STATE OF MICHIGAN

COURT OF APPEALS

INTERIOR/EXTERIOR SPECIALIST COMPANY, Plaintiff-Appellee,	UNPUBLISHED January 8, 2009
v	No. 276620 Wayne Circuit Court
DEVON INDUSTRIAL GROUP, LLC, SEABOARD SURETY COMPANY, and AMERICAN HOME ASSURANCE COMPANY, Defendants-Appellants.	LC No. 05-506508-CK

Before: Schuette, P.J., and Zahra and Owens, JJ.

PER CURIAM

Defendants appeal as of right from three orders issued by the trial court: (1) a final judgment, entered on October 26, 2006; (2) an order denying defendants' motion for relief from judgment, entered on February 15, 2007; and (3) an order denying defendants' motion for partial summary disposition. We affirm.

I. Basic Facts and Proceedings

Devon Industrial Group (DIG) contracted with the Detroit Public Schools to renovate Detroit's Southeastern High School. DIG subcontracted the demolition work out to plaintiff Interior/Exterior Specialists Company. IES obtained the government contract for $890,000. However, during the course of construction, ten change orders were issued, increasing the contract amount to $1,243,978. In addition, the project was slated to take six months, but it took 24 months to complete.

On March 4, 2005, plaintiff filed suit against defendants, alleging breach of contract and, alternatively, abandonment of contract.[1] Plaintiff asserted that DIG breached the contract by failing to properly manage the project and by interfering with plaintiff's work, resulting in

[1] Plaintiff also filed a claim against defendants Seaboard Surety Company and American Home Assurance Company under DIG'S payment bond.

additional costs. IES alternatively alleged that the parties abandoned the contract by the significant change in the scope and quantity of plaintiff's work and by mutually abandoning provisions of the contract.

On March 27, 2006, defendants moved for partial summary disposition, asserting that IES had signed a document on May 6, 2004 entitled, "partial unconditional waiver of lien" ("waiver") that entitled defendants to dismissal of plaintiff's claims that related to any work completed before March 31, 2004, and any claims related to any change orders issued to, and approved by, plaintiff. The trial court heard oral arguments and denied defendants' motion, concluding the waiver did not preclude plaintiff's claims.

On August 3, 2006, defendants filed several motions in limine, four of which are relevant to this appeal: (1) defendants argued that plaintiff should be precluded from claiming damages for work that occurred before March 31, 2004, because it waived those damages; (2) defendants argued that plaintiff should not be permitted to compute its damages under a "total cost theory;" (3) defendants argued that plaintiff should not be allowed to introduce evidence of delay in the project because the contract contained a provision that limited damages for delay to an extension of time; and (4) defendants argued that plaintiff should not be allowed to introduce evidence of delay in the project because plaintiff agreed to perform the work in accordance with DIG'S instructions and time schedule. Plaintiff responded, arguing that the motions were not motions in limine, but "disguised" motions for summary disposition. Plaintiff also opposed defendants' motions on their merits. The trial court agreed with plaintiff and denied defendants' motions, stating:

> I think these motions are, say, these aren't motions, true motions in limine. Motions in limine are motions . . . that say that the rules of evidence will be violated in some way and we wanted to, we want an advance ruling.
>
> These motions say that the Plaintiff will be unable to prove damages in this case. . . . Well, that may be true, but we don't, we won't know ti1 it's over with.

At trial, plaintiff presented evidence that DIG failed to properly administer the construction project and denied plaintiff its ability to do its work in accordance with its own "means and methods." For example, plaintiff wanted to remove debris starting from the third, second, and then the first floor because that would have been cheaper to clean up; but DIG required the work to be done in the reverse order. Further, plaintiff wanted to use a mini excavator that did not exceed the weight capacity based on its engineering study, if various precautions were used, but DIG did not approve the use of the equipment because it said the equipment exceeded the 90-pound per square foot weight capacity. Yet the use of the equipment was later approved by DIG on May 29, 2003, though the original request was made on December 8, 2002. Therefore, from December 2002 through May 2003, the equipment was not used on the elevated floors, which included floors one, two, three, and the attic. During that time, plaintiff still continued to work, but at greater expense and less efficiently because plaintiff had higher labor costs.

Plaintiff further claimed that DIG'S project superintendent, Nick Bosanac, interfered with plaintiff's crews, caused plaintiff delays, and was unreasonably hard on plaintiff because he was

biased against Hispanics. For instance, plaintiff asserted that Bosanac would talk directly to plaintiff's crew and make orders outside the scope of the contract, such as cement removal. Further, plaintiff planned on pushing debris off the east side of the building with equipment, which was allowed by Occupational Safety and Health Act (OSHA), but instead Bosanac ordered plaintiff to build a ramp to get the debris over to the west side and drop the debris down by hand. Ray Roberts, a representative of the Southeastern High School, stated that Bosanac indicated on the job site that he did not want to work with the Mexicans working for plaintiff.

Plaintiff also claimed that it incurred additional costs because of asbestos in the building. There was an asbestos abatement schedule, and the abatement was supposed to take place before plaintiff started the demolition work, but it did not occur until demolition commenced. Additionally, when demolition commenced, DIG did not provide an asbestos supervisor who was in charge of the asbestos abatement, as was required by the OSHA. The delays regarding the asbestos occurred through August of 2003, and even though the contract specified that plaintiff was required to work around the asbestos, there were excessive quantities of asbestos and delays in removing the asbestos. Larry Carpenter, of IES, testified that the asbestos found in the South tower took two weeks to remove, which was unreasonable.

William Gurry, an expert in construction scheduling, testified that it was feasible for plaintiff to finish the project in six to seven months according to the terms of the contract and the original plan. The plan called for 9,500 man-hours, but the actual man-hours used were 24,495.5. The work was inefficient largely because plaintiff was unable to use the Bobcat and the excavator for a couple of months. Gurry calculated that plaintiff was responsible for 20-30% of the inefficiency, and that DIG, or parties who DIG is responsible for, caused 70-80% of the inefficiencies.

In September of 2004, plaintiff lost its bonding capacity. Plaintiff claimed to have lost its bonding capacity because of a $125,000 fiscal year loss, which plaintiff blamed on the Southeast High School project and DIG. Notably, 85 percent of plaintiff's business was from institutional jobs, which required bonding capacity. Plaintiff asserted its loss of bonding capacity resulted in decreased earnings in fiscal years 2004, 2005, and 2006. Julian Llamas, the owner of IES, estimated the company lost about $2,400,000 in profit from its loss of bonding capacity and that it would take some time to regain IES's reputation. He also stated that Bosanac caused delays by granting work approvals and then revoking the approvals.

Julie Llamas operates the finances of IES. She testified the total out-of-pocket costs of the project were $2,062,251, and overhead costs were applied at a rate of 15% of the total out-of pocket costs. Total actual direct and indirect costs of the project were $2,662,251. The labor and material costs were $1,300,000. Labor and fringe benefits costs were about $275,000. The cost of the actual supervisory hours from the time when the project should have ended to the time it actually ended, June of 2003 through June 8, 2006, was $122,901.92. The extended equipment costs from June of 2003 to June 8, 2006 were $175,239.90. However, Ms. Llamas stated in an interrogatory that the total claim for direct and consequential damages were $2,400,000.

After plaintiff rested, defendants moved for a directed verdict on count one (breach of contract) and count two (abandonment) of plaintiff's complaint. Defendants also asked the trial court to dismiss plaintiff's consequential damages claim. Defendants referred the trial court to

Section 2.18.8 of the contract between DIG and Detroit Public Schools, which stated that "[t]he subcontractor and contractor waive claims against each other for consequential damages arising out of or relating to this contract." Also, as previously argued in their motion in limine and motion for summary disposition, defendants asked the trial court to bar any claims relating to the change orders signed and agreed to by the parties because the change orders constituted an accord and satisfaction to any dispute. Defendants again asked the trial court to dismiss claims relying on the "total cost theory."

The trial court denied defendants' motions and ruled that the jury, if they made an award at all, would determine direct damages and consequential damages. In regard to the "total cost theory," the trial court held an issue remained whether it was more probable than not that the damages had been suffered. The trial court further held that plaintiff may not recover consequential damages under the original contract because of the waiver; however, the issue of mutual abandonment and consequential damages would be decided by the jury. The trial court also noted there was no claim for losses due to change orders per agreement of the parties. After deliberations, the jury reached a verdict. The jury found that DIG breached the contract, and alternatively, that the contract was abandoned. The jury awarded direct damages in the amount of $1,095,087, and consequential damages in the amount of $2,000,000. Plaintiff moved for entry of a judgment. The trial court entered judgment for $1,095,087 on the abandonment verdict and $2,000,000 on the consequential damages verdict. Defendants objected to the judgment, referencing the trial court's prior holding that the issue of consequential damages would be decided by the jury, but would not be awarded by the court. Also, defense counsel reminded the court that he had been instructed not to discuss the waiver of consequential damages with the jury. The trial court held that the jury found the consequential damages to be within the contemplation of the parties at contract formation; therefore, both the abandonment damages and consequential damages would be awarded. After entry of the verdict, defendants filed a motion for judgment notwithstanding the verdict (JNOV), or a new trial, arguing that the consequential damages waiver clause should have been presented to the jury to decide if that particular waiver clause was abandoned. The trial court denied the motion. Defendants now appeal.

II. Waiver

A. Standard of Review

"A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion." *Meyer v City of Center Line*, 242 Mich App 560, 568; 619 NW2d 182 (2000). An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor* Co, 476 Mich 372, 388; 719 NW2d 809 (2006). This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 369; 666 NW2d 251 (2003). Likewise, this Court reviews de novo issues of contract interpretation. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402,408; 646 NW2d 170 (2002).

B. Analysis

We conclude that the trial court did not commit error requiring reversal in excluding the waiver from evidence. Rather, the waiver is limited to claims under the Construction Lien Act. As mentioned, plaintiff executed the instant document on May 4, 2006:

> * * PARTIAL UNCONDITIONAL WAIVER OF LIEN * *
>
> I/We have a contract with Devon Industrial Group to provide contract work for 9-1564-09 the improvement of the property described as SOUTHEASTERN HIGH SCHOOL and hereby waive my/your construction lien rights, rights against any payment bonds, and claims arising from the improvement, in the amount of $1,142,354.91 for labor material provided through 03-31-2004.
>
> This waiver, together with all previous waivers, if any, does cover all amounts due to me/us for the contract improvements provided through the date as above.

Defendants argue that the trial court should have enforced the phrase, "claims arising from the improvement" to preclude all plaintiff's claims through March 31, 2004. However, "[c]ontracts must be construed so as to give effect to every word or phrase as far as practicable." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). Here, defendants essentially ignore that the instant document is entitled "partial unconditional waiver of lien." Considering the subject of the instant document, the phrase "claims arising from the improvement" can reasonably be viewed as only addressing construction lien claims. The conclusion is further bolstered when considering the statutory context in which the document was executed. "Under the doctrine of noscitur a sociis, 'a word or phrase is given meaning by its context or setting.'" *Koontz v Ameritech Services, Inc*, 466 Mich 304, 3 18; 645 NW2d 34 (2002), quoting *Brown v Genesee Co Bd of Comm'rs* (After Remand), 464 Mich 430, 437; 628 NW2d 471 (2001).

There is no doubt the instant document is based on MCL 570.1 115(9), which provides that, "[t]he following forms shall be used in substantially the following format to execute waivers of construction liens:"

> (a) PARTIAL UNCONDITIONAL WAIVER
>
> I/we have a contract with .....(other contracting party) to provide ..... for the improvement to the property described as ....., and by signing this waiver waive my/our construction lien to the amount of $ ....., for labor/materials provided through .....(date). This waiver, together with all previous waivers, if any, (circle one) does does not cover all amounts due to me/us for contract improvement provided through the date shown above.

Here, the parties used the above form because they intended "to execute waivers of construction liens." MCL 570.1115(9). Adding the phrase, "claims arising from the improvement," to the instant document does not alter this conclusion. The instant document is

statutorily derived and only relates to construction lien claims. Further, by rejecting defendants' view of the instant document, the trial court properly avoided an interpretation of "[the Construction Lien Act] . . . [that would] prevent a lien claimant from maintaining a separate action on a contract." MCL 570.1302(2). The trial court properly found that the instant document waived only construction lien rights, and thus, properly excluded the instant document from evidence.

II. Abandonment

Defendants first argue that the verdict presented was contrary to great weight of the evidence. We disagree.

A. Standard of Review

"When a party claims that a jury verdict is against the great weight of the evidence, this Court may overturn the verdict only when it is manifestly against the clear weight of the evidence. The jury's verdict should not be set aside if there is competent evidence to support it." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003) (Internal citation omitted). When the evidence can be interpreted to provide a logical explanation for the jury's findings, the verdict is not inconsistent. *Lagalo v Allied Corp*, 457 Mich 278, 282; 577 NW2d 462 (1998). The fundamental rule is that courts must make every attempt to harmonize a jury's verdict. *Id*.

B. Analysis

> "The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted." *Dault v Schulte*, 31 Mich App. 698, 187 NW2d 914, 915 (1971) (quoting 17 Am Jur 2d Contracts § 484 (now 17A Am Jur 2d Contracts § 543 (1991))). A party displays intent to abandon if it "positively and absolutely refuses to perform the conditions of the contract, such as a failure to make payments due, accompanied by other circumstances, or where by [its] conduct [it] clearly shows an intention to abandon the contract." *Collins v Collins*, 348 Mich 320, 83 NW2d 213, 216-17 (1957) (internal quotations omitted). Abandonment must be mutual, however; if one party continues to perform under the contract after the other party exhibits its intent to abandon, there has been no abandonment. See 17A Am Jur 2d Contracts § 543; see *also SS Silberblatt, Inc v Seaboard Sur Co*, 417 F2d 1043, 1054-55 (CA 8, 1969) (holding that abandonment requires mutual consent of the parties); *Dault*, [*supra*] at 915-16 (finding that the parties abandoned the contract because one party ordered work not contemplated in the contract and the other party "acquiesced" by performing the non-contractual work rather than performing under the contract). [In *RM Taylor, Inc v General Motors Corp*, 187 F3d 809 (CA 8, 1999).]

Here, the trial court did not abuse its discretion in denying defendants' motion for new trial because the jury's verdict of abandonment was not against the great weight of the evidence. Whether there has been an abandonment of a contract is a question of fact to be determined by the jury. *Dault, supra* at 701 (quoting 17 Am Jur 2d Contracts § 484 (17A Am Jur 2d Contracts

§ 543 (1991)). Here, plaintiff presented the jury with substantial evidence that the contract was abandoned. Plaintiff presented evidence that DIG acted inconsistently with the terms of the contract by denying plaintiff control over its means and methods and directing it to perform in a certain manner,[2] directing plaintiff to perform work outside the scope of the original contract,[3] and forcing plaintiff to perform under conditions contrary to those contracted for.[4] Plaintiff also demonstrated that it acquiesced in DIG's acts instead of exercising its right to cease performance.

Further, plaintiff presented evidence that DIG acted inconsistently with the terms of the contract by unreasonably delaying the project an additional 18 months, nearly tripling the anticipated cost. Three witnesses testified that the project could have been completed within the originally contemplated six months but for DIG's interference. While the parties contemplated the possibility of delays when contracting, agreeing to a "no damages for delay" clause, the evidence supports plaintiff's claim that the delay in this case exceeded what either party anticipated at contracting. Therefore, the jury was not unreasonable in finding that the excessive delay, combined with plaintiff's acquiescence in performing non-contractual work, constituted an abandonment of the contract.

Defendants contend that the contract was not abandoned due to a lack of mutuality. However, "[a]n abandonment need not be express but may be inferred from the conduct of the parties and the attendant circumstances," and the parties need not have positively and absolutely refused to perform under the contract in order for the contract to have been abandoned. *Dualt, supra* at 701. Here, plaintiff demonstrated that DIG acted inconsistently with the terms of the contract and that plaintiff acquiesced in such acts rather than exercise its right to cease performance. According to the evidence presented at trial, the jury was not unreasonable in reaching that conclusion.

Further, plaintiff's continued performance under the contract did not destroy mutuality. Here, the evidence showed that plaintiff performed the non-contractual work in addition to the original contractual work, and a reasonable jury could have concluded that this constituted an implied abandonment of the contract. Therefore, the jury's finding that the contract was abandoned is not contrary to the great weight of the evidence, and the trial court did not abuse its discretion in denying defendants' motion for new trial.

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[2] Examples include the capping of steam lines, erection of shoring and development of safety procedures.

[3] Examples include the large-scale excavation of the north side of the project, gypsum block removal and sidewalk removal.

[4] Plaintiff presented evidence that it was forced to work in muddy conditions, without power, without heat and without proper equipment despite contrary contractual provisions.

III. Consequential Damages

A. Standard of Review

This Court reviews de novo a trial court's decision to grant or deny a motion for JNOV. *Sniecinski v Blue Cross & Blue Shiel*d, 469 Mich 124, 131; 666 NW2d 186 (2003). In doing so, we view "the evidence and all legitimate inferences in a light most favorable to the nonmoving party. "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Diamond v Witherspoon*, 265 Mich App 673, 682; 696 NW2d 770 (2005).

B. Analysis

Defendants argue that the trial court committed error requiring reversal in denying defendants' motion for JNOV regarding the jury's award of consequential damages. Defendants specifically maintain that the remedy for abandonment is limited to recovery in quantum meruit.

Defendants, relying on *Tempo, Inc v Rapid Electrical Service & Sales, Inc*, 132 Mich App 93; 374 NW2d 728 (1984), claim that Michigan does not allow for the recovery of consequential damages in claims of abandonment. In *Tempo*, the jury considered claims for "$102,000 on the written contract price or $114,000 for the reasonable value of work performed" and returned a verdict of $180,000. *Id*. at 102. As in this case, the jury award was attributed, in part, to "consequential damages for loss of credit, *lost profits due to loss of bonding*, and additional interest due on payments to suppliers." *Id*. (Emphasis added). Thus, *Tempo*, *supra*, actually supports plaintiff's claim that consequential damages are available for claims to recover "the reasonable value of work performed," i.e., quantum meruit.

Defendants also cite *HO Brackney & Son v Ryniewicz*, 346 Mich 404, 409-410; 78 NW2d 127 ((1956), as "another of the few Michigan cases on abandonment, [in which] the court awarded damages in quantum meruit *plus profit and overhead* on the quantum meruit award." (Emphasis added.) Again, however, the case upon which defendants rely actually supports plaintiff's position. The *HO Brackney & Son* Court specifically states that:

> It is also urged that plaintiff was not entitled to recover *profit and overhead* in the amount of $4,227 on a quantum meruit. It appears that the custom of the trade is to include *overhead costs of 15% to 20%* in addition to cost of labor and materials. Such cost often includes *wear and tear on tools, truck, gas used, taxes, and insurance, as well as profit and the cost of office expense*. There was evidence to show that this profit of 15% was reasonable. It was not error to submit this matter to a jury.

Defendants have simply failed to demonstrate that recovery must be limited to the reasonable value of services rendered, and indeed, have relied on case law suggesting that recovery is not limited to the reasonable value of services rendered. Therefore, defendants are not entitled to relief.

Defendants also argue that the trial court committed error in refusing to allow the jury to consider the consequential damages waiver. However, even assuming the trial court should have allowed defense counsel to quote the consequential damages waiver at trial and argue its effect at trial, defendant cannot show harm because the jury found in favor of plaintiff on the abandonment claim, to which the consequential damages waiver is irrelevant. If the jury had returned a verdict for plaintiff only on the breach of contract claim, then defendants' argument may be persuasive.

Defendants maintain the trial court committed error by indicating that it would not allow an award of consequential damages, but "reversed course and awarded IES consequential damages," at the motion for entry of judgment. Defendants' claim in this regard cannot be sustained. Specifically, the trial court instructed the jury to consider consequential damages. Defendants' claim that the trial court had previously "ruled" that it would not award consequential damages is obviously belied by a jury instruction on consequential damages. Further, as discussed above, defendants' claim that the consequential damages waiver is effective is only persuasive if the jury had returned a verdict for plaintiff only on the breach of contract claim. In other words, the trial court very well may have enforced the consequential damages waiver if the jury had returned a verdict for only breach of contract. Given that the jury found in favor of plaintiff on the abandonment claim, however, defendants have not established error requiring reversal.

Defendants also claim that the jury award of consequential damages is speculative. We disagree. However, as mentioned, this Court has upheld the award of consequential damages resulting from a contractor's loss of bonding capacity. *Tempo, Inc, supra*. In *Tempo*, an electrical contractor brought suit for non-payment and consequential damages, presenting evidence at trial that non-payment resulted in the loss of its bonding capacity. *Id* at 96, 102. The contractor calculated its lost profits by determining which jobs he would have bid on during a specified period and estimating that it would have been awarded contracts for one out of every three to four jobs bid, with a profit margin of three percent. According to the Court, "[w]hile to some degree speculative, this method of calculating lost profits had a reasonable degree of certainty and was not based solely on conjecture and speculation." *Id*. at 150.

Here, damages for plaintiff's loss of bonding capacity were not too remote and speculative. Plaintiff's calculation of its damages for the loss of its bonding capacity was nearly identical to the method of calculation this Court approved in *Tempo*. Plaintiff calculated its damages by estimating that it would have been the low bidder on 15 to 20 percent of the projects it would have bid on for the period of September 2005 through July 2006, adding a profit margin of ten to 15 percent. Given that this Court has approved the method utilized by plaintiff to calculate its damages resulting from the loss of its bonding capacity, the trial court did not err on this basis.

IV. Direct Damages

A. Standard of Review

When reviewing a trial court's decision on a motion for a directed verdict, the standard of review is de novo and the reviewing court must consider the evidence in the light most favorable to the nonmoving party. *Zsigo v Hurley Medical Center*, 475 Mich 215; 716 NW2d 220 (2006).

Directed verdicts are appropriate when no factual question exists upon which reasonable minds may differ. *Meagher v Wayne State University*, 222 Mich App 700; 565 NW2d 401 (1997).

B. Analysis

We conclude that plaintiff presented sufficient evidence that added costs due to delay were caused by DIG. During trial, plaintiff presented a timeline reflecting each instance of DIG's conduct that impacted plaintiff's work (including harassment, interference, and inadequate site conditions) and the length of delay caused by each instance. There was testimony that the project was delayed 17-18 months, and that this delay was attributable to DIG's conduct. Conversely, DIG presented evidence that it was not responsible for some of the delays, instead placing blame on plaintiff and Detroit Public Schools. However, the evidence was sufficient to allow the jury to assess the damages that were directly related to the delays. A factual question existed upon which reasonable minds could differ as to whether plaintiff's requested damages were caused by DIG. Thus, the court did not err in denying defendants' motion for directed verdict, nor did it abuse its discretion in refusing to exclude evidence relating to direct damages.

Defendants last argue that the trial court erred by allowing an award of damages for the alleged delay because the contract required plaintiff to "perform the work . . . at such time and in such order and sequence as [defendant] may direct." Initially, defendants' claim is moot given the jury's conclusion in regard to abandonment of contract. Further, we conclude that a rational jury could find overwhelming evidence of unreasonable and substantial delay. See *EC Nolan Co, Inc v State*, 58 Mich App 294, 302-04; 227 NW2d 323 (1975). Thus, defendants have failed to establish error requiring reversal.

Affirmed.

/s/ Brian K. Zahra
/s/ Donald S. Owens

STATE OF MICHIGAN

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Before: Schuette, P.J., and Zahra and Owens, JJ.

SCHUETTE, J. (*dissenting*).

I disagree with my distinguished colleagues in the majority, Judges Zahra and Owens. I believe that the trial court erred when it concluded that the May 4, 2006 waiver was not applicable to plaintiff's breach of contract and abandonment claims. Therefore, I would reverse and remand this case on that ground.

The waiver that plaintiff executed on May 4, 2006, provides as follows:

> * * PARTIAL UNCONDITIONAL WAIVER OF LIEN * *
>
> I/We have a contract with Devon Industrial Group to provide contract work for 9-1564-09 the improvement of the property described as SOUTHEASTERN HIGH SCHOOL and hereby waive my/our construction lien rights, rights against any payment bonds, and claims arising from the improvement, in the amount of $1,142,354.91 for labor/material provided through 03-31-2004.
>
> This waiver, together with all previous waivers, if any, does cover all amounts due to me/us for the contract improvements provided through the date as above.

Defendants moved for partial summary disposition, asserting that under the above waiver, defendants were entitled to dismissal of plaintiff's claims that related to any work

completed before March 31, 2004. The trial court denied defendants' motion, reasoning as follows:

> THE COURT: Okay. Now, you're saying that – if I understand – that it doesn't matter if they still had amounts that were due and owing and unpaid, by signing this document they be operation of law lose their right to collect it.
>
> MR. TEGER: They are saying that upon receipt of this payment -
>
> THE COURT: No, just answer my question.
>
> MR. TEGER: I believe the answer –
>
> THE COURT: Don't – don't – it's a straightforward question.
>
> MR. TEGER: I'm sorry.
>
> THE COURT: You want to change the question. What you are telling me that even though before they signed this document, they had claims remaining in excess of the amount that's on the form. That by signing the form, their right disappeared, they don't have it anymore.
>
> MR. TEGER: Yes, Your Honor.
>
> THE COURT: What's the consideration for that?
>
> MR. TEGER: Because what they are saying is that upon receipt of this amount of money, I have been paid in full for all the work to that date.
>
> THE COURT: No, no, but – okay, all right, but it's false. My hypothetical – my hypothetical says that that statement is false. They're saying they got paid in full but they really have not. And I think what you are asking me to rule is that because they say they are paid in full, even though they haven't, when they sign the form they can't collect the remainder.
>
> MR. TEGER: You're saying when they signed the form, they crossed their fingers. They didn't really mean it.
>
> THE COURT: No, - well, we don't know. I don't know if they crossed their fingers or they made a mistake or they did it on purpose. I'm asking about your –
>
> MR. TEGER: Yes.
>
> THE COURT: - your – my hypothetical – okay, I'll take it, it's a mistake, let's say it's a mistake.

MR. TEGER: They have waived their claim, I agree, your hypothetical.

THE COURT: Okay. Well, I don't agree. I don't agree. So, I - the motion is denied.

Likewise, the trial court denied defendants' motion in limine regarding the waiver, and when defendants attempted to admit the waiver as evidence, the trial court refused, concluding that the waiver was not applicable to plaintiff's claims, reasoning as follows:

> My ruling is this. That as a matter of law, this is nothing more than a receipt for the amount paid. . . .
>
> Now, if you want to – I guess I can't stop the Defendant from claiming that when [plaintiff] signed this, they intended to forego every breach of contract. This is a breach of contract case is what it is. And this doesn't say anything about giving up, you know, the cause of action of breaches of contract.
>
> * * *
>
> So what I'm saying is that the likelihood that you're going to convince the jury . . . against [plaintiff's] absolute and utter denial is slim and none. So what we're going to end up doing is spending a couple of hours arguing about a point where you do not succeed as a matter of law, and it is all but impossible, unless [plaintiff's] going to admit that, you know, . . . when they signed this, they intended to give up any cause of action they had for breach of contract. It's not possible. It's a monumental waste of time.
>
> * * *
>
> And so my ruling is that [the waiver] doesn't preclude [plaintiff] as a matter of law, and that there are no facts that are ever going to make a jury issue on the claim that they intended to waive any claim for damages for breach of contract.

Defendants argue that the trial court erred in denying their motion for partial summary disposition, erred in denying their motion in limine, and erred in refusing to admit the waiver into evidence. I agree.

Michigan defines waiver as a "voluntary and intentional abandonment of a known right." *Quality Products & Concepts Co*, *supra* at 374. Generally, contractual waivers of claims will be enforced where the waiver is fairly and knowingly made. *Skotak v Vic Tanny Int'l*, 203 Mich App 616, 618; 513 NW2d 428 (1994). Moreover, "[t]he fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). Unambiguous contractual language must be construed and enforced as written. *Quality Products & Concepts Co*, *supra* at 375. A contract is ambiguous "'when its provisions are capable of conflicting interpretations.'"

Klapp v United Ins Group Agency, Inc, 468 Mich 459, 467; 663 NW2d 447 (2003) (citation omitted). "[T]he meaning of an ambiguous contract is a question of fact that must be decided by the jury." *Id*. at 469.

Here, the trial court should have enforced the waiver of claims executed by IES and dismissed IES's claims for work done before March 31, 2004. Its conclusion that the waiver did not apply to IES's breach of contract and abandonment claims was erroneous because the waiver is unambiguous. While it is titled a "Partial Unconditional Waiver of Lien," the language of the waiver went beyond a standard construction lien, see MCL 570.1115, and waived all "claims arising from the improvement." This clause, coupled with the last sentence of the waiver, which states, "This waiver, together with all previous waivers, if any, does cover all amounts due to me/us for the contract improvements provided through the date as above," makes clear that the parties' intended to preclude recovery by IES for all claims that related to any work completed before March 31, 2004. Therefore, I believe that the trial court erred when it failed to grant defendants' motion for partial summary disposition and defendants' motions in limine, and when it failed to admit the waiver into evidence for consideration by the jury, and I would reverse and remand this case for further proceedings.

/s/ Bill Schuette