

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

BINK PROPERTIES, LLC,
a Michigan limited liability company,

Plaintiff,

v

File No. 10-8254-CK
HON. PHILIP E. RODGERS, JR.

VERSATILE MORTGAGE FUNDING
CO., a Michigan domestic profit corporation,
and VERSATILE MORTGAGE, LLC, a
Michigan limited liability company, and
RANDALL BROWN, an individual,

Defendants.

Eric W. Phelps (P55375)
Attorney for Plaintiff

Deborah Lynch (P33418)
Attorney for Defendant Versatile Mortgage, LLC

pc: Versatile Mortgage Funding Co.
Randall Brown

**FINAL DECISION AND ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY DISPOSITION, PURSUANT TO MCR 2.116(C)(8)**

Plaintiff, Bink Properties, LLC (hereinafter "Bink"), is a Michigan limited liability company located in Traverse City, Michigan. Plaintiff filed its original Complaint against Defendants, Versatile Mortgage Funding Co. (hereinafter "Versatile Funding"), and Versatile Mortgage, L.L.C. (hereinafter "Versatile Mortgage"), on March 15, 2010. Bink subsequently

filed a First Amended Complaint on May 18, 2010.¹ Versatile Mortgage filed a Response to the original Complaint and the First Amended Complaint on April 12, 2010 and June 7, 2010, respectively. The First Amended Complaint lists the following causes of action against the Defendants: action for breach of lease; action for damages; breach of implied lease; breach of implied promise to pay for the use and occupancy of a leasehold; ratification of lease and fraud. Versatile Mortgage also filed a Motion for Summary Disposition, Pursuant to MCR 2.116(C)(8) on April 12, 2010. The applicable facts are as follows.

On March 15, 2004, Versatile Funding entered into a written Lease Agreement with Howard Energy Co., Inc., the owner of 13561 West Bayshore Drive, Traverse City, Michigan, where the subject leasehold, Suite 2050, was located at the time that the lease was signed. Suite 2050 consisted of 1,494 square feet of office space and 232.4 square feet of kitchen and common space. Rent was \$29,862 annually, for a term of five years. The first lease was signed by Gregory Blanche, on behalf of Howard Energy Co., Inc., and Craig Gibson, President of Versatile Funding. On January 28, 2005, the term of the lease between Howard Energy Co., Inc. and Versatile Funding was extended from April 30, 2009 through June 30, 2010 and was substantiated by a mutually signed, written letter amendment dated June 28, 2005. The written amendment was signed by David B. Howard, Executive Vice President of Howard Energy Co., Inc., and Craig Gibson.

On July 1, 2005, Versatile Funding entered into a second written Lease Agreement with Howard Energy Co., Inc. for Suite 2000, located in the same building as the primary leasehold property. Under this lease, the tenants had an additional 753.7 square feet of occupancy and were to pay \$15,957 annually. The second lease was signed by David B. Howard, Executive Vice President of Howard Energy Co., Inc. on behalf of the Landlord, and Craig Gibson.

On or about August 10, 2007, Howard Energy Co., Inc. sold the building located at 13561 West Bayshore Drive to Bink. The Assignment was signed by David B. Howard and Linda Wehr, President of Bink. Concurrent with the sale of the building, Howard Energy Co., Inc. assigned its interests as landlord to Bink for the following leases: JGB Distributing, Inc.; Versatile Funding (Suite 2050) and Versatile Funding (Suite 2000).

¹ Attorney Deborah Lynch filed her appearance to act as counsel for Versatile Mortgage, LLC on April 12, 2010. Plaintiff added Randall Brown, an individual, as a defendant to this litigation in its First Amended Complaint. As of the date of this Order, defendants Versatile Mortgage Funding, Co. and Randall Brown remain unrepresented parties in this litigation. However, see *infra* at FNs 23 and 24.

The Court now issues this decision and order, and for the reasons stated herein, grants the Defendant Versatile Mortgage's Motion for Summary Disposition, Pursuant to MCR 2.116(C)(8).

STANDARD OF REVIEW

The purpose of a motion for summary disposition is to test the legal validity of claims or defenses and to expose a claim or defense by requiring the opposite party to support the allegations in his or her pleadings. Further, it serves to determine whether or not a trial on the merits is required to resolve the action or some portion of it.

MCR 2.116(C)(7)

A motion for summary disposition pursuant to MCR 2.116(C)(7) states that a claim may be barred because of:

[r]elease, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or disposition of the claim before commencement of the action.

In reviewing a motion under MCR 2.116(C)(7), the Court must accept as true the plaintiff's well-pleaded allegations and construe them in the plaintiff's favor. *Abbott v John E. Green Co*, 233 Mich App 194, 198; 592 NW2d 96 (1998). The Court considers the pleadings, affidavits, depositions, admissions, and documentary evidence filed or submitted by the parties to determine whether the claim is barred by law. See MCR 2.116(G)(5) and *Employers Mut Cas Co v Petroleum Equip, Inc*, 190 Mich App 57, 62; 475 NW2d 418 (1991). If no facts are in dispute, and reasonable minds could not differ on the legal effect of those facts, whether the plaintiff's claim is barred by the statute of limitations is a question for the court as a matter of law. However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997), quoting *Baker v DEC Int'l*, 218 Mich App 248, 252-253, 553 NW2d 667 (1996). See also, *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (2000).

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc*, 167 Mich App 202, 205; 421 NW2d 631 (1988). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. *NuVision v Dunscombe*, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). See also, *Roberts v Pinkins*, 171 Mich App 648, 651; 430 NW2d 808 (1988).

ARGUMENT

Plaintiff claims that on or about June 11, 2008, Randall S. Brown who Plaintiff alleges was principle of Versatile Funding, formed Versatile Mortgage which listed the leasehold property as its registered office. Plaintiff alleges that Versatile Funding and Versatile Mortgage continued to occupy the leasehold pursuant to the two leases until March 2, 2010, when Mr. Brown sent an email to Bink's President stating the suite had been vacated on February 28, 2010, and that Versatile Mortgage would no longer be utilizing the leasehold. At the time Defendant vacated the leasehold premises, four months remained under the Lease Agreements. Plaintiff posits that Randall S. Brown misrepresented himself as an agent of Versatile Funding with the authority to act on behalf of the business. Therefore, when Versatile Mortgage/Brown vacated the leasehold prior to the termination of the Lease, it was a breach of contract. Plaintiff has calculated the rent due under the Lease Agreements as \$15,274.

Further, the Plaintiff alleges: that Defendants made unsatisfactory and/or incomplete alterations to the physical structure and interior elements of the leasehold premises contrary to the language in the Lease Agreements; Defendants removed various interior elements from the premises prior to vacating the leasehold, and Defendants left the leasehold premises without properly cleaning it or removing certain discarded items. The Plaintiff explains that to return the leasehold premises to a condition suitable for rental, the Plaintiff will have to incur costs to repair the material alterations, clean the spaces and remove the discarded items. The Plaintiff estimates said total costs to be \$12,264.80.

Plaintiff appears to argue in the alternative that Versatile Funding assigned the Lease to Versatile Mortgage. If the Lease was in fact assigned, Versatile Mortgage would be subject to the same terms and conditions as stated in the original Lease Agreements.

Defendant Versatile Mortgage acknowledges that a change of building ownership occurred at the end of 2007 and notes that Plaintiff willingly accepted rental payments delivered by Versatile Mortgage after said change in ownership. Defendant also acknowledges that it occupied space within the subject premises, however, Versatile Mortgage argues it did not have a written contract with Bink or with Defendant Versatile Funding. Versatile Mortgage denies the Plaintiff's claim that Randall S. Brown is or has ever been a principle, as owner, partner, shareholder, resident agent, officer of Defendant or in any other capacity, of Versatile Funding. Versatile Mortgage denies assuming the leasehold premises and argues that Mr. Brown was an employee who began working for Versatile Funding in the fall of 2004. In June of 2008, Mr. Brown formed Versatile Mortgage as a separate and distinct entity from Versatile Funding. Moreover, Versatile Mortgage claims it made numerous attempts to negotiate with Bink a lease for its own benefit and admits to occupying the subject leasehold. Defendant asserts that verbal notice was provided to Plaintiff before February 1, 2010, and written notice on February 12, 2010 that Defendant would be vacating the premises. Regarding the Plaintiff's claim for damages, Versatile Mortgage denies making any alterations to the premises and/or removing anything other than Defendant's property. Defendant asserts that if any alterations were made to the premises, they were done by Craig Gibson and/or representatives of Howard Energy. Approval for any alterations would have been made by Versatile Funding and/or Craig Gibson.

Pursuant to MCR 2.116(C)(7), the Defendant maintains that this Court should grant summary disposition because a claim may be barred based on the statute of frauds and there is no evidence of a writing creating a tenancy between Bink and Versatile Mortgage. Defendant also argues that Plaintiff has failed to allege any assignment made by Versatile Funding, approved in writing by the Landlord, to Versatile Mortgage, and therefore Plaintiff's claims should be dismissed pursuant to MCR 2.116(C)(8). Further, Plaintiff has: failed to state there is a valid, enforceable contract between the Plaintiff and Versatile Mortgage; failed to show an offer and acceptance between the parties; failed to establish Defendant's obligation to Plaintiff and to show how Defendant has refused to perform any contractual obligation. Plaintiff has not

demonstrated that Versatile Mortgage is the approved assignee of the Lease Agreement nor provided evidence of any contractual liability or privy of contract between Bink and Versatile Mortgage.

Plaintiff's Response asserts that the Court should deny Versatile Mortgage's Motion for Summary Disposition because the Plaintiff's claims are not barred by the statute of frauds and because the Plaintiff has stated claims upon which relief can be granted.

ANALYSIS

1. AGENCY

Plaintiff has alleged facts and brought claims based on it's perception that Versatile Funding and Versatile Mortgage were one and the same entity. Plaintiff argues that Brown misrepresented that he was a partner of Craig Gibson (i.e. a partner of Versatile Funding) and that he had authority to act on behalf of Versatile Funding.² Bink relied on Brown's self titled job description as a "manager by default,"³ concluding that he was an authorized agent of Versatile Funding and that Versatile Funding remained the lessee of the premises.⁴

An agency relationship arises out of an express or implied contract.⁵ The mere reference to an agreement by such words as "agency agreement" and to a party thereto by the word "agent" is not decisive that the relationship created thereby was an "agency."⁶ An agent represents his or her principal in business dealings with another entity; conversely, a "servant" is an employee and subject to the principal's direction and control in work intrusted [sic] to the employee.⁷ It is the Defendant's position that Brown was merely an employee of Versatile Funding and therefore lacked the authority as provided by an agency relationship.⁸

Despite the allegations and claims of the parties, this Court does not believe it is relevant or necessary to determine whether or not Brown acted as an agent of Versatile Funding. Regardless of whether Brown was an agent or simply an employee of Versatile

² Affidavit of Lisa Wehr, May 27, 2010; paragraph 3; see also Plaintiff's Exhibit H submitted with Plaintiff's Response in Opposition to Defendant Versatile Mortgage's Motion for Summary Disposition.

³ Deposition of Randall Brown, May 12, 2010; page 7, line 3.

⁴ *Supra* at FN 2; paragraph 5.

⁵ *Burton v Burton*, 332 Mich 326; 51 NW2d 297 (1952).

⁶ *Stephens v Detroit Trust Co.*, 284 Mich 149; 278 NW 799 (1938).

⁷ *Saums v Parfet*, 270 Mich 165; 258 NW 235 (1935).

⁸ *Supra* at FN 3; page 7, line 19.

Funding, Versatile Mortgage is not liable to the Plaintiff for the 4 months of rent due and owing on the leasehold property.

As an agent of Versatile Funding, Brown would have been acting solely on the behalf of said entity and his actions cannot be imputed to Versatile Mortgage. Authority exercised by Brown with regard to Versatile Funding's lease in no way implicates Versatile Mortgage as a party liable for rental payments or breach of the covenant to pay rent. If Bink accepted Brown as an agent of Versatile Funding, as it claims, Bink's suit against Versatile Mortgage is moot. As an agent, Brown could have only bound to or breached agreements entered into or ratified by Versatile Funding.

As an employee, Brown paying the rent for the benefit of his employer to secure his own employment, does not constitute a contractual obligation between the Plaintiff and Versatile Mortgage or Brown. Such behavior does not establish a contract between Gibson and Brown nor does it create an additional business relationship between the two. There was never a contract, express or implied, between Brown and Gibson regarding the merging of Versatile Funding and Versatile Mortgage. It is unclear if Gibson was even made aware of the existence of Versatile Mortgage. Thus, as an employee of Versatile Funding, Brown could not bind Versatile Mortgage.

Liability for vacating the premises with 4 months remaining on the lease falls entirely on Versatile Funding, not Versatile Mortgage. No other parties are contractually bound by the lease agreements the Plaintiff seeks to enforce.

2. ASSIGNMENT

In the August 10, 2007 Assignment and Assumption, Howard Energy Co., Inc. assigned its right and title to all the applicable leases associated with the South West Bayshore Drive premises to Bink. Exhibit A attached to the Assignment listed the tenants as JGB Distributing, Inc. leasing Suite 2100 and Versatile Mortgage Funding Co. leasing Suites 2050 and 2000. With regard to the March 15, 2004 lease and the July 1, 2005 lease between the original lessor and Versatile Funding, both agreements discuss assignment and subletting of the premises in paragraph 8, which states as follows:

Tenant shall not assign, or in any way encumber this Lease, no any part, right or interest thereof, nor shall Tenant let or sublet or permit any part of the premises to be used or occupied by other for any reason whatsoever, unless Landlord shall consent thereto in writing in each and every case and instance, which consent

shall not be unreasonably withheld; a requirement that Tenant shall remain fully liable on this Lease shall not be deemed an unreasonable requirement to the giving of consent.

Pursuant to paragraph 8, regarding assignment and subletting, Versatile Funding was proscribed from transferring or assigning its interest in the premises without the Landlord's permission in writing. Bink has failed to produce any assignment, assumption or transfer evidencing that Versatile Funding agreed to confer its interest in the lease premises to Versatile Mortgage. Bink also lacks evidence and/or any documentation that, as Landlord, it agreed to or approved any such assignment or sublease between Versatile Funding and Versatile Mortgage. No writing has been produced and Bink has never claimed to have consented to an assignment or sublease by Versatile Funding.

However, had there been an assignment of Versatile Funding's interest in the leased premises to Versatile Mortgage, the original lessee would still be liable to Bink for rent. Accepting rent from an assignee, with knowledge of the assignment, is ordinarily conclusive evidence of consent to the assignment, or waiver of the necessity for prior consent since it is recognition of the assignee as tenant.⁹ Thus, if Bink had knowledge of an assignment of Versatile Funding's lease and subsequently accepted rent from the assignee (i.e. Versatile Mortgage) then Bink would be estopped from claiming a violation of the covenant in the lease against assignment. Furthermore, where a lease containing an express covenant to pay rent has been assigned, the fact that the lessor accepts rent from the assignee does not release the lessee from his liability for rent during the remainder of the lease term.¹⁰ An assignment terminates privity of estate, but not privity of contract.¹¹ The continued liability of a lessee under an express covenant to pay rent, for rent accruing subsequent to the assignment of the lease, is not affected by the fact that the lessor has received payment from the assignee; nor does the institution of an action by the lessor against the assignee, by itself, affect the lessee's liability.¹² An assignee is personally liable for rents accruing while he holds the leasehold, but the

⁹ AM JUR 2d §939, p 872.

¹⁰ See *Stewart v Sprague*, 71 Mich 50; 38 NW 673 (1888); *Hartz v Eddy*, 140 Mich 479; 103 NW 852 (1905); *Steinberg v Fine*, 225 Mich 281; 196 NW 367 (1923). See also, 36 ALR 316.

¹¹ *Id.*

¹² AM JUR 2d §956, p 879-880.

assignee's liability to the lessor is dependant on privity of estate.¹³ Any act terminating the assignee's privity of estate divests the assignee of future liability to the lessor.¹⁴

There is insufficient evidence to demonstrate that the lease agreements, naming Versatile Funding as Tenant, were ever assigned to Defendant Versatile Mortgage. Nevertheless, had the leases been assigned to Versatile Mortgage, the original agreements were between Howard Energy Co, Inc. (later assigned to Bink) and Versatile Funding and Versatile Funding was legally bound to pay rent during the lease term based on the privity of contract. Once Versatile Mortgage vacated the leasehold premises there would no longer be any privity of estate with Bink. Any liability to pay rent would have ceased for Versatile Mortgage and privity of estate would have reverted back to Versatile Funding.

3. SUBLEASE

This Court finds that, at the most, Versatile Mortgage was a sublessee of Versatile Funding. A sublease differs from an assignment of a lease in that an assignment is a complete transfer or sale of the lease, whereas a sublease creates a new contract between the lessee and the sublessee to which the original lessor is not a party.¹⁵ There is no privity of contract between the sublessee and the original lessor.¹⁶ A sublease does not transfer the lessee's rights or obligations under the lease.¹⁷ An agreement, express or implied, by a lessee allowing a third person to use the leased premises while the lessee retains legal possession does not constitute a violation of the covenant in a lease against assignment or subletting, but merely amounts to a license to use the property.¹⁸ Subletting does not affect the lessee's liability to the lessor for the payment of rent or the performance of the covenants of the lease and the original lessee is liable for any violation of the covenants of the lease by the subtenant, regardless of whether the lessee knew of the violation.¹⁹ There is no privity of contract or estate between the original lessor and the sublessee because the lease does not pass to the subtenant and there is no contractual relation between the subtenant and lessor.²⁰ Whatever rights a subtenant has are derived from

¹³ 70 ALR 1102.

¹⁴ *Id.*

¹⁵ 41 Tenth Decennial Digest, Landlord & Tenant, §79(1), p 1105.

¹⁶ 41 Tenth Decennial Digest, Landlord & Tenant, §80(1), p 1109.

¹⁷ *Supra* at FN 13; p 1106.

¹⁸ *Fairbanks v Power Oil Co of Ohio*, 81 Ohio App 116; 77 NE2d 499 (1945); AM JUR 2d §932, p 860.

¹⁹ AM JUR 2d §992, p 907.

²⁰ AM JUR 2d §999, p 913.

the sublease and are subject to the terms of the original lease.²¹ Because there is no privity either of contract or estate between a landlord and subtenant, the subtenant incurs no liability directly to the lessor, merely because of the subletting, either for payment of rent reserved in the original lease or for the performance of the other covenants on the part of the lessee.²²

While Versatile Mortgage occupied the leasehold premises, Brown signed the rent checks on behalf of Versatile Funding, but used his own funds. Payment in this manner, in effect, merely eliminated the lessee or ‘middleman’ from the payment transaction in the sublease situation. Brown was not acting as an agent or assignee, but as both a sublessee and employee of the sublessor.

Plaintiff has failed to establish any contractual liability or privity of contract between itself and Versatile Mortgage. Any recovery of damages for rent due must be sought against Versatile Funding as lessee. For the reasons stated herein, Defendant Versatile Mortgage is entitled to summary disposition pursuant to MCR 2.116(C)(8).²³ Plaintiff’s complaint is dismissed with prejudice, and this final order resolves all issues and closes the case.²⁴

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

²¹ *Id.*

²² AM JUR 2d §1000, p 914.

²³ Randall Brown is also entitled to summary disposition for the same reasons as stated in the preceding argument. Brown, as owner of Versatile Mortgage, cannot be held personally liable for any unpaid rent relating to the leasehold.

²⁴ Pursuant to the above argument, this Court finds there are insufficient facts and/or evidence to establish that Brown acted as an agent of Versatile Funding. Therefore, Versatile Funding is entitled to summary disposition.