

STATE OF MICHIGAN
IN THE 14th CIRCUIT COURT FOR THE COUNTY OF MUSKEGON

NORTHERN BIOMEDICAL RESEARCH,
INC., a Delaware corporation; and 1210
PONTALUNA , LLC, a Michigan limited
Liability company,

Case No: 21-004490-CB

Hon. Kenneth S. Hoopes

Plaintiffs/Counter-Defendant

-v-

NBR INVESTMENT PROPERTIES, LLC, a
Michigan limited liability company,

Defendant/Counter-Plaintiff

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**Opinion and Order Re: Defendant's Motion for Partial
Summary Disposition**

Plaintiff Northern Biomedical Research, Inc., leases a property from Defendant located at 1210 E. Pontaluna Road, Norton Shores, Michigan. The property includes a 65,000 square foot laboratory, warehouse space, and office space. The lease contains an option to purchase the property which Plaintiff exercised on or about July 1, 2021. The sale did not take place due to a dispute as to valuation of the property. Plaintiff

commenced this action seeking enforcement of the sale. The complaint contains three counts. Count III seeks monetary damages for Defendant's alleged breach of the lease contract. The monetary damages include, but are not limited to, lost revenue, lost profits, rent for a separate property to expand Plaintiff's operation, and rent paid to Defendant after the scheduled closing date.

Defendant files this motion for partial summary disposition pursuant to MCR 2.116 (C)(8) and (C)(10) alleging Plaintiff's claim for lost revenue and profits are consequential damages and, as such, are barred by the language of the lease. Plaintiff argues said monetary damages are direct damages and are not barred.

A motion brought pursuant to MCR 2.116 (C)(8) tests the legal sufficiency of the complaint with all factual allegations assumed to be true when construed in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 597 NW2d 817 (1999). It can be granted if the claim is so clearly unenforceable as a matter of law that no factual development could produce a recovery. *Id.* The court's inquiry is confined to the pleadings alone. *Id.*

A motion brought pursuant to (C)(10) tests the factual sufficiency of the claim. *Shinn v Mich Assigned Claims Facility*, 314 Mich App 765; 887 NW2d 635 (2016). The motion can be granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of Law. *West v General Motors Corp.*, 469 Mich 177; 665 NW2d 468 (2003). The moving party has the initial burden to support the claim with affidavits, depositions, admissions or other documentary evidence. *McCoig Materials, LLC v Galui Constr., Inc.*, 295 Mich App 684; 818 NW2d 410 (2012). The evidence is to be considered in the light most favorable to the nonmoving party. *Liparoto Constr. Inc.*

v Gen Shale Brick, Inc., 284 Mich App 25; 772 NW2d 801 (2009). A genuine factual issue exists if the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might disagree. *Bahri v IDS Prop. Cas. Ins. Co.*, 308 Mich App 420; 864 NW2d 609 (2014).

The parties do not dispute the lease agreement contains the following unambiguous language:

Section 19.3: Waiver of Consequential, Punitive, Exemplary Damages. Landlord and Tenant each hereby waive their right to recover any consequential, punitive, or exemplary, damages.

This language bars either party from collecting consequential damages due to the other's breach. The issue before the court is whether Plaintiff's claim for lost revenue and profits are consequential damages. The Michigan Courts have accepted the definition of consequential damages as those that do not arise within the scope of the immediate buyer-seller transaction, but rather stem from losses incurred by the nonbreaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting. *Sullivan Indus, Inc v Double Seal Glass Co*, 192 Mich App 333, 347; 480 NW2d 623 (1991), quoting *Petroleo Brasileiro, SA v Ameropan Oil Corp*, 372 F Supp 503 (ED NY 1974). Michigan Courts have further indicated that consequential damages include lost profits. *Uganski v Little Giant Crane & Shovel Inc.*, 35 Mich App 88, 108-110, 192 N.W.2d 580 (1971); *Valley Die Case Corp. v A.C.W., Inc.*, 25 Mich App. 321, 334-336, 181 N.W.2d 203 (1970).

Plaintiff's claim for lost revenue and profits stem from its inability to expand the existing laboratory space after the scheduled closing did not take place. Plaintiff alleges


it was planning on expanding the laboratory which would have enabled it to accommodate additional work for its existing and potentially new customers. This court finds, in applying the definition of consequential damages, its request for monetary damages of lost revenue and profits are consequential and are therefore barred by Section 19.3 of the lease agreement. The court applies the standard of review for (C)(8) and (C)(10) motions, and finds that Plaintiff's claim for lost revenue and profits are claims for which relief cannot be granted given the language of the lease agreement. Further, there is no genuine issue as to any material fact that could persuade this court otherwise. Defendant, as the moving party, is entitled to partial summary judgment as a matter of law.

Defendant's motion for partial summary disposition also included the issues of reputational harm and lost business opportunities. Plaintiff has concurred with Defendant's argument that these damages would fall within the definition of consequential damages and are waived by Section 19.3 of the parties' lease. Therefore, the court will not address this issue.

Defendant's motion for partial summary disposition pursuant to MCR 2.116 (C)(8) and (C)(10) is GRANTED and Plaintiff Northern Biomedical Research, Inc., is barred from seeking monetary damages for lost revenue and lost profits as set forth in Count III paragraph 91 of its First Amended Complaint.

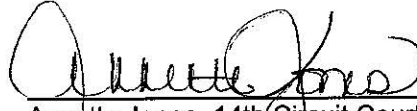
IT IS SO ORDERED. This is not a final order and does not close this case.

January 6, 2023


Kenneth S. Hoopes (P53469)
Circuit Judge

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of January, 2023 I personally handed or mailed copies of this order to the parties above named at their respective addresses by ordinary mail.


Annette Jones, 14th Circuit Court
Assistant to the Hon. Kenneth S. Hoopes