

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

PRAY FINAL STRAW, LLC,

Plaintiff/Counter-Defendant,

vs.

Case No. 2014-2742-CB

PARTRIDGE CREEK FASHION
PARK, LLC,

Defendant/Cross-Plaintiff.

and

PARTRIDGE CREEK FASHION
PARK, LLC

Third-Party Plaintiff,

vs.

ROBERT C. LEITHAUSER, GWENDOLYN
LEITHAUSER, ROBERT J. PEEBLES, J.D.,
and THOMAS J. LEFEVRE,

Third-Party Defendants.

OPINION AND ORDER

Plaintiff has filed a motion for partial summary disposition as to liability pursuant to MCR 2.116(C)(10). Plaintiff and Third-Party Defendants have also filed a joint motion for partial summary disposition. Defendant has filed responses and cross-motions for summary disposition as to both motions.

I. Factual and Procedural History

On August 20, 2013, Plaintiff and Defendant executed a lease for the construction and operation of a restaurant ("Lease"). In addition, Third-Party

Defendants each executed guaranties guaranteeing Defendant's obligations under the Lease ("Guaranties").

On July 15, 2014, Plaintiff filed its complaint in this matter. In its complaint, Plaintiff alleges that Defendant has breached multiple provisions of the Lease.

On August 14, 2014, Defendants filed its answer to the complaint, as well as a counterclaim against Plaintiff and a third-party complaint against the Third-Party Defendants. In its counterclaim and third-party complaint, Defendant alleges that Plaintiff has breached the terms of the Lease, and that Third-Party Defendants have breached the terms of the Guaranties.

On June 15, 2015, Plaintiff and Third-Party Defendants filed their joint motion for partial summary disposition. On July 7, 2015, Plaintiff filed its second motion for partial summary disposition. On July 27, 2015, Defendants filed its response to both motions and counter-motion for summary disposition. On August 11, 2015, Plaintiff filed its reply in support of its motion, and its response to Defendant's counter-motion. On August 17, 2015, the Court held a hearing in connection with the motions and took the matters 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

The central issue in dispute is whether Plaintiff missed a deadline on December 24, 2013 by failing to submit certain working drawings (“Working Drawings”). The provisions of the Lease governing the Working Drawings is Section 5.01(b) and Exhibits B and B-2D of the Lease. Section 5.01(b) provides:

[Plaintiff] agrees, prior to the commencement of the term of this Lease, at [Plaintiff's] own cost and expense, to provide all work of whatsoever nature in accordance with its obligations set forth in Exhibit B as “Tenant’s Work.” [Plaintiff] agrees to furnish to [Defendant] the Working Drawings and Specifications (and Demolition Drawings, as applicable) with respect to the Leased Premises prepared in a manner and within the time periods required in Exhibit B. If such Working Drawings and Specifications (and Demolition Drawings, as applicable) are not furnished by [Plaintiff] to [Defendant] within the required time periods in form to permit approval by [Defendant], then [Defendant] may at its option at any time while [Plaintiff] is in default of this provision, in addition to any and all other remedies provided in this Lease, by notice to [Plaintiff], declare this Lease null and void and of no further force and effect, in which event this Lease shall terminate, but [Plaintiff] shall remain liable for all obligations arising during this original stated term as provided in this Lease. In addition, if [Defendant] determines that [Defendant] and [Plaintiff] are unable to agree upon Working Drawings and Specifications (and Demolition Drawings, as applicable), [Defendant] shall have the option, upon notice to [Plaintiff], to declare this Lease null and void and of no further force and effect, in which event this Lease shall terminate on the date specified in such notice, in the same manner as provided in the preceding sentence.

(See Plaintiff’s Exhibit A, Lease.)

Further, Exhibit B-2D of the Lease provides, in pertinent part:

All Working Drawings and Specification prepared by [Plaintiff's] Architect shall be submitted by [Plaintiff] in the form of one (1) set of reproducible prints (i.e., seplas) and one (1) set of prints, to [Defendant] within twenty-one (21) days from receipt by [Plaintiff] of [Defendant's] approved Store Design Drawings. Any required revisions to such Working Drawings and Specifications shall be prepared and resubmitted within ten (10) days of receipt of notice from [Defendant].

(Id.)

In its motion, Defendant contends that the 21 days deadline set forth in Exhibit B-2D was triggered by December 3, 2013 email sent by Defendant to Plaintiff's Architect ("Email"). (See Plaintiff's Exhibit E.) In its pleadings, Plaintiff asserts that the Email was insufficient to trigger the 21 day deadline because it was not delivered to Plaintiff or its owner, but rather to its architect.

With respect to the delivery requirement, Plaintiff relies on the portion of Exhibit B-2D that provides that the 21 day deadline is triggered by "receipt by [Plaintiff] of [Defendant's] approved Store Design Drawings." (See Plaintiff's Exhibit A.) In its response, Defendant contends that delivery of the store design drawings to Plaintiff's architect was sufficient under Section V of Exhibit B of the Lease which provides, in part:

All notices, drawing information and other material furnished by [Defendant] to [Plaintiff] under this Exhibit or pursuant to Sections 5.01 or 5.02 of the Lease may be effectively submitted to [Plaintiff] by mailing the same to [Plaintiff] at the address set forth on the Date Sheet on page 1 of the Lease or to Tenant's architect if Tenant has provided [Defendant] with such an address notwithstanding any contrary or additional requirement contained in any other section of the Lease.

(See Plaintiff's Exhibit A.)

A contract must be interpreted according to its plain and ordinary meaning.” *Wells Fargo Bank, NA v. Cherryland Mall Ltd Partnership (On Remand)*, 300 Mich App 361, 386; 835 NW2d 593 (2013), quoting *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. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. *Klein v. HP Pelzer Auto Sys, Inc*, 306 Mich App 67, 75–76; 854 NW2d 521 (2014).

In this case, the first sentence in Exhibit B-2D of the Lease provides that it is “attached to and forming a part of Exhibit B...” (See Plaintiff’s Exhibit A) Section V of Exhibit B provides that all notices Defendant provides to Plaintiff under Exhibit B, Section 5.01 or 5.02 may be delivered to Plaintiff’s architect. (Id.) Moreover, Section V unambiguously provides that its terms control notwithstanding any contrary terms found in the Lease. (Id.) Consequently, the Court is convinced that even if Plaintiff is correct that Exhibit B-2D requires that notice of acceptance of the store design drawings be sent to Plaintiff or its owner, such a requirement is overcome by the terms of Section V of Exhibit 5. As a result, the 21 day deadline began to run upon receipt of the approved store design drawings by Plaintiff’s architect on December 3, 2013.

Plaintiff also contends that the December 3, 2013 email did not constitute a final approval of the store design drawings. However, Plaintiff has failed to support its position in any way. 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. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Moreover, Plaintiff's architect and builder both testified that they understood that the store design drawings had been approved as of early December 2013. (See Defendant's Exhibit G. at p.22, Exhibit F. at 40.) Based on Plaintiff's failure to support its position, and Defendant's uncontroverted evidence that the December 3, 2013 email constituted a final acceptance of the store design drawings, the Court is convinced that Plaintiff's position is without merit.

Next, Plaintiff contends that even if the deadline to submit the Working Drawings was December 24, 2013, its failure did constitute a material breach of the terms of the Lease. However, unambiguous contracts must be enforced as written. *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005). In this case, Section 5.01(b) of the Lease unambiguously provides that Defendant could, in the event that Plaintiff fails to provide the Working Drawings by the required date, provide notice to Plaintiff declaring the Lease null and void and of no further force or effect, in which event the Lease would be terminated. (See Plaintiff's Exhibit A.) Consequently, the material breach doctrine is inapplicable in this matter based on the clear and unambiguous language of the Lease. As a result, Plaintiff's position is without merit.

The remaining issue is whether Plaintiff is liable for the rent that would have been owed under the Lease had the Lease not been terminated. Defendant contends that Plaintiff and Third-Party Defendants are liable for all the rental payments they would have had to pay under the Lease or Guaranties had the Lease not been terminated. Specifically, Defendant relies on the portion of Section 5.01(b) of the Lease that provides that if Defendant terminated the lease due to Plaintiff's failure to timely submit the Working Drawings, "[Plaintiff] shall remain liable for all obligations arising during this original stated term as provided in this Lease." (See Plaintiff's Exhibit A.)

In response, Plaintiff and Third-Party Defendants contend that they are not liable for rent because Defendant never delivered the Leased Premises to Plaintiff.

The general rule in Michigan is that a landlord has no claim for rent accruing after the tenant's right to possession and use of the leased premises ends. *Wreford v Kenrick*, 107 Mich 389, 65 NW 234 (1895); *Dolese v Bellows-Claude Neon Co*, 261 Mich 57; 245 NW 569 (1933). However, that general common-law rule may be modified by agreement in a written lease. *Stott Realty Co v United Amusement Co*, 195 Mich 684, 690; 162 NW 283 (1917). Indeed, in *Stott* the Michigan Supreme Court quoted with approval the Supreme Court of Illinois decision in *Grommes v St. Paul Trust Co*, 147 Ill 634; 35 NE 820, 822 (1893), which was a case in which the Court enforced a provision requiring the tenant to pay all rents that would have been due through the end of the lease

term in the event the tenant breaches its covenants. *Grommes*, 147 Ill at 643, *Stott*, 195 Mich at 691-692.

In this case, as in *Grommes*, the Plaintiff and Defendant agreed that Plaintiff would be liable for all of its obligations under the Lease in the event that Defendant terminated the Lease as a result of Plaintiff failing to timely submit the Working Drawings. Consequently, the Court is convinced that Section 5.01(b) is enforceable notwithstanding the fact that Plaintiff never obtained possession of the Leased Premises, and that Defendant is entitled to damages pursuant to Section 5.01(b). Moreover, Defendant is, in addition to seeking to recover its damages from Plaintiff, also entitled to recover said damages from the Third-Party Defendants under the Guaranties. The Guaranties provide, in pertinent part, that the Third-Party Defendants guarantee the “full, faithful, and timely payment and performance by [Plaintiff] of all of the payments, covenants and other obligations of [Plaintiff] under or pursuant to the Lease.” (See Defendant’s Exhibit M.) Accordingly, Third-Party Defendants have agreed to pay any amounts for which Plaintiff is liable under the Lease.

While the Court is convinced that Section 5.01(b) entitles Defendant to damages, the amount of damages remains in dispute. Under Michigan law, a landlord's damages due to a tenant's breach of a lease is measured by the excess of the agreed rent over: 1) the rental value of the property, or 2) the rent the landlord can obtain for the property through reasonable diligence. See *Tel-Ex Plaza, Inc. v. Hardees Rests., Inc.*, 76 Mich App 131, 134, 255 NW2d 794 (1977). In this case, neither party has provided the Court with any evidence as to

the rental value of property or the rent that Defendant could have obtained for the Leased Premises through reasonable diligence. However, it is undisputed that Defendant sold its rights to the Leased Premises in October 2014. Accordingly, Defendant could not have obtained any rent for the Leased Premises after the date it sold its rights. As a result, Defendant is only entitled to recover damages that it incurred through October 2014.

IV. Conclusion

Based upon the reasons set forth above, Plaintiff's motion for summary disposition is DENIED. In addition, Plaintiff and Third-Party Defendants' motion for summary disposition is DENIED. Further, Defendant's motion for summary disposition of its counter and third-party complaint is GRANTED. However, the issue of damages remains OPEN. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

Date: NOV 04 2015

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