

STATE OF MICHIGAN  
SIXTEENTH JUDICIAL CIRCUIT COURT

KAM KAM HOLDINGS, LLC,

Plaintiff,

vs.

Case No. 18-868-CB

RITE AID OF MICHIGAN, INC., and  
RITE AID CORPORATION,

Defendants.

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**OPINION AND ORDER**

Defendants Rite Aid of Michigan, Inc. (“Rite Aid of Michigan”) and Rite Aid Corporation (“Rite Aid Corp.” or together as “Rite Aid Defendants”) seek summary disposition under MCR 2.116(C)(10) on plaintiff Kam Kam Holdings, LLC’s (“Plaintiff Kam Kam”) Complaint.

Rite Aid of Michigan also filed a motion for partial summary disposition under MCR 2.116(C)(10) on its cross-complaint against third-party defendant Speed and Kolor King, Inc. (“Kolor King”).

**I. Factual and Procedural Background**

This case concerns the parking lot of a commercial property located at 8055 Clinton River Road in Utica Michigan<sup>1</sup> (“the Property”). In June of 1997, Rite Aid of Michigan, as tenant, entered into a written lease (“Lease”) with Utica Towne Center, Inc. for the Property. Rite Aid Corp. entered into a Guaranty Agreement guaranteeing Rite Aid of Michigan’s performance under the Lease. Article 12 of the Lease stated that:

Landlord shall maintain in good condition and repair the structural portions of the Building, including foundation, bearing, walls and columns. Tenant shall

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<sup>1</sup> The Parties also refer to the subject property by address 44800 Van Dyke Ave, Utica, Michigan.

otherwise keep the Premises in good order and repair, including repair to and replacement of the Building roof and the Parking Lot, except to the extent that such repair results from the act or omission of Landlord or except where same are covered by the standard fire and extended coverage insurance policy.

Rite Aid Defendants' Exhibit 1. In March 2011, Rite Aid of Michigan subleased the Property to Kolor King. In the Sublease, Kolor King promised to perform Rite Aid of Michigan's obligations under the Lease. The Lease/Sublease expired on March 31, 2017. In September 2017, a subsequent owner of the Property, Pierson Dollar Properties, LLC ("Pierson Dollar Properties") sold the Property to Plaintiff Kam Kam. Plaintiff Kam Kam now alleges that when it purchased the Property after the Lease expired, it acquired all rights and interests under the Lease. Plaintiff Kam Kam now asserts that the Rite Aid Defendants breached the Lease by failing to maintain the parking lot during the tenancy.

On March 3, 2018, Plaintiff Kam Kam filed its Complaint alleging: Count I, breach of contract (tenant); Count II, breach of contract (guarantor). On November 21, 2018, the parties entered into a Stipulated Order to Partially Dismiss Plaintiff's Claims with Prejudice relating to Plaintiff Kam Kam's claims arising out of the condition of the building, roof, and damage from sign removal. Therefore, only the portion of Plaintiff Kam Kam's claims relating to the parking lot remain.

## II. Standard of Review

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, Law and Analysis

The Rite Aid Defendants first argue that Plaintiff Kam Kam lacks standing to enforce terms of the Lease because the previous owner, Pierson Dollar Properties, never assigned any rights under the expired Lease to Plaintiff Kam Kam. While the Offer to Sell Real Estate executed in 2017 stated that at closing Pierson Dollar Properties would transfer to Plaintiff Kam Kam rights under previous lease agreements regarding the Property, the sale closed with no assignment of rights according to the Rite Aid Defendants. The Rite Aid Defendants maintain that once a lease expires, the lessor has no remaining rights to assign. Consequently, the Rite Aid Defendants conclude, Pierson Dollar could only have assigned a cause of action for breach of the Lease and such assignment failed to satisfy the statute of frauds.

Plaintiff Kam Kam responds that it has standing to bring the present claim because the covenant to keep the premises in good repair runs with the land; the Rite Aid Defendants do not have standing to challenge the assignment; and the circumstances give rise to an equitable assignment.

“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) citation omitted. Under general contract law, rights can be assigned unless

the assignment is clearly restricted; an assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses. *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004).

The Court of Appeals has observed that few cases in Michigan address the elements necessary to create an assignment. *Burkhardt v Bailey*, 260 Mich App 636, 654–55; 680 NW2d 453 (2004). However, the parties must have a “perfected transaction” that they intend “to vest in the assignee a *present right* in the thing assigned.” *Id.* citation omitted, emphasis added. Further, under the statute of frauds, an assignment of “things in action” must be “in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise....” *Id.* citing MCL 566.132(1)(f). A written instrument, even if poorly drafted, creates an assignment if it clearly reflects the intent of the assignor to *presently transfer* the thing to the assignee. *Id.*

Turning to the present case, Plaintiff Kam Kam presented no written evidence that it holds an assignment to any cause of action under the Lease. Instead, as its Exhibit E, Plaintiff Kam Kam relies on a document entitled Offer to Sell Real Estate (“Offer to Sell”). The Offer to Sell, signed September 17, 2017 by seller Pierson Dollar Properties and purchaser Grow Green, LLC (later assigned to Plaintiff Kam Kam), states:

Seller at Closing . . . shall sell, transfer and convey to Purchaser, and Purchaser shall purchase, all of Seller’s right, title and interest in the Premises.

A. Seller’s rights include, without limitation, any and all rights Seller has pursuant to any previous lease agreements entered into with respect to the Premises, an assignment of which shall be executed at closing.

In the First Amendment to Purchase and Sale Agreement, dated December 26, 2017, between Pierson-Dollar Properties, LLC and Grow Green, LLC, the parties amended the terms of the

Purchase Agreement relating to price and assigned the Purchase Agreement to Plaintiff Kam Kam. However, there the parties assigned the Purchase Agreement not the seller's rights under any lease agreement. As stated above, the statute of frauds requires assignments of causes of actions to be written and signed by the party charged. MCL 566.132(1)(f). Further, an assignment requires a clearly manifested intent to a present transfer. *Burkhardt*, 260 Mich App at 656. While the terms of the Purchase and Sale Agreement contemplate a future assignment to be executed at closing, it does not create a present transfer of rights. Plaintiff Kam Kam has presented no writing to evidence that the seller ever completed the assignment that it contemplated. As such, Plaintiff Kam Kam's purported assignment fails to satisfy the statute of frauds.

In an attempt to save its claim, Plaintiff Kam Kam relies on three other unavailing arguments. First, Plaintiff Kam Kam relies on privity of estate principles and argues that the covenant to keep premises in good repair runs with the land. In support, it cites *Plaza Inv Co v Abel*, 8 Mich App 19, 24–25; 153 NW2d 379 (1967) where the Court stated, “upon a conveyance of the landlord's entire interest in leased property the privity of estate formerly existing between the original landlord and the original tenant is at an end, and the benefits and burdens of all covenants running with the land pass to the transferee who, as a result of such transfer, comes into privity of estate with the tenant . . .”

However, the *Abel* case differs from the present matter in several important respects. The defendant in *Abel* purchased the property during the tenant's tenancy and while the tenant had possession. Here, the tenancy expired before Plaintiff Kam Kam purchased the property. As such, Plaintiff Kam Kam and Rite Aid of Michigan did not have privity of estate supporting

obligations running with the land.<sup>2</sup> See, *Breen v Feldman*, 264 Mich 347, 349; 249 NW 874 (1933) (Nothing left to assign after plaintiff's interest in the lease terminated). Given that Rite Aid of Michigan no longer has possession of the property, it follows that what remains is not a duty to repair running with the land but rather a cause of action for damages—the assignment of which must satisfy the statute of frauds.

Further, the *Abel* Court concerned a landlord's liability for a previous owners' breach of the duty to repair and the ensuing damage to the tenant's property. Here, Plaintiff Kam Kam seeks to enforce a contractual duty of a tenant to repair purportedly owed to a previous owner. Plaintiff Kam Kam had no direct relationship with the Rite Aid Defendants. Plaintiff Kam Kam has cited no cases supporting such a recovery by way of privity of estate. The *Abel* Court observed that "there is ample authority" holding that a transferee cannot recover for a "breach by the tenant committed prior to the transfer." *Abel*, 8 Mich App at 26. The *Abel* Court ultimately found no authority to hold a successor to a landlord or tenant's interest liable for a predecessor's breach. *Id.* at 26-28. Therefore, *Abel* does not support Plaintiff Kam Kam's position that the Rite Aid Defendants owe a duty to repair under privity of estate.

Second, Plaintiff Kam Kam argues that the Rite Aid Defendants have no standing to challenge the purported assignment agreement. However, Plaintiff Kam Kam overlooks that it is the party seeking to enforce rights allegedly gained by assignment and therefore has the burden of proof.

Finally, Plaintiff Kam Kam argues that it has an equitable assignment. Where "a legal instrument fails to create an assignment but the circumstances clearly establish the assignor's

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<sup>2</sup> If the Court were to adopt Plaintiff Kam Kam's argument and reasoning that a third-party, subsequent purchaser can hold a former tenant, with whom it had no dealings, liable for needed repairs to property, the result would create an onerous due diligence burden in property transactions.


intent to presently transfer an interest, an equitable assignment may arise.” *Burkhardt v Bailey*, 260 Mich App 636, 658; 680 NW2d 453 (2004). Plaintiff Kam Kam has produced no instrument that shows a present intent to transfer an interest. Plaintiff Kam Kam has also not established that the doctrine of equitable assignment may circumvent the writing requirement of the statute of frauds. As a result, the equitable assignment argument lacks support.

For the above stated reasons, Plaintiff Kam Kam has not shown that it has an enforceable assignment of rights under the Lease or privity of estate to enforce a duty to repair. As such, the Court will GRANT the Rite Aid Defendants motion for summary disposition. Consequently, the Court need not reach Rite Aid Defendants remaining arguments relating to sufficiency of evidence. Further, as Rite Aid of Michigan conceded, the Court’s decision to grant the motion for summary disposition regarding standing renders the remaining motion for Partial Summary Disposition against Kolor King moot.

**I. Conclusion**

For the reasons set forth above, the Rite Aid Defendants’ motion for summary disposition is GRANTED. 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.

  
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JUDGE JAMES M. BIERNAT, SR.  
In the Absence of Hon. Richard L. Caretti

DATED: February 4, 2019

cc: William A. Calunas  
Joel C. Bryant  
Donald A. Delong  
James M. Poniewierski