

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.

OPINION AND ORDER RE: PLAINTIFFS' MOTION FOR RECONSIDERATION

At a session of Court
Held in Pontiac, Michigan
On

~~_____~~
~~AUG 07 2014~~

Plaintiffs On Go, LLC, On Go Holdings, LLC, and Derrick George move the Court to reconsider its decision granting in part Naser Investments, LLC's motion for partial summary disposition. The Court has discretion to grant or deny reconsideration. MCR 2.119(F)(3); *Charbeneau v Wayne County General Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). Reconsideration is warranted if a party identifies a palpable error by which the Court and the parties have been misled and shows that a different disposition must result from correction of that error. MCR 2.119(F)(3).

Plaintiffs assert that the Court erred when it concluded that there was no question of fact that the On Go entities were the first parties to materially breach the loan agreements, thus precluding them from asserting a breach of contract action. Naser Investments asserted that the On Go entities breached the loan agreements by failing to make the required interest payments

on the loan. The promissory note required On Go Holdings and On Go Enterprises to pay “monthly installments of interest only commencing on July 1, 2012.” Plaintiffs claim that Naser Investments and its principal Aziz Naser lead them to believe that they could pay the interest through depositing receivables into a “lockbox” account controlled by Mr. Naser. However, the note states that the interest would be paid to “Lender,” which is Naser Investments. There is nothing in the loan agreement or promissory note stating that the interest payments could be made by depositing receivables into an account. Further, there is no evidence that Naser Investments or Mr. Naser agreed in writing to waive the interest payment terms. Because there is no question of fact that the On Go entities made no interest payments, there is no question of fact that they materially breached the loan agreements as of July 1, 2012.

Plaintiffs also assert that Naser Investments was the first to materially breach the agreement because it failed to place loan proceeds in a bank account jointly controlled by Naser Investments and the On Go entities. However, Plaintiffs fail to explain how this alleged breach is material or substantial. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). In order to be considered a substantial breach that eliminates the other party’s obligation to perform, the breach must affect the “essential operative elements of the contract” such that the other party’s performance is rendered ineffective or impossible. *Baith v Knapp-Stiles, Inc*, 380 Mich 119, 126; 156 NW2d 575 (1968). Plaintiffs fail to explain how Naser Investments’s alleged failure to deposit loan proceeds in a jointly controlled account affected the essence of the agreement or rendered the On Go entities’ performance ineffective or impossible. Plaintiffs do not allege that Naser Investments failed to extend any loan to the On Go entities or preventing them from accessing the loan proceeds.

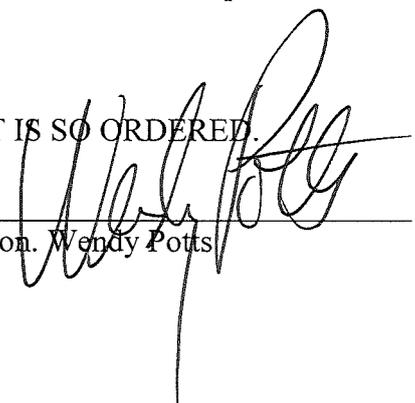
Plaintiffs also argue that Naser Investments first breached the loan agreements by failing to comply with its duty of good faith and fair dealing. Plaintiffs are correct that an agreement generally carries an implied duty of good faith and fair dealing. *Hammond v United of Oakland, Inc*, 193 Mich App 146, 152; 483 NW2d 652 (1992). However, the breach of the implied covenant of good faith and fair dealing is not an independent cause of action. *Hammond, supra* at 152; *Fodale v Waste Management of Michigan, Inc*, 271 Mich App 11, 35; 718 NW2d 827 (2006). Even if Plaintiffs could assert a breach of contract claim on this ground, they again fail to explain how Naser Investments's alleged failure to act in good faith constituted a substantial breach that would excuse the On Go entities from their duty to perform. *Baith, supra*.

For all of these reasons, Plaintiffs fail to demonstrate palpable error in the Court's conclusion that there is no question of fact that the On Go entities were the first to materially and substantially breach the loan agreements by failing to make the required interest payments. Plaintiffs' motion for reconsideration is denied.

Dated:

AUG 07 2014

IT IS SO ORDERED.



Hon. Wendy Potts