STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

WARREN PROFESSIONAL PLAZA, LLC, a
Michigan limited liability company,

Plaintiff,

vs. Case No. 2015-2207-CB

KOSTOPOULOS & ASSOCIATES, PLLC,
a Michigan professional limited liability company,
and RITA KOSTOPOULOS, jointly and severally,

Defendants.
_____/

OPINION AND ORDER

Defendants have filed a motion for summary disposition pursuant to MCR 2.116(C)(7). Plaintiff has filed a response requesting that the motion be denied.

I. Facts and Procedural History

On or about October 24, 2004, Defendant Kostopoulos & Associates, PLLC ("Defendant PLLC") entered into a lease ("Lease") with Oakland Hills Land Development, LLC ("Oakland Development") pursuant to which Defendant PLLC agreed to rent premises located at 30800 Van Dyke, Suite 204, Warren, Michigan ("Subject Property"). The Lease has subsequently been amended three times, most recently on December 20, 2010. Defendant PLLC's obligations under the Lease, and the first two amendments, are guaranteed by Defendant Rita Kostopoulos ("Defendant Kostopoulos") pursuant to guaranties contained within the original lease, as well as the first two amendments ("Guaranty"). In February 2013, Plaintiff purchased the Subject

Property. In March 2015 Plaintiff sold the Subject Property to Fortune Commercial, LLC ("Fortune").

On June 24, 2015, Plaintiff filed its complaint in this matter. In its complaint, Plaintiff alleges that Defendants have failed to satisfy their payment obligations under the Lease/Guaranty for the time period in which Plaintiff owned the Subject Property.

On August 27, 2015, Defendants filed their instant motion for summary disposition pursuant to MCR 2.116(C)(7). On September 10, 2015, Plaintiff filed its response, requesting that the motion be denied. On the same day, Defendants filed their reply brief in support of their motion. On September 14, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley*

Ski Area, Inc, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id*

III. Arguments and Analysis

In their motion, Defendants contend that Plaintiff's claims are barred by res judicata and/or release. The doctrine of res judicata bars a subsequent action when "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004).

In their motion, Defendants assert that Plaintiff's claims are barred as the result of a district court action brought by Warren Galaxy Plaza, LLC ("Galaxy") for unpaid rent and eviction against Defendants in connection with the Lease ("District Court Action"). The District Court Action was resolved via a consent judgment and stipulated order. (*See* Defendant's Exhibit C.) "Res judicata applies to consent judgments." *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001). Accordingly, the first element of res judicata is met in this matter.

With regards to the second element, it is undisputed that Plaintiff was not a party to the District Court Action. However, Defendants contend that Galaxy is Plaintiff's privy.

"To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair*, 470 Mich at 122 (internal citations omitted). "The outer limit of the doctrine traditionally requires both a "substantial identity of interests" and a 'working functional relationship' in which the interests of the nonparty are presented and protected by the party in the

litigation." *Id.* (internal citations omitted). "[A] perfect identity of the parties is not required, only a substantial identity of interests that are adequately presented and protected by the first litigant." *Id.*

In this case, Defendants contend that Galaxy is Plaintiff's assignee, two steps removed, and that as a result, in the District Court Action, Galaxy represented the same interests as Plaintiff in this matter. "An assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed." *First of America Bank v Thompson*, 217 Mich App 581, 587; 552 NW2d 516 (1996).

In its response, Plaintiff contends that it did not assign its rights to collect the rent that became due when Plaintiff owned the Subject Property. In support of its position, Plaintiff relies on paragraph 14.10 of the purchase agreement it executed in connection with its sale of the Subject Property to Fortune ("Agreement"). Paragraph 14.10 of the Agreement provides that: "Pending Insurance Claim and other existing collectibles prior to closing shall belong to Sellers." (*See* Plaintiff's Exhibit 2.) However, paragraph 2.1 of the Agreement provides, in pertinent part: "[Plaintiff] agrees to sell to [Fortune], and [Fortune] agrees to purchase from [Plaintiff], the Property." (Id.) The Agreement defines "Property" to include, *inter alia*, the rights of [Plaintiff], as landlord under any of the lease agreements with the tenants who currently occupy the Property and any personal guaranties, negotiable instruments or other documents executed by [Plaintiff] and the tenants in conjunction with the lease agreements." (Id.)

The primary goal in contract interpretation is to honor the intent of the parties. *UAW–GM Human Resource Ctr v. KSL Recreation Corp,* 228 Mich App 486, 491; 579 NW2d 411 (1998). "A contract must be interpreted according to its plain

and ordinary meaning." *Woodington v. Shokoohi,* 288 Mich App 352, 373; 792 NW2d 63 (2010) (citation omitted). "A contract is ambiguous if it allows two or more reasonable interpretations, or if the provisions cannot be reconciled with each other." *Id.* at 374. "[I]f contractual language is clear, construction of the contract is a question of law for the court." *Id.*

Whether contract language is ambiguous is a question of law. *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). A contract is ambiguous if its provisions are capable of conflicting interpretations. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). In this case, Plaintiff agreed to assign all of its rights under the Lease to Fortune. However, paragraph 14.10 provides that Plaintiff retains its existing "collectibles". The term "collectibles" is not defined by the Agreement, and it appears undisputed that the term can be defined in multiple ways. While Defendants rely on the dictionary definition of "collectible" which restricts collectibles to items such as antiques, art, books coins, that are rare and valuable, bought for their potential future worth as an investment, such a definition is clearly not how the parties to the Agreement intended to define collectible as they refer to a pending insurance claim, something outside of the rigid dictionary definition, as a collectible. (See Plaintiff's Exhibit 2.)

Accordingly, the parties have failed to bring to light what the term means in the context of the Agreement, and the Court is convinced that the term is ambiguous. If a contract is subject to two or more interpretations, factual development is necessary to determine the intent of the parties, and summary disposition is inappropriate. *Klapp*, 468 Mich at 469. Based on the ambiguous language of the Agreement, the Court cannot

determine as a matter of law whether Plaintiff assigned its right to the rent at issue in the matter. Consequently, Defendants' motion for summary disposition on that basis must be denied.

In addition, the portion of Defendants' motion based on release must also be denied. Defendants' release argument is based on the same contractual provisions the Court has already found to be ambiguous. As a result, the issue of fact that precludes summary disposition on res judicata grounds also prevents the Court from granting summary disposition on the basis of release.

Defendants also contend that Defendant Kostopoulos is not liable as she is not a party to the most recent amendment to the Lease. Indeed, the 2010 amendment to the Lease did not contain a guaranty, and Defendant Kostopoulos was not a party to the 2010 amendment. Moreover, the original lease, as well as the amendment prior to the 2010 amendment had elapsed at the time that Plaintiff purchased the Subject Property. (*See* Exhibit 1 to Complaint.) The last amendment that Defendant Kostopoulos guaranteed was the second amended lease executed in May 2007, which was to expire on December 31, 2010, at least three years before Plaintiff purchased the Subject Property. (Id.) While the second amended lease was most recently amended in 2010, that amendment did not contain a guaranty. (Id.) Plaintiff's sole alleged basis for its breach of contract claim against Defendant Kostopoulos is the 2010 amended lease. However, Defendant Kostopoulos was not party or guarantor to the 2010 amended lease. Consequently, Defendants' motion for summary disposition of Plaintiff's breach of contract claim against Defendant Kostopoulos must be granted.

IV. Conclusion

For the reasons set forth above, Defendants' motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Defendants' motion for summary disposition of Plaintiff's breach of contract claim against Defendant Rita Kostopoulos is GRANTED. The remainder of Defendants' motion is DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

Date: DEC 09 2015

Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge