STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

PARTY FOR LESS, LLC,

Plaintiff/Counter-Defendant,

vs. Case No. 17-3336-CB

K&P REALTY, LLC, P & J TRADING SUPPLY COMPANY, INC.,

Defendants/Counter-Plaintiffs.
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OPINION AND ORDER

Defendant P&J Trading Supply Company, LLC ("Defendant P&J") filed a motion for summary disposition under MCR 2.116(C)(8) and (C)(10). Co-defendant K&P Realty, LLC ("Defendant K&P") filed a concurrence.

I. Background

By complaint dated September 8, 2017, Party for Less, LLC ("Plaintiff") alleged that it entered into a lease agreement[1] for retail space in Eastpointe, MI; that Defendants "unilaterally moved" the space and "took it over;" that Defendants allowed the new space to be in such disrepair that the city closed the business location; and that Plaintiff suffered damages as a result. Plaintiff asserted claims for violation of the lock-out statute (Count I) and breach of contract (Count II). On April 25, 2018, Defendant P&J filed its motion for summary disposition. The Court heard oral arguments and took the mater under advisement.

[1] The Complaint alleges only that "the parties" entered the lease without specifying which co-defendant or if both entered the agreement. Defendant P & J is not a party to the lease. P&J Answer ¶6.

II. Standard of Review

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119–20; 597 NW2d 817 (1999). The court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.* citation omitted. A court will only grant a motion under MCR 2.116(C)(8) where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

The Court will grant a motion for summary disposition under MCR 2.116(C)(10) if the documentary evidence shows no genuine issue of material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-55; 597 NW2d 28 (1999). The party opposing the motion for summary disposition has the burden of showing that a genuine issue of disputed fact exists. *Fulton v Pontiac Gen Hosp*, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The Court does not assess credibility, weigh the evidence, or resolve factual disputes; if material evidence conflicts, the Court will deny the motion for summary disposition under MCR 2.116(C)(10). *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

III. Arguments

Factually, Defendant P&J asserts that Plaintiff is a holdover tenant that had a

month-to-month lease with Defendant K&P. According to Defendant P&J, Plaintiff paid no rent since August 2017 and abandoned the lease without any eviction or force. Defendant P&J states that on July 14, 2017, the fire marshal ordered an evacuation of the premises because Plaintiff did not have a proper business license. Plaintiff was never denied access to the leasehold but chose not to return Defendant P&J claims. Defendant P&J says that it entered into a master lease with Defendant K&P in December 2016 wherein it would manage the property and assume the leases. Defendant P&J maintains that Defendant K&P agreed to relocate Plaintiff to another space, to which Plaintiff did not object but rather set up its equipment and operated all while continuing to pay rent. Defendant P&J argues that it never intended to evict Plaintiff, never locked out Plaintiff and could not have done so because the rented space has no windows or doors. Further, Plaintiff would have been shut down regardless because Plaintiff did not have the proper business license according to Defendant P&J.

Legally, Defendant P&J argues that Plaintiff's complaint is legally insufficient because it fails to allege that Defendants used force to "lock out" Plaintiff and fails to identify any contractual provision that Defendants breached.

Plaintiff responds that it had a well-established business that operated in Suite 110 under its lease agreement with Defendant K&P before it was forced to move to Suite 112 and locked out of Suite 110. Plaintiff argues that it was properly approved to operate by the City in Suite 110 and therefore Defendant P&J's claim that Plaintiff was unlicensed is misleading and disingenuous. Plaintiff argues that the lock-out statute has been construed in modern times to encompass less violent means of self-help, including

changing the locks. Plaintiff claims that Defendant P&J provides no support for its motion for summary disposition on the contract claim in Count II.

IV. Law and Analysis

The anti-lockout statute provides that:

> (1) Any person who is *ejected or put out* of any lands or tenements in a *forcible and unlawful* manner, or being out is afterwards *held and kept out, by force*, is entitled to recover 3 times the amount of his or her actual damages or $200.00, whichever is greater, in addition to recovering possession.
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> (2) Any tenant in possession of premises whose possessory interest has been unlawfully interfered with *by the owner* is entitled to recover the amount of his or her actual damages or $200.00, whichever is greater, for each occurrence and, if possession has been lost, to recover possession.

MCL 600.2918(1)-(2) emphasis added. The anti-lockout statute encourages landlords to select the judicial process rather than self-help remedies including forceful dispossession of a tenant. *Deroshia v Union Terminal Piers,* 151 Mich App 715, 719–720; 391 NW2d 458 (1986). Subsection (1) prohibits "forceful self-help regardless of whether or not the tenant was in rightful possession of the premises." *Id.* at 718. Subsection (2) "prohibits a landlord from resorting to self-help even where the landlord is entitled to possession." *Id.* at 720. "To discourage self-help, the Legislature has provided that the tenant may recover treble damages for forcible ejectment under subsection (1), and actual damages for other unlawful interference under subsection (2). *Id.*

Put differently, a Plaintiff may only recover treble damages under subsection (1) of MCL 600.2918. While subsection (1) refers to a tenant who has been ejected, "put out" or "held and kept out" in a forcible and unlawful manner, subsection (2) addresses

tenant interests that have been "interfered with." A claim by a tenant in possession would fall under subsection (2). See, *Deroshia*, 151 Mich App at 719–20.

Moreover, MCL 600.2918(1) contemplates an unlawful or forceful manner of self-help. The Michigan Supreme Court interpreted a predecessor version of MCL 600.2918(1) and concluded that the statute:

> [W]as not intended to apply to a mere trespass, however wrongful; but the entry or the detainer must be riotous, or personal violence must be used or in some way threatened, or the conduct of the parties guilty of the entry or detainer must be such as in some way to inspire terror or alarm in the persons evicted or kept out; in other words, the force contemplated by the statute is not merely the force used against, or upon the property, but force used or threatened against persons as a means, or for the purpose of expelling or keeping out the prior possessor.

Shaw v Hoffman, 25 Mich 162, 168–69 (1872) emphasis added. In 1953, the Supreme Court reaffirmed the holding in *Shaw,* stating that *Shaw* required forcible entry or detainer to show a violation of the statute. *Patterson v Dombrowski,* 337 Mich 557, 562; 60 NW2d 456 (1953).[2] *Shaw* has not been overturned and therefore is still binding precedent upon this Court. *See, United Coin Meter Co v Lasala*, 98 Mich App 238, 241; 296 NW2d 221 (1980) (Relying on *Shaw* to deny plaintiff treble damages because the lockout statute applied to the use or threat of personal violence or force). Consequently, the present Plaintiff may not recover treble damages because it alleges no personal violence or force.

Recently, the Court of Appeals held that a plaintiff did not show forcible ejectment under MCL 600.2918(1) where the defendant summoned the police who then

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[2] Changing the locks on a building does not constitute a forcible entry. *Grant v Detroit Ass'n of Women's Clubs*, 443 Mich 596, 615; 505 NW2d 254 (1993), Griffin, J. dissenting, citing *Patterson v Dombrowski,* 337 Mich 557, 562, 60 NW2d 456 (1953).

threatened plaintiff with arrest for entry. *Mier v Zimmerman*, unpublished per curium opinion of the Court of Appeals, issued March 13, 2008 (Docket No. 273312), p 3. In *Mier,* the Court stated that "MCL 600.2918(1) prohibits forceful *self-help* and was intended to prevent parties from "taking the law into their own hands in circumstances which are likely to result in a breach of peace." *Id.* The facts alleged in the present matter resemble *Mier,* because authorities—there a police officer, here city code enforcement—prevented access to the tenancy. The *Mier* Court concluded that calling the police was not akin to using forceful self-help. Therefore, the Legislature's allowance of treble damages did not apply. *Id.*

In the present matter, Plaintiff's September 8, 2017 complaint does not specify which subpart of MCL 600.2918 upon which it relies. Plaintiff alleged that "Defendant unilaterally moved Plaintiff tenant's space" and "caused or allowed the new space to be in such disrepair that the city of Eastpointe has closed Plaintiff's business location." Complaint ¶ 8-9. Plaintiff, under Count I for violation of the lock-out statute, also alleged that under MCL 600.2918, "Defendant constructively evicted Plaintiff from its retail location" entitling Plaintiff to "restoration of (sic) premises and three times damages." *Id.* ¶13, 15. Constructive eviction would fall under MCL 600.2918(2)(f), which does not entitle Plaintiff to treble damages.

Plaintiff alleged no facts, such as forceful or unlawful self-help, forcible entry/detainer or breach of the peace, to support recovery of treble damages under MCL 600.2918(1). Plaintiff cites no authority where 'constructive eviction' gives rise to liability for treble damages. As a result, Plaintiff has not stated a claim under MCL 600.2918(1) and is not entitled to treble its damages.

Under MCL 600.2918(2) however, a tenant may recover actual damages for interference with its possessory interest caused "by the owner." Defendant P&J argues that the fire marshal rather than P&J closed the building and therefore any interference did not come from the owner. Further, Defendant P&J argues that Plaintiff fails to specifically allege any of the acts listed in subpart (2). Defendant P&J concludes that without allegations that Defendants violated part 1 or part 2 of the statute, Count I of the Complaint must be dismissed.

Nonetheless, MCL 600.2918(2)(f) provides for recovery where a landlord causes "by action or *omission*, the termination or *interruption* of a service procured by the tenant or that the *landlord is under an existing duty to furnish*, which service is so essential that its termination or interruption would constitute constructive eviction, including heat, running water, hot water, electric, or gas service." Emphasis added. If Defendants failed to maintain the leasehold such that the city closed the premises, then Defendants could have caused a constructive eviction and cannot escape liability under the statute by blaming the city of Eastpointe. To the extent that Plaintiff alleges that Defendants "took over" the space, and permitted the space to be in "such disrepair that the city of Eastpointe has closed the Plaintiff's business location", Plaintiff has sufficiently stated a claim for constructive eviction for purposes of MCR 2.116(C)(8).

To the extent that Defendant P&J seeks summary disposition under MCR 2.116(C)(10) on Count I of Plaintiff's complaint, it has not properly supported its motion. The party seeking summary disposition under MCR 2.116(C)(10) has the initial burden of supporting its position with documentation such as affidavits or depositions. *Smith v Globe Life Ins Co,* 460 Mich 446, 455; 597 NW2d 28 (1999). Once the moving party

meets its burden, the burden shifts to the opposing party to demonstrate a genuine issue of material fact. *Id.* The opposing party may no longer rely on mere allegations but must go beyond the pleadings and provide specific facts supporting a finding of a genuine issue of material fact. *Id.* Here, Defendant P&J submitted the following attachments: Exhibit 1) a copy of a lease for the term of 2013 -2014 K&P Realty and Plaintiff; Exhibit 2), a lease dated December 17, 2016 between K&P Realty and P&J; Exhibit 3), a schematic floorplan of the premises; Exhibit 4), a receipt for payment of rent by Plaintiff dated 5/13/17; Exhibit 5) a fire marshal warning sign; Exhibit 6), a copy of the complaint; Exhibit 7), letter from city of Eastpointe dated 7/25/17; Exhibit 8) photographs; and Exhibit 9) an affidavit of Patrick Benge stating that Plaintiff failed to secure a license form city of Eastpointe, Plaintiff chose not to return to the building, that Defendants never denied Plaintiff access, Plaintiff was not locked out, and Plaintiff was not evicted. Exhibits 10 and 11 are copies of unreported cases.

The only evidence[3] that directly sheds light any claim under MCL 600.2918(2) is the Affidavit of Patrick Benge, which is unsigned.[4] An unsworn, unsigned affidavit may not be considered by the trial court on a motion for summary disposition. *Gorman v Am Honda Motor Co, Inc*, 302 Mich App 113, 120; 839 NW2d 223 (2013). Even if the Affidavit were signed, however, Mr. Benge concedes that Plaintiff was moved to Suite 112 and that the City of Eastpointe ordered the property to be closed due to code

[3] To the extent that Defendants rely on admissions in the arguments in their reply, on June 25, 2018, the Court held that no requests to admit have been deemed admitted at this time.

[4] Plaintiff's Exhibit 2 is an affidavit of Angela Hudson, which is missing all the pages except the first, and also is not signed.

violations. Therefore, questions of fact would still remain regarding Plaintiff's claim for constructive eviction under Count I.

Finally, the Court turns to Defendant P&J's motion for summary disposition on Count II for breach of contract. Since neither party cited any authority or provided any support regarding the breach of contract claim, the Court will not address that issue. A mere statement without authority is insufficient to bring an issue before the Court. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Therefore, the motion for summary disposition regarding Count II will be denied.

V. Conclusion

For the reasons set forth above, Defendants' motion is DENIED except as to the extent that Plaintiff asserts a claim for treble damages under MCL 600.2918(1). 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.

Date: JUL 31 2018

Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge