

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

EPC COMMERCIAL II LLC,
A Delaware limited liability company,

Plaintiff,

Case No. 2015-273-CB

vs.

TOWN CENTER FLATS, LLC, a
Michigan limited liability company,
VINCENT DILORENZO, and ANGELA
TINERVIA,

Defendants.

OPINION AND ORDER

Defendants have filed a motion for reconsideration of the Court's September 28, 2015 Opinion and Order granting Plaintiff's motion for partial summary disposition.

I. Factual and Procedural History

This lawsuit stems from a loan transaction ("Loan") between two entities, Plaintiff EPC Commercial II LLC ("EPC"), the lender, and Defendant Town Center Flats LLC ("TCF"), the debtor. In addition, Defendants Vincent Dilorenzo and Angela Tinervia ("the Guarantors") executed guaranties securing TCF's obligations under the Loan ("Guaranties")(Loan and Guaranties collectively, "Loan Documents"). EPC filed its "verified complaint for damages, foreclosure, appointment of receiver and injunctive relief" ("Complaint") on January 23, 2015, which sought damages against TCF for its breaches of the Loan Documents and its failure to pay EPC the amounts due thereunder, and damages against the Guarantors for their breaches of their Guaranties.

On January 31, 2015, TCF sought protection under Chapter 11 of the United States Code, 11 USC 1101 et seq., in the United States Bankruptcy Court for the Eastern District of Michigan, Case No. 15-413307. The Bankruptcy Court granted Debtor's "Motion for Interim Use of Rents and Granting Adequate Protections" (the "Consent Order") on April 22, 2015. (See Exhibit D of *Plaintiff's Motion*.) In the Consent Order, TCF, as the debtor, conceded to both its indebtedness and its breach, and thus its default under the Loan with ECP. Also, and most relevant to the instant dispute, TCF conceded to "\$5,329,329.37, plus attorneys' fees and costs. . . ." in owed damages to date to ECP. (See Plaintiff's Exhibit D, at ¶ F17.)

The Guarantors are joint owners of TCF. In their answers to the Complaint, dated February 12, 2015, the Guarantors admitted to breaching the Guaranties by "failing to pay amounts due and owing under the Loan Documents following TCF's default thereunder." (See ¶¶ 77, 81 of *Complaint*). Although the Guarantors admit liability to EPC pursuant to the Guaranties, both Guarantors contest the amount of damages they owe EPC.

On May 11, 2015, Plaintiff filed its motion of partial summary disposition pursuant to MCR 2.116(C)(10). On June 24, 2015, the Guarantors filed their response requesting Plaintiff's motion to be denied. On June 29, 2015, this Court held a hearing on the motion, took the matter under advisement, and requested the parties to submit supplemental briefs in support of their respective positions. On September 28, 2015, the Court entered its Opinion and Order granting Plaintiff's motion for partial summary disposition.

On October 9, 2015, Defendants filed their instant motion for reconsideration of the September 28, 2015 Opinion and Order. On October 30, 2015, Plaintiff, with leave from the Court, filed its response to the motion.

II. Standard 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 Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

III. Arguments and Analysis

In their motion, Defendants contend that the Court erred by holding that they had failed to establish that a genuine issue of material fact exists with respect to damages. Specifically, Defendants aver that:

If they had been given an opportunity to do so, Defendants would have presented evidence of six (6) insurance checks, totaling \$166,407.43, which were forwarded to Key Bank, Plaintiff's predecessor in interest, on December 9, 2010. See Exhibit 2. Defendants were never given credit for payment for the \$166,407.43. Furthermore, neither Key Bank nor Plaintiff applied the insurance proceeds to repair the roof on their real estate collateral.

(See Defendants' motion, at p.4.)

As a preliminary matter, Defendants could have presented the evidence in question in their response to Plaintiff's motion, at the hearing held in connection with the motion, or in their supplemental brief they filed in connection with the motion. Accordingly, Defendants position that they were not given an opportunity to present evidence is disingenuous at best. The Court has discretion to deny a motion for reconsideration when the moving party relies on arguments or legal theories that could have been raised prior to the judgment. *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). In this case, Defendants could have presented the evidence that they now rely upon before the Court granted Plaintiff's motion. However, Defendants failed to do so. Consequently, Defendants' contention is untimely and the motion should be denied on this basis alone.

Even though untimely, the Court will address the merits of the new argument contained in Defendants' motion. Other than attaching the Court's previous Opinion and Order, Defendants have attached two exhibits in support of their motion. The first is a December 9, 2010 letter and copies of 6 checks which Defendants' contend establish that TCF forwarded 6 checks totaling \$166,407.43 to Plaintiff's predecessor in interest on December 9, 2010. (See Defendants' Exhibit 2.) While it appears the checks were tendered to Plaintiff's predecessor in interest prior to the third amendment to the Loan Documents, which was executed on December 31, 2010, and which is the operative loan document in this matter (See Exhibit 14 to Complaint), it is unclear whether they were applied to the balance owed by Defendants in this case. Accordingly, The Court is

convinced that a genuine issue exists as to whether these payments have been applied to the balance owed by Defendants.

Defendants also contend that Plaintiff's predecessor was given two payments of \$17,601.46 each by TCF in 2013, and that Plaintiff has failed to credit either of those payments. Defendants' Exhibit 3 appears to be two check stubs documenting two payments to Key Bank, Plaintiff's predecessor in interest. The Court is convinced that a genuine issue exists as to whether these payments have been applied to the balance owed by Defendants.

In addition, Defendants assert that TCF has made payments totaling \$115,000.00 to Plaintiff since it filed for bankruptcy, that those payments should reduce their liability to Plaintiff, but that the payments have not been reflected in Plaintiff's proposed judgment. In support of their position, Defendants rely on the Guarantors' testimony in which they testify that TCF has paid Plaintiff \$70,000.00 since the day it filed its bankruptcy petition. (See Exhibits 2 and 3 to Defendants' Supplemental Brief.) Plaintiff has not addressed Defendants' argument, nor has it established that its proposed judgment reflects the payments it has received from TCF. Accordingly, the Court is convinced that a genuine issue exists as to whether these payments have been applied to the balance owed by Defendants. As a result, Defendants' motion for reconsideration must be granted with respect to the amount of damages and Plaintiff's motion for entry of judgment must be denied.

IV. Conclusion

Defendants' motion for reconsideration of the portion of the Court's Opinion and Order holding that there is no genuine issue of fact as to the amount of damages only is

is GRANTED. The issue of damages remains OPEN.

In addition, Plaintiff's motion for entry of judgment is DENIED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last pending claim nor closes the case.

IT IS SO ORDERED.

Date: DEC 10 2015

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