

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

GROUP MRJ, INC., d/b/a PASSPORT
PIZZA, and PASSPORT USA, INC.,

Plaintiffs,

Case No. 2014-584-CK

vs.

GALLO RETAIL GROUP, LLC, and
ANTHONY GALLO, a/k/a TONY J.
GALLO,

Defendants.

OPINION AND ORDER

Defendants have filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiffs have filed a response and request that the motion be denied. Defendants have also filed a reply brief in support of their motion.

In addition, Plaintiffs have filed a motion for clarification or to strike Judge Leduc's August 19, 2013 Order.

Factual and Procedural History

This matter arises out of a landlord-tenant dispute involving the parties. On April 29, 2010, Defendants leased commercial property commonly known as 5888 Van Dyke Ave, Washington Twp., MI ("Subject Property") to Plaintiffs. The arrangement was memorialized in an April 29, 2010 lease agreement executed by the parties ("Lease"). Plaintiffs leased the Subject Property in connection with their pizza business. The Lease included a provision granting Defendants a security interest in "all improvements, personal property, general intangibles, inventory, furnishings, equipment and fixtures

within the Subject Property or at any time placed on or in the [Subject Property] or used in connection with [Plaintiffs'] business.” (See Defendants’ Exhibit B.)

In June 2013 Plaintiffs failed to make the required payments under the Lease. As a result of the breach Defendants served Plaintiffs with a demand for possession. In response Plaintiffs allegedly ceased their pizza business operations and removed certain equipment.

Due to the Plaintiffs’ alleged action, Defendants took possession of the Subject Property and filed a complaint for claim and delivery with the 42-1 District Court. On August 19, 2013, Judge Leduc held a hearing in connection with Defendants’ motion for possession pending judgment. At the conclusion of the hearing Judge Leduc entered an order holding, *inter alia*, that the Lease had been terminated and that Defendants were in possession of the Subject Property. (See Defendants’ Exhibit E.) Judge Leduc also ordered Plaintiffs to return all equipment they had removed from the Subject Property. (Id.) Plaintiffs appealed the April 19, 2014 Order, but their appeal was denied by Judge Biernat, Jr. in Macomb County Circuit Court Case No. 2013-3403-AV.

On February 14, 2014, Plaintiffs filed their complaint in this matter asserting claims for: Injunctive Relief (Count I), Breach of Contract (Count II), Violation of Michigan Uniform Commercial Code (Count III), Unlawful Lockout (Count IV), Common Law Statutory Conversion (Count V), Promissory Estoppel (Count VI), and Interference with Actual and Prospective Economic Advantage and Quiet Enjoyment (Count VII).

On August 29, 2014, Defendants filed their instant motion for summary disposition. Plaintiffs have filed a response and request that the motion be denied. Defendants have also filed a reply brief in support of their motion.

On October 7, 2014, Plaintiffs filed a motion for clarification or striking of Judge Leduc's April 19, 2013 Order. On October 14, 2014, the Court held a hearing in connection with the motions and took the matters under advisement.

Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtko v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, 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 to Strike or Clarify

As a preliminary matter, the parties contest whether summary proceedings needed to be initiated in order for Defendants to obtain possession of the Subject Property. MCL

600.5714 governs summary proceedings to recover possession of premises. Under section 5714(1)(a) a person may recover the possession by summary proceedings if a person holds over premises after failing or refusing to pay rent. When interpreting a statute, the primary goal is to ascertain and give effect to the intent of the legislature. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). If the specific language of the statute is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 392; 594 NW2d 81 (1999). The Court must give effect to all words in a statute and may not interpret a statute so as to render some of the terms nugatory. *Talcott v City of Midland*, 150 Mich App 143, 148; 387 NW2d 845 (1985).

Section 5714(1)(a) provides that a summary proceedings may be utilized if two conditions are met: (1) The tenant is holding over (2) after failing or refusing to pay rent. In this case, Judge Leduc found that Defendants were in possession of the property. *See* Defendants' Exhibit E. Since the Subject Property was in Defendants' possession Plaintiffs were clearly not holding over. Consequently, there was no need for summary proceedings. While Plaintiffs could, and indeed have, filed claims for violation of the unlawful lock-out statute, MCL 600.2918, or other actions related to an alleged wrongful eviction, the fact remains that in this case Plaintiffs were not holding over, thereby negating any need for summary proceedings or an eviction order.

In their motion and response to Defendants' motion, Plaintiffs contend that the district court lacked the jurisdiction to find, in its August 19, 2013 Order, that Defendants were in possession of the Subject Property and that the Lease had been terminated. However, "[w]ant of jurisdiction must be distinguished from error in the exercise of

jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked.” *Bowie v Arder*, 441 Mich 23, 49; 490 NW2d 568 (1992). “In other words, lack of subject matter jurisdiction can be collaterally attacked, whereas the exercise of jurisdiction can be challenged only on direct appeal. *Clohset v No Name Corp*, 302 Mich App 550, 564; 840 NW2d 375 (2013).

In this matter, the district court exercised jurisdiction, as is evidenced by the portion of the order Plaintiffs are challenging. That order was appealed, and the appeal was denied. Consequently, Plaintiffs’ may not now challenge the findings of the district court in the August 19, 2013 Order.

For these reasons, Plaintiffs’ motion to strike, or to clarify, the August 19, 2013 Order must be denied.

(2) Defendants’ Motion for Summary Disposition

A. UCC claim

In support of their motion, Defendants contend that Plaintiffs’ Count II- Violation of the UCC lacks merit. Specifically, Defendants contend that Section 10.10 of the Lease granted them a security interest over all improvements, personal property, and equipment within Plaintiffs’ store. Section 10.10 provides:

As security for payment of Rent and additional charges and the performance of Tenant’s other obligations hereunder, Tenant hereby grants to Landlord a lien and security interest upon, and assigns, transfers and sets over to Landlord, all improvements, personal property, general intangibles, inventory, furnishings, equipment and fixtures within the leased premises or any time placed on or in the leased premises or used in

connection with the Tenant's business, including without limitation, tables, chairs, shelving, kitchen equipment, freezers, coolers, ovens (collectively, "Collateral") to the full extent of Tenant's and any assignee's or subtenant's interest therein. Upon the occurrence of any Event of Default and at anytime thereafter without notice to Tenant, Landlord may proceed immediately to enforce its rights in and realize the Collateral pledged and assigned hereunder and Landlord shall be entitled to liquidate, or otherwise proceed to enforce its rights in so proceeding after an Event of Default, Landlord shall have the rights and remedies of a secured party against a debtor in default under the Michigan Uniform Commercial Code without respect to issues of priority or the marshaling of assets, as well as any other rights and remedies Landlord may have under applicable law or this Lease it being the intent of the parties that all of the foregoing rights and remedies shall be cumulative and not exclusive. Tenant hereby appoints Landlord as its attorney in fact and grants Landlord its durable and irrevocable power of attorney for the purposes of effectuating any of the rights granted to Landlord herein. This power of attorney granted to Landlord is coupled with an interest and may not be revoked. Tenant acknowledges and consents to the filing by the Landlord or UCC financing statements to provide notice of Landlord's interest in the Collateral and Tenant agrees to take such further actions and execute such further instruments deemed necessary by Landlord to carry out the intent of the parties as is evidenced herein including without limitation the execution and delivery of UCC financing statements, control agreements, security agreements or other documents with respect to the Collateral in order for Landlord to maintain control over the Collateral as a secured party. Tenant shall pay all filing and release fees with respect thereto.

In their response, Plaintiffs first contend that Defendants are not entitled to take any action with respect to any secured collateral because there was not a default. However, Judge Leduc has previously held, and in fact Plaintiffs have previously admitted at the August 19, 2013 hearing, that Plaintiffs had failed to make the required lease payments, which under article 8.1 of the Lease is an "Event of Default", which pursuant to article 10.10 authorizes Defendants to enforce its rights as a secured party. Consequently, Plaintiffs' contention is without merit.

Next, Plaintiffs contend that even if there was a default Defendants could only repossess the collateral if they did so without breaching the peace. MCL 440.9609 governs a secured party's right to take possession of collateral after default, and provides:

1) After default, a secured party may do 1 or more of the following:

(a) Take possession of the collateral.

(b) Without removal, render equipment unusable and dispose of collateral on a debtor's premises under section 9610.

(2) A secured party may proceed under subsection (1) either pursuant to judicial process, or without judicial process if it proceeds without breach of the peace.

(3) If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party that is reasonably convenient to both parties.

In this matter, Plaintiffs concede that "a party may also repossess the collateral with the aid of judicial process such by commencing a claim and delivery action..." See Plaintiffs' Response, at 10. While Plaintiffs cites to MCR 3.105 in support of their assertion that the claim and delivery action must be filed in a circuit court, rather than a district court, the court rule contains no such restriction. Moreover, the initial claim and delivery action filed with the 42-1 district court has since been removed to this Court, and a default judgment has been entered in that matter against Plaintiffs. Consequently, even if Defendants were required to pursue their claim and delivery action in this Court, that requirement has been satisfied by transferring that matter to this Court. For these reasons, Plaintiffs' position is without merit.

Finally, Plaintiffs dispute that they consented to the financing statements filed by Defendants. Specifically, Plaintiffs argue that they did not agree to allow Defendants to file financing statements 2 years after the Lease was executed, and assert that they did not

execute the financing statement itself. However, the Lease does not contain a time limitation under which Defendants were required to file their financing statement(s) and Plaintiffs have failed to provide any authority that their initials were needed on the financing statement. Consequently, the Court is satisfied the Plaintiffs' assertions are without merit.

For the reasons discussed above, the Court is convinced the Defendants' motion for summary disposition of Plaintiffs' UCC claims must be granted.

B. Unlawful Lockout Claim

In their motion, Defendants contend that they have already been awarded possession of the Subject Property. In their response, Plaintiffs maintain that the district court lacked jurisdiction to enter the order and that the district court did not award Defendants possession of the Subject Property, but rather merely observed that they were in possession. As discussed above, Plaintiffs' position regarding jurisdiction may not be raised at this time as the order at issue was already appealed without success. With regards to whether the district court awarded Defendants possession, the August 19, 2013 Order provides that Defendants are in possession of the Subject Property. Further, as discussed above summary proceedings were not required as Plaintiffs were not holding over.

As Plaintiffs' only positions in response to the instant motion are without merit, Defendants' motion for summary disposition of Plaintiffs' unlawful lockout claims must be granted.

C. Promissory Estoppel Claim

“Promissory estoppel is a judicially created doctrine that was developed as an equitable remedy applicable in common-law contract actions.” *Crown Tech Park v D & N Bank, FSB*, 242 Mich App 538, 548 n. 4; 619 NW2d 66 (2000). To show promissory estoppel, a plaintiff must establish: (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686–687; 599 NW2d 546 (1999).

While Plaintiffs concede that they did not pay June rent, they assert that Defendants promised, in the Lease, to allow them to cure any default. However, section 8.1 of the lease provides, in pertinent part:

- (a) Each of the following events shall constitute an “Event of Default” by Tenant under this Lease:
 - (i) If Tenant fails to pay any Rent when due and the failure continues for ten (10) days after such due date.
 - (ii) (ii) If Tenant fails to comply with any other obligations under this Lease and the failure continues beyond the “Cure Period” after Landlord gives notice of the failures to Tenant.

While Plaintiffs contend that they had a right to cure their failure to pay rent, the unambiguous terms of the Lease provide for a “cure period” in the event of a default other than failure to pay rent. In this case Defendants were not required to provide an opportunity to cure as the default at issue was Plaintiffs’ failure to pay rent. Consequently, Plaintiffs’ contention is without merit and Defendants’ motion for summary disposition of Plaintiffs’ promissory estoppel claim must be granted.

D. Conversion Claims

In this case, it is undisputed that Defendants are exerting control over various items that were within the Subject Property at the time they took possession of the Subject Property. While Defendants contend that their dominion over the property is not wrongful as they hold a security interest in the items, the parties dispute which items are covered by Defendants' security interest. For these reasons, the Court is convinced that additional proceedings are necessary in order to determine whether Defendants have taken possession of any property to which they do not have an interest. Consequently, the Court is convinced that this portion of Defendants' motion must be denied.

E. Breach of Contract Claims

In their response, Plaintiffs set forth several alleged breaches Defendants have committed. The first alleged breach is Plaintiffs' allegation that Defendants violated section 2.1 of the Lease by filing a UCC financing statement naming items not in the Lease and leaving out two items. However, the financing statement utilizes the exact language provided by section 10.10 of the lease to describe the items it covers. *See* Exhibit J to Plaintiffs' Complaint; Lease, at section 10.10. Further, the more particular descriptions provided in the financing statement all fall within the general categories of property covered. *Id.* Consequently, the Court is convinced that the financing statements filed by Defendants comply with the terms of the Lease. Accordingly, Plaintiffs' breach of contract claims must be dismissed to the extent they are based on the financing statements.

Plaintiffs also allege that Defendants have breached section 5.6(b) of the Lease by interfering with their right to remove their equipment. Defendants do not appear to contest that Plaintiffs have the right under the Lease to remove any of their property not

covered by the security agreement. However, the parties dispute whether any of the property held by Defendants is not covered by the security provisions. Consequently, a genuine issue of material fact exists as to whether Defendants have breached the terms of the Lease. For these reasons, Defendants' motion must be denied to the extent it seeks summary disposition of Plaintiffs' breach of contract claims related to section 5.6(b) of the Lease.

Plaintiffs also allege that Defendants breached the Lease by unlawfully locking them out of the Subject Property. However, as discussed above, Judge Leduc has previously held that Defendants were permitted to repossess the Subject Property. Consequently, Plaintiffs' contention is without merit.

F. Tortious Interference Claims

In order to maintain a tortious interference claim, a plaintiff must establish: "the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *Cedroni Association, Inc. v. Tomblinson, Harburn Associates, Architects & Planners Inc.*, 492 Mich. 40, 45–46; 821 NW2d 1 (2012).

In their response, Plaintiffs contend that their tortious interference claims are based on the alleged illegal lockout and numerous breaches of the Lease. The only surviving basis for Plaintiffs' breach of contract claim is their allegation that Plaintiff's have wrongfully prevented them from recovering their property that is not covered by Defendants' security interest. However, Plaintiffs have failed to provide any evidence that Defendants intended the interference, if any, that their actions may have caused.

Consequently, Plaintiffs have failed to establish that a genuine issue of material fact exists with respect to a necessary element of their claim. Accordingly, Defendants' motion for summary disposition of Plaintiffs' tortious interference claims must be granted.

G. Claims as to Defendant Anthony Gallo Individually

In their motion, Defendants contend that Defendant Anthony Gallo ("Defendant Gallo") is entitled to summary disposition of any remaining claims against him. In their response, Plaintiffs contend that Defendant Gallo went outside the scope of his role as an officer of his corporation by engaging in an illegal lockout. However, for the reasons discussed above Defendants' actions did not amount to an illegal lockout. Consequently, Plaintiffs' position is without merit and Plaintiffs' remaining claims against Defendant Gallo individually must be dismissed.

Conclusion

For the reasons set forth above, Defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) is GRANTED, IN PART, and DENIED, IN PART. Specifically:

- (1) Defendants' motion for summary disposition of Plaintiffs' illegal lockout, tortious interference, UCC and promissory estoppel claims is GRANTED;
- (2) Defendants' motion for summary disposition of Plaintiffs' conversion claims is DENIED; and
- (3) Defendant's motion for summary disposition of Plaintiffs' breach of contract claims is GRANTED, IN PART and DENIED, IN PART.

Plaintiffs' breach of contract claims are dismissed except to the extent that they are based on section 5.6(b) of the Lease.

In addition, Plaintiffs' motion for clarification or to strike Judge Leduc's August 19, 2013 Order is DENIED.

Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

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

Dated: November 12, 2014

JCF/sr

Cc: *via e-mail only*
James C. Bishai, Attorney at Law, attybishai@gmail.com
Vincenzo Manzella, Attorney at Law, mhintz@lucidolaw.com
Kenneth S. Dombrowski, Attorney at Law, dombrowski@kallashenk.com