

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

COMERICA BANK, a Texas Banking
Association, successor in interest by merger
to Comerica Bank, a Michigan Banking
Corporation,

Plaintiff,

vs.

Case No. 2014-1336-CB

CREATIVE CHILD, INC., a Michigan
Corporation, and BRANDON BILSKI IN
HIS CAPACITY AS TRUSTEE OF THE
JUDITH A. BILSKI TRUST U/A/D
12-22-1999, an individual,

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants have filed a response and request that the motion be denied.

I. Factual and Procedural History

On August 29, 2011 JAB Properties, LLC ("JAB") executed a promissory note in favor of Plaintiff in the amount of \$586,616.11 ("Note"). Subsequently, Defendants each executed a guaranty securing JAB's obligations under the Note (collectively, the "Guaranties").

On March 24, 2015, Plaintiff filed its complaint in this matter asserting claims for breach of the Guaranties. On July 1, 2015, Plaintiff filed its instant motion for summary disposition. On July 20, 2015, Defendants filed their

response and request that the motion be denied. On July 27, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

III. Arguments and Analysis

In its motion, Plaintiff first contends that the Note matured on November 1, 2014, that JAB, nor the Defendants, has paid the balance owed under the Note, and that as a result Defendants have breached the terms of the Guaranties.

In response, Defendants do not dispute that the Note matured on November 1, 2014, that they have not paid the balance owed at the time the Note matured, or that failure to make the required payments constitutes a breach of the Note and Guaranties. Nevertheless, Defendants contend Plaintiff's claims for breach of the Guaranties based on failure to pay the amount due at maturity

fail because an amended complaint relates back to the date of the original complaint under MCR 2.118(D), that Plaintiff's claim had not accrued as of the date of the original complaint, and that as a result Plaintiff has failed to state a claim upon which relief can be granted.

MCR 2.118(D) provides that an amended pleading that adds a claim or defense relates back to the date of the original pleading "if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempt to be set forth, in the original pleading." The purpose of the relation back doctrine set for in MCR 2.118(D) is to defeat the statute of limitations in order to preserve valid claims that would otherwise be defeated by legal technicalities. *Smith v Henry Ford Hosp.*, 219 Mich App 555, 558; 557 NW2d 154 (1996). In this case, Defendants do not dispute the validity of Plaintiff's claims related to their failure to pay the balance at the time the Note matured. Instead, Defendants seek to make it more difficult for Plaintiff to prosecute its claims by having to file a separate lawsuit and then have the two cases consolidated. The Court is convinced that such an interpretation of the relation back doctrine goes against the purpose of the rule and the concept of judicial economy. Accordingly, the Court is satisfied that Defendants' position is without merit. Moreover, as Defendants have not contested the merits of Plaintiff's claim, Plaintiff's motion for summary disposition of Counts II and IV of its amended complaint should be granted.

In addition, Plaintiff asserts that its acceleration of the Note was effective on January 23, 2014 as Defendants did not cure their default until January 28,

2014. The Court has previously held that under *Oakland Nat Bank v Anderson*, 81 Mich App 432; 265 NW2d 362 (1978) and *Theatre Equipment Acceptance Corp. v Betman*, 259 Mich 245; 242 NW 903 (1932), Plaintiff's January 23, 2014 acceptance could only be effective if the Note was in default at the time the acceleration took place. Further, this Court held that because Defendants had cured the default before Plaintiff accelerated the Note, the acceleration was not effective.

In its current motion, Plaintiff asserts that it has discovered that Defendants in fact did not cure the default until January 28, 2014, five days after the acceleration. Specifically, Plaintiff relies on Defendants' bank record which evidences that Defendants did not cure their default on the January 2014 payment until January 28, 2014. (See Plaintiff's Exhibits 8 and 9.)

In response, Defendants do not dispute that the payment in question was not made until January 28, 2014; rather, Defendants assert that Plaintiff waived any breach of the Guaranties by accepting payment on January 28, 2014, and accepting additional payments for February through April 2014. In support of their position, Defendants rely on the Michigan Court of Appeals decision in *Oakland*.

In *Oakland*, the plaintiff made two loans to the defendant, both of which contained acceleration clauses. With respect to the first loan, the defendant was to be repaid via 10 monthly payments beginning on July 15, 1971. After the defendant failed to make the first two payments, the plaintiff filed its complaint. After the complaint was filed, the defendant made the late payments, including

the late fees and interest. On appeal, the Michigan Court of Appeals held that acceptance of the payments did not constitute a waiver by plaintiff of its right to accelerate. *Oakland*, 81 Mich App, at 436-437. Rather, the Court held that acceptance of defendant's check by the bank merely served to reduce defendant's indebtedness on the note, did not cure all the defaults which existed at the time and did not waive the acceleration of the balance owed under the note. *Id.* at 437.

With regards to the second note in *Oakland*, by the time plaintiff had filed its complaint the defendant had made the outstanding payments. In holding that the plaintiff had waived its right to accelerate the balance, the Court based its decision on the Michigan Supreme Court's decision in *Theatre Equipment Acceptance Corp. v Betman*, 259 Mich 245; 242 NW 903 (1932). The Court in *Oakland* summarized *Betman* as follows:

In *Betman* the debtor had signed a series of notes, each of which included an acceleration clause for the subsequent notes in the series upon default. The debtor made only a partial payment on the first note but the creditor did not accelerate the other notes at that time. Thereafter, the debtor paid the full balance of the next two notes. Before the fourth note matured, the creditor attempted to accelerate all remaining notes because of the unpaid balance due on the first note. The Supreme Court found that the creditor had waived his right to accelerate based on default on the first note by accepting payment on the second and third notes.

Oakland, 81 Mich App, at 436.

Michigan courts have displayed a strong reluctance to find waiver or estoppel except under the most compelling circumstances. *Formall, Inc. v Community Nat. Bank of Pontiac*, 138 Mich App 588, 601; 360 Nw2D 902 (1984). In this case, like the first note in *Oakland*, and unlike the second note in *Oakland*,

the payments Plaintiff accepted were accepted after the Note had been accelerated. While accepting payments after the Note was accelerated served to reduce Defendants' indebtedness, it did not cure its failure to pay the full amount demand in the January 23, 2014 acceleration letter by the January 30, 2014 deadline. Moreover, while Defendants' obligations were arguably current for the two days between when the payment was made on January 28, 2014 and the accelerated balance was not paid on January 30, 2014, Plaintiff made no indication that it was waiving the acceleration by accepting the January 28, 2014 payment. For these reasons, the Court finds the facts presented in this case closely analogous to those presented in connection with the first note in *Oakland*. Consequently, this Court, like the Court of Appeals in *Oakland*, is convinced that Plaintiff did not waive, and is not estopped from enforcing, its right to accelerate the Note.

Defendants also contend that whether acceptance of late payments after acceleration constitutes a waiver or a basis for estoppel is a question of fact under *Formall, Inc. v Community National Bank of Pontiac*, 138 Mich App 588; 360 NW2d 902 (1984). While the Court in *Formall* held that the facts presented in that case presented a genuine issue of fact that should be left the trier of fact, the Court also held that an issue of fact is not always created when a lender accepts a payment, temporarily defers acceleration or otherwise forbears or desists from strict compliance with the rights of collection. *Id.* at 603.

In *Formall*, the lender initiated negotiations for the renewal of the note in question and accepted interest payments. In addition, the parties disputed

various factual issues regarding the parties' interactions. In this case, the Court has held, and Plaintiff has not disputed in its instant response, that Plaintiff accelerated the Note before Defendants cured the outstanding default. Moreover, unlike *Formall*, Defendants has not presented any evidence that Plaintiff has taken any action, other than accepting payments it was entitled to receive, that would indicate in any way that it was waiving its prior acceleration. Consequently, the Court is convinced that the facts in this case do not present a sufficient basis for reasonable minds to infer that Plaintiff intended to waive its acceleration demand. Accordingly, the Court is satisfied that Plaintiff's position is without merit.

In addition to seeking the principal balance and interest owned under the Guaranties, Plaintiff also requests that the Court grant it attorney fees and costs as provided by the Guaranties. Specifically, paragraph 1 of the Guaranties provides, in pertinent part:

The total obligation of the undersigned under this Guaranty is UNLIMITED unless specifically limited in the Additional Provisions of this Guaranty, and this obligation (whether unlimited or limited to the extent specified in the Additional Provisions shall include, IN ADDITION TO any limited amount of principal guaranteed, all interest on all indebtedness, and all costs and expenses of any kind incurred by the Bank in collection efforts against the Borrower and/or the undersigned or otherwise incurred by the Bank in any way relating to the indebtedness or this Guaranty, including without limit attorneys' fees.

(See Plaintiff's Exhibit 1 and 2, at ¶1.)

Contractual provisions for payment of reasonable attorney fees are judicially enforceable. *Central Transport, Inc. v Fruehauf Corp*, 139 Mich App

536, 548; 362 NW2d 823 (1984). In this case, Defendants appears to concede that the Guaranties provide for Plaintiff to recover its attorney fees in the event that it incurs them in connection with efforts to collect amount owed under the Guaranties. While the reasonableness of the fees Plaintiff has requested has yet to be determined, the Court is satisfied that Plaintiff is entitled to recover the reasonable attorney fees and costs it has incurred in connection with this matter.

IV. Conclusion

Based upon the reasons set forth above, Plaintiff's motion for summary disposition is GRANTED. The issue of damages including reasonable attorney fees and costs remains OPEN. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor CLOSES the case.

IT IS SO ORDERED.

Date: SEP 30 2015

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge