STATE OF MICHIGAN

COURT OF APPEALS

FIELD CONSTRUCTION, INC., Plaintiff-Appellant,	UNPUBLISHED March 15, 2012
v	No. 300716 Wayne Circuit Court
MIDFIELD CONCESSION ENTERPRISES, INC., Defendant-Appellee.	LC No. 09-006937-CK

Before: O'CONNELL, P.J., and SAWYER and TALBOT, JJ.

PER CURIAM.

Field Construction, Inc. ("Field Construction") appeals as of right the trial court's judgment of no cause of action and award of contractual attorney fees to Midfield Concession Enterprises, Inc. ("Midfield Concession"). We affirm.

Facts and Proceedings

In 2008, Field Construction, a commercial contractor, was the low bidder on contracts to build several restaurants at the Detroit Metropolitan Wayne County Airport's new North Terminal. Part of the winning bid involved contracts to build two adjacent restaurants in the terminal for Midfield Concession ("the project"). The contracts required Field Construction to substantially complete the project by September 17, 2008, the day the terminal was scheduled to open. If Field Construction failed to do so, then it would be liable to Midfield Concession for $10,000 a day in liquidated damages until Field Construction achieved substantial completion.

Field Construction's Project Manager, David Stiney, testified that construction proceeded well at first but, in the final two or three weeks before the September 17, 2008, "drop dead" date, Stiney was faced with various issues that required additional work or equipment in order to achieve timely substantial completion. Stiney testified that these issues resulted from delayed information from the Wayne County Airport Authority, necessary changes to Midfield Concession's plans, and other circumstances outside of Field Construction's control. Addressing the issues occasioned extra costs that exceeded the cost allowances in Field Construction's bid, which had been incorporated into the overall sum to be paid to Field Construction upon completion.

Under the contracts, in order to be binding on Midfield Concession, any changes to the project, including increases to the contract sum for additional costs, had to be pre-approved by Midfield Concession on a written change order. The contracts also included a general clause stating that the contracts could be modified by the parties only through certain enumerated written documents, including change order forms.

Stiney testified, however, that the new costs incurred during the final weeks—"crunch time" for the project—could not be approved by the normal change order process because of the project's strict time constraints, the alleged unavailability of Dean Hachem, Midfield Concession's Project Manager and Director of Operations,[1] and the apparent hostility toward approving change orders of Samir Mashni, Midfield Concession's Vice President of Business Development and General Counsel. Stiney therefore concluded that he was faced with a dilemma: finish the project on time without securing change orders for the extra work and equipment, or fail to finish on time and become liable for $10,000 a day in damages. Stiney and Field Construction's President, Dana Field, elected to finish the project despite the lack of change orders. After completion, Field Construction sought payment of the full contract price plus $54,849 in extra costs it incurred during crunch time. Midfield Concession refused to pay the extra costs because it did not pre-authorize them with change orders.

Field Construction filed suit, seeking payment for the extra work it performed. After a bench trial, the trial court concluded that the parties had not mutually waived the contractual provision requiring written change orders. Accordingly, Midfield Concession was not bound to pay Field Construction for the extra costs Field Construction incurred without Midfield Concession's authorization. The court ruled that Field Construction had no cause for action and later granted attorney fees and court costs to Midfield Concession, as the prevailing party, as provided by the parties' contracts.

Waiver of the Written Change Order Requirement

Field Construction argues that the trial court erred by failing to consider whether the change order requirement was waived as a result of Midfield Concession's conduct, which left Field Construction without a tenable way to proceed under the contracts during crunch time. We disagree. Field Construction primarily relies on *Quality Products and Concepts Co v Nagel Precision, Inc*[2] and *Klas v Pearce Hardware & Furniture Co*.[3] Field Construction argues that because Midfield Concession knew that Field Construction had to proceed with the work, but

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[1] Stiney initially testified that Hachem was on vacation during crunch time. After Midfield Concession proved the contrary that Hachem was in Michigan and at the terminal during this time, Midfield Concession emphasized that Hachem seemed unavailable and did not visit Field Construction's project sites.

[2] *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362; 666 NW2d 251 (2003).

[3] *Klas v Pearce Hardware & Furniture Co*, 202 Mich 334; 168 NW 425 (1918).

Midfield Concession, through its conduct, made it difficult or impossible for Field Construction to obtain change orders, Midfield Concession should be estopped from raising the change order requirement in defense of its refusal to pay Field Construction for the extra work performed and Midfield Concession should be deemed to have waived the change order requirement.

This Court reviews a trial court's findings of fact at a bench trial for clear error.[4] "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made."[5] Deference is given to the trial court "because it is in a better position to examine the facts."[6] "The legal effect of a contractual clause is a question of law that is reviewed de novo."[7]

When interpreting a contract, our obligation is to determine and enforce the intent of the contracting parties as is evident in the contract's unambiguous language.[8] The parties are "free to mutually waive or modify their contract notwithstanding a written modification or anti-waiver clause."[9] But a party may not unilaterally do so as "mutuality is the centerpiece to waiving or modifying a contract."[10] Mutuality is established when waiver or modification is proved by "clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract."[11] "The clear and convincing evidence standard presents a heavy burden that far exceeds the preponderance of the evidence standard that is sufficient for most civil litigation."[12] If the party seeking to establish waiver or modification relies on a course of conduct, the law of waiver applies and "the significance of written modification and anti-waiver provisions regarding the parties' intent is increased."[13] Waiver is "a voluntary and intentional abandonment of a known right."[14] Accordingly, "[m]ere knowing silence generally cannot constitute waiver."[15]

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[4] *Chelsea Inv Group LLC v City of Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010).

[5] *Id.* at 251.

[6] *Id.*

[7] *Quality Products*, 469 Mich at 369.

[8] *Id.* at 375.

[9] *Id.* at 364 (emphasis omitted).

[10] *Id.*

[11] *Id.* at 364-365.

[12] *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 224; 707 NW2d 353 (2005).

[13] *Quality Products*, 469 Mich at 365.

[14] *Id.* at 374.

[15] *Id.* at 365.

Field Construction argues that Midfield Concession's conduct here resulted in waiver by estoppel. Field Construction's argument fails for two reasons—one primarily factual and the other primarily legal. Although Stiney apparently had the impression that Hachem was unavailable and Mashni was hostile to change orders, Midfield Concession exposes the weakness of Field Construction's argument that Stiney was justified in proceeding without change orders after a single alleged unreturned phone call to Hachem,[16] and a single alleged conversation with Mashni.[17] Stiney did nothing after this point to follow up by phone or email with Midfield Concession's agents. Additionally, testimony elicited from Midfield Concession's witnesses revealed that other contractors finished similar work on time and at lower costs despite the hectic nature of crunch time at the new terminal. Similarly, Mashni testified that despite his hostility toward a change order Field Construction requested earlier during the project, Mashni was available during crunch time and was aware of how "critical" the drop dead date was. Indeed, despite Mashni's reticence regarding the earlier change order request, Field Construction does not dispute that Mashni ultimately approved that request within a day in light of the pressure Stiney and Field placed on him to move quickly. Finally, Field Construction emphasizes Stiney's testimony that crunch time at the airport effectively made it impossible for a contractor to seek competitive bids from subcontractors before submitting documentation to support a change order request, in part because there was no time to obtain security clearance for additional subcontractors. This argument is largely irrelevant as the contractual change order provision does not require competitive bidding and Stiney admitted he did not solicit competitive bids when he submitted the three earlier change orders that Midfield Concession approved. Thus, to the extent that Field Construction argues that it was effectively impossible to comply with the change order requirement due in large part to Midfield Concession's conduct, the trial court would have been justified in concluding that Field Construction did not prove this argument, as a matter of fact, by clear and convincing evidence.[18]

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[16] Hachem denied receiving a phone message from Stiney.

[17] Stiney testified that Mashni told him "to get the job done whatever it took," but that "there would be no overtime for the job and that if the job wasn't turned over by the opening date," Field Construction "would be subject to $10,000 a day in penalties." Stiney claimed that Mashni also threatened that, in Stiney's words, "if I didn't get the job done on time without the overtime that he would make sure I never work in the airport again." Mashni denied threatening Stiney in this way and testified that Stiney never discussed Stiney's alleged concerns that there was no time for change orders at the end of the project or that the project was at risk of being incomplete on the drop dead date.

[18] *Quality Products,* 469 Mich at 364-365.

Field Construction also raises its duty to mitigate damages in support of several of its arguments, claiming that this duty required it to proceed with unauthorized extra work in order to avoid the $10,000 a day in liquidated damages. The Supreme Court explained the duty to mitigate in *Morris v Clawson Tank Co*, 459 Mich 256, 263-264; 587 NW2d 253 (1998) (brackets in original):

Field Construction's argument also fails as a matter of law. Field Construction relies in part on *Klas*[19] to support its waiver by estoppel argument. *Klas*, however, is unavailing as the portions of it cited by Field Construction are mere obiter dictum, for reasons explained in *Quality Products*.[20] In concluding that a question of fact existed for the jury with regard to whether the defendant waived a written change order requirement, the *Klas* Court quoted authorities stating that waiver may be evinced by words or acts, but also "'may be implied where the order and the extra work are known to the owner and not objected to by him[;] . . . the owner by his conduct may be estopped from setting up such [written change] provision as a defense.'"[21] Hence Field Construction relies on *Klas* for the proposition that a written change order requirement may be waived through knowing silence.

The plaintiff in *Quality Products* attempted to rely on *Klas* for this very proposition, which was rejected by the *Quality Products* Court. Emphasizing the rule that a contract may be waived or modified only by mutual assent, *Quality Products* held that the "[d]efendant's mere silence, regardless [of] whether [the] defendant possessed knowledge of [the] plaintiff's sales activity outside the contract, [did not] amount to an intentional relinquishment of the sales-territory and sales-commissions limitations in the contract or the contract's restrictive amendment clauses."[22] Significantly, *Quality Products* emphasized that *Klas* itself did not involve such knowing silence.[23] Thus, although "the *Klas* Court proceeded to expound on 'implied waivers[,]' . . . no discussion of implied waivers was necessary to the resolution of the

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> Mitigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing.
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> > "Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided." [*Shiffer v. Gibraltar School Dist Bd of Ed*, 393 Mich 190, 197; 224 NW2d 255 (1974) (quoting McCormick, Damages, § 33, p 127).]

The doctrine does not apply here, where Field Construction is essentially arguing that it chose a course of conduct to avoid higher costs to itself under the contract. Further, Field Construction offers no authority or legal argument in its favor.

[19] *Klas*, 202 Mich at 334.

[20] *Quality Products*, 469 Mich at 378-379.

[21] *Klas*, 202 Mich at 340 (citation omitted); see also *id.* at 339.

[22] *Quality Products*, 469 Mich at 377-378.

[23] *Id.* at 378.

case" and, therefore, "the *Klas* Court's exposition on implied waivers not only mislabels the defendant's express representations as implied conduct, it is obiter dictum."[24]

Here, even if the trial court accepted that Mashni or Hachem knew that Stiney was performing additional work that might have justified additional payment if Stiney had secured change orders, and they failed to stop him, at most this amounted to the sort of knowing silence that *Quality Products* held does not establish mutual agreement to waive a contractual provision. Further, it is not clear that the trial court accepted this version of events. Rather, it would seem that the court may have concluded from the evidence that, to any extent Mashni communicated a refusal to consider additional change orders, it was expressly because he believed Field Construction could perform all of the necessary work to finish the project on time within the costs of the original contracts. As the trial court stated, although this placed Field Construction in a difficult position, "[t]hat's the position that they were in and, you know, sometimes in order to get work the contractors put themselves in positions where they can come out on the short end of the stick. And I think in some ways that's what happened here." Accordingly, Field Construction's waiver by estoppel argument fails.

Field Construction also asserts that the trial court applied the incorrect legal standard when it issued its ruling. We disagree, primarily for the reasons set forth above. Field Construction is nominally correct that in rendering its holding, the trial court did not expressly refer to whether the parties' "conduct" established affirmative intent to waive the change order provision. Rather, the court stated that Field Construction was "relying on a waiver of the change order provision by oral agreement or a verbal modification." But read as a whole, the trial court's ruling suggests that it considered Stiney's overall testimony and properly concluded that this testimony did not establish waiver or modification, even under Field Construction's proffered conduct-based theory: the court stated that it "does not find that there was a waiver of the change order provision through the testimony of Mr. Stiney" while fully acknowledging Stiney's claim that Midfield Concession's conduct put him in a difficult position "because if he didn't complete the job he'd be subject to the liquidated damages, and on the other hand, you know, without following the proper procedure, getting the consent of the owners or some authorized representative, he wouldn't get paid for the change orders." The court then properly concluded that Stiney's alleged dilemma did not constitute affirmative waiver of the change order provision by Midfield Concession. Accordingly, we find that the trial court did not apply the wrong legal standard when it ruled in favor of Midfield Concession and the court properly denied Field Construction's motion to amend the judgment under MCR 2.517(B) on the basis of Field Construction's waiver by estoppel theory.

Equitable Claims

Field Construction further contends that the trial court erred in denying its post-judgment motion to amend the pleadings[25] to incorporate a plea for equitable relief. We disagree. This

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[24] *Id.* at 378-379.

[25] MCR 2.118(C)(1).

Court reviews a trial court's decision on a motion under MCR 2.118(C)(1) for an abuse of discretion.[26] "An abuse of discretion occurs when the decision results in an outcome that falls outside the range of principled outcomes."[27]

> MCR 2.118(C)(1) provides:
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> When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

This subsection is "liberal and permissive, treating issues tried by consent of the parties 'as if they had been raised by the pleadings.' The only requirement is that the party seeking amendment move to have the court amend the pleadings."[28]

Here, Field Construction's argument for equitable relief was not tried by consent of the parties. Field Construction does not dispute that in its complaint it sought payment under the contracts. Review of the record reveals that Field Construction did not expressly argue for equitable relief at trial, but implied that it was not seeking such relief. To the extent that Field Construction's statement in its closing argument indirectly raised equitable arguments, Field Construction offered no clear argument or law on the subject for the trial court to consider. Because Field Construction's equitable arguments were not "tried by express or implied consent of the parties," the trial court did not abuse its discretion when it declined to amend the pleadings to incorporate equitable theories.[29]

Moreover, it is worth noting that Field Construction's arguments, on appeal, for equitable relief fail as a matter of law. "The theory underlying quantum meruit recovery is that the law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit from another."[30] "'However, a contract will be implied only if there is no express contract covering the same subject matter.'"[31] "'Generally, an implied contract may not be found if there is an express contract between the same parties on the same subject matter.'"[32]

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[26] *Zdrojewski v Murphy*, 254 Mich App 50, 61; 657 NW2d 721 (2002).

[27] *Decker v Rochowiak*, 287 Mich App 666, 681; 791 NW2d 507 (2010).

[28] *Zdrojewski*, 254 Mich App at 61.

[29] *Decker*, 287 Mich App at 681; MCR 2.118(C)(1).

[30] *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194; 729 NW2d 898 (2006).

[31] *Id.*, quoting *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

[32] *Morris Pumps*, 273 Mich App at 194, quoting 42 CJS, Implied and Constructive Contracts, § 34, p 33 (emphasis omitted).

Field Construction discusses several cases in which a party to a construction contract sought equitable relief for extra work performed on the project. These cases outline two circumstances under which a party may recover although it contracted to perform certain construction work (or to supply materials), it performed additional work (or supplied additional materials), and it agreed that any changes to the original contract had to be in writing. Recovery may be sought either "for items not contemplated in the original contract," or as the result of "changes from the written contract" if the factfinder first determines that "the requirements of a writing had been waived."[33]

As discussed above, Field Construction has not shown that the writing requirement here was waived. Field Construction has also failed to show that the additional work here was not contemplated by the contracts. Field Construction does not argue that the project elements for which it later sought additional payment were outside of the original contracts. Rather, it argues that, as the project progressed, these elements required work or equipment for completion that raised the costs above the allowances in Field Construction's bids, which had formed the basis for the contracts. Thus, it is clear that these elements were encompassed by the contracts and Field Construction's equitable arguments could not succeed based on the evidence presented at trial.

Attorney Fees

Field Construction finally argues that even if the judgment is affirmed, this Court should reverse the trial court's award of attorney fees in Midfield Concession's favor and remand for further findings because the fee award was unreasonable. We disagree. Attorney fees may be "recoverable as an element of costs or damages . . . where provided by contract of the parties."[34] Appellate courts review a trial court's award of reasonable fees for an abuse of discretion.[35] A trial court's decision whether to hold an evidentiary hearing to determine the amount of fees is reviewed for an abuse of discretion and "[i]f the trial court has sufficient evidence to determine the amount of attorney fees and costs, an evidentiary hearing is not required."[36]

The parties' contracts provide: "If either party places the enforcement of this Agreement, or any part hereof, or the exercise of any remedy herein provided, in the hands of an attorney who institutes an action or proceeding upon the same . . . , the non-prevailing party shall pay to the prevailing party its reasonable attorneys' fees and costs of court." Field Construction's argument in opposition to the fee award before this Court is narrow. It argues only that the fee award of $38,240 is not proportional to the amount sought in the case ($54,849). Additionally,

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[33] *Cascade Electric Co v Rice*, 70 Mich App 420, 426, 429; 245 NW2d 774 (1976).

[34] *Grace v Grace*, 253 Mich App 357, 370-371; 655 NW2d 595 (2002).

[35] *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

[36] *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 171; 712 NW2d 731 (2005).

Field Construction asserts that further findings are necessary because the trial court prolonged the proceedings by basing its judgment on "something that [Field Construction] never disagreed with: that there had not been an express, oral agreement to waive or modify the change order requirement," and "[i]f that was to be the basis of the court's ruling, then the court should have granted [Midfield Concession's] motion for summary disposition, or its motion for a directed verdict, rendering a certain amount of the fees awarded to [Midfield Concession] unnecessarily incurred." This latter argument is unpreserved and Field Construction offers no authority to support it. That notwithstanding, the argument is rooted in Field Construction's claim that the court never considered Field Construction's theory that Midfield Concession's conduct effectively waived the change order provision. As previously explained, it appears that the trial court did understand and properly rejected Field Construction's theory. The trial court did not abuse its discretion by failing to hold an additional hearing to make findings on this argument when it was not raised in the trial court by Field Construction.[37]

Field Construction's former argument also fails. Although the proportionality of a fee award to the amount sought in the case is a relevant factor,[38] it is merely one factor in the "multi-factor approach" trial courts should use to determine reasonable attorney fees.[39] Field Construction offers no further argument to show why the trial court's overall reasoning resulted in an unreasonable award.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Michael J. Talbot

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[37] *Smith*, 481 Mich at 526.

[38] See MRPC 1.5(a)(4); *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982).

[39] *Smith*, 481 Mich at 530.