STATE OF MICHIGAN

COURT OF APPEALS

FAWZIE, INC., d/b/a AMERICAN MOBIL MART, Plaintiff-Appellant, v EXXONMOBIL CORPORATION, f/k/a MOBIL OIL CORPORATION, and WILSON CARRIERS, INC., Defendants-Appellees.	UNPUBLISHED January 14, 2010 No. 288819 Wayne Circuit Court LC No. 02-224509-CZ

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

Plaintiff, Fawzie, Inc., appeals by leave granted from the trial court's order granting the motion of defendants, ExxonMobil Corporation and Wilson Carriers, Inc., to enforce the parties' consent judgment. Fawzie argued before the trial court that, although some terms of the parties' consent judgment had occurred, the neutral engineer appointed by the trial court had not obeyed all the terms of the judgment, so the engineer's decision was not valid under its terms. We reverse and remand. We decide this appeal without oral argument.[1]

I. Basic Facts And Procedural History

This case arises out of an incident that occurred on August 19, 1999, when Wilson Carriers allegedly spilled 1,000 gallons of gasoline and diesel fuel onto Fawzie's property. The parties settled the case prior to trial in a stipulated order or consent judgment in which they agreed to allow the trial court to choose a neutral environmental engineer from a list of 10, which would be mutually proposed by the parties. The judgment required the engineer to examine the entire file of the Michigan Department of Environmental Quality (MDEQ) regarding the site. Importantly, the judgment required the engineer to utilize the standards of the MDEQ requirements for remediation that were in place on and before August 19, 1999, in its investigation of the site.

[1] MCR 7.214(E).

If the engineer determined that no further remediation was required on the site as a result of its investigation, Fawzie would be responsible for paying the engineer's fees under the terms of the judgment. However, if additional remediation was required, ExxonMobil and Wilson Carriers would be held responsible for the costs of the remediation as well as the engineer's fees.

After its initial choice declined to participate in the case, the trial court selected Atwell-Hicks, LLC, as the engineer. Atwell-Hicks submitted its findings to the parties in a letter dated June 21, 2007, which stated in part that it was the opinion of the engineer

> that the gasoline/diesel spill, which occurred on August 19, 1999; [sic] had *minimal impact* on subsurface soil and groundwater conditions at the subject site. The spill was adequately controlled by emergency response personnel and cleaned up to the satisfaction of the Michigan Department of Environmental Quality. Comparison of historical and recent chemical data in subsurface soil and groundwater did not reveal and [sic] significant changes in chemical concentrations, thus no significant impact. [Emphasis in original.]

Atwell-Hicks later submitted an addendum to its summary of findings letter, wherein it stated that it had "conclude[d] that no additional remediation activities are needed at the [site at issue] to address the 1999 spill. Furthermore, the [MDEQ] issued a no further action letter, dated May 15, 2000, regarding the spill." Based on the findings of Atwell-Hicks, ExxonMobil and Wilson Carriers filed a motion asking the trial court to enter a final judgment ordering Fawzie to pay the costs of the engineer's assessment, according to the parties' agreement in the consent judgment. The trial court granted the motion, concluding that regardless of whether Atwell-Hicks had used the proper standards to come to its determination that no further remediation was required on the site, its conclusion was still valid.

The trial court acknowledged during the hearing on the motion to enforce the judgment that Atwell-Hicks may not have abided by the terms of the parties' agreement by failing to follow the requisite MDEQ standards for determining whether a site is contaminated before coming to its conclusion that no further remediation was required on the site. However, the trial court ultimately determined that because the parties had agreed in the stipulated order "that if the neutral engineer found that no further remediation was required that then the plaintiff would pay their bill. So the Court's gonna grant the defendant's motion. [Fawzie will] have to pay the bill." Fawzie now appeals.

II. Consent Judgment Enforcement

A. Standard Of Review

Fawzie argues that the trial court erred when it enforced the fee provisions of the consent judgment but did not honor the conditions precedent to the fee award. "An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the

construction and interpretation of contracts."[2] Issues of contract interpretation are questions of law that this Court reviews de novo.[3]

B. Analysis

We conclude that the trial court acted improperly by failing to adequately consider Fawzie's argument that the engineer's investigation and ultimate determination did not honor the terms of the parties' settlement order. The settlement order did not simply provide that a neutral engineer was to come to a conclusion using any means it deemed appropriate. Rather the engineer was to "utilize the standards of the MDEQ requirements for remediation that were in place on and before August 19, 1999." ExxonMobil and Wilson Carriers do not dispute that Atwell-Hicks did not utilize MDEQ Operational Memorandum No. 9, on "Groundwater and Soil Closure Verification Guidance," in its investigation. They claim that Atwell-Hicks appropriately excluded this memorandum from use because it was not relevant to its investigation. They assert that the memorandum governs a different type of contamination than was at issue here.

It is not clear to us from the record whether Fawzie's claim regarding which MDEQ standards Atwell-Hicks should utilized is correct. Because Fawzie has raised a factual issue regarding the terms of the parties' settlement order, it was improper for the trial court to enforce the payment provision of the order without addressing Fawzie's argument. "[C]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory."[4] Thus, we find that further proceedings are warranted on the factual issue Fawzie has raised.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck

---

[2] *Kloian v Dominos Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006) (citations and quotation marks omitted).

[3] *Id.*

[4] *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003).