STATE OF MICHIGAN

COURT OF APPEALS

WAYNE OAKLAND CONTRACTING, INC., a Michigan corporation, Plaintiff-Appellee, v CITY OF GARDEN CITY, a municipal corporation, and GARDEN CITY DOWNTOWN DEVELOPMENT AUTHORITY, a municipal corporation, Defendants-Appellants.	UNPUBLISHED December 14, 2004 No. 248387 Wayne Circuit Court LC No. 00-024745-CZ

Before: Whitbeck, C.J., and Saad and Talbot, JJ.

PER CURIAM.

Plaintiff was awarded the contract to perform "streetscape" and watermain work for defendants and asserted that it was forced out of business when defendants refused to compensate plaintiff for "massive cost overruns" caused by defendants. The jury found for plaintiff on its claims of breach of contract, fraudulent inducement, and abandonment of contract, and awarded $12,000,000 in damages. We affirm.

Defendants argue on appeal that the trial court erred in denying defendants' motion for summary disposition as to plaintiff's contract claim. We do not agree. A motion under MCR 2.116(C)(8) tests the "legal sufficiency of the complaint on the basis of the pleadings alone." *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001), citations omitted.

Plaintiff asserted in its contract action that defendants provided defective drawings and specifications, materially changed the project, did not respond to material changes in site conditions and to requests for clarifications and information in a timely matter, repeatedly violated payment agreements, intentionally interfered and misrepresented the conditions, "cardinally" changed the scope of the project, made excessive and untimely changes, refused to deal fairly and in good faith, and denied plaintiff access to the site, including the failure to obtain necessary approvals, easements and permits. As defendants argue, the contract contains

numerous provisions that required plaintiff to notify defendants in writing if problems arose or if changes were needed in the parties' agreement. Defendants assert that, under the language of the contract, plaintiff was precluded from bringing this action because the plain language of the contract required plaintiff to make written requests to change the terms of the agreement. However, at the motion hearing, plaintiff argued that the parties had mutually waived the contract provisions and pointed to minutes from city meetings that showed that the change orders were computed and negotiated after the work was done, in order to permit the construction project to continue on schedule. Plaintiff relied on the meeting minutes to show that the parties had adopted a procedure for approving changes "in the field" because they were "desperate" to keep the construction going, and asserted that "all the problems that are the base of our claim are in the meeting minutes," which were prepared by the city engineer.

Defendants rely in this issue on *Loyer Const v Novi,* 179 Mich App 781; 446 NW2d 364 (1989), where the contractor was held bound by a contractual unit price for variations in the work. Defendants reliance on *Loyer* is misplaced. The Court in *Loyer* specifically contrasted the facts of that case with situations such as the one alleged here, where a defendant city misrepresented "the conditions shown in the plans and specifications," and there were "all kinds of overruns and otherwise changed conditions."

A waiver of contractual rights may be "inferably established by such declaration, act, and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance." *HJ Tucker v Allied Chucker,* 234 Mich App 550, 564; 595 NW2d 176 (1999). In this case, plaintiff presented evidence to the trial court to support such an inference, particularly minutes prepared by the city engineer. In the city minutes, it was noted that the city was always willing to meet with plaintiff to discuss change orders, contained a reminder that a fifteenth "change order" was yet to be negotiated by the parties, and that the "issue at hand" was to schedule the remaining work even though the final change order was outstanding. This evidence, "giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Allstate Ins v Dep't of Management,* 259 Mich App 705, 709-710; 675 NW2d 857 (2003). The trial court did not err in denying defendants' motion for summary disposition on plaintiff's contract claim.

Next, defendants contend that the trial court erred in allowing plaintiff to admit a letter from its bonding agent because the letter was hearsay. The admission of evidence is reviewed for an abuse of discretion. *People v Jones,* 240 Mich App 704, 706; 613 NW2d 411 (2000). The trial court admitted the letter solely for the purpose of showing that Terry Goers, owner of plaintiff company, had attempted to mitigate his damages, and the parties agreed on a limiting instruction that the letter could not be considered for the truth of the statements. Defendants argue that, despite the limiting instruction, the letter was hearsay and considered by the jury for its truth. We note that, even if admitted in error, the letter was cumulative to Goers' testimony that he made every effort to obtain bonding and keep the company in business. In addition, the jury was instructed that the letter was not to be used for its truth, and is presumed to follow the instructions of the court. *People v Graves,* 458 Mich 476, 486; 581 NW2d 229 (1998). Reversal is not warranted on this basis.

Defendants also argue that the trial court erred in excluding evidence of a document that plaintiff sent them asserting a "final claim" for compensation. Plaintiff asserted that the claim was an attempt to settle; defendants argued that it was a demand for payment. The trial court

redacted the amount sought under the final claim and allowed its use for impeachment only. Pretrial settlement negotiations are generally inadmissible as evidence of damages. *Arnold v Darczy,* 208 Mich App 638, 640; 528 NW2d 199 (1998); MRE 408. Defendants argue that MRE 408 does not apply unless there is an actual dispute as to the validity of the amount of the claim, and unless the challenged statements were made in compromise negotiations. The evidence before the trial court that defendants responded to plaintiff's first inquiry by asserting that only $20,000 was owed, and plaintiff's response detailing its final demand, satisfy these requirements.

Defendants also argue that the trial court improperly admitted the testimony of plaintiff's witness CPA Robert Rock; defendants acknowledged that Rock was "a qualified expert," but argued that he used "junk science" rather than "proper methodology" to arrive at his conclusions regarding plaintiff's lost profits. Plaintiff responded that Rock's methodology was "recognized in the accounting industry as a legitimate way of establishing lost profits," and provided the court with an excerpt from an accounting manual to support this claim. The trial judge indicated that she had a business degree and understood defendants' argument, found that defendants' challenges went to the weight rather than the admissibility of the evidence, and denied defendants' motion. An expert opinion is generally admissible so long as the basic methodology and principles employed to reach the conclusion are sound, *Anton v State Farm Mutual Automobile Ins,* 238 Mich App 673, 678; 607 NW2d 123 (1999), citations omitted. Here, Rock relied on plaintiff's business records for his opinion and used a method that was supported by documentary evidence and that the trial court found reasonable. We find no abuse of discretion.

Defendants also argue that Rock should not have been permitted to express an opinion that plaintiff should be compensated for delays in the project. Defendants did not object to the testimony below, which was largely irrelevant to Rock's expert testimony, and we find no plain error affecting defendant's substantial rights. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999). Defendants argue, too, that the trial court erred in refusing to allow defendants to call David Kocsis to refute Rock's testimony. This claim is not presented in defendants' Statement of Questions, is therefore not preserved and is considered waived. *Bouverette v Westinghouse Corp,* 245 Mich App 391, 404; 628 NW2d 86 (2001).

Finally, defendants argue that the trial court abused its discretion in denying defendants' motion for JNOV, new trial, or remittitur. There is no merit to this claim. This Court reviews de novo "the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a mater of law, should the motion [for directed verdict or judgment notwithstanding the verdict] be granted." *Wilkinson v Lee,* 463 Mich 388, 391; 617 NW2d 305 (2000); *Forge v Smith,* 458 Mich 198, 204; 580 NW2d 876 (1998). The grant or denial of a motion for new trial is a matter for the trial court's discretion. *People v Jones,* 236 Mich App 396, 404; 600 NW2d 652 (1999). In deciding a motion for remittitur, the trial court determines whether the jury verdict was supported by the evidence; This Court gives due deference to the trial court's unique ability to evaluate the evidence, and will not reverse absent a clear abuse of discretion. *Anton, supra.* Plaintiff presented evidence that, if believed, would support the jury finding that defendants breached the contract by failing to procure the necessary easements and permits, failing to pay plaintiff on schedule, and failing to allow plaintiff to follow the schedule set out in its bid, or to complete the job in a cost efficient manner. There was evidence that defendants did not reasonably compensate plaintiff for cost overruns outside plaintiff's control, even though defendants' own

representatives agreed that there were problems outside plaintiff's control and that additional costs in a project this size were anticipated. Contrary to defendants' claim, the evidence supported a finding that defendants both repeatedly breached the contract and finally abandoned it. There was testimony to support a verdict of $10.8 million dollars in lost profits, and testimony to support an award of over $1 million in additional costs. Considering all the evidence and all legitimate inferences in the light most favorable to plaintiff, the jury verdict and award were fully supported by the evidence.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Michael J. Talbot