

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

RIZZO ENVIRONMENTAL
SERVICES, INC.,

Plaintiff,

vs.

Case No. 2014-335-CB

DUMPSTER BROKERS, LLC,
d/b/a DUMPSTER FOR LESS,
and WILLIAM TURNER,

Defendants.

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MACOMB COUNTY
MICHIGAN

OPINION AND ORDER

Defendants have filed a motion for reconsideration and/or relief from judgment. Plaintiff has filed a response and requests that the motion be denied.

I. Factual and Procedural History

On November 19, 2012, Defendant Dumpster Broker, LLC d/b/a Dumpster For Less ("Defendant Dumpster") entered into a written contract with Plaintiff pursuant to which, *inter alia*, Plaintiff agreed to be Defendant's vendor for the purpose of providing, and later retrieving, dumpsters (the "Contract").

On November 3, 2014, Plaintiff filed its first amended complaint in this matter alleging that Defendant Dumpster breached the Contract (Count I), and that Defendant William Turner breached his personal guaranty under the Contract (Count II). Plaintiff's complaint also includes claims for account stated against Defendant Dumpster (Count III), unjust enrichment against Defendant Dumpster (Count IV), and fraud against all the Defendants (Count V).

In December 2015, the parties entered into a settlement agreement ("Settlement Agreement") wherein Defendant Dumpster Broker, LLC d/b/a Dumpster for Less ("Defendant Dumpster") agreed to pay Plaintiff \$25,000.00 in installments in full settlement of this matter. While Defendants made all but one of the payments in compliance with the Settlement Agreement, they allegedly failed to make the last payment in a timely manner.

On June 26, 2016, Plaintiff filed a stipulated order to set aside the dismissal of this action for the limited purpose of entering a consent judgment. On June 30, 2016, the consent judgment ("Consent Judgment") was executed and entered by the Court.

On July 7, 2016, Defendants filed their instant motion for reconsideration of and/or relief from the Consent Judgment. Plaintiff subsequently filed a response opposing the motion. On July 25, 2016, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standards of Review

Motions for reconsideration must be filed within 21 days of the challenged decision. MCR 2.119(F)(1). The moving party must demonstrate a palpable error by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. MCR 2.119(F)(3). A motion for reconsideration which merely presents the same issue ruled upon by the Court, either expressly or by reasonable implication, will not be granted. *Id.* The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a

motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). The grant or denial of a motion for reconsideration is a matter within the discretion of the trial court. *Cole v Ladbrooke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

With regards to Defendants' motion for relief from judgment, Defendants seek relief under MCR 2.612 MCR 2.612(C)(1)(a), which provide:

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect;

III. Arguments and Analysis

In this case, the Consent Judgment was filed pursuant to the terms of the Settlement Agreement. Specifically, the Settlement Agreement provides that the parties signed the Consent Judgment at the time the Settlement Agreement was executed and that it was to be held in escrow by Plaintiff's counsel. Further, the Settlement Agreement provides that if Defendants fail to make a required payment by the 10th day of the month in question Plaintiff's counsel is authorized to file the document with this Court, along with an affidavit of Plaintiff's agent in which he sets forth the payments made and the balance owed. Additionally, the Settlement Agreement provides that Defendants shall have seven days from the day they are served with the affidavit and consent judgment to file objections. In this matter, the Consent Judgment was filed on June 21, 2016. Defendants did not file an objections within 7 days of that date; rather, Defendants instant motion

was filed on July 7, 2016, 16 days after the Consent Judgment was filed. Despite admitting failing to file timely objections to the Consent Judgment, Defendants contend that the Consent Judgment should be set aside based on the substantial performance doctrine.

"Michigan follows the substantial performance rule". *Gibson v Group Ins. Co. of Michigan*, 142 Mich App 271, 275-276; 369 NW2d 484 (1985). In *Gibson*, the Michigan Court of Appeals explained the doctrine as follows:

A contract is substantially performed when all the essentials necessary to the full accomplishment of the purposes for which the thing contracted has been performed with such approximation that a party obtains substantially what is called for by the contract.

Generally speaking, deviations from the absolute terms of a contract do not necessarily cause a failure of performance, but may entitle a party to extra compensation or damages. Imperfections in the matters of details which do not constitute a deviation from the general plan do not prevent the performance from being regarded as substantial performance. On the other hand, where the deviations or alterations are such as would essentially change the terms of performance, they will be considered as a failure of performance.

P&M Constr Co v Hammond Ventures, Inc., 3 Mich App 306, 315; 142 NW2d 468 (1966).

In this case, the obligation at issue is Defendants payment obligation under the Settlement Agreement. Specifically, the issue is whether Defendants payment of the final \$4,000.00 installment on June 15, 2016, two days after receiving a notice of default, and after making the other six payments, constituted substantial performance under Michigan law.

In this case, the Settlement Agreement does not contain a time is of the essence clause. Where time is not of the essence to a contract, a short delay in payment, which does not result in detriment to the payee, may constitute substantial performance of the contract. *A E Giroux, Inc. v. Contract Services Assoc., Div. of Premium Corp. of America, Inc.*, 99 Mich App. 669, 670-671, 299 NW2d 20 (1980). However, the exact words "time is of the essence" are not required to make time of the essence; rather, "[a]ny words which show that the intention of the parties is that time shall be of the essence....will have that effect." *Friedman v Winshall*, 343 Mich 647; 73 NW2d 248 (1955), quoting 12 Am Jur, Contracts, §311, p.866. In *Burton Industries, Inc. v Atlas Technologies, Inc.*, unpublished per curium opinion of the Court of Appeals, decided May 11, 2005 [Docket No. 259052], the Court of Appeals addressed a situation analogous to the facts presented in this case.

In *Burton*, as in this case, the parties settled their underlying litigation via a settlement agreement. That settlement required defendant to make specific payments by particular dates. Further, the settlement provided a default provision providing that a greater amount would be owed if the defendant failed to make the required payments in a timely fashion. The defendant ultimately made one of the required payments two days late, causing the plaintiff to seek to enforce the default provision. On appeal, the Court of Appeals held that: "The fact that the [settlement] required payment of designated sums on specified dates and provided a clear sanction upon default leads to the conclusion that

time was of the essence. The inclusion of the default provision demonstrates that timeliness of payments was important to the agreement." *Id.* at 3.

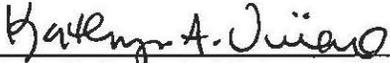
In this case, as in *Burton*, the parties settled their underlying dispute via a settlement agreement requiring Defendants to make installment payments by specified dates. Moreover, in this case, as in *Burton*, the Settlement Agreement provides a default provision that is to apply in the event that Defendants failed to make the payments in a timely manner. Consequently, the Court is satisfied that time is of the essence with respect to the Settlement Agreement despite the absence of the exact phrase "time is of the essence", in light of the fact that the Settlement Agreement provides for particular payments at specified dates and provides a sanction for Defendants failure to timely comply with its obligations. As a result, the Court is convinced that Defendants' contention that they substantially performed their obligations is without merit. Moreover, since that position is the only asserted basis in support of their motion, Defendants' motion for reconsideration and/or relief from judgment must be denied.

IV. Conclusion

For the reasons discussed above, Defendants' motion for reconsideration and/or relief from judgment is DENIED. In compliance with MCR 2.602(A)(3), the Court states this matter REMAINS CLOSED.

IT IS SO ORDERED.

Date: AUG 10 2016



Hon. Kathryn A. Viviano, Circuit Court Judge