

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

**JAMES A. AKOURI and
JAMES A. AKOURI LIVING TRUST,
Plaintiffs,**

v.

**Case No. 15-150003-CB
Hon. James M. Alexander**

**BIRMINGHAM PROPERTY, LLC, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants Jamal and Salam Kalabat’s motion for summary disposition. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

In their Complaint, Plaintiffs claim that they loaned money to the Kalabats, which was secured by a security interest in their membership interest in Defendant Birmingham Property.

Plaintiffs claim that the Kalabats have defaulted on their repayment obligations, such that Plaintiffs have foreclosed on the Kalabats’ membership interests in Birmingham. In a separate lawsuit, Birmingham was recently ordered to close a sale of certain real property in Birmingham. The net sale proceeds from said sale are currently held in escrow pending further order of the court in that separate lawsuit.

But Plaintiffs now claim that they are entitled to their “pro-rata” share of the proceeds of said sale based on their foreclosure on the Kalabats’ membership interests in Birmingham Property.

On these allegations, Plaintiffs filed the present suit on claims titled: (Count I) declaratory relief, (Count II) foreclosure of membership interest, (Count III) breach of fiduciary duty (only as to nonmovant Defendant Laith Yaldao), and (Count IV) fraud (also only as to Laith Yaldao).

The Kalabats now move for summary disposition of Plaintiffs' declaratory and foreclosure claims 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).

The Kalabats claim that they are entitled to summary disposition of Plaintiffs' claims for two reasons. First, Plaintiffs assigned their right to enforce the underlying Agreements, thereby stripping them of standing to assert their claims. Second, the Agreements were modified, and the Kalabats are not in default.

I. Assignment?

The Kalabats first argue that they are entitled to dismissal of Plaintiffs' claims because Plaintiffs assigned their right to enforce the underlying Agreements in September 2007.

Plaintiffs claim that the source of their security interest in Birmingham Properties comes from identical July 2, 2007 Membership Interest Security and Pledge Agreements executed by Jamal and Salam Kalabat. Under these Agreements' terms, Plaintiff James Akouri loaned the Kalabats \$250,000, and the Kalabats secured repayment of the same by granting a security interest in their membership interests in Birmingham Properties (at the time, Jamal and Salam each held a 30% interest in said company).

Subsequently, on September 15, 2007, Akouri sent identical letters to Jamal and Salam Kalabat. These letters provide:

With respect to [the July 2, 2007 Membership Interest Pledge Agreement], you have granted me certain rights restricting your use, operation or disposition of the subject Collateral [a “Membership Interest in Birmingham Property”] under the Agreement. This letter is to notify you that I have delegated and assigned to Laith Yaladoo all of my enforcement rights under the Agreement, including all rights to notice or request for consent for any action or inaction by you. In furtherance of the foregoing, hereby grant you the right to operate the Collateral and dispose of the Collateral all pursuant to your agreement with Laith Yaladoo without the necessity of any notice to me or consent from me. Please communicate with Laith Yaladoo with respect to all such matters.

The Kalabats argue that, under this “assignment” of the right to enforce the Pledge Agreements, Plaintiffs are no longer the real party in interest, citing *Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013) for the proposition that “[a] plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties.” *Barclae*, 300 Mich at 483, quoting *Fieger v Comm’r of Ins*, 174 Mich App 467, 471; 437 NW2d 271 (1988).

And, the Kalabats argue, Plaintiffs’ Complaint “is based exclusively on the Agreements” that were subsequently assigned for purposes of enforcement. In *Weston v Dowty*, 163 Mich App 238, 242; 414 NW2d 165, 167 (1987), the Court of Appeals reasoned:

An assignment is defined as “[a] transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.” To constitute a valid assignment there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned. *Id.* at 242 (internal quotations and citations omitted).

Further, in 2004, our Court of Appeals examined assignments in *Burkhardt v Bailey*, 260 Mich App 636, 654-55; 680 NW2d 453, 463 (2004), reasoning (emphasis added):

There is little case law in this state regarding what elements are necessary to create an assignment. In *Weston v. Dowty*, 163 Mich.App. 238, 242, 414 N.W.2d 165 (1987), this Court opined “there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned.” Further, Michigan's version of the statute of frauds requires that an assignment of “things in action” be “in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise....”

M.C.L. § 566.132(1)(f). **Thus, under Michigan law, a written instrument, even if poorly drafted, creates an assignment if it clearly reflects the intent of the assignor to presently transfer “the thing” to the assignee.** *Hovey v. Grand Trunk W. R. Co.*, 135 Mich. 147, 149, 97 N.W. 398 (1903).

“An assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses.” *Burkhardt*, 260 Mich App at 653. In other words, the assignee of a cause of action becomes the real party in interest with respect to a claim. *Kearns v Michigan Iron & Coke Co*, 340 Mich 577, 582; 66 NW2d 230 (1954) (reasoning “where an assignment is such that satisfaction of the judgment obtained by the assignee will discharge the defendant from his obligation to the assignor, for the purpose of the suit the assignee is the real party in interest and may maintain an action in his own name”).

In response, Plaintiffs make several arguments: (1) the Kalabats are estopped from arguing an assignment because they admitted in bankruptcy filings that Akouri owned the note and security agreement; (2) there was no assignment because “the purported assignment is only notice that Akouri had ‘delegated and assigned to Laith Yaldoo all of my enforcement rights under the agreement’”; (3) the alleged assignment was revoked via an October 8, 2015 letter from Plaintiffs’ counsel to Laith Yaldoo and the Kalabats’ counsel; and (4) the Kalabats lack standing to enforce the “third-party” assignment because they are not parties thereto.

Plaintiffs’ second argument touches on the larger problem. The letters from Akouri to each Kalabat only provide “This letter is to notify you that I have delegated and assigned to Laith Yaldoo all of my enforcement rights under the Agreement, including all rights to notice or request for consent for any action or inaction by you.”

But these letters are not from Akouri to Yaldoo, and it is unclear if Akouri ever generated or delivered any writing **to Yaldoo** purporting to assign his enforcement rights **to Yaldoo**. Not

only does neither side produce any such writing, neither side even references any such writing. And an assignment must be in writing to be enforceable under MCL 566.132(1)(f).

Both sides only reference the letters from Akouri to the Kalabats. But this Court is unconvinced that Akouri's letters to the Kalabats constitute an effective assignment to Yaladoo. While the Kalabat letters appear to refer to some, separate assignment from Akouri to Yaladoo, neither side has produced the same.

For the foregoing reasons and viewing all evidence in the light most favorable to Plaintiffs, the Court finds that there are material facts in dispute, whereby the Kalabats are not entitled to judgment as a matter of law under (C)(10). As a result, the Kalabats' motion for summary disposition based on a purported assignment is DENIED.

II. Modification?

The Kalabats next argue that they are entitled to summary disposition because the Agreements were modified on May 20, 2015, and the Kalabats are not in default under said modification. The May 20, 2015 "Payoff Letter and Release" provides that the Kalabats have until May 20, 2016 to pay \$250,000 to release Akouri's lien.

Plaintiffs respond that this letter is not a **modification** of the underlying Agreements. Rather, it represents an **offer**. The Court agrees. The Payoff Letter does not contain any language that the Kalabats' default was waived. Rather, the Letter provides that, "upon payment of the payoff amount," Plaintiffs would agree to release the liens. As a result, the Letter provides that said payment is the method of acceptance of the offer. But the Kalabats do not argue that they ever attempted to pay this amount.

Plaintiffs further argue that this offer was revoked before acceptance via an October 8, 2015 letter from Plaintiffs' counsel to Laith Yaladoo and the Kalabats' counsel. This letter

provides (in relevant part): “Any offer to accept anything less than the 60% interest in Birmingham Property, LLC, or its sale proceeds has been, and hereby is, revoked.”

It is well settled that “A simple offer may be revoked for any reason or for no reason by the offeror at any time prior to its acceptance by the offeree.” *Bd of Control of E Michigan Univ v Burgess*, 45 Mich App 183, 186-187; 206 NW2d 256 (1973), citing *Weiden v Woodruff*, 38 Mich 130, 131-132 (1878).

Because the May 20, 2015 “Payoff Letter and Release” was simply an offer that the Kalabats failed to accept before Plaintiffs revoked the same, the Kalabats’ motion for summary disposition based on a modification is DENIED.

IT IS SO ORDERED.

February 16, 2016
Date

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