

STATE OF MICHIGAN
COURT OF APPEALS

ENRIGHT CONSTRUCTION, INC.,

Plaintiff/Counter-Defendant-
Appellee,

v

RHYS MUSSMAN, d/b/a ROYAL
DEVELOPMENT,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED

October 11, 2005

No. 256079

Marquette Circuit Court

LC No. 01-038393-CK

Before: O'Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order dismissing his final counterclaim with prejudice and closing the case. He also challenges the trial court's denial of his earlier motion for summary disposition. We affirm.

Defendant claims he was entitled to summary disposition because the relevant contract unambiguously required modifications to be in writing and because the modification clause was not waived by the parties' actions as a matter of law. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We agree with the trial court that summary disposition for defendant was inappropriate because plaintiff raised a material question of fact whether the parties waived the writing requirement.

A signed, written agreement can be modified, and strict performance can be waived, because parties are always free to make a new, subsequent agreement. *Turner v Williams*, 311 Mich 563, 566; 19 NW2d 100 (1945). A waiver does not need to be established by an express agreement, but rather it can be based purely on the parties' actions. *Id.* However, such a modification or waiver of a contract provision requires clear and convincing evidence of mutual agreement, by actions or otherwise. *Quality Products & Concepts Co v Nagel Precision, Inc.*, 469 Mich 362, 372; 666 NW2d 251 (2003). Viewing the evidence in plaintiff's favor, plaintiff provided clear and convincing evidence of the parties' mutual assent to waive the contract's writing requirement.

Plaintiff sent defendant a written proposal to build a road. The proposal estimated that materials would cost \$10,000, and labor would cost \$10,000 per week. One of the proposal's primary assumptions was that the project would only take two weeks, but the proposal explained that "there are many variables and this can be lengthened or shortened." The proposal also stated that plaintiff would "follow the directions of [defendant's] supervisor." While these terms were all handwritten, defendant relies on boilerplate print that stated, "Any alteration or deviation from above specifications involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate." However, other print stated, "All agreements contingent upon . . . delays beyond our control." Defendant signed the proposal, apparently assenting to it as a contract.¹

Plaintiff demonstrated that defendant's agents, without putting anything in writing, asked plaintiff to work beyond the two weeks originally estimated in the proposal. In fact, the evidence showed that plaintiff worked on the project for twenty weeks, ten times the length of time originally estimated, not including a winter break. Any claim that defendant expected plaintiff to perform the extra work as part within the original \$30,000 agreement is belied by the fact that defendant, without complaint, paid plaintiff over \$83,000, nearly three times the original proposal's estimate. Defendant claims that he paid the money because of an accounting error. Even if this were true, the payment, viewed in a light most favorable to plaintiff, represents clear and convincing evidence that the parties waived any writing requirement and altered the original agreement.² Therefore, while we do not necessarily agree with the ambiguity found by the trial court, it did not err when it denied defendant's motion for summary disposition because, viewed in the light most favorable to plaintiff, there was clear and convincing evidence that the parties waived any writing requirement. We will not reverse a trial court's decision when it reaches the right result. See, e.g., *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

Defendant argues that, according to *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 327; 550 NW2d 228 (1996), a party's inadvertent oversight regarding a contract provision is insufficient to establish clear and unmistakable evidence of mutual intent. However, viewing the evidence in plaintiff's favor, the case at bar involved a single project that took ten times longer than estimated, involved defendant's agents encouraging plaintiff to keep working despite these obvious delays and additional costs, and resulted in paid invoices amounting to almost three times the contract price. These facts indicate a situation well beyond possible

¹ Defendant did not insert a date next to his signature, but plaintiff never earnestly disputed that it was contractually bound by the terms of the proposal.

² We note that the writing requirement actually protects plaintiff, not defendant. The requirement states that plaintiff will not execute any alteration or deviation from the proposal without a written order, not that the parties will never alter or deviate from the proposal without a written addendum. The language is clearly designed to protect plaintiff from a customer's claim that plaintiff orally agreed to further changes and then failed to perform. Therefore, plaintiff's mere provision of labor and materials beyond what the proposal specified, and defendant's acceptance of that labor and those materials, sufficed to indicate that the parties waived any writing as a condition to the execution of a contract modification.

mistaken payments or contractual oversights. They represent clear and convincing evidence of the parties' mutual assent to waive the contract's written modification condition.³

Defendant next challenges the sanction the trial court imposed on him for not appearing at a court-ordered settlement conference. Defendant argues that the trial court abused its discretion when it dismissed his counterclaim with prejudice. We disagree. A trial court's decision to impose sanctions is reviewed for an abuse of discretion. *Massey v Ferndale*, 206 Mich App 698, 702; 522 NW2d 734 (1994). A court may dismiss a claim with prejudice if a plaintiff fails to comply with a court order. MCR 2.401(G)(1). However, "[d]ismissal is a drastic step that should be taken cautiously." *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). "Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Id.* Before dismissing a claim, the court should consider the following factors:

(1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Id.* at 507.]

Reviewing the ruling in context, the trial court did not abuse its discretion. Following the bench trial that resulted in an award to plaintiff for its requested damages, the only remaining issue was defendant's counterclaim that plaintiff failed to build the road in a workmanlike manner. The day before the settlement conference, defendant moved to have the counterclaim dismissed without prejudice and failed to appear for the settlement conference. Trial was already scheduled to begin a few weeks later. Defendant admits his willful violation of the court's order to appear. His brief indicated that he "chose not to appear at the settlement conference . . . due to the fact that he had directed that the counterclaim be dismissed albeit without prejudice." However, the court was under no obligation to grant defendant's requested dismissal, which would have only led to further delay, so it was not a valid excuse for deliberately missing the court-ordered settlement conference. Defendant's claim that he was available for the settlement conference by telephone does not lessen the willfulness of his violation, especially because he never indicated his availability at the time of the settlement conference. The court found that there was clear prejudice to plaintiff from further delay because the road, which plaintiff had not worked on in nearly four years, was subject to deterioration, making it harder for plaintiff to

³ After denying summary disposition, the trial court held a bench trial and found that plaintiff performed reasonably according to the instructions of defendant's agents. It therefore entered judgment in plaintiff's favor for its unpaid invoices. Defendant does not challenge the trial court's ultimate findings or this final judgment. We note that the trial court's ultimate findings are consistent with our alternative grounds for affirming its denial of defendant's motion for summary disposition. The trial court found that, through his agents and in keeping with the instructions in the original contract, defendant extended the contract to cover the additional labor and materials needed to finish the road.

prove its workmanship at the time of completion. A sanction for plaintiff's wasted costs would not have addressed this additional prejudice. Therefore, the trial court did not abuse its discretion when it sanctioned defendant with dismissal.

Affirmed.

/s/ Peter D. O'Connell

/s/ David H. Sawyer

/s/ William B. Murphy