

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

TAG IRA, LLC,

Plaintiff,

vs.

Case No. 2014-659-CB

RESIDENTIAL GROUP 231, LLC, PROPERTY  
SOLUTIONS OF MICHIGAN, INC., ALLEN  
BOIKE, and STEVEN E. LONDEAU, JR.,

Defendants.

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OPINION AND ORDER

Plaintiff has filed a motion to compel discovery against Defendants Property Solutions of Michigan, Inc. (“PSOM”) and Allen Boike (“Defendant Boike”). PSOM and Defendant Boike have filed a joint response and request that the motion be denied.

In addition, Plaintiff has filed a proposed judgment under the 7-day rule. PSOM and Defendant Boike have filed objections to the proposed judgment.

*Facts and Procedural History*

In early 2011, Defendant Boike, allegedly on behalf of PSOM, contacted Plaintiff’s agent attempting to solicit an investment in a pool of securities that PSOM was seeking to purchase. Plaintiff declined the offer but agreed to extend a short term loan of \$200,000.00 to enable the purchase.

On August 26, 2011, a promissory note was issued by Defendant Residential Group 231, LLC (“RG231”) in favor of Plaintiff in the amount of \$200,000.00 (“First Note”). None of the other Defendants are named in the First Note. RG231 ultimately defaulted on the terms of the First Note.

On February 21, 2012, Plaintiff sent a written notice of default to RG231 and PSOM. On March 2, 2012, in order to stop collection efforts, a promissory note was executed between PSOM and Plaintiff, which Defendants Boike and Londeau signed in their corporate capacities, and additionally in their individual capacities (“Second Note”). While two payments were made pursuant to the Second Note totaling \$106,000.00, PSOM ultimately defaulted on the terms of the Second Note.

On February 20, 2014, Plaintiff filed its complaint in this matter alleging claims for: breach of contract (Count I), breach of implied contract (Count II), quantum meruit (Count III), promissory estoppel (Count IV), fraud (Count V), and conversion (Count VI).

On August 21, 2014, Plaintiff filed its motion for partial summary disposition. PSOM and Defendant Boike filed a joint response. Defendant Londeau filed an individual response. In addition, Plaintiff filed a reply in support of its motion.

On October 3, 2014, the Court entered its Opinion and Order granting, in part, and denying, in part, Plaintiff’s motion. Specifically, the Court dismissed Plaintiff’s account stated claim, granted the remainder of Plaintiff’s motion with respect to PSOM and Defendant Londeau, and denied Plaintiff’s motion as to Defendant Boike pending an evidentiary hearing on his defense related to his signature stamp.

On November 24, 2014, Plaintiff filed its motion for entry of judgment as to Defendant Londeau and PSOM. On December 1, 2014, the Court held a hearing in connection with the motion. At the hearing, Defendant Londeau and PSOM objected to Plaintiff’s motion and requested an evidentiary hearing. The Court granted Defendants’ request and set the matter for an evidentiary hearing on December 22, 2014. Additionally, the Court advised the parties that the evidentiary hearing would also address the merits of Defendant Boike’s defense.

On December 22, 2014, the Court held a hearing in connection with the instant motion. Due to Plaintiff's failure to provide detailed billing records prior to the hearing, the Court adjourned the portion of the evidentiary hearing related to Plaintiff's motion for entry of judgment. However, the parties proceeded with the issue of Defendant Boike's defense. At the conclusion of the hearing, the Court took that matter under advisement. On February 3, 2015, the Court entered its Opinion and Order granting Plaintiff's motion for summary disposition of its breach of contract claim against Defendant Boike.

On February 9, 2015, the Court held a hearing in connection with Plaintiff's motion for entry of judgment. At the conclusion of the hearing, the Court took the matter under advisement. On March 11, 2015, the Court entered its Opinion and Order granting Plaintiff's motion for entry of judgment, in part, and denying the motion in part. Specifically, Plaintiff was awarded \$49,612.50 in attorney fees it has incurred in this matter. Plaintiff's request for attorney fees incurred in RG231's bankruptcy was denied. In addition, the Court ordered that Plaintiff file a proposed order consistent with the Opinion and Order within 28 days.

On March 26, 2015, Plaintiff filed its proposed judgment under the 7-day rule ("Proposed Judgment"). On April 1, 2015, PSOM and Defendant Boike filed their objections to the Proposed Judgment. On April 10, 2015, Plaintiff filed its response to PSOM and Defendant Boike's objections. Further, on April 13, 2015, PSOM and Defendant Boike filed their supplemental objections to the Proposed Order.

On March 30, 2015, Plaintiff filed a motion to compel and for sanctions against PSOM and Defendant Boike. PSOM and Defendant Boike have filed a response and request that the motion be denied. In addition, Plaintiff has filed two supplements in support of its motion.

On April 13, 2015, the Court held a hearing in connection with the motions and took the matters under advisement.

*Arguments and Analysis*

As a preliminary matter, on April 23, 2015 this Court received a notice of bankruptcy with respect to PSOM. The filing of a bankruptcy petition automatically stays other court proceedings (state or federal) related to the debtor. 11 U.S.C. § 362(a). Consequently, the portions of the instant motions related to PSOM are automatically stayed and will not be addressed.

The Court will now address the motions in turn with respect to the remaining Defendants.

(1) Motion for Entry of Judgment

Defendant Boike's first objection to the Proposed Order is that pursuant to MCR 2.604(A) Plaintiff is not entitled to a judgment where Plaintiff does not seek final resolution of the case. However, MCR 2.604(A) simply provides that any order entered which adjudicates less than all of the claims does not terminate the action, is subject to possible revision prior to the entry of final judgment, and may only be appealed by leave. MCR 2.604(A), contrary to Defendant's Boike's position, does not bar a court from entering a judgment related to a portion of the claims within a case. Consequently, the Court is convinced that Defendant Boike's contention is without merit.

Defendant Boike also contends that there should be a credit applied to the judgment with respect to a \$13,500.00 note Plaintiff is to receive from RG231. However, Defendant Boike has not provided the Court with any evidence that Plaintiff has actually received the note in question, nor has he provided any support for his contention that a credit should be applied.

Next, Defendant Boike contends that Plaintiff has miscalculated the amount of the Proposed Judgment. First, Defendant Boike objects to two late charges in the amount of 10% of the principal. Section 3 of the March 2, 2012 note (“Note”) provides:

Borrower acknowledges that default in the payment of any sum due under this Note will result in losses and additional expenses to [Plaintiff] in servicing the indebtedness evidenced by this Note, handling such delinquent payments, and meeting its other financial obligations. Borrower further acknowledges that the extent of such loss and additional expenses is extremely difficult and impractical to ascertain. Borrower acknowledges and agrees that, if any payment due under this Note is not received by the Lender within ten (10) days when due, a charge of ten cents (\$0.10) for each dollar (\$1.00) that is not paid when due would be a reasonable estimate of expense so incurred (the “Late Charge”). Without prejudicing or affecting any other rights or remedies of [Plaintiff], Borrower shall pay the Late Charge to [Plaintiff] as liquidating damages to cover expenses incurred in handling such delinquent payment.

Under the Second Note, PSOM was required to pay the full principal of \$200,000.00 plus outstanding interest by June 2, 2012. (*See* Plaintiff’s Exhibit C, Second Note, at ¶2.1.) In this case, it is undisputed that the principal amount was not paid on June 2, 2012, nor was it paid within the 10 day grace period referenced in ¶3 of the Note. Consequently, Plaintiff was entitled to a 10% late fee based on the balance owed as of June 12, 2012. However, the loan summaries Plaintiff has attached to its motion are not consistent with the term of the Note. Rather, Plaintiff’s loan summaries incorporate the terms of the August 26, 2011 promissory note issued by RG231 (“First Note”). Indeed, both of Plaintiff’s loan summaries reference a loan issuance date of August 2011 rather than March 2012, which indicates that Plaintiff’s calculations with respect to its proposed judgment are based on the First Note. However, PSOM nor either Defendant Boike or Defendant Londeau were parties to the First Note. Rather, the only note they are a party to is the Second Note. As a result, any damage, including late fees, must be calculated based on the terms of the Second Note alone. Upon reviewing the Proposed Judgment,

the Court is convinced that the judgment amounts are based on the incorrect note. Consequently, the Proposed Judgment is inappropriate and will not be approved.

In addition, Defendant Boike contends that the Second Note and the Proposed Judgment reflect a usurious interest rate. However, MCL 450.1275 provides that a domestic corporation may, by agreement in writing, agree to pay a rate of interest in excess of the legal rate and the defense of usury shall be prohibited. In this case, PSOM is a corporation, and the Second Note is clearly a writing in which PSOM agreed to pay interest at a certain rate. Consequently, MCL 450.1275 prohibits PSOM from raising a usury defense.

The next issue is whether Defendant Boike and Defendant Londeau are responsible for the interest rate provided by the Second Note. The interest rate permitted by law with respect to individuals is 7%. MCL 438.31. However, MCL 438.61 allows a financial institution such as Plaintiff to charge any rate of interest if the borrower executes a sworn statement that the proceeds of the loan will be used for a business purpose. While in this case it appears undisputed that Defendants Londeau and Defendant Boike did not provide a notarized statement swearing that the proceeds of the Second Note would be used for a commercial purpose, the Michigan Court of Appeals in *Holland v Michigan Nat Bank-West*, 166 Mich App 245; 420 NW2d 173 (1988) held that a statement that a loan would be used for commercial purposes was effective to trigger the business entity exception notwithstanding that fact that the statement was not notarized. *Id.* at 259-261.

In this case, Defendants Londeau and Boike executed the document knowing that it contained a declaration that the proceeds of the Second Note would be utilize for a business purpose, and were given an opportunity to review the documents. Consequently, the Court is convinced that the facts are sufficient to satisfy the business entity exception to the default usury

cap provided by MCL 438.31. As a result, Defendant Boike's contention that the Second Note's interest rate is usurious is without merit.

In sum, the Court is convinced that due to the fact that Plaintiff's proposed judgment against Defendants Boike and Londeau are based on the wrong note, i.e. the First Note rather than the Second Note, its motion for entry of judgment must be denied.

(2) Plaintiff's Motion to Compel

In its motion, Plaintiff requests the following documents:

- A. PSOM tax returns for the years 2013 & 2014;
- B. RG231 Tax Returns for years 2010-2014;
- C. Personal Tax Returns for Boike, 2010-2014;
- D. Quickbook records for PSOM and RG231 for 2010-2014;
- E. Londeau Separate Agreement; and
- F. The identity of the investor(s) who was/were supposed to repay Plaintiff's loan.
- G. PSOM Bank Statements for the years 2011-Present.

As a preliminary matter, as discussed above, PSOM has recently filed for bankruptcy protection. Consequently, the portion of the motion to compel requesting documents and answers from PSOM are automatically stayed. As a result, those portions of the motion are denied, without prejudice.

With respect to RG231's tax returns, Defendants have provided a verified statement of Mark W. Reed, CPA in which he stated that his firm has prepared PSOM's tax returns from 2010-2012, and that RG231 did not file separate tax returns; rather, RG231's returns were incorporated into PSOM's returns. Moreover, Defendants' response to the instant

motion is consistent with Mr. Reed's statement. Based on the fact that the requested information allegedly does not exist Plaintiff's request for the documents must be denied.

The next item requested is Defendant Boike's tax returns for 2010-2014. In his response, Defendant Boike represents that he has already produced his 2010-2013 tax returns and that his 2014 return has not been completed yet. Consequently, there are no additional returns to be produced at this time.

Plaintiff also has requested RG231's profit/loss reports and bank account ledgers for 2010-2014. In response, Defendants assert that such documents do not exist in the form requested. Consequently, the Court is convinced that such records, as requested, cannot be produced.

With regards to the Londeau separation agreement, Defendants have stated that the document has been produced.

Defendants also represent that no individuals/investors fall within the category requested in category F above.

#### *Conclusion*

For the reasons set forth above, Plaintiff's motion for entry of judgment is DENIED, WITHOUT PREJUDICE.

Further, Plaintiff's motion to compel is DENIED as the items requested have been produced, cannot be produced at this time, and/or do not exist.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.



IT IS SO ORDERED.

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

Dated: May 11, 2015

JCF/sr

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