

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

ENTERPRISE ROMEO, LLC,

Plaintiff,

vs.

Case No. 2013-3220-CK

GJERGJ G. GOJCAJ and NATURAL 1  
CORP, d/b/a TIMES SQUARE FAMILY  
DINING, and BENDER & HARLOW  
HOLDINGS, LLC,

Defendants.

and

NATURAL 1 CORP, d/b/a TIMES SQUARE  
DINING,

Counter-Plaintiff,

vs.

ENTERPRISE ROMEO, LLC, RROK GOJCAJ  
And MARA GOJCAJ,

Counter/Third Party Defendant.

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OPINION AND ORDER

Defendant Gjergj G. Gojcaj and Defendant/Counter-Plaintiff Natural 1 Corp. (Natural 1") d/b/a Times Square Family Dining (Jointly, "Movants") have filed a motion for summary disposition pursuant to MCR 2.116(C)(10).

Plaintiff/Counter-Defendant Enterprise Romeo, LLC ("Enterprise") and Third Party Defendants Rrok Gojcaj ("R. Gojcaj") and Mara Gojaj ("M. Gojcaj") (Enterprise, R.

Gojcaj and M. Gojcaj collectively, "Respondents") have filed a joint response and request that the motion be denied.

In addition, Movants have filed a reply brief in support of their motion.

### I. Facts and Procedural History

This matter involves the purchase of real estate commonly known as 70927 Van Dyke, Bruce Twp., MI 48065 ("Subject Property"). In or about 2010, Defendant Bender & Harlow Holdings, LLC ("Defendant Bender") owned the Subject Property. G. Gojcaj, through his company, Natural 1, leased the Subject Property from Defendant Bender and operated a restaurant named Times Square Family Dining ("Times Square").

In summer/fall 2010, Defendant Bender sued Times Square in the 42-1 District Court for non-payment of rent. Attorney Peter Gojcaj represented Times Square in connection with that matter. The 42-1 District Court action ultimately settled, resulting in a "Settlement Agreement and Mutual Release" ("Settlement Agreement"), and a new lease dated November 29, 2010 ("Revised Lease").

During the time of the above-referenced events, Defendant Bender had a mortgage on the Subject Property in favor of Bayview Loan Servicing, LLC ("Bayview"). In late 2010, Bayview foreclosed as the result of Defendant Bender's breach of the terms of the mortgage. After Bayview foreclosed, but before the redemption period expired, Times Square, through its member G. Gojcaj, contacted Bayview in connection with its desire to purchase the Subject Property.

Although it/he had been cleared to purchase the Subject Property, Times Square/G. Gojcaj lacked the funds needed to purchase the Subject Property. In an effort to resolve the financial problems, G. Gojcaj contacted his uncle, R. Gojcaj.

Ultimately, on February 25, 2011, R. Gojcaj purchased the Subject Property. The sale was memorialized by a "Real Estate Purchase Agreement" ("Purchase Agreement"). R. Gojcaj has allegedly subsequently assigned his rights in the Subject Property to his company, Enterprise.

On May 3, 2013, Enterprise filed its complaint against Movants to recover possession of the Subject Property and for damages with the 42-1 District Court.

On May 30, 2013, Movants filed their counter and third party complaint. In their counter/third party complaint, Movants allege that R. Gojcaj, as owner of the Subject Property, and as landlord, has failed to maintain the Subject Property. Movants also alleged that Mara Gojcaj ("M. Gojcaj") tortiously interfered with their business relationships (Count II), that R. Gojcaj and M. Gojcaj tortiously interfered with their expectancy of expanding their business (Count III). On June 3, 2013, the case was removed to this Court.

On April 18, 2014, the parties stipulated to joining Defendant Bender as a defendant. On June 12, 2014, Plaintiffs filed their first amended complaint ("Amended Complaint"). In addition to adding Defendant Bender as a defendant, the Amended Complaint added a claim against Movants for fraud and misrepresentation (Count I), silent fraud against Defendant Respondents (Count II), breach of contract against Defendant Bender (Count IV)<sup>1</sup>, fraud and misrepresentation against Defendant Bender (Count V), concert of action against the Defendant Respondents and Defendant Bender (Count VI), civil conspiracy against Defendant Respondents and Defendant Bender

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<sup>1</sup> The Court notes that the Amended Complaint does not contain a count III; rather, it goes directly from count II to Count IV.

(Count VII), summary removal proceedings against Defendant Respondents (Count VIII), and trespass against Defendant Respondents.

On January 1, 2015, Defendant Bender filed its motion for summary disposition. On January 27, 2015, Plaintiffs filed a motion for summary disposition against Movants. On January 29, 2015, Plaintiffs filed their response to Defendant Bender's motion. On February 3, 2015, Movants filed their concurrence with Defendant Bender's motion for summary disposition. On February 10, 2015, Movants filed their amended concurrence with Defendant Bender's motion. On February 10, 2015, Movants filed their response to Plaintiffs' motion for summary disposition. On February 12, 2015, Defendant Bender filed its reply in support of its motion. On February 13, 2015, Plaintiffs filed their reply in support of their motion.

On February 17, 2015, the Court held a hearing in connection with the motions and took the matters under advisement. On March 6, 2015, the Court entered its Opinion and Order: (1) Denying Plaintiffs' motion for summary disposition as to their claim for summary proceedings, and granting Movants' request for summary disposition of the summary proceedings claim pursuant to MCR 2.116(l)(2), and (2) Denying, in part, and denying without prejudice, in part, Defendant Bender's motion for summary disposition.

On April 17, 2015, Movants filed their instant motion for summary disposition. On May 22, 2015, Respondents filed their response. On May 27, 2015, Movants filed a reply brief in support of their motion. On June 1, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

## II. Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

## III. Arguments and Analysis

In their motion, Movants first contend that Respondents' fraud claims against them fail where they did not have a duty to disclose the information at issue. Specifically, Movants contend that they were not parties to the Purchase Agreement and therefore had no duty to disclose the Revised Lease.

To assert an actionable fraud claim, the plaintiff must demonstrate that: (1) the defendant made a material representation; (2) it was false; (3) when the defendant made it, the defendant knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) the defendant made it with the intention that it should be acted upon by the plaintiff; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff thereby suffered injury. *Cooper v Auto Club Ins Association, supra; Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

With respect to Respondents' claim for material representation, the only statement they have identified is a statement in the seller's disclosure executed by Defendant Bender that it had no knowledge of any leases encumbering the Subject Property. While the statement was made by Defendant Bender, not Movants, Respondents nevertheless contend that Movants should be bound by the statement because the affidavit was prepared at the instruction of G. Gojcay. However, in addition to failing to cite to any evidence establishing that G. Gojcay played a role in drafting the seller's affidavit, Respondents' false misrepresentation claim against Movants fails as a matter of law because in order to prevail a claim for fraudulent misrepresentation, a plaintiff must prove, *inter alia*, that "**the defendant** made a false a false representation of material fact." *Alfieri v Bertorelli*, 295 Mich App 189; 813 NW2d 772 (2012). In this case, the statement at issue was made by Defendant Bender, not Movants. Consequently, Respondents' claim for fraudulent misrepresentation against Movants must be dismissed.

With regards to Respondents' claim for silent fraud, Respondents contend that Movants failed to advise R. Gojcay of the Revised Lease before he chose to close the Purchase Agreement. Silent fraud is essentially the same as ordinary fraud except that it occurs where a defendant, rather than making a material misrepresentation, suppresses a material fact that he has a legal obligation to disclose. *Barclae v Zarb*, 300 Mich App 455; 834 NW2d 100 (2013). In this case, Respondents contend that Movants had a legal obligation to disclose the Revised Lease before Respondents closed the Purchase Agreement. However, Respondents have failed to provide the Court with any authority supporting their contention that a tenant has a duty to disclose

their lease to a prospective purchaser of the landlord's interest. Consequently, Respondents have failed to properly support their position. See *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000) ("A party may not merely state a position and then leave it to the Court to rationalize and discover the basis for the claim, nor may he leave it to the Court to search for authority to sustain or reject his position.") As a result, Movants' motion for summary disposition of Respondents' silent fraud claim must be granted.

In addition, Respondents' fraud claims fail because their reliance on Movants' silence/actions was not reasonable. "A party's reliance on a misrepresentation in fraud actions must be reasonable." *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004). Further, "[t]here can be no fraud where a person has the means to determine that a representation is not true." *Nieves v Bell Indus., Inc* 204 Mich App 459, 464; 517 NW2d 235 (1994). In this case, R. Gojcaj conceded that he did not make any independent efforts to determine whether there were any leases or other encumbrances on the Subject Property prior to closing the Purchase Agreement. Moreover, Respondents appear to concede that they could have discovered the Revised Lease had they made any effort to do so. Consequently, the Court is convinced that Respondents had the means to discover that the Revised Lease existed, which, in addition to the reasons set forth above, bars their fraud claims and entitles Movants to summary disposition.

Next, Movants contend they are entitled to summary disposition of Respondents' trespass claim and request for equitable relief because they are without foundation and meritless. Respondents have not responded to this portion of Movants' motion.

Consequently, Respondents appear to concede that Movants' are entitled to summary disposition of the trespass claim and request for equitable relief.

In addition, Movants contend that they are entitled to summary disposition of Respondents' conspiracy and concert of action claims because both of those claims fail without an underlying tort. Indeed, concert of action and conspiracy claims fail without an underlying tort. *Cousineau v Ford Motor Co*, 140 Mich App 19, 37; 363 NW2d 721 (1985). For the reasons discussed above, Movants are entitled to summary disposition of Respondents' underlying claims against them. Consequently, Movants are also entitled to summary disposition of Respondents' concert of action and conspiracy claims.

Lastly, Movants request that the Court grant them summary disposition of their tortious interference claim against Respondents. The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted.

Movants' tortious interference claims are based on M. Gojcaj's alleged refusal to leave the Subject Property after being asked to do so by G. Gojcaj. However, Movants have failed to cite to any evidence that any of the elements of their claim have been

satisfied. Consequently, the Court is convinced that Movants' have failed to satisfy their burden in requesting summary disposition of their tortious interference claim. As a result, Movants' motion for summary disposition of their tortious interference claim must be denied.

#### IV. Conclusion

Based upon the reasons set forth above, Defendant Gjergj G. Gojcaj and Defendant/Counter-Plaintiff Natural 1 Corp's motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Specifically, Defendant Gjergj G. Gojcaj and Defendant/Counter-Plaintiff Natural 1 Corp's request for summary disposition of their tortious interference claims is DENIED, and their requests for summary disposition of Plaintiff's fraud, silent fraud, concert of action, conspiracy, trespass and request for equitable relief are GRANTED. This Opinion and Order does not resolve the last claim and does not close the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: JUL 09 2015

Kathryn A. Viviano  
Hon. Kathryn A. Viviano, Circuit Court Judge