

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

P&J TRADING SUPPLY
COMPANY, INC.

Plaintiff/Counter-defendant/
Third-party Plaintiff,

vs.

Case No. 19-928-CB

K&P REALTY, LLC,

Defendant/Counter-plaintiff/
Third-party Plaintiff,

and

JOHN PARK,

Third-party Defendant,

K&P REALTY, LLC

Defendant/Counter-plaintiff/
Third-party Plaintiff,

vs.

PATRICK BENGE,

Third-party Defendant.

/

OPINION AND ORDER

Defendant/Counter-plaintiff/Third-party Plaintiff K&P Realty, LLC ("K&P") filed a Motion for Possession Judgement, to Escrow Rents or Alternatively Security for Costs Pursuant to MCR 2.109.

I. Background

In their motion papers, the parties do not elaborate on the factual background of this case but instead rely on previous filings before this Court. Since the present motion concerns mostly procedural matters, a full recitation of the nature of the parties' dispute

is unnecessary. In short, the controversy involves a commercial retail facility that K&P owns located at 20880 Gratiot Avenue in Eastpointe, Michigan (“facility”).

Previously, P&J entered into an agreement with K&P to lease space at the facility. A dispute arose among the parties in 2017 regarding alleged code violations and a condemnation action from the City of Eastpointe. As a result, litigation ensued between P&J and K&P. The 2017 case resulted in a stipulated order of dismissal without prejudice and the parties entered into a Settlement Agreement providing for a six-month lease term and an agreement to purchase the facility on land contract according to various terms. In January of 2019, both parties filed motions to enforce the Settlement Agreement. The Court denied both motions in February 2019.

K&P then filed a new claim for possession in district court in case 19-524-LT. In this Court, P&J also filed the present lawsuit seeking relief for alleged breach of the Settlement Agreement and K&P filed a counter-claim also alleging breach, among other things.

Specifically, on March 3, 2019, 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 lock-out statute. On April 22, 2019, K&P filed a Counter-complaint and Third-party Complaint 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. K&P’s Counter-claim does not include a claim for possession.

On March 25, 2019, on a hearing on a motion to dismiss, the district court held

that the case for possession should be transferred to the Circuit Court. K&P's Exhibit 4. On May 31, 2019, this Court entered a stipulated Order stating that K&P's claim for possession shall remain with the district court. K&P's Exhibit 3. On June 17, 2019, the district court denied K&P's motion for possession. K&P's Exhibit 5.

On August 26, 2019, K&P filed its present motion for possession before this Court. The Court heard oral argument on September 3, 2019 and denied that part of the motion for security of costs for the reasons stated on the record. However, the Court took the part of K&P's motion relating to possession under advisement.

II. Arguments

In support of its motion for possession, Defendant K&P argues that the Circuit Court has jurisdiction to order possession. K&P contends that P&J previously argued to the district court that the Circuit Court had jurisdiction to hear summary proceedings. According to K&P, P&J continues to operate its business at the premises without paying rent. Therefore, K&P argues that this Court has equitable powers to enter an order granting possession to K&P and for P&J to vacate the premises.

In Response, Plaintiff P&J does not dispute this Court's jurisdiction to hear a claim for possession but argues that the district court and circuit court have both previously entered orders that place K&P's summary possession claim with the district court. As for the claims pending in this Court, P&J argues that K&P did not plead any claim for possession. P&J maintains that K&P has no right to enforce the Settlement Agreement because it remains in material breach and has failed to cure.

III. Law and Analysis

As an initial matter, other than that part of K&P's motion seeking security for

costs, K&P does not identify the court rule under which it seeks an order of possession. In effect, K&P's motion is one for summary disposition, because it would require the Court to first determine the merits of the claim—whether the Settlement Agreement was breached and which party first materially breached.

Yet in its Counter-complaint in this matter, K&P has not alleged any claim for possession. Instead, K&P seeks money damages for alleged breach, conversion of rents, and fraud. In addition, it is unclear whether K&P proceeds on a claim for breach of the lease or breach of the Settlement Agreement. Moreover, given the parties' May 31, 2019 stipulation that the claim for possession would remain in district court, and the district court's apparent consideration of the matter, it is unclear on what basis K&P now seeks a ruling from this Court with regard to possession.¹ Therefore, K&P has provided no basis for the order of possession it now seeks.

As a result, K&P has failed to establish a basis in support of its motion for possession. Therefore, the motion is denied.

IV. Conclusion

For the reasons set forth above, K&P's motion 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: OCT 10 2019

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge

¹ See MCR 2.116(C)(6).

