

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

ENTERPRISE ROMEO, LLC,

Plaintiff,

vs.

Case No. 2013-3220-CK

GJERGJ G. GOJCAJ and NATURAL 1
CORP, d/b/a TIMES SQUARE FAMILY
DINING,

Defendants.

and

NATURAL 1 CORP, d/b/a TIMES SQUARE
DINING,

Counter-Plaintiff,

vs.

ENTERPRISE ROMEO, LLC, RROK GOJCAJ
And MARA GOJCAJ,

Counter/Third Party Defendant.

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OPINION AND ORDER

Plaintiff Enterprise Romeo, LLC (“Enterprise”) and Counter/Third Party Defendant Rrok Gojcaj (“R. Gojcaj”) (Enterprise and R. Gojcaj collectively as “Plaintiff Movants”) have filed a motion for summary disposition against Defendants Gjergj G. Gojcaj (“G. Gojcaj”) and Natural 1 Corp., d/b/a Times Square Family Dining (“Natural 1”) (G. Gojcaj and Natural 1 collectively as “Defendant Respondents”) have filed a response and request that the motion be denied. In addition, Plaintiff Movants have filed a reply in support of their motion.

In addition, Defendant Bender & Harlow Holdings, LLC (“Defendant Bender”) has filed a motion for summary disposition. Plaintiff has filed a response and requests that the motion be denied. Defendant Respondents have filed a concurrence to Defendant Bender’s motion.

Facts and Procedural History

This matter involves the purchase of real estate commonly known as 70927 Van Dyke, Bruce Twp., MI 48065 (“Subject Property”). In or about 2010, Defendant Bender owned the Subject Property. G. Gojcaj, through his company, Natural 1, leased the Subject Property from Defendant Bender and operated a restaurant named Times Square Family Dining (“Times Square”).

In summer/fall 2010, Defendant Bender sued Times Square in the 42-1 District Court for non-payment of rent. Attorney Peter Gojcaj represented Times Square in connection with that matter. The 42-1 District Court action ultimately settled, resulting in a “Settlement Agreement and Mutual Release” (“Settlement Agreement”), and a new lease dated November 29, 2010 (“Revised Lease”).

During the time of the above-referenced events, Defendant Bender had a mortgage on the Subject Property in favor of Bayview Loan Servicing, LLC (“Bayview”). In late 2010, Bayview foreclosed as the result of Defendant Bender’s breach of the terms of the mortgage. After Bayview foreclosed, but before the redemption period expired, Times Square, through its member G. Gojcaj, contacted Bayview in connection with its desire to purchase the Subject Property.

Although it/he had been cleared to purchase the Subject Property, Times Square/G. Gojcaj lacked the funds needed to purchase the Subject Property. In an effort to resolve the financial problems, G. Gojcaj contacted his uncle, R. Gojcaj. Ultimately, on February 25, 2011

R. Gojcaj purchased the Subject Property. The sale was memorialized by a “Real Estate Purchase Agreement” (“Purchase Agreement”). R. Gojcaj has allegedly subsequently assigned his rights in the Subject Property to his company, Enterprise.

On May 3, 2013, Enterprise filed its complaint against Defendant Respondents to recover possession of the Subject Property and for damages with the 42-1 District Court.

On May 30, 2013, Defendant Respondents filed their counter and third party complaint. In their counter/third party complaint, Defendant Respondents allege that R. Gojcaj, as owner of the Subject Property, and as landlord, has failed to maintain the Subject Property. Defendant Respondents also alleged that Mara Gojcaj (“M. Gojcaj”) tortiously interfered with their business relationships (Count II), that R. Gojcaj and M. Gojcaj tortiously interfered with their expectancy of expanding their business (Count III). On June 3, 2013, the case was removed to this Court.

On April 18, 2014, the parties stipulated to the joining of Defendant Bender as a defendant. On June 12, 2014, Plaintiffs filed their first amended complaint (“Amended Complaint”). In addition to adding Defendant Bender as a defendant, the Amended Complaint added a claim against Defendant Respondents for fraud and misrepresentation (Count I), silent fraud against Defendant Respondents (Count II), breach of contract against Defendant Bender (Count IV)¹, fraud and misrepresentation against Defendant Bender (Count V), concert of action against the Defendant Respondents and Defendant Bender (Count VI), civil conspiracy against Defendant Respondents and Defendant Bender (Count VII), summary removal proceedings against Defendant Respondents (Count VIII), and trespass against Defendant Respondents.

On January 1, 2015, Defendant Bender filed its motion for summary disposition. On January 27, 2015, Plaintiffs filed their motion for summary disposition against Defendant

Respondents. On January 29, 2015, Plaintiffs filed their response to Defendant Bender's motion. On February 3, 2015, Defendant Respondents filed their concurrence with Defendant Bender's motion for summary disposition. On February 10, 2015, Defendant Respondents filed their amended concurrence with Defendant Bender's motion. On February 10, 2015, Defendant Respondents filed their response to Plaintiffs' motion for summary disposition. On February 12, 2015, Defendant Bender filed its reply in support of its motion. On February 13, 2015, Plaintiffs filed their reply in support of their motion.

On February 17, 2015, the Court held a hearing in connection with the motions and took the matters under advisement. The Court has reviewed the materials submitted by the parties, as well as the arguments advanced at the hearing, and is now prepared to render its decisions. The Court will review each of the motions in turn.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

(1) Plaintiffs' Motion for Summary Disposition

¹ The Court notes that the Amended Complaint does not contain a count III; rather, it goes

The first issue before the Court is whether the Revised Lease remains in full force and effect. In their motion, Plaintiffs first contend that the Revised Lease between Defendant Respondents, as tenants, Defendant Bender, as landlord, was terminated in light of the release language of the Purchase Agreement. In their response, Respondent Defendants assert that the Revised Lease remains in effect and could not have been terminated by the Purchase Agreement as they were not parties to the Purchase Agreement and in light of paragraph 21 of the Revised Lease.

It appears undisputed that the original lease was between Defendant Bender, as landlord, and Defendant Respondents, as tenants. It also appears undisputed that the 2010 42-1 District Court action related to the original lease was resolved via the Revised Lease.

The Revised Lease was originally between Defendant Bender, as landlord, and Natural 1, as tenant. However, the Revised Lease provides that it binds the heirs, successors and assignees of the parties. (*See* Defendant Respondents' Exhibit B, at ¶ 21.)

The Purchase Agreement was between Defendant Bender, as seller, and R. Gojcaj, as purchaser. The Purchase Agreement contained the following release:

As consideration to enter into this Agreement, [Defendant Bender], its members, directors, employees, officers, agents, heirs, successors and assigns, hereby releases, waives, and forever discharges [R. Gojcaj], [Natural 1], their assigns, employees, members, officers, directors, agents, attorneys, or entities that he will form from any and all claims, demands, cause of actions, Lawsuit, lease agreements, rent, obligations, revenue, damages, attorney fees, costs and liabilities of any nature whatsoever, whether known or not now known, suspected, or claimed, which [Defendant Bender] ever had, now has, or may claim to have against [R. Gojcaj], [Natural 1], by reason of any act or omission concerning any matter, cause or anything existing or occurring on or before the date hereof, including, without limited the generality of the foregoing any and all personal property, equipment, fixtures, trade fixtures or any other machinery located in the Property, and any other subsequent or prior oral arguments that existed or may have existed whatsoever among and between the parties.

directly from count II to Count IV.

In consideration of the mutual covenants set forth herein and except for claims relating to a violation of this Agreement, [Natural 1] hereby releases and forever discharges [Defendant Bender] from any and all claims, demands, causes of actions, obligations, from past, present, or future revenue, damages, attorney fees, costs and liabilities of any nature whatsoever, whether known or not now known, suspected, or claimed, which [R. Gojcaj] ever had, now has or may claim to have as of the date of this Agreement against [Defendant Bender], which directly or indirectly, by reason of any act or omission concerning any matter, cause, or anything existing or occurring on or before the date hereof, including without limiting the generality of the foregoing, any claims relating to or arising out of claims which were or could have been asserted in any lawsuit, or relating in any way to any promissory notes, prior lease agreements and any other subsequent or prior oral agreements that existed or may have existed whatsoever among and between the parties.

While Plaintiffs and Defendant Bender contend that section 13 of the Purchase Agreement terminated the Revised Lease, it is undisputed that Natural 1 was not a party to the Purchase Agreement. “It goes without saying that a contract cannot bind a nonparty.” *Equal Employment Opportunity Comm. v Waffle House, Inc.*, 534 US 279, 294, 122 S Ct. 754, 151 L Ed 2d 755 (2002). Nevertheless, Plaintiffs and Defendant Bender contend that Defendant Respondents are estopped from contesting that section 13 of the Purchase Agreement terminated the Revised Lease because Peter Gojcaj, the drafter of the Purchase Agreement, originally drafted the Purchase Agreement pursuant to the instructions provided by Defendant Respondents.

As a preliminary matter, neither Defendant Bender nor Plaintiffs provide the Court with any authority that would operate to bind Defendant Respondents to the terms of the Purchase Agreement via estoppel. Moreover, Peter Gojcaj testified that the references to Natural 1 in section 13 of the Purchase Agreement were mistakenly carried over from the original draft of the Purchase Agreement, at which time Respondent Defendants intended to purchase the Subject Property. (*See* Defendant Respondents’ Exhibit D) Based on Defendant Bender and Plaintiffs’ failure to support their estoppel argument, as well as the fact that the references to Natural 1 were

included by mistake, the Court is convinced that Defendant Bender and Plaintiffs' position is without merit, that the Purchase Agreement did not operate to terminate the Revised Lease, and that the Revised Lease remains in full force and effect. Consequently, Plaintiffs' motion for summary disposition of its summary proceeding claim (Count VII) must be denied. Further, based on the Court's holding that the Revised Lease has not been terminated, and the fact that Plaintiffs' sole alleged basis for summary proceedings is that Defendant Respondents do not have any right to possess the Subject Property, the Court is convinced that Defendant Respondents are entitled to summary disposition in their favor of Count VII pursuant to MCR 2.116(I)(2).

(2) Defendant Bender's Motion for Summary Disposition

Plaintiffs' amended complaint contains four counts against Defendant Bender: Count IV- Breach of Contract, Count V- Fraud and Misrepresentation, Count VI- Concert of Action and Count VII- Civil Conspiracy.

A. Breach of Contract

Plaintiffs' breach of contract claim against Defendant Bender is based on their allegation that Defendant Bender breached the Purchase Agreement by purportedly failing to reveal the existence of the Revised Lease. In its motion, Defendant Bender contends that there was no breach because the release in the Purchase Agreement terminated the Revised Lease. However, for the reasons discussed above, Defendant Bender's position is without merit as the Revised Lease was not terminated by the Purchase Agreement.

B. Fraud and Misrepresentation, Concert of Action and Civil Conspiracy

To assert an actionable fraud claim, a plaintiff must demonstrate that: (1) the defendant made a material representation; (2) it was false; (3) when the defendant made it, the defendant

knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) the defendant made it with the intention that it should be acted upon by the plaintiff; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff thereby suffered injury. *Cooper v Auto Club Ins Association, supra; Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

Defendant Bender contends that there can be no fraud because the Revised Lease was discharged by the Purchase Agreement. However, for the reasons discussed above, the Court is convinced that the Revised Lease was not terminated by the Purchase Agreement.

In addition, Defendant Bender contends that Peter Gojcay's involvement with both the Revised Lease and the Purchase Agreement precludes a finding of fraud. Peter Gojcay drafted and notarized the Revised Lease, and represented Defendant Respondents in connection with the Revised Lease. Further, Peter Gojcay drafted the Purchase Agreement consistent with Defendant Respondent's instructions, and was present at the closing.

In its motion, Defendant Bender contends that Plaintiffs' fraud claim fails because their attorney, Peter Gojcay, had actual knowledge of the Revised Lease. An attorney's knowledge is generally imputed to his client. *Saltmarsh v Burnard*, 151 Mich App 476, 491-492; 391 NW2d 382 (1986). However, in this case the parties dispute whether R. Gojcay and Peter Gojcay formed an attorney-client relationship. Whether there is an attorney-client relationship is a question of law for the court to decide. *Simko v Blake*, 448 Mich. 648, 655; 532 NW2d 842 (1995).

In this case, R. Gojcay did not formally retain Peter Gojcay in connection with the Purchase Agreement, and there is no evidence that R. Gojcay compensated Peter Gojcay for his services. However, neither is required in order to form an attorney-client relationship.

The relation of attorney and client is one of confidence based upon the ability, honesty, and integrity of the attorney,” *Haskins v Bell*, 373 Mich 389, 391, 129 N.W.2d 390 (1964), not solely, or even primarily, upon a client's obligation to pay. *Macomb Co Taxpayers Ass n v L’Anse Creuse Pub Sch*, 455 Mich 1, 10-11; 564 NW2d 457 (1997). The rendering of legal advice and legal services by the attorney and the client's reliance on that advice or those services is the benchmark of an attorney-client relationship. *Id.* at 11. The attorney's right to be compensated for his advice and services arises from that relationship; it is not the definitional basis of that relationship. *Id.*

In this case, Peter Gojcaj was present at the closing and R. Gojcaj took directions from him to sign the closing documents. (*See* Defendant Bender’s Exhibit 4.) However, it is unclear whether R. Gojcaj sought, relied upon, or received any advice from Peter Gojcaj. Rather, the record before the Court merely establishes that Peter Gojcaj was present at the closing and told R. Gojcaj where to sign the Purchase Agreement. The Court does not find the evidence before it sufficient to form the basis for finding an attorney-client relationship at this time. Consequently, Defendant Bender’s motion for summary disposition must be denied.

Conclusion

Based upon the reasons set forth above, Plaintiffs’ motion for summary disposition as to its claim for summary proceedings (Count VII) is DENIED. Further, Defendants Gjergj G. Gojcaj and Natural 1 Corp are granted summary disposition of Plaintiffs’ Count VII pursuant to MCR 2.116(I)(2).

In addition, Defendant Bender & Harlow Holdings, LLC’s motion for summary disposition is DENIED, IN PART, and DENIED, WITHOUT PREJUDICE, IN PART. Specifically, Defendant Bender & Harlow Holdings, LLC’s motion for summary disposition of

Plaintiffs' breach of contract claim (Count IV) is DENIED. The remainder of Defendant Bender & Harlow Holdings, LLC's motion is DENIED, WITHOUT PREJUDICE. This Opinion and Order does not resolve the last claim and does not close the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: March 6, 2015

JCF/sr

Cc: *via e-mail only*

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