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

NASSAR COMPANIES MANAGEMENT, LLC (f/k/a AMSON MANAGEMENT, LLC) a Michigan limited liability company,

Plaintiff/Counter-Defendant,

Case No. 22-197018-CB

Hon. Victoria A. Valentine

v.

TENNECO AUTOMOTIVE OPERATING COMPANY INC., a Delaware corporation,

Defendant/Counter-Plaintiff.

_____/

OPINION AND ORDER REGARDING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION AS TO LIABILITY IN ITS FAVOR UNDER COUNT I PURSUANT TO MCR 2.116(C)(10) and DEFENDANT/COUNTER-PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

At a session of said Court
held on the 20th day of March 2024
in the County of Oakland, State of Michigan
PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court on "Plaintiff's Motion for Summary Disposition as to Liability in its Favor under Count I Pursuant to MCR 2.116(C)(10)" and Defendant/Counter-Plaintiff's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10). The Court has reviewed the pleadings, motions, responses, and replies and has heard oral argument by the parties.

OPINION

I.

Overview

Plaintiff/Counter-Defendant Nassar Companies Management, LLC f/k/a Amson Management, LLC ("Nassar Management") is a property management company. At issue in this case is a Management Agreement dated August 10, 2017 ("Management Agreement") between Nassar Management and Defendant/Counter-Plaintiff Tenneco Automotive Operating Company, Inc. ("Tenneco").[1] Tenneco was the tenant of "Unit 6, Northville Technology Park Condominium, Northville, Michigan (the 'Property')" under a lease with NTP L6, LLC.[2] Under the Management Agreement Tenneco, as Tenant, engaged Nassar Management "as [Tenneco's] sole and exclusive management agent to supervise and manage the maintenance, repair and operation of the Property to the Tenant's obligation therefor under the Lease (collectively, the 'Management Services' . . ."[3]

Although the Management Agreement was dated August 10, 2017, the parties agree that the Agreement did not take effect until a certificate of substantial completion was obtained for the Property which apparently occurred in February 2020.[4] In correspondence from Tenneco to Nassar Management dated February 4, 2021 Tenneco raised issues with regard to Nassar Management's performance under the Management Agreement stating, in pertinent part as follows:

> Pursuant to the terms of the Lease, [Tenneco] and [Nassar Management] executed a Management Agreement (the "Agreement"), dated August 9, 2017, wherein [Nassar Management] was to provide certain property management services to [Tenneco]. During a recent visit to the Property, Tenant discovered that no HVAC maintenance has been performed on the HVAC unit servicing the Property despite

[1] The Management Agreement was between Nassar Management's predecessor Amson Management, LLC ("Amson") and Tenneco. There is no dispute that Nassar Management is bound by the terms of the Management Agreement and therefore, for ease of reference, this Opinion will refer to the Nassar Management as the "Management Company" under to the Management Agreement.
[2] Pl's Motion, Exh 1, Management Agreement, Introduction.
[3] *Id.,* § 1.
[4] Tenneco's Motion, Exh 6, "Certificate of Substantial Completion" signed 2/14/20.

the fact that [Tenneco] pays for such maintenance under the terms of invoices submitted by [Nassar Management] to [Tenneco]. In addition, an inspection of the invoices recently submitted to [Tenneco] has resulted in [Tenneco] discovering that there are discrepancies between the third party invoices submitted to [Nassar Management] and charges made to [Tenneco]. Finally, [Nassar Management] has failed to deliver on a timely basis any of the reports required to be delivered by [Nassar Management] under the terms of Section 9 of the Agreement.

As you can certainly understand, [Tenneco] is extremely concerned that the failure to maintain material elements of the Property pursuant to the Agreement will result in the incurrence of material additional costs to [Tenneco]. [Tenneco] will, under no circumstance, pay [Nassar Management] to the extent any discrepancies exist in the invoices submitted to [Tenneco] and [Tenneco] hereby demands that [Tenneco] be permitted to undertake a full audit of charges paid by [Tenneco] pursuant to the Agreement for past periods. Finally, in the event the defaults cited herein are not resolved in a satisfactory manner within the time periods set forth in Section 3.2 of the Agreement, [Tenneco] will exercise the remedies afforded to it under the Agreement including, without limitation, the right to self-help and offset expenditures against the operating account maintained by [Nassar Management]. [Tenneco] hereby reserves all other rights and remedies available to it under the terms of the Agreement and at law or in equity.[5]

In subsequent correspondence dated March 5, 2021, Tenneco stated the following:

Pursuant to the terms of the Lease, [Tenneco] and [Nassar Management] executed a Management Agreement (the "Agreement"), dated August 9, 2017, wherein [Nassar Management] was to provide certain property management services to [Tenneco] pursuant to the terms of the Agreement.

Reference is made to that certain Letter, dated February 4, 2021, wherein Tenant notified [Nassar Management] of its failure to maintain material elements of the Property and deliver material reports to [Tenneco] in accordance with the terms of the Agreement. As of the date of this Letter, the defaults cited therein have not been remedied by [Nassar Management]. Section 11.2 of the Agreement provides "[i]n the event of any breach or violation of this Agreement by either Party, this Agreement may be terminated by the non-breaching Party if the breaching Party does not cure such breach within thirty (30) days following written notice from the non-breaching Party." Due to [Nassar Management's] failure to remedy the applicable breaches within such thirty (30) day period, [Tenneco] hereby terminates the Agreement and the same shall not be of any further force or effect subsequent to the date of this Letter.[6]

[5] Pl's Motion, Exh 3, Correspondence dated 2/4/21.
[6] *Id.,* Exh 6, Correspondence dated 3/5/21.

Nassar Management filed the instant action alleging that Tenneco breached the Management Agreement by terminating it in contravention of § 11.2 of the Agreement (Count I) and by not paying certain expenses due and owing (Count II). Tenneco filed a Counterclaim alleging that Nassar Management breached the Management Agreement by failing to perform management services such as HVAC maintenance, misusing Operating Account funds, and failing to provide reports under § 9 of the Management Agreement.

Nassar Management now moves for summary disposition in its favor under MCR 2.116(C)(10) as to Count I of its Complaint with respect to liability only. Tenneco moves for summary disposition in its favor under MCR 2.116(C)(10) as to Counts I and II of Nassar Management's Complaint and as to Tenneco's Counterclaim.

II

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Universal Underwriters Group v Allstate Ins Co,* 246 Mich App 713, 720; 635 NW2d 52 (2001). The court, in reviewing a motion under MCR 2.116(C)(10), "considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citation omitted). The motion may be granted "if the affidavits or other documentary evidence show 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." *Id.*

III

Analysis

A. *Plaintiff/Counter-Defendant's Count I (Breach of Contract-Tenneco's Wrongful Termination of the Agreement)*

When one party breaches a contract, the non-breaching can either consider the contract terminated and sue for total breach or can continue performance and sue for partial breach. *See Blazer Foods, Inc v Rest Props, Inc*, 259 Mich App 241, 251 n 7; 673 NW2d 805 (2003) citing *Schnepf v Thomas L McNamara, Inc*, 354 Mich 393, 397; 93 NW2d 230 (1958); *Arnone v Chrysler Corp*, 6 Mich App 224, 228; 148 NW2d 902 (1967), and 2 Restatement Contracts, 2d (1981), § 236, comment b, p 214. Parties to a contract may modify this rule by conditioning the right to terminate upon notice and the opportunity to cure. *Convergent Grp Corp v County of Kent*, 266 F Supp2d 647, 657-658 (WD Mich, 2003) citing *Lichnovsky v Ziebert Int'l Corp*, 414 Mich 228, 236-37; 324 NW2d 732 (1982).

In this case, the parties conditioned the right to terminate the Management Agreement upon notice and an opportunity to cure. Section 11.2 of the Management Agreement states:

> In the event of any breach or violation of this Agreement by either Party, this Agreement may be terminated by the non-breaching Party if the breaching party does not cure such breach within thirty (30) days following written notice from the non-breaching Party (the "Section 11.2 Cure Period"). Any notice of breach must include a detailed statement of the nature of the breach. Notwithstanding the foregoing, if the breaching Party is [Tenneco] the Section 11.2 Cure Period shall be five (5) days in the case of a failure to pay any Management Fees as and when due. Also notwithstanding the foregoing, if the breaching Party is [Nassar Management] and if the breach cannot reasonably be cured within the Section 11.2 Cure Period, then so long as [Nassar Management] has commenced and is diligently pursuing cure to completion, the Section 11.2 Cure Period shall be extended to allow for such completion.[7]

[7] Pl's Motion, Exh 1, Management Agreement, § 11.2.

Nassar Management argues that "Tenneco breached the Agreement by prematurely terminating the Agreement without following the mandatory procedure in Section 11.2." Specifically, Nassar Management argues that:

> (1) Tenneco never gave Nassar Management notice of termination under Section 11.2 of the Agreement; (2) and even if it did, it terminated on March 5, 2021, and did not give Nassar Management until March 8, 2021 at 5:00p.m. before terminating; and (3) although not necessary to resolve this motion – Nassar Management had remedied the issues or was in the process of remedying them, when Tenneco prematurely terminated the Agreement.[8]

The Court first rejects the argument that Nassar Management was not given notice as required by Section 11.2. Nassar Management argues that the February 4, 2021 letter from Tenneco was not proper notice because it referenced Section 3.2 of the Management Agreement and does not inform Nassar Management of the 30-day cure period under Section 11.2.[9] However, the unambiguous language of Section 11.2 states the following about notice:

> In the event of any breach or violation of this Agreement by either Party, this Agreement may be terminated by the non-breaching Party if the breaching party does not cure such breach within thirty (30) days following written notice from the non-breaching Party (the "Section 11.2 Cure Period"). *Any notice of breach must include a detailed statement of the nature of the breach*.[10]

There is no requirement that notice of breach must reference § 11.2 or the 30-day cure period. This Court cannot read any such requirement into the Management Agreement and must enforce the contract as written. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008). See also *Kendzierski v Macomb County*, 503 Mich 296, 311-312; 931 NW2d 604 (2019) (emphasis in original) ("A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*" and a court "will

[8] Pl's Motion, p 8.
[9] Section 3.2 is a self-help provision that sets a cure period of 10 days. Pl's Motion, Exh 1, Management Agreement, § 3.2
[10] Pl's Motion, Exh 1, Management Agreement, § 3.2 (emphasis added).

not create ambiguity where the terms of the contract are clear."); *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004).

Section 11.2 does require "a detailed statement of the nature of the breach" and this requirement appears to be satisfied by the February 4, 2021 letter which alleges breaches regarding the lack of maintenance of the HVAC system; discrepancies in invoices submitted by Nassar Management; and failure to deliver reports required under the Management Agreement.

Although the Court rejects the argument that notice was not given in compliance with § 11.2, the Court agrees that Tenneco terminated the Management Agreement prior to the expiration of the cure period set forth in § 11.2. The Court agrees with Nassar Management that Tenneco terminated the Agreement in its March 5, 2021 letter.[11] Tenneco does not dispute Nassar's assertion that the March 5, 2021 letter was sent 29 days after the initial notice of February 4, 2021. It also does not dispute that this was before the expiration of the 30-day cure period set forth in § 11.2. Rather, Tenneco argues that even if the March 5, 2021 letter effectuated a termination it was not a material breach because there is no evidence that Nassar Management could have "cured" the deficiencies if it had a few more days under § 11.2. However, Tenneco has cited no provision in the Management Agreement which permits termination because a party is not prejudiced by the lack of compliance with the notice and cure provision of § 11.2.[12]

[11] Tenneco argues that the Agreement was not terminated on March 5, 2021, but at some later date. However, the letter unambiguously states that due to Nassar Management's failure to remedy the alleged breaches "[Tenneco] hereby terminates the Agreement and the same shall not be of any further force or effect subsequent to the date of this Letter."

[12] Additionally, the question of what prejudice, if any, was suffered by Nassar Development by improper termination is a question related to damages arising from the breach not whether a breach occurred in the first instance.

Having concluded that Tenneco breached the Management Agreement by terminating without complying with the notice and cure requirements of § 11.2, the question is whether Nassar Management may maintain an action for breach of contract. Tenneco argues that Nassar Management cannot do so because Nassar Management committed the first substantial breach(es) as outlined in the February 4, 2021 letter.

Under Michigan law, "'one who first breaches a contract cannot maintain an action against the other contracting party for [its] subsequent breach or failure to perform.'" *Skaates v Kayser*, 333 Mich App 61, 80; 959 NW2d 33 (2020) quoting *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). "This general rule is qualified however, by the requirement that the initial breach is *substantial*." *Skaates*, 333 Mich App at 80 (quotation marks and citation omitted) (emphasis in original). A substantial breach:

> can be found only in cases where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party. [*Tindle v Legend Health, PLLC*, __ Mich App __ ; __ NW2d __ (Docket No. 360861 issued April 20, 2023) quoting *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964).]

"One consideration in determining whether a breach is material is whether the nonbreaching party obtained the benefit which [it] reasonably expected to receive." *Skaates*, 333 Mich App at 80 (quotation marks and citation omitted). "'Michigan case law indicates that the determination of which breaches are substantial is inextricably tied to the particular facts of the case.'" *Schupra v Wayne Oakland Agency*, unpublished per curiam opinion of the Court of Appeals, issued May 22, 2008 (Docket No. 277585) quoting *Chrysler Int'l Corp v Cherokee Export Co*, 134 F3d 738, 742 (CA 6, 1998).

The Court concludes that there is a genuine issue of material fact as to existence of the alleged first breaches by Nassar Management and as to whether any of the alleged breaches were "substantial." As Tenneco indicates, under the Management Agreement, Nassar Management agreed to "supervise and manage the maintenance, repair and operation of the Property to the Tenant's obligation therefore under the Lease."[13] Tenneco asserts that Nassar Management was "obligated to ensure the following services were performed at the Property: 'Lawn/Landscaping,' 'Snow Removal,' 'Parking Lot Maintenance,' 'Window Cleaning,' 'Rubbish Removal.' 'Janitorial,' 'HVAC,' 'Building Maintenance Labor,' 'Elevator Maintenance,' 'Monitoring and Life Safety,' and 'Accounting and Administrative,' services among others."[14] However, apparently the only maintenance and repair issues alleged by Tenneco go to the HVAC system and, more specifically to replacement of filters.[15] The Court cannot conclude, as a matter of law, that the alleged breach regarding HVAC maintenance "has effected such a change in essential operative elements of the [Maintenance Agreement] that further performance by the other party is thereby rendered ineffective or impossible." *Tindle* at p 5 quoting *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964). The Court reaches the same conclusion with regard to the alleged failure to comply with the reporting provisions of § 9 of the Management Agreement

[13] Pl's Motion, Exh 1, Management Agreement, § 1.
[14] Tenneco's Motion, pp 3-4; Nassar Management Motion, Exh 1, Management Agreement, Exh A, Included Management Services.
[15] Pursuant to Exhibit A to the Management Agreement HVAC Maintenance Inspections:

> Includes but not limited to:
> 1) One comprehensive annual cooling inspection and seasonal start-up in the spring
> 2) One comprehensive annual heating inspection and seasonal start-up in the fall
> 3) One annual operating cooling inspection
> 4) One annual operating heating inspection
> 5) One annual coil cleaning
> 6) Four filter changes [Nassar Management Motion, Exh 1, p 84.]

and the alleged failure to produce any invoices with regard to other services required under the Management Agreement.[16]

Based upon the foregoing, there is a genuine issue of material fact as to whether Nassar Management initially committed a substantial breach of the Management Agreement and is therefore precluded from maintaining an action for Tenneco's breach. Accordingly, both Nassar Management and Tenneco's motion for summary disposition as to Count I of the Complaint is denied.

B. *Defendant/Counter-Plaintiff's Counterclaim for Breach of the Agreement*

Tenneco alleges in its Counterclaim that Nassar Management breached the Management Agreement by failing to perform management services such as HVAC maintenance, misusing Operating Account funds, and failing to provide reports under § 9 of the Management Agreement. Tenneco now moves for summary disposition on its Counterclaim, asserting there is no genuine issue of material fact that Nassar Development breached the Management Agreement. However, as this Court concluded above, there are issues of fact as to the alleged breaches by Nassar

[16] Section 9(A) states that "Management Agent shall furnish Tenant with the following statements concerning the operation of the Property at the time and in the manner specified" "[o]n or about thirty (30) days after the end of each calendar month, a statement setting forth all debits, credits and the balance of the Operating Account for the calendar month then ended." Nassar Management Motion, Exh 1, Management Agreement, § 9(A). Section 9(C) requires "[w]ithin sixty (60) days after the end of each calendar year, a year-end a [sic] statement setting forth all debits, credits and the balance of the Operating Account for the calendar year then ended." *Id.* § 9(C).

Exhibit A to Management Agreement entitled "Included Management Agreement" provides in Section 12, under the heading "Accounting and Administrative," "Property Manager will maintain records and accounting for all costs incurred for property management, including services performed at the facility, accounting reports, billings to tenant as well as any administrative needs to cover tenant needs and property oversite." To the extent that Tenneco alleges that it Nassar breached Section 12 of Exhibit A and that any such breach was substantial or that Tenneco was billed for services not performed or for vendor services not paid for by Nassar Management there appears to be a question of fact as well. *See e.g.* Nassar Management Response, Exh D, Invoices; Exh F Roggenkamp (Tenneco Facility Manager) Dep, pp 22-24.

Management. *See State-William Partnership v Gale*, 169 Mich App 170, 176; 425 NW2d 756 (1988) (the question of whether a breach of contract occurred is generally a question of fact).

Moreover, it has been noted that:

> [c]ourts have recognized that where a contract expressly includes a notice and cure provision, a party failing to provide such is precluded from then subsequently suing for [sic] the other party for breaching the agreement. *See e.g. Convergent Group Corp v County of Kent,* 266 F Supp2d 647, 657-59 (WD Mich, 2003) (holding that where the plaintiff did not give notice and an opportunity to cure under the contract, it was prevented from suing for breach); *American Seating Co v Transp Seating, Inc*, 220 F Supp 2d 845, 847-49 (WD Mich, 2002) (same); *Frenchtown Dev LLC v Oerther Bros*, No. 256656, 2005 WL 3304012, * 3 n. 5 (Mich Ct App Dec 6, 2005) (unpublished) ("By not notifying defendants that they were in default, plaintiff denied defendants the opportunity to cure any defect or default with respect to a duty plaintiff had expressly reserved the right to waive.") [*Chrysler Realty Co, LLC v Design Forum Architects, Inc*, 544 F Supp 2d 609, 616 (ED Mich, 2008), as amended (March 25, 2008), order corrected, 2008 WL 2245396 (ED Mich May 30, 2008), aff'd in relevant part 341 Fed Appx 93 (2002).[17]]

Based upon the foregoing, Tenneco's motion for summary disposition in its favor as to the Counterclaim is denied.

C. *Plaintiff/Counter-Defendant's Count II (Breach of Contract- Tenneco's Failure to Reimburse/Pay Certain Expenses Prior to its Wrongful Termination of the Agreement*

In Count II of its Complaint Nassar Management alleges that it was not reimbursed for $12,082.43 in vendor payments for August 2020 and that Tenneco also failed to pay a Management Fee of $5,983.33 in August 2020.[18] Tenneco contends that the amounts were paid. In support of its Motion for Summary Disposition on Count II Defendant presents an Invoice from Nassar Management to Tenneco dated August 1, 2020 in the amount of $12,082.43 for "Maintenance

[17] The decisions of lower federal courts are not binding on this Court but may be considered as persuasive. *Home-Owners Ins Co v Perkins*, 328 Mich App 570, 584 n 6; 939 NW2d 705 (2019) citing *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Likewise, unpublished decisions of the Michigan Court of Appeals are not binding on this Court but may be considered as persuasive authority. MCR 7.215(C)(1); *Slater v Ann Arbor Public Schools Bd of Ed*, 250 Mich App 419, 432; 648 NW2d 205 (2002).

[18] Complaint, ¶¶ 41-43.

2020" and a separate invoice for "Management Fee- August 2020" in the amount of $5,893.33.[19] Tenneco also includes a bank statement in the name of "Amson Nassar Management, LLC" showing a September 2, 2020 deposit in the amount of $17,975.76 ($12,082.43 + $5,893.33) with the description "Orig CO Name Federal-Mogul PO."[20]

In response, Nassar Management argues that the September 2, 2020 payment was on the September invoice(s) and not the August invoice(s). In support of this assertion, Nassar Management attaches invoices showing that the amounts invoiced for August and September were the same. Attached are invoices dated and with a due date of August 1, 2020, one stating "Maintenance August 2020" ($12,082.43) and one stating "Management Fee- August 2020" ($5,893.33).[21] Nassar Management also attaches two invoices dated August 24, 2020, with a due date of September 1, 2020, one stating "Maintenance September 2020" ($12,082.43) and one stating "Management Fee-September 2020" ($5,893.33).[22] The September 2020 invoices have hand-written notations indicating "Pd 9-2-20." There are no hand-written notations on the August 2020 invoices. Nassar Management further points out that § 7 of the Management Agreement requires payment of the management fee "[o]n or before the first day of each month."[23]

Based upon the documentary evidence presented by the parties, the Court concludes that there is a genuine issue of material fact with regard to the claim of non-payment alleged in

[19] Defendant's Motion, Exh 8. There is a discrepancy in the amount alleged to be owed in Management Fees in Count II ($5,983.33) and the amount invoiced ($5,893.33) and it appears that the discrepancy is the result of the transposition of the second and third numbers in the amount alleged in Count II.
[20] Defendant's Motion, Exh 5. Nassar Management apparently does not dispute that "CO Name Federal-Mogul PO" refers to Tenneco.
[21] Pl's Response, Exh E.
[22] *Id.*
[23] Pl's Motion, Exh 1, § 7.

Plaintiff's Count II. Accordingly, Tenneco's motion for summary disposition under MCR 2.116(C)(10) is denied.

ORDER

Based upon the foregoing Opinion:

IT IS HEREBY ORDERED that Plaintiff/Counter-Defendant's Motion for Summary Disposition under MCR 2.116(C)(10) as to liability only is **DENIED** as to Count I of Plaintiff's Complaint;

IT IS FURTHER ORDERED that Defendant/Counter-Plaintiff's Motion for Summary Disposition under MCR 2.116(C)(10) is **DENIED** as to Count I of Plaintiff's Complaint;

IT IS FURTHER ORDERED that Defendant/Counter-Plaintiff's Motion for Summary Disposition under MCR 2.116(C)(10) is **DENIED** as to the Counterclaim;

IT IS FURTHER ORDERED that Defendant/Counter-Plaintiff's Motion for Summary Disposition under MCR 2.116(C)(10) is **DENIED** as to Count II of Plaintiff's Complaint;

IT IS SO ORDERED.

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

/s/Victoria A. Valentine

HON. VICTORIA A. VALENTINE
CIRCUIT COURT JUDGE

Dated: 3/20/24