

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

THE DESSERT OASIS, LLC,

Plaintiff/Counter-Defendant,

v

Case No. 2013-137573-CZ
Hon. Wendy Potts

JUDITH ROSE and ROBERT ROSE,

Defendants/Counter-Plaintiffs.

OPINION AND ORDER RE: DEFENDANTS, COUNTER AND THIRD-PARTY
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

At a session of Court
Held in Pontiac, Michigan

On
JUN 25 2014

In September 2012, Plaintiff The Dessert Oasis LLC leased commercial property from Defendant Rose Enterprises on Main Street in Rochester. The lease requires Dessert Oasis to pay Rose Enterprises \$3,300 per month through 2013 and \$3,550 per month for 2014. Dessert Oasis must also pay part or all of the property taxes, insurance, Central Business District Assessment fees, utilities, and maintenance fees. Rose Enterprises allowed Dessert Oasis to pay its security deposit in installments, including a payment of \$1,575 that was due on January 1, 2014. Third-Party Defendant Jamal Hamood, who is Dessert Oasis's business manager, personally guaranteed the lease.

The lease agreement gave Dessert Oasis an option through January 2014 to purchase the property on a land contract for \$1,000,000. The option, written by Hamood, states that the price would be paid in monthly installments of \$10,000 with a 6% annual interest rate and a ten-year

balloon for any unpaid balance. The option does not provide a specific procedure for how Dessert Oasis would exercise it, and there are no terms for the land contract other than price and payments.

Sometime in 2013, the parties began to have issues with Dessert Oasis's use of the property. Among other issues, Rose Enterprises claims that Dessert Oasis's coffee roaster creates dust or debris that is a nuisance. On October 21, 2013, Hamood sent an email to Rose Enterprises about these issues, which also states that "Dessert Oasis has elected to exercise its option (see paragraph 31 of the Lease) to purchase the land and building for the sum of One Million Dollars as previously negotiated and detailed in paragraph 31 of the lease." Hamood attached to the email a proposed, unsigned land contract "for your [Rose Enterprises's] signature." On November 18, 2013, Rose Enterprises's attorney sent Hamood its version of a land contract. The parties continued to negotiate for several days, however, no agreement was reached on the language of a land contract.

On November 26, 2013, Dessert Oasis filed this action against Rose Enterprises and its principals Judith and Robert Rose. In its complaint, Dessert Oasis alleges that Defendants breached the option in the lease agreement by refusing to accept Dessert Oasis's offer to purchase and by placing conditions on its exercise of the option. Dessert Oasis further alleges that Defendants breached the lease by failing to perform construction or maintenance, tortiously interfered with Dessert Oasis's use of the premises and expectancies, and trespassed on its leasehold interests. Dessert Oasis also asked the Court to enter a declaratory judgment that it properly exercised its option. Rose Enterprises filed a counter-complaint against Dessert Oasis and a third-party complaint against Hamood stating claims for breach of its lease and guaranty, tortious interference, nonpayment of rent, eviction, and declaratory and injunctive relief.

The matter is before the Court on Rose Enterprises's motion seeking summary disposition of Dessert Oasis's Count I for breach of contract and Count VIII for declaratory relief. Rose Enterprises also seeks summary disposition of its Count V counterclaim for declaratory relief regarding Dessert Oasis's alleged failure to exercise the option, Count I counterclaim for breach of the lease, and Count II counterclaim regarding rent payment and eviction. Rose Enterprises seeks summary disposition under MCR 2.116(C)(8), which tests the legal sufficiency of the claims and (C)(10), which tests the factual support for the claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Dessert Oasis opposes Rose Enterprises's motion and seeks summary disposition in its favor under MCR 2.116(I)(2), which gives the Court authority to grant summary disposition to the opposing party if that party demonstrates that it, rather than the moving party, is entitled to judgment as a matter of law. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

At the outset, the Court rejects Rose Enterprises's request to evict Dessert Oasis because this Court lacks jurisdiction over the claim. An action to evict a tenant must be brought in the District Court, which has jurisdiction over summary proceedings to recover possession of premises. MCL 600.5704. Because Rose Enterprises cites no authority for this Court to enter an order of eviction, its claim for eviction is dismissed without prejudice for lack of jurisdiction. To the extent that Rose Enterprises intends to evict Dessert Oasis, it must do so through a summary proceeding in the appropriate District Court.

Regarding the option agreement, Rose Enterprises asserts that Dessert Oasis failed to exercise it according to the terms of the option before it expired. An option is an agreement whereby the owner of property gives another the right to buy the property at a fixed price within

a specified time. *Randolph v Reisig*, 272 Mich App 331, 336; 727 NW2d 388 (2006). An option is only an offer that must be accepted in strict compliance with the terms of the option both as to the exact thing offered and within the time specified. *Oshtemo v Kalamazoo*, 77 Mich App 33, 37; 257 NW2d 260 (1977); *Bailey v Grover*, 237 Mich 548, 554-555; 213 NW 137 (1927).

Although the option does not describe how Dessert Oasis would accept the offer, the undisputed facts show no words or conduct of Dessert Oasis or Hamood that could be construed as acceptance. Hamood's October 2013 email may have been intended as Dessert Oasis's acceptance of the option, however, it is a counteroffer because it came with the condition that Rose Enterprises sign a land contract. A valid acceptance must be absolute and unconditional. *Marshall Mfg Co v Berrien County Package Co*, 269 Mich 337, 339; 257 NW 714 (1934). If an acceptance is conditional, it is only a counter-proposal. *Marshall, supra*. Because Dessert Oasis's proposed land contract included additional terms and conditions not reflected in the option, the October 2013 email was not an acceptance of the option.

Further, Dessert Oasis took no other action before January 31, 2014 that could be construed as an acceptance of the option. Dessert Oasis tendered no payment and, in fact, fought Rose Enterprises's efforts to force it to pay anything, including its lease payments, after November 2013. Dessert Oasis is correct that tender of payment is not required to exercise an option unless the terms of the option mandate tender. See *Catsman v Eister*, 8 Mich App 563, 567; 155 NW2d 203 (1967). However, had Dessert Oasis tendered the first \$10,000 monthly payment with no conditions attached, that act would have constituted evidence of its intent to accept the option. See *Kamalath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992).

Dessert Oasis also claims that it exercised the option by filing this action, citing an unpublished decision, *Miranda & Assoc Inc v Abro*, unpublished decision per curiam of the Court of Appeals, decided December 29, 2009 (Docket No. 287230). The Court of Appeals in *Miranda* cites *Rashken v Smith*, 236 Mich 440; 210 NW 485 (1926) for the proposition that an option may be exercised by filing suit for specific performance. *Rasken, supra* at 442-443. However, Dessert Oasis has not asked this Court to order specific performance of the option agreement, and it cites no authority that a mere claim for breach of an option suffices as acceptance of the option. Even if filing any action pertaining to an option could be construed as acceptance, Dessert Oasis fails to explain how its request to force Rose Enterprises into a land contract with terms contrary to the terms of the option constitutes an acceptance. An action resting on a demand for a contract contrary to the terms of the option is not an acceptance. *Rashken, supra*. Because the plaintiff in *Miranda* sought specific performance in accordance with the option agreement, the Court of Appeals concluded that the specific performance claim constituted an acceptance. By contrast, Dessert Oasis asks this Court to impose a land contract on Rose Enterprises. Hence, the analysis of *Miranda* has no application to the facts of this case.

In sum, there is no question of fact that Dessert Oasis did not unconditionally accept the option on or before January 31, 2014 and Rose Enterprises is entitled to summary disposition of Dessert Oasis's Count I. Regarding the claims for declaratory judgment, which are Dessert Oasis's Count V and Rose Enterprises's counterclaim Count V, the Court grants summary disposition for Rose Enterprises and holds that Dessert Oasis did not exercise the option before it expired and the option is unenforceable as a matter of law.

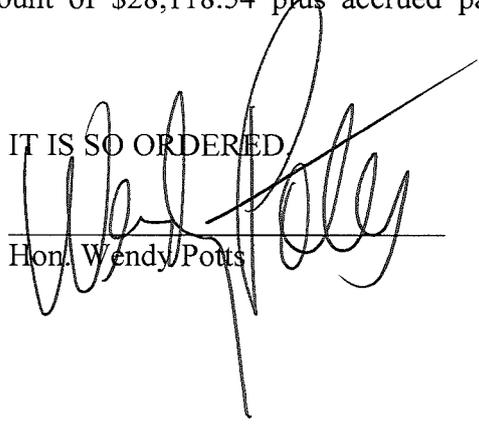
Rose Enterprises also asks the Court to grant it summary disposition of its counterclaims alleging Dessert Oasis breached the lease and failed to pay rent. As support for its claim of

nonpayment, Rose Enterprises presents the affidavit of its principal Robert Rose who asserts that Dessert Oasis did not pay its rent or other obligations under the lease since November 2013 and owed \$28,118.54 as of May 2014. Dessert Oasis argues that it had no obligation to comply with the lease agreement because its exercise of the option converted its status from a tenant to a land contract vendee. However, for the reasons stated above, Dessert Oasis did not unconditionally accept the option by January 31, 2014 and the option expired. Thus, the lease is still in effect and Dessert Oasis must pay rent and comply with its other lease obligations. Because Dessert Oasis presents no evidence raising a question of fact whether it paid its rent or other obligations since November 2013, Rose Enterprises is entitled to summary disposition and judgment on its claim that Dessert Oasis breached the lease agreement. The Court enters judgment in favor of Rose Enterprises and against Dessert Oasis in the amount of \$28,118.54 plus accrued payments, interest, and costs.

Dated:

JUN 25 2014

IT IS SO ORDERED



Hon. Wendy Potts