

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

DAVID & WIERENGA, P.C., a  
Michigan professional corporation,

Plaintiff,

vs.

CWD 50 MONROE, LLC, a Michigan  
limited liability company,

Defendant.

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Case No. 13-05802-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING IN PART, AND DENYING IN  
PART, DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Tenant displacement is an unfortunate yet inevitable by-product of development in Grand Rapids. Here, the renovation plans of Defendant CWD 50 Monroe, LLC ("CWD") resulted in the departure of its long-term tenant, Plaintiff David & Wierenga, P.C. ("D&W"), from the building at 50 Monroe Avenue, N.W. By all accounts, D&W voluntarily vacated its leased space at 50 Monroe, but it did so with the specter of forced relocation hanging over its tenancy. In the wake of D&W's departure, D&W filed this action alleging breach of its lease contract by CWD as well as claims for constructive eviction and promissory estoppel. In response, CWD submitted a counterclaim against D&W for breach of the lease and then moved for summary disposition under MCR 2.116(C)(10) on each of D&W's three claims. The Court concludes that CWD is entitled to summary disposition on the constructive-eviction and promissory-estoppel claims, but genuine issues of material fact prevent the Court from awarding summary disposition in favor of CWD on D&W's claim for breach of the lease agreement.

## I. Factual Background

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” Corley v Detroit Bd of Educ, 470 Mich 274, 278 (2004). “In evaluating such a motion, the court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties.” Id. Accordingly, the Court must set forth the facts in the light most favorable to D&W.

Beginning in 1994, Plaintiff D&W leased space on the seventh floor of the building located at 50 Monroe Avenue, N.W., in downtown Grand Rapids. On November 16, 1996, D&W signed a five-year lease for office space on the seventh floor. See Complaint, Exhibit 1. Then, on April 1, 2002, D&W signed an amendment to the lease that extended its tenancy for five years and expanded the law firm’s presence on the seventh floor. See id. (Amendment No. 1 to David & Wierenga P.C. Lease). That amendment also granted D&W “one (1) five (5) year Option to commence at the” end of its existing lease term in 2007. Finally, on October 28, 2011, D&W exercised that option through an amendment to its lease that not only extended D&W’s tenancy through October 31, 2016, see id., Exhibit 2, but also provided D&W with “two (2), five (5) year options to renew the lease upon the same terms and conditions at the then escalated lease rate upon the expiration of this lease.” See id. In sum, D&W obtained the right to remain in the building under its lease until 2016 with an option to stay put for an additional ten years after that.

After Plaintiff D&W executed the 2011 amendment of its lease, the building changed hands. Specifically, Defendant CWD bought the property at 50 Monroe Avenue, N.W., and made plans to renovate and expand the building. According to D&W, CWD principal Samuel Cummings informed D&W partner Ronald David on June 4, 2012, that D&W “would need to relocate from 50 Monroe

during [a 24-month] renovation period.” See Plaintiff’s Brief in Opposition, Exhibit 8 (Affidavit of Ronald E. David, ¶ 4). David asked about moving to other space in the building, but Cummings informed David that “that would not be possible.” Id. Later, at a meeting on September 26, 2012, Cummings advised the partners of D&W that CWD “could not commit” to allowing D&W to move back into its space after completion of the renovations. Id. (Affidavit of Ronald E. David, ¶¶ 8-9). Consequently, D&W promptly “signed a non-binding letter of intent to lease space at 99 Monroe.” Id. (Affidavit of Ronald E. David, ¶ 10).

Before Plaintiff D&W formally committed to move into the building at 99 Monroe, D&W received a separate letter of intent from Defendant CWD that would have permitted D&W to move to space in a CWD building at 169 Monroe. See Plaintiff’s Brief in Opposition, Exhibit 8 (Affidavit of Ronald E. David, ¶ 13). Although that letter of intent from CWD “expressed an option to return to 50 Monroe after completion of renovations,” that letter of intent also “indicated that the new terms would not honor the terms of [D&W’s] existing lease.” Id. Because D&W regarded those terms as an unacceptable renunciation of its existing lease at 50 Monroe, D&W entered into a binding lease agreement for new space at 99 Monroe. Id. (Affidavit of Ronald E. David, ¶ 14). And in the fullness of time, D&W moved from 50 Monroe to 99 Monroe in June of 2013.

On June 21, 2013, Plaintiff D&W filed this lawsuit against Defendant CWD. D&W alleged that CWD had breached D&W’s lease for space at 50 Monroe Avenue, N.W., through anticipatory repudiation, that CWD had constructively evicted D&W from that space, and that CWD had induced D&W to relocate in a manner giving rise to a claim for promissory estoppel. CWD has moved for summary disposition under MCR 2.116(C)(10) on each of the three claims, contending that D&W voluntarily vacated its space at 50 Monroe and thereby forfeited any right to enforce the lease.

## II. Legal Analysis

Defendant CWD seeks summary disposition under MCR 2.116(C)(10), which requires relief if “there is no genuine issue as to any material fact[.]” “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.” See West v General Motors Corp, 469 Mich 177, 183 (2003). Therefore, the Court must determine whether any genuine issue of material fact precludes the entry of summary disposition on each of Plaintiff D&W’s three claims.

### A. Breach of the Lease.

By all accounts, Plaintiff D&W’s lease for space on the seventh floor at 50 Monroe Avenue, N.W., ran through October 31, 2016. See Complaint, Exhibit 2. Today, D&W no longer occupies that leased space and Defendant CWD no longer receives rent payments from D&W. In requesting summary disposition on D&W’s claim for breach of the lease, CWD asserts that D&W bears legal responsibility for severing the lease agreement because D&W vacated the premises. D&W argues, in contrast, that CWD committed the initial breach of the lease by effectively ordering D&W out of 50 Monroe during renovations and refusing to assure D&W of a right to return after renovations on the same terms as D&W enjoyed under the existing lease.

Our Court of Appeals has explained that ““one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform.”” Able Demolition, Inc v City of Pontiac, 275 Mich App 577, 585 (2007). “However, the rule only applies if the initial breach was substantial.” Id. “To determine whether a substantial breach occurred, a trial court considers ‘whether the nonbreaching party obtained the benefit which he or she reasonably

expected to receive.” Id. Here, Defendant CWD contends that Plaintiff D&W breached first when it vacated its leased space at 50 Monroe, whereas D&W argues that CWD effectively breached the lease prior to that by renouncing several material provisions of D&W’s existing lease.

Plaintiff D&W’s argument hinges upon “the doctrine of repudiation or anticipatory breach,” which applies when “a party to a contract unequivocally declares the intent not to perform[.]” See Stoddard v Manufacturers Nat’l Bank of Grand Rapids, 234 Mich App 140, 163 (1999). In such a circumstance, “the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance.” Id. D&W availed itself of neither of those options. But “the doctrine of anticipatory repudiation” also provides that “one party’s breach can excuse the innocent party’s obligation to perform.” Lontz v Continental Casualty Co, No 281183, slip op at 3 (Mich App March 26, 2009) (unpublished decision), citing Thomas Canning Co v Johnson, 212 Mich 243, 252 (1920). Accordingly, Michigan law excused D&W from its obligations under the lease if, but only if, CWD first unequivocally repudiated its own obligations under the lease.

“In determining whether a repudiation occurred, it is the party’s intention manifested by acts and words that is controlling, not any secret intention that may be held.” Stoddard, 234 Mich App at 163. Here, viewing the evidence in the light most favorable to Plaintiff D&W, Defendant CWD offered D&W an opportunity to return to 50 Monroe after renovations to that building, “but indicated that the new terms would not honor the terms of [D&W’s] existing lease” with respect to rent and location within the building. See Plaintiff’s Brief in Opposition, Exhibit 8 (Affidavit of Ronald E. David, ¶ 13); see also id., Exhibit 12 (Affidavit of James R. Wierenga, ¶¶ 10, 13-14). The language of CWD representatives in this regard was “sufficiently positive to be reasonably interpreted to mean that [CWD] will not or cannot perform” its obligations under the existing lease. See Paul v Bogle,

193 Mich App 479, 494 (1992). Accordingly, the Court must deny summary disposition to CWD on D&W's claim in Count One for breach of the lease because D&W has offered sufficient evidence to create a genuine issue of material fact under the doctrine of repudiation or anticipatory breach.

B. Constructive Eviction.

Plaintiff D&W's claim in Count Two for constructive eviction rests upon the contention that Defendant CWD so gravely threatened D&W's tenancy as to effectively oust D&W from its space at 50 Monroe. Although "Michigan has long recognized the theory of constructive eviction[,]" see Belle Isle Grill Corp v City of Detroit, 256 Mich App 463, 474 (2003), our Legislature's enactment of MCL 600.2918 now "governs claims for constructive eviction or ejection." Id. That is, MCL 600.2918(2) defines the elements of unlawful interference with a possessory interest" necessary for a claim of constructive eviction.<sup>1</sup> Id. at 475. Specifically, MCL 600.2198(2) refers to interference of a physical nature such as "use of force or threat of force[,]" see MCL 600.2918(2)(a), "removal, retention, or destruction of personal property of the possessor[,]" see MCL 600.2918(2)(b), "change, alteration, or addition to the locks or other security devices," see MCL 600.2918(2)(c), and similar physical impediments to the tenant's occupancy. Here, as in Belle Isle Grill, the plaintiff "did not allege any facts in the complaint that would fall within the parameters" of MCL 600.2918(2), so the Court must grant summary disposition to CWD.<sup>2</sup> See Belle Isle Grill, 256 Mich App at 475.

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<sup>1</sup> Our Court of Appeals apparently transposed numbers in citing the controlling statute on at least two occasions as "MCL 600.2198(2)," as opposed to MCL 600.2918(2). See Belle Isle Grill, 256 Mich App at 475. Read in context, the statutory references of our Court of Appeals manifestly invoke MCL 600.2918(2). Indeed, "MCL 600.2198(2)" simply does not exist.

<sup>2</sup> Although an unpublished decision suggests that mere words may suffice to support a claim for constructive eviction, see Tucker v Estate of Abe Budman, No 235204, slip op at 10 (Mich App Jan 27, 2004), the contrary published ruling in Belle Isle Grill constitutes binding precedent.

C. Promissory Estoppel.

Plaintiff D&W's claim in Count Three for promissory estoppel requires proof of four distinct elements: "(1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided." Zaremba Equipment, Inc v Harco National Ins Co, 280 Mich App 16, 41 (2008). The theory underlying D&W's promissory-estoppel claim is, at best, murky. The promise, according to D&W, concerned "the necessity of Plaintiff [D&W] leaving the Building" at 50 Monroe Avenue, N.W. See Complaint, ¶ 58. That promise prompted D&W to leave the building, and thereby incur "moving related expenses and increased rental expenses for leasing comparable office space for the duration of the lease term and renewals." See id., ¶ 61. This claim seems especially ill-suited to the facts of this dispute, especially in light of the existing contract, *i.e.*, the lease agreement, between the parties. See, e.g., Gore v Flagstar Bank, FSB, 474 Mich 1075, 1078 (2006) (Kelly, J, dissenting). Indeed, if Defendant CWD acted within its rights under the parties' existing contract, D&W could not possibly demonstrate that an extra-contractual promise must be enforced to avoid injustice. See Zaremba Equipment, 280 Mich App at 41. Conversely, if CWD violated the parties' contract, the proper vehicle for asserting such a claim can be found in Count One of D&W's complaint. Thus, the Court concludes that CWD is entitled to summary disposition under MCR 2.116(C)(10) on the claim for promissory estoppel in Count Three of D&W's complaint.<sup>3</sup>

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<sup>3</sup> In its brief in opposition to the motion for summary disposition, Plaintiff D&W has chosen to recast Count Three as a claim for unjust enrichment, as opposed to promissory estoppel. To the extent that D&W seeks to advance an unjust-enrichment claim, the Court must reject that effort. As our Court of Appeals has repeatedly explained, a claim for unjust enrichment cannot exist when the parties' relationship is governed by a contract. See, e.g., Belle Isle Grill, 256 Mich App at 478-479.

### III. Conclusion

Plaintiff D&W has pleaded a rather tenuous claim against Defendant CWD for breach of the lease agreement, but D&W has presented sufficient evidence to create a genuine issue of material fact with respect to that claim. Accordingly, the Court must deny CWD's request pursuant to MCR 2.116(C)(10) for summary disposition on that claim. In contrast, the Court readily concludes that D&W's claims for constructive eviction and promissory estoppel are unsustainable as a matter of Michigan law, so the Court shall award summary disposition under MCR 2.116(C)(10) to CWD on both of those claims.

IT IS SO ORDERED.

Dated: May 14, 2014



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