

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

BEAUTY FUSION AESTHETICS, LLC,
a Michigan limited liability company,

Plaintiff,

v.

THE NEW 555 COMMERCIAL LLC,
a Michigan limited liability company,

Defendant, and

ICON ANTI-AGING AND AESTHETICS PLUS,
a Michigan professional limited liability company,

Nominal Defendant.

Case No. 2023-200652-CB

Hon. Victoria Valentine

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OPINION AND ORDER REGARDING DEFENDANT’S MOTION FOR SUMMARY DISPOSITION

At a session of said Court held on the
17th day of August 2023 in the County of
Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court on Defendant, THE NEW 555 COMMERCIAL LLC’s (“555”) motion for Summary Disposition under MCR 2.116(C)(8) and (C)(10). The parties appeared on August 16, 2023, for oral argument at which time the Court took the matter under advisement. The Court, having read the briefs, having heard oral argument, and being fully advised in the premises, hereby DENIES Defendant’s motion for the reasons set forth below.

PERTINENT STATEMENT OF FACTS

Plaintiff, Beauty Fusion Aesthetics, LLC ("Beauty Fusion") signed a Lease Agreement (the "Lease") with Defendant in 2020, which provides in part:¹

1. LEASE.

Landlord, in consideration of the rents to be paid and the covenants and agreements to be performed by Tenant, does hereby demise and lease unto Tenant that certain premises located in the Building (defined below) known as **Suite 20U (the "Premises") having an area of 1,975 rentable square feet (1,763.4 usable square feet plus 12% common area factor)** (the "Premises Floor Area") (measured to the middle of the side walls and to the exterior of the front and rear walls of the Premises, and not including service corridors), as shown on the *Location Plan attached hereto as Exhibit "A"* and being located in the Building (as defined herein), together with the non-exclusive right and easement to the use of the parking and common facilities (the "Common Areas") which may from time to time be furnished by Landlord in common with Landlord and the tenants and occupants (their agents, employees, customers and invitees) of the Building in which the Premises are located, and of Landlord's other adjacent buildings now or hereafter constructed, if any. The "Building" refers collectively to the group of buildings in the City of Birmingham, Michigan commonly known as 555 South Old Woodward and being situated on land bounded by South Old Woodward Avenue, Haynes Street, South Woodward Avenue, and Hazel Street (the "Land") . . .²

The referenced "Location Plan," which was attached to the Lease, is blank:

¹ See ¶ 1 of Complaint. (Bold in original; italics added).

² See Exhibit 1 attached to Complaint.

EXHIBIT A
LOCATION PLAN

[to be inserted]

The Lease also contains an exclusivity provision that provides:

During the Term, Tenant shall continuously use and use and occupy the Premises as a Medical Spa with services that include, but not limited to: non-invasive cosmetic procedures injectable treatments (neurotoxins, dermal fillers, collagen, PRP), energy based aesthetics treatment (laser, radiofrequency, ultrasound, body contouring), Micro needling for skin treatments, chemical peels facials, PRP treatments (injectable, facial, hair loss), teeth whitening, skin care products . . . Landlord warrants that they will not lease retail space to a medical spa that performs similar services to the primary services of Tenant.”³

Plaintiff alleges that “[t]wo years into the Agreement, upon information and belief, 555 entered into a lease with Icon [Anti-Aging and Aesthetics PLLC (“Icon”)], which advertises itself as providing the same services as Beauty Fusion, which constitutes a direct violation of the Exclusivity and Non-competition Provision [of the Lease].”⁴

Beauty Fusion then filed the instant complaint alleging breach of contract. 555 now files this motion for summary disposition, arguing that Beauty Fusion misconstrues the exclusivity provision contained in the Lease, which provides that Defendant agreed not to lease “retail space” to another “medical spa.” Defendant argues that Icon is a medical doctor’s office, which is located in the designated office section, not retail section of the building.

³ See Exhibit 1, ¶5a attached to the Complaint. (Emphasis added).

⁴ See ¶¶ 3 and 29 of Complaint.

STANDARD OF REVIEW

A Motion under MCR 2.116(C)(8) may be granted where “[t]he opposing party has failed to state a claim on which relief can be granted.” When deciding a motion on this ground, a court may consider only the parties’ pleadings. MCR 2.116(G)(5). “[A]ll well-pleaded allegations are accepted as true, and construed most favorably to the non-moving party.” *Wade v Dep’t of Corrections*, 439 Mich 158, 162-163 (1992). “A mere statement of a pleader’s conclusions and statements of law, unsupported by allegations of fact, will not suffice to state a cause of action.” *Varela v Spanski*, 329 Mich App 58, 79 (2019) (plaintiff failed to plead facts in support of his claim but instead made conclusory statements and conclusions of law). A motion under MCR 2.116(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*, 439 Mich at 163. Because Michigan is a notice-pleading jurisdiction, a complaint is required to contain only enough information “reasonably to inform the defendant of the nature of the claim against which he must defend.” *Veritas Auto Machinery, LLC v FCA Int’l Operations, LLC*, 335 Mich App 602, 615 (2021); MCR 2.111(B)(1).

A Summary Disposition under MCR 2.116(C)(10) may be granted where “[e]xcept as to the amount of damages, 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.” This motion tests the factual sufficiency of the complaint and “must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact.” MCR 2.116(G)(4). The moving party bears the initial burden of supporting its position. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 (1999). “Affidavits, depositions, admissions, or other documentary evidence in support of the

grounds asserted in the motion are required . . . when judgment is sought based on [MCR 2.116(C)(10)].” MCR 2.116(G)(3)(b).

“The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.” *Smith*, 460 Mich at 455 (citations omitted).

In evaluating a motion for summary disposition on this ground, a trial court must consider any affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, subject to the limitations in MCR 2.116(G)(6) (material submitted for consideration must be admissible as evidence). MCR 2.116(G)(5). This evidence should be considered in the light most favorable to the nonmoving party. *Brown v Brown*, 478 Mich 545, 551-552 (2007).

MCR 2.116(C)(8) motions are distinct from (C)(10) motions: (C)(8) motions denounce a claim’s legal sufficiency and require the court to consider evidence only from the pleadings, while (C)(10) motions denounce a claim’s factual sufficiency and allow the court to consider evidence beyond the pleadings. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160 (2019). Courts should be careful to analyze the summary disposition motion under the correct standard. See *id.* “While the lack of an allegation can be fatal under MCR 2.116(C)(8), the lack of evidence in support of the allegation cannot.” *Id.* at 162 (“the Court of Appeals erroneously conducted what amounted to analysis under MCR 2.116(C)(10) in deciding a motion under MCR 2.116(C)(8) by

requiring evidentiary support.)

Here, both parties attach exhibits to their respective submissions and rely on documentary evidence beyond the pleadings to support their respective positions, including but not limited to affidavits.

ANALYSIS

The goal of contract interpretation is to read the document as a whole and apply the plain language used in order to honor the intent of the parties. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529 (2007). "Contracts must be construed so as to give effect to every word or phrase as far as practicable." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467 (2003). If the language is clear and unambiguous, the contract must be interpreted and enforced as written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich. 105, 111 (1999).

"The initial question whether contract language is ambiguous is a question of law. If the contract language is clear and unambiguous, its meaning is a question of law. Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact." *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323 (1996). If the meaning of an agreement is ambiguous or unclear, the trier of fact is to determine the intent of the parties. *UAW-GM Human Res Ctr v KSL Recreation Corp*, 228 Mich App 486, 492 (1998).

A contract is ambiguous if "its provisions are capable of conflicting interpretations." *Klapp*, 468 Mich at 467. The Court should interpret the words in a contract according to their ordinary meaning, and a dictionary may be used to determine the ordinary meaning of a word or a phrase. *Vushaj v Farm Bureau General Ins Co of Michigan*, 284 Mich App 513, 515–516 (2009). The Court must not read words into a contract that are simply not

there. *Terrien v Zwit*, 467 Mich 56, 75 (2002). The use of an undefined term does not automatically render a contract ambiguous, and dictionary definitions may be used to determine the plain and ordinary meaning. *Terrien*, 467 Mich at 76; *Vushaj*, 284 Mich App at 515–516.

In *Klapp*, our Supreme Court considered when relevant extrinsic evidence may be considered to aid in the interpretation of an ambiguous contract. *Klapp*, 468 Mich at 470. Quoting *Edoff v Hecht*, 270 Mich 689, 695-696 (1935), the Court explained that extrinsic evidence can be used to interpret an ambiguous contract “‘where the language of the instrument itself taken alone is such that it does not clearly express the intention of the parties or the subject of the agreement.’ ” *Klapp*, 468 Mich at 470.

Further, the rule of interpreting a contract against the drafter, “contra proferentem,” is a tool to be used by the finder of fact in resolving an ambiguous contract “only if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the jury unable to determine what the parties intended their contract to mean.” *Klapp*, 468 Mich at 471-472. “The rule of contra proferentem is a tool to be used by a finder of fact in resolving an ambiguous contract not a tool to be used by the Court at the summary disposition stage.” *Kemp v Allen*, 2017 WL 2463399 * 3 n2, unpublished opinion of the Court of Appeals.

Here, Defendant 555 claims its 555 Building is a mixed-use development consisting of specific areas designated by the following uses- retail, office, residential and parking.⁵ The Lease, however, while referencing a “Location Plan,” attaches a blank Location Plan as its Exhibit A. Consequently, the Court is unable to determine and compare, from the lease, the location of these designated areas—the “retail” space area where Plaintiff is located and the “office” space

⁵ Affidavit of John J. Reinhart: Defendant’s MSD Exhibit 1.

area where Icon is located.

The pivotal exclusivity provision of the **Retail** Lease at issue provides:

“Landlord warrants that they will not lease **retail space** to a medical spa that performs similar services to the primary services of Tenant.” (¶15(a) of Lease; emphasis added).

And Section 15(b)(ii), to which Defendant 555 cites, provides:

(ii) "Commercial Rental Area" as used herein, shall be the sum of the rentable areas on all floors of the retail store space and office space within the Building, and for the purposes hereof. Commercial Rentable Area equals **89,539** square feet.

However, the Lease fails to define the terms “retail” space and “office space” as used therein. “Retail” is defined by the Merriam Webster dictionary as “to sell in small quantities directly to the ultimate consumer.” “Office” is defined by the Merriam Webster dictionary as:

a place where a particular kind of business is transacted, or a service is supplied: such as

a : a place in which the functions of a public officer are performed

b: the directing headquarters of an enterprise or organization

c: the place in which a professional person conducts business.

Here, the Court finds that dictionary definitions do not assist the Court in revealing the plain meaning of the pivotal terms— “retail” and “office”, which are undefined and open to more than one reasonable interpretation. The Court finds that the language used in the lease does not clearly express the intention of the parties. Therefore, its interpretation is a question of fact.

Defendant’s Motion under MCR 2.116(C)(8) and (C)(10) is DENIED.

Defendant shall file an Answer to the Complaint within 14 days of the date of this Order.

IT IS SO ORDERED.

This is NOT a final order and does NOT close out the case.



DATED: 8/17/23