

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

ORIGINAL ARABIC TOWN, INC.,

Plaintiff,

vs.

Case No. 2013-5080-CK

COUNTY LINE PLAZA, LLC and
R. GRAHAM CONSTRUCTION, LLC,

Defendants.

OPINION AND ORDER

Defendant County Line Plaza, LLC (“Defendant Plaza”) has filed a motion for summary disposition pursuant to MCR 2.116(C)(8). Plaintiff has filed a response and requests that the motion be denied.

Factual and Procedural History

This action arises out of a lease agreement (“Lease”) between Plaintiff and Defendant Plaza for the premises located at 2105 and 2109 15 Mile Road, Sterling Heights, MI (collectively, “Subject Property”). Prior to January 1, 2013, Plaintiff withheld rent to Defendant Plaza due to its complaint of water leaking into the Subject Property. In response, Defendant Plaza contacted Defendant R. Graham Construction, LLC (“Defendant Construction”) to install a new roof over the Subject Property and adjacent properties. The new roof was completed in December 2012 or early January 2013.

While the new roof fixed the leaks for a few months, in April 2013 the roof allegedly began leaking again. Plaintiff again complained to Defendant Plaza, but Defendant Plaza allegedly took no action(s) to resolve the complaint. In response, Plaintiff withheld rent, which

in turn caused Defendant Plaza to initiate a landlord tenant action in June 2013. On July 19, 2013, Plaintiff filed an answer and counterclaim to Defendant Plaza's action. On September 27, 2013, Plaintiff filed its motion for leave to amend its counterclaim and to remove the matter to this Court. On October 23, 2013, the district court entered an order granting Plaintiff's motion to amend its counterclaim and to remove the matter to this Court, but bifurcated the case and retained jurisdiction over Defendant Plaza's landlord tenant action.

In November 2013, the parties entered into a "Release and Settlement Agreement" purporting to resolve the parties' claims ("Settlement Agreement"). However, Defendant Plaza subsequently claimed that Plaintiff failed to comply with the terms of the Settlement Agreement and sought to reinstate the district court action. On February 3, 2014, the 41-A District Court granted Defendant Plaza's motion to reinstate the district court action, for Possession of the Subject Property, and for a money judgment ("District Court Order").

On April 7, 2014, Plaintiff filed its motion for leave to file a second amended complaint. On April 14, 2014, this Court granted Plaintiff's motion. On April 18, 2014, Plaintiff filed its second amended complaint, which added Defendant Construction as a party. The second amended complaint purports to state claims for: Count I- Breach of Contract, Count II- Gross Negligence, Count III- Breach of the Settlement Agreement, Count IV- Abuse of Process, and Count V- Negligence. Count V is only brought against Defendant Construction.

On October 31, 2014, Defendant Plaza filed its instant motion for summary disposition pursuant to MCR 2.116(C)(8). Plaintiff has filed a response and requests that the motion be denied. On January 26, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

Standards of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

Arguments and Analysis

1) Count I- Breach of Contract

In Count I of its second amended complaint, Plaintiff alleges that Section 11 of the Lease requires Defendant Plaza to maintain the roof and outer four wall of the Subject Premises, that from time to time through February 2014 the roof leaked, that Plaintiff advised Defendant Plaza of the leaks, but that Defendant Plaza failed to properly repair the roof, and that as a result of Defendant Plaza's actions Plaintiff has suffered damages. (*See* Second Amended Complaint, at ¶ 1-8.) In its motion, Defendant Plaza contends that Plaintiff's breach of contract claim fails based on section 13 of the Lease. Section 13 provides:

[Plaintiff] agrees to indemnify and hold harmless [Defendant Plaza] from any liability for damages to any person or property in, on or about said premises from any cause whatsoever, and [Plaintiff] will prosecute and keep in effect during the term hereof public liability and property damage insurance for the benefit of [Defendant Plaza] in the sum of \$200,000.00 for damages resulting to one person and \$500,000.00 for damages resulting from one casualty and \$50,000.00 property damages insurance resulting from any one occurrence. [Plaintiff] shall deliver said policies to [Defendant Plaza] and upon [Plaintiff's] failure so to do [Defendant Plaza] may at his option obtain such insurance and the cost thereof shall be paid as additional rent due and payable upon the next ensuing day.

As a preliminary matter, Defendant Plaza is correct to the extent that Plaintiff was required to indemnify it by obtaining an insurance policy for its benefit. However, “[a] contract which purportedly indemnifies one against the consequences of his own negligence is subject to strict construction and will not be so construed unless it clearly appears that indemnification for the indemnitee's own negligence was intended.” *Palomba v East Detroit*, 112 Mich App 209, 217; 315 NW2d 898 (1982). “[T]he requisite specificity and clarity required to give rise to a right to indemnity against the consequences of one's own negligence in the case of an express contract can never be found *by implication*.” *Skinner v DM-E Corp.*, 124 Mich App 580, 586; 335 NW2d 90 (1983).

In this case, Defendant Plaza agreed, in section 11 of the Lease, to keep the roof of the Subject Property in good order and repair. If proven, Plaintiff’s claim would establish that Defendant Plaza failed to satisfy its duty under the Lease by failing to keep the roof in good order. Accordingly, if the attempts to satisfy its duty were done negligently, the Court is convinced that Defendant Plaza may not seek indemnification for said negligence. Unlike the Michigan cases cited by Defendant Plaza, this matter does not involve a situation in which a third party, that is not acting on behalf of the landlord, causes the underlying damage. Rather, this case presents a situation in which Defendant Landlord and/or the company it hired allegedly negligently failed to satisfy its duty. Accordingly, the authority cited by Defendant Plaza is easily distinguishable and not controlling. Consequently, the Court is convinced that Defendant Plaza’s motion for summary disposition of Plaintiff’s breach of contract claim must be denied.

2) Count II- Gross Negligence

At oral argument, Defendant Plaza’s counsel conceded that Plaintiff’s gross negligence states a potentially viable claim under Michigan law. Consequently, the portion of Defendant

Plaza's motion for summary disposition of Count II of Plaintiff's second amended complaint must be denied.

3) Count III and IV- Breach of Settlement Agreement and Abuse of Process

Plaintiff's counts III and IV relate to the Settlement Agreement and the District Court Order. While Plaintiff contends that the District Court Order improperly interpreted the Settlement Agreement, and that it has filed a motion for reconsideration of the District Court Order, the fact remains that the District Court Order remains in effect. Although Plaintiff may not agree with the district court's interpretation of the Settlement Agreement, this Court is convinced that Plaintiff's filing of Counts III and IV in an attempt to de facto appeal the district court's decision is improper. While Plaintiff has avenues by which it can challenge the district court proceedings, and in fact is pursuing one of those avenues, this Court is convinced that Counts III and IV must be dismissed as being procedurally improper.

Conclusion

For the foregoing reasons, Defendant County Line Plaza, LLC's motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Specifically, Defendant's motion is granted with respect to Counts III (Breach of Settlement Agreement) and IV (Abuse of Process). Defendant's motion for summary disposition of Count I (Breach of Contract) and Count II (Gross Negligence) is DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: February 6, 2015

JCF/sr

Cc: *via e-mail only*

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