

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

WINGS EIGHT INC., a Michigan corporation,

Plaintiff/Counter-Defendant,

vs.

GRAND RIVER RETAIL, LLC, an Indiana
limited liability company,

Defendant/Counter-Plaintiff.

Case No. 14-11739-CZB

HON. CHRISTOPHER P. YATES

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OPINION AND ORDER GRANTING DEFENDANT GRAND RIVER RETAIL'S
MOTION FOR SUMMARY DISPOSITION AS TO COUNTS FOUR AND FIVE

This dispute raises two fascinating questions: (1) why is Buffalo Wild Wings called BW3?; and (2) when a landlord's title to property is transferred by a deed in lieu of foreclosure, as opposed to a sale of that property, does that transfer trigger a tenant's right of first refusal? The short answer to the second question is no, so the Court must grant summary disposition to Defendant Grand River Retail, LLC ("Grand River") under MCR 2.116(C)(10) on Counts Four and Five of the complaint filed by Plaintiff Wings Eight Inc. ("Wings Eight").¹ The Court must provide context for its ruling in order to explain precisely why Wings Eight cannot buy the property that it now rents.

In March of 2003, S.D. Benner, L.L.C. ("Benner") and Wings Eight entered into a landlord-tenant relationship by signing a long-term lease for property located at 3050 Alpine Avenue, N.W., in Walker. See Second Amended Complaint, Exhibit 1. Section 4(c) of the lease afforded Wings

¹ The short answer to the first question is that the company started as "Buffalo Wild Wings & Weck," but it dropped the reference to "weck" when it stopped serving sandwiches on weck rolls. As explained by allrecipes.com, "[w]eck rolls are cousins to the Brotchen and Kaiser rolls but are prepared and shaped differently." None of that information leads to summary disposition for anyone in this case, however, so the Court shall end its response to the first question on that note.

Eight “the first right of refusal to purchase the Leased Premises and the Building . . . should Landlord decide to sell the Leased Premises to someone other than another entity owned by or to be formed and owned by Landlord for a purchase price equal to the offer received in writing by Landlord[.]” Id. (Lease Agreement, § 4(c)). For more than a decade, Wings Eight operated a Buffalo Wild Wings restaurant on the property, paying its rent to Benner on a monthly basis.² Indeed, the Buffalo Wild Wings establishment still does business on Alpine Avenue despite the dispute before the Court.

In 2007, Benner, its commercial lender, Comerica Bank (“Comerica”), and Wings Eight all signed a “Subordination/Non-Disturbance Agreement” that spelled out, *inter alia*, their duties in the event that Comerica acquired the property “by foreclosure, deed in lieu of foreclosure, or in any other manner,” during the Wings Eight lease. See Second Amended Complaint, Exhibit 5 (Subordination/Non-Disturbance Agreement, §§ 6-7). In the fullness of time, Benner ran into financial difficulties and entered into a settlement agreement with Comerica on April 27, 2014. See Grand River Retail, LLC’s Motion for Summary Disposition, Exhibit C. As part of that agreement, Benner executed a “Quit Claim Deed in Lieu of Foreclosure” transferring the property at 3050 Alpine Avenue, N.W., to an entity to be designated by Comerica.³ See id., Exhibit D. Grand River ultimately recorded that deed in lieu of foreclosure, thereby completing the title transfer from Benner to Grand River. Wings Eight now contends that that recording and title transfer triggered the right of first refusal.

² The original lease had a ten-year term, see Second Amended Complaint, Exhibit 1 (Lease Agreement, § 4(a)), which ran through May 7, 2013, see id., but the parties subsequently agreed to an extension of the lease through December 7, 2018. See id., Exhibit 2.

³ In December 2014, Comerica sold, transferred, and assigned its entire interest in the Benner loan documents to an entity affiliated with Defendant Grand River, which in turn designated Grand River as the recipient of the property in the deed in lieu of foreclosure. As a result, Grand River now stands in the shoes of Comerica, see First of America Bank v Thompson, 217 Mich App 581, 587 (1996), and has the same rights and duties that Comerica once had.

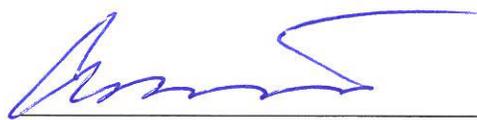
Both sides have moved for summary disposition under MCR 2.116(C)(10), which “tests the factual sufficiency of the complaint.” Maiden v Rozwood, 461 Mich 109, 120 (1999). In resolving the competing motions, the Court must consider “affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties[.]” See id. “Summary disposition is appropriate under MCR 2.116(C)(10) 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). Such “[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. Here, the facts are not in dispute, so the Court simply must determine as a matter of law which side should prevail on Plaintiff Wings Eight’s assertion of the right of first refusal in its lease.

Under Michigan law, “the promisee in a right of first refusal agreement cannot exercise any right to purchase property unless the seller decides to sell to a different buyer.” Randolph v Reisig, 272 Mich App 331, 339 (2006). Moreover, “rights of first refusal are to be interpreted narrowly.” LaRose Market, Inc v Sylvan Center, Inc, 209 Mich App 201, 205 (1995). Here, neither Benner nor Comerica nor Defendant Grand River ever decided “to sell to a different buyer.” See Randolph, 272 Mich App at 339. Instead, Benner defaulted on the obligation it owed to Comerica, so Comerica’s successor in interest, *i.e.*, Grand River, simply recorded a deed in lieu of foreclosure that Benner had provided as part of its arrangement with Comerica. Thus, even if Plaintiff Wings Eight maintained its right of first refusal despite signing the “Subordination/Non-Disturbance Agreement,” no conduct by Benner, Comerica, or Grand River amounted to a decision “to sell to a different buyer,” see id., so the right of first refusal was not triggered by the recording of the deed in lieu of foreclosure. See LaRose Market, 209 Mich App at 208 (explaining when “a ‘sale’ occurs”).

The Court's conclusion in this regard is confirmed and fortified by the language of the lease agreement between Benner and Plaintiff Wings Eight, see In re Egbert R Smith Trust, 480 Mich 19, 28 (2008) (Corrigan, J, concurring) ("rights of first refusal and options to purchase are governed by the contract terms established by the parties"), which ties the price for the exercise of the right of first refusal "to the offer received in writing by Landlord." See Second Amended Complaint, Exhibit 1 (Lease Agreement, § 4(c)). Here, of course, neither the landlord (Benner) nor the landlord's lender (Comerica) nor the lender's successor in interest (Grand River) received any offer in writing. Thus, as Wings Eight grudgingly concedes, the Court has no "offer" price to use in determining how much Wings Eight should pay to exercise its right of first refusal. Consequently, the Court cannot afford Wings Eight a right of first refusal because nobody made an "offer" to sell the property and no price exists that Wings Eight must pay to exercise its right of first refusal. Accordingly, the Court must award summary disposition under MCR 2.116(C)(10) to Defendant Grand River on Wings Eight's claims concerning its right of first refusal set forth in Counts Four and Five of its complaint.⁴

IT IS SO ORDERED.

Dated: January 5, 2016



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

⁴ The Court's decision in this regard appears to render moot Defendant Grand River's request for a declaratory judgment set forth as Count Two in its counterclaims, which asks for a ruling "that Wings Eight is in default of the Lease by failing to pay Additional Rent and as a result, no longer has a right of first refusal under Section 4(c) of the Lease[.]" If Grand River still requires a ruling on that point, however, the Court shall wait until the end of the case to resolve that issue because the parties still have a live dispute about whether Wings Eight has failed to satisfy its rent obligation.