

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

SPINE AND JOINT INSTITUTE OF
MICHIGAN, LLC,

Plaintiff/Counter-Defendant,

Case No. 21-188157-CB

Hon. Michael Warren

v

COOLIDGE RETAIL MANAGEMENT, LLC,

Defendant/Counter-Plaintiff,

and

COOLIDGE RETAIL MANAGEMENT, LLC,

Third-Party Plaintiff,

v

ABE BAYDOUN, RICARDO BORREGO,
and HILLCREST CAPITAL PARTNERS, LLP,

Third-Party Defendants.

**OPINION AND ORDER GRANTING, IN PART, AND DENYING, IN PART, THE
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION**

At a session of said Court, held in the
County of Oakland, State of Michigan
March 7, 2022

PRESENT: HON. MICHAEL WARREN

OPINION

I Overview

Before the Court is Defendant Coolidge Retail Management, LLC's Motion for Summary Disposition pursuant to MCR 2.116(C)(8) on Counts I-III of the Complaint and pursuant to MCR 2.116(C)(6) on Count V¹ of the Complaint.² Having reviewed the Motion, Response, and Reply, and otherwise being fully informed in the premises, oral argument is dispensed as it would not assist the Court in its decision-making process.³

In its Response, Plaintiff Spine and Joint Institute of Michigan, LLC ("SJI") has agreed to voluntarily dismiss Counts II, III and V. In addition, SJI has agreed to dismiss the portion of Count I claiming a breach of an implied duty of good faith and fair dealing in the contract. Hence, the only remaining claim is a breach of contract claim in Count I. In its Reply, Coolidge argues that the breach of contract claim should be dismissed

¹ There is no count IV.

² The Motion was filed in lieu of an answer.

³ MCR 2.119(E)(3) provides court with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court's Scheduling Order clearly and unambiguously sets the time for asserting and raising arguments, and legal authorities to be in the briefing – not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties' positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties' have received the process due.

because the Plaintiff has not complied with the pleading requirements involving conditions precedent.

SJI is a surgical group offering orthopedic surgical services. Defendant Coolidge Retail Management, LLC (“Coolidge”) owns certain real property at 5140 Coolidge Highway in Royal Oak Michigan (the “Property”). SJI and Coolidge entered into a lease agreement on December 27, 2017 (the “Lease”). The Property was to be used by SJI for the operation of a medical office/surgery center. SJI alleges that Coolidge agreed, under the Lease, “to develop the Property into a medical clinic and ambulatory surgical center, pursuant to certain site and work plans attached to the [Lease].”⁴ The Lease was amended four times between March 2018 and October 2020. The Amendments increased the rent and amended the “scope of landlord’s work allocated to Coolidge.”⁵

SJI alleges that in June 2020, although the “Property was substantially incomplete, [Coolidge] attempted to issue a possession letter to SJI and force it to start paying rent.”⁶ SJI objected to the June 2020 attempt to confer possession because the Property was allegedly not in working condition and was unavailable for occupancy as required by the terms of the Lease. SJI alleges that in July 2020 Coolidge issued a Possession Letter and rent invoice and that SJI objected because Coolidge had still not completed work required under the Lease. Nevertheless, SJI assumed possession of the Property and began paying

⁴ Complaint, ¶ 21.

⁵ *Id.* at ¶¶ 29-35; 71.

⁶ *Id.* at ¶ 39.

rent in August 2020, even though it alleges the Property was not operative or ready for business.

Coolidge later sent a notice of default under the lease, apparently for the non-payment of rent, and a termination letter to SJI. On May 24, 2021 SJI filed the instant action against Coolidge.⁷

With the voluntarily dismissal of all the Plaintiff's claims other than the breach of contract claim, at stake in this Motion is whether the remainder of Count I should be dismissed under MCR 2.116(C)(8) for failing to adequately plead the performance of conditions precedent when the argument was raised for the first time in the Defendant's Reply? Because the answer is "no," the Motion is denied with regard to the remainder of Count I.

II **Standard of Review**

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160 (2019); *Pawlak v Redox Corp*, 182 Mich App 758, 763 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is decided on the pleadings alone. *Bailey v*

⁷ Coolidge also filed a counter/third-party complaint which is not at issue in this Motion.

Schaaf, 494 Mich 595, 603 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357 (1991). Exhibits attached to pleadings may be considered under MCR 2.116(C)(8) because they are part of the pleadings pursuant to MCR 2.113(C). *El-Khalil*, 504 Mich at 163.

“All well-pleaded factual allegations are accepted as a true and construed in a light most favorable to the nonmovant.” *Maiden v Rozwood*, 461 Mich 109, 119 (1999); *Wade v Dep’t of Corrections*, 439 Mich 158, 162 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App at 360; *Spiek v Dep’t of Transportation*, 456 Mich 331, 337 (1998).

“[T]he mere statement of a pleader’s conclusions, unsupported by allegations of fact, will not suffice to state a cause of action.” *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395 (1994).

III Arguments

In its Motion, Coolidge argues that the breach of contract claim must be dismissed because it is “premised upon an alleged breach by [Coolidge] of the implied duty of good faith and fair dealing” and Michigan law does not recognize such a cause of action. SJI agrees that “Count I may be narrowed to eliminate a separate, embedded claim for breach of an implied duty of good faith and fair dealing.” But SJI asserts that the primary focus of Count I is the breach of the express terms of the Lease and that Count I should not be

dismissed in its entirety. In its Reply, Coolidge does not dispute that Count I is based, at least in part, on an alleged breach of the express terms of the Lease. Rather, Coolidge raises a new argument that summary disposition is proper under MCR 2.116(C)(8) because the Lease contains a notice provision that is a condition precedent and that “SJI’s failure to plead that it complied with the Lease’s specific, clear, and unambiguous condition precedent to claiming a default, and ultimately filing suit against [Coolidge], warrants dismissal under rule (C)(8).”

IV

Coolidge is not entitled to dismissal of Count I under MCR 2.116(C)(8) because the argument was first made in its Reply

“A condition precedent is a fact or event that the parties intend must take place before there is a right to performance” under a contract. *Abe Demolition, Inc v Pontiac*, 275 Mich App 577, 583 (2007) (quotation marks and citation omitted). “A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor.” *Knox v Knox*, 337 Mich 109, 118 (1953); *Real Estate One v Heller*, 272 Mich App 174, 179 (2006). “If the condition is not fulfilled, the right to enforce the contract does not come into existence.” *Knox*, 337 Mich at 118.

“Whether a provision in a contract is a condition the nonfulfillment of which excuses performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract.” *Id.* Courts are “disinclined” to construe

contract language as imposing a condition precedent in the absence of express language imposing such condition. *MacDonald v Perry*, 342 Mich 578, 586 (1955); *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350 (1999) (quotation marks and citation omitted) (“Courts are not inclined to construe stipulations of a contract as conditions precedent unless compelled by the language in the contract.”)

In this case, Coolidge relies on the following language in the Lease as establishing a condition precedent:

15. Default by Landlord: The failure by Landlord to observe or perform any of the covenants, conditions or provisions of this Lease to be observed or performed by Landlord, *where such failure shall continue for a period of thirty (30) calendar days after written notice thereof from Tenant to Landlord* will constitute a default and breach of this Lease by Landlord and entitle Tenant to terminate this Lease without fee or penalty or ongoing obligations. In the event of such termination, Landlord shall promptly refund Tenant's Security Deposit and Landlord will remain liable for all other damages for which Tenant may be entitled under applicable law. Notwithstanding any other provision of this Lease, Tenant shall have the right to perform the obligations of Landlord and obtain reimbursements from Landlord for the reasonable costs of the same, provided Tenant gives Landlord ten (10) calendar days prior written notice of Tenant's intent to exercise said right.⁸

Even if the above-quoted portion of the Lease constitutes a “condition precedent” to Coolidge's performance under the Lease, dismissal of Count I is unwarranted on this basis because this issue was not raised until the Reply Brief.⁹ Michigan law provides that

⁸ Complaint, Exhibit A, Lease, ¶ 15 (emphasis added). Coolidge also cites ¶ 19(h) of the Lease which provides, in relevant part, that “any notice . . . required to be given under this Lease shall be in writing, shall be sent by US certified mail, return receipt requested, postage prepaid, or by recognized overnight delivery service . . . or by electronic mail (provided that a copy is also simultaneously delivered by another method of delivery provided for herein).

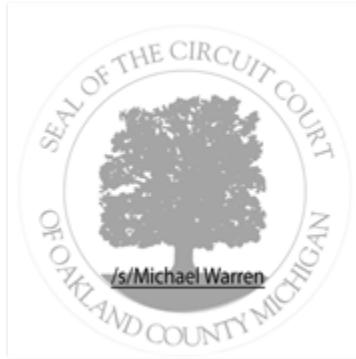
⁹ Consequently, SJI has not had an opportunity to address the condition precedent argument.

new, independent arguments may not be raised in a reply brief – reply briefs are “confined to rebuttal of the arguments made in the nonmoving party or parties’ response brief. . . .” MCR 2.116(G)(1)(a)(iii). Here the argument that a condition precedent was not pled is not a rebuttal argument. This argument could and should have been raised by Coolidge in its Motion, not as a new argument in the Reply.¹⁰

ORDER

In light of the foregoing, the Defendant’s Motion for Summary Disposition is (1) GRANTED with regard to counts II, III, V, and as to Count I solely in connection with any claim of breach of an implied duty of good faith and fair dealing and is otherwise DENIED.

This Order does NOT resolve the last pending claim and does NOT close the case.



¹⁰ Coolidge does not dispute that, in addition to allegations of the breach of the duty of good faith and fair dealing, the Complaint includes allegations of breach of the terms of the Lease. *See e.g.*, Complaint ¶ 118 (“Coolidge had already materially breached the Lease Agreement when it sent out the termination letter”); Complaint ¶ 124 (“Coolidge has breached the Lease Agreements, as amended, by failing to deliver a compliant and operative Property”); and Complaint ¶ 144 (“Coolidge breached the parties’ contracts and SJI has been damaged as a result”).