STATE OF MICHIGAN

COURT OF APPEALS

EXCELL CONSTRUCTION, INC.,

Plaintiff/Counter-Defendant-Appellant/Cross-Appellee,

v

MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES,

Defendant/Counter-Plaintiff/Third Party Plaintiff-Appellee/Cross-Appellant,

and

NORTH AMERICAN SPECIALTY INSURANCE COMPANY,

Third Party Defendant-Appellant-Cross-Appellee.

UNPUBLISHED
January 14, 2003

No. 228310
Court of Claims
LC No. 97-016804-CM

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff/counter-defendant Excell Construction, Inc. and third-party defendant North American Specialty Insurance Company (NASIC) (collectively referred to as plaintiff) appeal as of right the orders granting defendant/counter-plaintiff Michigan State University Board of Trustees' (defendant) motions for summary disposition and for a protective order. Plaintiff also appeals as of right the judgment in favor of defendant on defendant's counterclaim. Defendant cross-appeals, challenging the trial court's determination of interest on the judgment. We affirm in part, reverse in part, and remand.

Defendant awarded Excell Construction, Inc. the general contractor construction bid on defendant's Swine Teaching and Research Center. The parties executed the contract on March 7, 1996, and the project was to be completed by April 11, 1997. Third-party defendant North American Specialty Insurance Company issued performance bonds for much of plaintiff's bonded work. As of July 1997, the contract was not complete. Defendant terminated plaintiff on July 24, 1997.

Plaintiff brought this action for breach of contract, unjust enrichment, and misrepresentation/detrimental reliance. Defendant filed a counterclaim alleging that plaintiff breached the parties' contract. Defendant also filed a third-party complaint against NASIC as plaintiff's surety under the performance bond.

During discovery, defendant produced two letters from attorneys to defendant, dated July 8 and July 10, 1997, respectively, regarding its intention to terminate plaintiff at the earliest available opportunity, and discussing the options available to effectuate this intention. On defendant's motion, the trial court issued a protective order governing both letters on the ground that they were protected by the attorney-client privilege that could not be inadvertently waived by the attorney.

Defendant filed a motion for summary disposition and plaintiff filed a motion for partial summary disposition. Following two separate hearings, the trial court granted defendant's motion for summary disposition and ruled in favor of defendant on plaintiff's motion for summary disposition, leaving the determination of damages for a later hearing. Following a subsequent trial on the issue of damages, the trial court found plaintiff's expert's testimony "unpersuasive" and, based on defendant's evidence, found that defendant incurred reasonable costs in excess of the unpaid balance on the contract in the amount of $648,789.47. The court entered an amended judgment awarding defendant $727,885.19, which included interest calculated pursuant to MCL 600.6455(2).

Plaintiff argues that the trial court improperly granted summary disposition because factual questions remained with regard to whether termination of the contract was justified under the terms of the contract. We review the court's decision on a motion for summary disposition under MCR 2.116(C)(10) de novo, considering the evidence submitted by the parties in a light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 118, 120; 597 NW2d 817 (1999).

Plaintiff first argues that it would have been impossible for the project to be completed by the agreed-upon date because the project was still being designed up to and after termination of the contract and, therefore, termination of the contract for failure to complete the project in a timely manner was not justified. However, a review of the record reveals the contract was terminated because of the undisputed delays that were the result of its own failure to coordinate and adequately manage its subcontractors. Therefore, plaintiff's impossibility argument is without merit.

Plaintiff also argues that termination of the contract was defective under the contract conditions because the certifying architect did not exercise his independent judgment in concluding that the termination was for cause, but merely relied on defendant's word. We review this unpreserved argument for plain error that adversely affected plaintiff's rights. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 637; 601 NW2d 160 (1999). Assuming plaintiff's statement is true, plaintiff has not shown that the conclusion that termination was for cause was erroneous. On the contrary, it is undisputed that some of the delays encountered on the project resulted from plaintiff's own deficiencies in managing its subcontractors. Because this alone justified plaintiff's termination, plaintiff has failed to demonstrate that the architect's alleged failure to exercise independent judgment constituted plain error affecting plaintiff's substantial rights.

Next, plaintiff argues that the trial court erred by granting defendant's motion for a protective order with regard to inadvertently produced documents that defendant claims are subject to the attorney-client privilege. The question whether the attorney-client privilege applies to a communication is a question of law that this Court reviews de novo. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618; 576 NW2d 709 (1998).

The attorney-client privilege has a dual nature that "includes both the security against publication and the right to control the introduction into evidence of such information or knowledge communicated to or possessed by the attorney." *Franzel v Kerr Mfg Co*, 234 Mich App 600, 616; 600 NW2d 66 (1999), citing *Sterling v Keidan*, 162 Mich App 88, 93; 412 NW2d 255 (1987). The attorney-client privilege is personal to the client, and only the client can waive it. *Leibel v General Motors Corporation*, 250 Mich App 229, 240; 646 NW2d 179 (2002). Further, a waiver of the privilege does not arise by accident. *Sterling*, supra at 95-96. To constitute a valid waiver, there must be an intentional, voluntary act or "true waiver." *Leibel*, *supra* at 241. Thus, a document inadvertently produced that is otherwise protected by the attorney-client privilege remains protected. *Franzel*, *supra* at 618.

Plaintiff argues that there was a true waiver because defendant's disclosure was not inadvertent because the documents had been catalogued and Bates stamped. However, the evidence indicated that *all* defendant's documents had been Bates stamped and catalogued, whether or not defendant considered them privileged. Because there is no evidence in the record of a true waiver, the inadvertently disclosed documents retain privileged status and the trial court did not abuse its discretion by issuing a protective order. *Bloomfield Charter Twp v Oakland County Clerk*, 253 Mich App 1, 35; ___ NW2d ___ (2002).

Contrary to plaintiff's suggestion, the trial court did not err in failing to admit the documents under the "crime-fraud" exception to the attorney-client privilege because there were no allegations of a criminal enterprise or fraud in this case. See *People v Paasche*, 207 Mich App 698, 705; 525 NW2d 914 (1994). Furthermore, the material contained in the documents was not relevant to the determination whether plaintiff's termination was for cause under the contract, and the trial court therefore did not abuse its discretion in refusing to admit them for the purpose of "impeaching" defendant's stated reason for termination.

Plaintiff next argues that the trial court erred by not accepting the testimony of plaintiff's expert when determining damages. We review the determination of damages following a bench trial for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). Here, the trial court heard detailed testimony from each of the parties' experts with regard to the basis on which they made their determination of damages. We defer to the trial court's determination regarding the credibility of the expert witness testimony. *SSC Associates Ltd Partnership v Detroit General Retirement System*, 210 Mich App 449, 452; 534 NW2d 160 (1995), and we will not set aside the damage award "merely on the basis of a difference of opinion." *Id*. Because we are not left with a firm and definite conviction that a mistake has been made, we decline to reverse the trial court's determination that the testimony of defendant's expert was more credible. *Id*.; *Marshall Lasser, PC*, *supra* at 110.

Plaintiff also argues that the court erred in finding the surety liable although the conditions of the performance bond had not been met. However, because NASIC failed to raise

lack of notice or impossibility of performance as affirmative defenses, these defenses were waived. MCR 2.111(F)(3); *Harris v Vernier*, 242 Mich App 306, 312; 617 NW2d 764 (2000).

Defendant argues on cross-appeal that the trial court erred in applying the interest provision of MCL 600.6455, which applies to actions filed against the state in the court of claims, to defendant's counterclaim and third-party complaint. Defendant contends that the interest rate applicable to money judgments on civil actions, MCL 600.6013, applies because the counter-claim and third party claim filed by defendant was a civil action to recover on a money judgment. We agree.

Pursuant to MCL 600.6419(1)(a), all actions against the state or its departments, institutions, or agencies must be brought in the court of claims. Interest on actions brought in the court of claims is limited by MCL 600.6455(2), which applies to "complaints filed on or after January 1, 1987." MCL 600.6455(2). The purpose of § 6455 is related to the purpose underlying the entire governmental immunity scheme, namely to limit the liability of the state and to conserve scarce state resources. *Curtin v Dep't of State Hwy and Transportation*, 127 Mich App 160, 166; 339 NW2d 7 (1983). "The limitation on interest liability allows the state to defend against tort actions at a reduced level of economic risk, thereby decreasing the financial burden on the state's taxpayers when a claim against the state is successful." *Id.*

The language of § 6455(2) specifically applies to "complaints." Although the court of claims has jurisdiction to decide any counterclaims brought by the state, see MCL 600.6419(1)(b), there is nothing in the statutory language that indicates that the interest limitation of § 6455 applies to counterclaims or third-party complaints brought *by* the state. Complaints, counterclaims, and third-party complaints are defined as three separate forms of pleading. MCR 2.110(A)(1), (3). Because the statute is unambiguous the Legislature is presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible. *In re MCI Telecommunications*, 460 Mich 396, 411; 596 NW2d 164 (1999). Because the unambiguous language of § 6455(2) indicates that it applies only to complaints, the trial court erred by applying § 6455(2) to defendant's counterclaim and third-party complaint.[1]

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

[1] Indeed, applying the interest limitation to counterclaims filed in the court of claims would encourage the state to instead file a separate action in circuit court where the governing interest provisions are more favorable, resulting in unnecessary inefficiencies and duplication.