cannot establish fraud. This is because Plaintiff obviously knew when he signed the form that there was no local union to which his dues would be sent -- as his own handwriting on the form clearly shows. Because Plaintiff cannot establish

that his signature to the form was procured by fraud, he cannot establish wrongfulness as he alleges, and his conversion claims necessarily fail.

D. Plaintiff's Conversion Claims Are Barred by The Statute Of Limitations

In the alternative, even if Plaintiff's conversion claims survive dismissal under MCR 2.116(8), they must be dismissed under MCR 2.116(C)(7) because they are barred by the statute of limitations.

As noted *supra,* an essential element of Plaintiff's conversion claim is wrongfulness. Plaintiff claims that Defendant committed common law and statutory conversion when, at a November 2014 meeting, he was wrongfully made to sign a form authorizing "the monthly dues checkoff for International Union staff." (¶11, Ex. A) Plaintiff alleges that Defendant wrongfully asserted dominion over his money by misrepresenting that it was being taken from him as dues to a local union. (¶¶32, 38) In short, the conversion claims are premised on specific acts of wrongfulness which occurred during the November 2014 meeting where Plaintiff claims he was made to sign the authorization. Absent this November 2014 wrongful conduct, there can be no claim of conversion.

The limitations period applicable to conversion is the three year period in MCL 600.5805 (10) for "actions to recover damages for . . . injury to a person or property." *Tillman v Great Lakes Truck Center, Inc.*, 277 Mich App 47, 49; 742 NW2d 622 (2007), citing *Janiszewski v Behrman*, 345 Mich 8, 32; 75 NW2d 77 (1956). *See also, A1-Zabet v Ansara*, 2019 WL 286542 (Mich App, No. 340481, Jan. 22, 2019).

The relevant statutory language in MLC 600.5805 provides:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, *after the claim first accrued* to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

* * *

> (10) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

(emphasis supplied) And, according to the accrual statute, MCL 600.5827, the limitation period begins to run "*at the time the wrong upon which the claim is based was done* regardless of the time when damage resulted." (emphasis supplied)

Therefore, Plaintiff's conversion claims accrued in November 2014 when he alleges Defendant wrongfully procured his consent to dues withholding. That is when the claim "first accrued" under 600.5805 (1) and when "the wrong upon which the claim is based was done," MCL 600.5827, "regardless of the time when damage results." *Id.* As Plaintiff did not file his complaint until December 2019, more than five years after the claims accrued, any conversion claims are time barred pursuant to the three year limitations period in MCL 600.5805 (10).

While Plaintiff may argue that the continued withholding of dues was a "continuing violation" or "continuing wrong" which extended the limitations period, this argument must be rejected as contrary to the plain language of the statute and settled Michigan case law. As noted, under MCL 5805 (1) and (10) an action must be commenced within three years "after the claim first accrued" and under MCL 600.5827 "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."

Previously, Michigan recognized an exception to the application of limitations periods "where there are continuing wrongful acts." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 279; 769 NW2d 234 (2009) (citation omitted) Under this now defunct doctrine, "the period of limitations does not begin to run on the occurrence of the first wrongful act; rather the period of limitations will not begin to run until the continuing wrong is abated." *Id.* (citations omitted)

In *Froling, supra*, the court held that based on the plain language of the relevant statutory provisions, controlling Michigan case law has "completely and retroactively abrogated the common law continuing wrongs doctrine in the jurisprudence of this state." 283 Mich App at 288, citing *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005) See also, *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 251; 673 NW2d 805 (2003) (refusing to apply continuing wrong doctrine to extend limitations period in case involving continuing breach of contract).

Accordingly, because Plaintiff's conversion claims first accrued in November 2014 and Plaintiff did not file suit until December 2019, and because the continuing wrongs doctrine has been "completely and retroactively abrogated" in Michigan, Plaintiff's conversion claims are barred by the three year limitations period in MCL 600.5805(10).

III. CONCLUSION

For the reasons stated, Plaintiff's Complaint should be dismissed in its entirety with prejudice.

Respectfully submitted,

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Dated: January 24, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2020, the foregoing paper was filed with the Clerk of the Court using the ECF system which will send notification of such filing to all parties of record.

McKNIGHT, CANZANO, SMITH,
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