[Cite as *Fields Excavating, Inc. v. McWane, Inc.*, 2009-Ohio-5925.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

FIELDS EXCAVATING, INC.,	:	
Plaintiff-Appellant,	:	CASE NO. CA2008-12-114
	:	O P I N I O N
- vs -	:	11/9/2009
MCWANE, INC.,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2007CVH1098

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RINGLAND, J.

{¶1} Plaintiff-appellant, Fields Excavating, Inc., appeals a decision of the Clermont Court of Common Pleas granting summary judgment in favor of defendant-appellee, McWane, Inc. We reverse and remand.

{¶2} Fields Excavating specializes in public utility projects, primarily involving the installation of water, sewer and storm lines. Clow Water Supply, a subsidiary of

McWane, manufactures ductile iron pipe used in water and sewer lines. Fields has used Clow as its pipe supplier since approximately 1992. In 1998, Fields Excavating entered into a credit agreement with Clow. Since then Fields has purchased all materials supplied by Clow on the credit account.

{¶3} In 2005, Fields began experiencing problems with the pipe supplied by Clow. Specifically, on the "Baltimore-Lancaster Road Project," several problems occurred including pipes that did not fit together properly. Fields notified Clow of the problems and submitted a bill to Clow for additional charges attributable to these problems. After some negotiation, Clow paid the bill. On the "Social Road Project," Fields experienced problems with the Clow pipe being "out-of-round." Fields once again submitted a bill to Clow for the additional charges incurred and, after negotiation, Clow paid a portion of the expenses. On those two occasions, Clow paid for Field's additional labor, equipment, and pipe replacement costs needed to properly complete the project.

{¶4} Fields considered ceasing its business relationship with Clow due to the past problems and even solicited a bid from another supplier. Fields met with Clow representatives to discuss the problems it experienced with the 24-inch pipe supplied by Clow. Clow representatives assured Fields that the problems had been remedied and Clow would continue to reimburse it for the additional expenses and materials if Fields experienced any future problems. As a result, Fields continued its business relationship with Clow for three additional projects; the "Scioto-Darby 30-inch Project," the "Scioto-Darby 24-inch project," and the "Clermont County Project."

{¶5} While the 30-inch pipe was used mostly without incident, Fields continued to experience problems with the 24-inch pipe being "out-of-round" on the projects. The president of Fields stated that he would often call his contact, Robin, at Clow whenever a problem developed. According to the president, Robin would tell him to keep track of

the additional time expended on the project or, sometimes, a Clow representative would come to the job site to observe the problems.

{¶6} Following completion, Fields submitted claims to Clow related to the projects. Clow reimbursed Fields for the additional expenses on the "Scioto-Darby 24-inch project," however, Clow refused to pay the submitted claims for the remaining projects.

{¶7} Fields Excavating filed an action against McWane, seeking compensation for damages allegedly incurred on the "Clermont County" and "Scioto-Darby 30-inch" projects. Fields alleged breach of contract, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, bad faith breach of contract, and fraud. McWane filed a counterclaim for breach of contract for unpaid bills. The case was set to be tried before a jury on June 16, 2006. However, on June 6, McWane moved for summary judgment on all claims. Although noting that the motion was untimely and without requesting leave to file the motion, the trial court agreed on the morning of trial to vacate the trial date and set the matter for hearing on the motion for summary judgment. Following a hearing on the matter, the trial court granted summary judgment in favor of McWane, concluding that the presence of a no-oral-modification clause and anti-waiver clause in the credit application prevented Fields from relying upon the course of business between the parties or statements made by Clow representatives. Additionally, the court ordered Fields to pay $150,272.59 for the unpaid bill. Fields timely appealed, raising a single assignment of error:[1]

{¶8} "THE TRIAL COURT ERRED IN NOT RECOGNIZING THE ENFORCEABILITY OF SUBSEQUENT ORAL MODIFICATIONS (DESPITE THE

1. In its brief, Fields makes no reference to the breach of implied warranty claims, claim for bad faith breach of contract or fraud. Accordingly, this appeal is limited to Field's claim for breach of contract.

EXISTENCE OF PROHIBITING CLAUSES) WHERE ATTEMPTS AT MODIFICATION CONSTITUTED WAIVER, AND THE WAIVER WAS NOT RETRACTED AS REQUIRED BY R.C. 1302.12. ADDITIONALLY, THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THAT COMMON LAW PRINCIPLES OF EQUITY ESTOPPED APPELLEE FROM ASSERTING THAT THE EXISTENCE OF 'NO ORAL MODIFICATION' AND A 'NO WAIVER' CLAUSES PRECLUDED ENFORCEMENT OF ORAL MODIFICATIONS, WHEN THE PURPORTED MODIFICATIONS WERE THE RESULT OF APPELLEE INDUCING THE APPELLANT TO ENGAGE APPELLEE AS SUPPLIER FOR TWO MAJOR PROJECTS."

{¶9} On appeal, a trial court's decision granting summary judgment is reviewed de novo. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. See Civ.R. 56(C); see, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The movant bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt,* 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once this burden is met, the nonmovant has a reciprocal burden to set forth specific facts showing a genuine issue for trial. Id.

{¶10} The issues in the instant appeal primarily involve the two provisions in the credit agreement relied upon by the trial court in entering judgment against Fields, the no-oral-modification and anti-waiver clauses.

{¶11} The contract's no-oral-modification clause provides that signing the credit application "constitutes acceptance of all of Clow Water Systems Company's Terms and

Conditions of Sale printed on the reverse side of this application, for all current and future orders and sales. These terms and conditions may not be amended, modified, terminated or revoked accept [sic] by a written document signed by an authorized representative of Clow Water Systems Company."

{¶12} Additionally, the anti-waiver provision states, "WAIVER. No delay or failure by Seller to exercise any right or remedy under these Terms and Conditions shall be construed to be a waiver thereof. Waiver by Seller of any breach shall be limited to the specific breach so waived and shall not be construed as a waiver of any subsequent breach."

{¶13} In its sole assignment of error, Fields argues the trial court's decision relating to the anti-waiver and no-oral-modification provision was incorrect. Field's argues that the no-oral-modification clause was waived by the dealings between the parties and the trial court erred in entering summary judgment in favor of McWane.

No-Oral-Modification Clause – R.C. 1302.12 (UCC 2-209)

{¶14} Ohio's Uniform Commercial Code governs sales transactions such as the dealings between Fields and Clow. R.C. 1302.12, Ohio's codification of UCC 2-209, addresses no-oral-modification clauses: "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party." R.C. 1302.12(B).

{¶15} No-oral-modification clauses are designed to protect against fraudulent or mistaken oral testimony concerning transactions subsequent to a written contract. Nevertheless, the code drafters recognized the potential for abuse and various concerns that rigid no-oral-modification clauses may create. Accordingly, the drafters provided an important exception to the enforceability of no-oral-modification clauses. Wellman, The

Unfortunate Quest for Magic in Contract Drafting (2006), 52 Wayne L.Rev. 1101, 1115. Specifically, R.C. 1302.12(D) provides, "[a]lthough an attempt at modification or rescission does not satisfy the requirements of division (B) or (C) of this section, it can operate as a waiver." Similarly, R.C. 1302.11(C) states, "course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance."

{¶16} Numerous policy considerations and contract principles underlie the drafters' approach to no-oral-modification clauses. As Justice Cardozo stated, although two parties enter into "a contract, no limitation self-imposed can destroy their power to contract again * * *." *Beatty v. Geggenheim Exploration Co.* (1919), 225 N.Y. 380, 381. This is because parties to a contract possess, and never cease to possess, the freedom to contract even after the contract has been executed and what the parties have consented to do, they can later consent to abandon. Wellman at 1120. If strictly enforced, a no-oral-modification clause would deny effect to every oral modification – even those that are fully voluntary, freely entered, and entirely consensual – simply because there was no writing. Id. Similarly, in their agreement, parties can say they want the modifications in writing, but by the same rationale they can also, after the signing, decide to change how they deal with each other. Id. at 1117.

{¶17} Regardless of the clause, it is the parties' subsequent agreement that has legal effect, and if the parties go on to make an oral modification after they agreed on a no-oral-modification clause, then their subsequent agreement must be taken as itself modifying, or at least waiving, the no-oral-modification clause. Id. at 1113. Another problem with the idea behind a no-oral-modification clause is that it leads lawyers and judges to assume that post-signing words and conduct are somehow of no legal significance. Id. at 1115-1116. A no-oral-modification clause suggests that parties can,

through the right words, invoke a power beyond their own: if such clauses are rigidly enforced, then a party could simply insert the clause into an agreement and would be magically protected in the future no matter what that party said or did. Id. at 1116. More simply, by including a no-oral-modification clause in a contract, a party could orally induce the opposing party in any way and then hide behind the clause as a defense. Id.

{¶18} Although R.C. 1302.12 permits parties to include an enforceable no-oral-modification clause in their written agreement, courts, including those in Ohio, have been consistently critical of the enforceability of such clauses due to these numerous considerations. Murray, The Modification Mystery: Section 2-209 of the Uniform Commercial Code (1987), 32 Vill.L.Rev. 1, 29. The trial court in this case failed to recognize the extensive Ohio authority relating to no-oral-modification clauses.

{¶19} "Despite principles of freedom of contract and the potential benefit of avoiding false claims, the no-oral-modification clause has not garnered favor in the law. Indeed, this clause, which purports to erect a kind of 'private' statute of frauds for contracting parties, has generally not been given full effect by courts. * * * Accordingly, it has been held that the clause itself can be waived by oral agreement like any other term in a contract." *Fahlgren & Swink, Inc. v. Impact Resources, Inc.* (1992), Franklin App. No. 92AP-303, 1992 WL 385941, *4; *Glenmoore Builders, Inc. v. Smith Family Trust*, Summit App. No. 24229, 2009-Ohio-3174, ¶41. See, also, *Frantz v. Van Gunten* (1987), 36 Ohio App.3d 96, 99-100.

{¶20} "Even though parol evidence may not be introduced to show contrary intent or a subsequent modification, parol evidence of course of performance may be used to establish a waiver." *Canfic v. Dal-Ken Corp.* (Mar. 29, 1990), Franklin App. No. 89AP-868, 1990 WL 34771, *4; see, also, *Uebelacker v. CinCom Systems, Inc.* (1988), 48 Ohio App.3d 268, 273.

{¶21} Accordingly, Ohio courts consistently treat the issue of whether a no-oral-modification clause is waived as a question for the trier of fact. *Franz* at 100; *Fahlgren* at *4; and *Pottschmidt v. Klosterman*, 169 Ohio App.3d 824, 2006-Ohio-6964, ¶20-24.

{¶22} Fields argues that Clow's history of reimbursing for additional charges incurred due to defects in the pipes and the continuing assurances by Clow representatives that it would continue this process operated as a waiver under R.C. 1302.12(D).

{¶23} In opposition, McWane advances three arguments. First, McWane heavily relies upon R.C. 1302.12(B), which authorizes parties to include enforceable no-oral-modification clauses within contracts. However, McWane never acknowledges Ohio case law regarding no-oral-modification clauses, the effect R.C. 1302.12(D) may have upon the no-oral-modification clause, or whether waiver of the no-oral-modification clause occurred through the course of dealing. Instead, McWane argues that the anti-waiver provision contained in the agreement completely prevents waiver of any provision in the contract, including the no-oral-modification clause.[2]

Anti-waiver Clause

{¶24} Accordingly, we turn to the anti-waiver provision in the credit agreement to determine the extent of its applicability or the effect, if any, it has to the case at bar. Throughout its brief, McWane repeatedly suggests that the anti-waiver clause prevents waiver of the no-oral-modification clause. McWane basically claims that no provision in the contract, including the no-oral-modification clause, can ever be waived due to this anti-waiver clause.

{¶25} In support of this argument, McWane submits multiple instances where

2. Additionally, Fields argues in its brief that the course of conduct also waived the anti-waiver provision. McWane submits that this argument was never raised to the trial court and, as a result, cannot be

Ohio courts have upheld anti-waiver provisions. See *Ed Wolf, Inc. v. National City Bank* (Jan. 23, 1997), Cuyahoga App. No. 253045, 1997 WL 25524; *Lewis v. Motorists Mutual Insurance Co.* (Mar. 4, 1982), Cuyahoga App. No. 992735, 1982 WL 5196; *Shah v. Cardiology South, Inc.* (Jan. 21, 2005), Montgomery App. No. 20440, 2005-Ohio-211; and *Tie Bar v. Buffalo Mall* (Apr. 30, 1979), Mahoning App. Nos. 78 CA 95, 96, 97, 98, 99, 100, 1979 WL 207348. Our review of the law reveals that Ohio courts consistently uphold anti-waiver provisions.

{¶26} McWane's principle authority, *Allonas v. Royer* (1990), 67 Ohio App.3d 293, also involves a sales dispute. In *Allonas*, the plaintiffs owned a business selling and servicing televisions and appliances. Id. at 295. They signed a floor plan agreement to sell Borg-Warner and Whirlpool products. Id. Under the agreement, the companies would stock appliances at the store and, once sold, the store owners would pay the company for the item. Id. The security agreement allowed the companies to conduct routine inspections of the store to reconcile current inventory against payments made by the owners. Id. If any discrepancy was discovered, the store owners were required to reimburse the appliance companies immediately following the inspection. Id. at 296.

{¶27} In January 1986, the store owners went on vacation. Id. Towards the end of the month, both companies conducted an inventory inspection. Id. Borg-Warner discovered $8,842.06 in unaccounted-for inventory, while Whirlpool found a $3,428 discrepancy. Id. Both companies demanded immediate payment. Id. The store manager informed the inspectors that the owners were on vacation. Id. Two days later, the inspectors returned to the store and talked with the owners over the phone. Id. at

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entertained on appeal. Since waiver of the anti-waiver provision is irrelevant to our decision, Field's and McWane's arguments are moot.

297. According to the owners, Borg-Warner and Whirlpool representatives told them that they could pay for the unaccounted-for merchandise upon returning from vacation. Id. Nevertheless, shortly following the conversation, both companies repossessed the remaining inventory that was currently at the store. Id. at 298.

{¶28} The owners filed suit, arguing the appliance companies were estopped from repossessing the inventory due to the agents' oral promises to forbear repossession until they returned from vacation. Id. The Third District Court of Appeals court affirmed an award of summary judgment in favor of the appliance companies, finding that the store owners did not have enough money in the store bank accounts to reimburse the companies at the time and there was no reliance upon the promises of the inspectors. Id. at 299-300. As additional support for the decision, the court also noted the presence of an anti-waiver clause in the contract. Id. at 300. The court concluded that, despite any oral representations made by the inspectors, the companies retained the right to repossess the appliances.

{¶29} In this case, the trial court was persuaded by McWane's argument, relying upon the presence of an anti-waiver clause in the parties' agreement. In the written decision, the trial court stated, "the written credit agreement between the parties not only requires modifications to be in writing, but also requires any waivers of a contractual provision to be in writing."

{¶30} The trial court's conclusion is incorrect. Reading the actual language of the provision in this case, the anti-waiver clause does not prevent waiver of all provisions in the agreement, including the no-oral-modification clause.

{¶31} Typically, anti-waiver clauses serve to protect a party when it has previously accepted a late payment or failed to exercise a remedy when the agreement was earlier breached. This is highlighted in most of the cases cited by McWane. See

Ed Wolf, 1997 WL 25524 at *7 (acceptance of past-due payments); *Lewis*, 1982 WL 5196 at *1 (acceptance of past-due payments); *Tie Bar*, 1979 WL 207348 at *3 (late acceptance of rent payment); and *Shah*, 2005-Ohio-211 at ¶29 (acceptance of less money did not preclude doctor from pursuing full amount due under the contract).

{¶32} The language of McWane's anti-waiver clause unambiguously limits operation to this type of situation. The clause provides in full, "[n]o delay or failure by Seller to exercise any right or remedy under these Terms and Conditions shall be construed to be a waiver thereof. Waiver by Seller of any breach shall be limited to the specific breach so waived and shall not be construed as a waiver of any subsequent breach."

{¶33} The anti-waiver clause does not apply to the issue in this case. As provided above, the anti-waiver clause alludes to Clow's failure to exercise any rights or remedies if Field is in breach of the contract. In those instances, the anti-waiver clause provides that, if Clow has failed to exercise those rights or remedies in the past, it has not waived its ability to rely upon them in the future. The clause makes no reference to situations where the seller has committed a breach. Neither Clow nor McWane were seeking to exercise contractual rights or remedies due to a breach by Fields when the alleged waiver of the no-oral-modification occurred. Rather, Clow had allegedly supplied Fields with defective pipe, as it had done before, when the oral assurances were made and the company paid Fields for the additional expenses incurred.

{¶34} When compared to the clause in *Allonas*, the anti-waiver provision in this case is substantively different. The *Allonas* clause provides that "waiver of any provisions herein contained shall not be binding upon * * * [Whirlpool]." The terms of McWane's anti-waiver provision are significantly more limited than the clause in *Allonas*. The general anti-waiver clause in *Allonas* applies to all provisions in the contract, while

the clause in this case clearly alludes only to the seller's waiver of an earlier breach by the buyer and seller's delay or failure to exercise a right or remedy. As explained above, McWane was not in a position to exercise any right or remedy against Fields because Clow was the alleged breaching party. Additionally, the clause relied upon by McWane makes no reference to the no-oral-modification clause.

{¶35} Ohio courts have consistently upheld anti-waiver clauses, such as the cases cited by McWane. In those cases the anti-waiver clauses were enforced pursuant to their terms. We find no fault with the enforcement of anti-waiver clauses. However, an anti-waiver clause must be enforced pursuant to its explicit terms. In this case, McWane seeks to broadly construe the limited anti-waiver clause to apply to something for which it was not intended. If McWane wished to have a generalized anti-waiver that applied to all provisions in the contract like the clause in *Allonas*, it should have been included when drafting the contract. Accordingly, due to the express language of the clause, McWane's anti-waiver is inapplicable to this case and does not prevent waiver of the no-oral-modification clause.

Summary Judgment

{¶36} Having found that the anti-waiver clause has no effect in the case at bar and does not prevent waiver of the no-oral-modification clause, we must determine whether a genuine issue of material fact exists in this case.

{¶37} Provisions preventing oral modification are waived if: 1) an oral modification is acted upon by the parties; and 2) refusal to enforce the oral modification would result in fraud or injury to the promisee, i.e. detrimental reliance. *Software Clearing House, Inc. v. Intrak, Inc.* (1990), 66 Ohio App.3d 163, 171.

{¶38} "[A] party seeking to establish waiver bears a heavy burden of proof." *Pottschmidt*, 169 Ohio App.3d 824 at ¶24. However, where it is difficult to determine

whether a particular act sheds light on the meaning of the agreement or represents a waiver, the general preference would favor the "waiver" approach. R.C. 1302.11, Official Comment 3.

{¶39} After review of the record, Fields has presented sufficient evidence to demonstrate that a genuine issue of material fact exists regarding Field's breach of contract claim. Specifically, the deposition testimony and exhibits reveal that a possible waiver of the no-oral-modification clause occurred due to the course of dealing between the parties and statements made by Clow representatives. The record includes evidence and testimony that Clow supplied defective pipe to Fields during the "Baltimore-Lancaster Road Project" and "Social Road Project." Fields submitted a bill for reimbursement of additional expenses incurred during those projects, which Clow paid.

{¶40} Thereafter, Clow representatives assured Fields that the problems had been remedied and Clow would continue to reimburse for them for the additional expenses and materials if any problems were experienced during the "Scioto-Darby 30-inch Project," the "Scioto-Darby 24-inch project," and the "Clermont County Project." The 24-inch pipe supplied by Clow continued to be out-of-round. The president of Fields stated in his deposition that he would often call his contact, Robin, to notify her of the continued problems. According to the president, Robin would tell him to keep track of the additional time expended on the project as was done in the past or, sometimes, a Clow representative would observe the problems at the job site. Following completion of the projects, Fields submitted claims to Clow. Clow failed to reimburse Fields for the additional expenses related to the "Scioto-Darby 30-inch project" and "Clermont County Project."

{¶41} Based upon this evidence, we cannot find that McWane is entitled to

judgment as a matter of law. Fields' assignment of error is sustained.

{¶42} Judgment reversed and remanded.

YOUNG, P.J., and HENDRICKSON, J., concur.