

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

MOURAD COMPANY,
Plaintiff,

v.

Case No. 13-136602-CK
Hon. James M. Alexander

RAINBOW ENTERPRISES CO, ET AL,
Defendants.

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff's motion for summary disposition. In its Complaint, Plaintiff alleges that it leased certain commercial real estate to Defendant Rainbow,¹ who operated a Big Boy restaurant on the premises for a number of years. In November 2006, the parties agreed to extend the lease for another ten years. At the same time, Defendants Samir Saleh and Joseph Yousif executed a personal guaranty as further security for the lease extension.

Plaintiff alleges that Defendants defaulted on the lease by failing to pay rent, taxes, utilities, and otherwise maintain the premises as required under the lease terms. Plaintiff also alleges that the individual defendants failed to fulfill their obligations under the personal guaranty.

In September 2013, Rainbow consented to entry of a Judgment of Possession of the property. This Judgment also included a \$10,000 credit for any future deficiency claim in exchange for Rainbow waiving any claim for any real or personal property left at the premises. Considering this credit, Plaintiff claims that Defendants owe \$364,532.48, plus attorney fees.

¹ On April 14, 2014, the Court entered an Order staying proceedings as to Defendant Rainbow only based on its bankruptcy filing in the United States Bankruptcy Court for the Eastern District of Michigan (Case No. 2014-46048).

To that end, Plaintiff now moves for summary disposition under MCR 2.116(C)(10), which tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Under (C)(10), "In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). In response, Defendants seek summary disposition under MCR 2.116(I)(2).

In support of its motion, Plaintiff attaches the loan documents and personal guaranty, the District Court Consent Judgment of Possession, and the affidavit of Gerald Gabriel, a CPA retained by Plaintiff to analyze the financial records, which confirms the amounts owed.

Additionally, in a Supplemental Brief filed on March 21, 2014, Plaintiff claims that Defendants failed to answer Plaintiff's Request for Admissions, Interrogatories, and Requests for Production of Documents. As a result, each request to admit has been deemed admitted under MCR 2.312. Therefore, by operation of Court Rule, Plaintiff claims that Defendants admitted liability and the amount alleged due.

In their Response, Defendants do not contest that they defaulted under the loan and guaranty terms. Instead, Defendants claim that (1) Plaintiff may not pursue collection because it no longer owns the property, and (2) the property sale constituted a satisfaction of any debts owed by Defendant under the lease.

In support of its claim that Plaintiff cannot pursue collection because it sold the property,

Defendants cite *Plaza Investment Co v Abel*, 8 Mich App 19; 153 NW2d 379 (1967). In *Plaza Investment*, the Court of Appeals reviewed the responsibilities of the parties to a lease after the sale of the underlying property. Unlike this case, however, *Plaza Investment* considered a breach that occurred following the sale of the property. In this case, Defendants allegedly breached the lease and guaranty before the property sale. As a result, the Court rejects Defendants' reliance on *Plaza Investment* in support of their argument.

As the Court of Appeals reasoned, a "change of parties to the estate does not terminate the contractual relationship between the original landlord and the original tenant, which contractual relationship continues." *Plaza Investment*, 8 Mich App at 24-25. Plaintiff is the proper party to prosecute allegations of Defendants' breach of the lease agreement that predated the sale.

Next, Defendants curiously claim that the property sale to a third party satisfied all of Defendants' debt owed under the lease. Defendants, however, offer no authority in support of this remarkable argument. 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).

Generally, the victim of a tort or breach of contract must "use such means as are reasonable under the circumstances to avoid or minimize [his] damages." *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998). On or about August 27, 2013, Plaintiff sold the underlying property. At this point, Plaintiff no longer had the ability to collect on the underlying lease. As a result, Plaintiff mitigated its damages by selling the property, and the amount of "future rent" due under the lease terms are not recoverable as damages.

For the foregoing reasons and viewing all evidence in the light most favorable to Plaintiff, the

Court concludes that there are no material questions of fact in dispute, and Plaintiff is entitled to judgment as a matter of law.

According to Exhibit A – attached to Mr. Gabriel’s affidavit – Defendant owed Plaintiff \$238,778.57 on August 27, 2013 (the sale date). Defendants have failed to respond with any evidence of a different amount owed or otherwise contradict Plaintiff’s claim. Considering the \$10,000 credit under the September 14 Consent Judgment, Plaintiff is entitled to a money judgment for \$228,778.57 against Defendants Samir M. Saleh and Joseph S. Yousif only. Plaintiff may present the appropriate order for entry.

This Order is **not** a Final Order that resolves the last pending claim and closes the case because the matter is presently stayed as to Defendant Rainbow, which is in bankruptcy.

IT IS SO ORDERED

April 16, 2014
Date

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