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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CROWN ENTERPREISES, INC.,

Plaintiff/Counter-defendant,

Case No. 21-011302-CB
Hon. Brian R. Sullivan

and

BOUNCE HOUSE KRT, LLC

Defendant/Counter-plaintiff.

ORDER GRANTING AND DENYING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION IN PART AND GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the City County Building, City of Detroit, County of Wayne, State of Michigan, on 4/16/2022

PRESENT: HONORABLE BRIAN R. SULLIVAN

Plaintiff Crown Enterprises (Crown) filed suit for breach of contract (lease) and eviction as to its tenant, Bounce House KRT, LLC (KRT). Crown states KRT owes it unpaid rent, utilities, expenses, rubbish, late fees of $50.00 per day, costs and attorney fees under the lease it has with KRT. Crown filed suit seeking the above unpaid money from KRT, which was not paid because the order of the state during COVID shut down non-essential businesses state wide, including these premises and KRT could not operate the bounce house. KRT was one of the non-essential businesses and was not open for public business. KRT failed to pay rent (which included utilities, rubbish, and other costs) during the COVID closures. Crown claims the failure to pay is a breach of contract for which KRT is liable to pay.

KRT filed a counter-complaint for abuse of process, malicious prosecution, tortious interference with a contract/business expectancy and breach of contract. KRT seeks declaratory relief on the rent obligation under the "Force Majeure" clause in the contract, or on the basis of frustration of purpose, or impossibility of performance.

I. FACTS

The facts are not in dispute. KRT originally leased the 26,000 square foot premises at 9800 E 8 Mile Rd. Redford, from Bel Air 8 Mile LLC, beginning May 2012, for $6,000.00 per month. Bel Air sold to Crown in 2019. Crown entered into an amendment giving KRT tenancy until June 2023, with 2 options on the lease, ending in 2026.

Crown alleges KRT owes rent, utilities, costs, expenses, late fees (liquidated damages of $50.00 per day) and attorney fees. KRT agree it has not paid full rent, but did pay partial, pro rata rent according to the permissible use of the premises. The exact figures have not been presented to the court. Crown contends KRT breached the lease and that it owes Crown rent, utilities and late fees since April 2020 for the lease of the 8 Mile premises.

KRT filed a counter-complaint and asserted a number of defenses to the breach of contract claim, including impossibility and Force Majeure, a specific clause in the contract.

Covid-19 presented these parties, as well as the rest of mankind, with the unanticipated and unexpected pandemic. That pandemic resulted in the complete and partial closures of these premises and other businesses across the state.

The relevant COVID closure history is that on March 23, 2020 the Governor

ordered closings; on October 9 - 29th the order was for a 500-person limit; on October 29- November 18, the order was for 25% capacity; on November 18 – December 21 the order was for complete closure by the state; on December 21 to March 5, the order allowed for 25% capacity; on March 21 – January 22, 2021 the order allowed 50% capacity; on June 17 – percent the order lifted restrictions and allowed for 100% capacity.

Some undisputed facts are:

1. The parties had a lease for the premises at 8 Mile Rd of May 1, 2012, which was amended on June 18, 2014.

2. The lease was in effect during the times stated in the complaint

3. There was a government shut-down of the property, as stated above, either completely or partial, due to the pandemic of COVID.

4. Defendant could not operate the business, or operated it at capacity as established by the state.

5. Crown calculates the delay as 468 days and it seeks money for rent, costs, late fees, and attorney fees accrued during that time period and the efforts to collect it under the lease. Crown has sued for breach of contract.

6. Plaintiff filed 2 separate suits in the District Court to evict KRT from the premises. Crown filed notice to terminate the tenancy on June 26, 2020 and again on August 8, 2020, both of which were dismissed on September 10, 2020. The second case was filed January 21, 2021 and dismissed April 12, 2021.

7. Crown tried to evict KRT twice for nonpayment of rent. Crown then sued for breach of contract and eviction of KRT for nonpayment of rent in this court. KRT contends the force majeure clause in the lease was activated by the government action; there was a government prohibition; that it provided the 10-day notice and there was a period of delay which should be added to the end of the lease so it will fully perform. KRT asserts it paid rent in proportion to the restrictions of the state and Crown accepted that payment. Those details have not been provided to the court.

8. Crown alleges it is owed rent, utilities (VIIII A., p 3-4) and rubbish removal (VIII B. p 4) and other financial obligations under the lease. Lease

provision XVI, Default by Tenant, gives Landlord certain rights following a default which is uncured, after written notice, allowed once per calendar year. The available lease remedies are to terminate the lease, re-lease the premises, and a charge for liquidated damages under a provision for "processing and accounting charges and late charges that may be imposed on Landlord by any ground lease, mortgage or deed of trust encumbering the Shopping Center.

KRT asserts the 468 days Crown contends are in issue, from June 21, 2020, to present, should be added pursuant to the language: "the period of such delay will be added to the performance thereof…" Lease, article XXXIII, paragraph Q. "Delay" in the lease provision is used to include nonperformance.

9. KRT contends the force majeure clause in the lease was activated by the government action, that the action was a government prohibition, that KRT provided the 10-day notice pursuant required under the lease to Crown and the prohibition of use was an instance of a period of delay. That period of delay was from the government ordered closure to the complete allowance of full operation KRT contends it paid proportionate rent during this time period according to the per cent occupation it was allowed to enter to use the facility. Crown has not denied this statement.

10. KRT alleged it did pay rent, as it could, and in proportion to the restrictions of occupation as implemented by the state. Crown accepted the partial rent payments.

11. Crown contends there are 468 days, from June 21, 2020, that are in dispute. It seeks to extend the lease to compensate for the closure.

12. KRT asks this court to add "the period of such delay will be added to the performance thereof…" Lease, paragraph XXXIII Q).

The court declines to read the lease in the manner KRT suggests and to add time to the end of the lease for it to perform. That merely extends the lease and does not address the real issue, whether KRT is obligated to pay rent to Crown with all the additional expenses of the lease included in the term rent, to Crown for the pandemic closure. The lease does not provide for such a remedy, except under the force majeure clause, and the court concludes that provision does not control the facts or the controversy in this case. That request for relief is denied.

13. There is no genuine issue of material fact that KRT tendered partial rent, pursuant to the government mandate, uncalculated for this court, which was accepted by Crown.

II. Motions

The parties filed competing motions for summary disposition of the respective complaints. The court dismisses KRT's counter-complaint and dismisses Crown's breach of contract claim and eviction based on the failure to pay rent and applies the doctrine of temporary frustration of purpose doctrine. The application of this doctrine to the facts of this case spreads the risk of loss to both parties equally and proportionately, according to the percentage of allowable occupancy of the premises by the state. Neither party assumed that risk of loss in the lease. Crown loses its income under the lease from the tenant KRT and KRT loses its business income due to the closure of the business at the premises. Each party is in the prelease position and each bears a loss.

The court grants Crown's motion for summary disposition of KRT's counter-complaint. That suit alleges tort claims predicated on a breach of contract, but they cannot stand because there is no allegation of a breach of duty independent of, or separate from, the contract. KRT failed to state a claim upon which relief can be granted for abuse of process or malicious prosecution. Crown cannot interfere with its own contract. These claims are dismissed. Crown did not breach the lease and that count is dismissed. KRT's counter-complaint is dismissed in its entirety.

The court grants KRT's motion for summary disposition on the count of breach of contract. KRT's reliance on force majeure is misplaced. The rent clause in the lease is more specific than the force majeure clause. KRT is not entitled to delayed relief in that clause of the lease. Performance of the remaining time in the lease is still possible, so the doctrine of impossibility is not available to KRT. The entire purpose of the contract

was not frustrated, so the doctrine of frustration of purpose is not available to KRT. Temporary frustration of purpose, or impracticality, does apply to the facts of this case.

The court concludes the government's response to the pandemic imposed an increased burden on both parties after the parties entered into the lease. The state order issued during the pandemic was unforeseeable. KRT did not assume the risk of that burden in the contract. Neither did Crown. KRT made rent payments to Crown when it was allowed to operate its business. Crown accepted those partial payments.

Crown's request for rent, and the additional charges under the lease agreement, is predicated on conditions which did not exist at the time the contract was entered, including $50.00 per day late fee, liquidated damages and attorney fees. The occurrence of COVID is simply an unforeseen event that put a loss on both parties. KRT lost the ability to conduct business at the site and Crown lost rent from KRT. The parties did not agree in the lease where such loss should fall nor who should bear it. The court concludes it would be an unreasonable and an unfair burden to require the entire loss to fall on KRT alone, for a breach it did not cause under the circumstances of the case.

The court is aware that many cases which discuss the COVID closures, such as those from New York and other jurisdictions, which have held the tenant is not excused from performance under a lease due to the pandemic. The court, however, adopts the conclusion of the well-reasoned opinion in *Bay City Realty, LLC v Mattress Firm, Inc.* 20-CV-11498, and holds the doctrine of temporary frustration of purpose, or the rule of impracticability, applies to this case and that doctrine excuses KRTs performance of the lease during the COVID closures by the state. The reasoning is fair as KRT was unable to operate its business during the shut-down. Neither could Crown re-lease the closed

premises. The court concludes the event being unforeseeable that the loss should be borne by both, KRT lost the business because of the closure and Crown lost the rent due to the state closure. Were the court to conclude otherwise, KRT would lose both the business and be compelled to pay for premises it was precluded from using, it would pay and lose income. That duty was not anticipated at the time the lease was entered. Crown still has the building but lost the KRT income, just like KRT. Thus, the temporary frustration of purpose which caused the loss is borne by both parties as if the lease had not been entered.

KRT's motion for summary disposition of Crown's complaint on the count of breach of contract on impracticability (temporary frustration of purpose) is granted and Crown's breach of contract claim for lost rent, late fees, etc. are dismissed for that period of time which the building was closed and reduced according to the allowed occupancy for the pro rata reduced capacity of the premises when it was allowed to be open for those periods of time. The court concludes that a commercial tenant, rendered incapable of operating its business under the COVID mandates of the state that prohibit it from conducting business in the leased premises, is excused of the obligation to pay rent for so long as, and to the extent that, the tenant could not operate from the leased premises under the doctrine of temporary frustration of purpose. See *Bay City Realty, LLC v Mattress Firm, Inc*. 20-CV-11498. In the absence of a specific contractual agreement to the contrary, each party is relieved of performance due to a temporary frustration of purpose and each bears part of the loss as if they had no lease, or reduced lease to the extent of the state orders for that applicable time. The court denies Crown's request to evict KRT for the failure to pay rent because that failure is excused.

III. Standard of Review

A. MCR 2.116(C)(8). A motion under 2.116(C)(8) tests the legal sufficiency of the complaint. All well pled allegations are accepted as true and are construed in a light most favorable to the non-moving party. See *Maiden v Rozwood,* 461 Mich 109 (1999); *Wade v Department of Corrections,* 439 Mich 158 (1992). A motion under (C)(8) may be granted only where the claims alleged are so "clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade,* at 163. A court considers only the pleadings when considering a (C)(8) motion. MCR 2.116(G)(5).

B. MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Maiden v Rozwood*, 461 Mich 109 (1999). The trial court evaluates this motion for summary disposition by considering the affidavits, pleadings, depositions, admissions and other evidence submitted by the parties. *Maiden*; MCR 2.116(G)(5). See *Dextrom v Wexford Company*, 297 Mich App 406 (2010). The court must consider the evidence and draw all reasonable inferences in a light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich at 120; *Rice v Auto Insurance Association*, 252 Mich App 25 (2002); *Ward v Franks Nursery and Crafts, Inc.*, 186 Mich App 120 (1990).

A motion under sub-rule (C)(10) must specifically identify the issues to which the moving party believes there is no genuine issue as to any material fact. The adverse party may not rest on mere allegations or denials in the pleadings but must, by affidavit or otherwise, set forth specific facts showing there is a genuine issue of fact for trial. See MCR 2.116(G)(4). A party's pledge to establish an issue of fact at trial cannot survive summary disposition under (C)(10). *Maiden*, 461 Mich at 121.

The court rule requires the adverse party to set forth specific facts at the motion showing a genuine issue for trial. The reviewing court must evaluate the motion by considering the substantively admissible evidence proffered in support and opposition of the motion. *Maiden*, 461 Mich at 121; *McCart v J Walter Thompson USA, Inc.*, 437 Mich 109, 115, note 4 (1991).

If the proffered evidence fails to establish a genuine issue regarding any material fact the moving party is entitled to judgment as a matter of law. See MCR 2.116(C)(10), (G)(4); *Quinto v Cross and Peters Company*, 451 Mich 358 (1996); *SSC Associates Limited Partnership v General Retirement System of the City of Detroit*, 192 Mich App 360 (1991).

Summary disposition is proper when the evidence fails to establish a genuine issue of material fact, so the moving party is entitled to a judgment as a matter of law. See *West v General Motors Corp.*, 469 Mich 177 (2003). A genuine issue of material fact exists when the record, giving the benefit of a reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds may disagree. *West, Id*.

IV. CONTRACT LAW

A contract is an agreement between parties which derives its binding force from the meeting of the minds of the parties. *In Re Madigan Estate*, 312 Mich App 553, 562 (2015); *Sherbow*, 326 Mich App at 695. Parties are free to contract and courts enforce the contracts unless they are in violation of a law or public policy. *Edmore Village v Crystal Automation Systems, Inc.*, 322 Mich App 244, 264 (2017); *Sherbow*, at 695. That is, private contracts and covenants are to be enforced unless there is a specific basis for finding them unlawful. *Sherbow*, 326 Mich App at 696; *Terrian v Swit*, 467 Mich

56, 70 (2002).

A trial court's determination of an existence of a contract is a question of law. See *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452 (20006); *Sherbow*, 326 Mich App at 695.

The essential elements of a contract are: 1) parties competent to enter into the contract; 2) proper subject matter; 3) legal consideration; 4) mutuality of agreement and mutuality of obligation. *Thomas v Leja*, 187 Mich App 418 (1991); see *Miller Davis v Ahrens Construction Inc.*, 495 Mich 161 (2014); *Kamalnath v Mercy Memorial Hosp. Corp.*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992).

Where contractual language is clear and unambiguous the construction of a contract is a question of law for the court. *Quality Products and Concepts Company v Nagle Precision, Inc.*, 469 Mich 362, 375 (2003); *Meagher v Wayne State University*, 222 Mich App 700, 721 (1997); *Meagher v Wayne State University*, 222 Mich App 700 (1997); *Henderson v State Farm Fire and Casualty Company*, 460 Mich 348, 353 (1999).

The interpretation of a contract has the goal to give effect to the party's intent at the time they entered into the contract. *Miller-Davis v Ahrens Constr, Inc.* 495 Mich 161, 174 (2014). The party's intent is determined by interpreting language of the contract according to its plain and ordinary meaning. *Ahrens, supra*.

Language of a contract that is clear and unambiguous must be enforced as written. *Egbert R. Smith Trust*, 480 Mich 19, 24 (2008). Contracts must be enforced according to their terms. *Burkhart v Bailey,* 260 Mich App 636 (2004). A contract is unambiguous if it admits of one interpretation, even if it is unartfully worded or poorly

arranged. *Meagher,* 222 Mich App at 721-722 (1997). A court must give effect every word, phrase and clause in the contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp v United Insurance Group Agency, Inc.*, 468 Mich 459, 468 (2003). The court evaluates the language of a contract in accordance with its plain and ordinary meaning to ascertain the intent of the parties. *Rory v Continental Insurance Company*, 473 Mich 457, 461 (2005); *Smith Trust*, 480 Mich at 24; *Farm Bureau General Insurance Company v Blue Cross Blue Shield*, 314 Mich App 12, 20-21 (2016); *Klapp v United Insurance Group Agency, Inc.*, 468 Mich 459, 460 (2003).

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V. DISCUSSION

A. Crown's breach of contract and eviction claims.

KRT asserts Crown's breach of contract suit must be dismissed because there is no genuine issue of material fact that force majeure applied; there was impossibility of performance, or a frustration of the purpose of the contract. Alternatively, the period of shut down should be added to the lease by extending the lease to allow KRT to perform under the force majeure clause remedy.

The court concludes Crown cannot proceed on its breach of contract case because of the doctrine of temporary frustration of purpose. That doctrine applies to the facts of this case and provides KRT with relief to the extent it was prevented from conducting business in the premises as a tenant due to the shut-down order of the governor. Neither the force majeure clause, impossibility, nor frustration of purpose doctrines apply to the facts of the case. None of these doctrines provide a basis KRT with a basis of relief.

`1. Rent provision.

The lease states the rent must be paid "without any deduction or set off whatsoever". This clause, which mandates payment of rent, is a specific contract provision which prevents application of the force majeure clause.

2. Force Majeure

The force majeure clause does not specifically excuse "rent" payment. The clause be read to excuse certain performances by either party under certain circumstances, but it does not specifically excuse the payment of rent by tenant. The Force Majeure clause, in the Lease, XXXIII, paragraph Q, states:

> In the event Landlord or Tenant is prevented or delayed in the performance of any improvement or repair or fulfilling any other obligation required under this Lease due to delays caused by fire, catastrophe, strikes or labor trouble, civil commotion, acts of God, *government prohibitions or regulation*, inability or difficulty to obtain materials or *other causes beyond the performing party's reasonable control*, the performing party shall, within ten (10) days of the event causing such delay, provide written notice to the other party of the event causing the delay and the anticipated period of delay, and *the period of such delay shall be added to the time for performance thereof*. The performing party shall have no liability by reason of such permitted delayed. In the event the performing party fails to provide notice to the other party of the force majeure delay within such ten (10) days period, the performing party shall not be excused from the timely performance of such obligations regardless of the cause. (Emphasis supplied).

Crown contends the force majeure clause does not extinguish the obligation of KRT to pay rent under the lease. The court agrees. The construction of the contract requires the specific lease provision of the rent is not under the force majeure provision, so it excuses performance other than the payment of rent. For that reason, the force majeure is not a valid defense available to KRT to excuse the payment of the money owed under rent. The clause does allocate the risk of loss between the parties to extinguish liability for matters other than rent, which is controlled by another provision of the lease.

The force majeure clause does not extinguish tenant's obligation to pay rent based on the lease language that rent be paid without set off or deduction. The force

majeure clause does not excuse KRT's obligation to pay rent and is not a basis for the complete abatement of rent. See *Store Spa LA Fitness v Fitness Int'l LLC*. The force majeure clause must have specific language of rent abatement to accomplish that end, that is it must have language excusing performance. See *In Re Jitx Rest Group*, 616 BR 374, 376-377 (2020). This lease does not have that type of language so that clause does not control the facts of the case and the extension remedy is not available to KRT.

3. Rent is owed by KRT.

Crown contends KRT breached the lease when it did not pay rent. The failure to pay rent is a breach of the lease, unless it is excused by law. The court concludes non-payment of rent by KRT is a breach of the lease due to temporary frustration of purpose, also known as impracticability. The court concludes rent is excused for the time the premises were closed by the state.

Crown seeks past due rent, costs, expenses of utilities, rubbish, attorney fees etc. as well as liquidated damages in the lease for $50.00 per day, a "fair and reasonable estimate of the cost Landlord will incur by reason of such late payment." This late charge becomes additional rent, future payment of which goes to this charge first. In addition, there are two places in this paragraph for attorney fees and costs.

4. KRT's right to possession to operate the business.

The lease also has covenants the landlord did not perform, which is the right of the KRT to operate its business. In paragraph XXI landlord covenanted tenant shall "at all times" have peaceable and quiet enjoyment of the premises. KRT did not get that.

The first issue presented to the court is whether KRT was prevented from paying rent due to the government closure of the premises. The factual answer is that the

closure is clearly "no" as the order of the governor does not preclude the tenant from paying rent to Crown. But neither did KRT get access to the premises to operate its business in a quiet and peaceable manner. KRT was shut-out, albeit not by Crown.

The court is confronted with two aggrieved parties, neither of whom caused the closure, but both of whom suffered a temporary loss as a result of the state closures. Neither party reasonably foresaw or anticipated this event at the time they entered the lease. These facts amount to a temporary frustration of purpose, a defense to rent payment under the circumstances of this case.

a. Frustration of purpose. KRT asserts that frustration of purpose is a common law defense for the nonpayment of rent. Frustration of purpose does not apply for the reason the purpose of the entire lease was not frustrated, say, for example in the case where a party leases a flat to watch a parade and the parade is cancelled. *Krell.*

b. Impossibility. KRT next asserts the defense of impossibility is a defense to its obligation to pay rent under the lease. Impossibility of performance is not available as a defense as the premises are still there, as opposed say in the case of a party leases premises and the premises are destroyed in a fire.

c. Temporary frustration of purpose and Bay City case. The court does conclude there is no genuine issue of fact that the tenant, KRT, was deprived of its ability to use the premises for its commercial business, and for any other reasonable purpose, by the state order of the governor. *Bay City Realty v Mattress Firm*, 20-CV-11498 addressed a similar set of facts, and while not precedent it is guidance for the court. *Bay City* stands for the proposition that temporary frustration of purpose relieves a commercial tenant from the obligation to pay rent for the time the tenant was

prevented by conducting business in the leased premises by the order of the Governor.

There are three elements to Michigan's frustration of purpose claim: 1. The contact must be executory, which this contract is. 2. KRT's purpose must have been known at the time the contract was made. It was known to the parties. 3. The purpose, the bounce house operation, was frustrated by an event (COVID shut down) which was not reasonably foreseeable at the time the contract was made and it was not the fault of KRT. *Liggett Rest Grp v City of Pontiac*, 260 Mich App 127 (2003); *Molnar v Molnar*, 110 Mich App 622, 626 (1981). The difference is that the purpose in this case was temporarily, not permanently, frustrated. That result warrants relief by the court as where there is unallocated risk which must be borne, the court is required to determine where that risk should fall.

A COVID shut down was not a risk assumed under the contract. The frustration of purpose doctrine is generally asserted when there is a change of circumstances such that one party's performance is worthless to the other party. In this case, the premises were temporarily worthless to KRT. Crown lost income. The purpose of the contract was frustrated, but only temporarily. The building was of no use to the tenant who was prohibited from using it as it could not operate it business there and the governor said it could not be so used by the tenant. Crown expects rent for the building but KRT could not use the premises. Both parties suffered a loss. The contract did not provide for such a contingency or loss. The risk of loss was not solely assumed by either party in the lease. *Bay City* concluded the temporary governmental order should not result in a permanent cessation of the contract. This court finds this reasoning persuasive. Crown may not seek the rent for the periods of closure but may do so on the proportionate

periods of when the business was open. The late fees and attorney fees cannot be charged. See *Schaefer Lincoln Mercury Inc v Jump*, 1987 WL 642758 (Del Com Pl June 8, 1987).

The doctrines of impossibility of performance or frustration of purpose do not apply. The entire contract is not rescinded. The force majeure clause is not applicable. The rent is abated by the doctrine of temporary frustration of purpose. KRT's request to extend the lease to allow for performance as if the pandemic did not happen is denied. KRT must pay the sums owed under the lease to Crown. The calculation of that obligation must be done pursuant to the applicable pro rata percentage of the allowable occupancy under the orders of the state which allowed for any percentage of occupancy, as payable under the terms of the lease.

B. KRT's counter-claim against Crown.

Crown seeks summary disposition of KRT's counter-complaint. The court dismisses KRT's counter-claim as it is insufficiently alleged facts in the complaint, and fails to state a claim upon which relief can be granted. Also, the counter-complaint sounds in contract, not tort. The tort counts alleged in the counter-complaint, including malicious prosecution and abuse of process, are not actionable as they are predicated on a contract, not an alleged tort duty independent of the contract. It is legal for a landlord to try to evict a tenant who does not pay rent or to bring a cause of action to seek unpaid rent. There are no facts which support the claim that Crown breached the contract. Moreover, Crown cannot interfere with its own contract.

1. Insufficient facts in the counter-compliant.

KRT filed a counterclaim for malicious prosecution, abuse of process, tortious

interference with a contract (the lease), breach of contract and frustration of purpose. All the claims arose under the fact asserted that Crown had no business seeking relief under the lease. It is simply unsupported in fact and the counter-complaint requires facts to support the causes of action. *Maiden v Rozwood, supra*; MCR 2.116(C)(8).

KRT's counter-complaint sounds primarily in contract. The tort claims are based on Crown's actions to enforce the provisions of the lease, to get the rent or evict KRT on the basis of non-payment of rent. KRT's allegation that the landlord's actions to enforce the lease constitute malicious prosecution and abuse of process is wrong. KRT has not alleged any facts in the counter-complaint sufficient to plead or support either cause of action or that KRT prevailed in the suit. They were dismissed. Moreover, there is no genuine issue of material fact that Crown could lawfully bring that cause of action as there is a split of authority in the states about the law that controls and an uncertainty as to how to best handle the results of the state orders of the pandemic. MCR 2.116(C)(8); (C)(10).

2. Tort claims cannot predicated on breach of contract.

A contract action usually does not allow for suit in tort, absent specific allegations of a duty which exists independent of the contract. No such independent duty is alleged in the complaint or motion response. See *Hart v Ludwig*, 347 Mich 559 (1956); *Fultz v Union-Commerce Assocs*, 470 Mich 460, 461 (2004). KRT seeks to reassert the tort counts in the counter-complaint, but that is not the proper vehicle by which to attempt to state a cause of action for contract. A tort action cannot be predicated upon a duty unless it is separate and distinct from that contained in the contract. *Dahlman v Oakland Univ.*, 172 Mich App 502, 507 (1988). In short, the

alleged duty KRT alleges was breached, must be one independent of the duties set forth in the contract. *Fultz*, 470 Mich at 467. Otherwise, every contract would support an action for the same breach in tort. *Fultz, Id*.

In this case, plaintiff alleges the duties breached by Crown were duties imposed on it by the contract, eviction, termination of tenancy, non-payment of rent etc. These are contractual causes of action seeking contractual remedies premised on a lease, a contract, between the parties. No tort action can lie on the factual assertions made in the counter complaint by KRT. The tort actions are dismissed.

3. Tortious interference with contract/business expectancy.

Summary disposition is also granted on tortious interference of a contract/business expectancy and fraud/fraud in the inducement on this ground as no duty independent of the contract (which has been dismissed) has been alleged and a party cannot interfere with its own contract or relationship.

The elements of tortious interference with a contract or business relationship/expectancy are:

1. A contract or a business relationship/expectancy with a third party;
2. Knowledge by the defendant of the contract/business relationship/expectancy;
3. Intentional and improper interference by the defendant, inducing or causing a breach, disruption or termination of the contract or business relationship/expectancy; and
4. Damage to the party whose contract or business relationship/expectancy has been breached, disrupted or terminated. See *Mino v Clio School District*, 255 Mich App 60, 78 (2003); *BPS Clinical Labs v Blue Cross Blue Shield*, 217 Mich App 687, 698-699 (1996).

It is incumbent upon the party asserting the cause of action in this tort to allege the intentional doing of a per se wrongful act, or the performance of a wrongful act done with malice (which is unjustified in law) and done for the purpose of invading the

contractual rights, contract or expectancy of another. See *Jim-Bob, Inc. v Mahling*, 178 Mich App 71 (1989). As a general rule, a party cannot be held to interfere with its own contract. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364,382 (2004).

To maintain a claim of interference with a valid business relationship/expectancy it must be shown that a contract exists. See *Bonelli v Volkswagen of America, Inc*. 166 Mich App 483, 496-497 (1988); See *Weitting v McFeeters*, 104 Mich App 188 (1981); *Williams v DeMean*, 7 Mich App 71 (1967). There must be an allegation that defendants alleged in wrongful action which interfered with a desired advantage. See *Trepel v Pontiac Osteopathic Hospital*, 135 Mich App 361, 377 (1984). There can be no liability for interference with a contract that is void. The rationale is that the tort is not dependent upon the enforceability of a contract but on a third party or a stranger's interference with a contract. See *Northern Plumbing and Heating v Henderson Brothers*, 83 Mich App 84, 92-93 (1978).

Like *Cedroni Associates v Tomblinson, Harbor & Associates Architects & Planners, Inc.*, 492 Mich 40 (2012) where the court held that the business relationship rested on the school's discretion, there was no expectancy.

Feaheny v Caldwell, 175 Mich App 291 (1989) held agents are not liable for the tortious interference with their principal's contracts, unless it is alleged they acted solely for their own benefit with no benefit to the principal. See *First Pub Corp. v Parfet*, 246 Mich App 182, 193 (2001); *Lytle v Malady*, 209 Mich App 179 (1995).

KRT has failed to properly allege the elements of tortious interference with a contract or business expectancy. Crown cannot, as a matter of law on these facts, have interfered with its own contract. The facts necessary to state a cause of action are

unalleged and unidentified in the counter-complaint, and in response to the motion for summary disposition. There is no business relationship/expectancy, alleged to be in existence, which Crown interfered with, by alleging a breach, disruption, or termination of the lease. None has been alleged to be an interference by a third party or stranger. KRT must allege Crown interfered with such a relationship, contract or expectancy which it had with a third party. *Mino v Clio School District,* 255 Mich App 60, 78 (2003). Crown is a party to the lease, not a third party, or a stranger to that lease.

Feldman v Green, 138 Mich App 360, 369-370 (1984) requires that one who alleges tortious interference with a contract or relationship must allege the intentional doing of a per se wrongful act or, the intentional doing of a lawful act with malice and unjustified in law done for the purpose of invading plaintiffs contractual right or business relationship. The second part of the allegation requires the moving party to demonstrate, with specificity, those affirmative acts alleged to be performed by the interferer, the unlawful purpose of the interference.

A wrongful act is one done in the ordinary course of acting which infringes on the right of another to their damage or one inherently wrongful and not justified. See *Formall, Inc. v Community National Bank*, 166 Mich App 772, 780 (1989); *Patilo v Equitable Life Assurance*, 199 Mich App 450, 457 (1992).

KRT has not alleged Crown did a per se wrongful act (inherently wrong, unjustified infringes on the rights of another); or it intentionally did a lawful act with malice (without justification or excuse), or did an act unjustified in law, for the purpose of invading plaintiff's contract or business relationship. *Feldman v Green*, 138 Mich App 360, 369-370, 371 n1 (1984).

There are no facts in the complaint which shows Crown interfered in any way with the lease. In fact, it only sought to enforce the lease provisions. Any interference with the contract/expectancy must be intentional and improper to be actionable. To sustain a cause of action for interference of a business relationship/expectancy or contract there must be intent to bring about a breach of the contract or relationship. Since KRT has made no such allegation or statement in its counter-complaint or in response to any defendants' motion for summary disposition.

Crown's motion for summary disposition on the ground of tortious interference with a contract/relationship or business expectancy is granted.

CONCLUSION

Crown's motion for summary disposition as to the KRT's counter-complaint is granted; KRT's motion to dismiss Crown's complaint for breach of contract is granted on the ground of temporary frustration of purpose. KRT is not liable to pay the late fee, attorney fees or costs. KRT is obligated to pay the proportionate or pro rate rata of rent for the time periods the business was allowed to operate during those times it was allowed to be open. KRT's request for relief to extend the lease term is denied, and

IT IS SO ORDERD.

/s/ Brian R. Sullivan 4/16/2022
BRIAN R. SULLIVAN
Circuit Judge

ISSUED: 4/21/2022