

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

THE SHOPPES PLAZA LLC,

Plaintiff,

Case No. 13-08223-CKB

vs.

HON. CHRISTOPHER P. YATES

NHS RETAIL ONE, LLC; NORMAN
LESLIE, individually; BRODY
VENTURES, LLC; and CHRISTIAN
and KERRY WISER, individually,

Defendants.

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OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR
PARTIAL SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

On the northwest corner of the busiest intersection in Kent County sits a strip mall filled with desirable tenants. Patrons of that strip mall can have their hair styled and their nails done while they enjoy a burrito from Moe's Southwest Grill or a sandwich from Jimmy John's and a coffee beverage from Starbucks. And after that, without leaving the strip mall, patrons can have their cellular phones repaired, too. Who could ask for more?! As it turns out, The Shoppes Plaza LLC ("Shoppes Plaza") has asked for more, *i.e.*, damages from all of the defendants who played roles in the sale of that strip mall to Shoppes Plaza. Presenting a passel of claims for breach of contract, silent fraud, and breach of a lease and a personal guaranty, Shoppes Plaza contends that all of the defendants snookered them by extracting more money for the purchase price than the strip mall was actually worth. In response, the defendants have moved for partial summary disposition pursuant to MCR 2.116(C)(8) and (10), asserting that Shoppes Plaza's claims are unsustainable. The Court agrees with respect to all of the claims at issue, so the Court shall grant the defendants' motion *in toto*.

I. Factual Background

The defendants have moved for summary disposition under MCR 2.116(C)(8) and (10). “A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint[,]” Maiden v Rozwood, 461 Mich 109, 119 (1999), so the Court must examine only the pleadings in ruling on a motion for summary disposition pursuant to MCR 2.116(C)(8). In contrast, a “motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint[,]” id. at 120, so the Court may consider all “affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion” in resolving a request for summary disposition pursuant to MCR 2.116(C)(10). Id. Accordingly, the Court shall refer to Plaintiff Shoppes Plaza’s amended complaint and the materials submitted by the parties in setting the scene of the dispute.

In 2012, Plaintiff Shoppes Plaza negotiated with Defendant NHS Retail One, LLC (“NHS”) for the purchase of the strip mall at issue. NHS, as the seller, made representations to Shoppes Plaza about the property itself and the tenants that occupied the strip mall. As negotiations progressed, one tenant – Defendant Brody Ventures, LLC, d/b/a Sports Clips (“Brody”) – advised NHS that it “would be closing its store” and terminating its lease. See Amended Complaint, ¶ 12. Consequently, NHS opened discussions with a potential replacement tenant. At that same time, NHS was attempting to lease a separate space in the strip mall to Moe’s Southwest Grill (“Moe’s”). In the fullness of time, Moe’s became a tenant, sharing a utility meter with the adjacent nail salon, see Defendants’ Answer to Plaintiff’s Complaint, Exhibit 3 (Lease Agreement at Page 10, showing floor plan), which caused concern for the nail-salon owner. Additionally, while Shoppes Plaza and NHS were closing on the sale of the strip mall, Kent County sent out a tax bill for the property on December 1, 2012. Finally, in February of 2013, Brody entered into a lease-termination agreement with Shoppes Plaza.

On August 29, 2013, Plaintiff Shoppes Plaza filed this suit against Defendants NHS, Norman Leslie in his capacity as NHS's principal, Brody as the operator of Sports Clips, and Christian and Kerry Wiser as guarantors of Brody's lease obligation. Plaintiff Shoppes Plaza's amended complaint filed on October 23, 2013, sets forth the three claims at issue in the defendants' motion for summary disposition.¹ After completing discovery, the defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10) with respect to Shoppes Plaza's claims for breach of contract against NHS, fraudulent concealment against NHS and Leslie, breach of the lease agreement against Brody, and breach of a personal guaranty signed by the Wisers. After hearing oral arguments on the motion, the Court must determine whether Shoppes Plaza can proceed on its claims.

II. Legal Analysis

Although the defendants have cited MCR 2.116(C)(8) and (10) in their motion for summary disposition, the Court must consider materials outside the pleadings in order to resolve the motion, so the Court shall treat the motion as a request for summary disposition under MCR 2.116(C)(10). See Sal-Mar Royal Village, LLC v Macomb County Treasurer, 301 Mich App 234, 238 (2013). A motion for summary disposition under MCR 2.116(C)(10) should be granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." West v General Motors Corp, 469 Mich 177, 183 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." Id. Applying these standards, the Court shall consider each of the three claims challenged by the defendants.

¹ The Court issued an opinion and order on February 12, 2014, addressing a fourth claim that the Court need not reconsider in resolving the defendants' current motion for summary disposition.

A. Breach of Contract Against NHS.

Plaintiff Shoppes Plaza's claim against Defendant NHS for breach of the parties' purchase agreement comprises three separate transgressions: (1) failure to disclose Defendant Brody's plan to close its business and renounce its lease obligation; (2) refusal to pay the Kent County tax bill sent on December 1, 2012; and (3) failure to disclose the arrangement with the nail salon for utility bills resulting from the shared utility meter. To support its claim for breach of contract, NHS must offer evidence on three elements: "(1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." Miller-Davis Co v Ahrens Construction, Inc, 495 Mich 161, 178 (2014). On April 17, 2012, Shoppes Plaza and NHS both signed a document entitled "Commercial Real Purchase Agreement," see Counter-Complaint, Exhibit 1, which Shoppes Plaza cites as the exclusive basis for its breach-of-contract claim against NHS. See Amended Complaint, ¶ 11. Accordingly, the Court simply must consider the terms of that purchase agreement to ascertain whether NHS breached the parties' contract in any regard.

Plaintiff Shoppes Plaza characterizes Defendant NHS's failure to disclose Brody's intention to renounce its lease as a breach of the purchase agreement, but the Court cannot find any provision in the purchase agreement that could support such a claim. To be sure, the purchase agreement deals with subjects such as vacant portions of the strip mall, see Counter-Complaint, Exhibit 1 (purchase agreement, § 7), tenants, see id. (purchase agreement, § 11), and changes in the condition of the strip mall "because of fire or some other casualty between the effective date of this Agreement and the date of the closing," see id. (purchase agreement, § 16), but nothing in the purchase agreement even remotely requires NHS to notify Shoppes Plaza about changes in the financial conditions of tenants. The Court has reviewed the tenant estoppel certificate signed by Christian Wisser on behalf of Brody

on September 13, 2012, see Shoppes' Response in Opposition to Defendants' Motion for Summary Disposition, Exhibit 4, but nothing in that document imposes a disclosure obligation upon NHS, nor could NHS be contractually bound by Wiser's signature on behalf of Brody. See AFSCME Council 25 v Wayne County, 292 Mich App 68, 80 (2011) ("It goes without saying that a contract cannot bind a nonparty."). In sum, Shoppes Plaza has no basis for asserting a claim for breach of contract against NHS, regardless of whether NHS failed to disclose to Shoppes Plaza the precarious financial condition of a strip-mall tenant.² Accordingly, the Court shall grant summary disposition in favor of the defendants on that aspect of Shoppes Plaza's breach-of-contract claim.

The purchase agreement signed by Plaintiff Shoppes Plaza and Defendant NHS thoroughly addresses the subject of taxes. See Counter-Complaint, Exhibit 1 (purchase agreement, § 9). To be precise, the purchase agreement states, in pertinent part, as follows:

Seller shall pay all real and personal property taxes that are due and payable by the date of the closing. Buyer shall pay all real and personal property taxes that are due after the date of the closing. . . . The current real and personal property taxes shall be prorated as of the date of closing between Seller and Buyer based on the fiscal year of each taxing authority, and for purposes of the proration the taxes shall be deemed to be paid in advance. The date of closing shall be attributed to Buyer.

Id. On December 1, 2012, Kent County mailed a tax bill for more than \$10,000.³ Meanwhile, at the closing, the seller, *i.e.*, NHS, received a \$950.48 credit and the buyer, *i.e.*, Shoppes Plaza, incurred

² Plaintiff Shoppes Plaza's reliance upon the unpublished decision of our Court of Appeals in Grand Pointe Property, LLC v SEC Grand Pointe, LLC, No 301293 (Mich App Jan 17, 2013), to support its breach-of-contract claim is entirely misplaced. The verdict for the plaintiffs in the Grand Pointe case arose from a "claim for fraud based on false representation," id., slip op at 9, rather than a breach-of-contract theory. Thus, although the Grand Pointe decision may support Shoppes Plaza in its effort to recover on its fraud claim, the decision affords no assistance to Shoppes Plaza in its effort to recover for breach of contract.

³ The Court has spent much too much time spelunking in the file in search of documents, but the Court has yet to unearth a copy of the original tax bill.

a corresponding charge of \$950.48 for proration of the Kent “County Tax 11/30/12 to 12/31/12 @ 11191.09/yr.” See Defendants’ Motion for Partial Summary Disposition, Exhibit 6. This evidence clearly establishes that, consistent with the terms of the purchase agreement, the parties treated the Kent County taxes as “paid in advance[.]”see Counter-Complaint, Exhibit 1 (purchase agreement, § 9), which resulted in a credit to NHS for one month’s prepaid taxes for December 2012 after the closing occurred. Under that approach, and consistent with the language of the purchase agreement, the buyer, *i.e.*, Shoppes Plaza, thereafter bore sole responsibility for Kent County taxes, which were deemed “paid in advance[.]”see Counter-Complaint, Exhibit 1 (purchase agreement, § 9), and thus applied in calendar year 2013 and beyond. Because the parties’ purchase agreement unambiguously resolves the issue of the Kent County taxes in favor of the seller, *i.e.*, NHS, the Court must decide the issue as a matter of law,⁴ see Holland v Trinity Health Care Corp, 287 Mich App 524, 526-527 (2010), and award summary disposition to NHS under MCR 2.116(C)(10).

The final component of Plaintiff Shoppes Plaza’s breach-of-contract claim strikes the Court as truly odd. The layout of the strip mall apparently requires two tenants – the nail salon and Moe’s – to share a utility meter. As a result, Shoppes Plaza alleges that it wound up having to pay utility bills for the nail salon. See Amended Complaint, ¶¶ 21-22. Be that as it may, the parties’ purchase agreement contains no provision even remotely discussing allocation of utility costs. See Counter-

⁴ Our Supreme Court has drawn a clear distinction between the treatment of unambiguous contracts and contracts that are ambiguous: “Where a contract is to be construed by its terms alone, it is the duty of the court to interpret it; but where its meaning is obscure and its construction depends upon other and extrinsic facts in connection with what is written, the question of interpretation should be submitted to the jury, under proper instructions.” Klapp v United Ins Group Agency, Inc, 468 Mich 459, 469 (2003). “Only when contractual language is ambiguous does its meaning become a question of fact.” Holland v Trinity Health Care Corp, 287 Mich App 524, 527 (2010). Because the Court regards the purchase agreement as unambiguous on the matter of Kent County taxes, the Court must resolve the parties’ dispute on that point as a matter of law.

Complaint, Exhibit 1 (purchase agreement). Moreover, the purchase agreement makes no mention of any duty to disclose information about utilities. See id. As a result, the Court cannot fathom how Shoppes Plaza can recover damages from Defendant NHS on a breach-of-contract claim predicated upon NHS's failure to apprise Shoppes Plaza of the existing utility arrangement with the nail salon.⁵ Consequently, the Court must award summary disposition to NHS on that aspect of Shoppes Plaza's breach-of-contract claim.

B. Silent Fraud.

Count Two of Plaintiff Shoppes Plaza's amended complaint presents a claim for silent fraud, which is a tort of omission. In order to "prove silent fraud, also known as fraudulent concealment, the plaintiff must show that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure." Lucas v Awaad, 299 Mich App 345, 363-364 (2013). Shoppes Plaza accuses Defendant NHS and its principal, Defendant Norman Leslie, of failing to disclose the precarious nature of the Sports Clips tenancy and issues concerning the utility meter that the nail salon had to share with Moe's. The record does not support a claim for silent fraud on either one of those bases.

Defendant Brody operated the Sports Clips franchise in the strip mall under a lease agreement signed by Defendant NHS's predecessor. While Plaintiff Shoppes Plaza and NHS were in their final negotiations over the sale of the strip mall in 2012, Brody's principal (Defendant Christian Wisser)

⁵ The lease agreement signed by NHS and the nail-salon owner clearly states that all of the electricity and gas "consumed in the premises shall be paid for by" the "Tenant." See Defendants' Brief in Support of Motion for Summary Disposition, Exhibit 4 (lease agreement, § 21 at Page 4). Beyond that, if the landlord cannot "split utilities," the lease entitles the landlord to "bill the utilities to the Tenant on a pro-rata basis." Id. Therefore, the language of the lease itself belies the claim that NHS burdened Shoppes Plaza with an obligation to pay the nail salon's utility bills.

informed NHS's principal (Defendant Norman Leslie) that Brody was suffering financial troubles that could prompt the closing of the Sports Clips store in the strip mall. Consequently, Leslie began discussing a new lease – including a reduced rent rate – with Stacey Patulski in November of 2012. See Amended Complaint, Exhibit 1 (November 6, 2012, e-mail from Patulski to Leslie). Ultimately, however, Patulski did not buy the Sports Clips franchise from Brody, so no rent reduction went into effect. Instead, Brody remained a strip-mall tenant after Shoppes Plaza bought the strip mall from NHS, and then Shoppes Plaza entered into a lease termination agreement that ended Brody's tenancy in February 2013, see Defendants' Answer to Plaintiff's Amended Complaint, Exhibit 4, and enabled Sports Clips to continue operating in the strip mall, albeit under new ownership.

The Court acknowledges that a strip-mall seller's shenanigans aimed at hiding problems with a financially risky tenant can support a fraud claim by a strip-mall purchaser, see, e.g., Grand Pointe Property, LLC v SEC Grand Pointe, LLC, No 301293 (Mich App Jan 17, 2013), but nothing in this case justifies a cause of action against Defendant NHS for silent fraud. First, as the closing date for the transaction approached, NHS and Shoppes Plaza swapped e-mail correspondence about Sports Clips as an existing tenant and Moe's as a new tenant. See Defendants' Brief in Support of Motion for Summary Disposition, Exhibit 2. In response to Shoppes Plaza "wondering whether we can put off the Sports Clips lease assignment until after close as well" as negotiations with Moe's, id., NHS sent an e-mail explaining that "the Sports Clips guys haven't been hounding us for any change to occur pre-closing, so that matter can certainly wait." Id. Thus, NHS plainly engaged in a discussion with Shoppes Plaza about the Sports Clips lease. Second, although Brody and its principal informed NHS of financial concerns that might eventually force Brody to renounce its lease obligations, Brody did not actually attempt to escape from its lease obligations prior to the closing on the strip mall, so

NHS had no concrete information about Brody to provide to Shoppes Plaza.⁶ Third, in the wake of NHS's sale of the strip mall to Shoppes Plaza, Sports Clips stayed on as a tenant, albeit eventually under new ownership. Today, the strip mall Shoppes Plaza purchased from NHS is completely filled with paying tenants, including Sports Clips. Accordingly, the Court can neither find silent fraud nor justify any award of damages against NHS and Norman Leslie for their handling of the Sports Clips lease.⁷ Thus, the Court must grant summary disposition to NHS and Leslie on the silent-fraud claim concerning the Sports Clips lease.

Similarly, Plaintiff Shoppes Plaza's silent-fraud claim regarding the nail-salon utility meter cannot survive the defendants' motion for summary disposition. As an initial matter, the Court notes that the problem – to the extent a problem existed – was evident to anyone who looked around inside the strip-mall, so Shoppes Plaza could readily have discovered the utility-meter situation on its own. More significantly, “in order to prove a claim of silent fraud, a plaintiff must show that some type of representation that was false or misleading was made[.]” *M&D, Inc v McConkey*, 231 Mich App 22, 31 (1998) (conflict-panel decision). With respect to the utility-meter issue, Shoppes Plaza has simply alleged that Defendants NHS and Norman Leslie knew about the meter but failed to disclose that information to Shoppes Plaza. Because Shoppes Plaza has offered no evidence of any words, “action or conduct . . . intended to create a misimpression” to Shoppes Plaza, *see id.* at 33, no silent-

⁶ The Court regards Plaintiff Shoppes Plaza's reliance upon the negotiations between Stacey Patulski and Defendant NHS as a red herring. NHS engaged in discussions with Patulski about rent concessions, *see* Amended Complaint, Exhibit 1 (November 6, 2012, e-mail from Patulski to Leslie), but nothing came of the discussions, so no harm befell Shoppes Plaza as a result of the discussions.

⁷ Plaintiff Shoppes Plaza has offered no evidence to prove that it now receives less rent from the Sports Clips lease than it would have received from Brody under its lease. Therefore, the Court has no basis to conclude that Shoppes Plaza suffered an actual loss as a result of the substitution of the new owner of the Sports Clips store for Brody.

fraud claim can be sustained. See id. Consequently, the Court must award summary disposition to NHS and Leslie on the utility-meter aspect of Shoppes Plaza’s silent-fraud claim.

C. Breach of Lease Agreement and Personal Guaranty.

In Count Three of its amended complaint, Plaintiff Shoppes Plaza presents a straightforward claim against Defendant Brody for breaching the lease agreement for the Sports Clips space and the Wisers for breaching their personal guaranty to cover the lease obligations. Brody plainly failed to satisfy its financial responsibility under the lease, but Shoppes Plaza ultimately negotiated a lease termination agreement with Brody that ended its tenancy and enabled another owner to take over the Sports Clips store.⁸ See Defendants’ Answer to Plaintiff’s Amended Complaint, Exhibit 4. Under the terms of that agreement, Shoppes Plaza agreed to end Brody’s lease in exchange for the payment of \$7,853.86 in overdue rent and \$2,500 for “fees and costs of re-letting the premises.” Id., Exhibit 4 (Lease Termination Agreement, §§ 1-2). Brody apparently made the required payment in timely fashion, see Defendants’ Motion for Partial Summary Disposition, Exhibit 8 (e-mail exchange), so the Brody lease – including all of its obligations – terminated by dint of the express terms of the lease termination agreement.

Plaintiff Shoppes Plaza does not challenge the authenticity or the binding nature of the lease termination agreement, but Shoppes Plaza insists the agreement reserved its right to seek “damages resulting from the early termination and subsequent rental to a new tenant with four months[’] free rent.” See Shoppes’ Response in Opposition to Defendants’ Motion for Summary Disposition at 12.

⁸ The copy of the lease termination agreement contained in the record bears no signatures, see Defendants’ Answer to Plaintiff’s Amended Complaint, Exhibit 4, but the e-mail correspondence between representatives of Plaintiff Shoppes Plaza and Defendant Brody makes clear that both sides signed the agreement. See Defendants’ Motion for Partial Summary Disposition, Exhibit 8.

The agreement states that, upon Defendant Brody's payment of the agreed sum and Brody's vacation of the premises by the surrender date of February 14, 2013, "the Lease with respect to Tenant only shall be deemed terminated, effective on the Surrender Date." See Defendants' Answer to Plaintiff's Amended Complaint, Exhibit 4 (Lease Termination Agreement, § 2). To be sure, the agreement also provides that Shoppes Plaza "will maintain any and all other rights and remedies established under the Lease or under the law of the State of Michigan, and does not waive such rights and remedies by virtue of this Agreement." Id. But the Court has no basis to conclude that Shoppes Plaza had any right under the Brody lease to seek the damages it has requested for the transition period from Brody to another Sports Clips owner.⁹ As a result, the Court must grant summary disposition pursuant to MCR 2.116(C)(10) on Shoppes Plaza's claims that Brody breached its lease agreement and that the Wisers must cover Brody's obligation because of their personal guaranty.

III. Conclusion

For all of the reasons stated in this opinion, the Court must grant summary disposition to the defendants under MCR 2.116(C)(10) with respect to all of the claims asserted by Plaintiff Shoppes Plaza in Counts One, Two, and Three of its amended complaint. Therefore, all that remains in this

⁹ Remarkably, neither Plaintiff Shoppes Plaza nor the defendants have presented to the Court a copy of the lease agreement between Shoppes Plaza and Defendant Brody. As an initial matter, MCR 2.113(F)(1) states that, in most cases, "[i]f a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit" Here, Shoppes Plaza's amended complaint simply alleges that, "[o]n September 1, 2009, NHS and Brody executed the Lease[.]" see Amended Complaint, ¶ 32, but Shoppes Plaza did not attach that lease to its amended complaint or explain its failure to do so. Beyond that, our Supreme Court has made clear that, in response to a summary-disposition motion under MCR 2.116(C)(10), the party opposing the motion must present "substantively admissible evidence" supporting the claim at issue. See Maiden, 461 Mich at 121. Shoppes Plaza's failure to do so obligates the Court to grant summary disposition to the defendants with respect to Shoppes Plaza's claim based upon the lease that Brody signed.

case is final disposition of the \$75,000 placed in escrow that the Court discussed in its opinion issued on February 12, 2014. The Court shall schedule a status conference in the near future to determine, with the parties' assistance, how to resolve that lingering dispute.

IT IS SO ORDERED.

Dated: April 20, 2015



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge