

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR COUNTY OF WAYNE

_____,

Plaintiff,

vs.

Case No:

Hon. Judge:

_____,

Defendant.

_____,

Attorney for Plaintiff

_____,
Attorney for Defendant

PLAINTIFF'S MOTION TO ADD NEW PLAINTIFF PERSUANT TO MCR 2.207

NOW COMES Plaintiff _____ (“plaintiff”), by and through his attorney, |
_____, hereby submits this brief in support of his Motion to add a new Plaintiff
pursuant to MCR 2.207. For the reasons set forth below, plaintiff requests that his motion be
granted in its entirety.

Attorney for the Plaintiff,

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR COUNTY OF WAYNE

[REDACTED]

Plaintiff,

vs.

Case No:

Hon. Judge:

[REDACTED]

Defendant.

[REDACTED]
[REDACTED]

Attorney for Plaintiff

[REDACTED]
[REDACTED]

Attorney for Defendant

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

**BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO ADD NEW PLAINTIFF
PERSUANT TO MCR 2.207**

Plaintiff [REDACTED] ("plaintiff"), by and through his attorney [REDACTED], hereby moves to add [REDACTED] as a plaintiff to the above captioned matter pursuant to MCR 2.207.

BACKGROUND

Plaintiff [REDACTED] ("plaintiff") and defendant [REDACTED] ("defendant") were the sole and equal shareholders of [REDACTED] Corporation that owned and operated a party store business ("the Corporation"). Pursuant to the parties' agreement, defendant was responsible for collecting all proceeds from the Corporation's daily sales, and to deposit those proceeds into the Corporation's business accounts. For a period of more than two years, defendant did not distribute any profits or dividends to plaintiff, although the Corporation's business was thriving.

In [REDACTED] both parties agreed to sell the Corporation (Exhibit ___) to [REDACTED] [REDACTED] (“buyer”). At the time of the closing, the buyer paid [REDACTED] towards the purchase price and inventory of which defendant collected and illegally deposited in his personal account for his own benefit. Soon after, defendant and the buyer executed an “Amendment to Promissory Note and Security Agreement” in which defendant acknowledged the receipt of [REDACTED]. (Exhibit ___) Defendant also collected all the payments made by the buyers towards the Promissory Note, including two checks paid in [REDACTED] [REDACTED] and [REDACTED] in the amount of [REDACTED] and [REDACTED] respectively. (Exhibit ___) Defendant yet again illegally deposited these amounts into his personal account.

On October, ___, [REDACTED], plaintiff filed a complaint against defendant alleging six cause of actions including breach of implied contract and fiduciary duty. (Exhibit ___) However, after filing the complaint plaintiff’s counsel learned for the first time that plaintiff [REDACTED] [REDACTED] had signed an “Assignment of Monthly Purchase Price Payments” (“Assignment”) dated [REDACTED] in favor of [REDACTED]. Pursuant to the Assignment, all the monthly payments due by buyer to plaintiff pursuant to the Promissory Note and Security Agreement were assigned to [REDACTED]. (Exhibit ___) Accordingly, [REDACTED] [REDACTED] should be joined as a party to this action.

ARGUMENTS

I. THE COMPLAINT SHOULD BE AMENDED TO ADD [REDACTED] AS A PLAINTIFF

Under MCR 2.118(A)(2), leave to amend pleadings should be freely given when justice so requires. Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile. *Ben Fyke & Sons, Inc. v Gunter*, 390 Mich. 649 (1973).

Parties in a suit may be added or dropped at any stage of the proceedings on such terms as the court may feel are just. *Barry County Dep't of Social Services v. Potter*, 72 Mich. App. 233, 237 (Mich. Ct. App. 1976); See also *Miller v. Chapman Contr.*, 477 Mich. 102, 105 (Mich. 2007).

MCR 2.207, which specifically states that misjoinder of parties is not a ground for dismissal of an action, reads as follows:

Misjoinder of parties is not a ground for dismissal of an action. Parties may be added or dropped by order of the court on motion of a party or on the court's own initiative at any stage of the action and on terms that are just. When the presence of persons other than the original parties to the action is required to grant complete relief in the determination of a counterclaim or cross-claim, the court shall order those persons to be brought in as defendants if jurisdiction over them can be obtained. A claim against a party may be severed and proceeded with separately.

A motion to add new parties to a cause is not subject to denial merely because it introduces new facts, new theory, or different cause of action, so long as it springs from same transactional setting as that pleaded originally. *Matson v Soronen*, 57 Mich. App. 190, 193 (Mich. Ct. App. 1974).

In addition, where the plaintiff sues in the wrong capacity, courts have allowed the new plaintiff “to take advantage of the former action if the original plaintiff had, in any capacity, either before or after the commencement of suit, an interest in the subject matter of the controversy.” *Hayes-Albion Corp. v. Whiting Corp.*, 184 Mich. App. 410, 415 (Mich. Ct. App. 1990). In determining whether a new plaintiff is to be added, the key question that courts consider is “whether the defendant had notice within the statutory period of the “added” plaintiff and his claims.” *Id.* at 417. A defendant would not be prejudiced by the addition of a plaintiff if he had the requisite notice of the “added” plaintiff, and since the transactional base of the claim would have been pled before the period of limitation ran, the defendant would be prepared to defend all claims arising out of the transaction. *Id.*

Here, the statutes of limitations for breach of contract and unjust enrichment have not run. Moreover, the interest of the [REDACTED] is identical to that of [REDACTED], and the claims of both arise out of the same facts and transactions. As such, the defendant had notice of the claims and also had notice [REDACTED] claims by virtue of the assignments made by [REDACTED] to [REDACTED]. A copy of the assignment is annexed hereto as Exhibit "A." As a result, [REDACTED] should be added as a plaintiff to the above captioned matter.

II. THE DISCOVERY DEADLINES IN THIS MATTER SHOULD BE EXTENDED.

Plaintiff filed his complaint on [REDACTED]. However, no response to the complaint was ever received. Thereafter, on [REDACTED], plaintiff filed for a default judgment. (Exhibit ___) In addition, on [REDACTED] plaintiff's counsel wrote a letter to defendant's counsel informing him that plaintiff was willing to set aside the default if he appeared on defendant's behalf. (Exhibit ___) As there was no response, plaintiff filed the motion for default judgment on [REDACTED] (Exhibit ___). Thereafter, on [REDACTED] defense counsel sent a fax message to plaintiff's counsel informing him that the response to the complaint had already been filed, and that a copy had been faxed to plaintiff's counsel. (Exhibit ___) Plaintiff's counsel, however, never received the answer. The [REDACTED] fax from defense counsel also contained a response to plaintiff's motion for default judgment.

It should be noted that the granting or denial of discovery is within the trial judge's discretion. *Masters v. Highland Park*, 97 Mich. App. 56, 60 (Mich. Ct. App. 1980). See also *Prokos v. John Roumanis & Mediterran. Inc.*, 2002 Mich. App. LEXIS 45 (Mich. Ct. App. Jan. 15, 2002) (Unpublished). While ruling on a discovery motion, the trial court should consider whether the granting or extension of discovery would facilitate rather than hinder the litigation. *Masters*, at 60. The court should also consider the timeliness of the request, the duration of the litigation, and any possible prejudice to the litigants. *Id.*

Discovery in the instant case was supposed to be complete by (INSERT DATE).
Based upon the preceding, as well as the need to add a new plaintiff to this action, plaintiff respectfully requests an extension of all pending discovery deadlines.

III. ALL MONIES RECEIVED BY DEFENDANT PURSUANT TO PROMISSORY NOTE SHOULD BE PLACED IN AN ESCROW ACCOUNT PENDING THE RESOLUTION OF THIS MATTER

Defendant [REDACTED] was in charge of the day to day operations of the store, which included management of the cash flow of the business, collecting the proceeds from the daily sales and depositing these proceeds to the corporation's business accounts, payment of any payables of the business, and distributing any profits. However, for a period of more than two years, defendant did not distribute any profits or dividends to plaintiff despite the fact that the Corporation's business was running very successfully.

In addition, on [REDACTED] the Corporation adopted a resolution which gave the defendant the power to sign and conduct any action that he deemed was necessary to carry out the sale of the business. At the closing of the sale of the Corporation, the Buyer paid [REDACTED] towards the purchase price and inventory for the business. It was defendant who collected this amount. However, defendant illegally deposited this money into his personal account for his own benefit. Later on, defendant and the Buyer executed an Amendment to Promissory Note and Security Agreement (Exhibit __), in which defendant acknowledged the receipt of [REDACTED] in payments. Defendant also received two checks paid in [REDACTED] and [REDACTED] in the amount of [REDACTED] and [REDACTED] respectively, on behalf of the Corporation (Exhibit __). These amounts too were misappropriated by the defendant.

Moreover, from the date of closing until the date of the filing of this complaint, defendant has been collecting all the payments made by the buyers towards the sale of the

business. Defendant deposited all these amounts illegally into his personal account for his personal benefit.

Accordingly, plaintiff has and continues to suffer financial loss due to the acts of the defendant. Therefore, in the interest of justice, plaintiff requests this court order all monies received by defendant pursuant to the promissory note to be placed in an escrow account pending the resolution of this matter.

RELIEF REQUESTED

WHEREFORE, for the reasons stated above, plaintiff [REDACTED] request this Court grant his motion to add [REDACTED] as a new plaintiff, extend all pending discovery deadlines and order all monies received from the sale of the Corporation be placed in an escrow account pending resolution of this matter.

Dated: [REDACTED]

Respectfully submitted,

[REDACTED]