

| | | |
|--|--------------------|--|
| RIO GRANDE COUNTY, COLORADO DISTRICT COURT 925 6th Street, Room 204, Del Norte, CO 81132 (719) 657-3394 | | DATE FILED: January 5, 2021 11:31 AM CASE NUMBER: 2019CV30019 |
| PLAINTIFF: MTN Botanicals, LLC , a limited liability company; | ▲ COURT USE ONLY ▲ | <hr/> |
| vs. | | Case No: 2019CV30019 Division: C |
| DEFENDANTS: Lone Star Valley, LLC , d/b/a National Hemp Exchange , a limited liability company; Robert Mertz , an individual; The Robert W. Mertz Trust , a trust; and Mertz, Inc. , a corporation | | |
| ORDER DENYING “DEFENDANTS LONE STAR VALLEY, LLC D/B/A NATIONAL HEMP EXCHANGE AND ROBERT MERTZ’S PARTIAL MOTION FOR SUMMARY JUDGMENT” | | |

THIS MATTER comes before the Court on Defendants Lone Star Valley, LLC d/b/a National Hemp Exchange (“NHE”) and Robert Mertz¹ motion for partial summary judgment (“Motion”), which was filed on November 17, 2020. The Plaintiff, MTN Botanicals, LLC (“MTN”), filed a response on December 8, 2020. The Defendants filed a reply on December 22, 2020. Having reviewed the briefing, applicable law, and all pertinent matters of record, the Court hereby denies the Motion.

PROCEDURAL BACKGROUND

This case involves a dispute that stems from a contract for the sale of hemp clones; MTN alleges the Defendants breached the contract and committed various torts. *See generally First Amended Complaint (filed 4/24/20).*

¹ For ease of reference, the Court will refer to Defendants NHE and Mr. Mertz collectively as “the Defendants.”

MTN is engaged in the cultivation of agricultural products, including hemp. *Id.* at ¶ 11. NHE grows hemp and specializes in the sale of hemp clones and plants to third party farms for cultivation. *Motion* at p. 2. It operates a production facility in Monte Vista, CO. *Id.* at p. 3. Mr. Mertz is the CEO of NHE. *Id.* at p. 3; *First Amended Complaint* at ¶ 4. Defendant Robert W. Mertz Trust (“Trust”) is organized under the laws of Texas. The Trust is the owner of NHE’s site in Monte Vista, Colorado. *First Amended Complaint* at ¶ 6. Defendant Mertz Inc. is also organized under the laws of Texas. *Id.* at ¶ 7.

MTN filed its initial complaint on September 18, 2019. Initially, MTN named two additional Defendants that have since been dismissed from this case: Ron Jones, who worked as the head grower for NHE, and Austin Buckingham, who worked as the marketing director for NHE. *Initial Complaint* at ¶¶ 5-6. The Court entered an order granting MTN’s motion to dismiss Mr. Buckingham on April 13, 2020. The Court entered another order granting a stipulated motion to dismiss Mr. Jones on July 29, 2020.

MTN asserted the following claims against all Defendants: civil theft, civil conspiracy, fraudulent misrepresentation, unjust enrichment, and negligent misrepresentation. MTN also asserted a breach of contract claim against NHE. The Defendants seek dismissal of the civil theft and civil conspiracy claims. *See generally Motion.*

Along with its response to the Motion, MTN filed a motion for leave to supplement the record regarding the Defendants’ Motion (“Motion for Leave”). The Court granted that motion on December 14, 2020, and later that day, MTN filed a notice indicating it filed a transcript of the deposition of the Trust,² which was deposed on December 3, 2020, through Mr. Mertz. Mr. Mertz

² The transcript of this deposition is identified in the court file as “Exhibit 1 – Dec. 3, 2020 Deposition Excerpts” (“Dep. Transcript”).

is the sole grantor, sole trustee, and sole beneficiary of the Trust. *Response* at p. 4; *see also Exhibit D thereto (pt. I)*. MTN asserts the testimony Mr. Mertz gave during the deposition directly refutes some of the assertions the Defendants raised in their Motion. *Motion for Leave* at p. 2.

FACTS

MTN leased nearly 200 acres and purchased equipment in order to conduct a large-scale outdoor hemp growing operation during the 2019 growing season. *Affidavit of Mike Lennon (attached as Exhibit A to Response)* at ¶ 5. In March 2019, MTN began negotiating with NHE to secure the clones MTN needed for the 2019 grow operation. *Id.* at ¶ 9. MTN emphasized that it needed to obtain its clones no later than June 16, 2019 to take advantage of the 2019 growing season. *Id.* at ¶ 33. After negotiating with Mr. Mertz and employees of NHE, the parties reached an agreement. *Id.* at ¶ 10.

MTN alleges that “[NHE] agreed to provide 470,000 healthy, rooted, viable feminized hemp clones. In exchange, [MTN] agreed to provide [NHE] with \$2.75 per clone.” *First Amended Complaint* at ¶ 29. MTN also alleges that “[d]ue to the size of the order, [Mr. Mertz] directly signed off on the project.” *Id.* The Defendants assert the contract speaks for itself and deny MTN’s claim that Mr. Mertz directly signed off on the project. *Defendant Robert Mertz’ Answer to Amended Complaint (filed 6/3/20)* at ¶ 29; *NHE’s Answer to Amended Complaint (filed 6/4/20)* at ¶ 29.

MTN provided funds to NHE for the purchase of the hemp clones as contemplated by the contract. *Id.* at ¶¶ 1 and 11. The total contract price was \$1,292,500. *Motion* at p. 4; *see also Exhibit 4 attached thereto*. The Defendants assert that MTN failed to make payments in accordance with the parties’ agreement but acknowledges that it did pay \$590,000 towards the contract price. *Motion* at p. 2; *see also Exhibit 4 thereto*.

According to Mike Lennon, the head grower for MTN and one of its co-owners, when the parties began negotiations, NHE portrayed a thriving grow operation and showed him clones that he believed would be included in MTN's order. *Exhibit A to Response* at ¶¶ 2 and 15. However, upon visiting NHE's property in May 2019, Mr. Lennon observed several things that caused him to become concerned that NHE would not be able to complete MTN's order on time. *Id.* at ¶¶ 15-17. Following Mr. Lennon's May 2019 observations, MTN demanded a full refund. *Id.* at ¶ 19. According to Mr. Lennon, NHE promised it would provide 225,000 clones at a lower rate and provided a \$25,000 refund to MTN. *Id.*

MTN asserts NHE failed to provide anywhere close to 225,000 clones and many of the clones NHE did provide were problematic because they were in poor health (and some were dead). *Id.* at ¶¶ 20-22. The parties agree NHE delivered approximately 60,000 clones. *Compare id.* at ¶ 21 *with Motion* at p. 4. While it is undisputed that MTN paid NHE \$590,000, the parties disagree about the amount of funds NHE owes MTN. MTN asserts it is owed at least \$565,000 as a direct refund based on NHE's failure to deliver viable clones as promised. *Exhibit A to Response* at ¶ 37 (acknowledging the \$25,000 refund the Defendants provided and subtracting that amount from the amount MTN paid NHE). The Defendants contend MTN rejected an offer to settle for cash prior to the filing of this lawsuit. *Motion* at p. 5. A copy of the letter NHE sent MTN that set forth this settlement offer was attached to the Motion as Exhibit 6. Through this letter, NHE recounted the circumstances of the dispute, asserted MTN breached the contract, and indicated "[t]his leaves a total outstanding balance of \$331,891.00." *Id.* at p. 2. NHE offered to settle the dispute short of litigation on the following terms:

- 1) NHE will deliver at their expense to [MTN] the greenhouse [MTN] expressed interest in during the transaction. The market value of the greenhouse is \$60,000.00.

- 2) NHE will deliver the remaining \$271,891.00 in cash or kind on or before July 1, 2020. The value of the plants provided in kind will be at the original contract rate of \$2.75. Any disputes regarding the viability of any of the plants delivered will be settled by a neutral third party at the cost of [MTN].
- 3) The Parties shall execute mutual releases as well as standard non-disparagement agreements.

Id.

MTN alleges that “[a]t the direction of [Mr. Mertz], [NHE] routinely depletes its own assets by funneling them to Mertz Inc. . . .” *First Amended Complaint* at ¶ 7. MTN further alleges that Mr. Mertz, NHE, the Trust, and Mertz Inc. “have co-mingled their finances and at all relevant times, have served as alter egos of one another.” *Id.* Defendants NHE and Mr. Mertz contend this allegation is inaccurate. *Defendant Robert Mertz’ Answer to Amended Complaint (filed 6/3/20)* at ¶ 7; *NHE’s Answer to Amended Complaint (filed 6/4/20)* at ¶ 7; *Motion* at p. 10 (stating Mr. Mertz “denies these entities are alter egos . . .”).

MTN contends the Defendants “knowingly obtained, retained, or exercised control over [MTN’s] money, without authorization, and/or by threat or deception.” *First Amended Complaint* at ¶ 80. MTN further alleges that the Defendants “had an object to be accomplished, namely, to induce [MTN] to provide money to Defendants that Defendants intended to use for unauthorized purposes and keep for their own use.” *Id.* at ¶ 85. In support of these allegations, MTN attached an affidavit completed by Mr. Buckingham, who worked for NHE from August 2018 to December 2019 as its marketing director. *Exhibit B to Response* at ¶¶ 1-2; *Initial Complaint* at ¶¶ 5-6.

Based on his time working for Mr. Mertz, it is Mr. Buckingham’s belief that Mr. Mertz “runs what he calls his ‘mini conglomerate’ of shell entities that he uses to hide funds and finance each other.” *Exhibit B to Response* at ¶ 4. Mr. Buckingham also states that Mr. Mertz and NHE have placed ownership of their real property under the Trust’s name to shield themselves from

liability, and Mr. Mertz moves money between NHE and Mertz Inc. *Id.* at ¶ 6. Finally, Mr. Buckingham states

MTN provided NHE and [Mr. Mertz] with \$590,000 in total for an order that was never truly filled. The exact amount due back from what MTN paid depends on how the number is calculated, including the price per plant and evaluation of how many healthy plants were received by MTN, but by any calculation, MTN is clearly owed a refund that it has never received.

[Mr. Mertz] tried to avoid any direct communications on this issue, but he did ultimately acknowledge the need to begin refunding MTN's money and he directed me to promise to MTN that NHE would begin a payment plan to refund MTN, potentially on a weekly basis. After only one payment of \$25,000, [Mr. Mertz] directed us to stop, in spite of having acknowledged that NHE had received money from MTN that it was obligated to return.

Id. at ¶¶ 15-16.

ANALYSIS

The Defendants assert this matter merely involves a contractual dispute. *Motion* at p. 8; *see also Reply* at p. 2. This characterization of the dispute ignores most of the allegations MTN has asserted against the Defendants. What is more problematic, however, is that the Defendants seek to turn summary judgment principles on their head; the Defendants argue dismissal of the civil theft and civil conspiracy claims is appropriate because MTN is not capable of marshalling enough supporting evidence at trial. *Motion* at pp. 8 and 10. This argument is misplaced, as it misconstrues the summary judgment standard. The Defendants' arguments are founded on their proposed interpretation of the facts, which are still being developed considering discovery is ongoing. In this respect, the Court agrees with MTN's assertion that "the 'facts' that Defendants have presented are incomplete and only amount to one conceivable interpretation of the events in this case." *Response* at p. 2. For these reasons, the drastic measure of entering summary judgment on MTN's civil theft and civil conspiracy claims in the Defendants' favor is not warranted.

Rule 56 of the Colorado Rules of Civil Procedure allows courts to determine the merits of an action in a much more efficient manner than the rigors of a full trial. Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” C.R.C.P. 56(c); *Westin Operator, LLC v. Groh*, 347 P.3d 606, 611 (Colo. 2015).

“The party moving for summary judgment has the initial burden of showing that there is no genuine issue of material fact.” *Id.* “If the moving party satisfies that burden, the nonmoving party must then put forward evidence showing that a triable issue of fact exists.” *Id.* A material fact is one that “will affect the outcome of the case.” *Dominguez Reservoir Corp. v. Feel*, 854 P.2d 791, 795 (Colo. 1993). When the “facts are undisputed, or so certain as not to be subject to dispute, the court is in position to determine the issue strictly as a matter of law.” *Rogerson v. Rudd*, 345 P.2d 1083 (Colo. 1959).

Under this standard, the nonmoving party “must receive the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts.” *Tapley v. Golden Big O Tires*, 676 P.2d 676, 678 (Colo. 1983); *see also KN Energy, Inc. v. Great Western Sugar Co.*, 698 P.2d 769, 776 (Colo. 1985) (“Because summary judgment is a drastic remedy, the absence of dispute as to all issues of material fact must be clearly shown, and all doubts as to the presence of disputed facts must be resolved against the moving party.”) (citations omitted). “When the pleadings and affidavits show material facts are in dispute, it is error to grant summary judgment.” *Struble v. American Family Ins. Co.*, 172 P.2d 950, 955 (Colo. App. 2007) (citation omitted). As the Defendants correctly note, “[s]ummary judgment should not be granted, if there is the slightest

doubt as to the facts in question.” *Motion* at p. 6 citing *Moffat County State Bank v. Told*, 800 P.2d 1320, 1324 (Colo. 1990).

With respect to the civil theft claim, the Defendants argue (1) there are no facts to support that Mr. Mertz himself obtained MTN’s money, and thus, he could not have exercised control over that money; (2) there is “is no material fact in dispute to support” that NHE obtained control over MTN’s money without authorization; and (3) there are no facts to support the necessary *mens rea* for theft. *Motion* at pp. 7-8; *Reply* at pp. 3-7. The Court adopts the reasoning set forth in MTN’s response, which unequivocally demonstrates that a genuine dispute of material fact exists with respect to each point the Defendants raised regarding the civil theft claim. MTN produced competent evidence in the form of affidavits, checks, and the Defendants’ bank statements that directly refute the Defendants’ assertions. As such, the Court finds that material facts concerning the civil theft claim are in dispute and declines to enter summary judgment.

The Defendants’ arguments on the civil conspiracy claim largely piggyback off their arguments on the civil conspiracy claim. *Motion* at pp. 9-10. The Court is not convinced by the Defendants’ argument that there could not have been an overt act in furtherance of a conspiracy simply because they think the Court should enter summary judgment on the civil theft claim. For reasons already explained, that argument is rejected. The Defendants also argue the civil conspiracy claim must fail because there is no evidence suggesting there was a meeting of the minds between the Defendants. *Motion* at p. 10; *Reply* at p. 8. The affidavits that MTN attached in support of its response refute that argument. *See e.g. Exhibit B to Response* at ¶¶ 4-6 (where Mr. Buckingham indicates Mr. Mertz referred to the entities he manages as his “‘mini conglomerate’ of shell entities that he uses to hide funds and finance each other.”). This is but one of multiple assertions MTN made in its response (and supporting documents) regarding the purpose of the

arrangement of the entities Mr. Mertz manages. Viewing the evidence in the light most favorable to MTN and drawing all reasonable inferences in its favor, the Court concludes summary judgment on the civil conspiracy claim is inappropriate.

ORDER

IT IS THEREFORE ORDERED that “Defendants Lone Star Valley, LLC d/b/a National Hemp Exchange and Robert Mertz’s Partial Motion for Summary Judgment” is DENIED.

Done this this 4th day of January 2021.

BY THE COURT:



CRISTA L. NEWMYER-OLSEN
District Judge – 12th Judicial District