

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PUFF HOOKAH LOUNGE, INC,

Plaintiff,

v

Case No. 14-138904-CK

Hon. Wendy Potts

KARCH, LLC,

Defendant.

OPINION AND ORDER RE:
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR
2.116(C)(10)
AND
PLAINTIFF'S MOTION TO AMEND COMPLAINT AND FILE FIRST AMENDED
WITNESS LIST

At a session of Court
Held in Pontiac, Michigan

FEB 20 2015

Defendant Karch LLC owns commercial property on Orchard Lake Road in the city of Orchard Lake Village. Karch purchased the property in 2001 and for several years maintained a building that it leased to various restaurant and retail businesses. In June 2011, Karch leased space to Plaintiff Puff Hookah Lounge Inc. for a hookah bar. Karch claims that it was difficult to keep tenants in the building because of traffic constraints and that by 2012 the property was mostly vacant with only two tenants, Puff Hookah and a sewing center. Sometime in 2012, Walgreens made an offer to purchase a portion of the property near the road. In November 2012, Karch signed a purchase agreement with Thomas Murray and Orchard Lake Green, LLC, who demolished part of the existing structure and build a Walgreens store. The plan also called for reducing the amount of available parking in the adjacent lot. In February 2014, Puff Hookah

brought this action against Karch claiming that the new construction would interfere with its rights under the lease and the loss of use of the full parking lot would amount to a partial eviction. Puff Hookah also asked the Court to enter an injunctive order barring Karch from proceeding with its plan to sell the property to Murray and Orchard Lake Green. Puff Hookah moved for a preliminary injunction, which the Court denied. The Court also denied Puff Hookah's motion for reconsideration of the injunction decision.

The matter is now before the Court on Karch's motion for summary disposition under MCR 2.116(C)(10), which tests the factual support for Puff Hookah's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Karch asserts, and Puff Hookah does not dispute, that the injunction claim in Count One was mooted by the Court's decision to deny the preliminary injunction. Thus, the only two claims at issue are Count Two seeking a declaratory judgment regarding Puff Hookah's lease rights to the parking lot and Count Three alleging that Karch breached the lease and partially evicted Puff Hookah by allowing the Walgreens construction.

Regarding the declaratory judgment claim, Plaintiff fails to demonstrate a question of fact whether Karch breached its lease by allowing the demolition and construction or by reducing the size of the parking lot. As the Court noted in its earlier rulings, the lease agreement gave Karch the discretion to "make changes from time to time in the size, dimensions, the opening and closing of, and location and type of the common areas and buildings which comprise the Property . . ." Thus, Karch had the right to alter the parking lot, including by reducing its size. The lease agreement gave Puff Hookah the nonexclusive right to use the parking lot, but it did not guarantee that Karch would maintain a certain size parking lot or a certain number of spaces. Because Puff Hookah did not demonstrate a question of fact whether its lease required Karch to

maintain the parking lot size or number of spaces, Puff Hookah's declaratory judgment claim fails as a matter of law.

Similarly, Puff Hookah has not demonstrated a question of fact on its claim that Karch breached the lease by allowing the Walgreens construction and parking lot reduction. Because Puff Hookah presented no admissible evidence demonstrating a genuine dispute whether Karch was obligated to maintain the parking lot size or number of spaces, this claim also fails.

As for the partial constructive eviction claim, Puff Hookah would have to show that Karch deprived Puff Hookah of the beneficial use and enjoyment of the leased property or unlawfully interfered with its possessory interest. MCL 600.2918(2); *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 474-475; 666 NW2d 271 (2003). Although Puff Hookah claims that the reduction in parking spaces harmed its business, it did not produce any evidence to support this claim. Further, Puff Hookah presented no admissible evidence that the current amount of parking is insufficient for its business operations. Because Puff Hookah has not shown a factual dispute regarding the constructive eviction claim, Karch is entitled to summary disposition of that claim as well.

Puff Hookah also asks the Court to allow it to amend its complaint to clarify its constructive eviction and breach of lease claims and add claims for breach of an implied covenant of good faith and fair dealing, unjust enrichment, and detrimental reliance. Leave to amend pleadings shall be freely given when justice so requires. MCR 2.118(A)(2). However, amendment can be denied for compelling reasons, such as undue delay, actual prejudice, or futility. *Weymers v Khera*, 454 Mich 639, 658-659; 563 NW2d 647 (1997).

Karch asserts that the request to amend is dilatory, and the record supports this claim. Although delay alone is not normally grounds for denying a motion to amend, the Court has

discretion to deny an amendment that unfairly prejudices the opposing party. *Weymers, supra* at 659. Discovery closed November 18, 2014, the same day that Karch filed its motion for summary disposition, and the case is set for trial on March 30, 2015. Puff Hookah did not file its motion seeking leave to amend until January 15, 2015, almost two months after Karch's dispositive motion was filed and less than three weeks before the motion was set for hearing. The fact that Puff Hookah's original counsel withdrew in August 2014 is not significant because its current counsel filed his appearance on September 2, 2014. Puff Hookah does not explain why it could not have sought leave to amend before discovery closed and before Karch sought dismissal. Allowing Puff Hookah to add new claims now would unfairly prejudice Karch because it would prevent it from receiving a fair trial. *Weymers, supra*.

Even if Puff Hookah had exercised due diligence in seeking leave to amend, the proposed amendment is futile. An amendment is futile if it is legally insufficient on its face, it merely restates allegations already made, or it adds a claim over which the court lacks jurisdiction. *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006). Puff Hookah's proposed amended complaint merely restates its existing claims or adds theories based on the same facts or evidence. Puff Hookah has not explained how the defects in its existing claims and evidence would not be fatal to its new claims. Because Puff Hookah's proposed amendment is both unduly delayed and futile, the Court denies its request to amend.

For all of these reasons, Karch is entitled to summary disposition and the Court dismisses Puff Hookah's claims with prejudice.

This order resolves the last pending claim and closes the case.

Dated:

FEB 20 2015

IT IS SO ORDERED.

Hon. Wendy Potts