

STATE OF MICHIGAN  
COURT OF APPEALS

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ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellant,

v

TIMOTHY BROE, ELEANOR BROE, and BROE  
REHABILITATION SERVICES, INC.,

Defendants-Appellees.

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UNPUBLISHED

July 22, 2010

No. 290133

Oakland Circuit Court

LC No. 2004-063179-CK

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

STEPHENS, J. (*dissenting*).

I respectfully disagree with my colleagues. Because I conclude that plaintiff did not promptly rescind the contract upon defendants failure to timely perform, I further conclude that plaintiff waived the requirement in question and was required to provide defendant a reasonable period of time to perform. Therefore, I would vacate and remand for further proceedings.

I agree with the majority that a valid settlement agreement arose when plaintiff's counsel accepted defendants' offer to pay \$2.7 million by the end of the month. The acceptance was in writing and signed by plaintiff's counsel. Given that the parties specified a date for performance and that plaintiff was giving up its right to collect on the judgment in exchange for prompt payment of a lesser sum, time was of the essence to the contract. *In re Day Estate*, 70 Mich App 242, 246; 245 NW2d 582 (1976). I further agree that defendants breached the contractual agreement when they failed to perform before the end of November. As the majority correctly notes, once the breach was discovered, plaintiff had a right to rescind the contract so long as the right was promptly asserted. *Schneff v Thomas L McNamara, Inc*, 354 Mich 393, 397; 93 NW2d 230 (1958). My disagreement with the majority arises from my conclusion that plaintiff failed to promptly assert that right. Plaintiff did not elect to rescind the settlement agreement once defendants failed to make payment when due. Rather, it continued to wait for payment. Of particular importance to my conclusion is plaintiff's counsel's statement in his December 9, 2008 email, in which he stated that plaintiff "has been very understanding regarding the delay in payment." Counsel's statement indicates that plaintiff was not requiring strict compliance with that term of the agreement.

Because plaintiff did not promptly insist upon revocation when the deadline was missed, and given plaintiff's counsel's warning that plaintiff had been patient in waiting for payment but its patience was running out, I conclude that plaintiff, by its conduct, waived the requirement that

defendants make payment by the end of the month. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 373-374; 666 NW2d 251 (2003). If one party has waived time for performance of a contractual obligation, the other party has a reasonable time in which to perform unless the waiver was accompanied by a specific extension of time, which time then becomes of the essence. Absent a specific extension of time, the first party can rescind only after full notice and a reasonable time for performance is given. *Al-Oil, Inc v Pranger*, 365 Mich 46, 53; 112 NW2d 99 (1961), citing 17 CJS Contracts § 506. Here, plaintiff initially waived any objection to the delay in payment. In failing to demand timely performance, plaintiff did not initially provide defendant with a specific extension of time. Consequently, plaintiff could only rescind its offer after providing defendant with full notice and a reasonable time for performance. Plaintiff's counsel notified defense counsel on December 9, 2008 that plaintiff was no longer going to accept defendants' delay in performance and advised, "If this matter is not resolved by tomorrow [December 10, 2008], my client will enforce all of its options." Plaintiff's counsel filed a motion before the expiration of the deadline at approximately 3:30 p.m., requesting release of the bond posted in this case as "partial satisfaction" of the judgment. An hour later, Defense counsel sent a proposed settlement agreement, which contained additional terms not agreed to by the parties, and no funds were disbursed to plaintiff. Plaintiff's counsel promptly rescinded the agreement the next morning.

The statement of plaintiff's counsel placed defendant on full notice that performance was required. However, based on the record, it is unclear whether it was reasonable to demand performance within one day of that notice. The parties' arguments were principally focused on the enforceability of any agreement and whether time was of the essence in the original agreement. The trial court failed to provide any explanation of the factors that led it to conclude that the period of time was reasonable. As a result, I find it necessary to remand this matter to determine whether it was reasonable for plaintiff, on December 9, 2008, to demand performance by December 10, 2008 and to file a motion for release of the bond before the expiration of the deadline period. In making its determination, I would instruct the trial court to consider whether plaintiff could have reasonably expected the trial court to release its cash bond in the provided amount of time.

Finally, I note that I agree with the majority regarding the inapplicability of the doctrine of equitable estoppel.

/s/ Cynthia Diane Stephens