

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**ROYAL PETRO, LLC,
and ROYAL FT PETRO, LLC,
Plaintiffs,**

v.

**Case No. 18-170108-CB
Hon. James M. Alexander**

**MAKKI INVESTMENT, LLC,
And MOHAMAD MAKKI,
Defendants,**

_____ /

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motion for summary disposition.

According to Plaintiffs' Amended Complaint, Plaintiffs and Defendant Makki Investment, LLC, entered into an Asset and Real Estate Purchase Agreement (Agreement) on June 13, 2018, whereby Defendant was to sell, and Plaintiff was to purchase a gas station and convenience store.

Plaintiffs claim that they had performed all of their obligations under the Agreement including scheduling the closing with Defendants for September 15, 2018. Plaintiffs further claim that on or about August 6, 2018, Defendants' attorney notified Plaintiffs' attorney that Defendants were abandoning the deal. Plaintiffs contend that Defendants have since refused to perform under the Agreement by refusing to close.

On these general allegations, Plaintiffs filed their Amended Complaint on claims of (Count I) breach of contract; and (Count II) pierce the LLC veil (as to Mohamad Makki, sole owner of Makki Investment).

Defendants now move for summary of Plaintiffs' Amended Complaint under MCR 2.116(C)(8), and (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).¹ And a (C)(10) motion tests the factual support for a plaintiff's claims. *Id.* at 120.²

Defendants argue that they are entitled to summary disposition because (1) the exclusive remedy for a default under the Agreement is the return of the deposit; and (2) Mohamad Makki was not a party to the Agreement and piercing the corporate veil is an equitable remedy, not a separate cause of action. Defendants also seek attorney fees and sanctions.

Defendants first argue that they are entitled to summary of Plaintiffs' Amended Complaint because the Agreement provides that in event of a default, the exclusive remedy is the return of Plaintiffs' security deposit. To support their position, Defendants cite to paragraph 14.2.2 of the Agreement, which provides:

If Seller defaults and said default cannot be cured before Closing, Purchaser's sole and exclusive remedies, shall be to terminate this Agreement in which event

¹ Such a motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5). Further, "[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

² In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden*, 461 Mich at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

the Deposit will be returned to the Purchaser in full termination of this Agreement and neither party will have any further obligations to the other.

Defendants do not dispute that the parties entered into a valid Agreement. Defendants also admit that they defaulted under the Agreement and have since sold the property to a third-party. As such, Defendants admit that it is impossible to cure the defect. As such, Defendants argue that Plaintiffs' exclusive remedy is the return of their deposit. Defendants, however, argue that they are entitled to costs and attorney fees for having to defend the lawsuit.

In support of their argument Defendants attach: (1) Plaintiffs' Second Amended Complaint with the Asset & Real Estate Purchase Agreement; and (2) an email exchange between counsel for the parties.

In response, Plaintiffs argue that the facts of this case allow for Plaintiffs to recover more than their deposit. Plaintiffs argue that it is undisputed that Defendants breached the Agreement by refusing to close and selling the property to another purchaser. Plaintiffs argue that Defendants terminated the Agreement, not defaulted. Plaintiffs further argue that the Agreement did not allow Defendants to terminate the Agreement at will. Since Defendants terminated the Agreement, Plaintiffs argue that Defendants are liable for damages beyond the security deposit. Based on the same, Plaintiffs move for summary disposition under MCR 2.116(I)(2).

To support this argument, Plaintiffs attach (1) the Agreement, and (2) a copy of the deposit check with an email chain. Further, Plaintiffs point to section 14.1 of the Agreement, which provides:

Terminating Events:

14.1.1 Either party may terminate this Agreement due to an event and or none fulfillment of any obligation or satisfaction set forth in Sections 5, 6, 7, 8, or 10 above.

14.1.2 By Purchaser and Seller in a written agreement.

Plaintiffs contend that on July 18, 2018, Makki agreed to close on September 15, 2018. After that, Plaintiffs indicate that they took steps to prepare for closing, including securing a financing commitment. Plaintiffs claim that these preparatory steps all required additional funding. On August 6, 2018, however, Plaintiffs received an email from Defendants' attorney informing Plaintiffs that Defendants were terminating the Agreement. (Plaintiffs' Resp. Exhibit 2). Plaintiffs learned that Defendants agreed to sell the property to another buyer. The sale closed on October 30, 2018. Based on the same, Plaintiffs argue that if Defendants defaulted, rather than terminated, the Agreement, Defendants could have cured said default prior to their scheduled closing on September 15, 2018, but chose not to.

It is undisputed that Defendants breached the Agreement. The dispute is in how the breach is classified. Plaintiffs argue that Defendants terminated the Agreement while Defendants argue that they defaulted on the Agreement.

Black's Law Dictionary (11th ed.) defines breach of contract as a "violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance." The definition of terminate is "to put an end to; to bring to an end." *Id.* And default is defined as "to be neglectful; esp., to fail to perform a contractual obligation." *Id.*

As stated, it is clear through Defendants' admissions that Makki Investment breached the Agreement. Despite Defendants' argument that "breach of contract," "default," and "terminate" all mean the same, there are subtle differences in the definitions. Further, the Agreement provides separate sections for a "Termination Event" and a "Default." This indicates that the parties intended to have different meanings for the terms. This then leaves a question as to

whether the parties intended to have different remedies for a breach through termination or default.

Based on the same, the Court must first determine if the breach was caused by Defendant's termination or through a default. The Court will note that neither party submitted an affidavit in support of their respective motions. Further, both parties submitted very little documentary evidence. Plaintiffs argue that the Agreement was terminated, and supports the same with an email from Defendants' attorney admitting to the same. To the contrary, Defendants maintain that they defaulted on the Agreement rather than terminated it. As such, the Court is left with the opinion that a question of fact exists as to whether defendant Makki Investment terminated or defaulted on the Agreement.

Section 14.1 does not include a measure of damages that a party is entitled to in the event of a termination. As such, a question of fact does remain as to the amount of damages Defendants are liable for.

Based on the same, Defendants' motion for summary as it relates to Makki Investment is DENIED. Plaintiffs' motion under (I)(2) is granted is as much as Defendant Makki Investment breached the Agreement. The classification of the breach and the amount of damages to remain open.

Next, Defendants argue that Plaintiffs' claims against Makki individually should be dismissed because (1) he was not a party to the contract and (2) Michigan does not recognize a separate claim for piercing the corporate veil.

To support this position, Defendants rely on *Gallagher v Persha*, 315 Mich App 647; 891 NW2d 505 (2016). The *Gallagher* Court reasoned:

As has been said many times before today, Michigan law respects the corporate form, and our courts will usually recognize and enforce separate corporate

entities. But “usually” means not *always*, and when the requisite evidence establishes that the corporate form has been abused, the corporate form will be pierced so that creditors (and sometimes others) can seek payment of a corporate debt (like the judgment in this case) from a responsible corporate shareholder. Consequently, piercing the veil of a corporate entity is an equitable remedy sparingly invoked to cure certain injustices that would otherwise go unredressed in situations “where the corporate entity has been used to avoid legal obligations....” It is therefore a remedy, and not a separate cause of action. *Gallagher*, 315 Mich App at 653-654 (internal citations omitted).

In response, Plaintiffs argue that although piercing the corporate veil is not in and of itself a separate cause of action, the party seeking to disregard the separate existence of a corporation may do so in its original complaint or in a subsequent complaint after a judgment has been entered against the entity. *Id.* at 665-66. The Court agrees.

In order to successfully pierce the corporate veil, a Plaintiff must establish:

(1) the entity was the mere instrumentality of the owner, (2) the owner exercised his or her control in such a manner as to defraud or wrong the complainant in some way, and (3) the complainant would suffer an unjust loss or injury unless the court disregards the existence of the entity as separate from its owner. *Green v Ziegelman*, 310 Mich App 436, 454; 873 NW2d 794 (2015).

But “[t]here is no single rule delineating when a corporate entity should be disregarded, and the facts are to be assessed in light of a corporation’s economic justification to determine if the corporate form has been abused.” *Rymal v Baergen*, 262 Mich App 274, 294; 686 NW2d 241 (2004).

In its First Amended Complaint, Plaintiffs allege that Makki was the sole member and manager of Makki Investment, LLC. Plaintiffs also allege that, Makki Investment was a mere instrumentality of Makki and that he used the entity to commit a wrong or fraud against Plaintiffs. Plaintiffs further allege that as a result of Makki’s actions, they were and will continue to be damaged.

Essentially, Plaintiffs' theory is that Makki, knowing that he was able to receive a higher offer, entered into another purchase agreement in order to personally receive a higher profit for the sale. As a result, Makki, Makki Investment's sole member, breached the Agreement with Plaintiff for his personal gain.

Given these actions, Plaintiff claims that it should be entitled to pierce the corporate veil to attribute the alleged wrongs to Makki, individually – because he is the one that personally benefitted from breaching the contract by entering into and selling the property to another buyer. Assuming Plaintiffs are able to succeed on their breach of contract claim against Makki Investment, they may be able to piece the corporate veil.

Considering only the pleadings and accepting all well-pled factual allegations as true, Plaintiff has pled adequate factual allegations to sufficiently support its breach of contract and veil piercing claims – such that summary under (C)(8) is inappropriate and DENIED.

Based on the foregoing, Defendants' motion for summary pursuant to MCR 2.116(C)(8) and (C)(10) is DENIED in its entirety. Plaintiffs' motion pursuant to (I)(2) as to Defendant Makki Investment is GRANTED IN PART. The issue of the type of breach and damages is to remain open. Based on the Court's ruling, Defendants' request for attorney fees, costs, and sanctions is DENIED.

IT IS SO ORDERED.

June 26, 2019
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge