STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

MERRIWEATHER, LTD,

Plaintiff,

vs.

Case No. 19-1833-CB
Hon. Richard L. Caretti

NEW METHOD STEEL STAMPS, INC.,

Defendant.
_____/

OPINION AND ORDER

Plaintiff Merriweather, LTD ("Merriweather") filed a Motion for Reconsideration of the Court's August 15, 2019 *Opinion and Order* granting summary disposition in favor of defendant New Method Steel Stamps, Inc. ("New Method").

I. Background

For judicial economy, the Court incorporates the factual background more fully stated in its August 15, 2019 *Opinion and Order.* In short, Merriweather, as landlord, leased commercial property to New Method. Merriweather subsequently brought an action for eviction and asserted other claims against New Method. The parties entered into a Settlement Agreement and Mutual Release ("Settlement Agreement") which resolved all claims between them except for those arising from the Settlement Agreement itself.

In the Settlement Agreement, New Method agreed to leave the property in "broom clean" condition. In its present Complaint, Merriweather alleged that New Method breached the terms of the Settlement Agreement by leaving the property in damaged condition and in "a complete mess."

After hearing and considering New Method's motion for summary disposition, the Court concluded that the release clause in the Settlement Agreement barred the claim for most of Merriweather's alleged damage, which related to issues of maintenance and repair. To the extent Merriweather asserted claims for breach of the promise to leave the property in "broom clean" condition, the Court concluded that Merriweather did not produce sufficient evidence to create a question of material fact. Therefore, the Court dismissed Merriweather's claim for breach of contract. The Court also dismissed the unjust enrichment count because an express contract exists that covers the same subject matter.

On September 5, 2019, Merriweather filed a motion for reconsideration. New Method filed a response in opposition to the motion. The Court heard oral argument on the motion on September 27, 2019. Inadvertently, the Court's staff did not engage the Court reporting equipment on the date of the argument so no record of that proceeding exists. In compliance with information from SCAO, the Court offered an opportunity to the parties to correct the record. On October 3, 2019, counsel appeared before the Court and re-argued the motion. After hearing argument, the Court took the matter under advisement.

II. Arguments

Merriweather argues that the Court erred because it applied the release clause in the Settlement Agreement to future claims that did not yet exist at the time the parties entered into the release. Merriweather also argues that summary disposition was premature and a question of material fact exists as to the nature of the alleged damage.

III. Law and Analysis

For the Court to grant a motion for reconsideration, "[t]he moving party must demonstrate a palpable error by which the Court and the parties have been misled and show a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). A motion for reconsideration "which merely presents the same issue ruled upon by the Court, either expressly or by reasonable implication, will not be granted." *Id.*

"The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties." *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). "The grant or denial of a motion for reconsideration is a matter within the discretion of the trial court." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 8; 614 NW2d 169 (2000).

Courts are "permitted to revisit issues they previously decided, even if presented with a motion for reconsideration that offers nothing new to the court." *Hill v City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007). The trial court does not abuse its discretion "in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order." See e.g., *Chareneau v Wayne Co Gen Hospital*, 158 Mich App 730, 733; 405 NW2d 151 (1987). If a trial court wants to give a 'second chance' to a motion it has previously denied, it has every right to do so, and MCR 2.119(F)(3) does nothing to prevent this exercise of discretion. *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000) citation omitted.

Here, the Settlement Agreement between the parties contained a release clause that provided, in relevant part:

> Except for the obligations of the parties under this Agreement, Merriweather and Charlie . . . hereby releases, discharges and acquits NMSS . . . from any and all manner of action, causes of action, executions, debts, demands, rights, damages, costs, attorney fees, expenses and claims of every kind, nature and character whatsoever, whether in law or in equity, accrued or unaccrued, known or unknown, liquidated or unliquidated, certain or contingent, *which the releasing party ever had, now has or hereafter may in the future have against any person or entity released hereunder as a result of any fact, matter or thing existing* as of the Effective Date . . .

Merriweather's Response Exhibit A, emphasis added. Merriweather argues that the parties inspected the property before New Method vacated the premises but New Method subsequently damaged the floor when it removed the lobby desk. Merriweather maintains that it could not have known about the floor condition at the time of the release. According to Merriweather, "ripping up" the floor and removing fixtures does not constitute turning over the property in broom clean condition.

Merriweather's claim for damage to the floor sounds in breach of contract. Merriweather relies entirely on the Settlement Agreement promise that New Method would leave the property in "broom clean" condition. Setting aside the question of whether the "broom clean" term encompasses physical damage, Merriweather produced no evidence whatsoever in its Response showing any damage to the floor—much less that the damage occurred in the approximately 25 days after the parties entered the Settlement Agreement on September 5, 2018 but not after New Method vacated the property.[1]

Because the release language includes claims for damage "known or unknown," Merriweather's argument that "it could not have known about or have released" the floor damage lacks merit to the extent that the damage existed but Merriweather had not

observed it. The release applied to damage in existence as of the effective date, regardless of whether such a claim had accrued or whether it was known.

To the extent Merriweather argues that it could not have known about the damage to the floor because the damage had not yet occurred, Merriweather must present evidence that the alleged damage occurred after September 5, 2018 because it released any claims based on facts in existence before that date. The parties entered the Settlement Agreement on or around September 5, 2018. New Method vacated the property on or around September 30, 2018.

At oral argument, Merriweather produced a few photographs of the property but none clearly showed recent damage to the floor. Specifically, Merriweather presented pictures of alleged indentations left from the removal of a fixture when New Method moved out of the premises. However, it was clear to the Court that counsel referred to an area of dirt and discoloration where a desk had apparently been for years. The pictures showed no indentations. Counsel initially argued to the Court that tiles were missing. When the Court inspected the photos, it became clear that representation was inaccurate as the tiles were fully in place. Counsel for Merriweather then abandoned that argument.

After thorough review, the Court could find no indication in the photographs of indentations or anything that could attach a fixture to the floor—no brackets, no screws, no bolts, etc. Rather, two strips on the floor merely showed where a fixture had been for many years. Therefore, Merriweather has not presented sufficient evidence to create a question of material fact on the alleged damage to the floor. Neither has

[1] The Settlement Agreement required the removal of personal property and business equipment. According to the briefing, the lobby desk had been that place for many years.

Merriweather demonstrated that with discovery, it would be able to produce additional evidence of damage.

Similarly, Merriweather also argues that New Method damaged the parking lot while moving out. Again, Merriweather has not shown how the "broom clean" provision in the Settlement Agreement applies to the alleged physical damage to the parking lot. Merriweather also fails to show any damage to the parking lot that occurred after the signing of the Settlement Agreement. Rather, the photographs of the parking lot at best show apparent wear and tear from age. Therefore, for the same reasons as above, Merriweather has not shown that a question of material fact exists on its claim for breach of contract or that a palpable error occurred in the Court's decision to grant summary disposition in favor of New Method.

Finally, according to Merriweather, New Method left a large piece of concrete behind on the lawn, and at the time of the inspection, Merriweather was not aware that New Method would leave it. Again, it is less than clear that the "broom clean" term would apply to the removal of concrete. More problematic though, as explained above, the clear language of the release clause applies to "any fact or matter existing as of the Effective Date" of the Settlement Agreement. Merriweather does not argue or show that the concrete came into existence at the property only after the Effective Date.

Instead, Merriweather argues that it was unaware of New Method's intentions regarding the concrete. New Method represents that the concrete was present during the walk through; Merriweather does not produce any evidence to the contrary. As a result, Merriweather also fails to raise any question of material fact regarding the concrete. Put differently, Merriweather's lack of awareness that New Method would leave the concrete behind does not remove the concrete from the scope of the release

unless Merriweather can somehow show that the concrete did not exist on the property until after September 5, 2018. No such showing or argument has been made.

Merriweather further argues that the Court erred in granting a motion for summary disposition under MCR 2.116(C)(10) before the parties conducted discovery. However, when determining whether summary disposition is premature, the "question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position." *Marilyn Froling Revocable Living Tr. v Bloomfield Hills Country Club*, 283 Mich App 264, 292–93; 769 NW2d 234 (2009). "In addition, a party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence." *Id.* "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016) citation omitted.

In this case, Merriweather, as landlord, is in the best position to possess and present evidence of the condition of the property both before and after a tenancy. At a minimum, Merriweather should have offered the MCR 2.116(H) affidavits and demonstrated to the Court that probable testimony would support its contention. Merriweather has not shown that further discovery would uncover factual support for its position. Instead, Merriweather simply stated that the property condition is obviously a question of fact. Merriweather cited no authority requiring the Court to presume a question of fact exists on a motion under MCR 2.116(C)(10).

In effect, Merriweather seeks to circumvent the release language in the Settlement Agreement and proceed to discovery without providing the Court any basis to conclude that its present claims do not fall under the release. Merriweather states that the Court's decision immunized New Method to damage the property with impunity. However, despite Merriweather's hypotheticals of intentional damage, Merriweather overlooks that it has not asserted a claim in tort or even a claim for breach of a lease provision obligating New Method to pay for damage it caused to the property. Instead, Merriweather's claim relies entirely on a contractual promise to leave the property in clean condition. Merriweather presented no evidence and made no showing that it could develop evidence that the alleged damage falls within that provision or that it occurred subsequent to the Settlement Agreement and the parties' mutually agreed-upon release clause—which the Court is obligated to enforce.

Therefore, Merriweather has not shown that the Court was misled or that a palpable error occurred. The Court remains convinced that summary disposition was property granted. Merriweather's motion for reconsideration is denied.

IV. Conclusion

For the reasons set forth above, Merriweather's motion for reconsideration is DENIED. In accordance with MCR 2.602(A)(3), this *Opinion and Order* resolves the last pending claim and the case remains closed.

IT IS SO ORDERED.

HONORABLE RICHARD L. CARETTI
Circuit Court Judge

DATE: October 29, 2019

cc: Mark W. Peyser, Esq.
Robert C. Davis, Esq.

COUNTY OF MACOMB • STATE OF MICHIGAN •