STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Ave.
Grand Haven, Michigan 49417
616-846-8320

* * * * *

RAVUN, INC. and
MARK KUYPER,

Plaintiffs/Counter-Defendants,

v

NUVAR, INC.,

Defendant/Counter-Plaintiff.
_____/

OPINION AND ORDER DENYING DEFENDANT'S SECOND MOTION FOR SUMMARY DISPOSITION

Case No. 2021-006713-CB

Hon. Jon A. Van Allsburg

At a session of said Court, held in the Ottawa
County Courthouse in the City of Grand Haven,
Michigan on May 8, 2023.
Present: Hon. Jon A. Van Allsburg, Circuit Judge

The parties previously filed cross motions for summary disposition. The Court granted plaintiff's motion in part and denied defendant's motion for summary disposition. Defendant filed a Motion for Reconsideration which the Court also denied. Plaintiff filed an amended complaint, seeking a declaratory judgment (Count I), and adding a claim for breach of a promissory note (Count II). In lieu of an answer, defendant moves for summary disposition of the breach of promissory note claim pursuant to MCR 2.116 (C)(8) and (C)(10). Defendant's motion is denied.

I. Facts

This disagreement involves the sale of Nuvar, Inc. from plaintiff to defendant. The parties entered into an Asset Purchase Agreement (APA) and closed on May 31, 2018. The $11,000,000.00 purchase price was paid $7,000,000 in cash and the balance by a $4,000,000.00 promissory note ("Note") payable over ten years at 4.65% interest per annum. Beginning July 1, 2018, and on the first day of the month for 36 months thereafter, defendant was to make interest only payments to plaintiff. Beginning July 1, 2021, defendant was to make 28 quarterly principal and interest payments of $166,994.15 on October 1, January 1, April 1, and July 1 of each year

until the balance was paid in full. Section 2 of the Note stated, "Unless otherwise agreed or required by applicable law, payments will be applied first to any accrued unpaid interest; then to principal; then to any late charges; and then to any unpaid collection costs." Section 5 of the Note allows defendant to "prepay this Note in full or in part at any time without penalty, provided that all accrued interest on the unpaid balance hereof shall be paid at the time of said payment."

A non-waiver provision in the Note also provides that:

> No delay on the part of the holder in the exercise of any right or remedy under this note shall operate as a waiver. No single or partial exercise by the holder of any right or remedy under this Note shall preclude any other or future exercises or the exercise of any other right or remedy. No waiver or indulgence by the holder of any default shall be effective unless it is in writing and signed by the holder. No waiver of any right or remedy on one occasion shall be construed as a bar to, or waiver of, any such right or remedy on any future occasion.[1]

The Note also specifies a process for modification and states that "[t]he modification or waiver of any of Borrower's obligations or Lender's rights under this Note must be contained in writing signed by the Borrower and Lender."[2]

Finally, the Note provides several events that constitute a default. Relevant here is that a default occurs by "[a]ny failure by Borrower to make any payment within thirty (30) days of Borrower's receipt of written notice of nonpayment from Lender, unless Borrower is prevented from doing so by the Senior Creditor."[3] On default, the "Lender may, at its option, declare this Note to be fully due and payable, accelerate all unpaid principal, and have access to any and all remedies then available to enforce payment of this Note."[4] Additionally, "in the event of default...Lender shall be entitled to all of its costs of enforcement of this Note, including reasonable attorney fees incurred in such effort."[5]

On December 22, 2021, defendant paid plaintiff $1,860,452 by wire transfer. Defendant argues that this was part of an accord and satisfaction that dismisses plaintiff's case in its entirety, and if not an accord and satisfaction of the entire claim, then this payment is a prepayment that brings defendant current on its debt to plaintiff through July 2026. Defendant argues that because its payment obligations are prepaid, plaintiff's claim should be dismissed because it is not ripe.

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[1] *Id.*, Section 10.

[2] *Id.*, Section 17.

[3] *Id.*, Section 12 (a).

[4] *Id.*, Section 12.

[5] *Id.*

Plaintiff, on the other hand, claims that defendant breached the contract when it missed quarterly payments on January 1, 2022, April 1, 2022, July 1, 2022, October 1, 2022, and January 1, 2023, as the wire transfer on December 22, 2021 was an additional payment applied to principal and did not relieve defendant of its payment obligations under the Note.

II. Standards of Review

The Court's decision on a motion for summary disposition under MCR 2.116 (C)(8) for failure to state a claim on which relief can be granted is limited to review of the pleadings per MCR 2.116(G)(2). "The term 'pleading' includes only: (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer." MCR 2.110. The Court may also review the contract when an action is based on the contract. *Woody v Tamer*, 158 Mich App 764, 770; 405 NW2d 13 (1987). The contract between the parties here includes both the APA and the Note.

A motion for summary disposition based on MCR 2.116(C)(10) tests the factual support for a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Patterson v Kleiman,* 447 Mich 429, 432, 526 NW2d 879 (1994). The moving party must specifically identify the undisputed factual issues and support its position with evidence. MCR 2.116(G)(4); *Maiden v Rozwood,* 461 Mich 109, 120, 597 NW2d 817 (1999). The trial court must consider the submitted evidence in the light most favorable to the nonmoving party but may not make findings of fact or weigh credibility in deciding the motion. *Id.*; *Skinner v Square D Co,* 445 Mich 153, 161, 516 NW2d 475 (1994). If the moving party fulfills its initial burden, the party opposing the motion then must demonstrate with supporting evidence that a genuine and material issue of disputed fact exists. MCR 2.116(G)(4). *Reed v Reed*, 265 Mich App 131, 140–41, 693 NW2d 825, 833 (2005).

"When properly challenged, plaintiff must establish that he has a case on the law and that there are some evidentiary proofs to support his allegations as to any material fact." *Durant v Stahlin,* 375 Mich 628, 638, 135 NW2d 392 (1965). Under MCR 2.116(G)(4), a party opposing a motion for summary disposition is required to respond with affidavits or other evidentiary materials to show the existence of a factual dispute, rather than relying on the allegations or denials in the pleadings. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115, 469 NW2d 284, 287 (1991). Generally, the nonmoving party may not rest on mere allegations or denials but must proffer evidence of specific facts. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163, 645 NW2d 643 (2000). "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden*, 461 Mich at 121. A genuine issue of material fact exists "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open

an issue upon which reasonable minds might differ." *West v GMC*, 469 Mich 177, 183, 665 NW2d 468 (2003).

III. Defendant's Motion for Summary Disposition Based on Accord and Satisfaction

First, The Court considers defendant's renewed motion for summary disposition based on accord and satisfaction. The Court has twice denied defendant's accord and satisfaction defense. Defendant requested clarity on the status of those decisions and urged the court to reconsider *Faith Reformed Church of Traverse City Michigan v Thompson*, 248 Mich App 487, 639 NW2d 831 (2001) and its applicability to the facts of this case. It remains the Court's opinion that *Faith Reformed* is instructive but disagrees with defendant's conclusion as it relates to this case.

In *Faith Reformed*, defendant tenant moved out of its commercial space before its lease with plaintiff landlord expired. To satisfy its rent payments for the remainder of the lease term, defendant sent a $2,819.65 check accompanied by a letter that offered the $2,819.65 payment as "full and final resolution of any and all rental claims which the landlord has against the tenant."[6] The letter also indicated that the enclosed check brought the rent current through the end of the lease. An employee for plaintiff's management company cashed the check. A month later, the management company sent a letter to defendant that plaintiff did not accept the full settlement. Plaintiff did not return the check. The Court held that an accord and satisfaction existed because defendant's letter was clear and unequivocal and that even though a low-level employee cashed the check, defendant needed to return the check once it had knowledge of it. It also cited the holding in *Shaw v United Motors Products Co.*, 239 Mich 194, 214 NW 100 (1927), stating

> The applicable rule of law is, if the tender is in full satisfaction of an unliquidated claim, the amount of which is in good faith disputed by the debtor, and the creditor is fully informed of the condition accompanying acceptance, an accord and satisfaction is accomplished if the money so tendered is retained; for there can be no severance of the condition from acceptance and it avails the creditor nothing to protest and notify the debtor that the amount tendered is credited on the claims and not accepted in full satisfaction.[7]

This Court agrees with defendant's position that where a creditor accepts a conditional tender, the creditor also agrees to the condition. However, the expression of the condition must be clear, full and explicit. The Court finds that defendant did not clearly, fully, and explicitly express the conditions of the tender in this case. Defendant alleges that the condition was sent to plaintiff in a letter almost one month *before* it sent the wire payment. Nothing in the wire transfer related back to the statements alleged in the earlier letter; in fact, the letter did not even state the amount of the wire transfer that occurred a month later.[8] Unlike the letter in *Faith Reformed*, the letter in

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[6] *Faith Reformed,* 248 Mich App at 489.

[7] *Id.* at 494.

[8] As the court noted in its April 11, 2023 order denying reconsideration, a wire transfer is a "payment order" under Article 4A of the Uniform Commercial Code, defined as "an instruction of a sender to a receiving bank, transmitted

this case did *not* indicate that payment would be offered in full satisfaction of the debt. It did not indicate the amount of the payment or how it would be paid. Rather, it was merely a statement of future intent to make a payment. In other words, the letter was vague, not clear and unequivocal like the letter in *Faith Reformed.*

It remains the Court's opinion that there is no accord and satisfaction as a matter of law because there was no implied or explicit meeting of the minds between the parties, as shown by the fact that plaintiff was already filing suit against the defendant at the time the wire transfer was made. The Court clarifies that it also finds there is no accord and satisfaction as a matter of fact because the letters defendant sent to plaintiff allegedly stating a condition attached to the later wire transfer were not clear, full, and explicit statements of defendant's intent to satisfy the debt in full.

IV. Defendant's Motion for Summary Disposition of Count II of Plaintiff's Amended Complaint for Breach of Note Pursuant to MCR 2.116 (C)(8) and (C)(10)

Defendant next argues that if plaintiff's claims are not dismissed pursuant to an accord and satisfaction, then plaintiff's breach of contract claim should be dismissed because it is not ripe as defendant is prepaid through July 2026. Defendant argues that the promissory note was modified when it made a lump sum payment of $2,100,000 in June 2021, before quarterly payments toward principal began. Defendant provided plaintiff with an "updated" amortization schedule that reflected lower quarterly payments than originally contemplated over the same period as the original Note. Defendant sent the amortization schedule in an email to Defendant wherein she also asked for information to set up wire transfers for payments. Plaintiff Kuyper replied that he liked the idea of wire transfers but made no comment about the amortization schedule. Defendant made two payments in accordance with the amortization schedule before plaintiff brought this action. Defendant also argues that the lump sum payment that should be applied in the order in which the payments would come due pursuant to the Application of Payments Doctrine. In other words, defendant thinks payment should pause through July 2026. Plaintiff argues that it never agreed to a modification of the payment terms as required by the Note. Pursuant to the Note, the December 22, 2021 payment is applied first to accrued interest and then to the principal balance.

These issues are matters of contract interpretation. To interpret the Note, the Court must determine the parties' intent at the time they entered the contract *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 666 NW2d 251 (2003). "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins Co,* 473 Mich 457, 464; 703 NW2d 23 (2005). "A contract is ambiguous only if its language is reasonably susceptible to more than

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orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary, if the following apply: (i) The instruction does not state a condition to payment to the beneficiary other than time of payment...." MCL 440.4603(1)(a). It therefore appears that a wire transfer cannot constitute payment in an accord and satisfaction as the UCC prohibits a condition to a payment order. However, this question does not need to be answered in this case as the court has determined there was no accord and satisfaction.

one interpretation." *Gortney v Norfolk Western Ry Co*, 216 Mich App 535, 540-541; 549 NW2d 612 (1996). A dispute between the parties about the language does not in itself create an ambiguity and "[i]f the terms of the release are unambiguous, contradictory inferences become 'subjective and irrelevant,' and the legal effect of the language is a question of law to be resolved summarily." *Id.* Ultimately, the Court cannot create an ambiguity where none exists and the Court should avoid consideration of extrinsic evidence except as required to clarify ambiguities in the Contract. *Smith v Physicians Health Plan*, 444 Mich 743, 514 NW2d 150 (1994). To aid in its interpretation, the Court is to consider the contract as a whole and "avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 468; 663 NW2d 447 (2003). The Court must also avoid interpretation that "would impose an absurd or impossible condition on one of the parties." *Wembelton Development Co v Travelers Ins Co,* 45 Mich App 168, 172; 206 NW2d 222 (1973).

First the Court considers defendant's argument that the Note was modified. The Court finds that the terms of the Note are clear and unambiguous, were not modified, and defendant has failed to meet its burden under MCR 2.116 (C)(8) and (C)(10). In *Quality Products and Concepts Co. v Nagel Precision, Inc.*, 469 Mich 362, 666 NW2d 251 (2003), plaintiff, a sales rep for defendant, operated under an express written contract with defendant. The contract between the parties had strict anti-waiver and modification clauses. Pursuant to that contract, plaintiff received commission for designated sales, but was specifically excluded from sales to machine tool suppliers. Despite the prohibition, plaintiff solicited and completed sales to two machine tool suppliers. Defendant was aware of plaintiff's efforts to secure the sales and "never objected to plaintiff's efforts." Plaintiff requested commission on the sales and argued that the contract was modified when defendant did not stop plaintiff from soliciting the sales. Defendant refused to pay commission to plaintiff and plaintiff filed suit.

The Supreme Court found that while parties to a contract may mutually agree to modify a contract through course of conduct, the moving party must provide clear and convincing evidence of the modification, especially where the contract itself requires express modification. "Any clear and convincing evidence of conduct must overcome not only the substantive portions of the previous contract allegedly amended, but also the parties' express statements regarding their own ground rules for modification or waiver as reflected in any restrictive amendment clauses."[9]

Ultimately, the Supreme Court found that "Defendant's mere silence, regardless whether the defendant possessed knowledge of plaintiff's sales activity outside the contract, does not here amount to an intentional relinquishment of the sales-territory and sales-commissions limitations in the contract or the contract's restrictive amendment clauses"[10] and that to find otherwise would require the Court "to allow plaintiff to unilaterally modify a bilateral agreement *and*, in addition,

[9] *Quality Products* at 374-375.

[10] *Id.* at 377-378.

do so in the face of contractual terms that precisely prohibit unilateral modification on the basis of no more than the defendant's knowing silence."[11] The Court opined that "affirmative conduct, particularly coupled with oral or written representations can amount to waiver,"[12] but that was not the case here where the only evidence plaintiff provided was defendant's silence despite its knowledge of defendant's actions.

In this case, the payment provision in the promissory note specifies due dates for quarterly payments as well as the amount due. Like the contract in *Quality Products*, according to the modification clause, changes must be contained in a writing and must be mutual. Like the defendant in *Quality Products*, plaintiff did not ever agree to an amendment of those terms. At best defendant has provided facts that plaintiff knew about defendant's intent to modify the contract and did not object to two payments made in accordance with that intent. Like the Court in *Quality Products*, the Court finds that this is not clear and convincing evidence of a bilateral agreement to modify the terms of the note and does not amount to a waiver of plaintiff's right to enforce the terms of the note as written.

Next, the Court considers defendant's argument that plaintiff's claim is not ripe because defendant is prepaid through July 2026. Defendant's argument relies on *Mauro v Davie*, 236 Mich 309, 210 NW 308 (1926). In *Mauro*, through a series of transactions involving real estate, defendant Jackson had a lien against defendant Davie's property, but also collected payments for other outstanding debts on Davie's behalf. Defendant Jackson applied incoming payments across the various accounts and determined that a $3,852.31 shortfall was owed to him. He tried to foreclose on the lien. Davie argued that the lien to Jackson was satisfied and any payments due and owing were due to other creditors. The Supreme Court held that "where a credit is entered to a general account, and an account thereof rendered to the debtor, this is an election to apply the payment to the extinguishment of its items antecedently due in the order of time in which they stand in the account"[13] and found that Jackson's lien had in fact been paid based on the order in which the debts had accrued.

The Supreme Court in *Wallace v Glaser,* 82 Mich 190, 191; 46 NW 227 (1890) contemplated payment application to a mortgage secured by a promissory note and found that

> When partial payments have been made, apply the payment, in the first place, to the discharging of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of the principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal, but the interest continues on the former principal until the period when the payments

[11] *Id.* at 380 (emphasis in original).

[12] *Id.* at 379.

[13] *Mauro* at 312.

> taken together, exceed the interest due, and then the surplus is to be applied toward discharging the principal, and interest is to be computed on the balance as aforesaid.

In *Estate of Bowen v CIR*, 2 TC 1 (1943), the Tax Court of the United States was asked to apply *Mauro* to past-due payments made to a bank on decedent's behalf by his estate. The Court found that *Wallace v Glaser* controlled, not *Mauro v Davie,* and that *Mauro* had "to do with the right of the creditor to make application of partial payments as between the principal of different debts which the debtor owes the creditor and do not discuss the question of the application of payments as between principal and interest."[14]

Similarly, the Court finds that *Mauro* is not applicable here where there are not multiple accounts to which plaintiff must apply defendant's payments and where there is a clear promissory note which reflects the intent of the parties as to the application of payments. Pursuant to the clear and express terms of the Note, the payment "will be applied first to any accrued unpaid interest; then to principal; then to any late charges; and then to any unpaid collection costs." There is no question of fact that the overpayment, if any, must be applied to the unpaid interest, and then to the principal. This will reduce the amount of interest owed and should reduce the length of the loan. It does not, without mutual agreement from the parties, change the payment schedule as clearly defined in the Note. The Court cannot and will not introduce an ambiguity where one does not exist. Defendant's motion for summary disposition is denied.

The Court notes that plaintiff requested a declaratory judgment that determines the balance defendant owes to plaintiff given the inventory dispute. Whether, and how much, defendant owes plaintiff remains at issue as a question of fact. The Court must still determine whether the parties reached a final net working capital statement, and if not, whether defendant is entitled to any reduction for obsolete inventory. This could affect Plaintiff's breach of promissory note claim.

V. Conclusion

Defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) is denied.

IT IS SO ORDERED.

Dated: May 8, 2023

Hon. Jon A. Van Allsburg, Circuit Judge

[14] *Estate of Bowen* at 6.