

STATE OF MICHIGAN  
BERRIEN COUNTY PROBATE COURT

BENTON HARBOR FRUIT MARKET, INC.

Plaintiff,

FILE NO. 2013-0841-CZ-N

v.

HON. THOMAS E. NELSON

ESTATE OF JEFFERY MARC MATTNER,  
DECEASED C/O PETER J. MATTNER,  
PERSONAL REPRESENTATIVE,

**OPINION AND ORDER RE:  
CROSS MOTIONS FOR SUMMARY  
DISPOSITION**

Defendant.

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Jeffrey R. Holmstrom (P29405)  
Taglia, Dumke, White & Schmidt, P.C.  
Attorneys for Plaintiff  
720 State St. POB 890  
St. Joseph, MI 49085  
269-983-055

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Roger Alan Petzke (P26586)  
Troff, Petzke & Ammeson  
Attorneys for Defendant  
811 Ship St. #202  
St. Joseph, MI 49085  
269-983-0161

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**OPINION**

**FACTS**

This civil proceeding is brought under MCL 700.1303(1)(i) seeking to collect rent due under a Rental Agreement between Plaintiff Benton Harbor Fruit Market, Inc. (hereinafter referred to as "Market") and Defendant Estate of Jeffery Marc Mattner, Deceased (hereinafter referred to as "Estate"). The deceased died on December 25, 2012 and his Estate was opened on January 4, 2013. The claims notice was published on January 12, 2013. On August 21, 2013, the Market filed its claim for \$38,500 based on a March 21, 2012 Rental Agreement. No signed copy of that Agreement has been located. The claim for \$38,500 was denied by Estate on September 27, 2013 and this litigation was filed on November 22, 2013.

The \$38,500 claim is premised on un-paid rent under the March 21, 2012 Rental Agreement for the period of January 1, 2012-December 31, 2014. The contract called for lease payments to be made by the deceased for his occupancy of Docks 60-80 at Market's realty in Benton Township. The Agreement established rent payments of \$17,000 due 11/1/12; \$18,500 due 11/1/13 and

\$20,000 due 11/1/14. A payment of \$17,000 was made by the deceased on October 29, 2012. However, no further payments were made. As indicated, no signed Rental Agreement was ever located. However, the March 21, 2012 Minutes of the Market's Board of Directors (the deceased was a member of that Board) show that the lease structure as contained in the Agreement was approved by the Market's Board on that date. The deceased was present at that meeting but "did not vote" on that lease structure motion.

The Defendant Estate contends that the claim here is barred under MCL 700.3801(1) due to Market's tardy filing of its claim and because the claim fails under the Statute of Frauds at MCL 566.106 and MCL 566.108. Estate asks for a Judgment of Summary Disposition under MCR 2.116(C)(8) and/or (C)(10).

The Plaintiff Market asks for a Judgment of Summary Disposition as well under MCR 2.116(C)(10) due to its contention that undisputed evidence exists that the March 21, 2013 Rental Agreement between Market and the deceased was executed at the Market's Board's meeting that same date. Further, the deceased paid the initial installment under that Agreement. While the Market did not file its claim under the Agreement until some 3 months after the claims period under MCL 700.3801(1) expired in this case, it maintains that it was a "known creditor" of Estate. If a "known creditor", it did not receive a claims notice from the Estate as required by MCL 700.3801(2). Thus, Market contends its claim was timely filed on August 21, 2013. In addition, Market maintains that its claim was timely filed given that the rent under the Agreement was not due until November 1, 2013 and is covered by MCL 700.3803(2)(b) as a claim that arose after the decedent's death.

### **ANALYSIS**

Summary disposition may be granted under MCR 2.116(C)(10) where, viewing the evidence, then before the court in the light most favorable to the party opposing the motion, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

**IS PLAINTIFF’S CLAIM BARRED BY MCL 700.3801 or MCL 700.3803?**

MCL 700.3801 provides:

(1) Unless notice has already been given, upon appointment a personal representative shall publish, . . . a notice as provided by supreme court rule notifying estate creditors to present their claims within 4 months after the date of the notice's publication or be forever barred. **A personal representative who has published notice shall also send, within the time prescribed in subsection (2), a copy of the notice or a similar notice to each estate creditor whom the personal representative knows at the time of publication or during the 4 months following publication . . .** (emphasis added).

On January 12, 2013, Defendant Estate published its claims notice under MCL 700.3801. In the process of noticing potential claimants, the Estate did not provide the “creditor’s notice” to Plaintiff Benton Harbor Fruit Market, Inc., as a “known creditor”. Conversely, the Market did not file its claim against the Estate for rent due on its property until August 21, 2013, some 3 months after the claims period would expire under MCL 700.3801.

Here the initial question is whether the Market was a “known creditor” of the Estate such that notice as required by MCL 700.3801(2) was required to be given to Market by June 12, 2013. That issue turns on the following language under MCL 700.3801(1) & (2) which reads, in part:

**For purposes of this section, the personal representative knows a creditor of the decedent if the personal representative has actual notice of the creditor or the creditor's existence is reasonably ascertainable by the personal representative based on an investigation of the decedent's available records for the 2 years immediately preceding death and mail following death.**

**(2) Notice to a known creditor of the estate shall be given within the following time limits:**

**(a) Within 4 months after the date of the publication of notice to creditors. (emphasis added)**

If Market was a “known creditor” of the Estate here, then the Estate failed in its obligation to give notice as required by MCL 700.3801(2). Arguably, Personal Representative, “in reviewing the decedent’s available records for the 2 years preceding death” could have uncovered the fact that the decedent had regularly paid rent to the Market (see Ex. 1 attached to Defendant’s Brief in Support of Motion for Summary Disposition) on October 29, 2012—less than 2 months before

his death. Further, the Personal Representative knew (as evidenced by the inventory filed in this matter) of personal property which was located on Market's realty that decedent occupied at the time of his death. That personalty was apparently removed after the deceased's death. Clearly, the existence of the deceased's personalty on Market's property would legitimately be a basis for the Personal Representative's inquiry into any outstanding rents due by the deceased to Market which could be a potential claim against the Estate.

In addition, the deceased was a member of the Board of Directors of Market and had long rented dock space from the Market. (See paragraph 10 of Defendant Estate's Answer to Complaint.) As such, the personal representative's limited inquiry with the Market would have uncovered this long tenancy arrangement and/or the existence of the February 15, 2012 and March 21, 2012 Minutes of the Market's Board. Both suggested the existence of either a tenancy arrangement between Market and the Estate's decedent OR an actual lease obligation of the deceased. In either case, the potential claim here should have been "reasonably ascertainable" by the personal representative and, if so, notice to Market as a "known creditor" given.

Further, the attachments to the Estate's own Brief in Support of its Motion for Summary Disposition show the existence of a long term tenancy arrangement (memorialized by lease agreements from 1990-1994 and again from 2006-2009) between Market and the Estate's decedent. As noted above, a review of the Estate's records over the 2 years preceding his death would have uncovered the rent payments made to Market in October 2011 and October 2012. In addition, the decedent's property was located on and retrieved from the Market's property following the decedent's death in late 2012 (see Estate's Inventory filed April 5, 2013). So, clearly, the Estate should have had sufficient knowledge to know of the existence of potential claims by Market. As such, Market would be a "known creditor". And, accordingly a claims notice should have been provided directly to Market as required by MCL 700.3801(1). No such notice was given. This failure to provide such a claims notice to Market would excuse the filing of Market's claim until 3 years after the deceased's death. MCL 700.3803(1)(c).

Additionally, Exhibit 2 attached to Market's Brief in Support of Motion for Summary Disposition showed the deceased had paid rent to Market as recently as October 28, 2012—some 2 months before his death for 2012. Furthermore, based on the unexecuted Rental Agreement

attached to both parties' Motion for Summary Disposition, the next payment due on that agreement was not due until November 1, 2013 long after the claims period under MCL 700.3801(1) had expired. If one accepts the validity of the Rental Agreement, Market can persuasively argue that its claim for rent under the terms of that unexecuted Rental Agreement fell under MCL 700.3803 as a claim that arose after the decedent's death. Thus, the Market's claim would have to have been filed within 4 months after the rent was due under MCL 700.3801(2)(b).

As noted in the above analysis, under either MCL 700.3801(1)(c) or (2)(b), the claim for rent due being filed on August 21, 2013 was arguably timely filed by Market.

Thus, there clearly are 'genuine issues of material fact' if the Estate should have provided notice to Market as a "known creditor" in early 2013. Given one scenario, the Market was a "known creditor" and individual notice should have been given by the Estate to bar Market's claim. Otherwise, Market's claim was not barred when filed in August, 2013. Given another scenario, the Market was not a "known creditor" and its claim was not barred because it was a claim arising after the decedent's death extending the time for filing the claim per MCL 700.3803(2)(b). Given a third option, the Market's claim is barred because it was not a post-death claim and Market was not a "known creditor". So, the determination as to which scenario applies may well await an evidentiary hearing.

Accordingly, the Defendant's Motion for Summary Disposition under either MCR 2.116(C)(8) or (C)(10) based on Plaintiff's failure to timely file its claim is **DENIED**.

### **IS PLAINTIFF'S CLAIM BARRED BY THE MICHIGAN STATUTE OF FRAUDS?**

MCL 566.106 provides:

**No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or **conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.****

MCL 566.108 provides, in part:

**Every contract for the leasing for a longer period than 1 year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, . . .”**

Here it is undisputed that the Plaintiff Market has no writing evidencing this claim for rent under the lease purportedly agreed upon by the deceased. Thus, by the clear terms of MCL 566.108, Market cannot prevail on its complaint based on the unexecuted Rental Agreement attached to both parties’ Motions and referenced in the Market’s March 21, 2012 Board Minutes (also attached to both parties’ Motions).

Nevertheless, there is evidence that does exist in this case to support the existence of some tenancy arrangement between Market and the deceased. First, March 21, 2012 minutes of the Market’s Board of Directors’ meeting clearly shows the approval of such a lease with the decedent in attendance at that meeting even though the deceased did not vote to confirm that lease. Second, there are the affidavits accompanying Market’s Motion for Summary Disposition that clearly indicate the Agreement was executed by the deceased at the March 21 meeting. Third, there is evidence of a payment of \$17,000 on October 29, 2012, the same amount set out in the unexecuted Rental Agreement and the Board’s meeting minutes. The deceased’s payment of that sum also provides additional factual support of the tenancy arrangement between the deceased and the Market as set forth in the purported March 21, 2012 Rental Agreement. Those factual elements, if proven, may provide clear and convincing evidence to support the viability of the March 21, 2012 Rental Agreement and remove the Statute of Frauds bar in MCL 566.108.

The case of *Zander v. Ogihara Corp*, 213 Mich App 438 (1995) adopted the Florida appellate court’s position in *Weinsier v. Soffer*, 358 So 2<sup>nd</sup> 61 (Fla App, 1978) wherein it was required that “clear, strong, and unequivocal” parol or extrinsic evidence was necessary to prove a lost contract’s contents before permitting a party to “avoid” the requirements set forth in the statute of frauds. *Zander* at 444. Thus, a “genuine issue of material fact” may be able to be established in this case to overcome the bar at MCL 566.108 and prove the existence of the lost Rental

Agreement. And, as analyzed above, that evidence appears to be more than the “self- serving testimony” found inadequate by the *Zander* court. Thus, given that there exists “genuine factual issue” as to the existence of a valid March 21, 2012 Rental Agreement, summary disposition on behalf of either party is not available under MCR 2.116.

Genuine issues of material fact clearly exist in this case. First, there is the issue of whether clear and convincing evidence can be produced to support the fact that the Rental Agreement was signed by the decedent. Second, in the absence of such clear and convincing evidence, the issue still exists as to the amount of any rents which may be due to the Market by the Estate (either under the purported Rental Agreement—which was arguably partially performed by the deceased with his payment on 10/29/12 or in *quantum meruit* through the deceased’s continued occupancy of the Market’s premises until vacated by the Estate subsequent to the deceased’s death). And, third, factual issues may exist as to any potential set-offs against that rent due to Market’s failure to mitigate damages given Market’s clear knowledge of the decedent’s death on December 25, 2012 (given his membership on its Board of Directors and long term occupancy of one of Market’s docks) and his Estate’s likely inability to continue to occupy the space its decedent formerly utilized for his personal business pursuits.

As such, summary disposition in favor of either the Estate (on the basis of the statute of frauds) under MCR 2.116(C)(8) or the Market (on the basis of clear and convincing evidence that the Rental Agreement existed per *Zander*) under MCR 2.116(C)(10) is **DENIED**.

### **ORDER**

Given that both parties’ Motions for Summary Disposition are **DENIED**, the matter needs to be set for an evidentiary hearing forthwith.

Dated: August , 2014

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Thomas E. Nelson, Probate Judge