STATE OF MICHIGAN

IN THE 14TH CIRCUIT COURT

*****

CHALK SUPPLY, LLC,
Plaintiff,

v

RIBBE REAL ESTATE, LLC,
Defendant.
_____/

HON. TIMOTHY G. HICKS

File No. 2016-005515-CK

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OPINION AND ORDER FOLLOWING BENCH TRIAL

INTRODUCTION

The court presided over this non-jury trial on July 17 and 18, 2018. The court read a deposition, received post-trial briefs, and then considered oral argument on August 2. The court congratulates the attorneys for their fine work and now enters this opinion and order.

FACTS

Ribbe Real Estate owns an industrial building in Muskegon Township, on Harvey St. near Laketon Avenue and the adjacent U.S.31 expressway. Its resident agent is Scott Ribbe ("Ribbe"). Ribbe is also owner of Geerpres, which provides tools and materials to its customers from that same location. Geerpres rents its space from Ribbe Real Estate.

Geerpres did not use the entire facility. It had about 10,000 feet of unused space and advertised it for lease. That included both warehouse and office space.

Muskegon Township Fire Inspector Mark Nicolai became aware of Ribbe's marketing efforts and sent him a letter (exhibit N) on June 9, 2015, essentially indicating what documents the township would need before it could approve any tenant. He said:

> If the space is rented, this may change the use of that part of the facility to a different Occupancy Classification. This is based on the proposed tenants (sic) intended use, commodity (sic) manufactured or stored.
>
> Depending on the classification, the facility will have to be brought into code compliance for the space rented based on the intended use.

This precedes any Nash- Ribbe conversations by several months, but clearly reminded Scott Ribbe (references to "Ribbe" from this point on will generally refer to the individual rather than the company) of the need for any tenant to comply with township ordinances.

Plaintiff Chalk Supply[1], by its owner Jacob Nash, eventually contacted Ribbe about leasing the property. Chalk Supply's business was purchasing large quantities of restoration and finishing products, and then repackaging them for retail customers. Most were water-based, but some contained oil bases. It intended to use the property for

[1] The lease says that Chalk Supply does business as West Michigan Finishes. The acronym "WMF" is used frequently in the parties' communications.

warehousing purposes. (Exhibit D, Muskegon Charter Township Planning Commission Minutes, March 14, 2016.) There would be no retail operation at the site.

The pre-lease interaction between Nash and Ribbe was business-like and amicable. Eventually they included contacts with other Township officials such as Lorraine Grabinski, the (then) Zoning and Development Director, and Jeffrey T. Ream, the Township Building Official at the time. Both have, since the time in question, left the Township for other endeavors.

Ribbe testified that Nash told him that Chalk Supply would not need fire suppression because of its lower quantities and the fact that many were latex.

By early 2016 the Ribbe-Nash discussions had advanced to the point where Ribbe asked his counsel to prepare a lease. The first draft did not contain anything about fire suppression, but later ones did. Nash showed it to his own counsel. By February 19, 2016, the parties had signed the lease. (Exhibit A.)

The most important portions of the lease were these:

- Its duration was 18.5 months, starting March 15, 2016[2].
- The annual rent was $52,860 or $4,390 monthly.
- Paragraph 3a, which said:,

  > 'In the event that fire suppression installation is required to comply with local ordinance, (as per paragraph 11 below) the lease term will be paid...' (It required monthly payments to cover the cost of the fire suppression system)

- Paragraph 6 concerned alterations or improvements made to the property.
- Paragraph 35 essentially obligated the tenant to pay the landlord's expenses of enforcing the lease.

[2] The parties agreed, at the start of trial, that there was a typographical error in paragraph 2 because it said that the lease ended in September of **2018** instead of 2017.

The 13-page lease, well drafted, contained virtually all of the other standard commercial contract clauses relating to insurance, notices, and merger of prior commitments or understandings.

Ribbe, at points, suggests that Nash misrepresented the nature of his product. Nicolai made some suggestion to that effect, but also said he did not believe there was any intentional misrepresentation.

The court finds that Nash made no misrepresentation to anyone about his products. Nash testified to such and there is tangible evidence to support that- the unrefuted testimony that paragraph 11 was inserted into *later* versions of the contract to specifically address any concerns the township may have about the nature of Chalk Supply's product.

Both Ribbe and Nash testified that they believed that "fire suppression" meant some kind of sprinkler system. Neither contemplated, at the time they signed the contract, that they could or would have to construct a series of rooms to provide fire ***containment*** suitable to satisfy the township. It was Nicolai who suggested that, according to Nash.

Ribbe secured a quote for $65,000 to install a suitable suppression system. He "had a problem" with the prices, according to Nash, and told him so. He duly sent Nash the email on March 25, 2016 that is critical to the case and will be discussed later. The email was not a surprise to Nash when he received it because Ribbe had already told him that.

There were some discussions and written/email communications about other possibilities such as building some rooms within the larger warehouse. Those would

have provided fire **containment** and would have been acceptable to the Township. They would not have provided fire **suppression**. Nicolai had said that fire suppression was not required if they went with the "room within a room" design.

Nash and Ribbe continued their conversations in good faith, looking for some way to make the arrangement work. Ribbe suggested that they retain architect Brock Hesselsweet[3]. Nash did, and ultimately paid him about $2,000 for his services. But the "room within a room" construction presented practical problems for the way in which Chalk Supply conducted its business.

There were limits to how much product could be placed in each room. Nicolai said it was, under certain circumstances, 60 gallons per room. Nash testified that Chalk Supply "carried" 1200-1500 gallons daily. This required the use of forklifts and other equipment. Nash conceded that it was possible to build the rooms, but that it was not possible to conduct its business as contemplated with the room design, whether it was 20 rooms or some other number. Nash testified that erecting even 4 rooms would make the space unusable for their purposes.

Witness Dan Begue offered similar testimony. Yes, it is colored by his family connection to Nash, but he is less involved than Nash and left Chalk Supply's employment in 2016. He said that the "flow" would simply not work with the room within a room design.

In the end, Chalk Supply never received any keys and did not move any of its operations into the building. It did pay to ship some office furniture there, but never claimed it, and Ribbe just kept it in the proposed Chalk Supply offices until the 18-month lease term expired. After that, Ribbe moved it to the warehouse area, where it remains.

[3] Their cooperation was so complete that Hesselsweet, in his deposition, said that Ribbe was his client.

Chalk Supply paid a deposit of $54,875 for the first 12.5 months. Ribbe spent about $30,000 preparing the office area that was proposed for Chalk Supply's use. Chalk Supply never paid anything else, and Ribbe retained the rent deposit that was paid.

There are facts which require closer analysis. These are interwoven into the legal analysis which follows.

This chart presents a timeline with the most important dates.

Date	Event	Comment
1/26/2016	MSI Construction proposal to Remodel "office areas on north end of hallway."	The proposal pre-dates
2/10/2016	Series of emails evidencing parties' discussions with each other.	Exhibit C, pp 1-16
2/11/2016	Nash files Special Use Application	
2/19/2016	Lease signed	
3/14/2016	Planning Commission meeting	Commission conditionally approved
3/25/2016	Ribbe's email to Nash including the $65,000 fire suppression quote (Exhibit C, p 17.)	
4/18/2016	Ribbe's email about "room within a room" and extending lease to 24 months	
5/4/2016	Email from Architect Brock Hesselsweet about his meeting with township officials. (Exhibit I.)	
5/24/2016	Ribbe email to Nash proposing settlement after negotiations broke down. (Exhibit C, p 20-23.)	
7/20/2016	Email from Nash to Ribbe telling him to go ahead and search for a new tenant. (Exhibit F, p 26.)	

ANALYSIS AND DECISION

Plaintiff's complaint pleads four counts: (1) breach of contract, (2) impossibility of performance, (3) unjust enrichment, and (4) mutual mistake of fact. Defendant counterclaims for various items such as the unpaid rent and attached penalties, the unpaid security deposit, recovery of its costs for alterations made to the office area, and attorney fees.

In the end, there were not many significant factual disputes. The parties originally believed they had a contract. The court agrees. They worked cooperatively and in good faith, and continued to do so into March, April and May of 2016. They considered other alternatives, and procured professional assistance to design an alternative.

The two most prominent points of **factual** dispute were (1) Ribbe's hints (primarily in his trial brief) that Nash misrepresented the nature of his business, and (2) the parties' conflicting testimony about the nature of the alterations/remodeling done in the office area intended for use by Chalk Supply. The **legal** disputes are more extensive and prominent.

Both Ribbe and Nash present as honest and competent businessmen, but Nash's testimony was more credible. He was poised and relaxed on the witness stand. He generally left his hands in his lap and rarely consulted his notes. He easily, and without quibbling, conceded some things that were against his interest, such as that he did discuss his proposed office with Ribbe, and that he did not pay the security deposit.

Ribbe was argumentative at times. He sometimes responded to questions by asking one of the attorneys to show him something first, even when that seemed unnecessary. At one point, this prompted a comment from this judge instructing him to

answer the question. And his testimony varied at times. For example, near the end of the case, he claimed that he and Nash had "a separate agreement" about the alterations that were being made, even though there is a paragraph in the contract addressing that.

Count I. Breach of Contract by Ribbe

The typical breach of contract case involves someone's actions while the contract is being performed- late deliveries, defective goods, etc. This is different. Chalk Supply claims that Ribbe breached the contract **before** the parties began performing, i.e, before Chalk Supply moved in. Generally, contract law calls this an anticipatory breach (or, sometimes, repudiation) of the contract.

Factually, this focuses on the question of whether Ribbe repudiated the lease in the March 25, 2016 email. The email said:

> I received a quote on fire suppression for over $65,000. As such I wanted you to be aware that if required, we will need to review the tenure as I will not be willing to invest another $65k into an 18 month lease at this juncture. Frankly, I did not plan on additional doors, egress or fire, automatic closing doors and that related cost. I know your intention is to avoid the suppression, but felt to advise where I am at. Feel free to call and discuss if need be.

There is a second, related question- did Ribbe abandon the contract? The court examines both of these theories below.

The doctrine of **anticipatory repudiation** excuses a party's performance (Chalk Supply, here) where a party to a contract (Ribbe), prior to the time of performance, *unequivocally* declares the intent not to perform. *Paul v Bogle,* 193 Mich App 479, 493; 484 NW 2d 728 (1992).

The intent not to perform must be in clear language. Where repudiation is based upon oral representation by a party, the language "must be sufficiently positive to be

reasonably interpreted to mean that the party *will not* or cannot perform." *Bogle, supra* at 494 (emphasis added).

Ribbe's March 25, 2016 email to Nash meets this standard. When reasonably interpreted, he says he will not spend the $65,000 for fire suppression under this contract. Period. The language is unequivocal. It states "I will not be willing to invest another $65k" and "we will need to review the lease." The use of the words "will not" shows a clear intent not to perform.

The events **after** March 25 can be characterized in two ways. The first is that they were still trying to *amend or adjust* the first contract, but now with the room within a room plan. The second is that, after the abandonment of the first contract, they were attempting to form another one, with the room/room plan. Either way, they never reached the agreement necessary for a contract.

Trial testimony supports this conclusion. Nicolai testified that he had advised Ribbe that unless a "room in a room" floor plan was adopted, fire suppression would be required. Both Ribbe and Nash believed that fire suppression meant some type of overhead sprinkling system. Begue testified that Ribbe told him he would not pay the $65,000.00 to install the fire suppression system. At this point, Begue thought the deal was dead. The reasonable interpretation of Ribbe's March 25, 2018, paired with his subsequent conduct and statements, is an unequivocal intent not to perform the contract.

Nash, like Begue, testified that he believed[4] the "deal" was dead. He said that the parties explored other ways to make this work. The series of emails evidence this. Nash, in fact, hired Architect Brock Hesselsweet at Ribbe's recommendation. In this and all other parts of the case, the court finds that both parties worked in good faith. The room within a room design simply would not work for Nash's company, as discussed later.

Nash emailed Ribbe on April 18, 2016, proposing renovation plans suggested by Hesselsweet, stating as well that if Ribbe was not willing to go through with these plans, they may need to move on. Ribbe stated that in order to do those renovations, he would like to extend the lease, "minimum 24 months," with adjustments for the cost of installing doors. Ribbe said:

> I am working on the door quotes already. Candidly, what I would like to agree upon is an **extension of the lease, minimum 24 months**, with adjustment for the cost of the door(s). I have already spent $27,500 to get this done and cannot agree to the cost of the additional required modifications without being compensated in reasonable fashion. I believe there is a win/win in this somehow. (Emphasis added.)

In other words, we have no agreement until we resolve (1) the term of the lease and (2) Chalk Supply agrees to pay some additional sums relating to the door(s.) So the original contract was not modified, and no new contract was ever formed.

Ribbe testified at trial that this refusal was not really firm. He even suggested that he might have conceded the point if Nash had pushed it. In closing argument on August 2, counsel, when pressed by the court about what to label the March 25 email, called it "an invitation to re-negotiate."

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[4] His June 15 letter, which refers to "terminating the lease" is a choice of words which undercuts his position. If there was a valid contract in place at that time, one cannot simply declare it to be terminated. That would be a breach.

But none of these secret intentions negate the plain meaning of his words. In determining whether a party has committed an anticipatory breach, "it is the intention manifested by his acts and words which controls, and not his secret intention." *Carpenter v Smith,* 147 Mich App 560, 565; 383 NW 2d 248 (1985).

Ribbe clearly told Nash that he would not honor the current lease if he were required to invest the $65,000 "up front." He wanted a new agreement. As a result, Nash was free at that time to sue immediately for breach of contract, or wait until the time when performance was due. *Bogle, supra* at 493.

Ribbe's March 25 email also abandoned the contract. There is no other way to interpret it.

A contract is **abandoned** when the acts of one party, inconsistent with the existence of the contract, are acquiesced to by the other party. *Dault v Schulte,* 31 Mich App 698, 701; 187 NW2d 914 (1971). Abandonment is shown where a party "positively and absolutely refuses to perform the conditions of the contract, such as failure to make payments due, accompanied by other circumstances, or where by his conduct he clearly shows an intention to abandon the contract." *Collins v Collins,* 348 Mich 320, 327; 83 NW2d 213 (1957).

Nash clearly acquiesced to Ribbe's abandonment. He declined to pursue enforcement of that contract and immediately shifted into the room within a room fire containment plan. He- and Begue- both testified that "the deal was dead."

By March 25, the date of the email, the "room within a room" had been under consideration for some time. It is noteworthy that Ribbe did **not** say something like "fire suppression may not work, let's discuss whether something else might work in its

place." Or specifically mention the "room within a room" plan. His invitation to "feel free to call and discuss..." is too vague to have any legal significance; it can support both points of view.

But the parties continued working on a "Plan B"- the Hesselsweet room plan. But Ribbe abandoned even that *possibility*- it had not yet ripened into a contract- in his email of April 18. (Exhibit 31.) At that point, he wanted a longer lease and additional compensation. At best, that email was an offer or an invitation to make an offer. It was certainly inconsistent with the original contract.

By mid- May or so, after those discussions were exhausted, there was no new or second contract in place. There was no contract in place at that point, so there was no restraint on their ability to end the discussions and move on.

Count II. Impossibility of Performance.

Plaintiff claims that performance of the contract became impossible. Let us concede that fire suppression would not have been required for a great many businesses, and that Chalk Supply, if it distributed some other product, *could have* conducted business there. Both Nash and Begue conceded the point.

Ribbe correctly argues:

- "Impossible" is not the same as inconvenient or difficult.
- The law will not relieve a party from its obligations just because it later believes it made a bad bargain.
- *Failing to obtain necessary government approval or permits does not render performance impossible. Vergote v K Mart Corp*, 158 Mich App 96, 111; 404 NW2d 711 (1987). (Italics added by this judge.)

Case law provides some explanation of what renders performance impossible.

When, due to circumstances beyond the control of the parties, performance of a contract and its obligations becomes impossible, the party failing to perform is exonerated. *Bissel v LW Edison Co,* 9 Mich App, 284; 156 NW2d 623 (1967). However, the circumstances in this case were neither unforeseen nor beyond the control of the parties.

"[A] strict showing of impossibility is not required, but there must be a showing of impracticality because of extreme and unreasonable difficulty, expense, injury or loss involved." *Roberts v Farmers Ins Exch,* 275 Mich App 58, 74; 737 NW2d 332 (2007). The *Roberts* citation from above is accurate, but the facts of the case really do not provide much support to the plaintiff here.

The "contract" in the *Roberts* case was the $1,000 charged for the insured's (Roberts, her next friend, was the plaintiff) failure to appear for a medical examination in her first party insurance litigation. In the end, she lost. The court of appeals found that it was not "impossible" for her to find transportation to the doctor's office.

Plaintiff's claim fails on this count. It was possible to construct the rooms. If there were no township regulations involved, the parties might have consummated the contract and moved forward. It did not, in the end, make economic sense, but that does not render contract performance impossible.

Count III. Unjust Enrichment.

Plaintiff's claim fails, as based on this theory, because it is generally inapplicable where the parties have an express contract. *Belle Isle Grill Corp. v City of Detroit,* 256 Mich App 463, 477; 666 NW2d 271 (2003). These parties **did** have a contract as of February 19, 2016. And Chalk Supply made the first payment required.

Count IV. Mutual Mistake of Fact.

A contract may be rescinded because of a mutual misapprehension of the parties. *Lenawee Co Bd of Health v Messerly,* 417 Mich 17, 26; 331 NW2d 203 (1982). Whether or not to grant this equitable remedy is in the sound discretion of the trial court. *Id.* In determining whether plaintiffs are entitled to rescission, the court must ask: (1) was there a mistaken belief entertained by one or both of the parties to a contract and (2) if so, what is the legal significance of the mistaken belief? *Garb-Ko, Inc. v. Lansing-Lewis Services, Inc.,* 167 Mich App 779, 782; 423 NW2d 355 (1988).

Both these cases concerned situations where the parties' mistake related to an unknown condition ***of the land itself*** which essentially prohibited its use for the buyers' intended purpose. In *Lenawee Co*, it was the fact that the apartments lacked a suitable septic system and were not suitable for human habitation. In *Garb-Ko*, it was a leaking underground fuel tank.

Those two cases would not provide plaintiff with relief here. This land was suitable for Chalk Supply's contemplated commercial use. The only mistake these parties made was their failure to recognize the potential expense imposed by the need to comply with township regulations. This does not comprise a mutual mistake of fact as defined in the case law.

Defendant's Counterclaim

The counter claim seeks two general groups of damages. First, it seeks essentially the sums the contract obligated Chalk Supply to pay, with penalties where applicable. Second, Ribbe seeks to recover its costs for alterations made to the office area.

The court denies relief on the first claim, unpaid amounts due on the contract. The court adopts its analysis from above. Ribbe cannot both repudiate/abandon the contract and then seek to enforce its terms. Without a contract in place, paragraph 6 would not apply and Chalk Supply had no obligation to pay this money- generally.

The claim for alterations damages presents a different issue and a closer question. The issue there becomes whether Ribbe can establish that it performed the alterations during the brief period of time the contract was in place. In that case, paragraph 6 would apply. Or, ironically enough, whether Ribbe can recover the sums expended under some quasi-contract or unjust enrichment theory.

First, the contract theory.

Paragraph 6 of the contract is lengthy. The first several sentences establish rules, standards, and procedures governing alterations or changes made *by the tenant.* The penultimate sentence says:

> All improvements, alterations, additions, and physical changes to the Premises *shall be completed* at Tenant's sole expense and, upon termination of the Lease, shall automatically become the property of the Landlord. (Italics added)

They do not address changes/alterations made *by the landlord.* It is significant that the several sentences in the paragraph all pertain to alterations made by the tenant. These alterations were made by Ribbe, not Nash. For that reason, even if the contract governed, it would leave Ribbe with no relief.

Ribbe says that it made the alterations at Chalk Supply's request and for its benefit. Nash's live testimony denies this, while conceding that he did respond to Ribbe's questions about whether he wanted a private office for himself and some other minor things.

The most important exhibit is M.S.I. Construction's Invoice, dated March 10, 2016. (Exhibit BB). Paragraph 1 says "per proposal dated 1/26/2016." Common sense suggests that Ribbe and M.S.I. had some interaction and a site visit prior to M.S.I.'s drafting a proposal for the work. And the proposal would have to contain specific instructions from Ribbe so that the contractor could provide a meaningful number.

Neither Ribbe nor Nash could provide precise dates when they first started talking about leasing the property. At oral argument, defense counsel argued that this exhibit proves that Ribbe and Nash were talking prior to that date. The court finds that proposition unpersuasive. The court finds that the alteration/remodeling plan for the office was in place **before** any serious discussions involving the lease in question.

Both Begue and Nash concede that they had some discussions with Ribbe about incidental office issues, but Nash said he never had an agreement about the "big picture" or the costs. Defense counsel tried to convert Nash's "failure to object" to the remodeling in process into a contract. However, since Nash did not believe there was a contract covering that, he would have neither a reason nor an obligation to object. He probably would have stepped out of line if he had direct contacts with the contractors working on the job. Ribbe says he and Nash had a separate agreement about this, but he cannot point to specific details.

The court believes the Nash/Begue testimony is more credible, once again because he seems willing to concede facts supporting the other side. Contrast this to Ribbe, who contends that paragraph 6 covers all this, but also claims that there was a separate agreement.

For example, Nash's letter to Ribbe of June 15, 2016, says "I understand there were actual costs incurred for improvements *made on behalf of both of us*..." (italics added) and then makes an offer to pay half of those. However, the letter does not concede that Nash asked for those repairs, and the phrasing above does not suggest as much.

The court considered other theories of recovery, but they generally hinge on some request or promise made (by Nash/Chalk Supply in this case) which induced the party hearing the promise to act. This did not occur here.

This plan (the remodeling with M.S.I.) was in place before Nash and Ribbe commenced their negotiations. The fact that Chalk Supply could have been incidentally benefitted by this work is insufficient to impose civil liability upon it. Accordingly, the court enters a judgment of no-cause for action on Ribbe's counterclaim.

Counterclaim for Attorney Fees Pursuant to Paragraph 35

Defendant, citing paragraph 35, seeks to recover attorney fees and other costs, even though it is unsuccessful in this litigation. The paragraph, in somewhat unusual language, seemingly allows for such under certain circumstances.

Paragraph 35 allows Ribbe Real Estate to recover its specified costs in a suit (its counter-claim would count) or comparable collection effort for (1) recovery of possession, or the (2) amount due under the lease, or (3) "because of the breach of any other term contained in this lease on the part of the Tenant to be kept and performed." The first situation does not apply here. There is no possession to be recovered.

The latter two situations depend upon the existence of a contract: ("under the lease...in this lease.") Since Ribbe abandoned the contract, there is no contract and

nothing to breach. Accordingly, there is no basis for an award of attorney fees or any other recovery under paragraph 35.

CONCLUSION

Plaintiff may recover its taxable costs and statutory interest. The court orders plaintiff to submit any final judgment or orders within 21 days. If the parties can resolve their differences without a judgment, plaintiff must send an order which concludes the case and closes the file.

IT IS SO ORDERED.

Date: August 10, 2018

Timothy G. Hicks, P35198
Circuit Judge

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of August, 2018, I personally mailed copies of this order to the parties at their respective addresses, by ordinary mail.

Autumn R. Ward, Circuit Court
Legal & Scheduling Secretary