

Superior Court
of the
State of Delaware

Jan R. Jurden
President Judge

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Date Submitted: August 16, 2019
Date Decided: September 13, 2019

RE: Mohammed Mian v. Omer Sekerci
C.A. No. N17C-05-585 JRJ

Dear Counsel:

The Court is in receipt of Defendant/Counterclaim Plaintiff Omer Sekerci's Motion for Summary Judgment,¹ Plaintiff/Counterclaim Defendant Mohammed Mian's Response in Opposition to Defendant/Counterclaimant Omer Sekerci's Motion for Summary Judgment,² Plaintiff Mian's Supplemental Memorandum,³ and Defendant/Counterclaim Plaintiff Sekerci's Supplemental Memorandum.⁴ For the reasons explained below, Defendant/Counterclaim Plaintiff Omer Sekerci's Motion is **DENIED in part and GRANTED in part**.

¹ Defendant/Counterclaim Plaintiff Omer Sekerci's Motion for Summary Judgment ("Sekerci's Mot. Summ. J."), (Trans. ID. 63003585).

² Plaintiff/Counterclaim Defendant Mohammed Mian's Response in Opposition to Defendant/Counterclaimant Omer Sekerci's Motion for Summary Judgment ("Mian's Resp."), (Trans. ID. 63099649).

³ Plaintiff Mian's Supplemental Memorandum ("Mian's Supp. Memo."), (Trans. ID. 64082838).

⁴ Defendant/Counterclaim Plaintiff Sekerci's Supplemental Memorandum ("Sekerci's Supp. Memo."), (Trans. ID. 64105378).

Facts

Plaintiff Mohammed Mian (“Mian”) began Gino’s Pizza and Deli (“the Business”) in the mid-1990s and rented the property for the Business from Pettinaro Enterprises, LLC.⁵ On July 1, 2005, Mian entered into a Business Lease Agreement (the “Business Lease Agreement”) with Defendant/Counterclaim Plaintiff Omer Sekerci (“Sekerci”) for a 10-year term.⁶ Under the Business Lease Agreement, Mian agreed to lease to Sekerci “the business, including all equipment as listed in Exhibit ‘A’ [of the Business Lease Agreement].”⁷ Mian assigned his leasehold interest with Pettinaro Enterprises, LLC to Sekerci, which ran concurrently with the Business Lease Agreement.⁸

As required under the Business Lease Agreement, Sekerci provided Mian with 60 days’ notice of non-renewal of the Business Lease Agreement at the end of its term.⁹ Neither Mian nor Sekerci dispute this fact.¹⁰ The Business Lease Agreement states that upon termination of the lease:

- (1) The Lessee [Sekerci] agrees to contact Lessor [Mian] approximately one (1) week prior to moving out to schedule an appointment for final inspection and return of key;¹¹
- (2) The Lessee [Sekerci] is required to return to Lessor [Mian], in running condition, all equipment listed in Exhibit A of the Business Lease Agreement;¹² and
- (3) Two weeks after termination of the Business Lease Agreement, Lessor [Mian] is required to refund Lessee [Sekerci] the original deposit of \$30,000.00.¹³

Before termination of the Business Lease Agreement, Pettinaro Enterprises, LLC extended the property leasehold interest with Sekerci.¹⁴ Sekerci continues to run the Business at the leased property.¹⁵

⁵ Compl. ¶¶ 4-6, (Trans. ID. 60639987).

⁶ *Id.* ¶ 9; Sekerci’s Mot. Summ. J., Ex. A (“Business Lease Agreement”); Mian’s Resp. ¶ 1.

⁷ Business Lease Agreement ¶ 1, Ex. A (“Equipment List”).

⁸ *Id.* ¶ 6; Sekerci’s Mot. Summ. J. ¶ 3, Ex. C (“Assignment of Lease and Consent of Landlord”).

⁹ Sekerci’s Mot. Summ. J. ¶ 4, Ex. E; *see* Business Lease Agreement ¶ 13.

¹⁰ *Id.* ¶ 4; Compl. ¶ 10.

¹¹ Business Lease Agreement ¶ 13; Sekerci’s Mot. Summ. J. ¶ 4; Mian’s Resp. ¶ 4.

¹² *Id.* ¶ 14; Sekerci’s Mot. Summ. J. ¶ 4.

¹³ *Id.* ¶ 5(a); Sekerci’s Mot. Summ. J. ¶ 5.

Procedural History

On May 24, 2017, Mian filed a Complaint alleging breach of contract, unjust enrichment as an alternative to breach of contract, and conversion in regards to the equipment. Mian alleges Sekerci failed to return “the Business” to Mian at the term of the Business Lease Agreement, and thus, breached the terms of the contract.¹⁶ In the Complaint, Mian alleges Sekerci did not allow Mian to perform the final inspection of the Business, failed to return the key, and failed to return the equipment.¹⁷ In addition, Mian alleges that Sekerci has been unjustly enriched because he continues to enjoy the benefit of the Business without paying for it.¹⁸ Last, Mian alleges conversion of the equipment listed in Exhibit A of the Business Lease Agreement because Sekerci failed to return it to Mian and continues to possess and use it in the operations of the Business.¹⁹ Sekerci filed a counterclaim against Mian for failing to return the original deposit to Sekerci at the term of the Business Lease Agreement.²⁰

Standard of Review

Summary judgment is appropriate if the moving party establishes there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.²¹ All facts are viewed in the light most favorable to the non-moving party to determine if there is any dispute of material fact.²²

Breach of Contract

A breach of contract claim requires a plaintiff to establish the existence of a contract, the breach of an obligation imposed by the contract, and damages as a result.²³ Sekerci argues that Mian cannot establish there was a breach of an

¹⁴ Sekerci’s Mot. Summ. J., Ex. D, at 66–8 (“Mian Dep. Tr.”).

¹⁵ Compl. ¶ 13; Mian’s Resp. ¶ 5.

¹⁶ *Id.* ¶ 18.

¹⁷ *Id.* ¶¶ 12, 32.

¹⁸ *Id.* ¶¶ 23, 25.

¹⁹ Compl. ¶¶ 32–3.

²⁰ Answer and Countercl. ¶¶ 13-5, (Trans. ID. 61375151).

²¹ Super. Ct. Civ. R. 56.

²² *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005) (quotations omitted).

²³ *VLIW Techn., LLC v. Hewlett Packard Co.*, 840 A.2d 606, 612 (Del. 2012).

obligation imposed by the Business Lease Agreement; and thus, summary judgment is appropriate.²⁴

Delaware adheres to the ‘objective’ theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party.²⁵ When a contract is clear and unambiguous, [the Court] will give effect to the plain meaning of the contract’s terms and provisions.²⁶ “A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction.”²⁷ Ambiguity exists “[w]hen the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings.”²⁸ The determination of ambiguity lies within the sole province of the court.²⁹

Sekerci maintains that the assignment terminated Mian’s property rights to the leased property and rendered the “return of key” provision in the Business Lease Agreement unenforceable.³⁰ Sekerci argues that after the execution of the Assignment, the key to the leased property no longer belonged to Mian, but rather to Sekerci—the assigned leaseholder.³¹ Sekerci cites to Paragraph 19 of the Business Lease Agreement which states “invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions thereof and the Agreement shall be construed . . . as though such invalid or unenforceable provision has been omitted.”³² Mian argues that the “return of key” provision indicates that Sekerci was obligated to return the “key to the Business”—not the physical key.³³ This includes the equipment, the property leased, and the business name.³⁴ Mian relies upon case law interpreting leases.³⁵

²⁴ Sekerci’s Mot. Summ. J. ¶ 8.

²⁵ *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (quotations omitted) (quoting *NBC Universal v. Paxson Commc'ns*, 2005 WL 1038997, at *5 (Del.Ch. Apr. 29, 2005)).

²⁶ *Id.* (quotations omitted) (citing *Rhone-Poulenc Basic Chems. Co. v. Amer. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).

²⁷ *Rhone-Poulenc Basic Chems. Co.*, 616 A.2d at 1195.

²⁸ *GMG Capital Inv., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012) (internal quotations omitted) (quoting *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

²⁹ *Osborn ex rel. Osborn*, 991 A.2d at 1160.

³⁰ Sekerci’s Supp. Memo. at 4; see Assignment of Lease and Consent of Landlord.

³¹ *Id.*

³² *Id.* at 6.

³³ Mian’s Resp. ¶ 4; Mian Dep. Tr. at 52–3; Mian’s Supp. Memo. at 3.

³⁴ *Id.*

In response to Mian's allegations regarding the final inspection of the Business and the return of the equipment, Sekerci contends he provided Mian the opportunity for a final inspection of the Business and "attempted multiple times to return the equipment to Mian, but Mian refused to accept the equipment."³⁶ Mian disputes these assertions and alleges that Sekerci's employees did not allow Mian to inspect the Business nor take the equipment back.³⁷

Sekerci further asserts Mian cannot establish he suffered damages.³⁸ Sekerci contends that Mian appears to seek specific performance under the terms of the Business Lease Agreement because he wants Sekerci to "return his business" back to him.³⁹ However, Mian asserts that the remedy he seeks is monetary damages—the value of the Business and the equipment at the term of the Business Lease Agreement.⁴⁰

Upon review of the Business Lease Agreement and its attached exhibits, the Court determines the provisions in controversy are clear and unambiguous.

First, although the Court finds the "return of key" provision in Paragraph 13 of the Business Lease Agreement is clear and unambiguous, the Court also finds that this provision, when read in conjunction with Paragraph 6, is ineffective, and therefore unenforceable.

Under Paragraph 6 of the Business Lease Agreement, Mian assigned his leasehold interest to Sekerci.⁴¹ The original Pettinaro Property Lease specifies that during the term of the lease, the key to the property belongs to the leaseholder.⁴² When Mian assigned his rights to the leased property, it included an assignment of his rights to the key to the property. Thus, the assignment rendered the "return of key" provision unenforceable because, at the end of the term of the Business Lease Agreement, Sekerci was the leaseholder and rightfully possessed the key to the leased property.

³⁵ See *Wilmington & N. R.R. Co. v. Del. Valley Ry. Co., Inc.*, 1999 WL 463705, at *3 (Del. Super. Ct. Mar. 30, 1999) ("Within every lease is a covenant, either express or implied, that tenant will surrender possession of the leased property upon the termination of the lease agreement.").

³⁶ Sekerci's Mot. Summ. J. ¶ 4.

³⁷ Mian Dep. Tr. at 58, 83.

³⁸ Sekerci's Mot. Summ. J. ¶ 9.

³⁹ *Id.* ¶ 10.

⁴⁰ Mian's Resp. ¶ 4, Ex. A ("Declaration of Mohammed Mian").

⁴¹ Business Lease Agreement ¶ 6.

⁴² *Id.*, Ex. B ¶ 10 ("Pettinaro Property Lease").

Paragraph 19 of the Business Lease Agreement states that any unenforceable provision in the Agreement “shall not affect the other provisions and the Agreement shall be construed . . . as though . . . such unenforceable provision has been omitted.”⁴³ Consequently, the unenforceable “return of key” provision in Paragraph 13 will be construed as omitted for purposes of interpreting the Business Lease Agreement. Thus, the Court finds Sekerci was not obligated to return the key to Mian.

The Court finds the provisions in Paragraphs 13 and 14 regarding the final inspection and the return of the equipment are clear and unambiguous. Under the Business Lease Agreement, Sekerci was obligated to contact Mian and schedule an appointment to allow Mian to inspect the Business prior to termination.⁴⁴ In addition, Sekerci was obligated to return the equipment listed in Exhibit A to Mian.⁴⁵ There is a genuine issue of material fact as to whether Sekerci fulfilled these obligations.

Both parties dispute what occurred regarding the equipment and the final inspection. There are genuine issues of material fact as to whether Sekerci allowed Mian to perform the final inspection in accordance with Paragraph 13, and whether Sekerci attempted to return the equipment to Mian as required under Paragraph 14. In addition, there is a dispute as to whether Mian attempted to retrieve his equipment from the leased property and Sekerci’s employees prohibited him from doing so.

Viewing in the light most favorable to the non-moving party, the Court finds there is a genuine issue of material fact as to whether Sekerci failed to perform and, therefore, breached the Business Lease Agreement. Thus, the Court holds Sekerci’s Motion for Summary Judgment on Mian’s breach of contract claim is **DENIED**.

Counterclaim

Sekerci maintains that, under the Business Lease Agreement, Mian was required to return the \$20,000.00 deposit within two weeks of the termination of the Business Lease Agreement.⁴⁶ Mian argues that Sekerci’s failure to fulfill his obligations under the Business Lease Agreement is a material breach of the

⁴³ Business Lease Agreement ¶ 19.

⁴⁴ *Id.* ¶ 13.

⁴⁵ *Id.* ¶ 14.

⁴⁶ Sekerci’s Mot. Summ. J. ¶ 15.

contract, and therefore, Mian's obligation to return the deposit is justifiably excused.⁴⁷

Summary judgment on Sekerci's counterclaim is inappropriate because there is a genuine issue of material fact as to whether Sekerci materially breached the Business Lease Agreement, which would excuse Mian's duty to return the deposit. A party's performance of a contractual obligation is justifiably excused if the other party to the contract materially breaches the terms of the contract.⁴⁸ The trier of fact must determine if Sekerci breached the Business Lease Agreement, and if so, determine whether the breach was material.⁴⁹ Thus, Sekerci's Motion for Summary Judgment on his breach of contract counterclaim is **DENIED**.

Conversion

Conversion is "any distinct act of dominion wrongfully exerted over the property of another, in denial of the [plaintiff's] right, or inconsistent with it."⁵⁰ In support of his motion, Sekerci relies upon *Kuroda* which states that a conversion claim is generally not a viable cause of action when the plaintiff's claim arises solely from a breach of contract.⁵¹ Sekerci argues that Mian's demand for the return of the equipment arises solely from the Business Lease Agreement, and thus, if a claim exists, it is a contract claim, not a tort claim.⁵² Further, Sekerci contends that Mian refused to take back his equipment and such refusal does not equate to a claim for conversion under a tort or contract theory.⁵³

Under Delaware law, "[w]here . . . the plaintiff's claim arises solely from breach of contract, the plaintiff generally must sue in contract not tort."⁵⁴ Thus, in order to assert a tort claim along with a contract claim, the plaintiff must generally

⁴⁷ Mian's Resp. ¶ 7.

⁴⁸ *Commw. Const. Co. v. Cornerstone Fellowship Baptist Church, Inc.*, 2006 WL 2567916 *19 (Del. Super. Ct. Aug. 31, 2006).

⁴⁹ *Id.* ("Whether a breach is material is a fact-sensitive analysis.")

⁵⁰ *Kuroda v. SPJS Holding, LLC*, 971 A.2d 872, 889 (Del. Ch. April 15, 2009) (internal quotations omitted) (quoting *Drug, Inc. v. Hunt*, 168 A. 87, 93 (Del.1933)).

⁵¹ Sekerci's Mot. Summ. J. ¶ 12; see *Kuroda*, 971 A.2d at 889.

⁵² *Id.*

⁵³ *Id.* ¶ 13.

⁵⁴ *Kuroda*, 971 A.2d at 889 (internal quotations omitted) (quoting *Data Mgmt. Internationale, Inc. v. Saraga*, 2007 WL 2142848, at *3 (Del. Super. Ct. July 25, 2007)).

allege that defendant violated a legal duty, apart from the duty imposed by the contract.⁵⁵

Here, Mian's conversion claim arises solely out of Paragraph 14 of the Business Lease Agreement.⁵⁶ Paragraph 14 states that Sekerci, as the Lessee, was obligated to return the equipment to Mian.⁵⁷ Sekerci's duty to return the equipment to Mian arises solely from the duty imposed under the terms of the Business Lease Agreement. Mian does not assert that Sekerci breached a legal duty separate from his contractual duty under Paragraph 14. Therefore, Sekerci's Motion for Summary Judgment on Mian's conversion claim is **GRANTED**.

Unjust Enrichment

Mian seeks unjust enrichment as an alternative to his breach of contract claim.⁵⁸ Unjust enrichment is a theory of recovery to remedy the absence of a formal contract.⁵⁹ "Although a party may at times plead both breach of contract and unjust enrichment claims, those instances are limited to cases where there is some question about the effectiveness or application of the contract at issue."⁶⁰ When there is an express contract governing the relationship of the parties, a claim of unjust enrichment arising from the same relationship is precluded.⁶¹

Here, neither party disputes the validity of the Business Lease Agreement. There is an express contract governing the relationship of the parties. The issue in dispute is not the contract's validity, but rather the parties' interpretations of the provisions and terms of the Business Lease Agreement. Accordingly, Sekerci's Motion for Summary Judgment on Mian's unjust enrichment claim is **GRANTED**.

⁵⁵ *Id.* (quotations omitted).

⁵⁶ Compl. ¶¶ 31–3.

⁵⁷ Business Lease Agreement.

⁵⁸ Mian's Resp. ¶ 5.

⁵⁹ *MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *24 (Del. Ch. May 5, 2010).

⁶⁰ *Encore Preakness, Inc. v. Chestnut Health & Rehab. Group, Inc.*, 2017 WL 5068753, at *4 (Del. Super. Ct. Nov. 1, 2017) (citing *Rosssdeutscher v. Viacom*, 768 A.2d 8, 23 (Del. 2001)).

⁶¹ *CIT Commc'ns Fin., Corp. v. Level 3 Commc'ns, LLC*, 2008 WL 2586694, at *14 (Del. Super. Ct. June 6, 2008).

* * *

In light of these rulings, the Parties shall submit a joint set of proposed jury instructions to the Court on or before the Final Office Conference scheduled on September 25, 2019.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Jan R. Jurden', with a long horizontal flourish extending to the right.

Jan R. Jurden
President Judge

JRJ:mls

cc: Prothonotary