STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF CALHOUN

PELORUS FUND REIT, LLC. A Deleware limited liability company,
Plaintiff,
v

CHRISTOPHER TRAINOR, ASHLEY TRAINOR and ZACHARY TRAINOR,
Intervening Plaintiffs,
v

EVOLUTIONS HOLDING, LLC, a Michigan limited liability company, EGC ENTERPRISES, LLC, a Michigan limited liability company, GREEN FLAKE FARMS, LLC, a Michigan limited liability company, CRAIG FLOCKEN, an individual; and MATTHEW LAVENDER, an individual,
Defendants,
ERICH SPECKIN, an individual,
Intervening Plaintiff,
v

EVOLUTIONS HOLDING, LLC, a Michigan limited liability company; EVLA PROCESSING, LLC, a Michigan limited liability company; EVOLUTION GROW ENTERPRISES, LLC, a Michigan limited liability company; EVO SAUGATUCK HOLDINGS, LLC, a Michigan limited liability company; EGC ENTERPRISES, LLC, a Michigan limited liability company; EGC PROCESSING, LLC, a Michigan limited liability company; EVP HOLDINGS, LLC, a Michigan limited liability company; CRAIG FLOCKEN, an individual; and MATTHEW LAVENDER, an individual,
Defendants.

Case No. 2024-1304-CB
Hon. Brian K. Kirkham

RULING AND ORDER re: SUMMARY DISPOSITION MCR 2.116(C)(10)

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RULING AND ORDER Re: SUMMARY DISPOSITION

This matter was previously before the court for Summary Disposition as to other parties. The within Plaintiff Pelorus Fund REIT, LLC's Motion For Summary Disposition Against Defendants Matthew Lavender & Craig Flocken Pursuant To MCR 2.116(C)(10), hereinafter "Motion" pertains only to the individual identified Defendants.

BACKGROUND AND STATEMENT OF FACTS

In March of 2021 and August 2022, Plaintiff issued loans to Evolutions and the other Entities in the principal amount of $8,312,000.00 for the construction of a marijuana cultivation facility owned by Evolutions and to be operated by EGC. On March 1, 2021, Plaintiff made the initial loan in the amount of $4,012,000.00.

With the initial loan, the parties executed the initial Loan Agreement, the Initial Note, Collateral Security Agreements and an Initial Guaranty, wherein the Entities guaranteed all of Evolutions' obligations under the Initial Loan documents.

Plaintiff recorded the Initial Mortgage and the Initial UCCs in March of 2021 to perfect its security interest in the collateral.

The initial loan was a construction loan and was to mature in summer of 2022. In the summer of 2022, Evolutions sought to borrow additional sums, to extend the Loan maturity date and to expand its facilities. The increase in the Loan balance is evidenced by the First Amendment to Loan Documents which ratified, affirmed, amended and restated the Initial Loan Documents.

Plaintiff re-perfected its security interest by recording; an Amended Mortgage on July 12, 2022, filed amended UCC financing statements on July 12, 2022, August 23, 2022 and August 26, 2022. The UCC financing statements cover "all of the [Entities] assets, whether now owned or hereafter acquired."

On June 20, 2023, with the maturity date passing, the parties entered into the Second Amendment before a default was declared. Plaintiff states the Second Amendment "provide Evolutions with two extension options – the first of which was exercised contemporaneously, thus explaining why the Second Amendment was made effective as of April 1, 2023 (the prior maturity date). Evolutions did not exercise the second available extension, nor did it – or any of the Entities who guaranteed the Loan – pay off the Loan by its resultant maturity date. In addition, prior to that deadline, an installment payment of interest was missed, among other defaults under the Loan Documents." Plaintiff's Brief in Support of Plaintiff's Motion for SD (hereinafter "Brief"), pgs 5-6.

On April 30, 2024, the Plaintiff instituted the within action against Defendants seeking repayment of the Loan and requested the appointment of a Receiver.

On July 22, 2024, the court entered an Order Appointing Receiver, which allowed the Receiver to proceed with the sale of the Receivership assets.

STANDARD OF REVIEW

Plaintiff filed a Motion For SD pursuant to MCR 2.116(C)(10) claiming that "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law".

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n,* 491 Mich 22, 206(2012). The moving party has the initial burden of supporting his or her position by affidavits, depositions, admissions, or other documentary evidence. *Coblentz v Novi,* 475 Mich 558, 569 (2006).

When evaluating a motion under MCR 2.116(C)(10), the court must consider all evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden v Rozwood,* 461 Mich 109, 120 (1999).

SD must be granted pursuant to MCR 2.116(C)(10) if "there is no genuine issue of material fact." *El-Khalik v Oakwood Hearthcare Inc.,* 504 Mich 152, 160 (2019). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." Id. Mere speculation or promise to offer factual support at trial is insufficient to overcome a motion for SD and the opposing party must set forth specific facts demonstrating a genuine issue for trial at the time of the motion. *Maiden,* supra at 121.

Pursuant to MCR 2.116(G)(5) the court must consider "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, ... when the motion is based on subrule (C)(1)-(7) or (10). Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9)".

"In presenting a motion for SD, the moving party has the initial burden of supporting its position". *Quinto v Cross & Peters Co.,*451 Mich 358, 362 (1996). The burden then shifts to the party opposing the motion "to establish that a genuine issue of disputed fact exists." Id.

"A court may only consider substantively admissible evidence actually proffered relative to the motion for summary disposition under MCR 2.116(C)(10)." *Houston v Mint Grp, LLC,* 335 Mich App 545, 558 (2021).

A court must be "liberal in finding genuine issues of material fact." *Traverse City Record-Eagle v Traverse City Area Pub Sch Bd of Ed,* 337 Mich App 281 (2021).

A motion for summary disposition under MCR 2.116(C)(10) must be granted if there remains "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors Corp,*469 Mich 177, 183 (2003). Such "a genuine issue of material fact exists when the record,

giving the benefit of reasonable doubt to the opposing party, leaves open an issue reasonable minds might differ." Id.

LEGAL ANALYSIS

In Plaintiff's Motion they allege that "[t]hrough their discovery responses, responsive pleadings and motion practice, the Individual Defendants have conceded all facts necessary to the adjudication of" Courts I, II, VII and VIII.

In support of it's claim Plaintiff asserts; "Starting on March 1, 2021, Pelorus made the Initial Loan in the amount of $4,012,000,00 as evidenced by the Initial Loan Documents including, among other things, the Initial Guaranty wherein the Individual Defendants 'joint[ly] and several[ly] ' 'irrevocab[ly], absolute[ly], present[ly], and unconditional[ly]' guaranteed the 'payment and performance' of 'all amounts owed and performance and each and every one of the obligations, responsibilities, and undertakings' or Evolutions under the Initial Loan Documents. (Id. ¶¶ 19-20, FAC Ex.3, §§ 1.1,2,4,27.)"

Plaintiff alleges further, "pursuant to Section 12.3 and Section 13.3 of the Initial Guaranty, the Individual Defendants also represented and warranted that the Initial Guaranty constituted the 'legal, valid, and binding obligation' which was 'enforceable against [the Individual Defendants] in accordance with its terms' (id., sections 12.3 & 13.3), and that such guarantee would not be 'affected, reduced, modified, or impaired' by the 'modification or amendment' of the Loan Documents. (Id., § 2.2)".

The initial guarantee was signed by the Individual Defendants which is not in dispute.

COUNT I BREACH OF CONTRACT
COUNT II BREACH OF GUARANTEE

The court is going to address both of these claims together as they are interrelated and rely upon the same facts.

To support a breach-of-contract claim a party must establish three elements: "(1) there was a contract, (2) the other party breached the contract, and (3) the

breach resulted in damages to the party claiming breach." *Bank of America, NA v First American Title Ins Co,* 499 Mich 74, 100 (2016).

Plaintiff attached the First Amendment To Loan Documents (hereinafter "FALD") to it's First Amended Complaint (hereinafter "FAC"), as Exhibit 12. The FALD consisting of 5 pages was signed by all Defendants. The Amendments addressed by the FALD are contained in Article 1, §§ 1.1-1.4. Defendants assert that they did not sign the Amended Agreements and therefore are not bound by them. However, the FALD identifies the loan agreements that are covered by the FALD and the following acknowledgements were made:

> §1.1 "each Obligor shall be deemed to have joined the Amended Loan Agreement in its capacity as Guarantor by its Signature hereto."
>
> §1.2 "each Obligor shall be deemed to have joined such Consolidated Security Agreement (as defined in the Amended Loan Agreement) in its capacity as Grantor by its signature hereto."
>
> §1.3 "Lavender and Flocken shall be deemed to have joined Such consolidated Pledge Agreement (as defined in the Amended Loan Agreement) in its capacity as Pledgor by its signature hereto."

By the above language, the parties have incorporated the Loan Agreements by reference and affirmed them. In each contract the court must determine the intentions of the parties. To determine the intent of the parties, the court can look to the "expressed words of the parties and their visible acts". *Goldman v Century Ins Co,* 354 Mich 528, 535 (1958).

It is clear from the above language of the Agreement that the parties intended to modify, amend and ratify the prior Loan Agreements. Further, the parties agreed to be bound by the FALD and its terms.

If a contract is clear and unambiguous, construction of the contract is a question of law for the court. *G&A Inc. v Nahra,* 204 Mich App 329 (1994). If, however, the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and SD is therefore inappropriate. *SSC Associates Ltd Partnership v General Retirement System of Detroit,* 192 Mich App 360 (1991).

Defendants, Guarantors, Lavender and Flocken, have raised various defenses to the Plaintiff's FAC. In the FALD Article IV §4.2 Defendants acknowledge that, "The Obligors represent and warrant that they have no claims or causes of action against the Lender." Further, the Obligors "hereby release, remise and discharge Lender and (Released Parties) "From and against any and all claims, demands, debts, liabilities, contracts, obligations, accounts cases of action, or claims for relief of whatever kind or nature, whether known or unknown, suspected or unsuspected, by Releasing Parties, past or present, which arise from or by reason of, or are in any way connected with any agreement, transactions, occurrences, conduct, acts, or omissions of Release Parties." Pursuant to the plain and clear language of §4.2, Defendants have waived any and all defenses they assert against Plaintiff.

On March 1, 2021 all Defendants signed a Guaranty. Section 1.1 provides:

> Guaranty of Obligations. Guarantor guarantees to Lender, its Successors, and assigns the full and faithful payment of all amounts owed and performance of each and every one of the obligations, responsibilities, and undertakings to be carried out, performed, or observed by Borrower under the Loan Agreement, the Note, the Security Agreement, any other agreement that now or later secures repayment of the Note any other agreement that Guarantor now of later states is guaranteed, and any other agreement that Guarantor or Borrower signs in connection with the loan obtained by Borrower.

The Guaranty further provides at Section 1.2 the following:

> If at any time Borrower, or its successors or permitted assigns, fails, neglects or refuses to pay when due amounts or perform when due any of its obligations, responsibilities, or undertakings as expressly provided under the terms and conditions of the Loan Documents, Guarantor shall pay such amounts or perform or cause to be performed such obligations, responsibilities or undertakings as required under the terms and conditions of the Loan Documents.

Defendants do not dispute the signing of the Guarantee. However, the Defendants have tendered a cursory defense.

In response to Plaintiff's Request to Admit (RTA) number 1 requesting Defendants to admit that the Loan documents were amended on June 20, 2023, Defendants answered; "Defendants admit that they signed the First Amendment to Loan Documents dated August 9, 2022 and the Second Amendment to Construction Loan and Security Agreement dated June 20, 2023. Defendants further admit that Evolutions Holdings, LLC executed the First Amended and Restated Secured Note dated August 9, 2022 and the First Amended and Restated Mortgage dated August 9, 2022."

Plaintiff's RAC alleges:

2. The Guarantors (including EGC), being an affiliated group of entities and persons related to Evolutions, jointly and severally guaranteed Evolutions' obligations to Pelorus.
3. Since at least July of 2023, the Defendants have been chronically in default of their payment and performance obligations to Pelorus.
4. The Defendants currently owe Pelorus more than $10,260.299.81 (sic), with interest, fees, and costs continuing to accrue daily.

To these allegations both Defendants answer; " Defendant can neither admit nor the allegations of this paragraph as he is without sufficient information to do so and leaves Plaintiff to its proofs."

The court acknowledges that although Defendants Answers comply with MCR 2.111(C)(3), they are deficient under MCR 2.111(D), which states; "Each denial must state the substance of the matters on which the pleader will rely to support the denial.

As previously stated in *Cadillac Rubber & Plastics, Inc. v Tubular Metal Sys. LLC.,* 331 Mich App 416,422 (2020) the party opposing summary disposition cannot rest on mere allegations but must set forth specific facts to show a genuine issue exists for the trier of facts. The proffered evidence must be substantively admissible. *1300 LaFayette East Coop, Inc. v Savoy,*284 Mich App 522, 526 (2009).

A party may not merely announce his position and leave it to the court to discover and rationalize the basis for his claims. *Wilson v Taylor,* 457 Mich 232, 243 (1998).

Defendants have alleged that Plaintiff committed the first breach and therefore it is foreclosed from proceeding in this case. The court previously addressed this issue in the prior Ruling for Summary Disposition which is equally applicable to these Defendants.

As Defendants have admitted a default in Answer to RTA and failed to tender a legitimate defense in their Answers or any pleadings filed in this case. Therefore, Summary Disposition is appropriate as to Counts I and II.

COUNT VI UNJUST ENRICHMENT

"[T]o sustain the claim of unjust enrichment, plaintiff must establish (1) receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill Corp v Detroit,* 256 Mich App 463, 478 (2003).

Defendant asserts that the loan from Plaintiff was a construction loan which is paid directly to the building contractor, and because "no money went directly from Pelorus to the individual defendants. Thus, Pelorus has no evidence to show this court that there was the receipt of any benefit by the individual defendants."

Defendant's simplistic approach ignores the fact that the individual Defendants held an interest in the Defendant LLCs and also guaranteed repayment, as previously addressed.

It is therefore clear that Defendants received at minimum, and indirect benefit from the loaned funds and it would be inequitable for Defendants to retain the benefits to the Plaintiffs detriment. This fact was acknowledged by Defendants in the Pledge Agreement which provides; "(c) Each Pledgor will receive substantial direct and indirect benefits from the execution, delivery and performance of the obligations under the Loan Agreement and the other Loan Documents and each is, therefore, willing to enter into this Agreement."

Plaintiff is awarded Summary Disposition as to Court VII.

COUNT VIII COMMON LAW FRAUD

Plaintiff alleges that Defendant, Flocken, made various "representations, warranties and covenants concerning the EGC Pledged Securities (see FAC Ex.9, §§4.2& 4.7, FAC Ex. 12(C), §2.01 & Art IV, FAC Ex. 14 Schedule 7(a), FAC Ex. 17), coupled with his damning admissions contained in the Motion Response and Irog Responses (Mtn Resp at 13 n6; Ex. C, #1).

The court will acknowledge that Defendant, Flocken's, interest in the LLC changed more than a Wimbledon volley.

To establish a claim of common-law fraud the Plaintiff must prove: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; (6) the plaintiff suffered damage. *M&D, Inc v McConkey,* 231 Mich App 22, 27 (1998).

The Pledge Agreement, dated March 1, 2021, attached to Plaintiff's Complaint as Exhibit C, contains a list of Pledged Securities. The Pledged Securities lists Lavender as holding 100% of Evolutions Holdings LLC, Flocken as holding 77% of EGC Enterprises, LLC, and Flocken as holding 100% of Green Flake Farms, LLC.

The Information Certificate dated August 9, 2022, in Schedule 7(a) lists Flocken's interest in EGC Enterprises, LLC as 77%.

In Defendants' Response To Plaintiff's First Set Of Interrogatories And Requests For Production of Documents To Defendants, Defendants answered Interrogatory #1 as follows: "When EGC first formed, Flocken held 77% of the membership interest. By March 31, 2021, Flocken held 21% of the membership interest. By August 2022, Flocken's membership interest was 7.0%. Currently, Flocken holds 7.5% of the membership interests. At all times, Flocken holds 100% of the voting membership interests in EGC."

As set forth above, the Information Certificate dated August 9, 2022 lists Flocken's interest as 77% in EGC Enterprises, LLC. In answer to Interrogatories, Flocken states, "[b]y August 2022, Flocken's membership interest was 7.0%." Both Defendants signed the Information Certificate, in their representative capacity and individually.

Clearly, Defendant did not maintain a 77% membership interest on August 9, 2022 as represented in the Information Certificate.

Flocken made the representation that he had a 77% interest on August 9, 2022, that the representation was false when the Defendant made the representation, that the Defendant made the representation with the intention

that the Plaintiff would act upon it, and the Plaintiff did act in reliance upon it to it's detriment.

Plaintiff has established it's claim for common-law fraud and is entitled to Summary Disposition.

CONCLUSION

For the reasons set forth above, Plaintiff is awarded Summary Disposition on Counts I, II, VI and VII.

IT IS SO ORDERED.

June 25, 2025

HON. BRIAN K. KIRKHAM