

STATE OF MICHIGAN
COURT OF APPEALS

THE LEFKO GROUP,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 203669

Oakland Circuit Court

THERESA S. GONZALEZ and GARY H.
GONZALEZ,

LC No. 97-541160 CK

Defendants-Appellees.

Before: Smolenski, P.J., and McDonald and Doctoroff, JJ.

DOCTOROFF, J. (dissenting).

I disagree with the result reached by the majority in the instant case.

According to the agreement, the last payment was due on February 1, 1997, which fell on a Saturday. The agreement did not require defendant to make the payment by any specific time on February 1, 1997. Therefore, defendant's payment would have been timely had she made it at any time on that date. Defendant delivered the final payment on Monday, February 3, 1997, at approximately 10:00 a.m. Plaintiff refused to accept the payment on the ground that it was untimely. However, as noted by the trial court, financial institutions are not normally open for business on Saturday after 1:00 p.m. or on Sunday. Even if defendant had timely made the payment after 1:00 p.m. on February 1, 1997, plaintiff could not have cashed or deposited the funds. Therefore, it is highly unlikely that plaintiff was prejudiced by defendant's late tender of the final payment. Furthermore, despite the "no waiver" provision in the agreement, defendant had reason to believe that the payment would be accepted on Monday morning, as plaintiff accepted the payment due on Sunday, December 1, 1996, on the following Monday, December 2, 1996, because, although defendant attempted to deliver the payment on November 29, 1996, plaintiff's office was closed on that date.

I find persuasive the reasoning in *A E Giroux, Inc v Contract Services Associates*, 99 Mich App 669; 299 NW2d 20 (1980). In *Giroux*, the plaintiff was owed a disputed amount by the defendant on a construction contract. *Id.* at 670. The parties agreed to settle for \$42,549, to be delivered to the plaintiff by July 5, 1978. *Id.* Payment was received by the plaintiff on July 6, 1978. *Id.* The plaintiff thereafter brought suit on the original construction contract, and the defendant moved

for summary disposition on the basis that an accord and satisfaction had dissolved its liability under the original contract. *Id.* The trial court agreed and granted the defendant's motion. *Id.* On appeal, the plaintiff argued that time was of the essence and that, therefore, the accord and satisfaction was not adequately performed. *Id.* However, this Court affirmed the trial court's decision, noting that the plaintiff had admitted that no material damage was caused by the one day delay in payment and that, therefore, the defendant substantially performed the accord and satisfaction contract. *Id.* at 670-671. On the facts before it, this Court concluded that "plaintiff's argument that time was of the essence does not change this result." *Id.* at 671.

The agreement at issue in the instant case was an accord and satisfaction contract. Defendant substantially complied with the contract, and plaintiff suffered no detriment from the tender of the final payment on Monday, February 3, 1997, rather than Saturday, February 1, 1997. Accordingly, I would affirm the trial court's decision in the instant case.

/s/ Martin M. Doctoroff