IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ALAN MCQUILLIN, Plaintiff, v. IWONA EVANS, GLEN EVANS, and AQUA SCIENCE, LLC, Defendants.	)	C.A. Nos. N22J-01132 N22C-07-194 VLM

ORDER

Submitted: August 22, 2023
Decided: October 24, 2023

Upon Consideration of Plaintiff's Motion for Confessed Judgment,
DENIED.
Defendants' Motion to Dismiss under Superior Court Civil Rule 12(b)(6),
GRANTED, *in part,* **DENIED,** *in part*.

R. Grant Dick IV, Esq., & Andrew A. Ralli, Esq., Cooch and Taylor P.A., Wilmington, DE 19899, *Attorneys for Plaintiff, Alan McQuillin* .

John L. Williams, Esq., & Brian C. Crawford, Esq., The Williams Law Firm, P.A., Wilmington, DE 19899, *Attorneys for Defendants, Iwona Evans, Glen Evans, and Aqua Science, LLC.*

MEDINILLA, J.

AND NOW TO WIT, this 24th day of October, 2023, upon consideration of Plaintiff's Motion for Confessed Judgment and Defendants' Motion to Dismiss under Superior Court Civil Procedure Rule 12(b)(6), all Responses thereto, oral arguments, the record in this case, and for the reasons stated on the record, **IT IS HEREBY ORDERED** that for the following reasons, Plaintiff's Motion for Confessed Judgment is **DENIED,** and Defendants' Motion to Dismiss is **GRANTED,** *in part,* **DENIED**, *in part.*

Facts[1]

1. Plaintiff Alan Plaintiff McQuillin ("Plaintiff") and Defendant Iwona Evans ("Defendant Evans") served as the only members and managers of Aqua Science, LLC, ("Aqua Science"), a Delaware Limited Liability Company.[2] On February 18, 2020, Plaintiff and Defendant Evans entered the Limited Liability Company Agreement for Aqua Science LLC ("LLC Agreement").[3] Pursuant to Article 3 of the LLC Agreement, Capital Contributions and Company Interests, Plaintiff held a 49% membership interest and Defendant Evans held the remaining 51% membership interest.[4]

[1] Unless otherwise noted, this Court's recitation is drawn from Plaintiff's Amended Complaint ("Complaint") and all documents the parties incorporated by reference. Am. Compl. (D.I. 12) ("Am. Compl."); *see In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69–70 (Del. 1995).
[2] Am. Compl. ¶ 8.
[3] Am. Compl. Ex. B.
[4] *Id.* at 3.

2. On September 1, 2021, Plaintiff and Defendant Evans executed the Limited Liability Company Interest Purchase Agreement ("Purchase Agreement") with Defendant Evans agreeing to purchase Plaintiff's membership interest in its entirety for $50,000.[5] The Purchase Agreement stipulated that Defendant Evans would pay $10,000[6] upon execution of the transaction and the remaining balance of $40,000[7] was to be paid via promissory note[8] ("Promissory Note").

3. The Promissory Note, pertaining to the remaining $40,000 balance, specified that Defendant Evans would tender an initial amount of $10,000 on October 1, 2021, with six subsequent monthly payments of $5,000 due on the first day of each month.[9]

4. The Promissory Note included a Confession of Judgment provision noting that "[u]pon the occurrence of an Event of Default and the failure by the Maker to cure the default. . . the Maker hereby authorizes and empowers any Clerk, Prothonotary or Attorney. . . to confess judgment in the Superior Court of Delaware. . . ."[10] And included the following language:

> The Maker acknowledges that the Maker has had the assistance of independent counsel in the review and execution of this note (or has decided not to consult counsel) and further acknowledges

[5] Am. Compl. Ex. A at 1-8.
[6] *Id.* at 1.
[7] *Id.* at 2.
[8] Am. Compl. Ex. A at 1-4.
[9] *Id.* at 1.
[10] *Id.* at 2.

> that the Maker understands the meaning and effect of the foregoing provision concerning confession of judgment.[11]

5. In conjunction with the Purchase Agreement, on September 1, 2021, Plaintiff and Defendant Evans subsequently entered into a Settlement Agreement and Mutual Release ("Settlement Agreement,") which stipulated a mutual and broad release of claims in the event litigation ensued.[12]

6. Arbitration provisions were included in both the Purchase Agreement[13] and the LLC Agreement.[14]

7. Defendant Evans tendered the initial $10,000 upon execution of the transaction in September 2021,[15] as well as $7,000 (of the $10,000) due on October 1, 2021.[16] No additional payments were made.[17]

8. On April 8, 2022, Plaintiff filed a Praecipe requesting this Court to commence a Confession of Judgment against Defendant Evans for the unpaid

---

[11] Am. Compl. Ex. A at 2.
[12] Am. Compl. Ex. C at 1-4.
[13] Under Article 5, Indemnification, the Purchase Agreement stipulated in Section 5.4 that, "[i]f the parties hereto cannot agree to a resolution of any dispute arising. . . within ten (10) business days after the expiration of the twenty (20) day notice period provided for in Section 5.3 of this Agreement, the proposed claim shall be submitted to binding arbitration administered by the American Arbitration Association. . . ." Am. Compl. Ex. A at 5.
[14] Under Article 12, Miscellaneous, the LLC Agreement stipulated in Section 12.9 that, excepting for Remedies regarding Breach of Covenants of Non-Disclosure and Non-Competition as provided in Section 4.6, "any and all disputes, claims, controversies or conflicts arising out of or relating to this Agreement, or the breach or violation of this Agreement, shall be submitted to binding arbitration administered by the American Arbitration Association. . . ." Am. Compl. Ex. B at 28.
[15] Am. Compl. ¶ 12.
[16] *Id*.
[17] *Id*.

amount under the Promissory Note.[18] Defendant Evans filed an objection to the Entry of Confession of Judgment.[19] Plaintiff then filed his Reply.[20]

9. On November 7, 2022, Plaintiff filed an Amended Complaint alleging that Defendant Evans still owed $34,500 of the purchase price under the Purchase Agreement.[21] Plaintiff also filed against Glen Evans and Aqua Science, LLC, (collectively, "Defendants").

10. The Amended Complaint[22] included five claims: (1) Breach of Contract (for Defendant Evans's refusal to pay the remaining balance owed under the Purchase Agreement and Promissory Note); (2) Breach of Contract (for Defendant Evans's refusal to perform further actions requested by Plaintiff including refusing efforts to remove Plaintiff as guarantor of the Credit Cards); (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; (4) Defamation, Slander/Slander *per se*; and (5) Defamation and Libel (alleging Defendants sent a direct message to Plaintiff's employer that Plaintiff was attempting to steal

[18] Pl.'s Praecipe for Confessed J. (D.I. 1) ("Confessed J."). Plaintiff's Confessed Judgment 58.1 Complaint was filed in N22J-01132. This amount included $33,000 in outstanding principal, $1,000 in late payment interest charges, $2,000 for attorney's fees, and $200 in costs.
[19] Def.'s Obj. to Entry of Confession of J. (D.I. 4) ("Def.'s Obj. to Entry of Confession of J."). Defendant's Objection to Entry of Confession was Judgment was filed in N22J-01132.
[20] Pl.'s Reply in Supp. of Entry of Confessed J. (D.I. 6) ("Pl.'s Reply in Supp. of Entry of Confessed J."). Plaintiff's Reply in Support of Entry of Confessed Judgment was filed in N22J-01132.
[21] Am. Compl. ¶ 13. This remaining balance included the remaining $3,000 of the $10,000 due on October 1, 2021, $30,000 for the remaining six unpaid monthly installments, and $1,500 in late payment charges pursuant to Section 4 of the Promissory Note.
[22] *Id.* ¶ 30-61.

equipment from Aqua Science and that this was "not new behavior for him"[23]).

11. On November 21, 2022, Defendants filed their Motion to Dismiss the Amended Complaint.[24] On January 13, 2023, this Court consolidated the Confession of Judgment and the Amended Complaint into one action.[25] On March 6, 2023, Plaintiffs filed their amended answering brief opposing the Motion to Dismiss the Amended Complaint,[26] with Defendants replying on March 24, 2023.[27] On August 22, 2023, this Court heard oral arguments on the Motion to Dismiss[28] and conducted an evidentiary hearing for the Confessed Judgment proceeding.[29] The matter is ripe for review.

Contentions

12. Defendants provide several reasons for 12(b)(6) dismissal. As to Count I, Defendants contend that it merely duplicates the Confession of Judgment.[30] As to Count II, Defendants argue that this claim is subject to the arbitration provision in Section 5.4 of the Purchase Agreement.[31] For Count III, Defendants argue that

[23] Am. Compl. Ex. K.
[24] Defs.' Mot. to Dismiss Am. Compl. (D.I. 14) ("Defs.' Mot. to Dismiss Am. Compl.").
[25] Mot. to Consolidate Actions Granted (D.I. 17) ("Mot. to Consolidate Actions Granted").
[26] Pl.'s Am. Answering Br. in Opp'n to Def.s' Mot. to Dismiss Am. Compl. (D.I. 24) ("Pl.'s Am. Answering Br. in Opp'n to Def.s' Mot. to Dismiss Am. Compl.").
[27] Defs.' Reply Br. in Supp. of Mot. to Dismiss (D.I. 25) ("Defs.' Reply Br. in Supp. of Mot. to Dismiss").
[28] Judicial Action Form dated 8-22-2023 regarding Motion to Dismiss (D.I. 34).
[29] Judicial Action Form dated 8-22-2023 regarding Motion for Confessed Judgment (D.I. 35).
[30] Defs.' Mot. to Dismiss Am. Compl. at 8.
[31] *Id*. at 12.

dismissal is warranted because the claims assert a breach of the express provisions of the Purchase Agreement, whereas claims for a breach of the implied covenant "must allege a specific implied contractual obligation."[32] As to Count IV, Defendants argue that Plaintiff's mere recitation of the elements of slander and slander *per se* are insufficient, and fails to identify any spoken statements or any recipients of such statements.[33] As to Count V, Defendants argue Plaintiff fails to establish the elements of libel including lack of evidence that Plaintiff's reputation was injured by any communications.[34]

13. In response, as to both Counts I and II, Plaintiff argues the claims are not duplicative, and that he has sufficiently alleged different causes of action for both a breach of the Promissory Note, and the Purchase Agreement for Defendant Evans's failure to remove him from further obligations, and her failure to act in good faith.[35] As to Count III, he argues dismissal is inappropriate because the implied covenant claims can be litigated simultaneously along with breach of contract claims as an alternative form of relief.[36] Finally, regarding Counts IV and V, he maintains he has pled sufficient facts for both defamation claims, and that statements made by Defendant Glen Evans are imputed to Defendant Evans under an agency theory.[37]

---

[32] Defs.' Mot. to Dismiss Am. Compl. at 13.
[33] Defs.' Reply Br. in Supp. of Mot. to Dismiss at 15.
[34] Defs.' Mot. to Dismiss Am. Compl. at 16.
[35] Pl.'s Am. Answering Br. in Opp'n to Def.s' Mot. to Dismiss Am. Compl. at 13.
[36] *Id.* at 16.
[37] *Id*. at 20.

Confession of Judgment

14. Under 10 *Del. C.* § 2306, a judgment by confession does not serve as a final judgment until the "defendant-obligor" has had the "opportunity for a judicial determination as to whether the defendant-obligor understandingly waived his or her right to notice and an opportunity to be heard prior to the entry of final judgment against him or her."[38] If, after this first hearing on whether the defendant waived his or her rights, the Court concludes that "the plaintiff prevails on the issue of whether the defendant-obligor understandingly waived notice and an opportunity to be heard prior to the entry of judgment against him or her, then judgment shall be entered [against the defendant-obligor]. . . ."[39]

15. Superior Court Civil Rule 58.1, Entry of judgment by confession and execution thereon, effectuates the intent of 10 *Del. C.* § 2306, by providing that during the hearing for waiver, "the burden shall be on the plaintiff to prove that debtor effectively waived debtor's right to notice and a hearing prior to the entry of judgment against debtor."[40]

16. Delaware courts abide by the federal rule regarding waiver that "[t]he execution and delivery of a note containing cognovit provisions, waiving the right to prejudgment notice and a hearing, is constitutional if the waiver is knowing,

[38] 10 *Del. C.* § 2306(b).
[39] 10 *Del. C.* § 2306(g).
[40] Super. Ct. Civ. R. 58.1(g)(3).

voluntary and intelligent. . . ." [41] "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." [42] And, in *Mazik v. Decision Making, Inc.*, our Supreme Court clarified that, "[t]he validity of a waiver depends upon the totality of the circumstances."[43]

17. Under the totality of circumstances standard, this Court can consider the following factors, if applicable.

> (1) the defendant's business sophistication and experience with similar documents[44]; (2) whether the defendant consulted an attorney[45]; (3) whether all bargaining parties took the necessary steps to ensure that the terms of the agreement were read and understood at the time the transaction was entered[46]; and (4) whether defendant had the opportunity and time to review the document containing the confession of judgment. [47]

18. During the evidentiary hearing, Defendant Evans testified that English was not her first language and that her education was obtained outside of the United States.[48] This was her first business venture, and she was not familiar with the

---

[41] *Pellaton v. Bank of New York*, 592 A.2d 473, 476 (Del. 1991) (quoting *D.H. Overmyer Co., Inc. v. Frick,* 405 U.S. 174, 187, 92 S.Ct. 775, 783, 31 L.Ed.2d 124 (1972)).
[42] *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938).
[43] *Mazik v. Decision Making, Inc.*, 449 A.2d 202, 204 (Del. 1982) (citations omitted).
[44] *RBS Citizens, N.A. v. Caldera Mgmt., Inc.*, 2009 WL 3011209, at *3 (D. Del. Sept. 16, 2009) (citing *Pellaton,* 592 A.2d at 476).
[45] *RBS Citizens, N.A. v. Caldera Mgmt., Inc.*, 2009 WL 3011209, at *3 (citing *Pellaton,* 592 A.2d at 477).
[46] *RBS Citizens, N.A. v. Caldera Mgmt., Inc.*, 2009 WL 3011209, at *3 (citing *Sussex Tr. Co. v. Clifton Canning Co., Inc.,* 1988 WL 116426, at *7 (Del. Super. Ct. Nov. 2, 1988)).
[47] *Id*.
[48] Judicial Action Form dated 8-22-2023 regarding Motion for Confessed Judgment.

documents.[49] She did, however, concede that she had the assistance of counsel, the "company's attorney" for Aqua Science.[50] She relied on his expertise throughout the execution of the documents, and testified that she did not understand the meaning and effect of the confession of judgment provision.[51]

19. Notably, the Confession of Judgment provision failed to include any language that would indicate that a debtor was waiving a right to notice and a hearing, since nowhere in the provision do the words (waiver, right, notice or hearing) appear. Furthermore, the Promissory Note was attached as an Exhibit to the Purchase Agreement where the "Maker" and the "Payee" were initially incorrectly identified as Plaintiff and Defendant Evans, respectively. Handwritten corrections were made to that document. Defendant Evans testified she did not know what the respective designations meant.

20. For the reasons stated on the record, the Court finds that Plaintiff fails to meet his burden that Defendant Evans knowingly waived her right to notice and hearing under Rule 58.1. The Court does not enter judgment against Defendant Evans.

[49] Judicial Action Form dated 8-22-2023 regarding Motion for Confessed Judgment.
[50] *Id*.
[51] *Id*.

Amended Complaint

21. Under Delaware Superior Court Civil Rule 12(b)(6), dismissal is appropriate when the complaint fails to state a claim upon which relief can be granted.[52]

> When reviewing a ruling on a motion to dismiss, we (1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as "well pleaded" if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) do not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[53]

22. Since Defendants were successful in opposing the Confessed Judgment, they concede Count I survives dismissal. No further analysis is required.

23. Counts II and III are claims for breach of contract and breach of the implied covenant of good faith and fair dealing within the Purchase Agreement, which includes an arbitration clause. Plaintiff argues the claims are not subject to arbitration because the Purchase Agreement and the Promissory Note have conflicting forum selection clauses that "muddy" the parties' intentions[54] regarding substantive arbitrability.[55] Plaintiffs fail to develop this argument.

---

[52] Super. Ct. Civ. R. 12(b)(6).
[53] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 535 (Del. 2011) (citing *Savor, Inc. v. FMR Corp.,* 812 A.2d 894, 896-97 (Del. 2002)).
[54] Pl.'s Am. Answering Br. in Opp'n to Def.s' Mot. to Dismiss Am. Compl. at 17.
[55] *BuzzFeed, Inc. v. Anderson*, 2022 WL 15627216, at *7 (Del. Ch. Oct. 28, 2022), *judgment entered*, (Del. Ch. 2022) (citations omitted) ("When conflicting arbitration provisions muddy the parties' intentions regarding substantive arbitrability, it cannot be said that the parties intended to

24. Delaware courts abide by the rule that "*any doubts* concerning the scope of arbitrable issues should be resolved in favor of arbitration."[56] Our Supreme Court has adopted the majority federal view "that reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator."[57] Here, the parties evinced a clear intent in the contracting language found in both the LLC Agreement and Purchase Agreement to submit to binding arbitration without any carveouts or exceptions noted.

25. Therefore, Defendant's Motion to Dismiss Counts II and III is **DENIED**, pending an arbitrator's decision on the scope of the arbitration provisions and whether the claims fall within the applicable provisions.

26. For the reasons discussed on the record, Count IV, Defamation, Slander, and Slander *per se*, regarding Defendant Evans' defamatory statements, is a claim that cannot survive. "At common law, defamation consists of the 'twin torts' of libel and slander."[58] In short, slander is oral defamation.

27. Plaintiff does not plead any facts involving spoken defamation in any respect. Thus, he cannot recover under any reasonably conceivable set of

---

submit the question of substantive arbitrability to the arbitrator. In that circumstance, Delaware law entrusts substantive arbitrability to the courts.").

[56] *McLaughlin v. McCann*, 942 A.2d 616, 621 (Del. Ch. 2008) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)) (emphasis added) (citations omitted).

[57] *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006) (citations omitted).

[58] *Preston Hollow Capital LLC v. Nuveen LLC*, 216 A.3d 1, 9 (Del. Ch. 2019) (quoting *Spence v. Funk*, 396 A.2d 967, 970 (Del. 1978)).

circumstances susceptible of proof. As such, Count IV of the Amended Complaint must be dismissed and Defendant's Motion to Dismiss Count IV is **GRANTED.**

28. As for Count V, Defamation and Libel, this written defamation claim requires the plaintiff to prove: "(1) the defamatory character of the communication; (2) publication; (3) that the communication refers to the plaintiff; (4) the third party's understanding of the communication's defamatory character; and (5) injury."[59]

29. At this juncture, even vague allegations are well-pleaded if they give the opposing party notice of the claim. Plaintiff alleges that certain defamatory messages were sent, not only to him but also to his wife, and employees of his current employer. At this juncture, despite only vaguely claiming that the communications harmed his reputation, this Court finds this is sufficient to survive dismissal. Defendant's Motion to Dismiss Count V is **DENIED.**

30. In conclusion, Plaintiff fails to meet his burden of Confessed Judgment against Defendant Evans under Rule 58.1, and Plaintiff's Motion for Confessed Judgement is **DENIED**. Defendants' Motion to Dismiss under Rule 12(b)(6) is **GRANTED,** *in part,* and **DENIED,** *in part,* as fully set out above.

IT IS SO ORDERED.

/s/ Vivian L. Medinilla
Vivian L. Medinilla
Judge

[59] *Essounga v. Delaware State Univ.*, 2016 WL 1613206, at *3 (Del. Super. Ct. Apr. 18, 2016) (citations omitted).