

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

GOLD STAR LAW, PC

Plaintiff,

v

Case No. 20-184072-CB  
Hon. Michael Warren

CONTINENTAL PLAZA VENTURES, LLC,

Defendant.

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**OPINION AND ORDER GRANTING  
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**

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**OPINION**

**I  
Overview**

The present cause of action arises out of a commercial lease dispute. Gold Star Law, PC (the "Plaintiff" or "GSL") alleges that the office space (Suite 445) it leases from Continental Plaza Ventures, LLC (the "Defendant") has been rendered uninhabitable and unusable by water damage originating from a fire in the adjacent suite that occurred on

April 27, 2020. In particular, the Plaintiff alleges Breach of Contract (Count I) and Request for Declaratory Relief (Count II).<sup>1</sup>

Before the Court is Defendant's Motion for Summary Disposition. 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.<sup>2</sup>

At stake in this Motion is whether the Plaintiff's remaining claim for Breach of Contract (Count I) should be dismissed? Because there is no genuine issue of material fact that (1) the Plaintiff has waived its right to the audit by failing to follow the procedure for auditing operating expenses, and (2) even if the Defendant breached the Lease, the Plaintiff has not alleged any damages, the answer is "yes."

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<sup>1</sup> By way of Opinion and Order dated March 9, 2021, Count II was dismissed pursuant to MCR 2.116(C)(10). No ruling was rendered in connection with Count I.

<sup>2</sup> MCR 2.119(E)(3) provides courts 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 set 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.

## II The Lease and the Amended Complaint

### A The Lease

The parties agree that the Plaintiff executed the original lease agreement in May 2013 with the Defendant's predecessor, non-party Osprey, S.A., Ltd. (the "Lease")<sup>3</sup>. The size of the commercial premises under the original lease was approximately 7,745 square feet and is known as "Suite 400." The Lease was amended approximately one year later on June 24, 2014 (the "First Amendment"<sup>4</sup>) to expand the leased premises to include a new suite known as "Suite 445," an additional space of approximately 2,221 square feet. The Plaintiff subleased Suite 445 to a related entity identified as "UAP" with Osprey's knowledge and permission. In 2017, the Defendant purchased the entire property from Osprey, S.A., Ltd. and assumed the Lease. The term of the Lease was extended to February 28, 2024 by virtue of a Second Amendment to Lease executed by the parties on June 19, 2018 (the "Second Amendment"<sup>5</sup>). Paragraph 9 of the Second Amendment "ratif[ies] all of the terms, covenants and conditions of the Lease, and except as modified by this Amendment, all of such terms, covenants and conditions shall remain unchanged and in full force and effect . . . ." Unless referenced separately, the Lease, First Amendment, and Second Amendment shall be referenced collectively as the "Lease."

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<sup>3</sup> Exhibit 2 to Motion.

<sup>4</sup> Exhibit 2 to Motion.

<sup>5</sup> Exhibit 3 to Motion.

The Lease defines "Operating Expenses" as "all operating expenses of any kind and nature which are necessary, ordinary or customarily incurred in connection with the operation, maintenance, repair or replacement of the Building and the Common Areas as reasonably determined by Landlord."<sup>6</sup> Section 8 of the Lease governs the payment of Operating Expenses and requires the Plaintiff to pay its pro rata share of any projected increase in Taxes and Operating Expenses and provides that the Plaintiff has 60 days to notify the Defendant of any dispute and that failure to do so constitutes a waiver:

## **8. TAXES AND OPERATING EXPENSES**

**A. Payment of Taxes and Operating Expenses.** Subject to the Controllable Expense Cap set forth in Section 1.T. above, it is agreed that during each Calendar Year beginning with the first month of the second Calendar Year and each month thereafter during the original Lease Term, or any extension thereof, Tenant shall pay to Landlord as Additional Rent, at the same time as the Monthly Rent is paid, an amount equal to one-twelfth (1/12) of Landlord's estimate (as determined by Landlord in its sole discretion) of Tenant's Pro Rata Share of any projected increase in the Taxes or Operating Expenses for that particular Calendar Year in excess of the Tax Base or Operating Expenses Base\*, as the case may be (the "Estimated Escalation Increase") Tenant has the option to pay such amount, lump sum instead of 12 monthly payments upon receipt of the Landlord's billing, A final adjustment (the "Escalation Reconciliation") shall be made between the parties as soon as practicable following the end of each Calendar Year comparing the actual increase in Tenant's Pro Rata Share of Taxes or Operating Expenses in excess of the Tax Base or the Operating Expenses Base, as the case may be, to the Estimated Escalation Increase. \*Notwithstanding anything to the contrary, Tenant shall not be required to pay Tax or Operating Expenses for the first two calendar years of the Lease. Tenant shall be billed the "Estimated Escalation Increase" for the calendar year of 2015 if the projected 2015 tax and operating expenses are greater than the 2013 Base Year Expenses.

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<sup>6</sup> Lease, Section 2K, p 7.

As soon as practicable following the end of each Calendar Year, Landlord shall submit to Tenant a statement setting forth the Estimated Escalation Increase for the following Calendar Year. Beginning with said statement for the second Calendar Year, it shall also set forth the Escalation Reconciliation for the Calendar Year just completed. To the extent that the Escalation Reconciliation is different from the Estimated Escalation Increase upon which Tenant paid Rent during the Calendar Year just completed, Tenant shall pay Landlord the difference in cash within thirty (30) days following receipt by Tenant of such statement from Landlord, or receive a credit on future Rent owing hereunder (or cash if there is no future Rent owing hereunder) as the case may be at Tenant's election. Until Tenant receives such statement, Additional Rent for the new Calendar Year shall continue to be paid at the rate being paid for the particular Calendar Year just completed, but Tenant shall commence payment to Landlord of the monthly installment of Additional Rent on the basis of said statement beginning on the first day of the month following the month in which Tenant receives such statement. In addition to the above, if, during any particular Calendar Year, there is a change in the information on which Landlord based the estimate upon which Tenant is then making its payment of Estimated Escalation Increase so that such Estimated Escalation Increase furnished to Tenant is no longer accurate, Landlord shall be permitted to revise such Estimated Escalation Increase by notifying Tenant, and there shall be such adjustments made in the Additional Rent on the first day of the month following the serving of such statement on Tenant as shall be necessary by either increasing or decreasing, as the case may be, the amount of Additional Rent then being paid by Tenant for the balance of the Calendar Year (but in no event shall any such decrease result in a reduction of the rent below the Monthly Rent plus all other amounts of Additional Rent). Landlord's and Tenant's responsibilities with respect to the Additional Rent described herein shall survive the expiration or early termination of this Lease.

If the Building is not fully occupied during any particular Calendar Year, Landlord may adjust those Operating Expenses which are affected by Building occupancy for the particular Calendar Year, or portion thereof, as the case may be, to reflect an occupancy of not less than ninety-five percent (95%) of all such rentable area of the Building,

Subsection B governs disputes over Operating Expenses:

**B. Disputes Over Taxes or Operating Expenses.** If Tenant disputes the amount of an Escalation Reconciliation or an Estimated Escalation Increase, Tenant shall give Landlord written notice of such dispute within sixty (60) days after Landlord advises Tenant of same. Tenant's failure to give such notice shall constitute a waiver of its right to dispute the amounts so determined. If Tenant timely objects, Tenant shall have the right to engage its own professional advisors ("Tenant's Advisors" also called Accountants in this Lease") for the purpose of verifying the accuracy of the Escalation Reconciliation statement in dispute, or the reasonableness of the Estimated Escalation statement in dispute. If Tenant's Accountants determine that an error has been made, Landlord and Tenant's Accountants shall endeavor in good faith to agree upon the matter, failing which Landlord and Tenant's Accountants shall jointly select an independent certified public accounting firm (the "Independent Accountant") which firm shall conclusively determine whether the Escalation Reconciliation is accurate or whether the Estimated Escalation Increase is reasonable, and if not, what amount is accurate or reasonable, as the case may be. Both parties shall be bound by such determination, provided that such determination is made within sixty (60) days after the date that the Independent Accountant is determined. If Tenant's Accountants do not participate in good faith in choosing the Independent Accountant within 20 days after expiration of the sixty day period from Tenant's notice of dispute set forth above then Landlord's determination of the accuracy of the Escalation Reconciliation statement or the reasonableness of the Estimated Escalation Increase Statement, as the case may be, shall be conclusive and Tenant shall be bound thereby. All costs incurred by Tenant in obtaining Tenant's Accountants and the cost of the Independent Accountant shall be paid by Tenant unless Tenant's Accountants disclose an error, acknowledged by Landlord (or found to have conclusively occurred by the Independent Accountant), of more than ten percent (10%) in the computation of the total amount of Taxes or Operating Expenses as set forth in the statement submitted by Landlord with respect to the matter in dispute; in which event Landlord shall pay the reasonable costs incurred by Tenant in obtaining such audits. Tenant shall continue to timely pay Landlord the amount of the prior year's Additional Rent determined to be incorrect as aforesaid until the parties have concurred as to the appropriate Additional Rent or have deemed to be bound by the determination of the Independent Accountant in accordance with the preceding terms.

The Lease further states in relevant part (bold and capitalized emphasis in original) as follows:

### **13. INSURANCE**

**D. Waiver of Claims.** Except for claims arising from Landlord's willful misconduct or gross negligence that are not covered by Tenant's insurance required hereunder, Tenant waives all claims against Landlord for . . . damage to property, or to any other interest Tenant sustained by Tenant or any party claiming, through Tenant resulting from: (i) any occurrence in or upon the Premises; (ii) leaking of roofs, bursting, stoppage or leaking of water, gas, sewer or steam pipes or equipment, including sprinklers, (iii) . . . fire, explosion . . . or other casualty, . . . Tenant agrees that Tenant's property loss risks shall be borne by its insurance, and Tenant agrees to look solely to and seek recovery only from its insurance carriers in the event of such losses.

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### **15. CASUALTY DAMAGE**

Tenant shall promptly notify Landlord or the Building Manager of any fire or other casualty to the Premises or to the extent it knows of damage, to the Building. In the event the Premises or any substantial part of the Building is wholly or partially damaged or destroyed by fire or other casualty which is covered by Landlord's insurance, the Landlord will proceed to restore the same to substantially the same condition existing immediately prior to such damage or destruction unless such damage or destruction is incapable of repair or restoration within one hundred eighty (180) days, in which event Landlord may, at Landlord's option and by written notice given to Tenant within sixty (60) days of such damage or destruction, declare this Lease terminated as of the happening of such damage or destruction. If in the Landlord's sole opinion the net insurance proceeds recovered by reason of the damage or destruction will not be adequate to complete the restoration of the Building, Landlord shall have the right to terminate this Lease and all unaccrued obligations of the parties hereto by sending a notice of such termination to Tenant. To the extent after fire or other casualty that Tenant shall be deprived of the use and occupancy of the Premises or any portion thereof as a result of any such damage, destruction or the repair thereof, providing Tenant did not cause the fire or other casualty, Tenant

shall be relieved of the same ratable portion of the Monthly Rent hereunder as the amount of damaged or useless space in the Premises bears to the rentable square footage of the Premises until such time as the Premises may be restored. Landlord shall reasonably determine the amount of damaged or useless space and the square footage of the Premises reference in the prior sentence.

\* \* \*

## **26. QUIET ENJOYMENT**

Landlord covenants and agrees with Tenant that so long as Tenant pays the Rent and observes and performs all the terms, covenants, and conditions of this Lease on Tenant's part to be observed and performed, Tenant may peaceably and quietly enjoy the Premises subject, nevertheless, to the terms and conditions of this Lease, and Tenant's possession will not be disturbed by anyone claiming by, through, or under Landlord.

### **B The Fire Loss**

On April 27, 2020, the Property sustained a loss when a fire damaged a portion of the fourth floor, resulting in burn/charring, smoke and water damage to various areas, including Suite 445.<sup>7</sup> The Plaintiff notified the Defendant of the damage shortly after the loss occurred and the Defendant began assessing the damage, restoration options, and associated costs. Suite 445 required restoration, including new walls, floors, ceilings, electrical, cabinetry and other significant repairs and refurbishing.<sup>8</sup> As a result of the extensive damage and necessary repairs, the Plaintiff's subtenant UAP was required to temporarily vacate the premises until the restoration was complete. Repairs to Suite 445

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<sup>7</sup> Exhibits 4 and 6 to Motion.

<sup>8</sup> Exhibits 4 and 6 to Motion.

took approximately 6 months and were completed on or about October 27, 2020.<sup>9,10</sup> On April 17, 2020, the Defendant sent the 2019 common area maintenance (“CAM”) reconciliation statement to the Plaintiff at PO Box 1768 in Troy, Michigan while the Property was being repaired.<sup>11</sup> GSL first requested an audit on August 7, 2020.<sup>12</sup> The Defendant declined the request, citing Section 8.B of the Lease.<sup>13</sup> The Defendant thereafter permitted the Plaintiff to audit the CAM charges for 2019 as part of an audit of the CAM charges for 2020.<sup>14</sup> On September 28, 2021 the Plaintiff sent partial payment of the 2019 and 2020 CAM charges. Outstanding CAM and rent charges allegedly remain due under the Lease.

## C The Amended Complaint

In its Amended Complaint, the Plaintiff alleges that Suite 445 “remains uninhabitable to this day;” that “the damage to Suite 445, including the removal of interior wall portions adjacent to other suites, caused Suite 445 to become unsecured and therefore not suitable for storage of confidential information” which is UAP’s core

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<sup>9</sup> Exhibits 4 and 6 to Motion.

<sup>10</sup> While the Property was being repaired, the Plaintiff notified the Defendant that it no longer wished to continue renting Suite 445 and requested to renegotiate the terms of the Lease. Exhibit 12 to Motion. The parties were unable to reach an agreement. Exhibit 7 to Motion.

<sup>11</sup> Exhibit 7 to Motion.

The reconciliation statement was sent to the address the Plaintiff requested that the Defendant use, and which served as the Plaintiff’s updated Notice Address under the Lease (the “PO Box Address”). The PO Box Address was used as the Plaintiff’s return address and was the address identified on the Plaintiff’s October 2020 rent check. Exhibits 8, 9 and 10 to Motion. The Plaintiff never notified the Defendant of any further change of address. Exhibit 7 to Motion.

<sup>12</sup> Exhibit 7 to Motion; Exhibit 3 to Response.

<sup>13</sup> Exhibit 7 to Motion.

<sup>14</sup> Exhibit 7 to Motion. An alleged clerical error was discovered, and the reconciliation was revised.

business (storage of confidential information on its premises); and that “the damage to Suite 445 caused the space to be unusable for business purposes.” The Amended Complaint additionally alleges:

27. The [L]ease between the part[ies] charges Defendant with the responsibility of maintaining and repairing the premises, including restoring the space to the same or substantially the same condition it was in in the event that the space is damaged by fire or other casualty. See **Exhibit A, Section 15**.

28. Section 15 of the [L]ease specifies that [Plaintiff] “shall be relieved of the same ratable portion of the Monthly rent hereunder as the amount of damaged or useless space in the Premises bears to the rentable square footage of the Premises until such time as the Premises may be restored.”

29. As of the date of the filing of this Complaint, Suite 445 has not been restored and is not usable for business purposes. See **Exhibit C**.

30. As of the date of the filing of this Complaint, Defendant has not informed [the Plaintiff] of any reasonable basis why the restoration of Suite 445 has taken so much time.

32. As of the date of filing this Complaint, Defendant is well beyond any conceivably reasonable time to have made the relatively routine repairs to Suite 445 and is in violation of the single lease for both suites.

33. Despite ongoing negotiations between the parties through various counsel, Defendant has not agreed to remove Suite 445 from the lease and release [the Plaintiff] from rental obligations towards Suite 445.

The Plaintiff alleges the Defendant breached the Lease as follows:

43. The lease between the parties requires Defendant to provide GSL with the use and enjoyment of Suite 400 and Suite 445.

44. The lease between the parties requires Defendant to take reasonable steps to repair and restore the leased spaces in the event of damage.

45. In the six months since Suite 445 was damaged, the suite has not yet been restored or made usable for business purposes.
46. In the six months since Suite 445 was damaged, Defendant has not taken reasonable steps to repair the suite.
47. The lease entitles GSL to an abatement of rent in the event that casualty damage causes all or part of the premises to become unusable.
48. Defendant breached the entire lease between the parties by failing to provide GSL with reasonable enjoyment of the entire space being lease, particularly Suite 445.
49. Defendant breached the entire lease between the parties by failing to take reasonable steps to repair and restore Suite 445 after it was damaged.
50. Defendant breached the entire lease between the parties by initially refusing to grant GSL the rent abatement to which it is entitled.
51. Defendant breached the lease between the parties by failing to provide GSL with adequate support for its demand for increased Operating Expenses, which prevented GSL from availing itself of its right under the lease to have the Operating Expenses audited by a professional advisor.

**D**  
**The March 9, 2021 Opinion and Order**

In an Opinion and Order dated March 9, 2021 regarding the Defendant's motion for partial summary disposition, the Court held that where the Defendant elected to repair and replace Suite 445 after the fire loss, the Plaintiff's sole remedy for loss of use or occupancy during the period of repair due to fire or other casualty is rent abatement:

In the instant case, the plain language of Section 15 of the Lease provides that in the event of displacement due to fire or other casualty, the Plaintiff's sole remedy until completion of restoration and repair is rent abatement in proportion to the amount of damaged or useless space.

\* \* \*

The only party with the option to terminate the Lease is the **Landlord** (Defendant) not the Tenant (Plaintiff) if it determines within sixty days of the casualty that the property cannot be restored within 180 days from the date of loss. Uncontroverted evidence establishes that the Landlord (Defendant) did not exercise that right.

\* \* \*

Thus, because the parties specifically agreed that the Plaintiff's right to quiet enjoyment is "subject, nevertheless, to the terms and conditions of this Lease" (Section 26) and is therefore subject to Section 15 wherein the parties clearly agreed that the Plaintiff's sole remedy for loss of use or occupancy due to fire or other casualty until the premises are restored is rent abatement, . . . .<sup>15</sup>

The Court further determined that "the Plaintiff provide[d] no *evidence* to substantiate allegations in its pleadings or argument in its Response that the Defendant's delay in restoring Suite 445 was unreasonable. The evidence reveals exactly the opposite is true, even when viewed in the light most favorable to the Plaintiff."<sup>16</sup>

By way of Order dated February 7, 2022, the Court found that those prior findings are now law of the case:

[T]he March 9, 2021 opinion [and] order did make the following definitive findings, which are now law of the case and arguments to the contrary may not be asserted at trial:

The plain language of the Lease establishes that the Plaintiff's sole remedy for loss of use or occupancy during the period of repair due to fire or other casualty is rent abatement (not termination of the lease);

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<sup>15</sup> Opinion and Order dated March 9, 2021, pp 14-16.

<sup>16</sup> Opinion and Order dated March 9, 2021, p 18.

The Plaintiff provided no evidence to substantiate allegations in its pleadings or argument in its Response that the Defendant's delay in restoring Suite 445 was unreasonable and the evidence revealed exactly the opposite is true.

### **III The Arguments**

The Defendant moves for summary disposition pursuant to MCR 2.116(C)(8) and (10). The Defendant argues that the Plaintiff's remaining claim for Breach of Contract (Count I) should be dismissed because there is no genuine issue of material fact that the Plaintiff waived its right to audit the 2019 CAM expenses and the Plaintiff's claim for Breach of Contract (Count I) further fails as a matter of law because it has neither alleged nor suffered any damages as a result of the Defendant initially declining to permit an audit of the 2019 CAM reconciliation.

The Plaintiff argues that the notice regarding CAM charges was not received by the Plaintiff until July 24, 2020 as evidenced by the affidavit of its office manager, Ryan Sherman. The Plaintiff further argues that notwithstanding the CAM issue, the Court has not ruled upon the Defendant's alleged failure to take reasonable steps to timely repair and restore Suite 455 and its failure to provide the Plaintiff with the reasonable enjoyment of the space being leased.

**IV**  
**Standards of Review**

**A**  
**MCR 2.116(C)(8)**

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 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v 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). *Id.* at 163. Matters of public record may also be considered. MCR 2.113(C)(1)(a). See also *Dalley v Dykema Gossett*, 287 Mich App 296, 301 n 1 (2010) (court documents are matters of public record that may be considered on a motion under MCR 2.116[C][8]).

“All well-pleaded factual allegations are accepted as 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 357; *Spiek v Dept of Transportation*, 456 Mich 331, 337 (1998).

**B**  
**MCR 2.116(C)(10)**

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). Accordingly, “[i]n 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.” *Maiden v Rozwood*, 461 Mich 109, 119-120 (1999); MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto*, 451 Mich at 358. The moving party “must specifically identify the issues” as to which it “believes there is no genuine issue” of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim. *Quinto*, 451 Mich at 361. If the moving party properly supports its motion, the burden “then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Id.* at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also *Meyer v City of Center Line*, 242 Mich App 560, 575

(2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

In all cases, MCR 2.116(G)(4) squarely places the burden on the parties, not the trial court, to support their positions. A reviewing court may not employ a standard citing mere possibility or promise in granting or denying the motion. *Maiden*, 461 Mich at 121-120 (citations omitted), and may not weigh credibility or resolve a material factual dispute in deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161 (1994). Rather, summary disposition pursuant to MCR 2.116(C)(10) is appropriate if, and only if, the evidence, viewed most favorably to the non-moving party(ies), fails to establish any genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362, citing MCR 2.116(C)(10) and (G)(4); *Maiden*, 461 Mich at 119-120 (1999). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160 (2019) (citation omitted). Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

**V**  
**The Plaintiff cannot sustain its claim  
for Breach of Contract (Count I)**

**A**  
**The Law of Breach of Contract**

A claim for breach of contract lies when the following elements are established: “(1) parties competent to contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation.” *Thomas v Leja*, 187 Mich App 418, 422 (1991). A plaintiff may recover in a breach of contract action when it proves that defendant’s breach was the proximate cause of the harm the plaintiff suffered. *Chelsea Inv Group LLC v City of Chelsea*, 288 Mich App 239, 254 (2010). “The 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 result of the breach.” *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 550-551 (2017).

The cardinal rule when interpreting contracts is to ascertain and give effect to the intention of the parties. *Zurich Ins Co v CCR & Co, (on rehearing)*, 226 Mich App 599, 603 (1997). “In interpreting a contract, it is a court’s obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning.” *In re Smith Trust*, 480 Mich 19, 24 (2008). If the language of the contract is clear and unambiguous, it must be enforced as written. *Phillips v Homer*, 480 Mich 19, 24 (2008).

Here, the Plaintiff alleges the Defendant breached the Lease as follows:

48. Defendant breached the entire lease between the parties by failing to provide GSL with reasonable enjoyment of the entire space being lease, particularly Suite 445.

49. Defendant breached the entire lease between the parties by failing to take reasonable steps to repair and restore Suite 445 after it was damaged.

50. Defendant breached the entire lease between the parties by initially refusing to grant GSL the rent abatement to which it is entitled.

51. Defendant breached the lease between the parties by failing to provide GSL with adequate support for its demand for increased Operating Expenses, which prevented GSL from availing itself of its right under the lease to have the Operating Expenses audited by a professional advisor.

**1**

**The Court has already rejected the Plaintiff's arguments regarding the reasonableness of the Defendant's delay**

In its March 9, 2021 Opinion and Order and the recent February 7, 2022 Order, the Court has ruled as a matter of law that the plain language of the Lease establishes that the Plaintiff's sole remedy for loss of use or occupancy during the period of repair due to fire or other casualty is rent abatement<sup>17</sup> (not termination of the Lease) and the Plaintiff provided no evidence to substantiate allegations in its pleadings or argument in its response that the Defendant's delay in restoring Suite 445 was unreasonable and the evidence revealed exactly the opposite is true. The Plaintiff is precluded from asserting any argument to the contrary.

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<sup>17</sup> The parties agree that the Defendant did abate rent. Response, p 4.

**The Plaintiff does not refute that it has neither alleged nor suffered damages**

On its face, the First Amended Complaint is devoid of any allegation that the Plaintiff sustained damages as a result of the Defendant's purported breach of the Lease. The Plaintiff fails to address this pleading deficiency in its briefing.

Moreover, the Plaintiff fails to address the Defendant's argument that the Plaintiff has not suffered any damages. Indeed, the Plaintiff does not refute the Defendant's arguments that the Plaintiff has "incurred arrears for total rent obligations for Suite 400 and 445," "has suffered no damages because it had not paid any CAM reconciliation 2019 or 2020 until September 28, 2021," "when [the Plaintiff] did finally pay the reconciliation, it was a partial payment based upon its audit of [the Defendant's] records," the Plaintiff "also owe[s] [the Defendant] for its pro rata portion of increases in taxes for Suite 445 and 400" and "as [the Plaintiff] only paid for CAM reconciliation it deems correct (i.e. \$349.76), [the Plaintiff] has suffered no damages."<sup>18</sup>

"Trial Courts are not the research assistants of the litigants; the parties have a duty to fully present legal arguments for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388 (2008). By failing to join the argument, any argument that the Plaintiff has suffered damages to sustain its claim for Breach of Contract (Count I) is deemed abandoned. *Houghton v Keller*, 256 Mich App 336, 339-340 (2003) ("failure to properly

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<sup>18</sup> Motion, p 13.

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"). The absence of any allegation or proffer of damages warrants summary disposition.

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**The Plaintiff waived its right to audit the 2019 CAM Expenses**

Under the terms of the Lease, "If Tenant disputes the amount of an Escalation Reconciliation or an Estimated Escalation Increase, Tenant shall give Landlord written notice of such dispute **within sixty (60) days after Landlord advises Tenant of same.** Tenant's failure to give such notice shall constitute a waiver of its right to dispute the amounts so determined."<sup>19</sup> The date the Landlord advises the Tenant of an Escalation Reconciliation or an Estimated Escalation Increase triggers the Tenant's audit rights. The Plaintiff has not rebutted the affidavit of Jamie Maginness attesting that the CAM reconciliation statement was transmitted to the Plaintiff at its PO Box Address on April 17, 2020.<sup>20</sup> The Defendant did not dispute the 2019 CAM expenses until August 7, 2020,

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<sup>19</sup> Lease, Section 8B (emphasis added).

<sup>20</sup> The reconciliation statement was sent to the address the Plaintiff requested that the Defendant use, and which served as the Plaintiff's updated Notice Address under the Lease (the "PO Box Address"). The PO Box Address was used as the Plaintiff's return address and was the address identified on the Plaintiff's October 2020 rent check. Exhibits 8, 9 and 10 to Motion. The Plaintiff never notified the Defendant of any further change of address. Exhibit 7 to Motion.

well beyond 60 days after transmission. As a result, under the terms of the Lease, the Plaintiff waived its right to audit the 2019 CAM expenses.

**ORDER**

For the foregoing reasons, Defendant's Motion for Summary Disposition is **GRANTED.**

This is a final order and closes the case.

