

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

**WALDRON PROPERTIES 11, LLC and
DENNIS STEVENS,
Plaintiffs,**

v.

**Case No. 13-136376-CK
Hon. James M. Alexander**

**ZOUP! SYSTEMS, LLC and
ERIC ERSHER,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants’ Motion for Summary Disposition. On March 20, 2011, Plaintiff Waldron and Defendant Zoup! entered into a Franchise Agreement, whereby Waldron would own and operate a Zoup! franchise. Shortly thereafter, the parties’ relationship began to deteriorate.

In general, Plaintiffs filed their Complaint alleging violations of the Michigan Franchise Investment Law Act and breach of the Franchise Agreement. In return, Defendants seek a declaration that the Franchise Agreement is terminated and that they have no obligation to agree to a sale of the franchise. Defendants also seek its “loss of bargain” damages and attorney fees and costs.

In their motion, Defendants argue that they are entitled to summary disposition because: (1) they did not violate the Franchise Investment Law Act; (2) they did not breach the Franchise Agreement; and (3) it is undisputed that “Waldron has failed to comply with Zoup!’s standards

and procedures since, at least, July 10, 2013.” As a result, Defendants argue that they had every right to terminate the Franchise Agreement.

In response, Plaintiffs argue that Defendants (in part): (1) deceived Plaintiffs into entering into the Franchise Agreement, in part, based on potential catering sales that Defendants never intended to allow at the location; (2) attempted to terminate the Franchise Agreement based on conditions that were present before the franchise sale; (3) failed to specifically identify alleged operational violations; (4) failed to provide an opportunity to cure any violations; and (5) unjustly refused to agree to a sale of the franchise.

Both parties: (1) provide numerous affidavits and other documentary evidence supporting their positions, (2) argue (nearly exclusively) based on their perceived version of these “facts”; and (3) cite little authority. As a general rule, this Court is highly skeptical when parties file motions for summary under (C)(10) and argue facts – as the case here.

In any event and despite the parties’ wildly differing accounts of this case, Defendants now seek summary disposition of under MCR 2.116(C)(10) – which presumes that there are no material facts in dispute.

A motion under MCR 2.116(C)(10) tests the factual support for Plaintiff’s claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). The moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Id.* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

With respect to Plaintiffs' allegations of a breach of the Michigan Franchise Investment Law Act, Defendants conclude that Plaintiffs fail to allege sufficient fraud necessary to support their claim. But Defendants offer no true substantive analysis on this issue beyond their conclusion. In fact, Defendants concentrate the entirety of their cursory argument on one of Plaintiffs' claims (that regarding catering sales) – ignoring the remainder of Plaintiffs' claims regarding fraud.

Defendants' motion on this issue is properly denied based simply on their failure to address each of Plaintiffs' fraud allegations. Michigan law is clear that, "A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim." *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

The parties' dispute surrounding Plaintiff's breach of Franchise Agreement and Defendants' request for a declaration that they were entitled to terminate said agreement center on whether Plaintiffs were in compliance with Zoup!'s operational standards. Plaintiffs argue that their franchise took every step to ensure compliance. In support, Plaintiffs attach the affidavit of Dennis Stevens, who details Plaintiffs' efforts. In their Reply Brief, despite characterizing their supportive affidavits as "documentary evidence," Defendants characterize Plaintiffs' affidavit as simply making "arguments." But an affidavit is evidence, not argument.

Further, Defendants claim that "Plaintiffs have presented no . . . **credible** evidence to support their allegation that they have been in compliance with Zoup!'s operational standards." In other words, Defendants specifically make credibility an issue, and credibility must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, "courts 'may not resolve factual disputes or

determine credibility in ruling on a summary disposition motion” *White, supra* at 625, citing *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004); and *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005).

For the foregoing reasons and viewing the evidence in the light most favorable to Plaintiffs, this Court cannot conclude that there are no material facts in dispute whereby Defendants are entitled to judgment as a matter of law. As a result, Defendants’ Motion to for Summary Disposition is DENIED in its entirety.

This simply isn’t a case that’s properly decided on summary disposition.

IT IS SO ORDERED.

July 16, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge