STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

S.A.G., INC.,

Plaintiff/Counter-Defendant,

vs.

J.K. GROUP HOLDINGS, LLC

Defendant/Counter-Plaintiff.

Case No. 2023-202012-CB

Hon. Victoria Valentine

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OPINION AND ORDER REGARDING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court held on the 22nd day of January 2024 in the County of Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court on Plaintiff/Counter-Defendant S.A.G. Inc's ("SAG") Motion for Summary Disposition under MCR 2.116(C)(9), which asks the Court to find that Defendant J. K. Group Holdings, LLC failed to state a defense to Plaintiff's complaint.

SAG also seeks Summary Disposition under MCR 2.116(C)(10), which asks the Court to dismiss Defendant/Counter-Plaintiff J. K. Group Holdings, LLC's counterclaim that seeks a declaratory judgment.

The Court, having reviewed the briefs and submission, having considered the merits, having heard oral argument on November 15, 2023, and on December 13, 2023, and being fully advised in the premises, respectfully DENIES Plaintiff's motion under MCR 2.116(C)(9) and (10) without prejudice.

ABBREVIATED STATEMENT OF FACTS

The parties entered into an "Agreement to Purchase and Sale of Property" dated March 3, 2023[1], which provides in pertinent part as follows:

> AGREEMENT OF PURCHASE AND SALE
> (5720 Highland Rd., Waterford Twp., MI 48327)
>
> THIS AGREEMENT OF PURCHASE AND SALE (this "Agreement") is dated as of March _*3,*_ 2023. (the "Effective Date") between S.A.G., Inc, as seller ("Seller"), and J.K GROUP HOLDINGD LLC as buyer ("Buyer").
>
> * * *
>
> Diligence Period: Fifteen (15) days, beginning on and including the Effective Date.
>
> Closing Date: Such date as shall be mutually agreed upon in writing by Buyer and Seller, but in no event later than forty-five (45) days from the expiration of the Diligence Period.
>
> * * *
>
> **ARTICLE 1**
> **PURCHASE AND SALE OF THE PROPERTY**
>
> Section 1.2. Purchase Price; Deposit. Buyer will pay the Purchase Price as described in this Section. All payments will be made in immediately available funds delivered into escrow with the Escrow Agent.

[1] See Counterclaim: Exhibit A.

(a) Buyer will deliver the Deposit within three (3) days following the Effective Date. *The Deposit will become* ***non-refundable*** *to Buyer* ***(other than as expressly set forth in this Agreement) and simultaneously be released to Seller by Escrow Agent immediately upon the expiration of the Diligence Period in accordance with Section 2.1(a) below*****;** provided however, if Closing occurs, the Deposit will be credited by Seller against the Purchase Price at Closing. Escrow Agent will place the Deposit in a federally insured account on behalf of Seller and Buyer (emphasis added).

ARTICLE 2-BUYER'S INVESTIGATIONS AS-IS SALE.

Section 2.1. Buyer's Investigations.

(a) During the Diligence Period, *Buyer will conduct such commercially reasonable, non-invasive investigations,* studies or tests of the Property as Buyer deems necessary to determine whether Buyer desires to complete the acquisition of the Property. Buyer, in its sole and absolute discretion and for any reason or no reason whatsoever, may reject the Property by giving written notice of termination to Seller and Escrow Agent (the "Termination Notice") prior to the expiration of the Diligence Period. Such written notice may be given by email addressed to all parties with a copy of the e-mail delivered via 1st Class U.S. Mail postage prepaid to the physical addresses as provided herein. If the last day for due diligence falls on a weekend or a federal holiday, notice may be given on the next business day prior to 12 p.m. **If Buyer timely gives a Termination Notice, the Deposit will be returned to Buyer and this Agreement and the rights and obligations of the Parties under this Agreement will terminate, except for Obligations Surviving Termination. Alternately, Buyer may accept the Property by giving written notice of acceptance to Seller and Escrow Agent (the "Acceptance Notice") prior to the expiration of the Diligence Period. If Buyer timely delivers an Acceptance Notice, or fails to deliver either a Termination Notice or an Acceptance Notice prior to the expiration of the Diligence Period, then (i) Buyer will be deemed to have accepted the Property, (ii) the Deposit will immediately become non-refundable to Buyer (other than as expressly set forth in this Agreement) and simultaneously released to Seller by Escrow Agent and (iii) this Agreement will continue in effect subject to the other provisions hereof.** Buyer acknowledges and agrees that Buyer will have the full opportunity during the Diligence Period to inspect and

investigate all aspects of the Property. Seller grants to Buyer and its contractors and representatives access to the Property for the purpose of performing such studies or tests. . .

Section 5.2. Default by Buyer. ***If Buyer fails to perform any obligation of Buyer under this Agreement prior to or at Closing*** and does not cure such failure (a) within one (1) Business Day after receipt of written notice from Seller asserting such failure, if Buyer (i) fails to timely pay or deposit any amount of money required to be paid or deposited by Buyer under this Agreement, or (ii) fails to timely deliver Closing Documents or authorize Closing if and when required of Buyer for Closing to occur under this Agreement, or (b) within ten (10) days after receipt of written notice from Seller asserting any such failure, if Buyer fails to perform any other obligation of Buyer (any such failure, if not cured within such period, being a **"Buyer Default"), then Seller will be entitled, by giving written notice to Buyer and Escrow Agent within thirty (30) days after the occurrence of such Buyer Default, as Seller's sole and exclusive remedy against Buyer, to terminate this Agreement and receive the Deposit as Seller's agreed and total liquidated damages, and neither of the Parties will thereafter have any further rights, liabilities or obligations under this Agreement** except for Obligations Surviving Termination. The Parties have agreed that Seller's actual damages in the event of a Buyer Default would be extremely difficult or impracticable to determine. The Parties have therefore agreed that, considering all the facts and circumstances existing as of the Effective Date, the amount of the Deposit is a reasonable estimate of the damages that Seller would incur in the event of a Buyer Default. Each Party specifically confirms the accuracy of the statements made above and the fact that each Party was represented by counsel who explained, at the time this Agreement was made, the consequences of this liquidated damages provision, **this agreement is contingent on buyers obtaining lenders financing. (Emphasis added).**

It is undisputed that Defendant Buyer deposited a $50,000 earnest money deposit with the Escrow Agent; Defendant Buyer failed to deliver notice of acceptance or termination prior to the expiration of the due diligence period; and the closing did not take place within 45 days of the expiration of the due diligence period--by May 2, 2023.

CLAIMS

Plaintiff Seller claims that under Section 2.1 of the Agreement, the earnest money deposit became nonrefundable after the expiration of the diligence period (15 days beginning on and including the 3/3/2023 effective period) and that Defendant Buyer breached their agreement by refusing to return the deposit and/or by objecting to the Escrow Agent's release of the deposit to Plaintiff Seller contrary to section 2.1 of the Agreement. As a result, Plaintiff Seller filed a 2-count complaint alleging Breach of Contract and Declaratory Relief.

Defendant Buyer, in turn, filed a counter-complaint, which asks the Court to declare that the $50,000 deposit is Defendant Buyer's property by virtue of Section 5.2 of the Agreement. Defendant argues that this section makes the purchase of the property contingent on Defendant Buyer obtaining financing.

Plaintiff's Motion argues that Defendant failed to assert a defense to the complaint and that it is entitled to judgment as a matter of law because:

> (1) Defendant's reliance on Section 5.2 does not relieve it and/or override Defendant's obligation to deliver a termination notice as required by Sections 1.2 and 2.1, and
>
> (2) the liquated damage provision is not "unconscionable."

Defendant argues that Section 2.1 of the Agreement relates to "commercially reasonable, non-invasive investigations" -- not to a termination notice regarding lender financing. Defendant cites to other provisions in the Agreement that refer to a return of the deposit to Defendant:

- Section 2.2(c)-title
- Section 3.2-in the event of a casualty
- Section 3.3-in the event of a condemnation

Defendant also relies on Section 5.2, which provides, "**this agreement is contingent on buyers obtaining lenders financing."** Defendant, therefore, argues that its failure to obtain financing does not constitute its "failure to perform any obligation under this Agreement." (Section 5.2).

Lastly, the Defendant argues that the $50,000 deposit was an unconscionable liquated damage provision.

The Court DENIES Plaintiff's motion under MCR 2.116(C)(9) and (10) as premature.

ANALYSIS

"The goal of contract interpretation is to determine and enforce the parties' intent on the basis of the plain language of the contract itself." *Bayberry Group, Inc v Crystal Beach Condo Assoc*, 334 Mich App 385, 393 (2020) (cleaned up). See also *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375 (2003). A written contract must be interpreted according to its plain and ordinary meaning. *Woodington v Shokoohi*, 288 Mich App 352, 373-374 (2010). Contracts must be construed as a whole. *Village of Edmore v Crystal Automation Sys, Inc*, 322 Mich App 244, 262 (2017). Courts must "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468 (2003). If contractual language is clear, its interpretation is a question of law for the court. *Woodington v Shokoohi, 288 Mich App* at 374. "Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement . . . [Courts] examine the language of the contract according to its plain and ordinary meaning." *Innovation Ventures, LLC v Liquid Mfg, LLC,* 499

Mich 491, 507 (2016). It "has long been the law in this state that courts are not to rewrite the express terms of contracts." *McDonald v Farm Bureau Ins Co,* 480 Mich 191, 199- 200 (2008).

Here, Section 1.2(a) of Agreement provides that "*The Deposit will become* ***non-refundable*** *to Buyer* ***(other than as expressly set forth in this Agreement).***"

Section 5.2 of the Agreement provides in part as follows:

> **If Buyer fails to perform any obligation of Buyer under this Agreement prior to or at Closing and does not cure such failure (a) within one (1) Business Day after receipt of written notice from Seller asserting such failure, If Buyer** (i) fails to timely pay or deposit any amount of money required to be paid or deposited by Buyer under this Agreement, or **(ii) fails to timely deliver Closing Documents or authorize Closing if and when required of Buyer for Closing to occur under this Agreement, or (b) within ten (10) days after receipt of written notice from Seller asserting any such failure, if Buyer fails to perform any other obligation of Buyer (any such failure, If not cured within such period, being a "Buyer Default"), then Seller will be entitled, by giving written notice to Buyer and Escrow Agent within thirty (30) days after the occurrence of such Buyer Default, as Seller's sole and exclusive remedy against Buyer, to terminate this Agreement and receive the Deposit as Seller's agreed and total liquidated damages**, and neither of the Parties will thereafter have any further rights, liabilities or obligations under this Agreement except for Obligations Surviving Termination.

In construing any contract, the court will ascertain the intent of the parties both from the language used and from the surrounding circumstances. *First Baptist Church of Dearborn v Solner*, 341 Mich 209 (1954); *Moulton v Lobdell-Emery Mfg Co*, 322 Mich 307 (1948). All this means is that if a contractual term is otherwise ambiguous or subject to more than one possible construction within the four corners of the written instrument and the circumstances or relations of the parties underlying the contract resolve that ambiguity, the Court must inquire into them in performing its interpretive function. *Zurich Insurance Co v CCR & Co* (On Rehearing), 226 Mich App 599, 607-608 (1997).

Plaintiff's Complaint states in part:

10. Pursuant to Section 2.1 of the Agreement, in pertinent part:

> [. . .] If Buyer timely delivers an Acceptance Notice, or fails to deliver either a Termination Notice or an Acceptance Notice prior to the expiration of the Diligence Period, then (i) Buyer will be deemed to have accepted the Property, (ii) **the Deposit will immediately become non-refundable to Buyer** (other than as expressly set forth in this Agreement) **and simultaneously released to Seller by Escrow Agent** and (iii) this Agreement will continue in effect subject to the other provisions hereof.

11. JK failed to deliver either an Acceptance Notice or Termination Notice prior to the expiration of the Due Diligence Period, therefore the Deposit became non-refundable to JK and was to be released by the Escrow Agent to the Company.

12. Pursuant to Section 2.1 of the Agreement, despite the Deposit becoming non- refundable, the Agreement continued in effect according to its terms and conditions.

13. Following the expiration of the Due Diligence Period, the Company made numerous inquiries as to JK's closing on the Property, which inquiries went unanswered.

14. JK failed to close on its purchase of the Property on the Closing Date, and the Agreement was therefore terminated.

15. Despite repeated demands to do so, JK refused to consent to the release of the Deposit despite its contractual obligations and objected to the Company's demand to the Escrow Agent to release the Deposit to the Company.

16. JK's refusal to consent and its further objection to the Escrow Agent releasing the Deposit to the Company is a breach of the Agreement. Plaintiff's Complaint

Defendant/Counter-Plaintiff answers the Complaint as follows:

11. In answer to paragraph 11, Defendant admits that it did not deliver the Acceptance Notice or Termination Notice, **but states that Section 5.2 of the Agreement makes Purchaser financing a contingency, and in as much as Defendant was unable to secure financing, the Deposit**

must be returned to Defendant.

12. In answer to paragraph 12, Defendant admits that the Agreement continued after the expiration of the Due Diligence Period but states that Section 5.2 of the Agreement makes Purchaser financing a contingency, and in as much as Defendant was unable to secure financing, the Deposit must be returned to Defendant.

13. In answer to paragraph 13, Defendant denies for the reason that the allegation is untrue.

14. In answer to paragraph 14, Defendant admits.

15. In answer to paragraph 15, Defendant admits.

A motion under (C)(9) may only be granted where "[t]he opposing party has failed to state a valid defense to the claim asserted against him or her." And, only when the pleading is "'so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery.'" *Vayda v Lake Co,* 321 Mich App 686, 693 (2017), quoting *Abela v Gen Motors Corp*, 257 Mich App 513, 518 (2003). When deciding a motion on this ground, "the trial court may only consider the pleadings, which include complaints, answers, and replies, but not the motion for summary disposition itself." *Ingham Co v Mich Co Rd Comm Self-Ins Pool*, 321 Mich App 574, 579 (2017); MCR 2.116(G)(5).

Summary disposition under MCR 2.116(C)(9) is generally improper where a material allegation of the complaint is categorically denied. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 48 (1990); *Fancy v Egrin*, 177 Mich App 714, 724 (1989); *Heligman v Otto*, 161 Mich App 735, 738 (1987) (summary disposition for failure to state a valid defense held improper where defendants categorically denied some of plaintiff's material allegations). Under MCR 2.111(C)(3), a statement

that the defendant lacks knowledge or information sufficient to form a belief as to the truth of an allegation has the effect of a denial. MCR 2.111(C)(3). Furthermore, "[t]he fact that the defense ultimately might be unsuccessful in whole or in part does not render it invalid for purposes of MCR 2.116(C)(9), nor does the fact that it ultimately might be found not to create a genuine issue of material fact to be resolved at trial, thus entitling plaintiff to summary disposition." *Nasser,* 435 Mich at 48. Here the Defendant/Counter Plaintiff denied the allegations in the Complaint. Plaintiff's Motion under (C)(9) is denied.

Motion For Summary Judgment under MCR 2.116(C)(10)

Summary disposition under MCR 2.116(C)(10) may be granted where "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). This motion tests the factual sufficiency of the complaint and "must specifically identify the issues as to which the moving believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). The moving party bears the initial burden of supporting its position. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 (1999). "Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . when judgment is sought based on [MCR 2.116(C)(10)]." MCR 2.116(G)(3)(b). "The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rest on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence

establishing the existence of a material factual dispute, the motion is properly granted." *Smith*, 460 Mich at 455 (citations omitted; emphasis added).

This Court is mindful that the (C)(10) motion is brought prior to the close of discovery. Generally, motions based on MCR 2.116(C)(10) should not be filed until discovery is completed. *Colista v Thomas*, 241 Mich App 529, 537 (2000). However, the motion may be granted when "there is no reasonable chance that further discovery will result in factual support for the nonmoving party." *Id* at 537-538. "Mere speculation that additional discovery might produce evidentiary support is not sufficient." *Caron v Cranbrook Ed Comm*, 298 Mich App 629, 646 (2012) (summary disposition in favor of defendants was not premature where plaintiffs could point to no prospective evidence to support their position, and there was not a fair chance of such evidence existing).

Therefore, because discovery has not closed, any additional issue that may remain under Section 5.2, such as notice and opportunity to cure, is premature. Further, Section 2.1 of the Agreement states "i) the Deposit will immediately become non-refundable to Buyer (**other than as expressly set forth in this Agreement**) and simultaneously released to Seller by Escrow Agent…" And section 5.2 expressly indicates that **"this agreement is contingent on buyers obtaining lenders financing."** Again, if a contractual term is otherwise ambiguous or subject to more than one possible construction within the four corners of the written instrument and the circumstances or relations of the parties underlying the contract resolve that ambiguity, the Court must inquire into them in performing its interpretive function. *Zurich Insurance Co v CCR & Co* (On Rehearing), 226 Mich App 599, 607-608 (1997).

Looking at the evidence in the light most favorable to the non-moving party, Plaintiff's Motion for Summary Disposition is denied without prejudice.

Liquidated Damages

Lastly, as to the issue of liquidated damages, such a provision must be reasonable for it to be enforceable. *St Clair Med, PC v Borgiel*, 270 Mich App 260 (2006); *St Paul Fire & Marine Ins Co v Guardian Alarm Co*, 115 Mich App 278 (1982). The validity and reasonableness of a liquidated damage provision is *determined by conditions existing at the time the contract was entered into*, not when a breach occurs. *Wilkinson v Lanterman*, 314 Mich 568 (1946); *Solomon v Department of State Highways & Transp*, 131 Mich App 479 (1984). A liquidated damages provision will not be enforced if it is held to constitute a penalty. *Watson v Harrison*, 324 Mich 16 (1949); *Fisher v Waddell*, 227 Mich 339 (1924).

Defendant claims it is unconscionable for Plaintiff to retain the $50,000 deposit when the property was off the market for 60 days. However, the validity and reasonableness of a liquidated damage provision is *determined by conditions existing at the time the contract was entered into*, not when a breach occurs. *Wilkinson v Lanterman*, 314 Mich 568 (1946).

CONCLUSION

Based on the above, Plaintiff's motion for Summary Disposition is DENIED under MCR 2.116(C)(9) and DENIED under MCR 2.116(C)(10) without prejudice.

IT IS SO ORDERED.

THIS IS NOT A FINAL ORDER AND DOES NOT CLOSE THE CASE.

/s/Victoria A. Valentine

Dated: 1/22/24