

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

**GRIFFIN'S SPORTS BAR & GRILL
OF COMMERCE, LLC,
Plaintiff/Counter-Defendant,**

v.

**Case No. 18-170230-CB
Hon. James M. Alexander**

**ON THE DUNES SPORTS BAR, INC.,
Defendant/Counter-Plaintiff**

and

**THOMAS WIDMER, VONDA WIDMER,
and ADAM MICHAEL ZIMMERMAN,
Defendants.**

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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant/Counter-Plaintiff's motion for summary disposition.

According to Plaintiff's Complaint, Plaintiff/Counter-Defendant and Defendant/Counter-Plaintiff entered into a Restaurant Service Agreement (RSA) on October 31, 2017. Pursuant to the RSA, Plaintiff/Counter-Defendant was to be the exclusive operator of the restaurant. Further, the RSA provided that Plaintiff/Counter-Defendant was to assume the premises "as is." Despite this, Plaintiff/Counter-Defendant alleges that Defendant/Counter-Plaintiff altered the layout of the restaurant over Plaintiff/Counter-Defendant's objection. Plaintiff/Counter-Defendant also alleges that Defendant/Counter-Plaintiff violated the RSA by failing to adequately maintain the premises. Additionally, Plaintiff/Counter-Defendant believes that Defendant/Counter-Plaintiff will falsely

assert that Plaintiff/Counter-Defendant breached the RSA to engage in self help to evict Plaintiff/Counter-Defendant.

On these general allegations, Plaintiff/Counter-Defendant filed its Complaint on claims titled (Count I) breach of contract; (Count II) business defamation and product disparagement; (Count III) tortious interference with business expectancy; (Count IV) conspiracy to commit breach of contract; (Count V) conspiracy to commit business defamation; and (Count VI) conspiracy to interfere with business expectancy.

In response, Defendant/Counter-Plaintiff filed a Counter-Complaint alleging that Plaintiff/Counter-Defendant, knew, at all relevant times, that Defendant Counter-Plaintiff was intending to build out the restaurant to provide additional space for guests. Additionally, Defendant/Counter-Plaintiff alleges that Griffin, Plaintiff/Counter-Defendant's manager, lacked experience in restaurant operations. Based on the same, Defendant/Counter-Plaintiff alleges that Griffin, and his staff, created problems for the restaurant and Defendant/Counter-Plaintiff. Additionally, Defendant/Counter-Plaintiff argues that the restaurant manager was associated with several other restaurants and was operating a catering service out of Defendant/Counter-Plaintiff's premises.

On these general allegations, Defendant/Counter-Plaintiff filed its Counter-Complaint on claims titled (Count I) declaratory relief; (Count II) breach of contract; (Count III) tortious interference with business relationship or expectancy; and (Count IV) breach of contract – failure to report.

As stated, Defendant/Counter-Plaintiff now moves for partial summary disposition under MCR 2.116(C)(10) of Counts II and IV of its Counter-Complaint. A (C)(10) motion tests the factual

support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).¹

Defendant/Counter-Plaintiff argues that there is no genuine issue of material fact that Plaintiff/Counter-Defendant defaulted under the terms of the parties' RSA and has failed to cure the default, resulting in the subsequent RSA termination.

Defendant/Counter-Plaintiff argues that the RSA is clear and under the same, Plaintiff/Counter-Defendant owed an additional \$30,096.78. Defendant/Counter-Plaintiff sent a Notice of Breach to Plaintiff/Counter-Defendant on June 7, 2019, which informed Plaintiff/Counter-Defendant of the breach and advised that it had seven days to cure the same pursuant to the RSA. (Defendant/Counter-Plaintiff, Exhibit 2). Based on Plaintiff/Counter-Defendant's breach and failure to cure, Defendant/Counter-Plaintiff argues it was entitled to engage in self-help and evict Plaintiff/Counter-Defendant.

Section 9 of the RSA provides:

In the event of a failure by Operator to pay to Dunes any amounts under Section 7 hereof, or in the event that Operator shall fail to comply with the law, regulation and ordinances applicable to the sale of alcoholic beverages at the Restaurant, Dunes shall have the right to revoke the license granted to Operator hereunder and bar Operator from the Complex and Restaurant, unless Operator cures any of such defaults or failures within seven (7) days after Dunes delivers written notice of such default or failure to Operator. (Defendant/Counter-Plaintiff, Exhibit 1).

In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

¹ 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.

Michigan law is also well-established that “a court must construe and apply unambiguous contract provisions as written.” *Rory v Cont’l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008).

In response, Plaintiff/Counter-Defendant argues that it was not in default under the percentage rate pursuant to the RSA because Defendant/Counter-Plaintiff used the wrong figure to calculate “gross sales.” Further, Plaintiff/Counter-Defendant argues that it did not cure the alleged default pursuant to the Notice of Default because the same was defective based on the inaccurate figure. In support of its position, Plaintiff/Counter-Defendant attaches the affidavit of Nicholas Kallas, Plaintiff/Counter-Defendant’s accountant. (Plaintiff/Counter-Defendant, Exhibit C).

Kallas states that, based on the available information, Defendant/Counter-Plaintiff used the wrong figures to calculate the gross sales percentage, and did not provide its calculation for the same. *Id.* Further, Kallas states that Plaintiff/Counter-Defendant did now owe \$\$30,096.78, as alleged by Defendant/Counter-Plaintiff. *Id.* Rather, Kallas states that Plaintiff/Counter-Defendant only owes \$24.55. *Id.*

Here, Plaintiff/Counter-Defendant, has submitted evidence disputing the validity of the default and, in turn, the Notice of Default. In reply, Defendant/Counter-Plaintiff argue that the breach could be “by \$.01 or by \$1,000,” and Plaintiff/Counter-Defendant has admitted that it, at least, was in default by \$24.55. As such, Defendant/Counter-Plaintiff maintain that it is entitled to terminate the RSA. But as stated, there is a genuine dispute regarding any alleged breach, the Notice of Breach, and the amount due. And Plaintiff/Counter-Defendant has submitted evidence establishing the same.

It is well settled that credibility and factual disputes are issues that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, “courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion” *White, supra* at 625, citing *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004); and *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005).

Here, the Court would necessarily have to make credibility and factual determinations in order to rule on Defendant/Counter-Plaintiff’s motion for partial summary. The same renders summary disposition pursuant to (C)(10) inappropriate.

Based on the foregoing, there are genuine issues of material fact as it relates to Plaintiff/Counter-Defendant’s alleged breaches of the RSA. As such, Defendant/Counter-Plaintiff’s motion for partial summary disposition is DENIED. Further, Plaintiff/Counter-Defendant’s motion pursuant to (I)(2) DENIED.

IT IS SO ORDERED.

September 25, 2019
Date

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