

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

COMERICA BANK, a Texas Banking
Association, successor in interest by merger
to Comerica Bank, a Michigan Banking
Corporation,

Plaintiff,

vs.

Case No. 2014-1336-CK

CREATIVE CHILD, INC., a Michigan
Corporation, and BRANDON BILSKI IN
HIS CAPACITY AS TRUSTEE OF THE
JUDITH A. BILSKI TRUST U/A/D
12-22-1999, an individual,

Defendants.

OPINION AND ORDER

Defendants have filed a motion for reconsideration of the Court's December 30, 2014 Opinion and Order granting Plaintiff's motion for summary disposition. Plaintiff, by the leave of the Court, has filed a response and requests that the motion be denied.

In the interests of judicial economy the factual and procedural statements set forth in the Court's December 30, 2014 Opinion and Order are herein incorporated.

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

Arguments and Analysis

In their motion, Defendants contend that Plaintiff waived, or is estopped from asserting, any breach of the Note where payments under the Note were current at the time Plaintiff sent its January 23, 2014 letter advising of the breach and accelerating the balance, and where payments were current at the time Plaintiff filed its complaint in this matter. In support of its position, Defendants rely on the Michigan Court of Appeals decisions in *Oakland Nat Bank v Anderson*, 81 Mich App 432; 265 NW2d 362 (1978) and *Formall, Inc v Community Nat Bank of Pontiac*, 138 Mich App 588; 360 NW2d 902 (1984).

In *Oakland*, the plaintiff made two loans to the defendant, both of which contained acceleration clauses. With respect to the first loan, the defendant was to be repaid via 10 monthly payments beginning on July 15, 1971. After the defendant failed to make the first two payments, the plaintiff filed its complaint. After the complaint was filed, the defendant made the late payments, including the late fees and interest. On appeal, the Michigan Court of Appeals held that acceptance of the payments did not constitute a waiver by plaintiff of its right to accelerate. *Oakland*, 81 Mich App, at 436-

437. Rather, the Court held that acceptance of defendant's check by the bank merely served to reduce defendant's indebtedness on the note, did not cure all the defaults which existed at the time and did not waive the acceleration of the balance owed under the note. *Id.* at 437.

With regards to the second note in *Oakland*, by the time that plaintiff had filed its complaint the defendant had made the outstanding payments. In holding that the plaintiff had waived its right to accelerate the balance, the Court based its decision on the Michigan Supreme Court's decision in *Theatre Equipment Acceptance Corp. v Betman*, 259 Mich 245; 242 NW 903 (1932). The Court in *Oakland* summarized *Betman* as follows:

In *Betman* the debtor had signed a series of notes, each of which included an acceleration clause for the subsequent notes in the series upon default. The debtor made only a partial payment on the first note but the creditor did not accelerate the other notes at that time. Thereafter, the debtor paid the full balance of the next two notes. Before the fourth note matured, the creditor attempted to accelerate all remaining notes because of the unpaid balance due on the first note. The Supreme Court found that the creditor had waived his right to accelerate based on default on the first note by accepting payment on the second and third notes.

Oakland, 81 Mich App, at 436.

After reviewing the record, as well as the Michigan Court of Appeals' decision in *Oakland*, this Court is convinced that Defendants' motion must be granted. The rule set forth in *Oakland* and *Betman* is that in order to accelerate the balance of a loan the loan must be in default at the time of acceleration. Indeed, the Court of Appeals found that the first note had been properly accelerated, and not waived, because the bank had accelerated the balance prior to defendant curing the defaulted payments. However, the Michigan Court of Appeals distinguished the situation presented by the second note, and

held that the bank did not have a right to accelerate, based on the fact that it had accepted the outstanding payments prior to exercising its right to accelerate.

In this case, as with respect to the second note in *Oakland*, Creative's payments under the Note were current at the time Plaintiff sent the notice of acceleration. While Plaintiff could have accelerated the balance outstanding had it done so prior to Creative catching up on the outstanding payments, or arguably could have rejected any untimely payments and declared the balance accelerated, the Court is convinced that under *Oakland* and *Betman* Plaintiff's right to accelerate pursuant to Defendant's failure to timely make payments was prevented by its decision to accept the untimely payment on January 17, 2014.

In its complaint, Plaintiff also contends that Defendant Trust has breached the terms of the Guaranty by diminishing the assets in the trust, and that Defendant has breached the terms of the Note and Guaranty by failing to comply with certain financial reporting requirements. However, Plaintiff has not cited to any particular provisions in the Note or Guaranty preventing Defendant Trust from taking the actions it has taken with respect to its assets. Further, while Plaintiff has alleged that certain financial reporting requirements have not been satisfied, it has failed to provide any evidence in support of its position, nor has it specifically referenced the provision(s) setting forth the requirements that were allegedly breached. Consequently, the Court is convinced that Plaintiff's remaining bases for its claims may not form the basis for summary disposition in its favor at this time. Accordingly, Plaintiff's motion for summary disposition with respect to these allegations must be denied without prejudice.

Conclusion

Based upon the reasons set forth above, Defendants' motion for reconsideration is GRANTED. Plaintiff's motion for summary disposition is DENIED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order RE-OPENS this matter as there are unresolved claims in this matter.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: February 23, 2015

JCF/sr

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