

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BEVERLY VENTURE, L.L.C.,

Plaintiff,

v

Case No. 15-146405-CK

Hon. Wendy Potts

CWL-BEVERY HILLS, LLC,  
CWL-12 MILE, LLC, and  
JIMMY JOHN'S FRANCHISE LLC,

Defendants.

OPINION AND ORDER RE:

DEFENDANT JIMMY JOHN'S FRANCHISE LLC'S MOTION FOR SUMMARY  
DISPOSITION AND DEFENDANTS CWL-12 MILE, LLC AND JIMMY JOHN'S  
FRANCHISE LLC'S MOTION TO STRIKE PLAINTIFF'S JURY DEMAND

At a session of Court  
Held in Pontiac, Michigan

On  
NOV 12 2015

This matter is before the Court on two separate motions:

- (1) Defendant Jimmy John's Franchise LLC's Motion for Summary Disposition;  
and
- (2) Defendants CWL-12 Mile, LLC and Jimmy John's Franchise LLC's Motion  
to Strike Plaintiff's Jury Demand.

On October 20, 2015, the Court entered an Order Waiving Oral Argument on the  
aforementioned motions pursuant to the stipulation of the parties.

By way of background, Plaintiff and Defendant CWL-Beverly Hills, LLC entered into a  
lease agreement on October 31, 2001 for lease space in Plaintiff's shopping mall located at  
31255 Southfield Road, Beverly Hills, Michigan 48025. According to Plaintiff, Defendant  
breached the terms of the parties' lease agreement in January 2015. On April 6, 2015, Plaintiff

commenced this action claiming breach of contract against Defendant CWL-Beverly Hills, LLC on allegations of premature termination of the lease, discontinued payment of rent, impermissible damage to and non-repair of the premises, and failure to maintain the premises in a like condition as when taken.

Plaintiff filed a successor liability claim against Defendant CWL-12 Mile, LLC as the alleged successor corporation operating as a Jimmy John's Gourmet Sandwich shop approximately one mile away from CWL-Beverly Hills, LLC. Plaintiff also filed a claim of tortious interference against Defendant Jimmy John's Franchise LLC for alleged, wrongful acts that induced Plaintiff CWL-Beverly Hills, LLC to break the lease and cause damage to the premises.

***Defendant Jimmy John's Franchise LLC's Motion for Summary Disposition***

Defendant Jimmy John's Franchise LLC (hereinafter referred to as "Jimmy John's") has filed a motion for summary disposition under MCR 2.116(C)(8), requesting the Court to dismiss Plaintiff's Complaint<sup>1</sup> in its entirety with prejudice. In its Brief, Defendant seeks dismissal of Plaintiff's Complaint against Jimmy John's Franchise, LLC as outlined in Count V.

Defendant Jimmy John's argues that Plaintiff's Complaint fails to satisfy the requirements of tortious interference. That is, Plaintiff's Complaint fails to specifically allege that Jimmy John's behavior was wrongful per se or that Jimmy John's engaged in specific, affirmative acts that corroborate its instigation of CWL-Beverly Hills, LLC's alleged breach of the lease agreement.

In response, Plaintiff contends that its Complaint and First Amended Complaint both state a prima facie case for tortious interference against Jimmy John's. Plaintiff asserts that

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<sup>1</sup> Plaintiff filed a First Amended Complaint on September 23, 2015. The Court will consider the motions as they relate to Plaintiff's First Amended Complaint.

Jimmy John's conduct was wrongful per se, but even if it was not, the First Amended Complaint provides additional facts regarding Jimmy John's malicious and unjustified affirmative acts to render summary disposition moot.

Plaintiff maintains that its First Amended Complaint provides a more fact-specific account of Jimmy John's conduct as follows:

- Jimmy John's had knowledge of the lease between Plaintiff and CWL-Beverly Hills, LLC;
- Jimmy John's had knowledge of the precarious financial condition of CWL-Beverly Hills, LLC based upon franchise reports;
- Jimmy John's formally approved a site for CWL-12 Mile, LLC approximately one mile from the location of CWL-Beverly Hills, LLC, with the knowledge that the owners of CWL-Beverly Hills, LLC would be the same owners of CWL-12 Mile, LLC;
- Jimmy John's reassigned a substantial amount of delivery territory to CWL-12 Mile, LLC; and
- Jimmy John's intentionally and actively induced CWL-Beverly Hills, LLC to wrongfully break the lease and cause damage.

In its reply, Defendant Jimmy John's argues that Plaintiff's First Amended Complaint and response to this motion have failed to answer the question – what did Defendant Jimmy John's actually do to cause the breach? According to Jimmy John's, Plaintiff has not provided any fact-specific allegations as to how Defendant Jimmy John's conduct was wrongful per se or a purposeful attempt to improperly interfere with the lease.

In this matter, Defendant Jimmy John's Franchise LLC moves for summary disposition of Plaintiff's tortious interference claim under MCR 2.116(C)(8), which tests the legal sufficiency of the Complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the non-movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The Court only considers the pleadings in a (C)(8) motion. *Id.* Where no factual development of the allegations permits recovery by law, a movant is entitled to summary disposition. *Id.* "The mere statement of the pleader's conclusions, unsupported by

allegations of fact upon which they may be based, will not suffice to state a cause of action.” *NuVision, Inc. v Dunscombe*, 163 Mich App 674, 681; 415 NW2d 234 (1987).

“The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. Where the defendant’s actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.” *BPS Clinical Laboratories v Blue Cross & Blue Shield*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996); *Lakeshore Community Hosp. v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995).

To survive summary disposition of its claim for tortious interference, Plaintiff must specifically allege that Defendant Jimmy John’s intentionally committed a per se wrongful act or committed a lawful act with malice and without legal justification for the purpose of invading Plaintiff’s lease agreement with CWL-Beverly Hills, LLC. *Badiee v Brighton Area School*, 265 Mich App 343, 366-367; 695 NW2d 521 (2005).

According to Plaintiff, its First Amended Complaint provides that Defendant Jimmy John’s was aware of the subject lease agreement and had information regarding the precarious financial position of CWL-Beverly Hills, LLC. Defendant Jimmy John’s formally approved a site for CWL-12 Mile, LLC, with the knowledge that the owners of CWL-Beverly Hills, LLC

would be the same owners of CWL-12 Mile, LLC. Plaintiff then claims that Jimmy John's reassigned a substantial amount of delivery territory to CWL-12 Mile, LLC.<sup>2</sup>

The Court finds that Count V of Plaintiff's First Amended Complaint simply provides a factual progression of the establishment of a second Jimmy John's Sandwich Shop, presumably as an attempt by franchisor Jimmy John's to maximize the greatest financial return in terms of fees and royalties in order to expand and build upon its brand. Defendant Jimmy John's decision to open a second store in the vicinity can certainly be considered a legitimate business venture without a showing of intentional interference on the part of Jimmy John's. Plaintiff has not provided any fact-specific allegations of wrongful conduct or malicious or unjustified acts by Defendant Jimmy John's to corroborate an intentional invasion of the subject lease agreement. Thus, Plaintiff's First Amended Complaint fails to prove that Defendant Jimmy John's intentionally interfered in Plaintiff's business relationship with CWL-Beverly Hills, LLC by inducing CWL-Beverly Hills, LLC to breach the Plaintiff's lease agreement and cause damage to the premises.

In consideration of Plaintiff's general allegation that Jimmy John's "intentionally and actively induced Tenant [CWL-Beverly Hills, LLC] to wrongfully engage in Breaking the Lease and Causing Damage,"<sup>3</sup> the Court finds that this is merely a statement of Plaintiff's conclusions that is not supported by specific factual allegations. As such, Plaintiff has failed to state a claim of "tortious interference" upon which relief can be granted.

Accordingly, the Court grants Defendant Jimmy John's Franchise LLC's Motion for Summary Disposition and hereby dismisses Count V of Plaintiff's First Amended Complaint concerning the tortious interference claim against Jimmy John's Franchise LLC.

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<sup>2</sup> See also Paragraphs 31 through 34 of Plaintiff's First Amended Complaint.

<sup>3</sup> See also Paragraph 35 of Plaintiff's First Amended Complaint.

***Defendants CWL-12 Mile, LLC and Jimmy John's Franchise LLC's  
Motion to Strike Plaintiff's Jury Demand***

In their Motion to Strike Plaintiff's Jury Demand, Defendants CWL-12 Mile, LLC and Jimmy John's Franchise request the Court to strike Plaintiff's demand for jury trial. Based upon the Court's decision to dismiss Count V of Plaintiff's First Amended Complaint regarding Jimmy John's Franchise LLC, this motion will be relevant only to Defendant CWL-12 Mile, LLC.

In its motion, Defendant CWL-12 Mile, LLC argues that Plaintiff's successor liability claim is an equitable action and therefore, there is no right to a jury trial. Secondly, Defendant avers that Plaintiff knowingly and voluntarily waived any right to jury trial when it entered into the lease agreement with Plaintiff. The language of the lease provides "landlord and tenant waive their rights to trial by jury in any action, proceeding, or counterclaim, each against the other, or with respect to any issue or defense raised therein...on any matters whatsoever arising out of, or in any way connected with this lease, the relationship of landlord and tenant, tenant's use and occupancy within said premises.." Per Defendant, the broad language within the lease agreement waives Plaintiff's right to a jury trial on any matter connected to the lease, including the successor liability claim.

In response, Plaintiff asserts that its jury demand is proper as it relates to Defendant CWL-12 Mile, LLC with respect to damages and any other non-equitable issues. Plaintiff contends further that Defendant CWL-12 Mile, LLC is not a party or signatory to the lease and as a consequence, has provided no consideration with regard to the lease. Therefore, CWL-12 Mile, LLC cannot legally assert the benefits that arise out of the contract. Additionally, contractual benefits for CWL-12 Mile, LLC were never contemplated as that particular business did not exist at the time the lease was executed.

In its reply, Defendant CWL-12 Mile, LLC maintains that the broad waiver language in the lease provides that Plaintiff waived its right to a trial by jury with respect to any issue or defense raised on matters arising out of or connected with the lease. Here, Plaintiff's successor liability claim arises directly from the breach of contract claim involving the lease.

Defendant CWL-12 Mile, LLC also reaffirms its argument that the doctrine of successor liability is derived from equitable principles and as such, there is no right to a jury. Moreover, Plaintiff's successor liability claim does not require a determination of separate damages since Plaintiff is seeking damages under the alleged breach of contract claim concerning CWL-Beverly Hills, LLC. Damages would be determined on the breach of contract claim and if successor liability is found, those damages would then be applied against the alleged successor.

With regard to Plaintiff's waiver of its right to a jury trial within the lease agreement, the Court finds that this waiver only applies to Plaintiff and Defendant, CWL-Beverly Hills, LLC as the parties to the contract. "It goes without saying that a contract cannot bind a nonparty." *AFSCME Council 25 v County of Wayne*, 292 Mich App 68, 80; 811 NW2d 4 (2011); quoting *Equal Employment Opportunity Comm v Waffle House, Inc*, 534 US 279, 294; 122 S Ct 754; 151 L Ed 2d 755 (2002). The Court finds that Defendant CWL-12 Mile, LLC is not a party to the subject lease agreement and therefore, has no rights under that agreement and cannot benefit from the jury waiver provision.

With that said however, the Court finds that Plaintiff's successor liability claim against Defendant CWL-12 Mile, LLC is in fact derived from equitable principles and as argued by Defendant, there is no right to a determination by a jury. The Michigan Court of Appeals has held that the doctrine of successor liability is "derived from equitable principles." *Craig v Oakwood Hosp.*, 471 Mich. 67, 77; 684 NW2d 296 (2004); *Stevens v McLouth Steel Products*

*Corp.*, 433 Mich 365, 376, 446 NW2d 95, 100 (1989). “The parties have a constitutional right in Michigan to have equity claims heard by a judge sitting as a chancellor in equity. If a plaintiff seeks only equitable relief, he has no right to a trial by jury.” *Dutka v Sinai Hospital of Detroit*, 143 Mich App 170, 173, 371 N.2d 901 (1985).

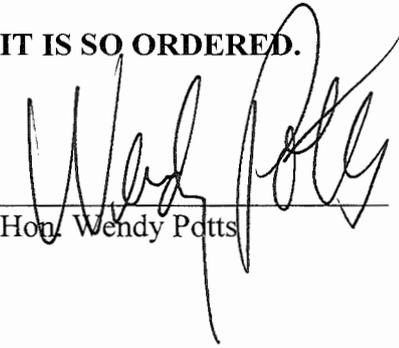
Had Plaintiff not waived its right to a jury trial in the lease agreement, a jury could have determined whether or not to award damages to compensate for the breach of contract claim against CWL-Beverly Hills, LLC. Instead, the Court shall be the trier of fact with regard to Plaintiff’s breach of contract claim. Assuming arguendo that Plaintiff prevails on its successor liability claim, any damages<sup>4</sup> applied to Defendant CWL-12 Mile, LLC – as the successor of CWL-Beverly Hills, LLC - will have already been determined by this Court under the breach of contract claim. Any remaining issues related to the successor liability claim are equitable in nature and shall be determined by this Court as the trier of fact.

For the reasons stated herein, Defendant CWL-12 Mile, LLC’s Motion to Strike Plaintiff’s Jury Demand - in relation to the successor liability claim set forth in Count IV of the First Amended Complaint - is hereby granted.

Dated:

NOV 12 2015

**IT IS SO ORDERED.**

  
Hon. Wendy Potts

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<sup>4</sup> Plaintiff’s Count IV in the First Amended Complaint is titled “Tenant’s Successor is Liable for Obligations of the Tenant.” Plaintiff is seeking money damages against Defendant CWL-12 Mile, LLC that arise from the breach of contract claim against CWL-Beverly Hills, LLC.