

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

**STORE 2 FRASER, LLC,
Plaintiff,**

v.

**Case No. 14-144517-CK
Hon. James M. Alexander**

**INTERNATIONAL RESTAURANT
GROUP, LLC, and INTERNATIONAL
PROPERTIES OF MADISONVILLE, LLC,
Defendants,**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition.¹ According to its Amended Complaint, on September 25, 2013, Plaintiff purchased real property located at 5001 Kenwood Road in Madisonville, Ohio from Defendant International Properties of Madisonville. Less than one week later, on October 1, 2013, Plaintiff leased these premises to Defendant International Restaurant Group to operate a Little Caesars restaurant.

Plaintiff claims that this deal was a sale-leaseback transaction that resulted in Plaintiff purchasing the property from International Properties for \$385,000 and then leasing the same back to International Restaurant under a 5-year, triple-net lease (with \$3,000 monthly lease payments).

But after less than six months after the deal was closed, International Restaurant closed the Little Caesars restaurant – claiming financial trouble. In addition to alleging claims for breach of the lease agreement, Plaintiff also alleges fraud claims based on allegations that Defendants made

¹ Plaintiff moves for partial summary disposition on its breach of lease agreement claim – seeking a ruling only as to liability. Defendants, on the other hand, move for dismissal of Plaintiff’s Amended Complaint.

representations that induced Plaintiff to pay more for the property than it was worth. Plaintiff further claims that Defendants knew that the purchase price was inflated and never intended to fulfill the terms of the lease agreement.

In any event, Plaintiff now moves for summary disposition as to liability on its breach of lease claim under MCR 2.116(C)(10), and Defendant moves for summary disposition of Plaintiff's Amended Complaint under MCR 2.116(C)(7), (C)(8) or (C)(10).

A motion under (C)(7) determines whether a claim, among other reasons, is barred. A (C)(8) motion tests the legal sufficiency of the complaint. And a (C)(10) motion tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

1. Ohio Law.

Initially, the parties dispute whether Ohio law governs this dispute. This determination affects both parties' motions. The Lease Agreement provides, at paragraph 31.02, that "This Lease and the rights and obligations of the parties are governed by the laws of the State of Ohio."

It is well established that "Michigan's public policy favors the enforcement of contractual . . . choice-of-law provisions." *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341, 345; 725 NW2d 684 (2006). And "Michigan courts will enforce contractual choice-of-law provisions if certain conditions are met." *Turcheck*, 272 Mich App at 346.

Our Supreme Court has reasoned, citing to Restatement 2d of Conflict of Laws, § 187:

Although § 187(1) permits the application of the parties' choice of law if the issue is one the parties could have resolved by an express contractual provision, § 187(2) states two exceptions. Section 187(2)(a) provides that the choice of law will not be followed if the chosen state has no substantial relationship to the parties or the transaction, or when there is no reasonable basis for choosing that state's law. Section 187(2)(b) bars the application of the chosen state's law when it "would be contrary to

a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.” *Chrysler Corp v Skyline Industrial Services, Inc*, 448 Mich 113, 126; 528 NW2d 698 (1995).

Plaintiff argues that the first consideration favors applying Michigan law because “Ohio does not have any substantial relationship to this case.” The Court disagrees. The property is located in Ohio. And just as Michigan should, Ohio rightfully has a say considering real property rights and conveyances within its own borders.

For this reason, the Court finds that the parties had good reason to apply Ohio law because Ohio has a substantial connection to a lease involving Ohio real property. The Court further finds that Michigan does not have a materially greater interest than Ohio in the determination of this issue. Ohio’s interest in application of its laws relative to Ohio property outweighs any interest that Michigan may have.

For the foregoing reasons, the Court will apply Ohio law – as contracted by the parties.

2. Breach of Lease Agreement.

Next, Plaintiff seeks a summary ruling as to liability on its breach of lease claims (Counts I and II), and Defendants move for summary disposition of said claims because the lease is invalid under Ohio law.

It makes sense to address Defendants’ argument first. Under Ohio’s Statute of Conveyances, at Ohio Revised Code 5301.01(A) (emphasis added):

A . . . lease of any interest in real property . . . shall be signed by the . . . lessor in the case of a . . . lease The signing **shall be acknowledged** by the grantor, mortgagor, vendor, or lessor, or by the trustee, before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor,

who shall certify the acknowledgement and subscribe the official's name to the certificate of the acknowledgement.

Defendants argue that, because the Lease was not notarized or otherwise acknowledged, then the Lease is invalid and automatically reverted to a month-to-month tenancy, which ended when International Restaurant vacated the premises.

In support, Defendants cite *Ruben v SM & N Corp*, 613 NE2d 1101; 83 Ohio App 3d 80 (1993). Analyzing ORC 5301.01, the *Ruben* Court reasoned:

it is well settled that where a purported lessee takes possession under a defectively-executed lease and pays rent, a tenancy will be implied and is subject to all of the terms of the purported lease **except duration. The duration of the term is determinable by the provisions for payment of rent**, so a lease providing for annual rent creates a tenancy from year to year, **whereas a lease providing for monthly rent creates a tenancy from month to month.** *Ruben v SM & N Corp*, 613 NE2d at 1102-1103 (emphasis added) (internal citation omitted).²

In response to Defendants' argument, Plaintiff cites only nonbinding and distinguishable caselaw. For example, Plaintiff cites *Logan Gas Co v Keith*, 158 NE 184, 117 Ohio St 206 (1927) and *Cole v EV Properties, et al*, 563 Fed. Appx 389 (CA 6 2014), but these cases involve oil and gas leases. Further, Plaintiff's citation to *Citizens National Bank v Denison*, 133 NE2d 329; 165 Ohio St 89 (1956) is only for general background on the cited statute.

Based on *Ruben* and *Delfino*, the Court finds that, because Plaintiff did not properly acknowledge its signature on the lease in compliance with ORC 5301.01, the Lease is invalid under Ohio law and creates a month-to-month tenancy that ended when International Restaurant vacated

² See also the Ohio Supreme Court case of *Delfino v Paul Davies Chevrolet, Inc*, 209 NE2d 194, 196-197; 2 Ohio St 2d 282 (1965); quoting *Wineburgh v Toledo Corporation*, 181 NE 20; 125 Ohio St 219, paragraph one of the syllabus, reasoning:

A defectively executed lease for a term of five years upon monthly rental creates a tenancy in the lessee from month to month; and where the tenant occupying under such lease vacates the premises at the end of a month, after fully prepaying the rentals then due, he is not liable to the lessor for the rental installments accruing after such vacation, in an action at law based upon such defectively executed lease.

the premises in April 2014.

It is undisputed that International Restaurant continued to pay monthly rent until October 2014. Based on the above argument, Defendants request that International Restaurant be awarded the amount it overpaid Plaintiff in the months since it left the premises. But Defendants did not file any Counterclaim, and as a result, the Court has no basis to award International Restaurant any damages.

For all of the foregoing reasons and viewing all evidence in the light most favorable to Plaintiff, the Court finds that there are no material facts in dispute and Defendants are entitled to judgment as a matter of law. Defendants' motion summary disposition under (C)(10) is GRANTED, and Plaintiff's breach of lease agreement claims (Counts I and II) are DISMISSED.

For the same reasons, Plaintiff's motion for partial summary disposition is DENIED.

3. Fraud.

Defendants next seek dismissal of Plaintiff's fraud claims (Counts III and IV) – arguing that Plaintiff did not sufficiently plead such claims. Ohio and Michigan law have similar requirements to establish fraud. In Ohio, to establish fraud, a plaintiff must plead and prove the following elements:³

- (a) a representation or, where there is a duty to disclose, concealment of a fact,
- (b) which is material to the transaction at hand,
- (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
- (d) with the intent of misleading another into relying upon it,

³ In Michigan, in order to prevail on a fraud claim, a plaintiff must establish:

1. The defendant made a material representation.
2. The representation was false.
3. When the defendant made the representation, it knew that it was false, or the defendant made the representation recklessly, without any knowledge of its truth, and as a positive assertion.
4. The defendant made the representation with the intention that it should be acted on by the plaintiff.
5. The plaintiff acted in reliance on the representation.
6. The plaintiff suffered injury due to his reliance on the representation.

Hord v Environmental Research Inst, 463 Mich 399, 404; 617 NW2d 543 (2000).

- (e) justifiable reliance upon the representation or concealment, and
- (f) a resulting injury proximately caused by the reliance.

Cohen v Lamko, Inc, 462 NE2d 407, 409; 10 Ohio St.3d 167 (1984); citing *Friedland v Lipman*, 429 NE2d 456; 68 Ohio App 2d 255 (1980), paragraph one of the syllabus.

Generally, Ohio Courts have reasoned that fraud cannot be predicated upon promises or representations relating to future actions or conduct:

Representations as to what will be performed or will take place in the future are regarded as predictions and are not fraudulent, irrespective of whether the matter is before the court as an action for the deceit or defensively as a ground of avoidance of a written contract. A false assertion presupposes that an event has occurred, that a duty has been performed, that a fact has intervened or that an authority exists, either or all of which may have reduced the contract or prevented its being consummated. *Tibbs v National Homes Constr Corp*, 369 NE2d 1218, 1222; 52 Ohio App 2d 281, 286 (1977), quoting 24 Ohio Jurisprudence 2d 646, 647, Fraud and Deceit, Section 38.

Rather, “a fraudulent representation must be of an existing fact in order to justify an action in tort for damages sustained by reason of an acting upon such representation.” *Tibbs*, 369 NE2d at 1223; quoting *Dozier v Keller*, 56 NE2d 288; 73 Ohio App 321 (1944).

A careful review of Plaintiff’s Amended Complaint fails to reveal any allegation that Defendant materially represented an existing fact. Instead, at most, Plaintiff alleges that Defendants knew that they were not going to perform under the lease agreement and offered an inflated opinion of the value of the property. But such promises relate solely to future performance and opinions of value are not facts. As a result, Plaintiff has failed to adequately plead actionable fraud.

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The Court finds that the allegations contained in Plaintiff's Complaint do not amount to actionable fraud. As a result, accepting all well-pled allegations as true and construing them in the light most favorable to Plaintiff, the Court finds that Plaintiff's fraud claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. As a result, Defendants' motion is GRANTED, and Plaintiff's fraud claims (Counts III and IV) are DISMISSED under (C)(8).

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

October 21, 2015
Date

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