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

FARMINGTON CENTER MICHIGAN, LLC

Plaintiff/Counter-Defendant, **Case No. 23-203428-CB**
Hon. Michael Warren

v

ADNAN AL-DAIS d/b/a LAZIZO,

Defendant/Counter-
and Third Party Plaintiff/
Counter Third-Party Defendant,

v

MUKTHAR NASSER EL-MATARI and
IBRAHIM ALWAHABI,

Third-Party Defendants/
Counter Third-Party Plaintiffs.

OPINION AND ORDER REGARDING PLAINTIFF'S
MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)
&
THIRD-PARTY DEFENDANTS' MOTION FOR SUMMARY DISPOSITION
PURSUANT TO MCR 2.116(C)(10)

At a session of said Court, held in the
County of Oakland, State of Michigan
March 31, 2025

PRESENT: HON. MICHAEL WARREN

OPINION

I
Overview

The present cause of action arises out of a lease of commercial property located in Farmington, Michigan. Pursuant to a Shopping Center Lease (the "Lease") executed on March 13, 2007, and a series of assignments and amendments, Farmington Center Michigan, LLC (the "Plaintiff") was the landlord of tenant Adnan Al-Dais (the "Defendant") who operated Lazizo Restaurant at the property. In October 2020, the Defendant purported to sell the restaurant and assign his interest in the Lease to the Third-Party Defendants, Mukthar Nasser El-Matari and Ibrahim Alwahabi (the "Third-Party Defendants").[1] The Plaintiff alleges that the Defendant breached the Lease by failing to pay rent and other costs when due, failing to keep the leased premises open during business hours, purporting to assign the Lease without obtaining the Plaintiff's consent, and permitting someone other than the lessee to occupy the premises without the Plaintiff's written consent. In particular, the Plaintiff alleges one count of Breach of Shopping Center Lease. In turn, the Defendant filed a Counter and Third-Party Complaint for Breach of Contract (as to El-Martari and Alwahabi) (Count I); Estoppel (as to Farmington) (Count II); Breach of Avoidable Consequences Doctrine (as to Farmington) (Count III); and Silent Misrepresentation (as to Farmington) (Count IV). The

[1] The Defendant's Response to the Plaintiff's Motion improperly refers to Mukthar Nasser El-Matari and Ibrahim Alwahabi as "Cross-Defendants." Mukthar Nasser El-Matari and Ibrahim Alwahabi are not defendants; therefore, they cannot be "cross-defendants."

Third-Party Defendants filed a Counter Third-Party Complaint for Intentional Fraud and Misrepresentation (Count I), Promissory Estoppel (Count II) and Tortious Interference with a Business Relationship or Expectancy (Count III).[2]

Before the Court is the Plaintiff's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)[3] and Third-Party Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10).[4] Oral argument is dispensed as it would not assist the Court in its decision-making process.[5]

At stake is whether summary disposition of the Defendant's affirmative defense of mutual modification and release is warranted? Because there is a genuine issue of material fact for trial, the answer is "no."

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[2] On August 7, 2024, the Court granted summary disposition in the Plaintiff's favor of the Defendant's counterclaims and the Defendant's affirmative defense of account and satisfaction. Summary disposition was denied as to the Defendant's affirmative defenses of mutual modification and release.

[3] The Plaintiff's Motion seeks summary disposition of the Defendant's affirmative defenses of mutual modification and release and mitigation.

[4] The Third-Party Defendants move for partial summary disposition of their Counter Third-Party Complaint.

[5] 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.

Also at stake is whether summary disposition of the Plaintiff's claim due to lack of consideration is warranted? Because there is a genuine issue of material fact for trial, the answer is "no."

Additionally at stake is whether the doctrine of collateral estoppel precludes the Defendant from denying that the Lease is enforceable against him and that he breached the Lease? Because enforceability of the Lease against the Defendant has been litigated and determined by a valid and final judgment after the Defendant had a full and fair opportunity to litigate the issue, the Defendant is collaterally estopped from denying that the Lease and its written amendments are enforceable against him and denying that he breached the Lease.

Further at stake is whether summary disposition of the Defendant's affirmative defense of mitigation is warranted? Because the reasonableness of the Plaintiff's mitigation efforts is genuine issue of material fact for trial, the answer is "no."

Finally, at stake is whether summary disposition of the counter third-party claim for Intentional Fraud and Misrepresentation (Count I) is warranted? Because the Third-Party Defendants have failed to support their argument with any evidence, the answer is "no."

II
Background

The Plaintiff is the owner of a shopping center in Farmington, Michigan. The Defendant was a tenant pursuant to the terms of a Lease that was subsequently assigned to the Plaintiff as landlord and later amended.[6] The Lease requires prior written approval for any assignment, and contains anti-waiver and written modification provisions:

> 18. **Assignment or Subletting**. Tenant shall not assign, mortgage, pledge, or otherwise transfer or encumber this Lease or any interest therein, either voluntarily or by operation of law or otherwise, or sublet the whole or any part of the Leased Premises, or permit occupancy by anyone else, without obtaining on each occasion Landlord's prior written consent, which consent Landlord may deny, regardless of commercial reasonableness. In any assignment, the assignee must assume this Lease in writing on Landlord's form. Any request for Landlord's consent to the assignment subletting shall be accompanied by payment of Landlord's reasonable administrative and attorneys' fees relating thereto. Notwithstanding an assignment or subletting or occupancy of the Leased Premises by anyone other than Tenant, Tenant shall not be released (nor shall any of Tenant's constituents, partners, or members be released) from any obligations, liabilities or covenants under this Lease and shall continue to remain responsible.
>
> * * *
>
> 20. **No Waivers by Landlord**. No waiver by Landlord of any breach by Tenant or requirement of obtaining Landlord's consent shall be deemed a waiver of any other provision of this Lease or any subsequent breach of the same provision or a waiver of any necessity for further consent. No payment by Tenant or acceptance by Landlord of a lesser amount than due from Tenant shall be deemed to be anything but payment on account, and Tenant's payment of a lesser amount with a statement that the lesser amount is payment in full shall not be deemed an accord and satisfaction. Landlord may accept the payment without prejudice to recover the balance

[6] The Lease was originally executed in March 2007 between Kimco Farmington 146, Inc. (Landlord) and LARA, INC. (Tenant).

due or pursue any other remedy. Landlord may accept payments even after default by Tenant without prejudice to subsequent or concurrent rights or remedies available to Landlord under this Lease, at law or in equity. . . .

* * *

24. **Miscellaneous Provisions**.

(A) This Lease contains the entire agreement between the parties. No oral statements or representations or written matter not contained in this Lease shall have any force or effect. This Lease cannot be modified or terminated orally, but only by a writing signed by Landlord and Tenant, except for a termination expressly permitted by this Lease.

* * *

[Lease.]

On October 14, 2020, the Defendant entered into an agreement to sell his restaurant to the Third-Party Defendants. Along with the Purchase Agreement, the Defendant and the Third-Party Defendants executed an Assignment of Lease (the "Assignment") which purported to assign all of the Defendant's rights, title and interest in the Lease to the Third-Party Defendants. The Assignment also contained a "Release of Assignor's Liability," which provided that "By executing this Assignment, Landlord agrees that the Assignor is released from any and all obligations under the terms of the Lease from and after this Lease Assignment's Effective Date. . . ." [Assignment of Lease.]

On October 15, 2020, the Defendant's counsel sent the Assignment to the Plaintiff, stating, in part, "Mr. Al-Dais he (sic) has entered into a purchase agreement and lease assignment (copies attached) in contemplation of the sale of the restaurant. As is

understood, the assignment is subject to your client's approval. The purchaser will assume all liabilities under the lease and personally guarantee same. All past due rent will be paid in full upon approval of the assignment by the landlord." [October 15, 2020 Email.]

On October 26, 2020, the Defendant sent correspondence to Geoffrey Schnipper ("Schnipper"), an employee at Glen Una Management (the Plaintiff's general partner), stating "The above transaction is structured as a sale of the restaurant business with an assignment of my lessee's interest in the lease with the owner. I will not be a creditor of the buyer. . . . Please advise me of the owner's specific objections, if any, to the lease assignment so that we can resolve it and proceed to closing." [October 26, 2020 Correspondence.] On October 26, 2020, Schnipper, an employee at Glen Una Management (the Plaintiff's general partner) responded, in part, that "I remained concerned about this transaction. The Assignment of Lease only mentions the terms of the Lease Amendment from February 2019. . . . Also, this document transfers all liability to the assignee. We will not release the tenant from being a guarantor. That is a non-starter." [October 26, 2020 Email.] On October 27, 2020, the Defendant's counsel replied that "Dr. Adnan does not have a problem remaining on as guarantor." [October 27, 2020 Email.]

The Defendant paid the past due rent out of the funds from the sale of his restaurant, but the Plaintiff did not execute the Assignment.

The Defendant alleges that from approximately October 2020 until February 2022, the Third-Party Defendants operated a restaurant at the location and rent was paid to the Plaintiff.[7] Alwahabi testified he paid the Defendant. [Deposition of Alwahabi, p 47.]

In February 2022, the Third-Party Defendants advertised the restaurant for sale. On March 15, 2022, Schnipper advised the Defendant via email:

> The lease was never properly assigned. You did not say you were selling the business, you said they were an operating partner. This is a clear violation of your lease.
>
> Yes, you needed to stay on as the guarantor. However, we never had a chance to review the sale document or the new tenant's financials. There is a mechanism for assigning the lease, but keeping you on as a guarantor. You said they are not making any money. You have zero protection if they were to walk away or go into default. They are nowhere in the paper trail for this lease. As a result, they do not have the right to sell the business at all.
>
> [March 15, 2022 Email.]

On August 2, 2022, the Defendant signed a Marketing Agreement, agreeing that he "will remain obligated for all the terms of [his] lease" and should the Lease be terminated, he "will be obligated, upon execution of termination agreement, to pay

[7] Alwahabi testified he paid the Defendant. [Deposition of Alwahabi, p 47.]

Landlord the sum of the following: (1) the full payment of rent up to the time that the new tenant begins paying rent." [March 20, 2022 Correspondence.]

In September 2022, the Plaintiff initiated an eviction proceeding against the Defendant due to nonpayment of rent, among other breaches, and to extinguish the right of the Third-Party Defendants. The Defendant and the Third-Party Defendants failed to appear at the eviction hearing and the Plaintiff obtained a judgment to recover possession of the premises in October 2022.

On October 1, 2023, the Plaintiff executed a lease agreement with a new tenant. [Blueberry Brunch, LLC Commercial Retail Lease.]

III
Standard of Review

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]).

IV
Summary Disposition of the Defendant's Affirmative Defense of Mutual Modification and Release in the Plaintiff's Favor is Denied

In his fourth affirmative defense, the Defendant claims that "the parties mutually agreed to modify the contract and Defendant was released from any potential liability." Likewise, the fifth affirmative defense claims that the Defendant "was released from obligation."

A
The Law of Contracts and Modification

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 the 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 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). Courts "must interpret a contract in a way that gives every word, phrase, and clause meaning, and must avoid interpretations that render parts of the contract surplusage." *Klapp v United Ins Group Agency Inc*, 468 Mich 459, 468 (2003). Courts may not strain to find ambiguity and must read contracts to avoid an absurd or unreasonable result. *Scott v Farmers Ins Exchange,* 266 Mich App 557, 561 (2005); *Miller v Van Kampen,* 154 Mich App 165, 168 (1986). Ultimately, courts must strive to enforce the agreement intended by the parties.

"[A] waiver is a voluntary and intentional abandonment of a known right." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 369, 374 (2003). Michigan

jurisprudence has long held that "contracts with written modification or anti-waiver clauses can be modified or waived notwithstanding their restrictive amendment clauses" through the parties' mutual agreement, which can be "established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 369, 373-373 (2003). Under Michigan law, "parties to a contract are free to mutually waive or modify their contract notwithstanding a written modification or anti-waiver clause because of the freedom to contract." *Id*. at 364. However, "a party alleging waiver or modification must establish a mutual intention of the parties to waive or modify the original contract." *Id.* at 364. Just as mutual agreement is the centerpiece to contract formation, it must be present where there is a contract modification. *Id.*

Mutual agreement may be established through "clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract." *Id*. at 365. "Mere knowing silence generally cannot constitute waiver." *Id.* Rather, there must be some evidence that party "affirmative accepted" the activities as a modification of the original contract. *Id.* at 379-380. However, "when a course of conduct establishes by clear and convincing evidence that a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms, the requirement of mutual agreement has been satisfied." *Id.* at 374.

B
Analysis

The Plaintiff argues that the Defendant "cannot possibly meet his burden to produce 'clear and convincing evidence' to support his allegations that he and Plaintiff mutually intended to modify or waive the restrictive amendment provisions and release [the Defendant] from his obligations under the Shopping Center Lease based on: (1) [the Defendant's] October 21, 2020 payment of the past due amount that was owed under the Shopping Center Lease at that time; or (2) the parties' conduct between October 2020 and May 2022 during which time [the Defendant] alleges that '[t]he Third-Party Defendants then operated the restaurant for 19 months and paid rent to the Plaintiff.'" [Motion, pp 7-8.] The Plaintiff further argues that the October 27, 2020 email from the Defendant's counsel, stating "Dr. Adnan does not have a problem remaining on as guarantor" and the executed Marketing Agreement confirm there was never any mutual intent to modify the amendment provisions in the Lease or release the Defendant from his obligation to pay rent.

However, in the August 7, 2024 Opinion, this Court determined that

> In this case, the written Lease is clear that, prior to assigning his interest in the Lease, the Defendant must obtain the Plaintiff's written consent. The Lease also contains an anti-waiver provision: "No waiver by Landlord of any breach by Tenant or requirement of obtaining Landlord's consent shall be deemed a waiver of any other provision of this Lease. . . . Additionally, the Lease provides that it "cannot be modified or terminated orally, but only by a writing signed by Landlord and Tenant. . . ."

> When viewing the pleadings in the light most favorable to the Defendant, he has alleged facts that support a defense of mutual modification and release. Specifically, the Defendant has alleged:
>
> - The Defendant informed the Plaintiff of the pending sale and lease assignment in October 2020.
>
> - The Defendant's counsel told the Plaintiff's counsel that "All past due rent will be paid in full upon approval of the assignment by the landlord." In response, the Plaintiff's counsel replied "The currently outstanding and past due balance under the lease agreement is $14,671.42. Please let me know when the payment has been made."
>
> - The Third-Party Defendants then operated the restaurant for 19 months and paid rent to the Plaintiff.
>
> - When the Third-Party Defendants experienced a business slow down and failed to pay rent, the Plaintiff's management company told the Defendant that "[the Third-Party Defendant] is in default of *his* lease."
>
> Accordingly, the Defendant's claim that the parties had a mutual agreement to modify the express terms of the Lease and release the Defendant from his obligations under the Lease is not so untenable that no factual development can justify the defenses.
>
> * * *
>
> [August 7, 2024 Opinion (footnotes omitted).]

Thus, this Court has determined that there is a genuine issue of material fact as to whether the parties mutually agreed to modify the Lease. Further, deposition testimony demonstrates there is a genuine issue of material fact. In particular, Schnipper testified "We didn't approve any assignment, any subtenancy, nothing," but also acknowledged that he knew the Third-Party Defendants were occupying the space and was aware a

restaurant was being operated therein, and knew who the Third-Party Defendants were based on the proposed assignment of the Lease. [Deposition of Schnipper, pp 35-36.] In the end, a genuine issue of material fact exists and summary disposition of the Defendant's Affirmative Defense of Mutual Modification and Release is denied.[8]

V
Summary Disposition of the Plaintiff's Claim in its Favor Due to Alleged Lack of Consideration is Denied

In general, a contract modification must be supported by additional consideration unless it is in writing and signed by the party against whom it is charged. MCL 566.1. "To have consideration there must be a bargained-for exchange. There must be a benefit on one side, or a detriment suffered, or service done on the other. Courts do not generally inquire into the sufficiency of consideration." *General Motors Corp v Dep't of Treasury, Revenue Div*, 466 Mich 231, 238-239 (2002) (quotation marks and citations omitted). Consideration exists "if the promisee in return for a promise does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not." *Stott v Stott*, 258 Mich 547, 552 (1932). However, "'[u]nder the preexisting duty rule, it is well settled that doing what one is legally bound to do is not consideration for a new promise.'" *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 158 (2006), quoting *Yerkovich v AAA*, 461 Mich 732, 740–741 (2000).

[8] The Defendant relies upon his own select answers to interrogatories but fails to explain how such answers are "clear and convincing evidence of modifications/release."

The Plaintiff argues that there is no genuine issue of material fact that the Defendant did not provide any additional consideration that could support the existence of an oral agreement to modify or release obligations under the Lease. The Defendant argues that consideration is not necessary because parties can mutually waive or modify their contract, but nonetheless, there was several forms of consideration to support the enforceability of the oral modification, including, the termination of the tenancy, the return of the premises, the execution of the Marketing Agreement, and the ability of the Plaintiff to lease the premises again.

Whether the parties mutually agreed to modify the Lease has yet to be determined and "[g]enerally, it is improper for a trial court to grant a motion for summary disposition on the basis of lack of consideration alone because whether there was valid consideration to support the contract is a factual question for the trier of fact." *Rosati Masonry Co, Inc v Jonna Construction Company*, unpublished per curiam opinion of the Court of Appeals, issued March 3, 1998 (Docket No. 198336), p 2. Furthermore, the Defendant's argument could prove fruitful at trial. Accordingly, summary disposition of the Plaintiff's claim in its favor due to lack of consideration is denied.

VI
The Doctrine of Collateral Estoppel Precludes the Defendant from Denying that the Lease is Enforceable Against Him and That He Breached the Lease

"Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the

prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577 (2001). In order for collateral estoppel to apply: "(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684 (2004) (quotation marks and citations omitted). The mutuality (third) element is not required "when the doctrine is used defensively to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit." *Id.* at 691-692. "The doctrine of collateral estoppel applies to a default judgment." *Detroit Auto Inter-Insurance Exchange v Higginbotham*, 95 Mich App 213, 219 (1980). "[A] default judgment is equivalent to an admission by the defaulting party to all of the matters well pleaded." *Sahn v Brisson*, 43 Mich App 666, 670-671 (1972).

In the instant action, the Defendant has denied that "[t]he Shopping Center Lease, as amended, is a valid contract and enforceable against [him]" and denied that he has breached the Lease by, among other things, failing to pay rent when due and assigning the Lease without the Plaintiff's prior written consent. [Answer, ¶22-¶23.] However, the 47th Judicial District Court in *Farmington Center Michigan, LLC v Al-Dais*, Case No. LT22C1352, found the Defendant in default, determined that "[t]he plaintiff has a right to recover possession of the property" and ordered that "[t]je plaintiff can apply for an order evicting the defendant if the defendant does not move out on or before October 31,

2022" and "[t]he defendant may be liable for money damages after moving if additional rent is owed or if there is damage to the property." [October 2022 Judgment.] Hence, the enforceability of the Lease against the Defendant has been litigated and determined by a valid and final judgment after the Defendant had a full and fair opportunity to litigate the issue. Accordingly, the Defendant is collaterally estopped from denying that the Lease and its written amendments are enforceable against him and from denying that he breached the Lease.

VII
Summary Disposition of the Defendant's Affirmative Defense of Mitigation in the Plaintiff's Favor is Denied

A
The Law of Mitigation

The mitigation of damages "is an affirmative defense, to be established by the defendant, which is related to the broader principle of 'avoidable consequences.'" *Laurel Woods Apartments v Roumayah*, unpublished opinion of the Court of Appeals, issued December 11, 2012 (Docket No. 299396), p 9. Mitigation of damages means that "[w]here one person has committed a Tort, breach of contract, or other Legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages." *Shiffer v Bd of Ed of Gibraltar Sch Dist*, 393 Mich 190, 197 (1974). The failure to use reasonable efforts to reduce damages can be used to reduce recovery. "A landlord is required to mitigate his losses where, [], he is suing for damages under the lease." *Valentine v Wiltse*, unpublished per curiam opinion

of the Court of Appeals, issued January 18, 2005 (Docket No. 251362), p 1. However, "[t]he defendant bears the burden of proving that the plaintiff failed to make reasonable efforts to mitigate damages," *Morris v Clawson Tank Co*, 459 Mich 256, 266 (1998). In general, "'[t]he question whether [a] plaintiff's efforts to mitigate damages were reasonable under the circumstances is one for the trier of fact.' *Id*. at 270. But like all questions of fact, the trial court may decide the matter as a question of law at the summary-disposition stage when reasonable minds cannot differ on the conclusion." *City of Riverview v Prudential Security, Inc*, unpublished per curiam opinion of the Court of Appeals, issued July 15, 2021 (Docket No. 353950), p 4, citing *1300 Lafayette East Coop, Inc v Savoy*, 284 Mich App 522, 525 (2009) ("A question of fact exists when reasonable minds can differ on the conclusions to be drawn from the evidence.").

B
Analysis

In his third affirmative defense, the Defendant claims that the Plaintiff "failed to mitigate damages." The Plaintiff argues there is no genuine issue of fact for trial as to the Defendant's mitigation defense.

The premises was first marketed in August 2022, before the landlord-tenant matter was filed. "Between August 19, 2022 and September 11, 2023, the Property was shown to at least 19 potential tenants" and "[m]any of those potential tenants participated in multiple showings and exchanged letters of intent . . . ." [*Id.*] A lease agreement with a new tenant was executed in October 2023 and the new tenant began paying rent in

January 2024. [Blueberry Brunch, LLC Commercial Retail Lease.] This evidence is uncontroverted.

However, the Defendant argues "it is clear that evidence exists that Plaintiff tried to limit the tenant pool by restricting who was shown the space. Plaintiff determined it no longer wished to lease the property to middle eastern business owners, as indicated during Alwahabi's deposition, clearly there was of (sic) appropriate mitigation and Plaintiff was exercising his newly bargained for right to lease the premises as it saw fit." [Response, unnumbered p 20.] The Defendant relies exclusively on page 23 of Alwahabi's deposition testimony:

A. I didn't sell it, because Dr. Adnan, he told me just go sell it, and the owner for the building, he told Real Estate, you can't sell the restaurant.
Q. Okay. He didn't tell you that?
A. No, he told the Real Estate.
Q. Okay.
A. The owner for the building, he told the Real Estate, you can't sell the restaurant, because I don't want another Arabic people, they have like Mediterranean food. They don't want Arabic food in this building, because the area is not work good (sic).
So he said he want like (sic) rent it for like burger, pizza, anything different than Arabic food.
Q. Okay. Who do you think told the owner or the plaza that?
A. I don't know who the owner (sic).
Q. Well, was the Manager of the plaza, did he say something that he didn't want any Arabic food in the restaurant?
A. Just the Lawyer, he tell (sic) me about it.
Q. What Lawyer?
A. Not Lawyer, I'm sorry, the Real Estate.
Q. What's the Real Estate Agent's name?

[Deposition of Alwahabi, p 23.]

Despite that Alwahabi's deposition testimony is multi-level hearsay (the owner allegedly told the real estate agent who allegedly told Alwahabi), our Court of Appeals in *Brendel's Septic Tank Service, LLC v Vickers*, unpublished per curiam opinion of the Court of Appeals, issued February 21, 2025 (Docket No. 369492) recently held that "In order to properly consider evidence when determining the propriety of summary disposition, it must be substantively admissible, but need not be in admissible form. Stated otherwise, the trial court may consider evidence that would be admissible if a proper foundation is established." *Brendel's*, unpub op at 6-7 (citation omitted) (an affidavit containing hearsay statements was sufficient to create a factual issue precluding summary disposition). In light of *Brendel's*, the Defendant has sufficiently demonstrated there is a genuine issue of material fact for trial. Accordingly, summary disposition of the Defendant's affirmative defense of mitigation is denied.[9]

VIII
Summary Disposition of the Counter Third-Party Complaint in the Defendant/Counter Third-Party Defendant's Favor is Denied

A
Intentional Fraud and Misrepresentation (Count I)

To prevail on a claim of fraud, a plaintiff must establish "(1) that the defendant made a material representation; (2) that it was false; (3) that the defendant made the

[9] This Court invites the Court of Appeals and the Supreme Court to reverse this Court in connection with this ruling in a published opinion, definitively finding that hearsay in an affidavit cannot be used to create a fact issue. But until then, the ruling stands.

representation knowing that it was false or made it recklessly without knowledge of its truth; (4) that the defendant intended that the plaintiff would act on the representation; (5) that the plaintiff relied on the representation; and (6) that the plaintiff suffered injury as a result of having relied on the representation. *Lucas v Awaad*, 299 Mich App 345, 363 (2013).

B
Analysis

In their Motion, the Third-Party Defendants argue "[the] Defendant knowingly and falsely represented to the Third-Party Defendants that he had the authority to assign the lease, despite knowing that written consent from the Plaintiff was required and had not been obtained. The Third-Party Defendants relied on this false representation, investing $120,000 into a business venture that was based on an illegal and void lease assignment. Their significant financial loss was directly caused by Defendant's fraudulent actions." [Motion, p 6.] However, the Third-Party Defendants' argument is wholly unsupported. "In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence." *Quinto*, 451 Mich at 362; See also MCR 2.116(G)(3) ("(3) Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . (b) when judgment is sought based on subrule (C)(10)."). Here, the Motion was filed without any exhibits and the Third-Party Defendants fail to cite to any documentary evidence to support their position. It is not this Court's job to scour the record. *Barnard Mfg v Gates Performance*, 285 Mich App 362

(2009), citing *Carmen v San Francisco Unified School Dist*, 237 F3d 1026, 1031 (CA 9, 2001); *Adler v Wal-Mart Stores, Inc*, 144 F3d 664, 672 (CA 10, 1998) ("Thus, where the burden to present such specific facts by reference to exhibits and the existing record was not adequately met below, we will not reverse a district court for failing to uncover them itself"). After all, "'[j]udges are not like pigs, hunting for truffles'" that might support a party's position. *Dibrell v City of Knoxville,* 984 F3d 1156, 1663 (CA 6, 2021) (citation omitted). Accordingly, because the Third-Party Defendants have failed to meet their burden, summary disposition of the counter third-party claim for Intentional Fraud and Misrepresentation (Count I) is denied.[10]

Without limiting the foregoing, summary disposition is also not warranted in the Defendant's favor under MCR 2.116(I)(2). Summary disposition under MCR 2.116(I)(2) may be granted "if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Washurn v Michailoff*, 240 Mich App 669, 672 (2000). Summary disposition under MCR 2.116(I)(2) is not available where a response exceeds the scope of the moving party's motion and is therefore, not responsive to the motion. *Church Mut Ins Co v Consumers Energy Co*, unpublished per curiam opinion of the Court of Appeals, issued Oct 30, 2003 (Docket No. 240571), p 3.

[10] The Third-Party Defendants' Motion for Summary Disposition only addresses their counter third-party claim for Intentional Fraud and Misrepresentation (Count I). The Motion does not address their counter third-party claims for Promissory Estoppel (Count II) and Tortious Interference with a Business Relationship or Expectancy (Count III).

The Defendant's request for relief under MCR 2.116(I)(2) is denied because it injects arguments not properly before the Court. The Defendant's request for summary disposition in its favor under MCR 2.116(I)(2) is predicated upon issues and arguments that are not responsive to the issues underlying the Third-Party Defendant's Motion. MCR 2.116(I)(2) does not allow the Court to render judgment for the nonmoving party on issues unresponsive, and thus, unrelated to the Motion. As such, the unresponsive arguments for relief under MCR 2.116(I)(2) are not properly before the Court and will not be considered as they are beyond the matter specifically identified in the Third-Party Defendants' Motion in accordance with MCR 2.116(G)(4) – i.e., whether summary disposition of the counter third-party claim for Intentional Fraud and Misrepresentation (Count I) is warranted. Allowing the Defendant's arguments to stand effectively eviscerates the entire briefing schedule and due process by encouraging responding parties to pursue disguised motions for summary disposition under MCR 2.116(C)(10) by ambush and to impermissibly wreak havoc with the shifting burden standards of MCR 2.116 (C)(10)/(G)(4) and the purpose of MCR 2.116(I)(2). Moreover, the dispositive motion filing deadline was September 13, 2024 and the Defendant did not timely move for summary disposition of the counter third-party claims.

ORDER

In light of the foregoing Opinion, Plaintiff's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) is GRANTED, IN PART. The Defendant is collaterally estopped from denying that the Lease and its written amendments are enforceable against him and denying that he breached the Lease.

Third-Party Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) is DENIED. The Defendant's request for relief under MCR 2.116(I)(2) is also denied.

/s/ Michael Warren

HON. MICHAEL WARREN
CIRCUIT COURT JUDGE