

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

**UKPAI UKPAI,
Plaintiff,**

v.

**Case No. 15-148120-CB
Hon. James M. Alexander**

**LAURENCE J. WOLF and
LAURENCE WOLF PROPERTIES,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants’ motion for summary disposition. This case involves a commercial landlord-tenant dispute. Under the terms of a November 1, 2013 Lease Agreement, Defendant Laurence Wolf Properties leased space in its building to Plaintiff, which was intended to be used as a coffee shop.

The lease term was one year, with rent set at \$2,500 per month from February through July 2014. After August 1, 2014, rent would increase to \$3,000 per month. The Lease also contained the following provision, at paragraph 4:

Lessee shall not make or add any alterations, decorations, installations, additions, improvements, fixtures or equipment (hereinafter collectively referred to as “alterations”) in or to the Premises without Lessor’s prior written consent. Such consent, if given, shall be subject to the following conditions and such additional conditions as Lessor may require:

. . .

(b) the alterations shall be made only by Lessor’s staff or by contractors or mechanics approved by Lessor, but at no profit to Lessor.

Disputes over this provision caused problems. Specifically, the parties had a difficult time agreeing on contractors, with Plaintiff claiming that Defendant was unreasonably withholding consent and delaying access to the premises in the planning stages.

Defendants also claim that Plaintiff was “habitually late in paying the rent.” As a result, on March 30, 2015, Defendants filed a summary proceeding for possession in the 43rd District Court. In response, Plaintiff filed a Counter-Complaint seeking \$24,800 in damages for Defendant’s refusal “to promptly approve contractors needed” to build out the premises. Plaintiff also alleged “[v]arious other forms of harassment” and, generally, that Defendants breached the contract.

On April 30, 2015, 43rd District Court Judge Joseph Longo conducted a hearing that resulted in a Judgment for Possession in Plaintiff’s favor. The Judgment did not award damages to either party.

On July 20, 2015, Plaintiff then filed the present action on claims titled: (1) breach of contract, (2) tortious interference, and (3) unauthorized access of Plaintiff’s credit. The breach of contract and tortious interference claims are based on the allegation that Defendants unreasonably withheld contractor consent or wrongfully interfered with Plaintiff’s relationships with said contractors.

Defendants now move for summary disposition under MCR 2.116(C)(7) and (C)(10) – arguing that Plaintiff’s claims are barred by res judicata and fail as a matter of law. A (C)(7) motion determines whether a claim is barred, among other grounds, by a “prior judgment.” The Court accepts the plaintiff’s well-pleaded allegations as true and construes them in the plaintiff’s favor unless the allegations are contradicted by documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Huron Tool & Eng'g Co v Precision Consulting Services, Inc*, 209 Mich App 365, 376-77; 532 NW2d 541 (1995).

A (C)(10) motion tests the factual support for a plaintiff’s claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). In such a motion, the moving party must

specifically identify the issues that he believes present no genuine issue of material fact. *Id.* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

1. Res Judicata.

Defendants first claim that Plaintiff's claims are barred by the doctrine of res judicata. The doctrine of res judicata bars a subsequent action when: (1) the prior action was decided on the merits; (2) both actions involve the same parties or their privies; and (3) the claims in the second case were, or could have been, resolved in the first case. *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004); *Sewell v Clean Cut Mgmt*, 463 Mich 569, 575; 621 NW2d 222 (2001).

In response, Plaintiff argues that Defendants failed to raise the res judicata as an affirmative defense, and the effect of said failure amounts to a waiver of the defense. Indeed, it is well-established that res judicata is an affirmative defense that must be raised in a party's first responsive pleading. MCR 2.111(F)(3); see also *Badon v Gen Motors Corp*, 188 Mich App 430, 433; 470 NW2d 436 (1991), *Roberts v City of Troy*, 170 Mich App 567, 578; 429 NW2d 206 (1988).

Our Court of Appeals has held:

Under MCR 2.111(F)(2), . . . a defense is waived if not pleaded or raised by motion. MCR 2.116(D) sets forth the timetable to raise particular issues by motion. . . . Issues related to capacity to sue, other action pending, and affirmative defenses must be raised not later than the first responsive pleading. MCR 2.116(D)(2). *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 319; 503 NW2d 758 (1993).

Further, under MCR 2.116(D)(2) (emphasis added), “[t]he grounds listed in subrule (C) . . . (7) [including a “statute of limitations” defense] . . . **must be raised in a party’s responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party’s first responsive pleading.**”

Under MCR 2.110(A): “The term “pleading” includes only: (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer. No other form of pleading is allowed.”

A review of Defendants’ first responsive pleading, their Answer and Affirmative Defenses (filed on October 13, 2015), reveals that Defendants did not raise res judicata.

Because Defendants have not pled res judicata as an affirmative defense, the Court may not consider the same. As a result, Defendants’ motion on this basis is DENIED.¹

2. Tortious Interference (Count II) and Unauthorized Access of Credit (Count III)

Defendants next move for summary disposition of Plaintiff’s tortious interference and unauthorized access of credit claims under (C)(10) – claiming that said claims fail as a matter of law.

With respect to Plaintiff’s tortious interference claim, Defendants claim that said claim fails because Plaintiff only pleads that Defendants refused to approve certain contractors. And in order to establish a tortious interference claim, a plaintiff “must allege the intentional doing of a **per se wrongful act or the intentional doing of a lawful act with malice and unjustified in**

¹ The Court also has the discretion to permit a party to amend a pleading on a motion brought under MCR 2.118. This includes a defendant’s answer and affirmative defenses.

law for the purpose of invading plaintiff's contractual rights or business relationship.” *Feldman v Green*, 138 Mich App 360, 369; 360 NW2d 881 (1984) (emphasis added).

And, Defendants argue, Plaintiff cannot establish this requirement because Defendants had **the express contractual right** to approve or deny Plaintiff's suggested contractors. Because Defendants retained that specific right, it cannot be said that their alleged withholding of approval was per se wrongful or unjustified in law. The Court agrees. Plaintiff expressly agreed that Defendants had such a right.

With respect to Plaintiff's unauthorized access of credit claim, Defendants argue that said claim fails because Plaintiff did authorize Defendants to access his credit by executing the “Authorization to Release Information” form on September 26, 2013 (attached as Exhibit F to Defendants' motion). Again, the Court agrees.

It is also worth noting that Plaintiff's Response on Defendants' (C)(10) motion does not dispute any of Defendants' factual allegations as to these two Counts. Rather, Plaintiff's Response simply regurgitates canned caselaw on the (C)(10) standard.

But Plaintiff's Response fails to make even a cursory argument beyond the mere conclusion that summary should not be granted. And 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).

(Remainder of this page intentionally left blank.)

For all of the foregoing reasons and viewing all evidence in the light most favorable to Plaintiff, the Court concludes that there are no material questions of fact in dispute and Defendants are entitled to summary disposition of Plaintiff's Counts II and III. The Court, therefore, GRANTS Defendants' motion as to these claims, which are hereby DISMISSED.

IT IS SO ORDERED.

April 27, 2016
Date

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