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

NINO SALVAGGIO INVESTMENT COMPANY, LTD,

Plaintiff,

Case No. 20-182616-CB

v.

Hon. Martha D. Anderson

WILLIAM BEAUMONT HOSPITAL, INC.,

Defendant.
_____/

OPINION AND ORDER GRANTING
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

This matter is before the Court on Defendant's Motion for Summary Disposition under MCR 2.116(C)(10). The Court, having reviewed the parties' submissions and pleadings, dispenses with oral argument, pursuant to MCR 2.119(E)(3).

I.

This litigation arises from a dispute between Plaintiff Nino Salvaggio Investment Company, Ltd. ("Plaintiff") and Defendant William Beaumont Hospital ("Defendant") following Plaintiff's denial of tenancy at Defendant's grocery store space in "Woodward Corners by Beaumont" located at 13 Mile Road and Woodward Avenue in Royal Oak, Michigan. Plaintiff's Amended Complaint against Defendant alleges claims of Breach of Contract (Count I); Fraud (Count II); Silent Fraud (Count III); Negligent and Innocent Misrepresentation (Count IV); and Promissory Estoppel (Count V).

Defendant now brings the pending Motion for Summary Disposition, pursuant to MCR 2.116(C)(10) arguing that no genuine issue of material fact exists relative to each of Plaintiff's claims compelling dismissal of Plaintiff's Amended Complaint against it. Plaintiff opposes Defendant's motion in its entirety, and requests summary disposition in its favor relative to Count I (only), pursuant to MCR 2.116(I)(2).

II.

A motion under MCR 2.116(C)(10) tests the factual basis of a plaintiff's complaint and shall be granted if no genuine issue of material fact exists (except as to damages). A court must examine the pleadings, affidavits, depositions, admissions, and any other evidence in

favor of the opposing party, granting the benefit of any reasonable doubt to the opposing party. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Initially, the moving party retains the burden of supporting its position by the above evidentiary proofs, but the burden then shifts to the opposing party to establish a genuine issue of material fact. *Id* at 455. The non-moving party is not permitted to rely on mere allegations in his/her pleadings, and summary disposition is granted if the opposing party fails to present documentary evidence to establish the existence of a genuine issue of material fact. *Id*. However, under MCR 2.116(I)(2), "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

III.

Count I – Breach of Contract

Under Count I, Plaintiff alleges that Defendant breached the "Letter of Intent for Woodward Corners by Beaumont" dated June 21, 2018 (the "LOI") executed by the parties by failing to act "in a good faith, honest, and reasonable manner" with Plaintiff, Am. Complaint, ¶¶48-49, and by contracting with another grocer for the tenant space Defendant allegedly promised to Plaintiff in violation of the "Concession Lease Exclusivity" provision[1] contained in the LOI. Am. Complaint, ¶¶31, 50. Plaintiff also alleges that Defendant breached the "Confidentiality and Non-Disclosure Agreement" dated February 28, 2018 ("Confidentiality & NDA") executed by the parties by disclosing confidential information to third parties. Am. Complaint, ¶¶37, 50.

Initially, Defendant argues that summary disposition is appropriate relative to the allegations that Defendant breached the LOI because the material condition precedent of execution of a lease for the Woodward Corners grocery space never occurred. With respect to this issue, the LOI states in pertinent part as follows:

> **This proposal is expressly contingent upon (a) receipt, review and approval by Landlord of financial statements and credit check authorization for all parties (Tenant, and any guarantor); and (b) full**

[1] "Tenant shall have the exclusive right to negotiate and enter into a lease with Landlord to provide a food and beverage concession within Beaumont Hospital-Royal Oak North Tower ("Concession Lease Exclusivity"). The Concession Lease Exclusivity shall begin upon the execution date of this letter and expire on the 90th day following the execution date of the lease for the Premises ("Concession Lease Exclusivity Period"). Upon expiration of the Concession Lease Exclusivity Period, Landlord shall have no further obligation to the Tenant for space within Beaumont Hospital-Royal Oak North Tower location. The Concession Lease Exclusivity shall be the only binding provision of this letter." LOI dated June 21, 2018, p. 3, "Concession Lease Exclusivity".

> **execution of a lease on Landlord's template retail lease form for the center.** LOI dated 06/21/18, p. 1 (bold and underline in original).

However, even if the parties had executed a lease, Defendant argues the "Concession Lease Exclusivity" Provision constitutes an unenforceable contract to contract in the future without setting forth any material terms for same. In support, Defendant cites *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812, 819; 428 NW2d 784 (1988).

In response, Plaintiff admits that the parties never executed a lease for the grocery space. Plaintiff takes the position, however, that the afore cited condition precedent does not apply to the "Concession Lease Exclusivity" provision of the LOI, which Plaintiff alleges requires Defendant to negotiate a lease in good faith. Plaintiff argues that this provision was "binding" upon the parties and never expired by its own terms ("The Concession Lease Exclusivity shall be the only binding provision of this letter." LOI dated June 21, 2018, p. 3, "Concession Lease Exclusivity".) And, according to Plaintiff, the "Concession Lease Exclusivity" contained all material terms of the parties' agreement, i.e., the parties to the contract (Plaintiff and Defendant), the subject matter ("the exclusive right to negotiate and enter into a lease"), and the time of performance (commencing upon "the execution date of this letter" and expiring "on the 90th day following the execution date of the lease for the Premises"). *Id*.

In support, Plaintiff relies upon *Opdyke Inv Co v Norris Grain Co*, 413 Mich 354, 358-60; 320 NW2d 836 (1982), which provides:

> A contract to make a subsequent contract is not per se unenforceable; in fact, it may be just as valid as any other contract. 1 Corbin, Contracts, § 29, p. 84; see *Hansen v Catsman*, 371 Mich 79, 123 NW2d 265 (1963). Like any other contract, a contract to make a contract can fail for indefiniteness if the trier of fact finds that it does not include an essential term to be incorporated into the final contract. *Socony-Vacuum Oil Co, Inc, v Waldo*, 289 Mich 316, 323; 286 NW 630 (1939). Similarly, if the agreement is conditioned on the happening of a future event that, through no fault of the parties, never happens, liability does not attach. *Opdyke Inv Co, supra* at 360.

As noted in Defendant's Reply, however, by its *very terms*, the "Concession Lease Exclusivity" provision of the LOI is merely an agreement "to negotiate" a lease at some future date, not an agreement to contract. Consequently, this Court finds that said provision is

unenforceable under Michigan law, pursuant to *Hansen v Catsman*, 371 Mich 79; 123 NW2d 265 (1963)[2] and *Opdyke Inv Co v Norris Grain Co*, 413 Mich 354, 359 (1982). Summary disposition as to Count I of Plaintiff's Amended Complaint is, therefore, appropriate as it relates to Plaintiff's allegations for breach of the LOI dated June 21, 2018, pursuant to MCR 2.116(C)(10) and *Smith v Globe Life Ins Co*, 460 Mich 446, 454-55 (1999).

Next, Defendant argues that summary disposition is appropriate relative to the allegations that Defendant breach the parties' Confidentiality & NDA in the absence of any evidence that Defendant breached same and given that the subject agreement is between Defendant and a non-party to this litigation (Nino Salvaggio of Royal Oak, LLC). The Confidentiality & NDA provides, in pertinent part, that:

> The parties agree to maintain and keep strictly confidential any and all information related to the Proposed Transaction disclosed by either party to the other party that is or reasonably should be understood to be confidential or proprietary, whether transmitted orally, in writing, via facsimile or other electronic means, either before or after the Effective Date (collectively "Confidential Information"). Confidential Information includes, but is not limited to, pricing data, formulas, trade secrets, financial information, services, service development, processes, procedures, business plans, tools, strategies, inventions (whether patentable or not), techniques and other unpublished information . . . . Confidentiality & NDA dated 02/28/18, p. 1, ¶1.
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> * * *
>
> . . . Neither party may use the other party's trademarks, service marks or designs registered to the other party, nor identify the other party in any announcement, publication, publicity, promotional, or advertising material concerning the existence or terms of this Agreement without the express prior written consent of that other party . . . . Confidentiality & NDA dated 02/28/18, p. 4, ¶10.

In support, Defendant relies upon the deposition testimony of Plaintiff's primary point of contract for Defendant's redevelopment project at Woodward Corners, Michael McInerney, who testified that the "word on the street" was that Plaintiff was the grocer for this project and/or that a "deal" existed with Plaintiff; McInerney, however, could not recall a single

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[2] "It is well-recognized that it is possible for parties to make an enforceable contract binding them to prepare and execute a subsequent agreement. In such a case, where agreement is expressed on all essential terms, the instrument is considered a contract, and is considered a mere memorial of the agreement already reached. 1 Corbin on Contracts, § 29. It is further to be noted, however, that 'If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; and the so-called 'contract to make a contract' is not a contract at all.' Corbin on Contracts, supra, p. 68. See, also, 6 Michigan Law and Practice, Contracts, § 27." *Hansen, supra* at 81 (underline added).

specific person who made this statement to him. (McInerney Dep, pp. 79-81). Additionally, McInerney testified that he has no knowledge of any tenant at Woodward Corners that Defendant attracted by utilizing Plaintiff's name; rather, he merely "suspected" this to be the case. (McInerney Dep, p. 84). Defendant also relies upon the deposition testimony of Plaintiff's owner, Leonard Salvaggio, who testified that he could not identify a specific individual to establish that Defendant somehow used Plaintiff's name to attract other tenants to the Woodward Corners project. (Salvaggio Dep, pp. 107-110). In light of the foregoing testimony, and in the absence of any evidence of any damages resulting from the alleged breach of the Confidentiality & NDA, Defendant seeks dismissal of Plaintiff's allegations under Count I relative thereto, pursuant to MCR 2.116(C)(10).

In response, Plaintiff disputes the fact that the subject Confidentiality & NDA is only between Defendant and a non-party given that the LOI executed by and between the parties in this case incorporates by reference the terms of the Confidentiality & NDA. See LOI dated 06/21/18, p. 3.[3] Further, it is Plaintiff's position that a genuine issue of material fact exists relative to whether Defendant breached the Confidentiality & NDA by utilizing "the confidential nature of the transaction as a selling point to other tenants." Pl's Response Brief, p. 14. As evidence, Plaintiff also relies solely upon the deposition testimony of McInereny and Salvaggio, which is merely hearsay as it relates to Plaintiff's claim that Defendant breached the parties Confidentiality & NDA by somehow utilizing Plaintiff's name to attract other tenants to the Woodward Corners project. Having failed to meet its burden of proof in that regard, the Court is compelled to grant summary disposition in Defendant's favor relative thereto, pursuant to MCR 2.116(C)(10) and *Smith, supra*.[4]

Count II – Fraud

Under Count II, Plaintiff generally alleges that Defendant made "repeated material representations of fact to [Plaintiff] and/or made repeated promises to [Plaintiff] with a present but undisclosed intent not to perform." Am. Complaint, ¶53.

[3] "The terms of this letter shall remain subject to the Confidentiality and Non-Disclosure Agreement between Beaumont and Tenant dated February 28, 2018." LOI dated 06/21/18, p. 3.

[4] In light of the Court's ruling, the Court shall not address Defendant's alternative theory of dismissal related to Defendant's alleged breach of the Confidentiality & NDA based upon the alleged lack of damages.

Defendant now seeks summary disposition arguing that no evidence exists of any credible misrepresentation made by any representative of Defendant to Plaintiff given the non-binding LOI between the parties and, further, that no reasonable reliance exists by Plaintiff as to any alleged statements. In support, Defendant relies upon the deposition testimony of Plaintiff's owner's (Leonardo Salvaggio), wherein he testified to his knowledge that "this deal wasn't ready yet and there was a chance that it would go south." (Salvaggio Dep, p. 103).

In response, Plaintiff argues that its "fraud claim is not based solely upon the LOI," but also a February 2018 email forwarded to McInerney from Defendant's Corporate Vice President – Real Estate, Design + Construction (Ronald Henry) providing Plaintiff with "'official notification' that [Defendant] has approved [Plaintiff] as the Grocer for Woodward Corners by Beaumont." Pl's Response Brief, p. 15. Plaintiff also argues that it reasonably relied upon the LOI between the parties as well as the February 2018 email. That said, Plaintiff fails to cite to <u>any</u> evidence in support of the element of reliance.

To prove a claim for fraudulent misrepresentation, a plaintiff must establish that:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury.

Roberts v Saffell, 280 Mich App 397, 403; 760 NW2d 715 (2008).

Reviewing all of the evidence, in a light most favorable to Plaintiff, the Court concludes that Plaintiff has failed to meet its burden to show that Plaintiff reasonably relied upon the LOI dated June 21, 2018 or the February 2018 email forwarded from Defendant to Plaintiff regarding Plaintiff's approval as the Grocer for the Woodward Corners project given: (1) the clear and unambiguous terms of the LOI dated June 21, 2018 was non-binding upon the parties, the LOI dated June 21, 2018 does not provide for any exclusivity provision relative to the negotiation of a lease for the Grocer space for the Woodward Corners project, and (3) the parties never executed a lease on Defendant's template retail lease form as required under the LOI dated June 21, 2018 for the Grocer Space for the Woodward Corners project. Moreover, Plaintiff's owner admitted at the time of deposition that he knew that the deal

could always "go south." (Salvaggio Dep, p. 103). Consequently, summary disposition is appropriate as to Plaintiff's fraud claim, pursuant to MCR 2.116(C)(10), *Roberts, supra* and *Smith, supra*.

Count III – Silent Fraud

Under Count III, Plaintiff alleges that Defendant "had a legal and/or equitable duty to disclose to [Plaintiff] that a decision had already been made in 2018 to contract with Meijer's (instead of [Plaintiff]) as the anchor tenant for Woodward Crossing" and that "[Defendant's] omissions and failure to honestly and accurately respond to [Plaintiff's] inquiries and concerns regarding the delay constitute actionable silent fraud." Am. Complaint, ¶¶63-64.

Defendant now seeks summary disposition arguing that no evidence exists as to Plaintiff's claim for silent fraud where, as here, the LOI dated June 21, 2018 did not provide for any exclusivity provision relative to the negotiation of a lease for the Grocer space for the Woodward Corners project, and Defendant had no duty to disclose to Plaintiff that it was negotiating with other potential vendors. In further support, Defendant cites to Plaintiff's owner's (Leonardo Salvaggio) testimony that, in September 2018, he knew that "this deal's dead." (Salvaggio Dep, pp. 102-103).

In response, Plaintiff argues that Defendant had a duty to disclose to Plaintiff that it "was no longer selected as the 'official' Grocer." Response Brief, p. 17. In support, Plaintiff cites *M&D, Inc v WB McConkey*, 231 Mich App 22, 29; 585 NW2d 33 (1998) (internal citations omitted) for the proposition that "a party" has a duty to disclose " 'substantially acquired information which he recognizes as rendering untrue, or misleading, previous *representations* which, when made, were true or believed to be true.' " Response Brief, p. 17. However, *M&D, Inc.* stands for no such proposition referring only to "a vendor's duty to disclose," not any duty of a "party."

"'Silent fraud,' also known as fraud by nondisclosure or fraudulent concealment, is a commonly asserted, but frequently misunderstood, doctrine." *M&D, Inc., supra* at 28. "This is primarily because most fraud claims are based upon alleged affirmatively stated false representations of material fact." *Id.* "A claim of 'silent fraud' requires a plaintiff to set forth a more complex set of proofs." *Id.* "To prove silent fraud, also known as fraudulent concealment, the plaintiff must show that the defendant suppressed the truth with the intent

to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure." *Lucas v Awaad*, 299 Mich App 345, 364-65; 830 NW2d 141 (2013). "A plaintiff cannot merely prove that the defendant failed to disclose something; instead, a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Id* (quotation marks and citation omitted).

Here, Plaintiff failed to meet its burden of proof to show that Defendant owed Plaintiff a legal and/or equitable duty to disclose to Plaintiff that it was negotiating with other potential vendors. Consequently, in the absence of any duty, Plaintiff's claim for silent fraud fails as a matter of law compelling summary disposition, pursuant to MCR 2.116(C)(10), *Lucas, supra* and *Smith, supra*.

Count IV – Negligent and Innocent Misrepresentation

Under Count IV, Plaintiff alleges that Defendant's personnel and/or representatives "made misrepresentations and false promises without making any attempt to verify the accuracy of those misrepresentations at the time they were made." Am. Complaint, ¶68. Plaintiff further alleges that Defendant's personnel and/or representatives "had a legal and/or equitable duty to investigate and discover that a decision had already been made in 2018 to contract with Meijer's (instead of [Plaintiff]) as the anchor tenant for Woodward Crossing." Am. Complaint, ¶69. Plaintiff alleges that Defendant's personnel and/or representatives "made innocent and/or negligence misrepresentations to Plaintiff in 2018 and failed to investigate the truth of those misrepresentations," and Defendant "did not reveal the truth to [its] personnel and/or representatives because [Defendant] intended that [Plaintiff] rely upon [Defendant's] silence and misrepresentations," to which Plaintiff relief to its detriment. Am. Complaint, ¶¶70-72.

"A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation." *M&D, Inc v WB McConkey*, 231 Mich App 22, 27 (1998). "[T]o prevail on an innocent misrepresentation claim, a plaintiff must also show that the plaintiff and defendant were in privity of contract." *Id*.

A claim of negligent misrepresentation requires proof that the plaintiff "justifiably relied to his detriment on information provided without reasonable care by one who owed

the relying party a duty of care." *Law Offices of Lawrence J Stockler, PC v Rose,* 174 Mich App 14, 33; 436 NW2d 70 (1989).

With respect to Count IV, Defendant's argument is twofold. First, Defendant argues that Plaintiff's claim for innocent misrepresentation compels dismissal because the parties were not in privity of contract, citing *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981) in support thereof. And second, Defendant argues that Plaintiff's claim for negligent misrepresentation compels dismissal because the written LOI dated June 21, 2018 was clear that it was not binding between the parties and also not exclusive.

In response, Plaintiff argues that the LOI dated June 21, 2018 evidences the fact that the parties were in privity of contract; however, as previously set forth herein, the LOI dated June 21, 2018 was non-binding and contained no exclusivity provision relative to the negotiation of a lease for the Grocer space for the Woodward Corners project. Furthermore, this Court has already concluded that Defendant owed Plaintiff no legal and/or equitable duty to disclose to Plaintiff that it was negotiating with other potential vendors. For these reasons, summary disposition is appropriate as to Plaintiff's claim for negligent and innocent misrepresentation compelling dismissal relative thereto, pursuant to MCR 2.116(C)(10), *M&D, Inc, supra*, *Law Offices of Lawrence J Stockler, PC, supra* and *Smith, supra*.

Count V – Promissory Estoppel

Under Count V, Plaintiff generally alleges, "in the alternative and/or in addition" (Am. Complaint, ¶74), as follows:

> 75. [Defendant] made clear and definite promises to [Plaintiff] in circumstances where justice requires that those promises be enforced.
>
> 76. [Plaintiff] reasonably relied upon [Defendant's] clear and definite but broken promises and was damaged as a result. Am. Complaint, ¶¶75, 76.

"The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided." *Novak v Nationwide Ins Co*, 235 Mich App 675, 686-87; 599 NW2d 546 (1999). "To support a claim of estoppel, a promise must be definite and clear." *Schmidt v Bretzlaff*, 208 Mich App 376, 379;

528 NW2d 760 (1995). "A promise is a manifestation of intention to act or refrain from acting in a specified manner, made in a way that would justify a promisee in understanding that a commitment had been made." *Id*.

"In determining whether a requisite promise existed, we are to objectively examine the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions." *Novak, supra* at 687. "We are to exercise caution in evaluating an estoppel claim and should apply the doctrine only where the facts are unquestionable and the wrong to be prevented undoubted." *Id*.

With respect to Count V, Defendant argues that summary disposition is appropriate because no evidence exists of any clear and definite promise by Defendant to Plaintiff "to enter into a binding lease that would entitle Plaintiff to the benefits of the lease." Def's Motion, p. 18. In response, Plaintiff disputes this citing the February 2, 2018 internal email at Defendant, which Defendant's Corporate Vice President – Real Estate, Design + Construction (Ronald Henry) subsequently forwarded to Plaintiff (via Michael McInerney) as an "FYI." Said email provided, in its entirety:

> This email is official notification that Beaumont Health has approved Nino Salvaggio's as the Grocer for Woodward Corners at Beaumont. The lease rate shall be $15/sf. Please proceed with finalizing their LOI and let me know when are ready to engage outside counsel or BH counsel as appropriate to begin lease negotiations. Also, please notify the design and construction team so they can begin detailed design documents for the Nino Salvaggio building. On a similar yet separate note, we will also need to begin discussion with Nino's for leasing the space currently occupied by Papa Joe's in the near future. Once the Nino's schedule is defined and we have an idea on when the store will be completed we can then work to determine timing on the work required in the South Tower to allow Nino's time for renovation. Note – Papa Joe's is currently on a month to month (keep this part confidential, Papa Joe's does not need to know this until the appropriate time). (Beaumont Email dated 02/02/18).

The Court concludes that nowhere in this internal Beaumont email is Plaintiff promised anything by Defendant, let alone any "clear and definite promise" as required

under *Schmidt, supra*. For this reason, summary disposition is granted as to Count V of Plaintiff's Amended Complaint, pursuant to MCR 2.116(C)(10).[5]

IV.

THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for Summary Disposition is **GRANTED**, pursuant to MCR 2.116(C)(10), and Plaintiff's Amended Complaint is **DISMISSED** in its entirety. Plaintiff's request for partial summary disposition as to Count I is **DENIED**, pursuant to MCR 2.116(I)(2).

IT IS SO ORDERED.

This Order resolves the last pending matter and closes the case.

/s/ Martha Anderson
June 27, 2022
HON. MARTHA D. ANDERSON
CIRCUIT COURT JUDGE

Dated: 6/27/2022.

[5] In light of the Court's dismissal of each claim of Plaintiff's Amended Complaint, the Court need not address Defendant's remaining argument for dismissal of same relative to alleged speculative damages.