

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT

HIGH TIDE AUTO SPA, LLC,

Plaintiff/Counter-Defendant,

v

Case No. 24-208275-CB  
Hon. Michael Warren

7B BUILDING AND  
DEVELOPMENT, LLC,

Defendant/Counter-Plaintiff/Third-Party Plaintiff,

v

SHERPA CAPITAL GROUP, LLC, and  
PATRIOT BANK, N.A., and CW PRODESIGN, LLC  
d/b/a CAR WASH PRO DESIGN,

Third-Party Defendants.

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OPINION AND ORDER REGARDING CAR WASH PRO DESIGN'S  
MOTION FOR SUMMARY DISPOSITION RE: ENFORCEMENT OF  
MANDATORY ILLINOIS FORUM SELECTION CLAUSE

At a session of said Court, held in the  
County of Oakland, State of Michigan  
November 25, 2024

PRESENT: HON. MICHAEL WARREN

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OPINION

I  
Overview

The present cause of action arises out of the renovation of a car wash located in Pontiac, Michigan. High Tide Auto Spa, LLC (“High Tide”) is the owner of the real property on which the car wash is located.<sup>1</sup> High Tide entered into a contract with 7B Building and Development, LLC (“7B”) to perform general contracting services related to the renovation of the car wash.<sup>2</sup> High Tide also entered into a contract with CW Prodesign LLC dba Car Wash Pro Design (“CWPD”) in which CWPD agreed to provide construction management and/or owner’s representative services to High Tide.<sup>3</sup>

High Tide ultimately terminated its contract with 7B in February 2024 and filed the instant suit against 7B in June 2024.<sup>4</sup> High Tide alleges that 7B breached the contract between the parties by, among other things, failing to complete its work in a timely manner and failing to comply with applicable roofing codes which resulted in water damage to the property.<sup>5</sup> High Tide also seeks to quiet title and discharge the construction lien that 7B recorded on the property.<sup>6</sup> 7B, in turn, filed a counterclaim against High Tide alleging that it was High Tide that breached the contract by failing to pay 7B for its work and seeking to foreclose the construction lien.<sup>7</sup>

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<sup>1</sup> Cross-Complaint ¶ 2.

<sup>2</sup> *Id.* ¶ 5.

<sup>3</sup> *Id.* ¶ 4.

<sup>4</sup> Complaint ¶ 8.

<sup>5</sup> *Id.* ¶¶ 13-16.

<sup>6</sup> *Id.* ¶¶ 25-38.

<sup>7</sup> Counter-Complaint ¶¶ 14, 16-24.

7B also filed a Cross-Complaint<sup>8</sup> against CWPD in August 2024, alleging negligent misrepresentation (Count I) and intentional interference with contract (Count II). CWPD now moves for summary disposition of 7B's Cross-Complaint based on the forum selection clause in the Special Development Services Agreement (the "SDS Agreement") between 7B and CWPD. Before the Court is Car Wash Pro Design's Motion for Summary Disposition re: Enforcement of Mandatory Illinois Forum Selection Clause. Oral argument is dispensed as it would not assist the Court in its decision-making process.<sup>9</sup>

At stake is whether 7B's claims against CWPD arise "directly or indirectly as a result or in consequence of" the SDS Agreement? Because the claim for intentional interference with contract relates to a provision in the SDS Agreement, the answer is "yes" with respect to Count II. However, because the factual allegations underlying the claim for negligent misrepresentation took place prior to the execution of the SDS Agreement, the answer is "no" with respect to Count I.

Also at stake is whether, to the extent that the SDS Agreement's forum selection clause applies, the forum selection clause should not be enforced in this instance because

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<sup>8</sup> 7B titled its complaint against CWPD a "Cross-Complaint." However, CWPD was not a party to High Tide's original complaint. Thus, when 7B added CWPD as a defendant to this lawsuit pursuant to MCL 570.1117, CWPD should have been named a Third-Party Defendant pursuant to MCR 2.204.

<sup>9</sup> MCR 2.119(E)(3) provides courts with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court's Scheduling Order clearly and unambiguously set the time for asserting and raising arguments, and legal authorities to be in the briefing - not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties' positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties have received the process due.

the statutory exceptions in MCL 600.745(3) apply? Because the inconvenience was part of the bargained contract, the answer is “no,” and the forum selection clause is enforceable against Count II.

## II Background

7B is a Wyoming corporation with its offices located in Lubbock, Texas.<sup>10</sup> CWPD is an Illinois limited liability company with its principal place of business located in Chicago, Illinois.<sup>11</sup> 7B entered into a contract with High Tide to act as a general contractor for the renovation of a car wash located in Pontiac, Michigan.<sup>12</sup> High Tide separately entered into a contract with CWPD for CWPD to provide construction management and/or owner’s representative services for the renovations to the car wash.<sup>13</sup>

Additionally, in October 2023, 7B and CWPD entered into the SDS Agreement related to the car wash project.<sup>14</sup> The key terms of the SDS Agreement include:

- An acknowledgment that CWPD provided 7B the opportunity to submit a bid on the car wash project to High Tide, and that High Tide awarded 7B the contract.<sup>15</sup>
- An agreement that “the relationship with the Developer’s Client [High Tide] will be conducted

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<sup>10</sup> Cross-Complaint ¶ 1.

<sup>11</sup> *Id.* ¶ 3.

<sup>12</sup> *Id.* ¶ 5.

<sup>13</sup> *Id.* ¶ 4.

<sup>14</sup> Car Wash Pro Design’s Motion for Summary Disposition re: Enforcement of Mandatory Illinois Forum Selection Clause, Exhibit A.

<sup>15</sup> *Id.*, Exhibit A § 1.

exclusively through the Developer [CWPD] for the Project.”<sup>16</sup>

- An agreement that CWPD shall be entitled to 8% of the total gross project cost.<sup>17</sup>
- An agreement to split certain other fees, including funds allocated to General Conditions, Overhead & Profit, buyouts, insurance proceeds, and equipment installation and distributor fees.<sup>18</sup>
- A forum selection clause which states that “[a]ll actions arising directly or indirectly as a result or in consequence of this Agreement shall be instituted and litigated only in courts having situs in Illinois.”<sup>19</sup>

7B alleges that CWPD, as the construction manager and/or owner’s representative, was responsible for developing the design drawings for the project, inspecting the property to determine the current state of the facility, and coordinating with the owner and architect regarding the scope and projected cost of the project.<sup>20</sup> 7B further alleges that it relied on the drawings and information provided by CWPD when preparing its scope of work and cost estimates for High Tide, and that High Tide selected 7B as the general contractor based on the information 7B submitted that was derived from the data provided by CWPD.<sup>21</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, Exhibit A § 3.

<sup>18</sup> *Id.*, Exhibit A §§ 4-7A.

<sup>19</sup> *Id.*, Exhibit A § 16.

<sup>20</sup> Cross-Complaint ¶ 8.

<sup>21</sup> *Id.* ¶¶ 9-11.

7B further alleges that the information provided by CWPD was deficient and “did not properly convey the necessary scope of work or the preexisting conditions at the property.”<sup>22</sup> According to 7B, the information it provided to High Tide based on the CWPD data included a scope and cost significantly less than necessary to complete the project.<sup>23</sup> When High Tide learned of the structural and electrical issues at the property and the extra costs associated with resolving those issues, High Tide terminated its contract with 7B.<sup>24</sup>

In addition to its allegations regarding the accuracy of the information CWPD provided to 7B, 7B also alleges that CWPD prohibited 7B from communicating directly with High Tide and failed to procure the necessary permits for the project.<sup>25</sup>

7B filed its Cross-Complaint against CWPD in August 2024 alleging negligent misrepresentation (Count I) and international interference with contract (Count II). CWPD now moves for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8), arguing that the forum selection clause in the SDS Agreement requires this case to be litigated in Illinois.

### III Standards of Review

#### A

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<sup>22</sup> *Id.* ¶ 13.

<sup>23</sup> *Id.* ¶ 16.

<sup>24</sup> *Id.* ¶ 18.

<sup>25</sup> *Id.* ¶¶ 25-27.

### **MCR 2.116(C)(7)**

Under MCR 2.116(C)(7), summary disposition is appropriate where claims are subject to “an agreement to arbitrate or to litigate in a different forum.” When evaluating a motion under MCR 2.116(C)(7), courts must accept the plaintiff’s well-pleaded allegations as true, and examine any pleadings, affidavits, admissions, depositions, and other documentary submitted by the parties in a light most favorable to the non-moving party. *Odom v Wayne Co*, 482 Mich 459, 466 (2008); *Herman v Detroit*, 261 Mich App 141, 143-144 (2004); *Gortney v Norfolk & Western Railway Co*, 216 Mich App 535, 538-539 (1996). If the pleadings show that a party is entitled to judgment as a matter of law, or if the proofs show that there is no genuine issue of material fact, the trial court “must enter judgment without delay.” *Gortney*, 216 Mich App at 539 (citation omitted).

### **B MCR 2.116(C)(8)**

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160 (2019); *Pawlak v Redox Corp*, 182 Mich App 758 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357 (1991). Exhibits attached to pleadings may be considered under MCR 2.116(C)(8) because they are part of the pleadings pursuant to MCR 2.113(C). *El-Khalil*, 504 Mich at

163. Matters of public record may also be considered. MCR 2.113(C)(1)(a). See also *Dalley v Dykema Gossett*, 287 Mich App 296, 301 n 1 (2010) (court documents are matters of public record that may be considered on a motion under MCR 2.116(C)(8)).

“All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.” *Maiden v Rozwood*, 461 Mich 109, 119 (1999); *Wade v Dep’t of Corrections*, 439 Mich 158, 162 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App at 360; *Spiek v Dept of Transportation*, 456 Mich 331, 337 (1998).

“[T]he mere statement of a pleader’s conclusions, unsupported by allegations of fact, will not suffice to state a cause of action.” *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395 (1994).

#### IV

#### **7B’s Claim for Intentional Interference with Contract Relates to the Special Development Services Agreement, but Negligent Misrepresentation Does Not**

##### A

#### **The Law Regarding Forum Selection Clauses**

“It is undisputed that Michigan’s public policy favors the enforcement of contractual forum-selection clauses and choice-of-law provisions.” *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341, 345 (2006). “[W]hen presented with a contractual forum-



selection clause, a court's first step is to 'determine the threshold issue whether a party is bound by a contract, and, accordingly, any forum selection and choice-of-law provision in the contract.'" *Barshaw v Allegheny Performance Plastics, LLC*, 334 Mich App 741, 748 (2020), quoting *Turcheck*, 272 Mich App at 346 n. 2. "When the action has been filed in Michigan, Michigan courts have the initial jurisdiction to make this determination. *Id.* (internal quotation omitted).<sup>26</sup> As our Court of Appeals has explained, "[a]lthough a valid forum-selection clause does not divest the Michigan courts of personal jurisdiction over the parties, it evinces the parties' intent to forgo personal jurisdiction in Michigan and consent to exclusive jurisdiction in another forum." *Turcheck*, 272 Mich App at 344.

## **B Analysis**

In the instant case, the SDS Agreement between 7B and CWPD contains the following forum selection clause:

16. The validity, interpretation and effect of this Agreement shall be determined under Illinois law. All actions arising directly or indirectly as a result or in consequence of this Agreement shall be instituted and litigated only in courts having situs in Illinois.

Thus, the first step in the inquiry is to determine whether 7B's claims arise "directly or indirectly as a result or in consequence of" the SDS Agreement.

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<sup>26</sup> "[A] forum-selection clause may be considered separately from any choice-of-law provision in the contract. In such cases, the Michigan court in which the action has been filed shall apply Michigan law in determining the effect of the forum-selection clause." *Barshaw*, 334 Mich App at 755.

7B's claim for intentional interference with contract (Count II of the Cross-Complaint) alleges that CWPD "blocked all efforts by 7B to communicate with High Tide regarding the project."<sup>27</sup> However, in the SDS Agreement, 7B and CWPD agreed that the relationship with High Tide would be conducted exclusively through CWPD for the project.<sup>28</sup> Consequently, 7B's allegation that CWPD blocked access to High Tide arises "directly or indirectly as a result of or in consequence of" their agreement in the SDS Agreement that CWPD would conduct all communication with High Tide. Hence, this claim falls within the ambit of the forum selection provision in the SDS Agreement.

The Cross-Complaint's claim for negligent misrepresentation is another matter. 7B broadly alleges that CWPD owed a duty to prepare and provide accurate information and drawings to 7B when 7B was preparing its scope of work and cost estimates for High Tide.<sup>29</sup> The SDS Agreement acknowledges that CWPD "provided [7B] the opportunity to submit a bid on a construction project for clients of the Developer at 45895 Woodward Blvd, Pontiac, Michigan (the 'Project'). [7B] was awarded a bid for the Project, and [7B] will be bound by the terms set forth herein. . . ."<sup>30</sup>

7B's allegations relate to the information provided by CWPD that was included in its bid to High Tide. The Cross-Complaint alleges that "[High Tide] contracted with 7B

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<sup>27</sup> Cross-Complaint ¶ 27.

<sup>28</sup> Car Wash Pro Design's Motion for Summary Disposition re: Enforcement of Mandatory Illinois Forum Selection Clause, Exhibit A § 1.

<sup>29</sup> Cross-Complaint ¶ 12.

<sup>30</sup> Car Wash Pro Design's Motion for Summary Disposition re: Enforcement of Mandatory Illinois Forum Selection Clause, Exhibit A § 1.

to act as general contractor based on 7B's scope of work and price derived from the drawings and information provided by CWPD."<sup>31</sup> Consequently, if CWPD did make any misrepresentations that were included in 7B's bid, the misrepresentations predated 7B's contract with High Tide. High Tide accepted 7B's bid and hired 7B for the project, and then High Tide and 7B signed an agreement *in August 2023*.<sup>32</sup> 7B and CWPD entered into the SDS Agreement *in October 2023*.<sup>33</sup> Thus, CWPD's alleged negligent misrepresentations that led to 7B's contract with High Tide were not a "result or consequence" of the SDS Agreement, which was entered into months after the alleged misrepresentations.

In the end, 7B's claim for intentional interference with contract arises "directly or indirectly as a result or in consequence of" the SDS Agreement, while the claim for negligent misrepresentation does not.

**V**  
**Enforcement of the Forum Selection Clause is Warranted**  
**Because Any Inconvenience was Part of the Bargain between the Parties**

**A**  
**MCL 600.745(3)**

Determining whether the forum selection clause applies does not end the analysis, however. Pursuant to MCL 600.745, a binding forum selection clause mandating the case

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<sup>31</sup> Cross-Complaint ¶ 11.

<sup>32</sup> Complaint, Exhibit A.

<sup>33</sup> Car Wash Pro Design's Motion for Summary Disposition re: Enforcement of Mandatory Illinois Forum Selection Clause, Exhibit A.

be litigated in another state may be set aside in limited circumstances. Specifically, MCL 600.745(3) provides:

If the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur:

- (a) The court is required by statute to entertain the action.
- (b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action.
- (c) The other state would be a substantially less convenient place for the trial of the action than this state.
- (d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.
- (e) It would for some other reason be unfair or unreasonable to enforce the agreement.

“A party seeking to avoid a contractual forum-selection clause bears a heavy burden of showing that the clause should not be enforced.” *Turcheck*, 272 Mich. App. at 348. “Where the inconvenience of litigating in another forum is apparent at the time of contracting, that inconvenience is part of the bargain negotiated by the parties.” *Id.* at 350. One factor that may be considered when analyzing whether an action would be “substantially less convenient” in the forum state is the avoidance of piecemeal litigation. *Robert A Hansen Fam Tr v FGH Indus, LLC*, 279 Mich App 468, 484-485 (2008) (analyzing the plaintiff’s argument that it would be far more convenient to litigate all claims in a

single action, but ultimately enforcing the forum selection clause because the plaintiff did not establish that it could not litigate all claims against all parties in the forum that the parties selected).

## **B Analysis**

In the present case, 7B argues that the forum selection clause in the SDS Agreement should not be enforced because Illinois would be a “substantially less convenient” forum for this litigation, and it would be unfair or unreasonable to enforce the agreement. See MCL 600.745(3)(c), (e). Specifically, 7B argues that because the underlying litigation with High Tide involves the enforcement of a construction lien, the Construction Lien Act mandates that the claims between High Tide and 7B be litigated in Michigan. See MCL 570.1118. 7B would then be forced to litigate its claims arising from the same facts and circumstances and involving the same construction project in two separate forums simultaneously.

However, the reality that 7B must litigate in Michigan with High Tide, and Illinois with regard to CWPD, is part of the bargain that was struck by 7B and CWPD. *Turcheck*, 272 Mich App at 350. The inconvenience of litigating in Illinois was self-evident at the time they entered the contract. That 7B might be in a lawsuit with another party in another venue should not eviscerate CWPD’s negotiated position as it relates to 7B. 7B has not shown how enforcement of the forum selection clause is more convenient for

CWPD, only for itself. Obviously CWPD believes Illinois is more convenient for CWPD and 7B has abandoned any argument to the contrary. This is the outcome that was negotiated with CWPD.

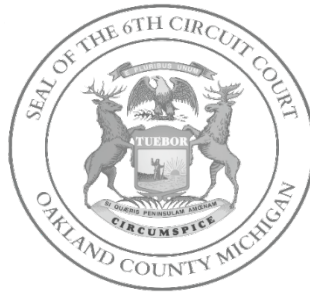
### ORDER

Based on the foregoing Opinion, Car Wash Pro Design's Motion for Summary Disposition re: Enforcement of Mandatory Illinois Forum Selection Clause is GRANTED IN CONNECTION WITH COUNT II AND DENIED AS TO COUNT I.<sup>34</sup>

/s/ Michael Warren

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**HON. MICHAEL WARREN**  
**CIRCUIT COURT JUDGE**



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<sup>34</sup> Neither party addressed how the Court should treat the entire Cross Complaint if the forum selection clause only applied to one count. Because "Trial Courts are not the research assistants of the litigants [and] the parties have a duty to fully present legal arguments for its resolution of their dispute," *Walters v Nadell*, 481 Mich 377, 388 (2008), summary disposition is only partially granted.