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

ANNA KARIBIAN DECLARATION OF TRUST,
Plaintiff,

v. **Case No. 15-148499-CK**
Hon. James M. Alexander

K&K HUNTINGTON, INC, ET AL,
Defendant.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motion for summary disposition. This case involves the failed sale of a liquor and convenience store. Plaintiff owned said store located on West Eleven Mile Road in Huntington Woods, and Defendants wished to purchase the same. As a result, the parties apparently entered into four agreements on March 5, 2012: (1) a Promissory Note, (2) a Mortgage, (3) a Purchase and Sale Agreement of Business Assets, and (4) a Lease.

The sale was never consummated, with both sides blaming the other for its failure. In a prior 2014 case, Defendants Raed Zaya and Nabil Kestou sued Plaintiff for its failure to repay the Promissory Note and seeking to foreclose the Mortgage provided to secure repayment of the same. This prior case resulted in an August 7, 2014 Stipulated Order of Dismissal after Plaintiff agreed to pay the amount owing under the Note.

Just over one year later, Plaintiff then filed the present action – claiming that Defendants breached the Lease and the Purchase Agreement and made fraudulent statements that they would perform under the same.[1]

Defendants now move for summary disposition of Plaintiff's Complaint – generally arguing that the four documents were all part of one transaction (the sale of the liquor store) and that sale never went through based on Plaintiff's failure to meet certain conditions precedent. As a result, Plaintiff's allegation that Defendants breached the Lease and Purchase Agreement fail. And, Defendants argue, a fraudulent misrepresentation claim cannot be based on misrepresentations of future performance of a written agreement.

To this end, Defendants now move for summary disposition under MCR 2.116(C)(8) and (C)(10), which respectively test the legal and factual basis of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

A (C)(8) motion 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, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163; *Lepp*, 190 Mich App at 730. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).[2]

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[1] On these general claims, Plaintiff alleged counts for (Count I) breach of lease, (Count II) breach of purchase and sale agreement, and (Count IV) fraudulent misrepresentation. Plaintiff's Complaint does not allege any Count III.

[2] "When an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

A (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In presenting such a motion, "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).

Both parties rely on provisions found in written agreements to support their positions. 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). "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." *Id.* at 594.

As often repeated by our Supreme Court, "courts must … give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Knight Enterprises v Fairlane Car Wash*, 482 Mich 1006; 756 NW2d 88 (2008); quoting *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

1. Breach of Contract (Counts I and II)

Defendants first claim that they are entitled to dismissal of Plaintiff's breach of contract claims because of the failure of certain conditions precedent to the sale. As a result, Defendants

claim, the lease and purchase agreement were never effectuated and they could not have breached the same.

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).

Initially, Plaintiff responds that the Note (and the prior lawsuit) has nothing to do with the claims in this case because the Lease and Purchase Agreement are completely separate documents. But this ignores the longstanding notion that, in order to determine the intent of contracting parties, it may be appropriate to examine the four agreements together (all executed on March 5, 2012). See *West Madison Inv Co v Fileccia*, 58 Mich App 100, 106; 226 NW2d 857 (1975) (reasoning "in order to determine the intention of the parties, separate instruments executed at about the same time, in relation to the same matter and between the same parties and made as elements of one transaction may be examined together and construed as one instrument"); *Culver v Castro*, 126 Mich App 824, 826 338; NW2d 232 (1983) (finding "where there are several agreements relating to the same subject matter the intention of the parties must be gleaned from all the agreements").

A. <u>Breach of Lease (Count I)</u>

With respect to the Lease, Plaintiff alleges that Defendants breached said Agreement by "failing to timely consummate the purchase of the liquor license." Plaintiff claims that "[t]he lease was to commence on the date that Plaintiffs [sic] liquor license was transferred to Defendants," which, Plaintiff claims, happened on November 20, 2012.

In support, Plaintiff relies on paragraph 2 of the Lease, which provides, in relevant part:

> **Term and Rent.** The term of this Lease shall be two (2) years from and after the date that the Michigan Liquor Control Commission approves the transfer of the license from [Plaintiff] to [Defendants] pursuant to that certain Purchase and Sale Agreement of Business Assets of even date herewith by and between the parties herein **and** the parties close on the transfer of said Purchase and Sale Agreement of Business Assets (the "Closing") (the "Commencement Date"). (emphasis added).

Initially, the Court notes that the Lease term was not set to begin when the liquor license **was transferred** from Plaintiff to Defendants. Rather, paragraph 2 provides that the Lease term will begin when (1) the state "approves the transfer" of said license, **and** (2) "the parties close on the transfer of said Purchase and Sale Agreement."

Defendants argue that, under the Purchase Agreement, there were several "Conditions precedent" to closing found in Section XV. Specifically, Defendants argue that provision D was not met. It provides:

> The obligations of [Defendants] under this offer are subject to the satisfaction, as is determined in [Defendants'] sole and absolute discretion, on or before the closing date, of all the conditions precedent set forth below. . . .
>
> > D. [Defendants] obtaining all necessary permits and licenses to operate business in the same form with the knowledge that [Defendants] shall be responsible for obtaining from the local governmental entities all necessary permits.

It is undisputed that Defendants did not obtain all necessary permits from the City of Huntington Woods to operate the business in the same form.

But Plaintiff argues that Defendants breached the Purchase Agreement by failing to take all reasonable steps necessary to facilitate the purchase,[3] and this failure was the cause of Huntington Woods permit denial.

After a review of the Huntington Woods meeting minutes on the permit application, the Court is left with the firm impression that the denial had more to do with the poor condition of

[3] Section X of the Purchase Agreement so requires.

the existing property than it had to do with Defendants failing to take all reasonable steps. But it ultimately doesn't matter whether or not Plaintiff disputes the steps taken by Defendants.

This is so because Plaintiff specifically contracted to give Defendants the "absolute discretion" to determine whether each of the conditions precedent was met. And it is undisputed that Defendants believe that the permit condition was not met. As a result, Defendants terminated the Purchase Agreement. And because they did so, the Lease (based on the closing of the Purchase Agreement) never became effective.

Because the Lease was never effectuated, Plaintiff cannot base its Count I on an alleged breach of the same.

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 questions of fact in dispute such that Defendants are entitled to judgment as a matter of law. As a result, Mayotte's motion for summary disposition is GRANTED under (C)(10), and Plaintiff's Count I is DISMISSED.

B. Breach of Purchase and Sale Agreement (Count II)

With respect to the Purchase Agreement, it appears that Plaintiff claims that Defendants breached the same by failing to close on the business sale. But, as stated above, Plaintiff contracted to give Defendants "absolute discretion" to determine whether all of the conditions precedent were met. As a result, Defendants' termination of the Purchase Agreement based on the failure of a condition precedent was not a breach.

For this reason, viewing all well-pled allegations as true and viewing the same in the light most favorable to Plaintiff, the Court concludes that Plaintiff's Count II is so clearly unenforceable as a matter of law that no possible factual development could justify recovery. As

a result, Defendants' motion for summary disposition is GRANTED, and Plaintiff's Count II is DISMISSED.

2. Fraudulent Misrepresentation (Count IV)

Finally, Defendants next seek dismissal of Plaintiff's fraudulent misrepresentation claim (Count IV) – arguing that such a claim cannot be based on an alleged breach of a future promise.

The Michigan Court of Appeals has held:

> To establish a claim of fraudulent misrepresentation, plaintiff was required to prove that: (1) defendant made a material representation; (2) the representation was false; (3) defendant knew, or should have known, that the representation was false when making it; (4) defendant made the representation with the intent that plaintiff rely on it; (5) and plaintiff acted on the representation, incurring damages as a result. Plaintiff must also show that any reliance on defendant's representations was reasonable. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005). *Hi-Way Motor Corp v Int'l Harvester Co*, 398 Mich. 330, 336; 247 N.W.2d 813 (1976), citing *Candler v Heigho*, 208 Mich. 115, 121; 175 N.W. 141 (1919).

Further, fraud in the inducement requires misrepresentations in character that relate to something other than promises concerning 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 simply alleging a disguised claim for breach of contract.

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

In this case, Plaintiff's fraudulent misrepresentation claim is founded on the allegation that Defendants never intended to follow through with the business purchase. But such allegations relate to performance of a material term contained in a contract. As such, it **may serve** as the basis of a breach of contract claim, but it **cannot serve** as the basis of a fraudulent misrepresentation claim. As a result, Plaintiff has failed to adequately plead actionable fraud.

For this reason, viewing all well-pled allegations as true and viewing the same in the light most favorable to Plaintiff, the Court concludes that Plaintiff's Count IV is so clearly unenforceable as a matter of law that no possible factual development could justify recovery. As a result, Defendants' motion for summary disposition is GRANTED, and Plaintiff's Count IV is DISMISSED.

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

IT IS SO ORDERED.

June 29, 2016_____ __/s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge