

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

**HMDS #1, LLC,  
Plaintiff/Counter-Defendant,**

**v.**

**Case No. 19-178083-CB  
Hon. James M. Alexander**

**AMAD PATROS GARBOU/JARBO,  
ET AT,  
Defendants/Counter-Plaintiffs,**

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**OPINION AND ORDER RE: SUMMARY DISPOSITIONS**

This matter is before the Court on cross motions for summary disposition.

According to Plaintiff's Complaint, Plaintiff and Defendants entered into a Lease Agreement for retail/commercial space in Detroit, Michigan. The Lease Agreement granted Plaintiff the Right of First Refusal, which allowed Plaintiff to match the terms of an offer to purchase the property.

On October 31, 2019, Plaintiff received a fully executed Purchase Agreement between Defendants and Alexander Bryce, LLC. The Purchase Agreement provided that the property would be sold for \$350,000, but in the case that the property is approved for a medical marihuana provisioning center, then the price shall be \$750,000. On November 8, 2019, Plaintiff advised Defendants that it would be exercising its Right of First Refusal. Despite exercising its right pursuant to the Lease Agreement, Defendants have failed to honor Plaintiff's Right of First Refusal.

On these general allegations, Plaintiff filed his Complaint on claims titled (Count I) breach of contract; and (Count II) specific performance.<sup>1</sup>

As stated, the parties now move for partial summary disposition 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).<sup>2</sup> And a (C)(10) motion tests the factual support for a plaintiff's claims. *Id.*<sup>3</sup>

In its motion, Plaintiff argues that it timely exercised its Right of First Refusal and has accepted the exact terms of the Purchase Agreement, but Defendants' have failed to honor the same or provide proof that the property does have a license. As such, Plaintiff argues that summary disposition should be granted in its favor.

Conversely, Defendants argue that, for Plaintiff to exercise its Right of First Refusal, Plaintiff must have agreed to be bound by the exact terms of the Purchase Agreement. Defendants argue that Plaintiff's letter attempting to exercise its rights deviated from the terms of

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<sup>1</sup> Plaintiff's Complaint included a claim for tortious interference against Alexander Bryce, LLC (Count III). On December 16, 2019, Plaintiff submitted a dismissal dismissing Alexander Bryce, LLC without prejudice. As such, Plaintiff's Count III is moot.

<sup>2</sup> 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) (emphasis added). 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). "When 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).

<sup>3</sup> 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 Purchase Agreement, and therefore, Plaintiff did not accept or timely exercise its Right of First Refusal.

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).<sup>4</sup>

Michigan law is 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). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court.” *Holmes v Holmes*, 291 Mich App at 594.

Further, when forming a contract,

The acceptance must be absolute and unconditional, and, if conditions are attached or if it differs from the offer, the transaction amounts only to a proposal and a counter proposal. *Harper Bldg Co v Kaplan*, 332 Mich 651, 655; 52 NW2d 536 (1952) (internal quotations and citations omitted).

There must be no variance between the acceptance and the offer. Accordingly a proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews its, or assents to the modification suggested. *Id.* at 656.

In the instant case, the parties do not dispute that the Lease Agreement was a valid contract. The Lease Agreement between Plaintiff and Defendants provides (in relevant part):

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<sup>4</sup> Further, “[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 pleadings as an exhibit . . .” MCR 2.113(C)(1). The requirement that the exhibit be attached is mandatory. *Stocker v Clark Refining Corp*, 41 Mich App 161, 165; 199 NW2d 862 (1972). And as previously stated, the contract becomes part of the pleadings, which the Court can review for purposes under MCR 2.116(C)(8).

So long as Tenant is not in default, Tenant shall be granted a right of first refusal to acquire the real property and building that is the subject of the Lease. Landlord shall provide Tenant a copy of the written terms of an acceptable offer from a third-party within seven (7) days of receiving offer. Tenant shall have fourteen (14) days after receiving written offer to inform Landlord in writing that it will accept the right to acquire the property under the terms of the acceptable offer. (Defendants' Exhibit A, §26.18).

On October 31, 2019, Defendants delivered to Plaintiff a copy of the Purchase Agreement between Defendants and Alexander Bryce, LLC, which triggered Plaintiff's right of first refusal. As it relates to the purchase price, the Purchase Agreement provides (in relevant part):

The Purchase Price for the Subject Premises shall be Three Hundred and Fifty Thousand (\$350,000.00). In the case that the property is approved for a medical marihuana provisioning center, including the required spacing variance from the City of Detroit Board of Zoning Appeals, the price shall be Seven Hundred Fifty Thousand Dollars (\$750,000.00) payable as follows:

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The purchase is specifically conditional upon Alexander Bruce, LLC or its sole owner Niccole Milton receiving city approval for a medical marihuana provisioning center at 210 West Eight Mile Road including the successful receipt of a required spacing waiver from the City of Detroit Board of Zoning Appeals. The Purchaser retains the option to purchase for \$350,000.00 if the medical marihuana approvals are denied. (Defendants' Exhibit B, §3).

In response, Plaintiff sent correspondence to Defendants on November 8, 2019 expressing its desire to exercise its right of first refusal pursuant to the Lease Agreement. Plaintiff's letter provides (in relevant part):

Tenant desires to exercise its Option under the Lease and negotiate in good faith a purchase agreement of the Property based on the same terms above. Please be advised that Tenant does not anticipate the need to be approved for a medical marihuana provisioning center, and will therefore purchase the Property for the base price of \$350,000. (Defendants' Exhibit D).

As stated, the Lease Agreement between Plaintiff and Defendants provides that Plaintiff may exercise its right of first refusal by informing Defendants that “that it will accept the right to acquire the property under the terms of the acceptable offer.” (Defendants’ Exhibit A, §26.18). The Purchase Agreement provided that if the property was approved for a medical marihuana provisioning center then the purchase price would be \$750,000.00. Further, “[t]he purchase [was] specifically conditional upon Alexander Bryce, LLC or its sole owner Niccole Milton receiving city approval for a medical marihuana provisioning center.” (Defendants’ Exhibit B, §3).

It is well established that “[u]nless acceptance is unambiguous and in strict conformance with the offer, no contract is formed.” *Pakideh v Franklin Commercial Mortg Grp, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). Plaintiff argues it properly elected to exercise its right of first refusal and accepted the exact terms of the Purchase Agreement. But, Plaintiff’s correspondence to Defendants’ expressing its desire to elect its option alters the terms of the Purchase Agreement.

In its correspondence, Plaintiff stated that it “does not anticipate the need to be approved for a medical marihuana provisioning center, and will therefore purchase the Property for the base price of \$350,000.” (Defendants’ Exhibit D). The Purchase Agreement was, however, “specifically conditional” upon receiving city approval for a medical marihuana provisioning center. Only in the event of that the medical marihuana approvals were denied would the purchase price be \$350,000. By stating that it did not need to be approved for a medical marihuana provisioning center and only offering to purchase the Property for \$350,000, Plaintiff did not accept the exact terms of the Purchase Agreement. As such, Plaintiff’s acceptance was

not in strict performance with the Purchase Agreement, and no contract was formed between Plaintiff and Defendants.

Further, Plaintiff's current offer to purchase the Property for \$750,000.00 is not a proper election of its right of first refusal, and it does not create a valid contract between the parties. Pursuant to the clear and unambiguous terms of the Lease Agreement, "Tenant shall have fourteen (14) days after receiving written offer to inform Landlord in writing that it will accept the right to acquire the property under the terms of the acceptable offer." (Defendants' Exhibit A, §26.18). Plaintiff's offer to purchase the Property at \$750,000 did not occur within the fourteen days provided for in the Lease Agreement.

Simply, Plaintiff failed to properly exercise its right of first refusal. Plaintiff did not accept the right to purchase the Property under the terms of the acceptable offer. Instead, Plaintiff varied the terms of the Purchase Agreement. By not accepting the terms of the Purchase Agreement, Plaintiff failed to exercise its right of first refusal. As such, Defendants have no contractual obligation sell the property to Plaintiff.

Based on the foregoing, there is no question of fact that Plaintiff did not properly exercise its right of first refusal. As such, there is no question of fact that Defendants did not breach the Lease Agreement. Based on the same, Defendants' motion for summary disposition of Plaintiff's Complaint is GRANTED, and the same is DISMISSED in its entirety. Plaintiff's motion for summary disposition is DENIED.

**IT IS SO ORDERED.**

February 26, 2020  
Date

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