

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

CAM COST SOLUTIONS, LLC,

Plaintiff,

v

Case No. 2013-136194-CK
Hon. Wendy Potts

KINETIC POST, INC,

Defendant.

OPINION AND ORDER RE: DEFENDANTS' MOTION FOR RECONSIDERATION
OF THIS COURT'S DECEMBER 18, 2013 ORDER DENYING DEFENDANT'S
MOTIONS FOR SUMMARY DISPOSITION AND/OR FOR A STAY AND GRANTING
PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION AND ENTERING
JUDGMENT IN ITS FAVOR AGAINST DEFENDANT

At a session of Court
Held in Pontiac, Michigan

On

JUN 12 2014

Defendant Kinetic Post, Inc. moves the Court to reconsider its decision granting Plaintiff CAM Cost Solutions LLC summary disposition and entering judgment in CAM Cost's favor. 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).

Kinetic asserts that the Court erred in concluding that CAM Cost's decision to collect its fees through installment payments did not modify its right to collect its fee when due under the parties' agreement. However, Kinetic cannot demonstrate grounds for reconsideration based on

arguments that were or could have been raised in its motion or in response to Plaintiff's requests for summary disposition. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Because Kinetic raised the same issue and arguments in its summary disposition briefs, it is not entitled to reconsideration. Kinetic's disagreement with this Court's reasoning or legal conclusions does not amount to palpable error. *Herald Co v Tax Tribunal*, 258 Mich App 78, 83; 669 NW2d 862 (2003).

Even if the Court were to revisit its decision, Kinetic fails to demonstrate any error warranting reconsideration. Kinetic agreed to pay CAM Cost one-third of the gross recovery Kinetic obtained from its landlord S&N Development Corp. The agreement states that CAM Costs' fees "are due and payable upon the receipt of a check, a credit, or at the time an agreement is reached between Kinetic and the Landlord or property manager for future benefit or consideration." As a result of CAM Cost's audit, Kinetic negotiated a refund from S&N that would be paid in installments from May 2012 through June 2015. Because S&N was paying Kinetic through installments, CAM Cost agreed to allow Kinetic to pay CAM Cost's fee through installments. However, after S&N stopped its installment payments in July 2013, and Kinetic stopped paying CAM Cost's fee, CAM Cost demanded that Kinetic pay the remaining fee owed, which Kinetic failed or refused to do.

In its motion for summary disposition, Kinetic asserted, among other theories, that CAM Cost's offer to accept installment payments was a mutual modification of the agreement that somehow absolved Kinetic of making any further payments. The Court rejected that theory because there was no evidence that CAM Cost agreed to forego payment of its fee if S&N stopped paying. The audit agreement entitled CAM Cost to seek payment of its fee at the time S&N agreed to refund Kinetic. Instead of immediately demanding its full fee, CAM Cost agreed

to allow Kinetic to pay as it received payments from S&N. At most, this installment arrangement was a modification of CAM Cost's right to immediately collect its fee, and not an agreement to forego collection of its fee altogether.

Kinetic now asserts a new twist on that same argument by claiming that CAM Cost waived its right to collect its fee by agreeing to allow Kinetic to pay the fee through installment payments. A waiver is an intentional relinquishment of a known right. *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 719; 179 NW2d 252 (1970). CAM Cost waived its right to collect from Kinetic only if there is evidence of "an actual intention to relinquish it or such conduct as warrants an inference of relinquishment." *Fitzgerald, supra* at 718. As noted above, CAM Cost's agreement to collect its fee through installment payments could be construed as a waiver of its right to immediately collect its entire fee when Kinetic entered into the refund agreement with S&N. However, Kinetic has not explained how the trier of fact could conclude that CAM Cost's decision to allow installment payments amounted to a wholesale waiver of CAM Cost's right to collect its fee. Kinetic presents no evidence that CAM Cost engaged in conduct showing an intention to relinquish its right to collect its fee.

For all of these reasons, Defendant fails to show palpable error in the Court's summary disposition opinion, and the Court denies the request for reconsideration.

Dated:

JUN 12 2014

IT IS SO ORDERED.

Hon. Wendy Potts

