STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

C&H VENTURES, LLC,

Plaintiff,

vs. Case No. 2015-1457-CB

ELI'S CONEY ISLAND, LLC and
AHMAD NABIH ZAHR,

Defendants.
_____/

OPINION AND ORDER

Plaintiff has filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants have filed a response and request that the motion be denied.

I. Factual and Procedural History

Plaintiff is the owner of a retail shopping center on Hayes Road, located in Shelby Township, MI, commonly known as Woodmill Square Plaza ("Shopping Center"). On June 9, 2014, Plaintiff, as landlord, and Defendant Eli's Coney Island, LLC ("Defendant Eli"), as tenant, executed a lease pursuant to which Defendant Eli agreed to lease a portion of the Shopping Center commonly known as 50985 Hayes Rd., Unit F, Shelby, Twp., MI ("Subject Property") from Plaintiff ("Lease"). The Lease provided for a 5 year term, commencing June 1, 2014. Rent was set at $6,000.00 per month for the first year, and $7,000.00 thereafter. Defendant Zahr executed a guaranty personally guaranteeing Defendant Eli's obligations under the Lease ("Guaranty").

On March 27, 2015, the Hon. Wendy Potts of the State of Michigan's Sixth Judicial Circuit Court for Oakland County entered a "consent judgment for permanent

injunctive relief, payment of money damages, and for dismissal of remaining claims" ("Consent Judgment") in *Leo's Coney Island Franchising Co v Shelby's Coney Island, LLC, Mohamad Diab, Eli's Coney Island, LLC, and Ahmad Zahr*, Case No. 14-140864-CP ("Oakland Case"). The Consent Judgment provided, in pertinent part, that Defendant shall cease doing business at the Subject Property as a coney island style restaurant and shall cease and desist from selling, offering for sale, or advertising for sale "coney island" style hot dogs and/or greek salads; and shall delete the words "Coney Island" from its trade name. (*See* Defendants' Exhibit D, Consent Judgment.)

On April 22, 2015, Plaintiff obtained a judgment of possession from the 41-A district court based on Defendants failure to pay $38,793.52 in owed rent ("Judgment of Possession"). Defendants have since vacated the Subject Property.

On May 1, 2015, Plaintiff filed its complaint in this matter ("Complaint"). The Complaint contains the following claims: Count I- Breach of Contract against Defendant Eli, and Count II- Breach of Contract against Defendant Ahmad Nabih Zahr ("Defendant Zahr"). On October 9, 2015, Plaintiff filed its instant motion for summary disposition pursuant to MCR 2.116(C)(10). On October 19, 2015, Defendants filed their response. On October 26, 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

While they do not dispute that they challenged the Lease (Defendant Eli) or Guaranty (Defendant Zahr), Defendants assert that they are not required to pay the rent owed under those documents because the Consent Judgment rendered the Lease impracticable and/or impossible.

The doctrine of impossibility may extinguish a party's liability under a contract if performance of the party's promise becomes objectively impossible. *Roberts v Farmers Ins Exch,* 275 Mich App 58, 73; 737 NW2d 332 (2007). To determine the application of the defense of impossibility, one must examine "'whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract." ' *Bissell v. L W Edison Co,* 9 Mich App 276, 285; 156 NW2d 623 (1967), quoting 84 ALR2d 12, § 9, p 51. The doctrine of impossibility is based on the facts of each case, and the circumstances excuse performance only to the extent to which performance is impossible. *Id.* at 286. Absolute impossibility is not required; however, "there must be a showing of impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." *Roberts,* 275 Mich App at 74 (internal quotation marks and citations omitted). While a supervening event's lack of foreseeability may produce an

impossibility sufficient to extinguish liability, *Vergote v. K Mart Corp (After Remand)*, 158 Mich App 96, 110; 404 NW2d 711 (1987), under Michigan law "[s]ubsequent events which in the nature of things do not render performance impossible, but only render it more difficult, burdensome, or expensive, will not operate to relieve [a party of its contractual obligations.]" *Chase v. Clinton Co*, 241 Mich 478, 484; 217 NW 565 (1928). The burden rests on a defendant to establish a contractual defense such as impossibility or impracticability. See *Rory v. Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005)(indicating that to avoid enforcement of a contract, a party has to establish a traditional contractual defense).

In this case, the only evidence Defendants have presented with respect to their impossibility/impracticability defense is the Consent Judgment. While it is undisputed that the Consent Judgment enjoined Defendants from operating a coney island style restaurant at the Subject Property, the impossibility in question was foreseeable. At the October 26, 2015 hearing, Defendants' counsel conceded that there was a preliminary injunction entered in connection with the Oakland Case enjoining Defendants from operating the type of restaurant Defendants were to run under the Lease. Accordingly, Defendants knew they could not comply with the terms of the Lease at the time it was executed. In order to prevail on an impossibility/impracticability defense, a party must show that the event or circumstance causing the frustration or impossibility was not foreseeable at the time the contract was made. *Liggett Restaurant Group, Inc. v City of Pontiac*, 260 Mich App 127, 134-135; 676 NW2d 633 (2003). In this case, the impossibility in question was reasonably foreseeable where a preliminary injunction was in place that barred Defendants from operating the type of business they agreed to

operate in the Lease at the time the Lease was executed. Consequently, Defendants' impossibility defense fails as a matter of law.

Defendants also contend that the Lease violates public policy. Specifically, Defendants point to case law that supports the proposition that Michigan courts will not enforce, on public policy grounds, contracts that violate the law. *Peeples v Detroit*, 99 Mich App 285, 302; 297 NW2d 839 (1980). However, Defendants not presented any authority whatsoever that public policy favors saving a party from a contract they agreed to when they had reason to know they could not legally perform the obligations under the contract. Moreover, even if Defendants were correct that they could not be required to operate a coney island style restaurant under the Lease, their payment obligations would not be excused. A general rule of contract law that a void section of an otherwise valid contract can be severed if it is not an essential part of the whole. *Peeples*, 99 Mich App at 296. Accordingly, even if Defendants could establish that the Consent Judgment operated to excuse them from having to operate a coney island style restaurant, at best that would sever that requirement and leave the remainder of the Lease undisturbed. Consequently, the Court is convinced that Defendants' position that the Consent Judgment rendered the Lease void in its entirety is insufficiently supported and without merit.

Finally, Defendant contends that Plaintiff has failed to properly support the amount of its requested back rent. In its motion, Plaintiff requests that the Court award it $78,865.52 in back rent. The only evidence submitted in support of its request is an affidavit executed by its counsel. (*See* Plaintiff's Exhibit D.) However, the affidavit merely contains a conclusory statement with respect to backed rent. Specifically, Mr.

Kalas testified that: "Plaintiff has incurred backed rent and charges under the Lease Agreement through October 2015, in the amount of $78,865.52." (Id. at ¶4.) The testimony does not provide any basis for the statement. MCR 2.119(B)(1)(c) provides that an affidavit offered in support of a motion must affirmatively show that the affiant could, if sworn as a witness, testify competently to the facts stated therein. *Regents of the Univ of Michigan v. State Farm Mut Ins Co,* 250 Mich App 719, 728; 650 NW2d 129 (2002). Mr. Kalas' testimony fails to allege facts showing that he has personal knowledge of the amount of backed rent that is owed. For these reasons, Mr. Kalas' affidavit is insufficient to establish the amount of backed rent Plaintiff is entitled to recover.

IV. Conclusion

Based upon the reasons set forth above, Plaintiff's motion for summary disposition is GRANTED as to liability. The issue as to the amount of damages Plaintiff is entitled to recover remains OPEN. In compliance with MCR 2.602(A)(3), this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

Date: DEC 10 2015

Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge