STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Street
Grand Haven, MI 49417
616-846-8315

* * * * *

ALL WE SELL IS FUN, LLC,

Plaintiff,

v

NASSIMI REALTY, LLC,

Defendant.
_____/

OPINION AND ORDER FOR SUMMARY DISPOSITION
File No. 21-06651-CB

Hon. Jon A. Van Allsburg

At a session of said Court, held in the Ottawa County Courthouse in the City of Grand Haven, Michigan, on the 4th day of February, 2022,
PRESENT: HON. JON A. VAN ALLSBURG, CIRCUIT JUDGE

This is an action for damages for wrongful eviction and fraud based upon the alleged breach of a Forbearance Agreement pertaining to commercial real estate. Defendant moves for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8), asserting that plaintiff has failed to state a claim for breach of contract, for an interest in land, or for fraud, and that its claims are barred by the Statute of Frauds, res judicata, and waiver. For the reasons stated below, defendant's motions are granted.

Summary of the Facts

Plaintiff operates a business under the name Reliable Sport, and sells recreational equipment such as bikes, scooters, trampolines, kayaks and pool tables. It entered into a commercial lease agreement with the defendant[1] in December 2017 for space in the Cedar Village Shopping Center in Holland, Michigan. The lease between the parties granted to plaintiff an option to purchase described in a Rider to Lease. (Def. Ex. 1, ¶ 4, p. 2; Plaintiff's Ex. A).

The Purchase Option found in the Rider gave plaintiff the right to purchase the leased property and all improvements for a price of $1,850,000.00 with thirty days written notice no later than June 30, 2019 subject to a list of terms, covenants and conditions. (Def. Ex. 1, ¶ R1, p.

[1] The "Landlord" in the Lease included defendant, Zar Property Holdings, LLC, and Namdar Equity Holdings, LLC, as tenants in common. Only Nassimi was named as a defendant in this action.

6). The right to exercise the option was conditioned on plaintiff being "not at the time in default of this Lease beyond any applicable notice and cure period." *Id.*

On June 1, 2018, the parties entered into an "Expansion and Amendment of Lease," adding an additional 5,600 square feet to the area leased by plaintiff. (Defendant's Exhibit 1, p.1). The Rider granting plaintiff an option to purchase was preserved in the expanded and amended lease.

Plaintiff fell behind on the monthly lease payments and in December 2018 defendant filed an action in the 58th District Court seeking to recover possession of the premises. The parties entered into a Forbearance Agreement on January 14, 2019, in which the parties agreed that plaintiff was in default, that defendant was entitled to possession of the property, and that landlord would not enforce its judgment for possession provided plaintiff made certain scheduled payments. (Def. Ex. 2, p. 1). The Forbearance Agreement contained the acknowledgement that plaintiff had "no defense, counterclaim or setoff to Landlord's claim for the Past Due Rent." (Def. Ex. 2, ¶ 7, p. 2). A Consent Judgment of Possession was entered in the 58th District Court on January 14, 2019, which referenced the Forbearance Agreement. (Def. Ex. 3).

In February 2019 plaintiff defaulted under the Forbearance Agreement, and an Order of Eviction was issued on February 27, 2019. (Def. Ex. 4). Further attempts to avoid eviction were unsuccessful, and plaintiff was involuntarily removed from the leased premises in May 2019. Defendant sold the commercial real estate to a third party in September 2019. (Def. Ex. 6). Plaintiff unsuccessfully attempted to set aside the Judgment of Possession in August 2020. (Def. Ex. 7).

Plaintiff's First Amended Complaint alleges a breach of contract (Count I) arising out of defendant's refusal to sell the lease property to plaintiff and selling the property to a third party. In Count II of the Complaint, plaintiff alleges that its payments made with and following entry of the Judgment of Possession in 2019 created an equitable interest in the leased property, and as a result plaintiff seeks a declaration of the parties' respective interests in the real estate. Plaintiff's Count III alleges fraud arising from defendant's alleged representations that its payments would entitle plaintiff to purchase the property pursuant to the Rider to Lease.

Standard of Review

Defendant's motion pursuant to MCR 2.116 (C)(7) tests whether the Plaintiff's First Amended Complaint is barred because by the Statute of Frauds, res judicata, or waiver, and requires the consideration of all documentary evidence filed or submitted by the parties. *Maskery v Board of Regents of University of Michigan,* 468 Mich 609; 664 NW2d 165 (2003). The court must accept as true the well-pleaded allegations in Plaintiff's First Amended Complaint and construe them in a light most favorable to the plaintiff, and should deny defendant's motion unless no factual development could provide a basis for recovery. *Huron Potawatomi, Inc. v Stinger,* 227 Mich App 127; 574 NW2d 706 (1997).

Defendant's motion under MCR 2.116(C)(8) tests the legal sufficiency of the First Amended Complaint, and may be granted only where the claims alleged are so clearly

unenforceable as a matter of law that no factual development could possibly justify recovery. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When ruling on a motion for summary disposition under MCR 2.116(C)(8), a court must look only at the pleadings, and must accept as true all factual allegations. *Dolan v Continental Airlines/Continental Express,* 454 Mich 373, 380-381; 563 NW2d 23 (1997), *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). The motion should be granted only if no factual development could possibly justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

Analysis

1. Plaintiff has failed to state a claim for breach of the option agreement.

An option contract is an offer that is irrevocable for a specified duration. *In re Smith Trust*, 480 Mich 19, 26; 745 NW2d 754 (2008).[2] Or, "[a]n option is basically an agreement by which the owner of the property agrees with another that he shall have a right to buy the property at a fixed price within a specified time." *Id.*, at 25.[3] As with other offers, an option must have terms reasonably certain enough to allow acceptance.[4] It is particularly important that option terms be conveyed in a definite manner, because in accepting an option the optionee must be in strict compliance with the terms of the offer. *Bailey v Grover*, 237 Mich 548, 554; 213 NW 137 (1927). The *Bailey* Court emphasized this point: "[a]n option is but an offer, strict compliance with the terms of which is required; acceptance must be in compliance with the terms proposed by the option both as to the exact thing offered and within the time specified; otherwise the right is lost." *Id.* at 554-555. The requirement of strict compliance with the terms of an option remains settled law. See also *Beecher v Morse*, 286 Mich 513, 516; 282 NW 226 (1938); *Nu-Way Serv Stations v Vandenberg Bros Oil Co*, 283 Mich 551, 553; 278 NW 683 (1938); *LeBaron Homes v Pontiac Housing Fund,* 319 Mich 310, 315; 29 NW2d 704 (1947); *Grasman v Jelsema*, 70 Mich App 745, 791; 246 NW2d 322 (1976).

In the present case, plaintiff's right to exercise the purchase option contained in the "Rider to Lease" required (among other requirements), 1) a written notice delivered to Landlord, 2) no later than June 30, 2019, and 3) at a time when plaintiff was not in default of the Lease. Plaintiff's First Amended Complaint does not allege compliance with any of these requirements. Plaintiff's failure to produce any documentary evidence showing that plaintiff in fact complied with the three requirements demonstrates that amendment of Count I would not be justified. The First Amended Complaint states only that Plaintiff "substantially complied" with the terms of the Rider to Lease. Plaintiff's First Amended Complaint, ¶ 9. This is legally insufficient to state a claim for breach of an option agreement, and defendant's motion as to Count I of the First Amended Complaint on the (C)(8) ground must be granted.

The court further concludes that no factual development in this case could justify a right to recovery under Count I. The agreement of the parties as stated in the Forbearance Agreement

[2] Citing 17 CJS, Contracts, § 55, p 502.

[3] Quoting *Oshtemo Twp v City of Kalamazoo*, 77 Mich App 33, 37; 257 NW2d 260 (1977).

[4] Restatement (Second) of Contracts, § 33.3.

is conclusive that the only period of time when plaintiff was not in default (and therefore entitled to exercise the option to purchase) was between December 2017 and December 2018 (prior to the filing of defendant's landlord-tenant action and plaintiff's admission of default). Because plaintiff never completed the Forbearance Agreement, the terms of the original Lease were never reinstated, plaintiff never ended its default, and thus never reacquired the right to exercise the option agreement prior to the expiration of the option on June 30, 2019. Plaintiff has not produced a written notice of exercise of the option dated and delivered to Landlord during the period of December 2017 to December 2018, compelling the conclusion that it does not exist. Plaintiff's admission in the Forbearance Agreement that it had "no defense, counterclaim or setoff" to Landlord's claim closes the door on any delayed production of such a document. Therefore, summary disposition in favor of the defendant to Count I on the (C)(7) ground is appropriate as well.

2. Plaintiff's claim for an interest in land is barred by res judicata and waiver.

MCL 600.2932 creates an equitable cause of action to quiet title to real estate, or to determine the interests of parties to real estate. Subsection (1) states:

> (1) Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

Michigan Court Rule 3.411 applies to such actions and requires the parties to attach to their pleadings the statements of title on which they respectively rely. MCR 3.411(C). It is undisputed that plaintiff's claim rests upon the December 2017 Rider to Lease which created the option under which plaintiff claims, as it is the only complete document attached to Plaintiff's First Amended Complaint (along with pages 6, 7, and 8 of the December 2017 Lease Agreement). Defendant's answer attached only the deed by which it (and its two co-owners – see footnote 1, above) conveyed ownership of the property to a third party in September 2019, subsequent to the dates relevant to this action.

Defendant also provided a copy of the signed Forbearance Agreement of January 14, 2019 as Exhibit 2 to its Brief in Support of Motion for Summary Disposition. The Agreement noted that an initial payment of $10,000.00 would be made, followed by weekly payments of $5,000.00, until all past due rent was paid in full. *Id.*, ¶ 3. If all payments were made, the Forbearance Agreement would terminate, plaintiff would no longer be in default, and the terms of the Lease would resume. *Id.*, ¶ 6. The Forbearance Agreement was incorporated by reference into the Consent Judgment of Possession entered in the landlord-tenant action on January 14, 2019. Defendant acknowledged receipt of some additional payments from plaintiff pursuant to the Forbearance Agreement on March 21, 2019. Defendant's Brief, Exhibit 5.

"The purpose of the doctrine of res judicata is to prevent multiple suits litigating the same cause of action." *King* v *Munro*, 329 Mich App 594, 600; 944 NW2d 198 (2019). "The doctrine bars a second, subsequent action when (1) the first action was decided on the merits, (2) the

matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Id.* at 601 (cleaned up) (citations omitted). "Michigan courts apply the doctrine broadly to bar not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.* (cleaned up) (citations omitted).

The documentation provided shows that the payments made by plaintiff (as alleged in Plaintiff's First Amended Complaint, ¶ 9) were made pursuant to the Forbearance Agreement. They could not have been made pursuant to an agreement to purchase real estate, as plaintiff never exercised the option contained in the Rider to Lease. Plaintiff's acknowledgment in the Forbearance Agreement, incorporated by reference in the Judgment of Possession, that it had "no defense, counterclaim or setoff to Landlord's claim," is res judicata as to Plaintiff's claim of an interest in the leased real estate.

Moreover, in *Hixon* v *Westwick Square Cooperative*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2021 (Docket No. 351825) (2021 WL 1157669), the Court of Appeals held that a judgment of possession issued by a district court is res judicata as to a subsequent claim in breach of contract between the same parties.

Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C). However, so long as the unpublished opinion does not conflict with a published decision of the Court of Appeals or the Michigan Supreme Court, a trial court is free to adopt the reasoning found in an unpublished opinion if the trial court finds the reasoning to be cogent and persuasive. *Steele* v *Dep't of Corrections*, 215 Mich App 710, 714 n2; 546 NW2d 725 (1996); *Tomiak* v *Hamtramck School Dist*, 426 Mich 678, 698; 397 NW2d 770 (1986).

This court finds the reasoning in *Hixon* to be cogent and persuasive. The court adopts this reasoning as its own and finds that the Consent Judgment of Possession entered into in the landlord-tenant action between the parties is *res judicata* as to Count II in the instant action. Additionally, waiver occurred per plaintiff's acknowledgement in ¶ 7 of the Forbearance Agreement. Summary disposition in defendant's favor as to Count II shall be granted pursuant to MCR 2.116(C)(7).

3. **Plaintiff has failed to state a claim for fraud, which claim is also barred by the Statute of Frauds.**

The elements of a fraud claim are:

> (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012) (cleaned up).

In general, "an action for fraud must be predicated upon a false statement relating to a past or existing fact; promises regarding the future are contractual and will not support a claim of fraud." *Cummins v Robinson Twp*, 283 Mich App 677, 696; 770 NW2d 421 (2009). Plaintiff's allegation that defendant "would be able to purchase the property" is a statement of future intention and is not inconsistent with the written agreements of the parties, which gave plaintiff a conditional right to purchase (in the form of an option). And there was no misrepresentation because there was nothing false in defendant's statement.

However, plaintiff's claim, as to a cause of action arising from such verbal representations, is not enforceable pursuant to the statute of frauds. "No … interest in lands, other than leases for a term not exceeding 1 year, … shall hereafter be created … unless by … a deed or conveyance in writing, subscribed by the party creating … the same…." MCL 566.106. Similarly, "Every contract … for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made…." MCL 566.108.

The contractual relationships between the parties, to the extent documented by the Commercial Lease and Rider to Lease, the Expansion and Amendment of Lease, the Forbearance Agreement, and the Consent Judgment of Possession, are clearly described, and explain the unfortunate history and demise of the parties' lease. Plaintiff fell into default, attempted to negotiate a way out of its default, conceded a Judgment of Possession but was able to forestall eviction with a series of payments pursuant to the Forbearance Agreement, and then ultimately failed to avoid eviction when it could not complete the terms of the Forbearance Agreement. All of the parties' actions, and plaintiff's payments, are explained by the documented history.

Plaintiff could not have reasonably relied upon a verbal representation that he "would be able to purchase the property" if he made certain payments, and the statute of frauds does not allow reliance upon such representations. Therefore no reliance has been shown. Summary disposition to Count III shall be granted in defendant's favor pursuant to MCR 2.116(C)(7) and (C)(8).

Conclusion

Defendant's motion for summary disposition is GRANTED. Pursuant to MCR 2.602(A)(3), this opinion and order resolves the last pending claim and closes this case.

IT IS SO ORDERED.

Dated: February 4, 2022

Hon. Jon A. Van Allsburg, Circuit Judge