STATE OF MICHIGAN

COURT OF APPEALS

FLAGSTAR BANK,

Plaintiff/Counter Defendant-Appellee,

v

STERLING GEE and MICHAEL PAN,

Defendants/Counter Plaintiffs-Appellants,

and

MING FAR INVESTMENTS, L.L.C.,

Intervening Counter Plaintiff-Appellant.

UNPUBLISHED
July 9, 2013

No. 306287
Oakland Circuit Court
LC No. 2010-107430-CK

Before: WILDER, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Appellants Sterling Gee, Michael Pan, and Ming Far Investments, L.L.C. (hereinafter "Ming Far") appeal as of right from the trial court's order denying appellants' motion for summary disposition, granting plaintiff summary disposition, and awarding plaintiff judgment of $1,633,421.19 plus interest and costs, in this action to enforce defendants Gee's and Pan's personal guaranties of a commercial loan made by plaintiff to Ming Far. We affirm.

I. BACKGROUND

In November 2006, Ming Far entered into a loan agreement with plaintiff to enable Ming Far to purchase a shopping center. Defendants Gee and Pan provided guaranties for the loan. The loan agreement required Ming Far to maintain a specified debt-service ratio to show that it had a sufficient income flow to pay off the loan. This requirement is set forth in the parties' agreement as follows:

> **AFFIRMATIVE COVENANTS.** Borrower covenants and agrees with Lender that, so long as this Agreement remains in effect, Borrower will:

* * *

Financial Covenants and Ratios. Comply with the following covenants and ratios:

Minimum Income and Cash flow Requirements. Borrower shall comply with the following cash flow ratio requirements:

DEBT SERVICE Ratio. Maintain a ratio of DEBT SERVICE in excess of 1.200 to 1.000. The ratio of gross rents from rental real estate activities less total expenses, then adding back depreciation, amortization and interest as reported for the mortgaged property on the borrower's Rental Real Estate Income and Expenses schedule included in its Federal Tax Return over the sum of total principal and interest payments due under the Note. This coverage ratio will be evaluated as of Tax Returns.

The parties closed the loan in November 2006. It was not until July 2008 that Ming Far provided its 2007 tax returns to plaintiff. At that time, plaintiff determined that Ming Far was in default of the loan agreement because the property was not generating sufficient cash flow to meet the specified debt-service-ratio requirement. In lieu of calling the loan at that time, plaintiff provided Ming Far another year to correct the problem.

In June 2009, plaintiff again investigated and determined that the debt-service ratio was lower than it had been the prior year because the shopping center lost tenants in 2008 and 2009. On June 23, 2009, plaintiff notified appellants by letter that Ming Far was in default of the debt-service-ratio requirement and had 10 days to cure the default. Also at that time, plaintiff placed an administrative freeze on Ming Far's bank accounts with plaintiff, which at that time held approximately $400,000. On August 31, 2009, after Ming Far had failed to cure the default, plaintiff notified appellants that it was seizing the bank accounts to apply the funds toward the loan balance.

Plaintiff thereafter brought this action against defendants Gee and Pan to enforce their personal guaranties. Defendants filed a counterclaim against plaintiff in which Ming Far was added as a party to pursue its claims against plaintiff along with defendants Gee and Pan.[1] The parties filed cross-motions for summary disposition. The trial court rejected appellants' argument that plaintiff had waived enforcement of the debt-service-ratio requirement by not seeking to enforce that requirement earlier. It also rejected appellants' argument that plaintiff was not entitled to summary disposition because plaintiff's act of freezing Ming Far's bank accounts prevented Ming Far from performing as required by the loan agreement. The court instead granted summary disposition in favor of plaintiff.

[1] The trial court's order also dismissed appellants counter-claims. Those claims are not at issue in this appeal.

II. STANDARD OF REVIEW

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The parties moved for summary disposition under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). A reviewing court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula*, 212 Mich App at 48.

III. IMPOSSIBILITY OF PERFORMANCE

Appellants argue that plaintiff was not entitled to summary disposition because it was plaintiff's act of freezing Ming Far's bank accounts that made it impossible for Ming Far to perform under the loan agreement, causing a default. We disagree.

Appellants rely on *Kiff Contractors, Inc v Beeman*, 10 Mich App 207, 210; 159 NW2d 144 (1968), for the following rule:

> The general rule is that a party to a contract cannot prevent, or render impossible, performance by the other party and still recover damages for nonperformance. See 17A CJS, Contracts § 468, at pp 638-642; and 5 Williston on Contracts (3d ed) § 677, p 224. In *Barton v Gray* (1885), 57 Mich 622, 636[; 24 NW 638], the Supreme Court cited a long line of venerable precedents in support of the principle that "no one who causes or sanctions the breach of an agreement can recover damages for its nonperformance."

If there is any conflicting evidence whether the performance of a contract has been rendered impossible, the issue is a question of fact for the trier of fact. *Roberts v Farmers Ins Exch*, 275 Mich App 58, 74; 737 NW2d 332 (2007).

We agree with the trial court and conclude that there was no genuine issue of material fact that precluded the trial court from rejecting on summary disposition appellants' claim that plaintiff made it impossible for Ming Far to cure its breach when it froze Ming Far's bank accounts. First, plaintiff's action in freezing the bank accounts was unrelated to the performance issue that caused Ming Far to be in default. Ming Far's default did not involve the failure to make required monthly payments. Instead, it breached the contract by failing to adhere to the debt-service-ratio clause in the loan agreement. The freezing of Ming Far's accounts did not make it impossible for Ming Far to cure this default, because Ming Far was already in breach of the debt-service-ratio requirement before plaintiff froze its bank accounts. Second, the parties expressly agreed in the contract that plaintiff could freeze Ming Far's bank accounts in order to "setoff all sums owing on the indebtedness":

> Borrower authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts, and, at Lender's option, to administratively freeze all such accounts to

> allow Lender to protect Lender's charge and setoff rights provided in this paragraph.

Appellants appear to argue that they could have used the account funds to rent space in the property for themselves and thereby cure the debt-service-ratio default. However, under the loan agreement, the debt-service-ratio formula was required to be based on actual income earned through leasing. Ming Far's use of its own funds to rent from itself would not have impacted its debt-service ratio because any rent it paid would have been subtracted from its rents received, thereby having zero effect on the debt-service ratio.[2] Further, at his deposition, Gee testified that Ming Far only attempted to cure the default by offering some commercial property that Pan owned as collateral, which plaintiff rejected. There is no evidence that appellants ever actually attempted to cure the default by requesting that plaintiff release some of the money from the frozen accounts.

In sum, appellants failed to show that plaintiff made it impossible for Ming Far to perform its obligations under the loan agreement, thereby precluding summary disposition in plaintiff's favor.

IV. WAIVER

Appellants' remaining arguments involve the concept of waiver. Appellants contend that because plaintiff did not enforce the debt-service-ratio clause earlier, plaintiff waived enforcement of the clause and was obligated to first provide notice to Ming before requiring strict compliance with that clause. Again, we disagree.

Appellants' reliance on *Collins v Collins*, 348 Mich 320, 327-328; 83 NW2d 213 (1957), in support of their contention that plaintiff's repeated failures to enforce the debt-service-ratio requirement earlier waived strict compliance with that requirement, is misplaced. There is no indication that the contract involved in *Collins* contained an anti-waiver provision. However, the loan agreement between plaintiff and Ming Far in this case does contain an anti-waiver provision that provides, in pertinent part:

> Lender shall not be deemed to have waived any rights under this Agreement unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right.

Appellants do not dispute that plaintiff never agreed in writing to waive enforcement of the debt-service-ratio requirement.

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[2] Under the contract, the numerator of the debt-service ratio includes "gross rents from rental real estate activities *less total expenses.*" Any rental payments by Ming Far would have been part of its total expenses, offsetting any income derived from paying rent to itself.

Appellants observe that, despite the existence of an anti-waiver provision in the loan agreement, the parties were free to modify their agreement to waive a contract term. In *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364-365; 666 NW2d 251 (2003), our Supreme Court explained:

> [P]arties to a contract are free to *mutually* waive or modify their contract notwithstanding a written modification or anti-waiver clause because of the freedom to contract. However, with or without restrictive amendment clauses, the principle of freedom to contract does not permit a party *unilaterally* to alter the original contract. Accordingly, mutuality is the centerpiece to waiving or modifying a contract, just as mutuality is the centerpiece to forming any contract.
>
> This mutuality requirement is satisfied where a waiver or modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract. In cases where a party relies on a course of conduct to establish waiver or modification, the law of waiver directs our inquiry and the significance of written modification and anti-waiver provisions regarding the parties' intent is increased. [Emphasis in original.]

In this case, appellants did not present any evidence of a written or oral modification of the loan agreement with respect to enforcement of the debt-service-ratio requirement. Appellants instead rely on plaintiff's course of conduct to establish a waiver or modification of the debt-service-ratio provision. As noted above, to establish a waiver or modification through a course of conduct, there must be clear and convincing evidence of the parties' intent to waive or modify a contract term.

In addition, appellants' reliance on the fact that plaintiff did not immediately accelerate payment of the loan balance when it first became apparent in 2008 that Ming Far was not meeting the debt-service-ratio requirement is unavailing. Our Supreme Court has held that a party's mere silence in enforcing a provision is insufficient to establish evidence of waiver, let alone clear and convincing evidence of waiver. *Id.* at 377-378. Therefore, without evidence of affirmative conduct establishing the parties' mutual agreement to waive compliance with the debt-service-ratio requirement, the trial court correctly rejected any claim that the parties had agreed to waive enforcement of the term.

Affirmed. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause