

STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET

414 Washington Street
Grand Haven, MI 49417
616-846-8315

PATRICK M. COOPER, individually and
dba Z.Ink Tattoo and Piercing,
Plaintiff,

**OPINION AND ORDER
DENYING MOTION FOR
RELIEF FROM JUDGMENT**

v

File No. 21-006505-CB

JOHN ELIZARDO, JR., individually and dba
Don't Tell Mom DTM, **DAKOTA NOVAK**,
ASHLEY PEREZ, Z&S Properties, LLC, and
STEVEN STERKEN,
Defendants.

Hon. Jon A. Van Allsburg

_____/

Defendants seek to have a stipulated judgment against them set aside on the grounds that the judgment was fraudulently entered in breach of a settlement agreement. The facts are largely undisputed.

In July 2022, the parties in this case entered into a Post-Suit Settlement and General Release Agreement ("Settlement Agreement") including the following terms:

1. Payment of Settlement

Defendants agree to pay \$10,000.00 by September 1, 2022 to be paid to Plaintiff's attorney Mancinelli Goeman Law Group PC.

Defendants will then pay \$32,500.00 in monthly installment payments of a minimum \$380.95 beginning on October 1, 2022, and continuing on the 1st day of each month thereafter until paid in full. Payment is effective upon actual receipt and not on the date of mailing. There is no penalty for pre-payment and Defendants may make additional payments to pay off the Judgment quicker.

...
In the event any installment payment is not timely received, Plaintiff or Plaintiff's attorney shall provide Defendants and Defendants' counsel email notice of such non-payment. Defendants shall have ten day grace period from the date of

email notice to their counsel at aac@hennlesperance.com and Johnelizardo@live.com after which if not cured, then Plaintiff and its counsel may file the Stipulation to Reinstate and the Stipulated Judgment.

The parties do not dispute that the Settlement Agreement provided that in the event of default, a Stipulated Judgment could be filed in the amount of \$80,000.00, with interest to accrue at 8% per annum and with credit for payments previously received. The loss of the significantly discounted payment agreement and entry of the Stipulated Judgment is at the heart of the present dispute.

The parties agree that through December 2023, defendants made all the payments required by the Settlement Agreement plus two additional payments of \$380.95 that were applied to the principal.¹ While the Settlement Agreement called for payments to be made to plaintiff counsel's law firm, on November 1, 2023, plaintiff counsel Mancinelli sent a letter to Elizardo and defendants' joint counsel Andrew Cascini asking for future payments to be sent directly to plaintiff at his business address. Elizardo sent the next payment as requested using a bill pay service provided by his bank. Plaintiff acknowledges that he received and deposited the first check sent in that manner. Defendants allege that they also used the bill pay service to send the following payments: \$380.90 on December 21, 2023; \$190.45 on January 3, 2024; \$190.45 on January 22, 2024; and \$380.90 on January 30, 2024. Plaintiff does not dispute that these four payments were sent but states that he only received one of these, the \$190.45 sent on January 22, 2024.

On January 24, 2024, plaintiff counsel Mancinelli emailed notice of default for nonpayment to defense counsel Cascini and to defendant Elizardo. Cascini replied, asserting that the required payments had been made. After the ten-day grace period ended, plaintiff filed an Affidavit of Default, the previously signed Stipulation and Order Setting Aside Dismissal and Reinstating the Case, and the Stipulated Judgment. The Court signed both stipulations on February 12, 2024. Beginning in March 2024, plaintiff pursued garnishment of defendants' assets.

Defendants now seek relief from the stipulated judgment, arguing that it was fraudulently entered because the required payments were timely made and therefore defendants were not in

¹ Defendants agreed amongst themselves that defendant Elizardo would make the payments and defendants Perez and Novak would pay Elizardo.

default. Furthermore, defendants argue that changing the address to which payments were to be made was a violation of the Settlement Agreement's requirement that all changes to the Settlement Agreement be made in writing and signed by all parties. Defendants go on to argue that by requesting, sending, and accepting payments by mail, parties established a course of dealing that satisfied the contractual requirements and that plaintiff violated the implied duty of good faith and fair dealing by filing the default and obtaining the subsequent consent judgment. Plaintiff argues that defendants have failed to show justification for setting aside the consent judgment.

Law and Analysis

The court has the power to grant relief from consent judgments, like other judgments, under the terms of MCR 2.612(C):²

(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.
- (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
- (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
- (d) The judgment is void.
- (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
- (f) Any other reason justifying relief from the operation of the judgment.³

However, "[t]he general rule is that a consent judgment cannot be set aside or modified except for fraud or mutual mistake."⁴ Settlement agreements are governed by principles of contract law. The existence and interpretation of a contract are questions of law.⁵

Defendants have not alleged a *mutual* mistake that would justify this judgment being set aside. At best, defendants argue that they made unilateral mistakes in not correctly following the

² *Trendell v Solomon*, 178 Mich App 365, 369-370; 443 NW2d 509 (1989).

³ MCR 2.612(C)(1).

⁴ *Tinkle v Tinkle*, 106 Mich App 423, 426; 308 NW2d 241 (1981).

⁵ *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

terms of the Settlement Agreement. Neither the mistaken belief that the Settlement Agreement allowed for paying ahead nor defendants' failure to confirm that the January payments were actually received by plaintiff justifies the setting aside of this consent judgment. The Settlement Agreement required payments to be made on the first day of each month and allowed pre-payment to pay off the judgment quicker. These terms are incompatible with an arrangement that would allow defendants to pay ahead and then skip a monthly payment.

Defendants argue that the parties' course of dealing was for payment to be mailed, and submit that payments accepted by mail are subject to the mailbox rule under *Hoch v Hitchens*.⁶ However, defendants have failed to show that a course of dealing expressly contemplated by the Settlement Agreement would modify a different term of the agreement explicitly rejecting the mailbox rule.⁷ The Settlement Agreement provided that payment would be effective on actual receipt and not on the date of mailing. The Settlement Agreement also gave a mailing address where defendants could send physical checks. The agreement clearly contemplated that defendants could mail payment by check, while nevertheless ensuring that the mailbox rule did not apply. The November 1, 2023, request that payments be sent directly to plaintiff at a different address does not change this analysis. When plaintiff did not receive the \$380.95 due January 1, 2024, defendants were in breach.

The implied covenant of good faith and fair dealing does not save defendants' motion. "Where a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith."⁸ Defendants claim that plaintiff breached this implied covenant but have not demonstrated that plaintiff abused any discretionary powers under the Settlement Agreement. The Settlement Agreement did not give plaintiff the authority to decide whether to have the payment effective when mailed or on actual receipt. Plaintiff followed the terms of the agreement and accepted payments only on actual receipt. The Settlement Agreement provided a grace period

⁶ *Hoch v Hitchens*, 122 Mich App 142, 147; 332 NW2d 440 (1982).

⁷ Paragraph 1 of the Settlement Agreement states, "Payment is effective upon actual receipt and not on the date of mailing." It further provides that notice of non-payment may be sent if "any installment payment is not timely received." It also states that defendants shall be in default "[i]f payment has not been received by the due date."

⁸ *Ferrell v Vic Tanny Intern, Inc*, 137 Mich App 238, 243; 357 NW2d 669 (1984).

during which defendants could cure their breach before plaintiff could file the Stipulation to Reinstate and the Stipulated Judgment. Plaintiff followed the agreed-upon procedure. It is not a breach of good faith to follow procedures expressly provided for in the Settlement Agreement. Defendants concede that plaintiff emailed notice of the default to the only email addresses provided in the Settlement Agreement, which belonged to defense counsel Cascini and to defendant Elizardo. Defendants' argument that plaintiff was in breach by not also notifying the other defendants is without merit. Defendants did not cure the breach during the ten-day grace period, so plaintiff was within his rights to file the consent judgment.

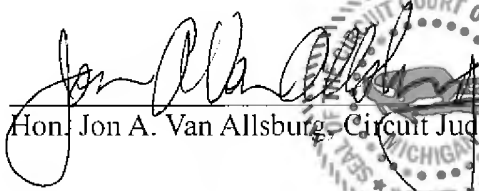
Conclusion

Defendants have failed to show justification for relief from the operation of the judgment they stipulated would automatically go into effect if they breached the terms of the Settlement Agreement. Defendants' motion is DENIED.

IT IS SO ORDERED.

This is a final order and closes this case.

Dated: October 1, 2024


Hon. Jon A. Van Allsburg, Circuit Judge

