

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

ANG/DEB, LLC and
B DITTYS ENTERPRISES, LLC,

Plaintiffs,

vs.

Case No. 16-3422-CB

RAY SROUR, LLC and
RAY SPORTS, LLC,

Defendants.

OPINION AND ORDER

This matter comes before the Court on Plaintiffs ANG/DEB, LLC ("ANG") and B Dittys Enterprises, LLC's ("B Dittys" or together as "Plaintiffs") motion for summary disposition under MCR 2.116(C)(10).

I. Factual and Procedural Background

Brian Dittmer is the sole member of plaintiffs ANG and B Dittys. Mr. Dittmer utilized ANG and B Dittys to operate a bar business. Specifically, ANG owned the real estate on which the bar operated while B Dittys owned the personal property necessary to operate the business.

Ray Srour is a member of defendants R. Srour, LLC ("Srour") and Ray Sports, LLC ("Ray Sports" or together as "Defendants"). On June 19, 2014, B Dittys and Ray Sports entered into a Business Property Purchase Agreement ("BPPA") for the sale of B Dittys' property. Under the BPPA, Ray Sports agreed to pay to B Dittys \$270,000 with \$5,000 down in escrow and the remaining balance paid in monthly installments of \$2,000. Ray Sports took possession and made five payments under the BPPA, and

then started paying into an escrow account. The parties to the BPPA agreed to close the transaction within ten days of securing the transfer of a liquor license. The transfer approval was finalized on January 26, 2015. Ray Sports has not yet closed the BPPA with B Dittys.

Ray Sports allegedly did not close or continue paying directly to Plaintiffs because it discovered in early December 2014 that ANG had not paid the previous owners, RTI Properties, LLC ("RTI") and Ron Illitch, for the business and property. RTI had, unbeknownst to Defendants, obtained a judgment against Plaintiffs for \$213,800 and an order to seize the property that Defendants purchased from Plaintiffs entered on January 18, 2017. Defendants protected their investment by voluntarily settling the judgment on Plaintiff's behalf, though Defendants were not parties to the underlying transaction with RTI and Ron Illitch.

On the same day the parties entered into the BPPA for the business, ANG entered into a land contract agreement with Srour for the sale of real estate located on Groesbeck in Clinton Township. In the real estate transaction, ANG agreed to sell the Srour real property for \$194,000, with \$104,000 down and Srour assuming a \$90,000 debt that ANG owed to Huntington Bank. It appears undisputed that Srour has made the required payments under the land contract.

Viewing the transactions as integrated, Plaintiffs filed a complaint averring that Ray Sports' refusal to close the business transaction and failure to pay agreed upon payments were breaches of the BPPA permitting Plaintiffs also to pursue rights under the land contract.

Plaintiffs filed its two-count complaint on September 28, 2016 seeking (I)

foreclosure on the land contract between ANG and Srour and (II) Claim and Delivery for the business assets and liquor license under the BPPA. On June 30, 2017, Plaintiff filed its motion for summary disposition. Defendants filed a response and request that the motion be denied. On August 7, 2017, the Court heard arguments and took the matter under advisement.

II. Arguments

Plaintiffs claim that Ray Sports breached the BPPA for failure to continue making payments and for failure to close the BPPA transaction. Plaintiffs argue that Defendants have no authorization to place payments into an escrow account, and that their alleged defaults on the BPPA also constitute defaults on the land contract. Accordingly, Plaintiffs aver that they are entitled to exercise their remedies for default under both the BPPA and land contract.

Defendants take the position that they did not default on the agreements, but only ceased paying Plaintiffs directly once they learned of or anticipated Plaintiffs breach. Ray Sports states that it began placing monthly payments into an escrow account and has not finalized the BPPA because it learned of Plaintiffs default to a previous owner when a court officer attempted to seize their property. Defendants argue that by settling the outstanding judgment on Plaintiff's behalf, though Defendants were not parties to the underlying transaction, they in effect satisfied their ongoing payment obligations to Plaintiffs. While they still owe money to Plaintiffs under the agreements, Defendants argue that they owe less in light of the settlement.

The entire transaction, according to Defendants, contemplates payment of \$464,000, of which only \$58,900 is still owed. Defendants calculate that they paid

\$104,000 down, they assumed a debt of 90,000 to Huntington Bank on behalf of Plaintiffs, paid \$5,000 into escrow, paid \$6,000 as principle and interest directly to Plaintiffs, settled \$213,800 in debt obligations to RTI on behalf of Plaintiffs, waived bank fees of \$1,300, and that they incurred \$15,000 in attorney's fees. Plaintiffs are not entitled to Claim and Delivery under Count II, according to Defendants, because Defendants are in lawful possession of the property.

III. 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. Indeed, "an adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

IV. Law and Analysis

A party claiming a breach of contract must establish: (1) that there was a contract; (2) that the other party breached the contract; and (3) that the party asserting breach of contract suffered damages as a result of the breach. *Dunn v*

Bennett, 303 Mich App 767, 774; 846 NW2d 75 (2013). “The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach.” *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). “The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent material breach or failure to perform.” *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972). In determining whether a breach is material, the court should consider whether the non-breaching party obtained the benefit it reasonably expected to receive. *Holtzlander v Brownell*, 182 Mich App 716, 721-722; 453 NW2d 295 (1990). Other considerations include the extent to which the injured party may be adequately compensated for damages for lack of complete performance, the extent to which the breaching party has partly performed, the comparative hardship on the breaching party in terminating the contract, the willfulness of the breaching party's conduct, and the greater or lesser uncertainty that the party failing to perform will perform the remainder of the contract. *Walker & Co v Harrison*, 347 Mich 630, 635; 81 NW2d 352 (1957).

Here, Plaintiffs have not shown that they are entitled to summary disposition for breach of the agreements because a question of material fact exists as to whether they materially breached the BPPA first by failing to pay RTI for the property that it sold to Defendants. If Plaintiffs failed to pay for the property that they sold to Defendants, then they could not in fact deliver the assets that they contractually promised to deliver to Defendants. Plaintiffs produce deposition testimony where Raymond Srour testifies that he has not consummated the BPPA and has made payments into an escrow account

rather than to Plaintiffs. Plaintiff's Exhibit 4. However Defendants produce evidence that Plaintiffs defaulted on their underlying obligation to RTI, which would impair Plaintiffs' ability to convey the property as agreed and could constitute a previous material breach. Defendants' Exhibit 5.

Further, Defendants show evidence of payments in the amount of \$150,000 they made on Plaintiffs' behalf, which far exceed the amount Plaintiff would otherwise be entitled to at this point at the contractual rate of \$2,000 per month. Defendants Exhibit 6. According to Defendants, Plaintiffs arguably would have incurred significantly greater damages had Defendants not intervened to prevent the seizure of the property. The parties present the Court with conflicting evidence of alleged breach and whether the payments made of Plaintiffs behalf constitute a good-faith substantial performance of the BPPA. Thus, questions of material fact exist as to Plaintiffs claim for breach of contract in Count (I), and summary disposition is therefore denied.

The second count of Plaintiff's complaint purports to state a cause of action for Claim and Delivery. Claim and delivery, or 'replevin', is a civil action to recover possession of goods that have been unlawfully taken or unlawfully detained and for damages sustained by the unlawful taking or unlawful detention. MCL 600.2920(1); MCR 3.105. However, an action for claim and delivery may not be maintained by a person who, "at the time the action is commenced, does not have a right to possession of the goods or chattels taken or detained." MCL 600.2920(1)(c). For the same reasons as stated above, questions of material fact exist as to whether Plaintiffs have the right to possess the property claimed or whether Defendant breached its agreement.

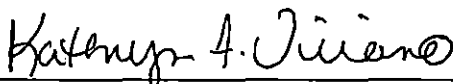
Therefore, summary disposition must also be denied as to Plaintiffs' complaint Count (II).

V. Conclusion

For the reasons set forth above, Pursuant to MCR 2.602(A)(3), Plaintiffs' motion is DENIED. This *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

Date: SEP 21 2017



Hon. Kathryn A. Viviano, Circuit Court Judge