STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BLUE HORSESHOE HOLDING COMPANY,

Plaintiff,

v **NO: 19-175976-CB**
Hon. Michael Warren

FLAGSTAR BANK, FSB,

Defendant.
_____/

OPINION & ORDER REGARDING
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION, and
PLAINTIFF'S COUNTER REQUEST FOR RELIEF UNDER MCR 2.116(I)(2)

At a session of said Court, held in the
County of Oakland, State of Michigan
February 3, 2021.

PRESENT: HON. MICHAEL WARREN
_____/

OPINION

I

Overview

This action for breach of contract and specific performance arises out of the Defendant's breach of an agreement to sell the Plaintiff a second promissory note and second mortgage the Defendant held on residential property owned and mortgaged by David and Susan Clark. The sale price was $15,000. On November 27, 2019, the predecessor Court granted the Plaintiff's request for summary disposition under MCR 2.116(I)(2) as to liability on the breach of contract claim while denying the Defendant's motion under MCR 2.116(C)(7), (8) and (10) ("the November 27, 2019 Order"). More particularly, the November 27, 2019 Order held that that "a valid contract exists between the parties" which the Defendant breached "by failing to honor the parties' agreement." However, "[t]he issue of damages will remain open." *Id.*

Before the Court is the Defendant's Motion for Summary Disposition under MCR 2.116(C)(10) seeking to cap the Plaintiff's potential damages at $91,398.53. The Motion argues that this is the only measure of potential damages the Plaintiff can establish with reasonable certainty that is causally connected to the Defendant's breach. The Motion further maintains that the Plaintiff's calculations exceeding this measure are premised upon impermissible speculation, conjecture, and a multitude of contingencies not contemplated by the parties at the time the contract was entered.

The Plaintiff counters that it is entitled to partial summary disposition under MCR 2.116(I)(2) in the minimum amount of $91,398.53, which it maintains is the undisputed value of the second note and second mortgage had the Defendant honored its agreement to sell those instruments to the Plaintiff for $15,000.00. The Plaintiff further maintains that, in fact, it is entitled to summary disposition in the amount of $278,882.10, which represents its actual damages of $172,483.57 for the fair market value of the property plus the $91,398.53 for the lost value of the note and second mortgage.

At stake are:

- Whether the Plaintiff is entitled to a judgment in the of amount of $91,398.53 when the evidence before the Court dispositively establishes that this measure of damages has been proven with "reasonable certainty" to be the direct, natural, proximate, foreseeable result of the Defendant's breach of its agreement to sell the Second Mortgage and Note to the Plaintiff? Because the answer is "yes," this portion of the Plaintiff's counter-request for relief under MCR 2.116(I)(2) is granted.

- Whether the additional damages calculations offered by the Plaintiff above $91,398.53 warrant summary disposition in the Plaintiff's favor under MCR 2.116(I)(2) or are even sufficient to create a genuine issue for trial? Because such damages are at best speculative, the answer is "no" and this portion of the Defendant's Motion for Summary Disposition is granted.

Oral argument is dispensed under MCR 2.119(E)(3) as it would not assist the Court in rendering a decision.

II

Standards of review

A

MCR 2.116(C)(10)

A motion under MCR 2.116(C)(10), tests the factual sufficiency of a claim or defense. See e.g., *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. 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." *Maiden v Rozwood,* 461 Mich 109, 119-120 (1999). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *Skinner v Square D Co*, 445 Mich 153, 162 (1994).

B

MCR 2.116(I)(2)

MCR 2.116(I)(2) provides that "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

III
Background

The Plaintiff's breach of contract claim arises out of the Defendant's breach of an agreement to sell the Plaintiff a second promissory note and second mortgage the Defendant held on residential property owned and mortgaged by David and Susan Clark. The Clarks owned the property and borrowed against it three times. The Defendant held the first two notes and mortgages. The first loan from the Defendant, evidenced by the first note was in the amount of $382,000, and was secured by the first mortgage ("First Mortgage"). The Clarks subsequently obtained a loan from the Defendant in the amount of $180,000 and executed a second note secured by the second mortgage ("Second Mortgage").[1] The Clarks also executed a third note in the amount of $131,456 to nonparty FirstMerit Bank, NA, secured by a third mortgage (the "Third Mortgage").[2]

Unfortunately, hard times hit the Clarks between 2017 and 2018, leading them to list the property for sale with no buyer for over two years.[3]

On April 3, 2019, the First Mortgage was foreclosed, and the property was sold at a sheriff's sale to the Plaintiff in the amount of its $308,739.88 successful bid.[4] The Sheriff's Deed obtained by the Plaintiff in the amount of $308,739.33 contained a six-month redemption period set to expire on October 3, 2019.[5]

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[1] First Amended Complaint ("FAC"), Paragraph 6.
[2] FAC, Paragraph 7.
[3] See Hardship Letter from Mr. Clark to the Defendant dated July 13, 2019 attached as MSD Ex A.
[4] FAC, Paragraphs 5, 8.
[5] Sheriff's Deed attached to the Complaint as Exhibit A.

Later that same day, after the foreclosure sale, the Plaintiff posted a notice on the property pursuant to MCL 600.3237 and MCL 600.3238 informing Mr. Clark of its intent to inspect the property.[6] Following the inspection, the inspector produced a "28[-]page repair list" of items on the property "that need[ed] to be corrected."[7]

The report was sent to Mr. Clark via an email dated April 18, 2019 from Dan Wicker,[8] whom the Plaintiff identifies as a real estate agent who works with the Plaintiff as an independent contractor.[9] The email advised that, "the statute [MCL 600.3238[10]] allows for 7 days to repair the items listed, which I have also included. I posted the notice [of intent to evict] at the property *today* per the statute. Call me to discuss."[11]

After the seven days lapsed, on April 26, 2019, the Plaintiff filed an eviction complaint in the 12th District Court of Jackson County against Mr. Clark, the Defendant, FirstMerit Bank, and occupants.[12] A footnote in the Plaintiff's Response explains, with no opposition, that the Defendant and FirstMerit Bank were named because each had a right to redeem pursuant to MCL 600.3240; "occupants" were named because Mr. Clark did not reside at the property at the time.[13] An Affidavit by Mr. Clark and emails directed to Mr. Clark by Wicker reveal that, at the same time Wicker was assisting the Plaintiff in

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[6] MSD Ex 4, pages 14-17.

[7] MSD Ex 5, 7/2/2019 emails to Huntington Bank (in relation to the Plaintiff's attempts to obtain a release regarding the Third Mortgage); MSD Ex 4 Plaintiff's Eviction Complaint, Summary Report at pages 26-49.

[8] MSD Ex 6.

[9] Henninger Affidavit, Paragraph 6, Response Ex C.

[10] MCL 600.3238 provides, in relevant part:

> (7) Before commencing summary proceedings for possession of the property under this section, the purchaser shall provide notice to the mortgagor by certified mail, physical posting on the property, or in any other manner reasonably calculated to achieve actual notice, that the purchaser intends to commence summary proceedings if the damage or condition causing reasonable belief that damage is imminent is not repaired or corrected within 7 days after receipt of the notice.

[11] Henninger Affidavit, Paragraph 6, Response Ex C. See also Eviction Complaint (MSD Ex 4), pp 18-19.

[12] MSD Ex 4, Eviction Complaint, pp 1-21.

[13] Response n 7.

the eviction proceedings against Mr. Clark, Wicker also attempted to persuade Mr. Clark to appoint him as Clark's representative in negotiating with the Defendant and possibly FirstMerit Bank, to resolve the Second and Third Mortgages and Notes.[14] Wicker also suggested to Clark that selling his home on his own was a lost cause as, with three mortgages and notes, he would have "'to sell it at about $680,000.00 to break even.'"[15] Alternatively, Wicker suggested that Mr. Clark could alleviate his costs if he agreed to the Plaintiff's offer of a "cash for keys for possession."[16] Wicker later testified that this proposed "cash for keys" transaction would include an agreement by Mr. Clark to waive his right to redeem on the First Mortgage; the same goal the Plaintiff intended when it initiated the eviction action.[17] Mr. Clark never accepted these offers.[18]

On May 23, 2019, the Defendant, through its Vice President and Associate General Counsel Paul Poles, provided permission to the Plaintiff to sign a consent judgment of eviction.[19]

On May 28, 2019, a Judgment of Possession relative to the property was entered in favor of the Plaintiff, only.[20] The Defendant nowhere disputes that the Judgment terminated, i.e., extinguished, the rights of the Defendant and FirstMerit to redeem the

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[14] See Clark Affidavit, Paragraphs 17-19.

[15] Clark Affidavit, Paragraph 20, quoting portion of an email dated April 14, 2019 attached to the compendium of documents comprising MSD Ex 6.

[16] MSD Ex 6 – April 14, 2019 email.

[17] MSD Ex 9 at 49-50.

[18] Clark Affidavit, Paragraph 19, 20-25 (MSD Ex 2).

[19] Complaint Ex C – bottom email communication.

[20] FAC Ex B.

According to an email dated May 23, 2019, by the time the Plaintiff's counsel received the May 23 email from Defendant's VP/Counsel Poles, he had "already sent the default judgment to the court for entry" because he "had not heard from Poles. FAC Ex C – May 23, 2019 email date stamped 2:30 p.m.

Sheriff's Deed pursuant to MCL 600.3238, or that by virtue of the Judgment and MCL 600.3240, only the Clarks had a right to redeem the Sherriff's Deed.[21]

On June 5, 2019, the Plaintiff contacted the Defendant to "make a nominal offer to purchase" the Second Mortgage and Note.[22] The parties exchanged offers and counteroffers via emails.[23] An email dated June 6, 2019 from the Plaintiff to the Defendant states, in part "Is there any counter offer? My client is only interested in the note and mortgage to shore up its position until it gets full title, which should happen this month."[24] It was sent after the Defendant sent an email stating "The UPB on the loan is roughly $180k, so the business unit in charge of the asset is not willing to take $2,000."[25] Another email sent later on June 6, 2019 responding to the Plaintiff counteroffer inquiry states "I don't have a counter offer at this time; however, I imagine the number would be at least five digits. I understand and appreciate the client's position, but given the UPB on the loan, we can likely sell the note for much more than $2,000."[26]

On June 13, 2019, after exchanging additional emails,[27] the Defendant's Vice President/Counsel Poles sent an email on June 13, 2019 time stamped 4:07 p.m. "All done at $15k – last and best"[28] and the Plaintiff's counsel responded at 4:34 p.m. "My client has agreed to your terms. My client will pay Flagstar $15K in exchange for an assignment of the second mortgage and for the original note and allonge/endorsement on the original note to my client, relative to the property at 1265 Maple Lane."

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[21] FAC at Paragraphs 12-13 and Defendant's Answer to same; Response at 3 citing the FAC which has gone unrebutted.

[22] FAC at Paragraphs 15-30 and FAC Ex C – top email, repeated on FAC Exs D – E.

[23] FAC Exs C-R.

[24] FAC Ex G.

[25] *Id.*

[26] FAC Ex I – June 6 email time-stamped 4:22 p.m.

[27] See FAC Ex C-P.

[28] FAC Ex Q

Within two days, i.e., by June 15, 2019, the Plaintiff had lined up a potential buyer for the Clark property, Eddie Muczynski, at the real estate firm where Dan Wicker worked. Wicker assisted Muczynski in listing his home for sale.[29] On June 15, 2019, Muczynski signed an offer to purchase the property from the Plaintiff for $550,00 in "AS IS"[30] condition *contingent* on, *inter alia, clear title*, appraisal, Muczynski obtaining a mortgage for the property within 20 days from the date of acceptance and the "*successful closing" of the sale on his home by* <u>*September 25, 2019*</u>.[31] Notably, <u>the Plaintiff never signed the offer</u>.[32] Additional relevant facts are discussed *infra.*

Meanwhile, on June 17, 2019 (four days after the June 13 emails between the parties *supra*), Mr. Clark received an offer on the property for $450,000.[33] In fact, the Plaintiff's FAC alleges that $450,00.00 is the fair market value of the property.[34] However, the Plaintiff's President, Joseph R. Henninger, III, attests that this is a typographical error and that the proper value should have stated "'550,000.00'" which corresponds to the purchase "agreement" from Muczynski.[35] Henninger additionally attests that the Plaintiff "never believed that the Property was only worth $450,000. Rather, [the Plaintiff] has always valued the Property between $550,000 and $700,000."[36]

In any event, as reflected by a "Short Sale Addendum" attached to the Purchase Agreement, the offer received by Mr. Clark was "subject to and contingent upon" a short

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[29] MSD Ex 9 (Wicker Dep] at 58-60); MSD Ex 7 (Henniger Dep) at 34-39.

[30] Henninger Dep at 34-35 regarding "as is" (MSD Ex 7). The Plaintiff also references the written Offer, without opposition by the Defendant – MSD Ex 10.

[31] MSD Ex 10 – contingency is on page 6.

[32] *Id.*

[33] Response Ex B

[34] FAC, Paragraphs 10, 28.

[35] Henninger Affidavit, Paragraph 17 (Response Ex C).

[36] *Id.*

sale, i.e., "the written agreement of [Mr. Clark's] mortgagee(s) and any other lienholder(s) . . . to accept less than the amounts owed" as reflected by the "Short Sale Addendum" attached to the Purchase Agreement.[37] Mr. Clark countersigned the Purchase Agreement for the purchase price of $450,000 on June 21, 2019.[38]

Mr. Clark attests that when he received the offer on the property for $450,000, he "intended to accept it, but needed Flagstar's [Defendant's] permission to accept less than the balance owed on the Second Mortgage and Note. With the proceeds from the sale, I intended to reimburse [Plaintiff] for the $308,000 it spent at the foreclosure sale, and pay [Defendant] approximately $106,000 for the Second Mortgage and Note, if it would agree to take less than the balance owed on the Second Note and Mortgage. Because of my financial situation, I could not have paid anything further on the Second Note."[39]

When Mr. Clark precisely contacted the Defendant regarding the offer and short sale contingency is unclear. However, on June 18, 2019, one day after Mr. Clark received the short sale offer and five days after the June 13 emails between the Plaintiff and Defendant regarding the sale of the Second Mortgage and Note for $15,000, the Defendant, through Vice President and Attorney Poles, responded to an email sent by the Plaintiff's attorney inquiring about the status of the paperwork necessary to close on their $15,000 agreement stating that he was "trying to get this cleared with our regulatory oversight department. Would you classify your client as a Debt Collector as defined under the FDCPA?"[40] The Plaintiff supplied the information requested.[41] On Flag Day (June 14), 2019, Defendant, through Poles, sent another email stating he wanted to "get it

[37] Response Ex B – the Short Sale Addendum to Buy and Sell Agreement" comprises the penultimate compendium of documents.
[38] *Id.* – see signature pages.
[39] Clark Affidavit, Paragraph 10 (MSD Ex 2).
[40] FAC Ex S.
[41] FAC Ex T.

in front of the business unit for review."[42] Ultimately, on June 26, 2019, the Defendant, through Poles, sent an email stating "The Business Unit is not willing to sell the note at this time. The only deal we can do is a lien release."[43] The Plaintiff's counsel responded on the same day (June 26, 2019), advising that the Defendant's "current position violates our previous agreement to have Flagstar [Defendant] sell the note and mortgage to my client for $15,000.00. Please advise if you will accept service of process on behalf of Flagstar."[44] There is no evidence that Defendant responded to the email.

By July 2019, the Defendant had received a hardship letter dated July 13, 2019 from Mr. Clark which, *inter alia,* requesting the Defendant to agree to a short sale on the Second Mortgage and Note.[45] Mr. Clark attests he "completed the appropriate paperwork with the Defendant, demonstrating my financial situation and the Smiths' offer on the Property, and awaited [the Defendant's] response."[46]

The evidence also reveals that during roughly the same time period – i.e., June to early to mid September, 2019 – the 12th District Court set aside the default judgment entered against Mr. Clark and scheduled a non-jury trial on the Plaintiff's eviction complaint.[47] At the one-day trial, Wicker approached Clark in the hallway outside the courtroom and, in the presence of Mr. Clark's attorney, Wicker "proposed to make me [Clark] a low offer to buy the Property, which he suggested I could present to Flagstar [Defendant] as an arm's length transaction, in exchange for promising to pay me a lump sum of money later, once Flagstar agreed to the low payment on the Second Note and was no longer involved with the Property."[48] "Wicker did not specify a price, but I

[42] FAC Ex U.
[43] FAC Ex W.
[44] FAC Ex X.
[45] MSD Ex 1 – hardship letter.
[46] Clark Affidavit, Paragraph 11 (MSD Ex 2).
[47] Clark Affidavit, Paragraph 22.
[48] Id., Paragraph 23.

understood the offer to be significantly below the $450,000 the Smiths had offered."[49] Mr. Clark declined the offer "which struck [him] as improper" and "told Mr. Wicker that if [Plaintiff] was willing to offer more than the $450,000 that was then pending Flagstar's approval, I would entertain it. But [the Plaintiff] never made one."[50] The Plaintiff "thereafter stipulated to dismiss me from the eviction proceeding on September 13, 2019."[51]

Ultimately, the Defendant agreed to Mr. Clark's short sale offer of $106,000 – *i.e.*, less than the full $180,00 payment of the Second Note.[52] Thereafter, on September 30, 2019, Mr. Clark redeemed the property and simultaneously closed on the short sale of the property for $450,000.00.[53]

The proceeds of the $450,00 sale were used to repay Plaintiff the $322,721.43 it paid for the property at the foreclosure sale, the Plaintiff's statutory attorney fees, and to pay the $106,398.53 short sale the Defendant agreed to accept as payment on the Second Mortgage and Note.[54]

Given that the predecessor Court has already determined liability for breach of contract, the Court must determine whether these facts entitle either party to summary disposition on the basis of any or all of their respective damages arguments.

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[49] Id., Paragraph 24.
[50] Id., Paragraphs 25-26.
[51] Id., Paragraph 27.
[52] Clark Affidavit, Paragraphs 10, 28; Closing Package on sale of property (MSD Ex 11).
[53] Clark Affidavit, Paragraph 28; Closing Documents (MSD Ex 11).
[54] *Id.*

IV

The Plaintiff is entitled to $91,398.53 pursuant to MCR 2.116(I)(2); however, the calculations offered by the Plaintiff beyond $91,398.53 are speculative

A

Applicable legal principles

To prevail on a claim for breach of contract, the plaintiff must establish by a preponderance of evidence that (1) a contract existed, (2) the terms of the contract, (3) that the Defendant breached the contract, and (4) that the breach caused injury to the Plaintiff. See e.g., *Miller-Davis Co v Ahrens Constr, Inc,* 495 Mich 161, 178 (2014); *Bank of Am v First Am Title Ins Co,* 499 Mich 74, 100 (2016).

"The proper measure of damages for a breach of contract is the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached." *Ferguson v Pioneer Sate Mut Ins Co,* 273 Mich App 47, 54 (2006); *Alan Custom Homes Inc v Krol,* 256 Mich App 505, 512 (2003) (only those damages "that are the direct, natural, and proximate result of the breach[ ]" may be recovered). As such,

> [t]he test is one of proximate cause as modified by the foreseeability standard. Damages recoverable are those which are a "direct and proximate result" of a breach and were "within the contemplation of the parties when the contract was made."
>
> [*Home Ins Co v Comm'l Ind Secur,* 57 Mich App 143, 146-147 (1974) (citations omitted).]

Therefore, "[t]he party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate cause of the breach," *Doe v Henry Ford Health Sys,* 308 Mich App 592, 601 (2014), or those "that are contemplated by the parties *at the time the contract was made*," *Lane v KinderCare,* 231 Mich App 689, 693 (1998) (citations omitted). In other

words, the plaintiff must establish a causal link between the alleged improper conduct of the defendant and the plaintiff's damages with reasonable certainty. See *Miller-Davis Co v Ahrens Constr,* 495 Mich 161, 180 (2014); *Alan Custom Homes Inc v Krol,* 256 Mich App 505, 512; *Gorman v American Honda Motor Co,* 302 Mich App 113, 118-119 (2013); *Doe,* 308 Mich App at 601-602. In addition, the damages must be reasonably foreseeable and "must not be conjectural or speculative in their nature, or dependent upon chances of business or other contingencies." *Doe,* 308 Mich App at 602. Although the amount of damages need not be determined with mathematical precision, *Severn v Sperry Corp,* 212 Mich App 406, 415 (1995), there must be a reasonably certain basis for computing them. *Doe,* Mich App at 601-602. See also *Chelsea Inv Group LLC v Chelsea,* 288 Mich App 239, 255 (2010). "[U]ncertainty as to the fact of the amount of damage caused by the breach of contract is fatal." *Van Buren Twp v Visteon Corp,* 319 Mich App 538, 551 (2017), citing *Home Ins Co,* 57 Mich App at 143, 147.

B

The Plaintiff is entitled to damages in the amount of $91,398.53 pursuant to MCR 2.116(I)(2)

Applying the foregoing standards, the evidence before the Court conclusively establishes that the only damages that can be proven with "reasonable certainty" as the direct, natural, proximate, foreseeable result of the Defendant's breach of its agreement to sell the Second Mortgage and Note to the Plaintiff is based on Mr. Clark's redemption of the property and simultaneous sale of it for $450,000. Of the $450,00.00 purchase price, $322,721.43 (the purchase price the Plaintiff paid at the foreclosure sale), $20,017.25 was deducted for closing costs, $862.79 was used to pay taxes, leaving $106,398.53 paid to the Defendant to satisfy the short sale it accepted on the balance of the Second Note. (See MSD Ex 11 [Closing Package]; Clark Affidavit, Paragraphs 10 and 28 [MSD Ex 2].) After deducting the $15,000 the Plaintiff was to pay the Defendant for the Second, the damages figure equals $91,398.53.

Reasonable minds could not differ in finding that the evidence, when combined with the nature of the underlying transaction, confirms that both parties knew or should have known that the Second Note and Mortgage were subject to Mr. Clark's right of redemption which he could exercise within the redemption period despite personal financial woes. Redemption rights are inherent under our mortgage foreclosure statutes and, by their nature, exist in the face of a mortgagor's (debtor's) financial woes which are reasonably inferred by the fact that a home is foreclosed upon for nonpayment of a loan. Furthermore, at the time the contract was entered in mid-June 2019, the Plaintiff and the Defendant both knew or should have known that, irrespective of Mr. Clark's personal financial troubles, Mr. Clark could redeem the property by selling it, and that such a sale could entail negotiations of a short sale or some other type of buy out of the Second Note with the holder of the Second Mortgage and Note, which is exactly what occurred. That this was reasonably foreseeable and contemplated by the parties is hardly disputable. The Defendant offers no evidence to show otherwise. The Plaintiff's evidence simply confirms this state of affairs through, *inter alia,* Wicker's unsuccessful efforts to persuade Mr. Clark to authorize Wicker/Plaintiff to communicate with the banks on his behalf.[55]

Thus, because the evidence confirms that at the time of contracting, the parties were equally aware that Mr. Clark could reasonably exercise his redemption rights by selling the property and negotiating with the holders of the Second Mortgage (and Third Mortgage), a reasonable basis in fact exists for finding that $91,398.53 is the "pecuniary value of the benefits" the Plaintiff "would have received if the contract had not been breached." As such, the net loss of $91,398.53 easily falls within the ambit of recoverable damages. See, e.g., *Hadley v Baxendale,* 9 Exch 341; 156 Eng Rep 145 (1854); *Kewin v Massachusetts Mutual Life Ins Co,* 409 Mich 401, 414-415 (1980), citing *Hadley,* 9 Exch 341; (1980), *Lawrence v Will Darrah & Assocaites,* 445 Mich 1, 7, 13 (1994). This figure is not conjectural or speculative in nature, or dependent upon the chances of business or other

[55] Clark Affidavit, Paragraph 18 (MSD Ex 2) and MSD Ex 6 (Wicker email).

contingencies, because it is based on what actually happened. *Chelsea Inv Group,* 288 Mich app at 255.

Bald assertions in the Defendant's Reply that payment towards the Second Note was "never part of the equation or envisioned by the parties" and was "unquestionably not foreseeable with any reasonable certainty" at the time of contracting, at a minimum, ignores what both parties *should have known* by the nature of the transaction. *Lawrence,* 445 Mich at 14 n 7 (quoted *supra*). Such passionate statements also ignore the Defendant's well-reasoned and supported analysis in its initial briefing demonstrating a reasonable basis in fact for computing damages in the amount of $91,398.53 as the direct, natural, proximate and foreseeable result of the its breach. Dispositive relief under MCR 2.116(I)(2) in the Plaintiff's favor is therefore warranted.

C

The calculations offered by the Plaintiff beyond $91,398.53 are speculative

Even accepting the Plaintiff's assertion that it was equally foreseeable to the parties at the time of contracting that Mr. Clark would not redeem, the damages and damages calculations the Plaintiff offers are premised on speculation, conjecture, and dependent upon contingencies that may or may not have ever occurred.

The first calculation - $191,630.47 representing the amount of the Second Note with accrued interest ($180,000 + accrued interest) – presumes that if Mr. Clark did not redeem, the Plaintiff would hold clear title to the property (by virtue of its Sheriff's Deed from the foreclosure sale) enabling it to sell the property while holding what would become an unsecured Note it purchased from the Defendant which the Plaintiff presumes it "would have been able to collect . . . either directly from Mr. Clark, or through foreclosure of the

Second Mortgage."[56] However, this scenario has no basis in fact. Even if one accepts that Mr. Clark could not redeem unless the Defendant breached its agreement with the Plaintiff and agreed to the short sale (because, absent the Defendant's breach, the Plaintiff would have rejected a short sale request), the Plaintiff offers no evidence that reasonably infers it would have been able to collect the $191,630.47. The evidence actually infers that Mr. Clark would be uncollectible. As noted, he was in hard financial times, and the Plaintiff knew or should have known that it likely could not collect from someone whose home was foreclosed upon for nonpayment of his loan. Mr. Clark, in fact, attested he could not pay the approximate $191,000 due on the Second Note,[57] and was only able to pay off a *portion* of the balance owed because a third party at last purchased the property after the property had been listed on the market for nearly two years.[58] The property's sale dictated the amount of the short sale payment ($106,398.53) – if not for the $450,000 sale, Mr. Clark had no funds to pay toward the second note at all.[59] Equally unsubstantiated is the Plaintiff's assertion that it would have collected $191,630.47 by foreclosing on the note. This presumes that a third party would pay that amount on an unsecured, heavily discounted note for which the Plaintiff only paid $15,000. No evidence reasonably infers this would have occurred.

The second scenario[60] argues that "the natural and proximate result of the Defendant's breach is the prevention of [the Plaintiff] to close on the sale of the property to Muczynski for $550,000." The Plaintiff relies on *Lawrence,* 445 Mich at 7 for this proposition. However, *Lawrence* actually debunks the argument. Under *Lawrence,* "the damages recoverable are those damages that arise naturally from the breach, or which can *reasonably* be said to have been in contemplation of the parties at the time the contract

[56] Response at 8.
[57] MSD Ex 2, Paragraph 10.
[58] *Id.*, Paragraphs 6-10.
[59] See *id.*
[60] See pages 8-9 of the Response.

was made." *Lawrence,* 445 Mich at 13 (internal quotations and citation omitted; emphasis in original). This is an objective standard, restated by Calamari and Perillo[61] as damages "the promisor knows or has reason to know" about. *Id.* See also *Home Ins Co,* 57 Mich App at 146-147 (citations omitted and internal quotations omitted) ("The test is one of proximate cause as modified by the foreseeability standard. Damages recoverable are those which are a direct and proximate result of a breach and were within the contemplation of the parties when the contract was made"). None of the Plaintiff's evidence reasonably infers that, at the time of contracting, the Defendant knew or should have known that the Plaintiff had lined up a purchaser to buy the property for $550,000. In fact, the Plaintiff's own evidence reflects that Muczynski had not even signed the purchase offer until June 15, 2019, two days *after* the Defendant agreed to sell the Plaintiff the second note. In addition, the email exchanges between the parties culminating in the contract are silent on Muczynksi, or buyer lined up by the Plaintiff – the Plaintiff was simply seeking to make a "nominal offer" to "shore up its position until it gets full title[.]" Furthermore, no evidence or authority reflects that a potential purchaser's actual lining up of a buyer in an amount certain on foreclosed property subject to the Defendant's second lien is something within the ordinary course of what happens in transactions of this nature, i.e., a bank selling a second note and mortgage during the redemption period on foreclosed property in an arms length transaction at a discounted price (which even the Plaintiff describes to be an offer for a "nominal" amount). All that the evidence reasonably infers is that the Defendant was selling a second note and mortgage at a deep discount which it held on property sold at foreclosure for $308,739.33 (well below the $550,000 Muczynski offer).[62] Simply put, the Plaintiff's evidence is insufficient to reasonably infer that the Defendant knew or had reason to know that, if it breached the parties' agreement, the Plaintiff would be unable to close on a sale of the property for $550,000.00.

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[61] Calamari & Perillo, Contracts (3d ed), § 14–5, p. 595.

[62] The evidence further reflects that the Defendant was aware of the Plaintiff's efforts to evict Mr. Clark for failing to perform the laundry lists of repairs contained on the 28 page repair list.

That the Muczynski offer, itself, was contingent on Muczynski closing on the sale of his own home by September 25, 2019, and the offer he received on his home on August 6, 2019 was likewise contingent on the sale and closing of their current home,[63] further adds to the speculative nature of the Plaintiff's assertion that the Defendant's breach is the proximate and foreseeable cause of the Plaintiff's failure to close on the sale of the property to Muczynski for $550,000. That Muczynski's home remained listed for sale in October 2020[64] – well over a year after the Defendant's breach – confirms that the Defendant's breach is not the proximate and foreseeable cause of the Plaintiff's failure to close on the property to Muczynski.

The Plaintiff's alternative calculation of damages at $278,882.10 is likewise speculative because, at a minimum, it relies on the sale of the property to Muczynski for $550,000.00.[65] The Court incorporates its Discussion *supra* in finding that this calculation is speculative because it relies on a sale that was not reasonably contemplated by the Defendant at the time of contracting and the sale itself was uncertain to occur regardless of the Defendant's breach.

Finally, the Plaintiff has abandoned any challenge to the additional calculations ($382,278,57 and $185,00 plus interest) discussed in the Defendant's briefing by failing to respond to them. See e.g., *Houghton v Keller*, 256 Mich App 336, 339-340 (2003) ("failure to properly address the merits of [one's] assertion of error constitutes abandonment of the issue"; a party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . nor may he give issues cursory treatment with little or no citation of supporting authority" (citations omitted)); *Etefia v*

[63] Response Ex A Section 7.
[64] MSD Ex 13.
[65] See Response at 9-10.

Credit Technologies, Inc, 245 Mich App 466, 471 (2001) ("Insufficiently briefed issues are deemed abandoned on appeal").

ORDER

Based on the foregoing Opinion,

1. The Plaintiff is entitled to damages in the amount of $91,398.53 pursuant to MCR 2.116(I)(2).

2. All additional relief is DENIED.

3. WITHIN 28 DAYS of the entry date on this Opinion and Order, the parties SHALL supply a Judgment consistent with this Opinion pursuant to MCR 2.602(B)(2) or (3) which additionally closes the case *if* appropriate.

/s/Michael Warren
_____/
HON. MICHAEL WARREN
CIRCUIT COURT JUDGE