

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PACKAGE COMPANY,

Plaintiff-Appellant,

v

FRED BROOKS,

Defendant-Appellee,

and

LEEDS FURNITURE INC. #4,

Defendant.

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UNPUBLISHED

December 26, 2000

No. 215949

Oakland Circuit Court

LC No. 97-538168-CK

Before: Bandstra, C.J., and Fitzgerald and D. B. Leiber\*, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from a circuit court order determining the status of the parties' consent judgment. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and defendant Brooks entered into a \$100,000 consent judgment requiring defendant to pay plaintiff \$500 per month for eighteen months plus a \$3,000 balloon payment at the end of that period. If defendant made each payment on time, the judgment would be deemed paid in full. If he defaulted, plaintiff would be entitled to collect the entire \$100,000 less payments made. Defendant made one late payment, but claimed he had received approval from plaintiff's counsel, who served as the collection agent. Plaintiff accepted the late payment and the next payment, which was timely, then instituted collection proceedings on the entire judgment. The court ruled that plaintiff had substantially complied with the terms of the judgment and thus the late payment did not constitute a default.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

A consent judgment “is a contract and is to be construed and applied as such.” *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). Where the language of the agreement is clear and unambiguous, its construction is a question of law for the court, which must enforce the agreement as written. *G&A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). Normally, consent judgments will not be modified absent fraud, duress or mutual mistake. *Gramer, supra*; *Trendell v Solomon*, 178 Mich App 365, 367; 443 NW2d 509 (1989).

If time is not of the essence, a short delay in payment which does not result in any detriment to the payee constitutes substantial compliance by the payor, who may not be defaulted. *A E Giroux, Inc v Contract Services Associates, Div’n of Premium Corp of America, Inc*, 99 Mich App 669, 670-671; 299 NW2d 20 (1980). The fact that the judgment required payment by a certain date and provided for a harsh sanction upon default is an indication that time was of the essence. *Friedman v Winshall*, 343 Mich 647, 656; 73 NW2d 248 (1955); *Nedelman v Meininger*, 24 Mich App 64, 74-76; 180 NW2d 37 (1970). The court’s sanctioning of defendant’s late payment did result in a detriment to the plaintiff, which lost its right to the full \$100,000. Therefore, the court erred in ruling that substantial compliance was sufficient.

However, there is some indication that plaintiff may have waived or be estopped from asserting the right to declare defendant in default. Defendant claimed that he had received permission from plaintiff’s counsel to remit the one payment late. Parties may orally agree to extend the time for performance of a contractual obligation, *Soltys v Soltys*, 336 Mich 693, 697; 59 NW2d 54 (1953), and while plaintiff’s counsel was not a party to the agreement, there was at least a question of fact whether he had apparent authority to act for plaintiff with respect to the collection, being both plaintiff’s attorney and the designated collection agent. Cf. *Nelson v Consumers Power Co*, 198 Mich App 82, 89-90; 497 NW2d 205 (1993); *Meretta v Peach*, 195 Mich App 695, 699-700; 491 NW2d 278 (1992). Accordingly, we remand this case to the trial court for an evidentiary hearing regarding the alleged consent to the late payment.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ E. Thomas Fitzgerald  
/s/ Dennis B. Leiber