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

GATEWAY CENTER, LLC,
Plaintiff/Counter-Defendant,

v. **Case No. 19-171291-CB**
Hon. James M. Alexander

FUN EATS AND DRINKS, LLC,
Defendant/Counter-Plaintiff.
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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff's motion for summary disposition. According to Plaintiff's Complaint, Plaintiff and Defendant entered into a Lease Agreement on August 26, 1999. The parties executed a fourth amendment of the Lease that provided the Lease was extended through November 30, 2021, with a base rent of $13,333.33 per month. Sometime in October 2018, Defendant closed its business and ceased operation in the leased premises. Subsequently, in November 2018, Defendant failed to pay rent. On January 2, 2019, Plaintiff commenced a Summary Proceeding to recover possession of the premises. On January 22, 2019, Defendant surrendered possession.

On these general allegations, Plaintiff filed a single-count complaint for breach of the Lease Agreement. Plaintiff argues that Defendant breached the Lease by failing to pay rent for November 2018 through the remaining term of the Lease. Based on the same, Plaintiff claims (at the time of filing its Complaint) that it is owed $52,888.15 of unpaid rent plus other contractual damages.

In response, Defendant filed a Counter-Complaint alleging that it is no longer liable under the

Lease due to a Lease Termination and Surrender Agreement (Lease Termination) between the parties. According to the Counter-Complaint on November 7, 2019, Plaintiff, through email, stated that it would accept Defendant's liquor license in exchange for terminating lease. Plaintiff then directed Defendant to draft a termination agreement. Defendant claims that, in reliance upon the agreement, it drafted the Lease Termination and took steps to transfer its liquor license. After working together to finalize the Lease Termination, on December 19, 2018, Plaintiff informed Defendant that it was no longer interested in terminating the lease.

On these general allegations, Defendant filed its Counter-Complaint on claims titled (Count I) breach of contract; (Count II) promissory estoppel; and (Count III) declaratory relief.

Plaintiff now moves for summary disposition under MCR 2.116(C)(10). 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]

Plaintiff argues that as early as May 2018, Defendant indicated that they would be closing its operation. At that time, Plaintiff began marketing the premises in hopes of finding a new tenant. Despite its efforts, Plaintiff has been unsuccessful in finding a new tenant. Plaintiff argues that in October 2018, Defendant did, in fact, cease operation, and has refused to pay rent since.

Based on the same, Plaintiff argues that there are ne genuine issues of material fact that there is a signed Lease Agreement between the parties that obligates Defendant to pay rent and other contractual fees. And Plaintiff argues that Defendant failure to pay rent under the terms of the Lease Agreement constituted a default. As such, Plaintiff argues that, as a matter of law, it is entitled to

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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

damages as a result of Defendant's breach.

Further, Plaintiff argues that Defendant's affirmative defense that Plaintiff's claim is barred by the existence of a Lease Termination fails because Defendant did not attach a copy of the alleged agreement to is Answer and Affirmative Defenses pursuant to MCR 2.113. Further, Plaintiff argues that no such agreement exists, and if any alleged agreement does exist, the same does not comply with the statute of frauds. As such, Plaintiff argues that any alleged agreement is not binding on the parties.

In response, Defendant argues that in November 2018, Defendant began developing an exit strategy for the premises that included seeking a subtenant to assume the Lease Agreement. Defendant argues that after some communication between the parties, Plaintiff offered, in writing, to terminate Defendant's lease in exchange for Defendant paying November's rent and transferring its liquor license to an unspecified designee of Plaintiff's choosing. Defendant accepted the same, and in reliance upon the agreement, Defendant ceased marketing the property, and took steps to memorialize their agreement to a final Lease Termination and to transfer its liquor license.

Defendant claims that the parties worked with their respective counsel to finalize the agreement. Before the agreement was reduced to its final form, Plaintiff informed Defendant that its prospective new tenant was not interested in leasing the premises. Based on the new tenant's representation, Plaintiff informed Defendant the Lease Agreement remained in effect and demanded future rent. Defendant argues that there were no conditions that Plaintiff secure a new tenant prior to the Lease Termination with Plaintiff, and Plaintiff offers no evidence to support the same. Defendant argues that, at minimum, there is a question of fact regarding the Lease Termination.

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moving party is entitled to judgment as a matter of law. *Id.* at 120.

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).

Here, the parties do not dispute that existence of a valid Lease Agreement or that Defendant ceased paying rent for the premise. Rather, the parties dispute the existence of the Lease Termination that would have relieved Defendant from future obligations under the Lease Agreement.

Plaintiff first argues that Defendant's defense based on a Lease Termination fails because Defendant failed to attach a copy of any agreement to its Answer and Affirmative Defenses. MCR 2.113(C)(1) provides (in relevant part), "[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 . . . ."

A review of the record shows that on February 27, 2019, Defendant filed its Affirmative Defenses claiming that "Plaintiff's claims are barred by the existence of a Lease Termination and Surrender Agreement between the parties." The agreement was not attached to Defendant's Affirmative Defenses. On March 13, 2019, Defendant filed a Counter-Complaint and Amended Affirmative Defenses, the Lease Termination was attached to both.

On April 24, 2019, the Court issued a Scheduling Order that permitted the parties to amend their pleadings as of right up to May 21, 2019. Defendant's amendments with the Lease Termination were filed well before May 21, 2019. Based on the same, Defendant's pleadings were timely and cured any filing deficiencies pursuant to MCR 2.113. As such, Plaintiff's argument based on the same fails.

Next, Plaintiff argues that the Lease Termination was never executed by the parties because it did not contain the entire expression of the agreement. Further, Plaintiff argues that securing a new

tenant for the premises was a condition precedent to the Lease Termination, which was confirmed through emails between the parties. The October 31, 2018, email that Plaintiff relies on to support its position provides (in relevant part), "[w]e are negotiating a lease with a new tenant, and we would want the termination agreement/lease amendment signed simultaneously with our new lease." (Plaintiff's Exhibit 16).

Defendant, however, cites to a November 7, 2018, email to support its position that the agreement was not preconditioned on Plaintiff securing a new tenant. The November 7, 2018, email from Plaintiff's agent provides:

> I spoke with ownership.
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> Assuming November rent is paid on time, they will accept just the liquor license and they will agree to terminate the lease immediately.
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> Please have a lease amendment or a termination agreement drafted for our review. (Defendant's Exhibit 11).

That same day, Defendant responded to Plaintiff informing Plaintiff that Defendant's attorney would draft a termination agreement. (Defendant's Exhibit 12).

Although Plaintiff appears to make the argument that this is a straightforward breach of lease case, the facts show otherwise. It is clear, based on the evidence submitted, that the parties engaged in negotiations to terminate the lease in exchange for Defendant's liquor license. (*See* Defendant's Exhibits 8, 9, 10, 11, 12, 13, 14, 16, and 17) Indeed, Defendant drafted a Lease Termination based on Plaintiff's representations. (Defendant's Exhibit 13). These communications alone create a question of fact as to whether the parties agreed to terminate the lease and any terms regarding the same.

Additionally, Plaintiff argues that the Lease Termination is not valid because it does not comply with the statute of frauds. Michigan law is clear and provides:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any matter relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing. MCL 566.106.
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> Further,
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> Every contract for the leasing for a longer period than 1 year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing. . . . MCL 566.108.

There is, however, also a question of fact as to whether the November 7, 2018 email was a writing that complies with the statute of frauds. (Defendant's Exhibit 11). There is evidence which could lead the trier of fact to determine that the email, signed by Plaintiff's agent, constitutes an agreement between the parties to terminate the lease. Although Plaintiff argues the final Lease Termination was never signed, the trier of fact could determine that singing the same was a ministerial act, reflecting the parties' final agreement reached on November 7, 2018.

Based on the foregoing, there are genuine issues of material fact as to the existence, and terms of, the Lease Termination. As such, Plaintiff's motion for summary disposition is DENIED.

IT IS SO ORDERED.

September 9, 2019	/s/ James M. Alexander
Date	Hon. James M. Alexander, Circuit Court Judge