

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:

NASER INVESTMENTS, LLC AND AZIZ NASER'S MOTION FOR SUMMARY
DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND MCR 2.210(B) AS TO PLAINTIFF
DERRICK GEORGE

AND

NASER INVESTMENTS, LLC'S MOTION FOR PARTIAL SUMMARY DISPOSITION AS
TO SECURITY INTERESTS AND OWNERSHIP OF ANY AND ALL ASSETS OF
DEBTORS, INCLUDING, BUT NOT LIMITED TO, CLAIMS INVOLVING DEBTORS' "5
HOUR ENERGY LAWSUIT" AND CLAIMS INVOLVING THIS ACTION

At a session of Court
Held in Pontiac, Michigan

On
DEC 19 2013

Defendants Naser Investments, LLC and Aziz Naser move the Court to dismiss Plaintiff Derrick George's claims against them under MCR 2.116(C)(8), which tests the legal sufficiency of the claims. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Naser Investments also moves the Court to grant it partial summary disposition regarding its claims against Plaintiffs On Go, LLC's and On Go Holdings, LLC's for breach of the loan agreements under MCR 2.116(C)(10), which tests the factual support for the claims. *Maiden, supra* at 120 (1999).

Regarding Mr. George, Defendants argue that the Court should dismiss him as a party because he is not a real party in interest as to the On Go entities' claims. Defendants assert that

the only claim George alleged personally was the defamation claim, which has since been dismissed. George contends that he is a real party interest to the On Go entities' breach of contract claims because he signed the loan agreement in his personal capacity and agreed to indemnify Defendants for any breach of the agreement.

An action must be brought by a "real party in interest," MCR 2.201(B), which is defined as "one who is vested with the right of action on a given claim." *Hofmann v Auto Club Ins Assn*, 211 Mich App 55, 95; 535 NW2d 529 (1995). Contrary to Defendants' claim, George is a party to the loan agreement and he signed it, at least in part, in his personal capacity as an indemnitor. However, there is no merit to George's theory that he can assert claims against Defendants as either an indemnitor or a subrogee of the On Go entities. George's indemnification obligations flow solely to Naser Investments. George did not make any promises to the On Go entities in the loan agreement, and Naser Investments did not make any promises to George. Thus, George fails to explain how his obligations as an indemnitor gives him standing to assert a claim against Defendants. To the extent that George is asserting an injury to himself flowing from the On Go entities' claims, Defendants are entitled to summary disposition of those claims.

Although George is not a real party in interest to the On Go entities' claims, Plaintiffs filed an amended complaint asserting that Aziz Naser tortiously interfered with George's employment and business relationships with the On Go entities. Defendants challenge the merits of George's tortious interference theory, however, George has alleged the essential elements of the claim: (1) George had a business or contractual relationship with the On Go entities, (2) Naser intentionally and wrongfully interfered with and caused a breach of that relationship, and (3) George suffered injury as a result. *BPS Clinical Laboratories v BCBSM*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996). Defendants' motion seeking dismissal of George was brought

only under (C)(8), and the Court can dismiss it only if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Maiden, supra*. Because George has a facially valid claim for tortious interference against Naser, the Court denies summary disposition. To the extent that Defendants believe that George's tortious interference claim lacks factual support, they can raise this issue in a (C)(10) motion. For all of these reasons, Defendants' motion is granted as to any injury George is claiming from the On Go entities' claims. However, the Court will not dismiss George as a Plaintiff because he alleged a legally cognizable claim for tortious interference against Naser.

As for the second dispositive motion, Naser Investments asserts that there is no question of fact that the On Go entities breached the loan agreement that required them to make monthly interest payments beginning in July 2012. The On Go entities do not present any evidence showing a question of fact whether they made the required interest payments. Instead, they claim that Naser Investments waived enforcement of its loan agreements through various conduct of its principal, Mr. Naser. However, the promissory note and loan agreement both have an anti-waiver clauses stating that neither Naser Investments's delay in enforcing its rights nor its course of dealing serve to waive enforcement of the loan provisions. Although an anti-waiver provision can be also waived, the On Go entities must establish the waiver through clear and convincing evidence. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003). The On Go entities present no evidence, much less clear and convincing evidence, that Naser Investment waived any provision in the agreements.

The On Go entities also argue that Mr. Naser should be equitably estopped from claiming a default because he continued to loan On Go money despite the fact that it was not paying interest. They also assert that Naser set up the lockbox account and lead them to believe that it was to be used for loan payments. Equitable estoppel arises where (1) a party by representation,

admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the relying party will be prejudiced if the representing party is permitted to deny the existence of the facts. *Cook v Grand River Hydroelectric Power Co, Inc*, 131 Mich App 821, 828; 346 NW2d 881 (1984). However, the On Go entities fail to explain how Naser Investments's continued extension of loan funds or its use of the lockbox account justifiably induced them to believe that they were relieved of their obligation to pay interest.

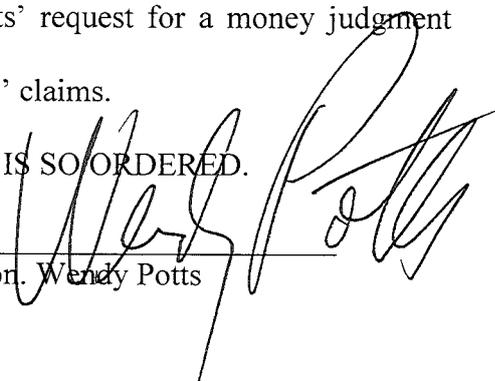
The On Go entities also argue that Naser Investment first breached the agreement through various conduct of Mr. Naser. In particular, the On Go entities claim that Naser Investment failed to loan funds to On Go as required by the parties' agreement. A party who breaches a contract may not maintain an action against the other contracting party for its subsequent breach or failure to perform, provided the initial breach is substantial. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). A breach is considered substantial where it "has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party." *Baith v Knapp-Stiles, Inc*, 380 Mich 119, 126; 156 NW2d 575 (1968). On Go first breached the loan agreements by failing to pay interest on July 1, 2012. In order to show that Naser Investments was the first party to breach the agreement, and thus barred from claiming that the On Go entities breached the agreements, the On Go entities would need to present evidence that Naser Investments materially breached the agreements before July 2012. This they fail to do. Because On Go presents no evidence of Naser Investments's breach of the loan agreements before July 1, 2012, they cannot avoid summary disposition on this ground.

In their final argument, the On Go entities claim that Mr. Naser engaged in silent fraud or fraudulently induced them to enter into the loan agreements by failing to disclose his intent to control On Go or that he was involved in an alleged Medicare fraud case. However, the On Go entities do not explain how Naser had a duty to disclose his legal issues or intentions before the loan agreements were executed. Even if Naser had a duty to disclose, the On Go entities present no evidence that, but this alleged nondisclosure, they would not have entered into the loan agreements.

For all of these reasons, the On Go entities fail to establish a question of fact regarding the validity and enforceability of Naser Investments's loan agreements. The Court grants Naser Investments's motion and enters a partial declaratory judgment holding that Naser Investments has a valid first priority interest in the On Go entities' collateral identified in the loan documents. The Court further holds that Naser Investments owns the On Go entities' collateral identified in the UCC sale. However, the Court denies Naser Investments' request for a money judgment without prejudice, pending the resolution of the On Go entities' claims.

Dated: **DEC 19 2013**

IT IS SO ORDERED.



Hon. Wendy Potts