

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

**KNIGHT ENTERPRISES, INC, and
CKS PROPERTIES, LLC,
Plaintiffs,**

v.

**Case No. 15-146596-CK
Hon. James M. Alexander**

**COMMUNITY CHOICE CREDIT UNION,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on four motions for summary disposition. The situation that led to this lawsuit is, simply stated, a mess.

Under the terms of a December 2014 Purchase Agreement, Community Choice Credit Union agreed to purchase certain real property located on Crooks Road in Royal Oak from CKS Properties (“the Property”). CKS is owned by Carroll Knight, who also owns Knight Enterprises (collectively, “Knight”).

At the time the Purchase Agreement was executed, Jeanna Enterprises operated a gas station and convenience store on the property under the terms of a November 2013 Commission Lease Agreement. Knight Enterprises was the landlord on this month-to-month lease and retained the right to terminate the lease at any time upon “thirty day advance written notice” to Jeanna.

Prior to the Purchase Agreement, the Credit Union sought land for a new branch location. It identified the Property and an adjacent lot as a potential site and eventually entered into purchase agreements for the two parcels.

Under the terms of the Purchase Agreement, Knight warranted that “[t]here are no outstanding leases or other agreements affecting the Property that may interfere with [the Credit Union’s] possession of the Property on or after the Closing Date.” Knight made this representation and warranty despite the lease agreement with Jeanna.

It is undisputed that Knight did not notify the Credit Union of the Jeanna Lease until the day after closing – when the Credit Union went to the Property and found a Jeanna representative operating the gas station.

On December 12, 2014 (the same day that Knight accepted the Purchase Agreement), the Credit Union and Knight executed a Purchase Agreement Addendum. This Addendum allowed Knight 30 days after closing to remove certain, specifically identified items of personal property from the Property.¹ These items were:

- Any Citgo imaging
- Price sign and poles
- All fuel dispensers
- Ruby Sapphire System
- Walk in cooler
- Veeder Root tank monitor system with tank probes
- Canopy Lights
- All inventory from station

Then on April 6, 2015, the Credit Union and Knight executed a “Removal of Inspection Contingency” that “becam[e] part of the Purchase Agreement.” This “Second Addendum” is the source of much dispute between the Credit Union and Knight. The Credit Union believes that the Second Addendum superseded, and thereby negated, the December 12 Addendum. Knight, on the other hand, argues that the both remain effective.

In any event, on April 7, 2015, the Credit Union and Knight closed the sale on the Property.

The next day, the Credit Union went to the Property and found Jeanna there – still operating a gas station. Jeanna, in fact, did not learn that Knight sold the Property and was cancelling Jeanna’s Lease until that day (the day **after** closing – April 8, 2015). And despite the Lease requiring 30-day written notice, Knight gave Jeanna same-day, day-after-closing, verbal notice of the Lease termination.

To further compound matters, when Knight attempted to remove the items listed on the December 12 Addendum from the Property on April 8, the Credit Union asserted its position that the April Second Addendum superseded (and negated) the December Addendum. As a result, the Credit Union refused Knight’s entry onto the Property to retrieve the items identified on the December Addendum. As a result, Jeanna lost some personal property and its entire inventory, much of which was perishable food items.

On these basic facts, the Credit Union sued Knight on claims of: (Count I) fraud in the inducement, (Count II) declaratory relief as to the invalidity of the addendum, and (Count III) breach of contract. (Oakland County Case No. 15-146566-CZ).

Knight then, separately, sued the Credit Union on claims of: (Count I) claim and delivery, (Count II) conversion, (Count III) breach of contract, and (Count IV) specific performance and permanent injunction. Jeanna then filed an Intervening Complaint against Knight and the Credit Union based on claims of: (Count I) breach of contract, (Count II) claim and delivery, and (Count III) illegal lock-out. The Credit Union then filed a Third-Party Complaint seeking indemnification from Knight based on the Jeanna allegations. (Oakland County Case No. 15-146596-CK).

¹ Although the Addendum “anticipated” that such items would be removed within five business days after closing.

All parties now move for summary disposition in some form and for various reasons under MCR 2.116(C)(8) or (C)(10).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. A motion under this subrule may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Wade v Dept of Corrections*, 439 Mich 158; 483 NW2d 26 (1992).

A motion under (C)(10) tests the factual support for 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).

As stated, the parties filed four motions for summary disposition. These motions are: (1) the Credit Union's motion for partial summary disposition as to its Counts II and III in Case No. 15-146566-CZ; (2) the Credit Union's motion for partial summary disposition as to its indemnity claim in Case No. 15-146596-CK; (3) Knight's motion for summary disposition of its claims against the Credit Union, and the Credit Union's and Jeanna's claims against them; and (4) Jeanna's motion for summary disposition of its claims against Knight and the Credit Union.

Disposition of several issues presented in these motions depend on the Court's interpretation of the legal meaning and effect of certain agreements. As a result, it makes sense to first address these issues.

Michigan law is well-established that “[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. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Holmes v Holmes*, 281 Mich App at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

A. The validity and effect of the “Second Addendum”

A basis of much of the parties’ conduct in this case involves the validity and the effect of the April 6, 2015 “Second Addendum.” As stated, the Credit Union argues that this Addendum superseded and negated the December 12, 2014 Addendum. This interpretation serves as the basis for its decision to refuse Knight’s or Jeanna’s post-closing entry onto the Property and led to said parties’ claims regarding the personal property and inventory remaining there.

The December 12 Addendum allowed Knight 30 days after closing to remove certain, specifically identified items of personal property from the Property. These items included certain equipment and “all inventory from station.” Relying on this Addendum, Knight argues that it attempted to gain entry to the Property, but the Credit Union refused. This led to Jeanna’s Intervening Complaint against both Knight and the Credit Union.

The April 6 Second Addendum provides (in full):

This Removal of Inspection Contingency becomes part of Purchase Agreement dated:
December 22, 2014.

Pertaining to the property located at: 1740 Crooks Road, Royal Oak, MI 48067.

Purchaser acknowledges and agrees accepts the property in “as-is”, “where-is” condition, including, without limitation, zoning land use or building code requirements or compliance with any laws, rules, ordinances or regulations of any governmental authority; any hidden defects, environmental conditions affecting the property, the existence of mold, or wood destroying insects, whether known or unknown, whether such defects were discoverable through inspection or not. Purchaser acknowledges that the inspection has been completed on the above property and they are satisfied with the results. Purchasers further remove the inspection contingency in the above referenced Purchase Agreement, Paragraph 8 (Property Inspection), and hereby agree to proceeding according to the terms of the contract.

The Credit Union argues that it was “its understanding” that this “As-is Where-Is” Addendum “superseded the previous Addendum” because as-is, where-is means that the Credit Union got to keep all personal property and inventory on the property. In support, the Credit Union cites to the Affidavit of its President and CEO, Robert Bava.

But, as Knight points out, “as-is, where-is” clauses simply refer to the condition of the property conveyed – in this case, the Property minus the carved-out personal property, inventory, or fixtures specifically subject to the parties’ December 12 agreement.

And the Credit Union fails to cite any factual or legal basis for its conclusion that the Second Addendum cancelled the first. 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).

The April 6 Second Addendum does not provide that the December 12 Addendum is superseded or cancelled. Had the parties so agreed, such a provision could have easily been

included. Simply put, Mr. Bava's understanding of the meaning of the "as-is, where-is" agreement is inconsistent with its unambiguous terms. Based on the plain meaning of the same, both Addendums remain in full effect.

As an alternative, the Credit Union argues that the Second Addendum fails for lack of consideration. But this argument ignores MCL 566.1, which provides:

An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration: Provided, That the agreement changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge.

The Second Addendum is in writing and signed by both the Credit Union and Knight. As a result, the Court rejects the Credit Union's argument that the same fails for lack of consideration.

B. Did Knight breach the Agreement by failing to disclose the Jeanna lease?

The Credit Union and Knight also dispute whether Knight breached the Purchase Agreement by failing to disclose the existence of the Jeanna lease. In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

As stated, under the Purchase Agreement, Knight warranted that "[t]here are no outstanding leases or other agreements affecting the Property that **may** interfere with [the Credit Union's] possession of the Property on or after the Closing Date." (emphasis added). And Knight made this representation without disclosing the Jeanna lease, which it did not disclose to the Credit Union until

the day after closing.

Knight responds to this claim by arguing that Jeanna “never interfered with the Credit Union taking possession of the property.” Rather, “Jeanna left the property to enable the Credit Union to take possession.”

But Knight’s response is more appropriately one relative to damages, not a breach of the contract. Knight warranted that there were no outstanding leases “that **may** interfere” with the Credit Union’s possession of the Property on the closing date. And the Jeanna lease “**may**” have done just that. In other words, it was a possibility. And Knight warranted against that possibility.

Because Knight so warranted and failed to disclose the active lease that survived until the day after closing, Knight breached the Purchase Agreement (even if said breach ultimately proves to be minimal or immaterial to the essence of the transaction).

C. The Credit Union’s breach of the December 2014 Addendum

Next, the parties dispute whether the Credit Union breached the December 2014 Addendum that allowed Knight 30 days to remove certain items from the Property. As stated, the Credit Union’s argument on this issue is dependent on its interpretation that the April 2015 Second Addendum superseded and negated the December 2014 Addendum. And for the reasons stated in Section A above, the Court rejected this argument.

The Credit Union breached the December 2014 Addendum to the Purchase Agreement when it refused Knight’s entry onto the premises to retrieve the specific items listed on the same. This breach had a ripple effect that ultimately compounded damages and dragged the only party innocent of any wrongdoing, Jeanna, into this case.

With these rulings in mind, the Court turns to the parties' individual motions.

D. The Credit Union's Credit Union's motion for partial summary disposition as to its Counts II and III in Case No. 15-146566-CZ.

The Credit Union first moves for partial summary disposition of its Counts II and III for declaratory relief as to the invalidity of the addendum and breach of contract, respectively. This motion solely seeks relief based on the Court's rulings provided in Sections A, B, and C above.

And for the reasons outlined above, the Court GRANTS IN PART the Credit Union's motion for partial summary disposition as to its Counts II and III in Case No. 15-146566-CZ. The Credit Union's motion is GRANTED only as to liability with respect to its Count III for breach of contract, and only to the extent that Knight breached the Purchase Agreement by failing to disclose the Jeanna lease that "may interfere" with the Credit Union's possession at the closing date.

In all other respects, the Credit Union's motion is DENIED, and the Credit Union's Count II is DISMISSED under (I)(2).²

E. The Credit Union's motion for partial summary disposition as to its indemnity claim in Case No. 15-146596-CK.

Next, the Credit Union moves for partial summary disposition as to its indemnity claim in Case No. 15-146596-CK. In said claim, the Credit Union claims that it is entitled to summary on said claim because the Purchase Agreement provided that, should Knight breach any representation made in the same, then Knight agreed to indemnify the Credit Union from liability.

Indeed, Section 7.05 of the Purchase Agreement provides, in full:

Seller hereby agrees to indemnify and hold Purchaser harmless from any and all liabilities, damages, costs, expenses, including reasonable attorney fees and costs, which may be incurred by Purchaser as a result of any breach of any representation or warranty made hereunder.

And, as stated, Knight breached its warranty that there was no lease on the premises that may interfere with the Credit Union's possession on the closing date. Therefore, the Credit Union claims, Knight owes it indemnification on Jeanna's claims for claim and delivery and illegal lock-out.

Knight responds that it was the Credit Union's own negligence that caused it to be sued by Jeanna, "specifically, that the Credit Union, not Knight, locked Jeanna out of the property and refused access to remove any inventory" based on its meritless interpretation of the meaning and effect of the April 2015 Second Addendum. And because the Credit Union's negligence caused the claims, and the indemnity provision (as written) does not cover the Credit Union's negligence, Knight is actually entitled to summary disposition on the indemnity claim.

In support, Knight cites to *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593; 513 NW2d 187 (1994) for the proposition that an indemnity contract must be interpreted just as any other contract, and where language is not included that indicates an intent to indemnify for the Credit Union's negligence, none can be presumed.

But Knight's interpretation of *Sherman* is directly contrary to its reasoning:

Michigan courts have discarded the additional rule of construction that indemnity contracts will not be construed to provide indemnification for the indemnitee's own negligence unless such an intent is expressed clearly and unequivocally in the contract. Instead, broad indemnity language may be interpreted to protect the indemnitee against its own negligence if this intent can be ascertained from "other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the parties." *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 596-97; 513 NW2d 187, 190 (1994); citing *Vanden Bosch v. Consumers Power Co.*,

2 Or, alternatively, under Knight's motion for summary disposition of said claim.

394 Mich 428; 230 NW2d 271 (1975); and quoting *Fischbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448, 452; 403 NW2d 569 (1987).

But the Court is limited when applying this evidence-intensive approach to a requested ruling on summary disposition. In fact, neither party has presented sufficient evidence that would permit the Court to determine, as a matter of law, whether the parties intended that Knight indemnify the Credit Union for its own negligence.

For the above reasons, the Court DENIES the Credit Union's motion for partial summary disposition of said claim.

F. Knight's motion for summary disposition of its claims against the Credit Union, and the Credit Union's and Jeanna's claims against them.

Next, Knight moves for summary disposition of its claims against the Credit Union and the Credit Union's and Jeanna's claims against Knight. This motion partially seeks relief based on the Court's rulings provided in Sections A, B, and C above.

Based on the same Knight's motion for summary disposition of its breach of contract claim against the Credit Union based on its breach of the December 2014 Addendum is GRANTED as to liability – with damages preserved for trial. Knight's motion with respect to the Credit Union's breach of contract claim is DENIED, as Knight breached its representations contained in the Purchase Agreement regarding the Jeanna lease.

Knight next moves for summary disposition on its claim and delivery and conversion claims – alleging that the Credit Union converted certain of its property that was subject to the December 2014 Addendum. On this claim, the Credit Union solely responds that the April 2015 Second Addendum superseded and negated the December 2014 Addendum. But the Court has rejected that

argument as provided above. And the Credit Union fails to otherwise challenge Knight's entitlement to relief. Because the Credit Union offers no other challenge or reasoning why Knight is not entitled to relief, the Court GRANTS Knight's motion with respect to the Credit Union's liability on Knight's Conversion and Claim and Delivery claims, with damages to be preserved for trial.³

Next, Knight seeks summary disposition of the Credit Union's fraud in the inducement claim. The foundation of this claim is that Knight knew that there was an existing lease that could potentially interfere with the Credit Union's possession – yet failed to disclose the same.

The Michigan Court of Appeals has held:

(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 477; 666 NW2d 271 (2003).

Knight claims that it is entitled to summary disposition because the Credit Union cannot establish that that Knight knew that there was a lease on the property or made the statement recklessly. The Court disagrees. In his motion and responses, Knight continually argues that he knew that lease existed, but he believed that it was immaterial.

The larger issue is that fraud in the inducement requires misrepresentations in character that relate to something other than the performance of the contract. *Huron Tool & Eng'g Co v Precision Consulting Services, Inc*, 209 Mich App 365, 373; 532 NW2d 541 (1995).⁴ Otherwise, a plaintiff is

³ It is undisputed that the Credit Union retained some of Knight's property based on its flawed interpretation of the effect of the April 2015 Second Addendum.

⁴ The *Huron Tool* Court reasoned:

The distinction between fraud in the inducement and other kinds of fraud is the same as the distinction drawn by a New Jersey federal district court between fraud extraneous to the contract and fraud interwoven with the breach of contract. *Public Service Enterprise Group, Inc v Philadelphia Elec Co*, 722 F. Supp 184, 201 (D NJ, 1989). With respect to the latter kind of fraud, the misrepresentations

simply alleging a disguised claim for breach of contract. This is precisely the case here. The Credit Union simply alleges that Knight represented that there was no existing lease on the property. But this representation was specifically a matter of contract. As a result, the Credit Union fails to allege any fraud independent of the parties' Agreement. For this reason, the Credit Union's fraud in the inducement claim (Count I) fails as a matter of law, and is, therefore, DISMISSED.

Finally, Knight moves for summary disposition of Jeanna's breach of contract claim. Jeanna bases said claim on the allegation that Knight breached the Lease Agreement by failing to provide 30 days' written notice of termination. Instead, Knight provided same-day, verbal notice. These facts are undisputed.

Knight, however, claims that Jeanna cannot establish that it was damaged. But Jeanna claims, with evidentiary support, that its lost inventory was worth approximately \$60,000. Knight's real argument appears to be that the Credit Union **caused** Jeanna's damages. But Knight was the party that breached the Lease Agreement, and Jeanna was damaged as a result of the breach.

For these reasons, the Court DENIES Knight's motion for summary disposition of Jeanna's breach of contract claim.

G. Jeanna's motion for summary disposition of its claims against Knight and the Credit Union.

Finally, Jeanna moves for summary disposition of its claims against Knight and the Credit

relate to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort.

Such fraud is not extraneous to the contractual dispute among the parties, but is instead but another thread in the fabric of [the] plaintiffs' contract claim. . . . [It] is undergirded by factual allegations identical to those supporting their breach of contract counts. . . . This fraud did not induce the plaintiffs to enter into the original agreement nor did it induce them to enter into additional undertakings. It did not cause harm to the plaintiffs distinct from those caused by the breach of contract [Id.]

Union. For the reasons outlined in Section F above, the Court GRANTS Jeanna's motion for summary disposition of Jeanna's breach of contract claim against Knight – but only as to liability. There is insufficient evidence of damages to make a summary ruling on the same.⁵

Jeanna also moves for summary disposition of its claim and delivery and illegal lock-out claims. In response to Jeanna's motion, the Credit Union only argues that Knight was the party responsible for preventing Jeanna access to the gas station/convenience store. In support, the Credit Union: (1) points the finger at Knight as the party that breached Jeanna's Lease, and (2) argues that the April 2015 Addendum gave the Credit Union all rights to Jeanna's property. The Court disagrees with both arguments.

For all of the reasons outlined above, the Court rejects the Credit Union's argument that the April 2015 Addendum gave it possession of Jeanna's property. It remains undisputed that the Credit Union refused to return Jeanna's property despite proof that said property belonged to Jeanna and despite the clear language of the December 2014 Addendum.

Finally, the Credit Union argues that damages on Jeanna's claims remain a question of fact and subject to mitigation. The Court Agrees.

For the above reasons, Jeanna's motion for summary disposition of its claim and delivery and illegal lock-out claims is GRANTED as to liability, with damages preserved for trial.

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⁵ In fact, Knight only argues damages in its response.

H. Summary

To summarize, in Case No. 15-146566-CZ, the Credit Union's motion is GRANTED as to liability with respect to its Count III for breach of contract, and only to the extent that Knight breached the Purchase Agreement by failing to disclose the Jeanna lease that "may interfere" with the Credit Union's possession at the closing date. The issue of damages is preserved for trial.

The Credit Union's Count II seeking declaratory relief as to the invalidity of the addendum is DISMISSED under (I)(2). Both the December 2014 and the April 2015 Addendum remain in full effect.

The Credit Union's motion for partial summary disposition of said claim its indemnification claim in Case No. 15-146596-CK is DENIED. It remains a question of fact whether the parties intended that Knight indemnify the Credit Union for its own negligence.

Knight's motion for summary disposition of its breach of contract claim against the Credit Union based on its breach of the December 2014 Addendum is GRANTED, but only as to liability – with damages preserved for trial.

Knight's motion to dismiss the Credit Union's breach of contract claim is DENIED as outlined above.

Knight's motion with respect to its Conversion and Claim and Delivery claims is GRANTED, but only as to the Credit Union's liability on the same. Damages is preserved for trial.

Knight's motion with respect to the Credit Union's fraud in the inducement claim (Count I) is GRANTED, and the same is DISMISSED.

Knight's motion with respect to Jeanna's breach of contract claim is DENIED.

Jeanna's motion with respect to its breach of contract claim against Knight is GRANTED,

but only as to liability, with damages preserved for trial.

Jeanna's motion for summary disposition of its claim and delivery and illegal lock-out claims against Knight is GRANTED as to liability on both claims, with damages preserved for trial.

IT IS SO ORDERED.

February 3, 2016
Date

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