STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO
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K-ZOO PROPERTY HOLDINGS LLC, a Michigan Limited Liability Company,

Plaintiff / Counter-Defendant,

v

SECURITAS SECURITY SERVICES USA, INC., a Delaware Corporation,

Defendant / Counter-Plaintiff.

Circuit Court File No. 2016-0552-CB

Hon. Alexander C. Lipsey

BENCH TRIAL OPINION AND ORDER

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FILED
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At a session of Court in the City and County of Kalamazoo, State of Michigan, on this 11th day of May, 2018.

PRESENT: HONORABLE ALEXANDER C. LIPSEY, Circuit Court Judge

This matter having come before the Court on a Complaint for Breach of Contract filed by the Plaintiff and a Counter-Complaint for Breach of Duty filed by the Defendant, the parties having presented proofs and oral arguments at a Bench Trial and having supplemented their positions with further briefing, and the Court being fully advised of the premises, for the reasons set forth below, this Court hereby finds in favor of the Defendant.

BACKGROUND

Plaintiff, K-Zoo Property Holdings, LLC, owns an industrial warehouse building in Kalamazoo County in which Defendant, Securitas Security Services USA, Inc., occupied a suite since February 2003 pursuant to a Lease Agreement. The subject lease was extended in 2015 and was slated to end on August 31, 2018.

On December 9, 2015, the local municipality performed a sewer smoke test and smoke backed up into the building as a result of an undetermined ventilation failure. Defendant thereafter began noticing a waxing and waning smell of sewage within the premises. On December 15, 2015, as the sewage smell was still present, Defendant gave notice to Plaintiff of the odor. The odor continued to intermittently intensify and linger, resulting in more repair notices to Plaintiff over the next several months. Plaintiff unsuccessfully attempted to verify the condition.

In July 2016, due to the continuation of the odor, Defendant gave notice to Plaintiff that it planned to begin abatement of rent that month and termination of the Lease Agreement by September 2016. Defendant vacated the premises on September 22, 2016.

On December 9, 2016, Plaintiff filed a Complaint against Defendant for Breach of the Leasing Contract. Plaintiff contends that Defendant did not meet the criteria for terminating the Lease Agreement early and that it suffered loss of rent and other damages as a result.

On January 17, 2017, Defendant filed a Counter-Claim against Plaintiff for Breach of Duty to Maintain and Make Repairs. Defendant contends that due to the continuation of the odor and the resulting early termination of the Lease Agreement, it incurred unanticipated moving costs and an increase in rent at its new business location.

On April 17, 2018, the parties appeared before this Court for a Bench Trial. Upon its completion, the Court took the matter under advisement and ordered the parties to submit

supplemental briefing. On April 24, 2018, the parties submitted their final briefing for the Court's consideration.

ANALYSIS

The general rule in Michigan is that a party who first materially breaches a contract cannot maintain an action against the other party for a subsequent failure to perform. *Walker & Co. v Harrison*, 347 Mich 630, 634–35, 81 NW2d 352, 355 (1957); *Flamm v Scherer,* 40 Mich App 1, 8-9; 198 NW2d 702 (1972).

Plaintiff contends that Defendant breached the Leasing Agreement by failing to pay rent and unjustifiably terminating it early. Defendant, on the other hand, contends that Plaintiff first materially breached the contract by failing to perform required duties; allowing Defendant to take advantage of the early termination clause.

Section 5 of the original Lease Agreement states:

> "...Lessor shall, at its sole cost and expense, maintain the entire premises described at Exhibit A in good repair and make all necessary repairs and replacements to all buildings (including the Leased Premises itself), interior and exterior, including but not limited to electrical, mechanical, heating and plumbing equipment, structural and non-structural repairs, any roof and glass areas, parking areas, grounds, landscaping, and sidewalk areas. Lessor shall have the continuing obligation to inspect the premises and accomplish repairs..."

Section 4 of the Lease Extension Addendum # 5 states:

> "Section 5 of the Initial Lease is hereby supplemented with the addition of the following paragraph:
>
> Notwithstanding anything contained herein to the contrary, if Lessor fails to commence to make any necessary maintenance, repair, or replacement for which Lessor is responsible within three (3) business days after receiving written notice from the Lessee of the need for the maintenance, repair, or replacement (except in the event

> of an emergency, in which case such repair shall be immediately commenced), and/or fails to diligently proceed to complete such repairs (or maintenance) following the commencement of the same, and in Lessee's reasonable judgement, there results a materially adverse impact on Lessee's ability to operate its business in the Premises in a reasonably safe or comfortable manner, then Lessee may make the repair (or take such other action as it deems reasonably necessary or desirable to effectuate reasonable mitigating relief from such adverse conditions) and deduct the cost of repair (or expense associated with such other action) from the rent as it comes due. In addition, should the integrity of the roof or any other structural component, or any building system, including but not limited to plumbing, electrical, and HVAC systems, be significantly impaired such that it materially interferes with the conduct of Lessee's business in the Premises for longer than three (3) business days following Lessor's receipt of written notice from Lessee with respect to same, then the rent will be abated during the impairment period. If the impairment continues for more than thirty (30) days following Lessor's receipt of the aforesaid notice from Lessee, then Lessee shall have the right, but not the obligation, to terminate this lease without penalty to Lessee at any time thereafter upon written notice to Lessor."

Plaintiff first argues that Defendant should have hired someone to come in and investigate the cause of the odor before they decided to vacate the premises early. Plaintiff points to the language in Section 4 of the Lease Extension Addendum # 5 which states "Lessee may make the repair (or take such other action as it deems reasonably necessary or desirable to effectuate reasonable mitigating relief from such adverse conditions) and deduct the cost of repair (or expense associated with such other action) from the rent as it comes due."

However, this Court finds no language in the lease to support Plaintiff's argument. Nowhere in the lease documents does it require that the Lessee must first try to remedy the impairment themselves before they can take advantage of the option to terminate the lease.

Pursuant to Section 4 of the Lease Extension Addendum # 5, to exercise the option for terminating the lease, three criteria must be met. First, the integrity of the roof or any other structural component, or any building system, including but not limited to plumbing, electrical,

and HVAC systems, must be significantly impaired. Second, the impairment must materially interfere with the conduct of the Lessee's business within the Premises. Finally, the impairment must continue for more than thirty (30) days following the Lessor's receipt of written notice from the Lessee.

As to the first criteria, Plaintiff argues that there is no evidence submitted at trial of problems with the HVAC system. Michael Dyer, Assistant Chief of the Comstock Township Fire Department, testified that, while he did not find the exact cause of where the smoke in the building was originating from, that the sewer smoke test would not have failed unless there was a dry or cracked pipe floor drain or a failure of the ventilation system. This is clearly a failure of one important system. Whether the smoke came from the impaired pipe floor drain or due to a failure of the HVAC ventilating system, the Court believes this criteria is established.

As to the second criteria, Plaintiff argues that the odor did not interfere with Defendant's business operation as some employees testified that the odor was bothersome but that they were still able to do their work. Defendant argued that it was hard to run an effective and profitable business and that it was embarrassing to have clients and third parties come into their place of business due to the odor. Evidence shows that Defendant had to shut down the business for three days due to the strong smell. The Court believes this criteria is established.

As to the third criteria, Plaintiff argues that it did not last more than 30 days. Plaintiff points to witness testimony that establishes that the odor would come and go intermittently. Defendant points out that there was 288 days between the first notice to Plaintiff and the day that Defendant vacated the premises. Evidence shows that Plaintiff was given notice of the odor in December 2015 and that the odor continued, although intermittently, until Defendant vacated the premises in September 2016. The Court finds that the 30 day requirement does not mean that the

odor must continually exist for 30 days; only that it remained unaddressed for 30 days after Plaintiff was first notified of the impairment. The Court believes this criteria is established.

The establishment of all three criteria would give Defendant the option to terminate the Lease Agreement without breaching the lease. Ultimately, Plaintiff was first put on notice of a problem in December 2015 when the sewer smoke test failed and the building filled with smoke. Section 5 of the Lease Agreement provides that the Lessor shall maintain the entire premises in good repair and make all necessary repairs and replacements to electrical, mechanical, heating and plumbing equipment. Section 5 of the Lease Agreement further provides that Lessor shall have the continuing obligation to inspect the premises and accomplish repairs.

Even with Defendant's notices of odor issues, Plaintiff did nothing for months until April 2016 when Plaintiff sent in a maintenance person, Joseph Bird, to look at the drains and check for possible dead animals in the ceiling. Evidence shows that Mr. Bird had no qualifications or experience in dealing with plumbing or HVAC related issues. In the case of a material system malfunction, Plaintiff would have had to hire an outside contractor. In this case, Plaintiff did not do that even with the knowledge that the sewer smoke test failed.

In regards to Defendant's Counter-Claim, Defendant seeks reimbursement of unanticipated moving costs and the increase in rent at its new business location. However, this Court is disinclined to award such damages to Defendant as these damages were costs Defendant would have incurred anyway upon vacating the premises. There was no evidence that Defendant had to make an emergency vacation of the property.

CONCLUSION

Based upon the foregoing, this Court finds, in regards to Plaintiff's Complaint, that Defendant did not breach the Leasing Agreement and Plaintiff is not entitled to damages.

This Court further finds, in regards to Defendant's Counter-Complaint, that Defendant is not entitled to damages.

IT IS SO ORDERED.

Dated: May 11, 2018

Honorable Alexander C. Lipsey
Circuit Court Judge

PROOF OF MAILING

I, Kelly Dollar, certify that on this date I mailed a copy of this document to the parties in interest at their above stated addresses via

☑ first-class mail
and/or
☐ interoffice mail.

Dated: 5-11-18

Kelly Dollar
Kelly L. Dollar
Law Clerk to the Hon. Alexander C. Lipsey