

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

**HERSHEY'S ICE CREAM OF FARMINGTON, LLC,
Plaintiff/Counter-Defendant,**

v.

**Case No. 13-137076-CK
Hon. James M. Alexander**

**ORCH 13, LLC,
Defendant/Counter and Cross Plaintiff,**

and

**MIRKO STOJKOVIC and
HERSHEY'S ICE CREAM OF ORCHARD LAKE, INC,
Defendants/Cross-Defendants.**

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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants/Cross-Defendants Stojkovic and Hershey's of Orchard Lake's (Scoops) motion for summary disposition. Scoops previously operated an ice cream store in Defendant ORCH 13's building.

In January 2013, Scoops listed its ice cream business for sale. Ultimately, Plaintiff Hershey's expressed interest, and the parties signed an Asset Purchase Agreement on September 28, 2013. The negotiated purchase price was \$37,000, and Hershey's paid Scoops \$10,000 upon signing the Agreement. The remaining \$27,000 was to be paid under the terms of a promissory note executed contemporaneously with the Agreement.

Under the Purchase Agreement, one condition to closing was that Hershey's "shall have received and negotiated an acceptable lease to [it] from the landlord at the current location." Despite this closing requirement, Hershey's never executed any lease with the landlord, ORCH

13. And notwithstanding accepting a lease-assignment fee from Scoops under the terms of its lease, ORCH 13 never came to terms with Hershey's.

ORCH 13 also refused to allow Hershey's access to the building to remove the equipment allegedly included in the sale because ORCH 13 claimed that it was the true owner of the equipment. As a result, Hershey's filed the present Complaint on claims for declaratory judgment (seeking a ruling as to the rightful ownership of certain business assets), conversion, indemnification, and breach of contract. ORCH 13 responded by filing a Counterclaim against Scoops and Hershey's for unpaid rent since the September 28th "sale."

Scoops now files the present motion – arguing that it does not belong in Hershey's and ORCH 13's dispute. To that end, Scoops moves for summary disposition under MCR 2.116(C)(10), which tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In response, both Hershey's and ORCH 13 seek summary disposition under MCR 2.116(I)(2).

Michigan law is well-established that "a court must construe and apply unambiguous contract provisions as written." *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

In its motion, Scoops argues that Hershey's "was so confident that a lease would be signed that Plaintiff closed without a signed lease. On September 28, 2013 Plaintiff closed and purchased the ice cream business. The lease was a mere formality."

In relevant part in response, Hershey's argues that "an express condition in the Asset Purchase Agreement" was a finalized lease between it and ORCH 13. Further, this condition could only be waived if "in writing and signed by all Parties." Indeed, as stated, the Asset Purchase Agreement did condition closing on a finalized lease. This never happened, and the parties did not waive the lease requirement in writing. This Court will enforce the unambiguous negotiated agreement of the parties. As a result, the sale closing never occurred.

This leaves the question what happens next. The only logical answer is that the parties must be put back in the position that they held before the signing of the Asset Purchase Agreement.

Hershey's is entitled to the return of any sums paid toward the purchase price, and Scoops must so provide. Hershey's is also released from any additional obligation under the Asset Purchase Agreement. Further, Hershey's reliance on the Asset Purchase Agreement for indemnification is misplaced because enforcement of that term assumes a valid closing that never occurred.

Because Hershey's does not hold a valid, fully executed Asset Purchase Agreement, it is without standing to seek a declaration of the rightful ownership of the disputed assets,¹ and no party could be liable to Hershey's for conversion of the same. This ruling resolves Hershey's Complaint in its entirety.

¹ Neither Scoops, nor ORCH 13 have an existing claim for a similar declaration, and as a result, any ownership dispute is not ripe for disposition.

The only remaining claim is ORCH 13's Counterclaim for unpaid rent against Scoops and Hershey's. But Hershey's has no obligation to ORCH 13 for any unpaid rent because it never had any lease agreement with ORCH 13, nor did it occupy the premises at any point. As a result, ORCH 13's Counterclaim as to Hershey's is DISMISSED in its entirety.

With respect to Scoops, however, a lease with ORCH 13 remains in place. While Scoops argues that it assigned the lease to Hershey's, Scoops lease with ORCH 13 requires such an assignment to be in writing and with ORCH 13's approval. No such writing exists, and this Court will again enforce the unambiguous negotiated agreement of these parties. As a result, there was no valid assignment. Scoops is entitled to a return of the \$1,725 assignment fee that it paid to ORCH 13.

With respect to unpaid rent, Scoops argues that ORCH 13 has failed to mitigate its damages in the intervening months since the Purchase Agreement. For example, Scoops argues, ORCH 13 had several mitigation options. It could have: (1) allowed Scoops back onto the premises to operate the ice cream store; (2) signed a lease with Hershey's for operation of the ice cream store; or (3) placed the ice cream equipment in storage and leased the storefront to another tenant.

Indeed, our Supreme Court has held that 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). The *Morris* Court continued, however, that "the question whether the plaintiff's efforts were reasonable is one for the trier of fact, and the defendant has the burden of proving that the plaintiff's efforts at mitigation were unreasonable." *Morris, supra* at 269.

As a result, because Scoops has pled the affirmative defense of ORCH 13's failure to mitigate its damages, summary disposition is inappropriate, and ORCH 13's summary request under (I)(2) is DENIED.

The only remaining claim is ORCH 13's claim for unpaid rent – and only as to Cross-Defendants Mirko Stojkovic and Hershey's Ice Cream of Orchard Lake (Scoops).

IT IS SO ORDERED.

July 9, 2014
Date

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