

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

BMO HARRIS BANK N.A.

Plaintiff,

v

Case No. 21-187277-CB
Hon. Michael Warren

SARKIS FREIGHT, INC., et al.,

Defendants.

**OPINION AND ORDER GRANTING PLAINTIFF'S MOTION
FOR SUMMARY DISPOSITION ON ALL CLAIMS AGAINST DEFENDANTS**

At a session of said Court, held in the
County of Oakland, State of Michigan
April 7, 2022

PRESENT: HON. MICHAEL WARREN

OPINION

**I
Overview**

The present cause of action arises out of eight commercial loans (the "Loans") BMO Harris Bank N.A. ("BMO") made to Sarkis Freight, Inc., Warrior Freight Holdings, LLC, and Heavy Weight Enterprises, Inc. (collectively the "Borrowers") pursuant to eight Loan and Security Agreements (the "Notes") to finance the Borrowers' acquisition of certain vehicles, trucks, and trailers for their freight business. The Loans were guaranteed

by corresponding Continuing Guarantees (the “Guarantees”). The Plaintiff alleges that the Loans went into default based on non-payment of the monthly installments due and as a result, the entire balance of each Loan became fully due. In particular, the Plaintiff alleges Breach of February 17, 2017 Loan Agreement by Sarkis Freight (Count I), Breach of August 16, 2017 Loan Agreement by Sarkis Freight (Count II), Breach of September 19, 2017 Loan Agreement by Sarkis Freight (Count III), Breach of January 3, 2018 Loan Agreement by Sarkis Freight (Count IV), Breach of Guaranty of Sarkis Loans by Sarkis (Count V), Breach of Guaranty of Sarkis Loans by Warrior Freight (Count VI), Breach of Guaranty of Sarkis Loans by Heavy Weight (Count VII), Breach of November 19, 2018 Loan Agreement by Warrior Freight (Count VIII), Breach of December 31, 2018 Loan Agreement by Warrior Freight (Count IX), Breach of Guaranty of Warrior Loans by Sarkis (Count X), Breach of Guaranty of Warrior Loans by Batal (Count XI), Breach of Guaranty of Warrior Loans by Sarkis Freight (Count XII), Breach of Guaranty of Warrior Loans by Heavy Weight (Count XIII), Breach of December 5, 2018 Loan Agreement by Heavy Weight (Count XIV), Breach of September 3, 2019 Loan Agreement by Heavy Weight (Count XV), Breach of Guaranty of Heavy Weight Loans by Batal (Count XVI), Breach of Guaranty of Heavy Loans by Sarkis Freight (Count XVII), and Breach of Guaranty of Heavy Loans by Warrior Freight (Count XVIII).

Before the Court is the Plaintiff's Motion for Summary Disposition. Oral argument is dispensed as it would not assist the Court in its decision-making process.¹

At stake in this Motion is whether summary disposition is warranted in the Plaintiff's favor when there is no genuine issue of material fact regarding the existence of the Loans and the failure to repay them as required under the Notes and the Guarantees? Simply put, the answer is "yes."

Also, at stake is whether the Plaintiff is entitled to an award of attorney fees? Because there is no genuine issue of material fact that the Plaintiff is entitled to attorney fees under the Notes and Guarantees and the Defendants raise no challenge to the amount of attorney fees sought, the answer is "yes."

II The Notes and the Guarantees

The parties agree that between February 17, 2017 and September 3, 2019, the Plaintiff made loans to the Borrowers to finance the acquisition of certain vehicles, trucks and trailers. The parties agree that the Plaintiff and the Borrowers executed the Notes and

¹ MCR 2.119(E)(3) provides courts with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court's Scheduling Order clearly and unambiguously set the time for asserting and raising arguments, and legal authorities to be in the briefing - not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties' positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties' have received the process due.

the Guarantees (collectively the "Loan Documents"). Pursuant to the Notes Payment Schedule, the Borrowers are to pay the Plaintiff monthly principal and interests payments and the remaining balance when the loans matured. In the event of a default and while the default continues:

Lender may, at its option, with or without notice to Debtor (i) declare this Agreement to be in default, (ii) declare the indebtedness hereunder to be immediately due and payable, (iii) declare all other debts then owing by Debtor to Lender to be immediately due and payable, and (iv) exercise all of the rights and remedies of a secured party under the Uniform Commercial Code and any other applicable laws, including the right to require Debtor to assemble the Equipment and deliver it to Lender at a place to be designated by Lender and to enter any premises where the Equipment may be without judicial process and take possession thereof.

The Loan Documents award attorney fees and costs upon the occurrence of an event of default:

Debtor agrees that Lender may bring legal proceedings to enforce the payment and performance of Debtor's obligations hereunder in any court in the State shown in Lender's address set forth herein, and service of process may be made upon Debtor by mailing a copy of the summons to Debtor at its address shown herein. Debtor agrees that Debtor shall also pay to Lender all expenses of retaking, holding, preparing for sale, selling and the like: including without limitation (a) the reasonable fees of any attorneys retained by Lenders, and (b) all other legal expenses incurred by Lender.

On November 3, 2020, the Borrowers defaulted on the Notes by failing to make the payments due. The Plaintiff sent demand letters to the Defendants advising them of the defaults and demanding payment. The vehicle, trucks, and trailers pledged as collateral for the Loans have been liquidated and the proceeds have been applied to the

Loan balances. The Plaintiff alleges that as of October 15, 2021, the Defendants owe \$217,561.83 pursuant to the Notes and the Guarantees.

III The Arguments

The Plaintiff moves for summary disposition pursuant to MCR 2.116(C)(10). The Plaintiff argues that the Defendants failed to honor the terms of repayment pursuant to the Loan Documents. The Plaintiff argues the Defendants owe the total unpaid balance of \$217,561.83 (as of October 15, 2021), plus attorney fees and costs in the amount of \$22,929.71 (through October 12, 2021).

The Defendants do not dispute execution of the loan documents or contest liability, but dispute the amount claimed owed. [Response, p 3 (“Defendants’ (sic) collectively have not denied the existence of the debt at issue in this case, but dispute the amount of damages claimed by the Plaintiff’s (sic) in their Motion at issue.”).] The Defendants argue that the Plaintiff has not presented sufficient evidence of the remaining balance of the Loans and the affidavit of Ronald DeLorge is invalid because it is neither signed nor notarized. The Defendants request that the Court deny the Motion and “compel the parties to Arbitrate this issue to achieve a fair settlement based upon the facts of the case and the assets available to the Defendants.”²

² The Defendants have not filed a motion to compel arbitration or a dispositive motion pursuant to MCR 2.116(C)(7).

IV Standard of Review

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). Accordingly, “[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion.” *Maiden v Rozwood*, 461 Mich 109, 119-120 (1999); MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto*, 451 Mich at 358. The moving party “must specifically identify the issues” as to which it “believes there is no genuine issue” of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim. *Quinto*, 451 Mich at 361. If the moving party properly supports its motion, the burden “then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Id.* at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also *Meyer v City of Center Line*, 242 Mich App 560, 575 (2000)

(concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

In all cases, MCR 2.116(G)(4) squarely places the burden on the parties, not the trial court, to support their positions. A reviewing court may not employ a standard citing mere possibility or promise in granting or denying the motion. *Maiden*, 461 Mich at 121-120 (citations omitted), and may not weigh credibility or resolve a material factual dispute in deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161 (1994). Rather, summary disposition pursuant to MCR 2.116(C)(10) is appropriate if, and only if, the evidence, viewed most favorably to the non-moving party(ies), fails to establish any genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362, citing MCR 2.116(C)(10) and (G)(4); *Maiden*, 461 Mich at 119-120 (1999). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160 (2019) (citation omitted). Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

V

The Defendants concede liability and there is no genuine issue of material fact regarding the amounts due and owing

There is no triable issue of fact regarding the Defendants' liability for breach of the Notes and Guarantees. [Response, p 3 ("Defendants' (sic) collectively have not denied the existence of the debt at issue in this case, but dispute the amount of damages claims by the Plaintiff's (sic) in their Motion at issue.").]

Notwithstanding the foregoing, the Defendants have not demonstrated that the Plaintiff's evidence is insufficient to establish the amounts purportedly due. The Defendants do not refute the substance of Mr. DeLorge's affidavit, specifically, his statements regarding the amounts that remain due and owing pursuant to the terms of the Notes. Further, the Defendants' attack on the affidavit of Ronald DeLorge for not being notarized or executed is unavailing. The Motion states that "Exhibit A is not notarized at this time due to the remote working of affiant. A notarized copy will be available prior to the hearing." [Motion, p 7.] A notarized and executed copy of the affidavit was allegedly tendered to the Defendants during November 2021 and was attached to the Plaintiff's Reply filed with the Court. The Defendants do not proffer any counter evidence challenging the purported remaining balance on the Loans. Thus, the Defendants have abandoned any contrary argument to the Plaintiff's position that as of October 15, 2021, the Defendants owe a balance of \$217,561.83

VI

The Defendants do not contest the Plaintiff's alleged entitlement to attorney fees or the reasonableness of the claimed fees

The Defendants do not refute the Plaintiff's alleged entitlement to attorney fees under the Loan nor challenge the amount of attorney fees sought. Indeed, the Defendants acknowledge the Plaintiff provided a valid Petition and Affidavit of Attorney's Fees and Court Costs reflecting the claimed attorney fees. [Response, p 5 ("Plaintiff's (sic) did not attach a valid document to their (sic) motion to justify the amount of damages sought, *excluding* the attorneys fees" [emphasis added]).] That Petition and Affidavit of Attorneys' Fees and Courts attests to the reasonability of the attorney fees and costs and includes a six-page Exhibit A which is a complete billing statement. The Defendants make no further argument regarding attorney fees and Michigan jurisprudence is well settled that trial courts need not divine the intentions, search for arguments, or otherwise make conclusions on the Defendants' behalf. *Mitcham v City of Detroit*, 355 Mich 182, 203 (1959) ("It is not enough . . . to simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and rationalize the basis for his arguments, and then search for authority either to sustain or reject his position"); *Wilson v Taylor*, 457 Mich 232, 243 (1998) ("A mere statement without authority is insufficient to bring an issue before this Court"); *Houghton v Keller*, 256 Mich App 336, 339-340 (2003) ("failure to properly address the merits of [one's] assertion of error constitutes abandonment of the issue. . . . nor may he give issues cursory treatment with little or no citation of supporting authority"); *People v Jones* (On Rehearing), 201 Mich

App 449, 456-457 (1993) (failure to provide cogent argument or supporting authority constitutes abandonment of the issue on appeal). Any argument that the Plaintiff is not entitled to an award of attorney fees is deemed abandoned.

ORDER

Based on the foregoing Opinion, Plaintiff's Motion for Summary Disposition is GRANTED AND THE PROPOSED JUDGMENT SHALL BE ENTERED.

