FILED by Macomb County Circuit Court
2/28/2020

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

P&J TRADING SUPPLY COMPANY, INC.,
Plaintiff/Counter Defendant/
Third-Party Plaintiff,

vs. Case No. 2019-928-CB

K&P REALTY, LLC,
Defendant/Counter Plaintiff/
Third-Party Plaintiff,

K&P REALTY, LLC,
Defendant/Counter Plaintiff/
Third-Party Plaintiff,

vs.

PATRICK BENGE,
Third-Party Defendant,
_____/

OPINION AND ORDER

Defendant K&P Realty, LLC ("K&P") filed a motion for partial summary disposition under MCR 2.116(C)(8) and (10) seeking dismissal of counts I-V of the Complaint.

Plaintiff P&J Trading Supply Company, Inc. ("P&J") also filed a motion for summary disposition under MCR 2.116(C)(10) seeking judgment against K&P on count III (breach of contract) of the Complaint.

I. Background

This lawsuit arises out of a dispute relating to a retail plaza located at 20880 Gratiot Avenue in the City of Eastpointe, also known as Park Point Plaza (the "Property"). In December 2016, P&J entered into a Lease Agreement ("2016 Lease") to rent retail space at the Property from K&P. In 2017, P&J filed a lawsuit seeking rescission of the 2017 Lease for breach of contract and fraud. See *P&J Trading Supply Company, Inc. v K&P*

Realty LLC, Macomb County Circuit Court, Case No. 2017-3723-CB ("2017 lawsuit"). The parties subsequently settled the case. See Settlement Agreement and Release of Claims signed April 26, 2018 ("Settlement Agreement). The Settlement Agreement provided generally that P&J would continue to rent space at the Property from K&P but for a term of six months pursuant to a new Commercial Lease attached as Exhibit A to Settlement Agreement ("commercial lease'), and that P&J would purchase the Property from K&P for 3.2 million dollars by land contract pursuant to an Offer to Purchase Real Property attached as Exhibit B to Settlement Agreement ("offer to purchase"), and for the release by all parties of all claims from the 2017 lawsuit. On January 8, 2019, the Court dismissed the 2017 lawsuit by the parties' stipulated Order of Dismissal.

After six months, the parties did not enter into a land contract and P&J remains in possession of the Property. On March 3, 2019, P&J brought the present litigation alleging K&P breached the Settlement Agreement in several ways including by failing to install a new roof. Specifically, P&J filed its Complaint alleging: count I, fraud in the inducement; count II, fraud (bad faith promise); count III, breach of contract; count IV, specific performance; count V, contract reformation; and count VI, violation of the lockout statute.

On April 22, 2019, K&P filed a Counter-complaint against P&J and Third-party Complaint against Patrick Benge alleging: count I, breach of contract; count II, breach of land contract; count III, fraud/misrepresentation; count IV, conversion; count V, breach of implied covenant of good faith and fair deals; and count VI, statutory conversion.

The Court heard oral argument on the cross motions for summary disposition on November 18, 2019 and took the matter under advisement. The Court subsequently gave the parties an opportunity to file supplemental briefs, which they have done.

II. Standards of Review

Summary disposition under MCR 2.116(C)(8) is appropriate where a party fails to state a claim upon which relief can be granted. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 426-427; 722 NW2d 243 (2006) (citation omitted). 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).

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).

III. K&P's Motion for Partial Summary Disposition

A. Fraud in the Inducement (Counts I) and Fraud/Bad-Faith Promise (Count II)

K&P argues that the economic-loss doctrine bars count I (fraud in the inducement) and count II (fraud/bad-faith promise) of P&J's Complaint. P&J argues that the economic-loss doctrine does not apply because this case does not involve a sale of goods. P&J further argues that its claims involve a bad faith promise/fraud in the inducement which are an exception to the economic loss doctrine.

The Michigan Supreme Court adopted the economic loss doctrine in *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 519; 486 NW2d 612 (1992). "The economic-loss doctrine is a judicially created doctrine that bars all tort remedies where the suit is between an aggrieved buyer and a nonperformance seller, the injury consists of damage to the goods themselves, and the only losses alleged are economic." *Sullivan Indus, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 339; 480 NW2d 623 (1991). The economic loss doctrine provides that "where a purchaser's expectations in a sale are frustrated because the product . . . bought is not working properly, [the purchaser's] remedy is said to be in contract alone, for [the purchaser] has suffered only 'economic' losses." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 43–44; 649 NW2d 783 (2002). "Since *Neibarger,* the economic loss doctrine in Michigan has been applied in the context of various transactions for goods or products to bar recovery in tort when damages are recoverable under the Uniform Commercial Code." *Quest Diagnostics, Inc v MCI WorldCom, Inc*, 254 Mich App 372, 377–78; 656 NW2d 858 (2002) citations omitted. "A factor present in all cases in which Michigan courts have applied the economic loss doctrine is that the parties to the litigation were involved, either directly or indirectly, in a transaction for goods." *Id.* at 379, citations omitted.

Here, it is undisputed that this case does not involve a transaction in goods under the UCC. Furthermore, K&P has not provided any legal authority to support its position that the economic loss doctrine applies in this case involving a commercial lease and offer to purchase real property. While K&P relies on *Gen Motors Corp v Alumi-Bunk, Inc*, 482 Mich 1080; 757 NW2d 859 (2008), the case involved a transaction in goods under the UCC (the sale of motor vehicles), not a lease and sale of real property. K&P also cites to *Fultz v Union-Commerce Assoc*, 470 Mich 460, 469; 683 NW2d 587 (2004) in support of its position. However, *Fultz* involved a negligence claim and the question of whether the defendant owed a duty to the plaintiff separate and distinct from its duty under a third-party contract. The present case concerns allegations of fraud and not questions of duty. Therefore, *Fultz also* does not support K&P's position. Accordingly, K&P's motion for summary disposition of counts I and II must be denied.

B. Breach of Contract (Count III)

In count III (breach of contract) of its Complaint, P&J claims K&P breached the parties' "Settlement Agreement" for various reasons. Complaint, ¶ 53. "To prevail on a breach of contract claim, a party "must establish by a preponderance of the evidence that (1) there was a contract, (2) the other party breached the contract, and (3) the breach resulted in damages to the party claiming breach." *Bank of Am, NA v Fid Nat Title Ins Co*, 316 Mich App 480, 489; 892 NW2d 467 (2016) citation omitted. "Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement." *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001). "If the contractual language is unambiguous, courts must interpret and enforce the contract as written." *In re Egbert R. Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

The parties' do not dispute they entered into a Settlement Agreement which provides generally K&P and P&J will enter a commercial lease (¶4), an offer to purchase (¶5), and a property management agreement (¶6) in exchange for a full release of all claims by the parties' in their pending lawsuit (¶¶ 1-3). See Settlement Agreement attached as Exhibit 1 to P&J's Complaint. While P&J refers to breaches of the "Settlement Agreement" in its Complaint, it identifies no provision of the Settlement Agreement that K&P allegedly breached.[1] Rather, its allegations involve breaches of the commercial lease and offer to purchase. Accordingly, the Court will analyze each alleged breach in connection with the applicable agreement.

1. Failure to Replace Roof

P&J maintains that K&P materially breached the offer to purchase by failing to replace the roof or perform any of its obligations relating to the roof (which K&P denies) because K&P re-covered the roof and did not replace it.[2] P&J seeks specific performance. K&P argues that P&J's claim must be dismissed because under the clear and unambiguous language of the offer to purchase, replacement of the roof was not a condition precedent to P&J's obligation to close, and since P&J has failed to fulfill its obligation to close, it has waived any right it had in relation to the roof.

Pursuant to the terms of the offer to purchase, P&J agreed to purchase from K&P real property located at 20880 Gratiot Avenue, Eastpointe Michigan ("Property") for

[1] For the reasons set forth in section III(A) of its Opinion and Order addressing P&J's and Benge's motions for summary disposition, the Court will treat the Settlement Agreement as separate and distinct from the commercial lease and offer to purchase.
[2] The Court granted P&J request to supplement the record to include "new evidence". P&J exceeded the scope by adding additional arguments relating to materiality of breach. The Court has considered these arguments for judicial economy and because it is satisfied Defendant's due process is not violated.

$3,200,000 paid in monthly installments of not less than $25,000 in accordance with a standard commercial land contract. Offer to Purchase at ¶ 1-2 attached as Exhibit B to Settlement Agreement attached to P&J's Complaint as Exhibit 1. The closing was to occur 180 days "from the date set forth below." *Id* at ¶ 4 The Effective date of the offer to purchase is April 26, 2018. *Id.*

Pursuant to paragraph 7(B) of the offer to purchase, K&P agreed to install a new code compliant roof. Specifically, the offer to purchase states in relevant part:

> 7. Inspection. Buyer acknowledges that it has had the opportunity for physical inspection of the Property . . . and shall accept the Property "AS IS WHERE IS, WITH ALL FAULTS" . . . with the following exceptions;
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> ***
>
> B. Seller shall install a new code compliant roof. While the parties contemplate the roof will be completed prior to closing, completion of the roof is not a condition precedent to closing. The Roof shall conform to the following requirements . . . (6) The parties recognize that roof replacement is essential to the agreement. Therefore, if completion of the roof is delayed beyond closing, the Seller shall be responsible for any actual damage the Buyer may suffer occasioned on delayed completion.

See Id at ¶ 7(B) (emphasis in original).[3]

While K&P denies P&J's allegation that it failed to install a new code compliant roof in accordance with the terms of the parties' agreement, for the purposes of its motion, K&P argues that regardless, installation of a new code compliant roof was not a condition precedent to P&J's obligation to close. This Court agrees. It is clear from the unambiguous terms of the offer to purchase, the parties contemplated potential delays related to the roof "beyond closing" and provided for a remedy if such delays were to occur – after closing. *Id.* Thus, pursuant to the parties' agreement, P&J must close on

[3] The parties' disagree about the interpretation of K&P's obligation related to the roof set forth in this provision of their agreement which this Court makes no determination.

the Property before seeking any damages for alleged delays related to the roof. *See Derosia v Austin*, 115 Mich App 647, 652; 321 NW2d 760, 762 (1982) citing *McWilliams v. Urban American Land Development Co.*, 37 Mich.App. 587, 592, 194 N.W.2d 920 (1972); *Sterling v. Fisher*, 356 Mich. 634, 640, 97 N.W.2d 64 (1959) ("The general rule is that a court of chancery will not grant specific performance unless the party seeking the decree has tendered full performance.") P&J admittedly has not closed on the Property. See P&J's Brief in Response, p 2. Accordingly, K&P's motion must be granted and count III of P&J's Complaint on this basis must be dismissed.

2. Failure to Remedy Building Code Issues within Six Months

P&J also maintains that K&P materially breached the offer to purchase by failing to remedy the remaining building code issues within 6 months. K&P argues that count III of P&J's Complaint on this basis must be dismissed because it is a condition precedent to P&J's obligation to close which P&J waived. K&P further argues that the condition is satisfied since the building is now code complaint. P&J denies any express or implied waiver but insists on "strict performance".

"A 'condition precedent' is a fact or event that the parties intend must take place before there is a right to performance." *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999) citation omitted. "A condition precedent is distinguished from a promise in that it *creates no right or duty in itself*, but is merely a limiting or modifying factor." *Id.* emphasis added. "If the condition is not satisfied, there is no cause of action for a failure to perform the contract." *Harbor Park Mkt, Inc v Gronda*, 277 Mich App 126, 131; 743 NW2d 585 (2007) citation omitted.

The offer to purchase states in relevant part:

7. Inspection. Buyer acknowledges that it has had the opportunity for

> physical inspection of the Property . . . and shall accept the Property "AS IS WHERE IS, WITH ALL FAULTS" . . . with the following exceptions;
>
> A. The seller must remedy all remaining building code issues during the term of the 6 month lease described in paragraph 6 above. Building Code issues include those common to the building excluding those that may be found in specific currently unoccupied interior lease spaces . . . The current lawsuit arising out of the code violations between the seller and the City of Eastpointe must be dismissed as a condition of the Buyer's obligation to close.

See Offer to Purchase attached as Exhibit B to Settlement Agreement attached to P&J's Complaint as Exhibit 1 (emphasis in original).

Pursuant to paragraph 7(A) of the offer to purchase, K&P was required to "remedy all remaining building code issues during the term of the 6 month lease" and obtain a dismissal of the Eastpointe lawsuit arising out of the code violations as a condition precedent of the Buyer's (P&J) obligation to the seller (K&P). Since the requirement in paragraph 7(A) is a condition by the clear and unambiguous language of the parties' agreement, as distinct from a promise, it creates no right to performance and P&J has no basis to enforce the condition under a claim of breach of contract; instead, P&J's remedy for K&P's failure to satisfy a condition precedent is to elect not to close the contemplated transaction. P&J admittedly has not closed on the purchase of the Property. See P&J's Brief in Response, p 2. Accordingly, K&P's motion must be granted and count III of P&J's Complaint on this basis must be dismissed.

C. Failure to Provide Lease Space Ready for P&J's Work

P&J also maintains that K&P materially breached the commercial lease because while admittedly granted access, P&J could not complete its tenant work because the City of Eastpointe refused to grant it a demolition permit because of K&P's continuing code violations. K&P argues that count III of P&J's Complaint on this basis must be dismissed

because K&P in fact provided P&J immediate access to the Property in conformity with the clear and unambiguous terms of the commercial lease and it was not obligated to ensure issuance of a demolition permit by the City of Eastpointe.

The commercial lease provides in relevant part,

> 23. Work by the Tenant. Tenants Work shall conform to the following:
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> ***
>
> G. Upon execution of the Lease the Tenant shall have the right to enter the Leased Premises for the purpose of furnishing and otherwise completing the Tenant's work; provided that work may not commence until after receipt of the Landlord's written approval of the Tenant's plans.

Commercial Lease, ¶ 23 attached as Exhibit A to Settlement Agreement attached to P&J's Complaint as Exhibit 1 (emphasis added). Under the terms of the commercial lease, "Leased Premises" means "all the space inside the exterior walls, roof deck and concrete floors of the designated units leased by the Tenant. . ." *Id*, ¶ 3.

Pursuant to the clear and unambiguous language of the commercial lease, P&J had the right to enter the Leased Premises only for the purpose of furnishing and otherwise completing Tenant's work and only with Landlord's written approval of Tenant's plans. *Id.* There is simply nothing in the text of the commercial lease that supports P&J's interpretation that K&P promised that the City of Eastpointe would grant it permits for demolition. The essential facts are uncontested. K&P permitted P&J to enter the leased premises. P&J's Response Brief at 8; see also, P&J's Reply Brief at 2; K&P's Exhibit F, John Park Affidavit, ¶2 (K&P provided immediate access to the leased premises). P&J accepted the leased space in "as-is" condition.[4] P&J was fully aware of the ongoing

[4] The commercial lease provided: "Tenant [P&J] acknowledged that Tenant has had a full opportunity to examine and has in fact examined the Leased Premises prior to signing this Lease and is satisfied with the present condition. Tenant accepts the Leased

building code violations as such was contemplated by the parties as set forth in the offer to purchase. See Offer to Purchase at ¶ 7(A) attached as Exhibit B to Settlement Agreement attached to P&J's Complaint as Exhibit 1. The City of Eastpointe (not K&P) prevented P&J from completing demolition work at the Leased Premises. See P&J's Exhibit 15 (9/2018 Letter from City of Eastpointe). Applying these uncontested facts to the terms of the commercial lease, there is no question of fact that K&P did not breach paragraph 23(G) of the commercial lease, but on the contrary fully performed. Accordingly, K&P's motion must be granted and count III of P&J's Complaint on this basis dismissed.

C. Specific Performance (Count IV) and Reformation (Count V)

K&P seeks summary disposition of the count IV (specific performance) and count V (contract reformation) for the same reasons as it argued under count III for breach of contract. Specifically, K&P argues P&J lacks a possessory interest in the Property and did not enter the land contract making equitable remedies inappropriate.

As to count IV (specific performance), P&J seeks specific performance for K&P's alleged breach of failing to replace the roof. For the same reasons set forth in section III(B)(1) above, K&P's motion must be granted. As to count V (reformation), K&P cites no authority to support its argument relating to reformation and the lack of a possessory interest. Therefore, in this regard, K&P's motion must be denied.

IV. P&J's Motion for Summary Disposition

P&J's motion for partial summary disposition only addresses breach of contract,

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premises in an "as is" condition." Commercial Lease, ¶2 attached as Exhibit 1 to Complaint.

which is count III in its Complaint. P&J argues that K&P materially breached its duties under the "Settlement Agreement" in five ways: 1) K&P failed to have the tenant space available for tenant work on May 1, 2018; 2) K&P failed to pay for building maintenance and management services that P&J performed; 3) K&P failed to dismiss the condemnation lawsuit in a timely manner; 4) K&P failed to resolve all building code violations within six months; and 5) K&P failed to replace the roof with a new, code-compliant roof.

A. Failure to Have Tenant Space Available for Work, Failure to Dismiss Condemnation Lawsuit Timely, and Failure to Remedy Building Code Violations Within Six Months

For the reasons set forth in section III(B)(2) and (B)(3) above, P&J's motion as to liability on count III (breach of contract) based on failure to have tenant space available for work, failure to dismiss condemnation lawsuit timely, and failure to remedy building code violations within six months must be denied.

B. Duty to Pay P&J for Building Management and Maintenance

P&J argues that K&P materially breached the Settlement Agreement by failing to pay for building maintenance. According to P&J, under the Settlement Agreement, P&J would serve as the building manager during the six-month tenancy period and K&P would pay for P&J's services. K&P argues in response that the parties never executed an agreement for building maintenance and at best a question of material fact exists because P&J never provided verification of the amount allegedly spent in the invoices.

The Settlement Agreement provides, in relevant part, "K&P and P&J will enter a property management agreement whereby P&J shall agree to manage the property during the 6-month lease tenancy, beginning on the same date as the 6-month lease described in Exhibit "A."" Settlement Agreement, P&J's Exhibit 12 ¶6. At best the

Settlement Agreement language is an agreement to enter a management agreement. The language cited above from the Settlement Agreement merely states that the parties "will enter a property management agreement." P&J has failed to provide the Court with a written management agreement relating to management services or any evidence of the substance of such an agreement. Accordingly, P&J's motion for summary disposition as to liability on count III of its Complaint must be denied.

C. Duty to Replace the Roof

For the reasons set forth above in section III(B)(1), P&J's motion as to liability on count III (breach of contract) based on failure to replace roof must be denied.

IV. Conclusion

For the reasons set forth above, K&P's motion is GRANTED in part and DENIED in part. Specifically, K&P's motion is GRANTED on count III (breach of contract) based on failure to replace roof, failure to remedy building code issues within 6 months and failure to provide lease space ready for P&J's work and count IV (specific performance). K&P's motion is DENIED in all other respects. Accordingly, count III (breach of contract) based on failure to replace roof, failure to remedy building code issues within 6 months, and failure to provide lease space ready for P&J's work and count IV (specific performance) of P&J's Complaint are dismissed

For the reasons set forth above, P&J's motion for summary disposition is DENIED.

In accordance with MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

Date: FEB 28 2020

Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge

COUNTY OF MACOMB · STATE OF MICHIGAN ·