STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

ON GO, LLC, et al,

Plaintiffs,

Case No. 13-135312-CB

v

Hon. Wendy Potts

NASER INVESTMENTS, LLC, et al,

Defendants.

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OPINION AND ORDER RE:
MOTION TO STRIKE AFFIDAVIT OF DERRICK GEORGE WITH EXHIBITS (FILED FEBRUARY 12, 2014)
AND
PLAINTIFFS' AMENDED JOINT COUNTER MOTION FOR SUMMARY DISPOSITION
AND

At a session of Court
Held in Pontiac, Michigan
On AUG 07 2014

The matter is before the Court on a dispositive motion filed by Plaintiffs On Go, LLC, On Go Holdings, LLC, and Derrick George and the objection of Defendants Naser Investments, LLC and Aziz Naser to Mr. George's late-filed affidavit.

The Court will first address Defendants' request to strike the affidavit. Plaintiffs apparently filed the affidavit in support of their Counter-Motion for Summary Disposition, which is the motion at issue in this opinion. Plaintiffs filed that motion on December 4, 2013 and noticed it for hearing on December 11, 2013, the date the Court set for hearing Defendants' summary disposition. However, because Plaintiffs' motion was not filed at least 21 days before the hearing date, MCR 2.116(G)(1)(a)(i), the Court ordered that the motion would not be heard

on December 11. Instead, the Court set it for hearing February 19, 2014 and set a briefing schedule with Defendants' response to the motion due on January 29, 2014 and Plaintiffs' reply due February 5, 2014. Both Defendants and Plaintiffs timely filed their respective response and reply briefs. On February 12, one week before the hearing date ordered by the Court, Plaintiffs filed a 20 page long "affidavit" signed by George along with more than 200 pages of attachments. Plaintiffs did not seek leave to file additional briefing or evidence before they filed the George affidavit. Plaintiffs' counter-motion was not heard on February 19, 2014 as scheduled because Plaintiffs neglected to file a notice of hearing or praecipe, as instructed in the December 6, 2013 scheduling order.

Defendants assert, and the Court agrees, that the George affidavit was improperly filed on several grounds. First, because it was not filed at least 21 days before the February 18 hearing date, it could not properly be considered as evidence in deciding the dispositive motion. MCR 2.116(G)(1)(a)(i). Although the hearing date on Plaintiffs' motion was adjourned, the affidavit was still improper because it was filed after Defendants' response to the motion, which deprived Defendants of an opportunity to respond to the claims and allegations in the affidavit. Even if the affidavit was timely filed or Defendants were given an opportunity to respond to the affidavit, it still is not a proper evidentiary submission because it is replete with hearsay, legal arguments, conclusory statements unsupported by the personal knowledge of the affiant, and references to statements in Plaintiffs' pleadings and other filed documents. The Court cannot consider an affidavit if its content is inadmissible as evidence. MCR 2.116(G)(6).

The Court further notes that the late filing of this affidavit appears to be part of Plaintiffs' pattern of late and improper filings. Several times throughout the course of this litigation, Plaintiffs attempted to file untimely or excessively long briefs or motions. Thus, even if the

affidavit was not substantively inadmissible, the Court would reject it as a sanction for Plaintiffs' inability or unwillingness to comply with the court rules and this Court's orders. *Persichini v William Beaumont Hospital*, 238 Mich App 626, 640; 607 NW2d 100 (1999).

For all of these reasons, the Court grants Defendants' motion, strikes the George affidavit, and will not consider it in deciding Plaintiffs' motion for summary disposition.

Turning to the substance of the dispositive motion, Plaintiffs move the Court to grant them summary disposition of their claims for conversion and tortious interference and Naser Investments, LLC and Aziz and Judy Naser's counterclaims. Plaintiffs bring the motion under MCR 2.116(C)(10), which tests the factual support for the claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Plaintiffs also ask the Court for other relief including ordering Defendants to escrow the $147,000 withdrawn from On Go's account in May 2013 and invalidating the UCC sale of On Go's collateralized assets.

The arguments Plaintiffs raise in this motion mirror the arguments they raised in their response to Defendants' motion for summary disposition decided in December 2013. Pertinent to this motion, the Court held in its December 19 opinion and order that (1) there was no evidence that Naser Investments materially and substantially breached the loan agreements before the On Go entities breached on July 1, 2012 by failing to pay interest, (2) there is no evidence that Naser Investments waived enforcement of On Go's obligation to pay interest under the loan agreements, (3) Naser Investments is not equitably estopped from enforcing the loan agreements, and (4) Aziz Naser had no duty to disclose his federal fraud investigation. These rulings, which the Court has since revisited and confirmed in its opinion denying Plaintiffs' motion for reconsideration, render moot most of Plaintiffs' arguments in the motion currently before the Court. However, Plaintiffs raise three issues that were not directly addressed or decided in the

December 19th opinion regarding Defendants' motion or the decision denying Plaintiffs' motion for reconsideration. Those new issues address whether (1) Aziz Naser converted funds from On Go's "lockbox" account, (2) Defendants tortiously interfered with the On Go entities relationships with its vendors and creditors, and (3) Defendants tortiously interfered with Derrick George's relationship with On Go.

Regarding the conversion claim, Plaintiffs fail to explain how they can maintain a claim for conversion of money. Generally, a claim alleging conversion of money fails unless the Defendant has an obligation to return the specific money intrusted to his care. See *Thrift v Haner*, 286 Mich 495, 497; 282 NW 219 (1938). Even if Plaintiffs could pursue a claim for conversion of money, Defendants have consistently maintained that Mr. Naser was entitled to take the money from the account. Because a question of fact exists regarding Plaintiffs' conversion claim, Plaintiffs are not entitled to summary disposition of that claim.

As for Plaintiffs' claim that Defendants tortiously interfered with On Go or George's relationships, these claims also appear to be subject to a factual dispute. However, the Court notes that, because Defendants' UCC sale was valid, Plaintiffs cannot premise their tortious interference claim on Defendants' exercise of their rights under the security agreement. To the extent that Plaintiffs' tortious interference claim is based on the UCC sale or Defendants' claim to a security interest in the On Go entities assets, the Court grants Defendants summary disposition of that claim under MCR 2.116(I)(2).

As for Plaintiffs' claim that Defendants tortiously interfered with George's employment relationship, Plaintiffs are not entitled to summary disposition because of a factual dispute. In his deposition, Mr. Naser denied that he threatened to defund On Go unless George took a pay cut. Because Plaintiffs' claims are disputed, Plaintiffs are not entitled to summary disposition.

For all of these reasons, the Court grants Defendants summary disposition of Plaintiff's tortious interference claim to the extent that it is premised on the UCC sale or Defendants' exercise of their rights under the security agreement. In all other respects, Plaintiffs' motion is denied.

IT IS SO ORDERED.

Dated: AUG 07 2014

Hon. Wendy Potts