

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

**31500 13 MILE, LLC, a Michigan
Corporation,**

Plaintiff,

Case No. 24-206422-CB

Hon. Victoria A. Valentine

v

**FH BASHA, LLC, a Michigan limited
liability company, and NAI FARBMAN,
a Michigan corporation.**

Defendants.

**OPINION AND ORDER REGARDING DEFENDANT NAI FARBMAN'S RENEWED
MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7)**

At a session of said Court, held in the
County of Oakland, State of Michigan
August 14, 2024

This matter is before the Court on Defendant NAI Farbman's Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(7). This Court has reviewed the pleadings, the motion, the response, and the reply submitted by the parties and has heard oral argument.

I.

Overview

Plaintiff 31500 13 Mile, LLC (“13 Mile LLC”) is a limited liability company which manages and operates rental properties. In July 2023 Plaintiff was assigned rights to a Commercial Purchase Agreement for the purchase of certain commercial property located at 31500 13 Mile Rd (the “Property”) from Defendant FH Basha, LLC (“Basha”) for the purchase price of \$2,000,000. Basha and Defendant NAI Farbman (“Farbman”) were parties to a listing agreement which allegedly gave Farbman the exclusive right to sell the Property. Plaintiff alleges that the purchase price was reached after the parties agreed on a 5.5% capitalization rate based upon the net operating income for the Property and that it relied on certain representations of Defendants regarding the total utility costs of the Property when agreeing to the Commercial Purchase Agreement. Plaintiff further alleges that after the purchase of the Property it learned that the utility costs were significantly higher than was disclosed by Defendants. Plaintiff alleges that considering the actual utility costs, the value of the property would have been \$1,428,370.73, much lower than the agreed upon purchase price.

Plaintiff brought the instant action against Basha and Farbman alleging: Breach of Contract-Basha only (Count I); Fraud (Count II); Innocent Misrepresentation (Count III); Negligent Misrepresentation (Count IV); and Civil Conspiracy (Count V). Farbman now moves for summary disposition under MCR 2.116(C)(7) arguing that the claims against it are barred by release language in the Commercial Purchase Agreement. Farbman also seeks sanctions under MCR 1.109(E)(6) for having to respond to a complaint not well grounded in fact nor warranted by existing law.

II.

Standard of Review

MCR 2.116(C)(7) provides for summary disposition where a claim is barred by release.¹

Under MCR 2.116(C)(7) . . . this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in the light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [*RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008) (citations omitted.)]

III.

Analysis

A.

“A waiver is the intentional and voluntary relinquishment of a known right. A valid waiver may be shown by express declarations or by declarations that manifest the parties’ intent and purpose, or be an implied waiver, evidenced by a party’s decisive, unequivocal conduct reasonably inferring the intent to waive.” *Home-Owners Ins Co v Perkins*, 328 Mich App 570, 585; 939 NW2d 705 (2019) (quotation marks and citations omitted). “A release is valid if it is fairly and knowingly made.” *Brooks v Holmes*, 163 Mich App 143, 145; 413 NW2d 688 (1987).

Farbman relies on the following language from the Commercial Purchase Agreement in support of its argument that Plaintiff's claims against it are barred by waiver.

¹ MCR 2.116(C)(7) provides that:

Entry of judgment, dismissal of the action, or other relief is appropriate because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

23. BROKER. Purchaser and Seller each acknowledge that . . . (ii) Seller's real estate agent is Brad Margolis, NAI Farbman and is acting as: an agent of the Seller. . . All brokers and their agents specifically disclaim responsibility for the condition of the Property and performance of this Agreement. *The parties each hereby, and by closing shall be deemed to, waive and release any and all claims and causes of action against all named brokers, their officers, directors, managers, members, employees and agents. . .*²

Plaintiff first argues that Farbman cannot enforce the terms of Paragraph 23 because "Plaintiff and Farbman do not have any privity of contract as Farbman was not a party to the Purchase Agreement." However, Plaintiff has not supported this assertion with any legal analysis or citation to legal authority. "A party may not merely announce its position and leave it to this Court to discover and rationalize the basis for [its] claims, or give issues cursory treatment with little or no citation to supporting authority." *Wolfe v Wayne-Westland Community Schs*, 267 Mich App 130, 139; 703 NW2d 480 (2005). *See also Moses, Inc v Southeast Mich Council of Governments*, 270 Mich App 401, 417; 716 NW2d 278 (2006) ("If a party fails to adequately brief a position, or support a claim with authority, it is abandoned.") and *Mercurio v Huntington Nat'l Bank*, __ Mich App __ (2023) (Docket No. 361855), 2023 WL 4981374 at p 10 (the trial court did no err by finding that the plaintiff made no substantive response to a legal argument made by the defendant in MSD.) Accordingly, the Court concludes that Plaintiff has abandoned any privity argument.

Plaintiff also asserts that "paragraph 23 is not binding since the Purchase Agreement was induced by fraud." The fraud alleged is the misrepresentation of the annual utility expenses for the Property which Plaintiff alleges induced it to enter into the Commercial Purchase Agreement. "A

² *Id.* at ¶ 23 (emphasis added).

release is invalid if (1) the releasor was acting under duress, (2) there was misrepresentation as to the nature of the release agreement, or (3) there was fraud or overreaching conduct to secure the release.” *Brooks v Holmes*, 163 Mich App 145. Here is alleged that there was fraud involved with securing the Commercial Purchase Agreement which contains the release. *Compare Brooks*, 136 Mich App at 145 (the plaintiffs did not allege any fraud or duress or coercion in the signing of the closing agreement in which release appeared and thus release was valid). Farbman argues that there is no evidence that Farbman engaged in any fraud, however, the Court determines that a question of fact remains as to Farbman’s conduct. Therefore, summary disposition is not proper under MCR 2.116(C)(7) based upon Paragraph 23 of the Commercial Purchase Agreement.

To the extent that Farbman is also arguing that the “As is” clause in Paragraph 12 of the Commercial constitutes a valid waiver, the Court notes, as Plaintiff points out, that case law supports a finding that an “as is” clause is ineffective against certain fraud claims. *See Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994) (“‘As is’ clauses allocate the risk of loss arising from conditions unknown to the parties” but does not “transfer the risk where a seller makes fraudulent representations.”). However, an “As is” clause is effective against a claim of innocent misrepresentation. *Coosard v Tarrant*, 342 Mich App 620, 637; 995 NW2d 877 (2022). Accordingly, summary disposition is proper as to the innocent misrepresentation claim (Count III) based upon the operation of the “As is” clause. *Id.*

B.

Farbman argues that because of the existence of the release, Plaintiff’s claim against it was frivolous and seeks the imposition of sanctions pursuant to MCR 1.109(E)(6). In light of this Court’s above-stated conclusions, there is no basis for sanctions under MCR 1.109(E)(6).

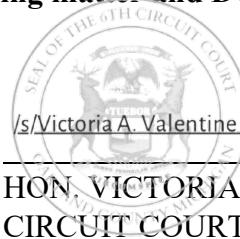
ORDER

Based upon the foregoing opinion, the Court hereby orders that:

Defendant, NAI Farbman's Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(7) is **GRANTED** as to Count III (Innocent Misrepresentation) and is otherwise **DENIED**. Farbman's request for sanctions under MCR 1.109(E)(6) is **DENIED**.

IT IS SO ORDERED.

This Order DOES NOT resolve the past pending matter and DOES NOT close the case.



/s/Victoria A. Valentine

HON. VICTORIA A. VALENTINE
CIRCUIT COURT JUDGE

Dated: 8/14/24