

STATE OF MICHIGAN  
SIXTEENTH JUDICIAL CIRCUIT COURT

MOY'S PROPERTIES, LLC,  
a Michigan limited liability company,

Plaintiff/Counter-Defendant,

vs.

Case No. 2021-001034-CB

AL KAWTHAR OF MICHIGAN, LLC,  
a Michigan limited liability company,

Defendant/Counter-Plaintiff,

and

ALI AHMAD, an individual,  
GHASSAN AHMAD, an individual, and  
ABBAS AHMAD, an individual,  
jointly and severally,

Defendants.

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OPINION AND ORDER

This matter is before the Court on Plaintiff Moy's Properties ("Moy's") motion for summary disposition filed March 15, 2022, Defendant Abbas Ahmad's ("Abbas") motion for summary disposition filed April 11, 2022, and Defendant/Counter-Plaintiff Al Kawthar ("Al Kawthar") and Defendants Ali Ahmad ("Ali") and Ghassan Ahmad's ("Ghassan") (collectively, "Defendants") motion for partial summary disposition filed April 18, 2022.

I. Background

This is a commercial landlord-tenant dispute between Moy's and its tenant, Al Kawthar, and three purported guarantors of Al Kawthar's unpaid rent, Ali, Ghassan and Abbas. In August 2011, Moy's and a previous tenant entered a lease agreement (the

“Original Lease”) under which the tenant would operate a restaurant at the leased property. The Original Lease was set to expire on October 31, 2016.

On February 1, 2014, Moy’s and Al Kawthar executed an assignment and assumption of the Original Lease (the “Assignment”) under which the previous tenant assigned its rights and obligations under the Original Lease to Al Kawthar. Simultaneous with the execution of the Assignment, Moy’s and Al Kawthar executed a First Amendment to the Original Lease (the “First Amendment”) (the Original Lease, Assignment, and First Amendment will be collectively referred to as the “Lease”), and Ali and Ghassan executed a guaranty agreement that personally guaranteed Al Kawthar’s obligations under the Lease.

Al Kawthar stopped paying rent and taxes in March 2020, and has not paid rent since then. According to Moy’s, in September 2020, the owner of Moy’s, Frank Moy, met with Ghassan and Abbas to resolve the unpaid rent and taxes. Moy’s alleges that in that meeting, Ghassan and Abbas agreed to pay Al Kawthar’s unpaid rent and taxes and that this agreement was memorialized in a writing. However, neither Ghassan nor Abbas subsequently made any payments to Moy’s.

According to Moy’s, in January 2021, Frank Moy drove by the property and saw the building was dark and the sign for the restaurant had been removed. He discovered the doors were locked and saw through the windows that some decorations had been removed. Believing that Al Kawthar had abandoned the property, in early February 2021, he had a locksmith change the locks to the building. According to Ghassan, on February 4, 2021, he visited the building and discovered the locks had been changed.

On March 17, 2021, Moy’s filed suit against Al Kawthar asserting a claim of breach

of the Lease (Count I) and against Ali, Ghassan, and Abbas for breach of personal guaranties (Count II). Al Kawthar filed a counter-complaint against Moy's alleging violation of the anti-lockout statute (Count I), breach of contract (Count II), fraud (Count III), breach of the covenant of quiet enjoyment (Count IV), claim and delivery (Count V), common law conversion (Count VI), and statutory conversion (Count VII).

On March 15, 2022, Moy's filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10) seeking summary disposition on its claims and Al Kawthar's counterclaims. Defendants filed their response on April 11, 2022, and Moy's filed his reply on April 21, 2022. In the meantime, Abbas filed a "motion to dismiss" under MCR 2.116(C)(8) and (10) seek summary disposition on Moy's claim against Abbas for breach of his personal guaranty. Moy's filed its response on May 9, 2022. Additionally, on April 18, 2022, Defendants<sup>1</sup> filed a motion for partial summary disposition under MCR 2.116(C)(10) seeking summary disposition on Al Kawthar's counterclaims of violation of the anti-lockout statute (Count I), common law conversion (Count VI), and statutory conversion (Count VII). Moy's filed its response on May 9, 2022.

The Court began oral arguments on Moy's motion for summary disposition on April 25, 2022, and extended oral arguments on the motion to May 16, 2022 and allowed Defendants to file a supplemental brief.<sup>2</sup> During the hearing the Court denied Moy's motion to the extent it requested summary disposition on damages. On May 16, 2022, the Court resumed oral arguments on all three motions and took them under advisement.

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<sup>1</sup> It's unclear why this motion for partial summary disposition was filed by all Defendants as only Al Kawthar has asserted counterclaims against Moy's.

<sup>2</sup> Defendants filed a supplemental brief on May 13, 2022 and an amended supplemental brief on May 16, 2022. The Court has reviewed both.

## II. Standards of Review

MCR 2.116(C)(7) tests, in part, whether a claim is barred because of a statute of limitations. For a motion brought pursuant to MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by evidence submitted by the moving party. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). If a party submits admissible documentary evidence, those materials must be considered. MCR 2.116(G)(5); *Pusakulich*, 247 Mich App at 82-83. The evidence is viewed in a light most favorable to the nonmoving party. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001). If there is no factual dispute, whether a claim is barred under MCR 2.116(C)(7) is a question of law for the court to decide. *RDM Holdings, LTD v Cont'l Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008).

A motion for summary disposition under MCR 2.116(C)(8) that the opposing party “has failed to state a claim upon which relief can be granted” must be granted “if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). It tests the legal sufficiency of the complaint based on the pleadings, including any written agreement that is the basis of action. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007). All factual allegations in the pleadings are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995). “Michigan is a notice-pleading jurisdiction, which means that a complaint is required to contain only enough information reasonably to inform the defendant of the nature of the claim against which he must defend.” *Veritas Auto Mach*,

*LLC v FCA Intl Operations, LLC*, 335 Mich App 602, 615; 968 NW2d 1 (2021).

A motion filed under MCR 2.116(C)(10) “tests the factual sufficiency of a claim.” *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). “Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *West v Gen Motors*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court must consider the documentary evidence submitted by the parties in the light most favorable to the non-moving party. *Maiden*, 461 Mich at 120. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West*, 469 Mich at 183. The initial burden is on the moving party to support its position “by affidavits, depositions, admissions, or other documentary evidence.” *Smith v Globe Life Ins*, 460 Mich 446, 455; 597 NW2d 28 (1999). The burden then shifts to the opposing party to set forth specific facts via admissible evidence that establish a genuine issue of disputed fact exists. *Maiden*, 461 Mich at 121.

However, where the moving party is challenging the non-movant’s claims, it may satisfy its burden under MCR 2.116(C)(10) in one of two ways: (1) by “submit[ting] affirmative evidence that negates an essential element of the nonmoving party’s claim,” or (2) by “demonstrat[ing] to the court that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim.” *Lowrey v LMPS & LMPJ*, 500 Mich 1, 7; 890 NW2d 344 (2016). In the latter, the movant “is not required to go beyond showing the insufficiency of [the non-movant’s] evidence.” *Id.* at 9. It doesn’t have “to proffer evidence to negate one of the elements of [the non-movant’s] claim.” *Id.* To survive, “the nonmoving party may not rely on mere allegations or denials in pleadings,

but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Id.* at 7. “If the non-moving party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.” *Id.*

### III. Moy’s Complaint

#### A. Breach of Lease (Count I)

Moy’s first seeks summary disposition under MCR 2.116(C)(10) on its claim for Breach of Lease (Count I) in its Complaint. Specifically, it argues that there is no genuine issue of material fact Al Kawthar breached the Lease by failing to pay rent and taxes since March 25, 2020. In response, Defendants do not dispute that Al Kawthar has failed to pay rent since March 25, 2020. Instead, they argue that Moy’s cannot recover the unpaid rent and taxes because Moy’s violated the anti-lockout statute, MCL 600.2918. They further argue that due to the COVID-19 pandemic, the force majeure provision in the Lease as well as the doctrines of frustration of purpose and impossibility relieved Al Kawthar of its payment obligations under the Lease. Finally, it argues Moy’s breach of contract claim against it is barred because Moy’s committed the first material breach of the Lease.

A party asserting a breach of contract must establish that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach. *Miller-Davis Co v Ahrens Const*, 495 Mich 161, 178; 848 NW2d 95 (2014). Here, the parties do not dispute Moy’s and Al Kawthar executed a series of agreements that form the Lease and under the Lease, Al Kawthar was obligated to pay rent and taxes. (Compl., Ex. B.) Nor is there any dispute Al Kawthar has failed to pay rent and taxes since

March 25, 2020.<sup>3</sup> (Mot. Exs. A and B.) Thus, absent a defense to this non-payment, Moy's motion for summary disposition as to its breach of contract claim against Al Kawthar must be granted.

#### 1. Anti-Lockout Statute as a Defense

Al Kawthar has asserted a number of defenses. It first argues that Moy's claim for breach of lease is barred *in its entirety* because Moy's violated the anti-lockout statute. In support of its assertion that Moy's alleged violation of the anti-lockout statute "is an absolute bar to the maintenance of any action for the payment of rents," (Am. Supp. Br., p 5), Al Kawthar relies on the Court of Appeal's unpublished opinion in *Dietrich Family Irrevocable Tr. v SE Michigan Law Assoc, PLLC*, unpublished opinion of the Court of Appeals, issued January 15, 2009 (Docket No. 279994). This reliance is misplaced. The sole issue in *Dietrich* was whether the anti-lockout statute precluded damages to a landlord for rent that accrues *after* the landlord impermissibly locks out a tenant. *Id.* at \*2 (emphasis added). The Court of Appeals held that it does and found the circuit court correctly determined the landlord's unlawful conduct "precluded plaintiff from recovering damages for rents owed *after the date of the lockout.*" *Id.* at \*3. (emphasis added.) See also, *DeBruyn Bros Realty Co v Photo Lith Plate Serv Corp*, 31 Mich App 487, 489; 188 NW2d 111 (1971) (landlord's constructive eviction of tenant that forced tenant to vacate property absolved tenant of any further duty to pay rent once the premises had been vacated); *McVeigh v McAlpine*, 335 Mich 413, 415; 56 NW2d 239 (1953) (explaining that a partial eviction is a defense to non-payment of rent after the eviction for the remainder

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<sup>3</sup> There appears to be some dispute as to when the Lease expired; however neither party adequately addressed that issue.

of the term of the lease). Accordingly, if Al Kawthar prevails in its claim under the anti-lockout statute (which remains in dispute<sup>4</sup>), post-lockout damages are not recoverable. However, as to damages for rents and taxes owed *prior* to the alleged lockout, Al Kawthar has failed to provide this Court with any support for this assertion. Indeed, the Court is unaware of any such authority. In the absence of any supporting authority, the Court is unpersuaded that Moy's alleged violation of the anti-lockout act bars Moy from recovering the unpaid rent and taxes that pre-date the lockout.

## 2. Force Majeure, Frustration of Purpose, and Impossibility Defenses

Al Kawthar next argues in its response and supplemental briefs that due to the government orders enacted during the COVID-19 pandemic, the force majeure provision in paragraph 34.1 of the Original Lease as well as the doctrines of frustration of purpose and impossibility relieved it of its obligation to pay rent and taxes under the Lease. Moy's argues these defenses are inconsistent with the Lease.

"[T]he purpose of a force-majeure clause is to relieve a party from penalties for breach of contract when circumstances beyond the party's control render performance untenable or impossible." *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 438–39; 886 NW2d 445 (2015). However, as with other terms in a contract, courts must honor the intent of the parties expressed in the words of the contract in determining the application of a force majeure clause. See *id.* at 446–447. Additionally, force-majeure clauses must be narrowly construed. *Id.* at 449.

The force majeure clause in the Lease is found in paragraph 34 of the Original

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<sup>4</sup> Moy's motion for summary disposition on Al Kawthar's counterclaim for Violation of the Anti-Lockout Statute is denied as set forth in section IV(A) below.

Lease, related to Default. (Compl., Ex. A, ¶34). That paragraph provides, in relevant part,

34. Default. Tenant agrees that any one or more of the following events shall be considered events of default as said term is used herein:

34.1 Tenant shall fail to operate the Premises for business in an aggregate amount of thirty (30) continuous days during any calendar year during the Term here of (other than for reason of disaster or force majeure)

34.2 Tenant shall fail to pay Rent or any other payment when due as provided in the Lease and the Tenant does not cure the default within twenty (20) days;

(*Id.*) Under the unambiguous language of Paragraph 34.1, the force majeure clause only applies to excuse a default for failure to operate the business for the specified number of days. There is no language in the Original Lease that indicates the parties intended to extend the force majeure clause in Paragraph 34.1 to the other default events identified in Paragraph 34, including Paragraph 34.2, which makes non-payment of rent and other payments an event of default. Had the parties intended to do so, they could have clearly said so. See *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830, (2003) (“When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties . . . .”) Because Moy’s breach of contract claim is based solely on Al Kawthar’s non-payment of rent and taxes, which constitutes a default under Paragraph 34.2, the force majeure clause in Paragraph 34.1 does not apply.

Turning to Al Kawthar’s frustration of purpose argument, a contractual frustration of purpose exists when “a change in circumstances makes one party’s performance virtually worthless to the other, frustrating his purpose in making the contract,” despite the fact that “there is not actually anything impeding the either parties ability to perform.”

*Liggett Rest Group v Pontiac*, 260 Mich App 127, 133-134, 676 NW2d 633 (2003) (cleaned up). For a frustration of purpose to exist:

(1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him.

*Molnar v Molnar*, 110 Mich App 622, 626; 313 NW2d 171 (1981). Additionally, “[t]he frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract.” *Liggett*, 260 Mich App at 135 quoting Restatement (Second) of Contracts § 265 (1981).

Beyond its conclusory assertions that the “parties knew the purpose behind the making of the lease agreement and that purpose was frustrated by the event of Covid-19 that was not reasonably foreseeable at the time the lease agreement was made,” (Resp., p 21), Al Kawthar hasn’t elucidated any argument or provided any evidence to support its argument that frustration of purpose applies to this case. See *Quinto v Cross & Peters Co*, 451 Mich 358, 370; 547 NW2d 314 (1996) (conclusory allegations in response to a motion for summary disposition are insufficient to meet a non-moving party’s burden to respond with “specific facts showing that there is a genuine issue for trial” under MCR 2.116(G)(4)). Thus, Al Kawthar’s frustration of purpose defense must be denied.

The defense of impossibility, which is closely related to frustration of purpose, occurs when the promised performance becomes “impracticable owing to some extreme or unreasonable difficulty, expense, injury, or loss involved, rather than that it is scientifically or actually impossible.” *Bissell v LW Edison Co*, 9 Mich App 276, 285; 156 NW2d 623 (1967). “The important question is whether an unanticipated circumstance has

made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.” *Id.* Here, like its frustration of purpose argument, Al Kawthar only provided a single, conclusory sentence supporting its impossibility defense: “the failure to pay rent upon which possession is predicated was impossible based upon the Covid-19 circumstances and regulations beyond the control of any party.” (Resp., pp 21-22.) Given the absence of any argument or evidence supporting its assertion of impossibility, Al Kawthar’s impossibility defense must be denied.

### 3. First Breach Defense

As its final argument against Moy’s breach of contract claim, Al Kawthar argues Moy’s “promised [Al Kawthar] the immediate turn-key use of the subject premises as a money making entity to be operated as a restaurant” but Al Kawthar was unable to open for business until September 2014 “due to the several and severe health restrictions imposed against the location, none of which were repaired by Plaintiff.” (Am. Supp. Br., p 4.) Moy’s conduct, according to Al Kawthar, constituted a first breach of the Lease that bars Moy’s from bringing its breach of contract claim.

“He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform.” *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964). The Court of Appeals has cautioned,

[T]he words ‘substantial breach’ must be given close scrutiny. Such scrutiny discloses that the application of such a rule 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.

*Id.* (emphasis added).

As it failed to do for other defenses, Al Kawthar again failed to provide any evidence to support its argument that Moy's first breached the Lease. It hasn't provided any evidence that Moy's promised "the immediate turn-key use" of the property or that it promised to resolve the alleged health restrictions—indeed, nothing in any of the documents comprising the Lease appears to contain either of those promises. (Compl., Ex. A and C.) And even assuming Moy's made those promises, Al Kawthar hasn't provided any evidence that Moy's breached them. Thus, Al Kawthar's first breach argument is wholly unsupported and must be denied.

For the reasons set forth above, Moy's motion for summary disposition on its claim for Breach of the Lease (Count I) as to liability for rent and taxes prior to the alleged lockout is granted, but denied as to Al Kawthar's defense of violation of the anti-lockout statute and liability for post-lockout damages (which remain in dispute).

#### B. Breach of Guaranties (Count II)

Moy's next seeks summary disposition against Ali, Ghassan, and Abbas on its claim for breach of personal guaranties (Count II) in its Complaint. Neither Ali nor Ghassan responded to Moy's request for summary disposition on this claim. However, Abbas has filed his own cross-motion for summary disposition challenging this claim against him.

To prevail on its breach of guaranty claim, Moy's must first establish there is a valid contract. "[T]he essential elements of a valid contract are (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; 468 NW2d 58 (1990). “[A] fundamental tenet of all contracts is the existence of mutual assent or a meeting of the minds on all essential terms of a contract.” *Burkhardt v Bailey*, 260 Mich App 636, 655; 680 NW2d 453 (2004).

“[A] guaranty contract . . . is a special kind of contract” that is subject to a strict interpretation of its precise terms so that the guarantor’s liability does not extend beyond the express terms of the contract. *Bandit Indus v Hobbs Intern*, 463 Mich 504, 511–513; 620 NW2d 531 (2001). The Supreme Court has explained that courts “must approach with caution a claim that the parties have formed a guaranty contract” because “[o]rdinary experience teaches that assumption of another’s debt is a substantial undertaking, and thus the courts will not assume such an obligation in the absence of a clearly expressed intention to do so.” *Id.* at 511-512. Consequently, “a personal guarantee cannot be implied from language that fails to clearly and unambiguously reflect an intention to assume such a responsibility.” *Id.* at 514.

With respect to Ali and Ghassan’s guaranties, Moy’s has provided evidence that on January 31, 2014, Ali and Ghassan executed a guaranty agreement under which they personally guaranteed payment under the Lease. (Compl., Ex. D; Mot. Ex. A, p 42.) Moy’s evidence also establishes that Ali and Ghassan failed to pay the past due rent and taxes under the Lease. (Mot. Ex. A, pp 42, 65 and Ex. B, ¶9.) Ali and Ghassan have not provided any contrary evidence demonstrating a genuine issue of material fact. Accordingly, Moy’s motion for summary disposition on its claims for breach of guaranties (Count II) against Ali and Ghassan as to liability only must be granted.

As for the breach of guaranties claim against Abbas, in his cross-motion, Abbas argues the document Moy's alleges is a guaranty agreement is not a valid contract. Specifically, Abbas contends there's no evidence he ever expressed any intention to be liable for Al Kawthar's debts. In response, Moy's argues that Abbas' guaranty agreement is ambiguous thus requiring the consideration of extrinsic evidence that precludes summary disposition.

The purported guaranty agreement for Abbas is a single, handwritten page that contains a series of numbers and dates. (Compl., Ex. E.) It is signed by Abbas and Frank Moys and dated September 1, 2020. (*Id.*) Nothing on the face of it indicates the purpose of the document or the parties' intent behind it; as such, it fails to clearly and unambiguously reflect an intention by Abbas to be a guarantor of anyone else's debts.

Moy's argues that the lack of any expression in the document showing an intent to form a guaranty contract is an ambiguity and to resolve the ambiguity the Court can consider extrinsic evidence—specifically, the conflicting evidence from Moy's and Abbas concerning the purpose of the document. This argument lacks merit.

While Michigan courts have indicated extrinsic evidence can be considered in determining the parties' intent as to the scope of an ambiguous guaranty contract, see *Comerica Bank v Cohen*, 291 Mich App 40, 46; 805 NW2d 544 (2010); *Stonecrest Bldg Co v Chicago Title Ins Co*, unpublished opinion of the Court of Appeals, issued July 21, 2015 (Docket No. 319841); *Seymour v Weinberg*, unpublished opinion of the Court of Appeals, issued May 17, 2005 (Docket No. 251924) p \*2, Moy's has not cited, nor is the Court aware of, any caselaw that permits it to consider extrinsic evidence to determine whether the parties intended to form a guaranty contract. Indeed, relying on extrinsic

evidence to determine whether a guaranty agreement was formed would be contrary to the Supreme Court's holding that "a personal guarantee cannot be implied from language that fails to clearly and unambiguously reflect an intention to assume such a responsibility." *Bandit*, 463 Mich at 514. Because the writing at issue here does not clearly and unambiguously reflect Abbas intent form a guaranty contract, Moy's motion for summary disposition must be denied, and Abbas cross-motion for summary disposition of Moy's claim for breach of guaranty against him must be granted.

#### IV. Moy's Motion for Summary Disposition as to Al Kawthar's Counterclaims

##### A. Violation of Anti-Lockout Statute (Count I)

Moy's seeks summary disposition on Al Kawthar's counterclaim for violation of the anti-lockout statute (Count I). Moy's argues there is no genuine issue of material fact that (1) Al Kawthar was in default for not paying rent and taxes and that (2) the Lease specifically allowed Moy's to reenter the building and dispossess Al Kawthar. Al Kawthar contends that the provision in the Lease that allowed Moy's to reenter the building and dispossess Al Kawthar does not bar its counterclaim under the anti-lockout statute because the anti-lockout statute cannot be waived. Moy's does not dispute the anti-lockout statute cannot be waived.<sup>5</sup> Instead, it argues the anti-lockout statute does not apply in this case because its actions fall under the abandonment exception to MCL 600.2918.

The anti-lockout statute, MCL 600.2918, eliminated the self-help remedy in landlord-tenant cases and provides two causes of action for a tenant who has been

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<sup>5</sup> The anti-lockout statute provides that its provisions "may not be waived." MCL 600.2918(7).

wrongfully removed from leased property. Relevant to this case, one of the causes of action created by the statute is for “[a]ny tenant in possession of premises whose possessory interest has been unlawfully interfered with by the owner.” MCL 600.2918(2). The statute defines “unlawful interference with a possessory interest” to include “[c]hanging, altering, or adding locks . . . without immediately providing keys or other unlocking devices to the person in possession.” MCL 600.2918(2)(c). A tenant wronged under the statute may recover damages and possession of the property. *Id.*

“An owner’s actions do not unlawfully interfere with a possessory interest if . . . [t]he owner . . . believes in good faith that the tenant has abandoned the premises, and after diligent inquiry has reason to believe the tenant does not intend to return, and current rent is not paid.” MCL 600.2918(3)(c). To establish that the premises have been abandoned, two requirements must be met. “First, it must be shown that there is an intent to relinquish the property and, second, there must be external acts that put that intention into effect. Nonuse alone is insufficient to prove abandonment.” *Dusaj v Interbay Funding LLC*, unpublished opinion of the Court of Appeals, issued May 18, 2010 (Docket No. 289441), p \*4, quoting *Sparling Plastic Industries v Sparling*, 229 Mich App 704, 717–718; 583 NW2d 232 (1998).

Moy’s cites to *Dusaj* in support of its abandonment argument. In *Dusaj*, unpub op at \*4, the Court of Appeals upheld the trial court’s dismissal of a tenant’s anti-lockout claim after finding there was no genuine issue of material fact the tenant abandoned the premises. On at least three different weekly visits, the landlord’s inspections revealed that the restaurant was not operating, there were no cars in the parking lot, and the lights were shutoff. *Id.* The landlord also observed the grass was high and uncut. *Id.* When looking

through the window into the restaurant, he observed dirty dishes with rotting food. *Id.* Additionally, garbage ordinance violations had been issued, garbage hadn't been collected in four to six weeks, and the gas service had been shut off for nonpayment by the tenant. *Id.* The tenant failed to provide any evidence on this issue, so the Court concluded the evidence revealed an intent to relinquish the property along with external acts reflecting that intent. *Id.*

Al Kawthar contends that factual disputes exist whether abandonment occurred in this case. Specifically, it relies on *Anderson v Great Lakes Prop & Inv*, unpublished opinion of the Court of Appeals, issued October 19, 2017 (Docket No. 332726), in support of its assertion that a question of fact exists whether Moy's had a good faith belief the property had been abandoned. In *Anderson*, the landlord was informed that utility services to the property had been turned off and when she inspected the property she found the entry door was broken. *Id.* at \*4. However, the landlord had seen lights on inside the property when she had inspected it and had met the tenant at the front door two-months before the lockout to give him a notice of change of ownership. *Id.* Additionally, the tenant provided counter-evidence showing he had continuously resided in the property and that he had open and active utility accounts that he had paid. *Id.* The Court noted that although the tenant hadn't paid rent for several months, "non-payment of rent, standing alone, is insufficient to exercise self-help under the statute." *Id.* at \*5. It concluded the conflicting evidence created a genuine issue of material fact whether the abandonment provision in MCL 500.2918(3)(c) applied.

In this case, regarding an intent to relinquish the property, the Court looks only to the evidence available to Moy's in early February 2021 when it had the locks changed.

Similar to *Dusaj*, Frank Moys returned twice to observe the condition of the property before concluding it was abandoned. (Moy's Mot., Ex. B.) He noticed that though it was daytime business hours, the property was dark and the sign for the restaurant had been removed. (*Id.*, ¶¶12-13.) Also the front and rear doors to the property were locked. (*Id.*, ¶¶12-13.) When he looked through the windows, he noticed certain decorations from the dining area had been removed. (*Id.*, ¶15.) After obtaining access to the property in or around February 2021, he noticed that certain kitchen equipment was missing. (*Id.* ¶22.) Additionally, the rent had been unpaid for 10 months. (*Id.*, ¶8.) He believed that Defendants had abandoned the property. (*Id.*, ¶ 23.) However, similar to the tenant in *Anderson*, Al Kawthar has provided evidence that it hadn't abandoned the restaurant. Specifically, the affidavit from Ghassan states the premises were "merely closed, with no utilities shut off." (Al Kawthar Mot., Ex. A.) Construing this conflicting evidence in a light most favorable to Al Kawthar, the Court finds a genuine issue of material fact exists whether Moy's conducted a "diligent inquiry" sufficient to establish a reasonable belief the property had been abandoned under MCL 500.2918(3)(c). Accordingly, Moy's request for summary disposition on Al Kawthar's anti-lockout statute counterclaim must be denied.

**Moy's further argues that Al Kawthar's counterclaim for violation of the anti-lockout statute must be dismissed because it was filed after the expiration of the statute of limitations pursuant to MCL 600.2918(8) which provides:**

An action to regain possession of the premises under this section must be commenced within 90 days after the time the cause of action arises or becomes known to the plaintiff. An action for damages under this section must be commenced within 1 year after the time the cause of action arises."

In this case, it is undisputed that Moy's changed the locks in early February 2021. It is further undisputed that Al Kawthar discovered it was locked out on February 4, 2021 and

filed its counter-complaint that included its anti-lockout counterclaim on June 8, 2021. Al Kawthar's anti-lockout counterclaim seeks to regain possession of the premises and damages. The cause of action arose on or before the alleged lock-out, specifically before February 4, 2021. Because it did not file its counter-complaint within 90 days after the alleged lockout, its request for a judgment of possession is barred by the statute of limitation pursuant to MCL 600.2918(8). However, because the counter-complaint was filed within 1 year of the alleged lockout, Al Kawthar's claim for damages is not barred by the statute of limitations.

#### B. Breach of Contract (Count II)

Moy's argues that it is entitled to summary disposition under 2.116(C)(7) on Al Kawthar's breach of contract counterclaim because it is barred by the statute of limitations. The statute of limitations for a breach of contract claim is six years. MCL 600.5807(9). Under MCL 600.5827, a statute of limitations "runs from the time the claim accrues, [and a] claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." The Court of Appeals has explained, "A breach of contract claim accrues on the date of the breach . . . ." *Michigan Millers Mut Ins Co v West Detroit Bldg Co*, 196 Mich App 367, 372 n 1; 494 NW2d 1 (1992), overruled in part on other grounds by *Miller-Davis Co v Ahrens Constr*, 489 Mich 355 (2011). Michigan Courts have rejected the proposition that a discovery rule may operate to toll accrual of a breach of contract claim. *Scherer v Hellstrom*, 270 Mich App 458, 463 n2; 716 NW2d 307 (2006).

In its motion, Moy's has failed to identify the specific alleged breaches and failed to provide any evidence that establishes when Al Kawthar's counterclaim accrued. Consequently, under MCR 2.116(C)(7), Moy's has failed its burden to demonstrate that

there is are not genuine issues of material fact and that Kawthar's breach of contract counterclaim in Count I is barred by the statute of limitations. Accordingly, in this regard, Moy's motion for summary disposition must be denied.

### C. Fraud (Count III)

Moy's also argues that it is entitled to summary disposition under 2.116(C)(7) on Al Kawthar's fraud counterclaim because it is barred by the statute of limitations. The statute of limitations for a claim of fraud is six years. MCL 600.5813; *Executone Bus Sys Corp v IPC Communications*, 177 Mich App 660, 670; 442 NW2d 755 (1989). The period of limitations begins to run "when the wrong was done," not when the fraud is discovered. *Boyle v Gen Motors Corp*, 468 Mich 226, 230; 661 NW2d 557 (2003).

Al Kawthar's fraud counterclaim is based on the allegation that prior to its execution of the Lease, Moy's misrepresented to Al Kawthar "that the subject premises were able to be utilized for a restaurant and could be opened without delay" and they "were fit to operate as a restaurant and were fully in compliance with all building and structural codes." (Ctr-Compl, ¶¶7, 30, 32.) And according to Al Kawthar, it relied on these misrepresentations when it entered the lease. As noted, Al Kawthar failed to address Moy's argument that its fraud counterclaim is barred by the statute of limitation. Even so, the Assignment and First Amendment (the documents Al Kawthar's calls "the lease") were executed on January 31, 2014. (Compl, Ex. B.) Al Kawthar didn't file its counter-complaint until June 8, 2021, more than seven years after the alleged fraud occurred. Accordingly, the Court finds Al Kawthar's fraud counterclaim in Count III of its counter-complaint is barred by the statute of limitations.

#### D. Breach of the Covenant of Quiet Enjoyment (Count IV)

Moy's also seeks summary disposition on Al Kawthar's counterclaim for breach of the covenant of quiet enjoyment (Count I). As to this counterclaim, Moy's simply made its request for summary disposition on that counterclaim with its request for summary disposition on the anti-lockout statute without any analysis. See *Thomas*, 155 Mich App at 710 ("A party may not leave it to [the courts] to search for authority to sustain or reject its position.") In the absence of any legal argument or any authority to support its request, Moy's motion for summary disposition on Al Kawthar's breach of the covenant of quiet enjoyment counterclaim must be denied.

#### E. Claim and Delivery (Count V)

Moy's argues that Al Kawthar's counterclaim for claim and delivery (Count V) is deficient because it fails to comply with the special pleading requirements in MCR 3.105(C). In its response, Al Kawthar again argues that because Moy's has prevented it from accessing the property to take inventory of its property, Moy's can't complain that this claim lacks the specific information required under the court rule.

MCR 3.105(C) requires that a complaint for claim and delivery must:

- (1) specifically describe the property claimed;
- (2) state the value of the property claimed (which will be used only to set the amount of bond and not as an admission of value);
- (3) state if the property claimed is an independent piece of property or a portion of divisible property of uniform kind, quality, and value; and
- (4) specifically describe the nature of the claim and the basis for the judgment requested.

A party bringing an action for claim and delivery must include in its complaint all of the information required in MCR 3.105(C). See *Joseph P Galasso, Jr, Revocable Living Tr. v Surveybraincom, LLC*, unpublished opinion of the Court of Appeals, issued May 15, 2012

(Docket No. 303300), p \*4 (affirming dismissal of claim and delivery action where plaintiff failed to state one of the required items under MCR 3.105(C)).

In this case, Al Kawthar's claim and delivery counterclaim alleges,

43. [Moy's] has repeatedly entered the leasehold premises and taken the property of [Al Kawthar] and failed to return the same despite repeated requests to do so..

44. Such a taking by [Moy's] to its own benefit was without approval or authorization.

45. [Al Kawthar] claims a judgment for the return of the described property, or for the value of the property, and also for damages in excess of the amount of \$25,000.00.

These allegations don't include any of the required information under MCR 3.105(C). Further, Al Kawthar's hasn't provided any authority to support its contention that it is excused from complying with MCR 3.105(C) because Moy's has prevented it from entering the restaurant. See *Thomas v McPherson Cmty Health Ctr*, 155 Mich App 700, 710; 400 NW2d 629 (1986) ("A party may not leave it to [the courts] to search for authority to sustain or reject its position.") Because Al Kawthar has failed to allege the information required under MCR 3.105(C), its claim and delivery counterclaim fails to state a legally sufficient claim and must be dismissed under MCR 2.116(C)(8).

#### F. Common Law and Statutory Conversion (Counts VI and VII)

Moy's argues that under MCR 2.116(C)(8), Al Kawthar failed to state legally sufficient claims for conversion, and specifically as to the statutory conversion counterclaim, it argues Al Kawthar failed to allege Moy's converted the property to its "own use." Al Kawthar argues Moy's has prevented it from inspecting the property to

determine exactly what property Moy's has converted, so given its lack of access to the property, its conversion claims are adequately pled.

"Michigan is a notice-pleading jurisdiction, which means that a complaint is required to contain only enough information reasonably to inform the defendant of the nature of the claim against which he must defend." *Veritas Auto Mach, LLC v FCA Intl Operations, LLC*, 335 Mich App 602, 615; 968 NW2d 1 (2021).

At common law, conversion is "any distinct act of domain wrongfully exerted over another's property in denial of or inconsistent with the rights therein." *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004) (citation omitted). Statutory conversion under MCL 600.2919a(1)(a) adds an additional element to common law conversion and covers a more narrow swath of conduct, as "someone alleging conversion to the defendant's 'own use'. . . must show that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose." *Aroma Wines & Equipment, v Columbian Distribution Services*, 497 Mich 337, 359; 871 NW 2d 136 (2015).

In its common law conversion counterclaim, Al Kawthar alleges, "The wrongful retention of [Al Kawthar's] property by [Moy's] has converted said property to [Moy's] to the damage . . . of [Al Kawthar]." (Ctr-Compl, ¶47.) As a result of this conversion, Al Kawthar alleges it has suffered monetary damages. (*Id.*, ¶50.)

Contrary to Moy's assertion, Al Kawthar is not required to plead conversion with specificity. All that is required for non-fraud claims is that the pleadings state, "the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B). The Court is satisfied that the

general allegations in the counter-complaint along with the allegations in the common law conversion claim are sufficient to reasonably inform Moy's of the nature of that claim against it. Moy's request for dismissal of the common law conversion counterclaim under MCR 2.116(C)(8) is denied.

However, though allegations in its statutory conversion counterclaim are substantially similar to those for its common law conversion counterclaim, as Moy's correctly argues, Al Kawthar failed to allege Moy's converted the property to Moy's "own use." Because the statutory conversion counterclaim fails to allege Moy's converted the property to its own use, it has failed to state a legally sufficient claim of statutory conversion and must be dismissed under MCR 2.116(C)(8). In accordance with MCR 2.116(I)(5), Al Kawthar may file amended pleadings as provide by MCR 2.118 within 14 days of the date of this Opinion and Order.

#### V. Al Kawthar's Motion for Partial Summary Disposition on its Counterclaims

Al Kawthar seeks summary disposition on its counterclaims for violation of the anti-lockout statute (Count I), common law conversion (Count VI) and statutory conversion (Count VII). It argues there's no genuine issue of material fact that Moy's locked Al Kawthar out of the property when it changed the locks in early February 2021 in violation of the anti-lockout statute and that the abandonment exception to the statute doesn't apply here. It further argues that Moy's improper lockout of Al Kawthar constitutes conversion. Moy's responds by arguing that the abandonment exception to the anti-lockout statute applies and that Al Kawthar's abandonment of the property precludes its conversion counterclaims.

The issues and arguments raised by both parties on Al Kawthar's motion concerning its anti-lockout statute counterclaim are identical to those made on Moy's motion. Because the Court determined above that a genuine issue of material fact exists whether the abandonment exception applies, Al Kawthar's request for summary disposition on its anti-lockout statute counterclaim must be denied. And as its common law conversion counterclaim is predicated on whether Moy's violated the anti-lockout statute, summary disposition must also be denied on that counterclaim. Finally, because the Court determined above that Al Kawthar failed to state a legally sufficient claim of statutory conversion and it must be dismissed under MCR 2.116(C)(8), Al Kawthar's motion for summary disposition on that counterclaim is moot and must be denied.

#### VI. Conclusion

For the reasons set forth above,

1. Moy's motion for summary disposition on its claim for breach of lease (Count I) is GRANTED in part, and DENIED in part. As to liability for damages prior to the alleged lockout, the motion is GRANTED. As to Al Kawthar's violation of the anti-lockout statute defense and liability for damages after the alleged lockout, the motion is DENIED.

2. Moy's motion for summary disposition on its claim for breach of guaranties (Count II) as to liability only is GRANTED in part, and DENIED in part. As to Ali and Ghassan, the motion is GRANTED. As to Abbas, the motion is DENIED.

3. Moy's motion for summary disposition of Al Kawthar's counterclaim for violation of the anti-lockout statute (Count I) is GRANTED in part, and DENIED in part.

As to Al Kawthar's claim for possession only, the motion is GRANTED. In all other respects on Count I, the motion is DENIED.

4. Moy's motion for summary disposition on Al Kawthar's other counterclaims is GRANTED in part, and DENIED in part. As to claims for fraud (Count III), claim and delivery (Count V), and statutory conversion (VII), the motion is GRANTED. Accordingly, Count III, Count V, and VII of Al Kawthar's counterclaims are DISMISSED. Pursuant to MCR 2.116(I)(5), as to Count V (statutory conversion) only, Al Kawthar may file amended pleadings as provided by MCR 2.118 within 14 days of the date of this Opinion and Order. As to claims for breach of contract (Count II) and breach of the covenant of quiet enjoyment (Count IV), the motion is DENIED.

5. Abbas's cross-motion for summary disposition on Moy's claim for breach of guaranties (Count II) as to him is GRANTED. Count II of Moy's Complaint against Abbas only is dismissed.

6. Al Kawthar's motion for partial summary disposition is DENIED.

This Opinion and Order neither resolves the last pending claim nor closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED

Date: 07/21/2022



*Kathryn A. Viviano*

signed by KATHRYN VIVIANO 07/21/2022 03:36:56 nly8CUns

Hon. Kathryn A. Viviano, Circuit Court Judge