STATE OF MICHIGAN

COURT OF APPEALS

RICHARD HOFER and LINDA ALDERMAN n/k/a LINDA KWIATKOWSKI and R&L, INC., OF CHEBOYGAN,

Plaintiffs/Counter-Defendants/Appellants,

v

LOWELL BEETHEM and JEAN BEETHEM, husband and wife,

Defendants/Counter-Plaintiffs/Appellees.

UNPUBLISHED
December 13, 1996

No. 187609
Cheboygan County
LC No. 93-3628-CH

Before: Sawyer, P.J., and Markman and H. A. Koselka,* JJ.

PER CURIAM.

Plaintiffs appeal by right an order entering a consent judgment in this property dispute matter. We affirm.

Plaintiffs own property on which they operate a business called "Sea Shell City." Defendants own adjoining property on which they operate a farm products stand. The complaint (filed July 29, 1993) and the counterclaim (filed August 20, 1993) largely relate to the use of a driveway that is on plaintiffs' property but that traverses a triangular piece of property the ownership of which is disputed. Defendants contend that they own the triangular parcel and plaintiffs contend they own it by adverse possession.

On February 10, 1995, the parties placed a settlement on the record. This settlement provided in pertinent part 1) that plaintiffs would remove a fence along the driveway on a portion of which there would be a joint driveway easement designated as a parking area (five feet on plaintiffs' property and five feet on defendants' property); 2) that defendants would pave that ten foot wide portion at their own expense at the same time that plaintiff resurfaced the driveway; 3) that the remaining portion of the fence would be replaced by shrubs to indicate the boundary line between the properties; and 4) that

---

* Circuit judge, sitting on the Court of Appeals by assignment.

defendants would grant plaintiffs an easement over the portion of the driveway on the disputed triangular parcel. The trial court approved the settlement and agreed to retain jurisdiction until the improvements were made.

On April 7, 1995, plaintiffs filed an proposed judgment setting forth the settlement pursuant to MCR 2.602(B)(3). We note that the proposed judgment stated that the resurfacing and paving were to be undertaken in spring 1995, while the settlement did not specify a time for these projects. On April 11, 1995, defendants filed an objection to the proposed judgment "for the reason that said proposed Order does not fully and completely reflect the Order of the Court herein." Plaintiffs apparently ordered the settlement transcript, a copy of which defendants' counsel contended that he received from plaintiffs' counsel on June 12, 1995. Plaintiffs' counsel claimed that plaintiffs concluded that there was no settlement and on June 29, 1995 went ahead and resurfaced the driveway, relocating a portion of it to avoid the disputed parcel at additional expense. On June 30, 1995, defendants filed a withdrawal of their objection to the proposed judgment and the trial court signed the judgment.[1] On July 5, 1995, defendants filed a motion to enforce the judgment and plaintiffs filed a motion to vacate it. At a July 12, 1995 hearing, the trial court held:

> I think that's a good agreement. I think it's an arm's length stipulation that the parties made, and I think it does go a long way to solving all the different disagreements that exist between these parties. . . .
>
> There are substantial benefits in this agreement beyond the ordinary. For example, the easement over [a] piece of defendants' lands, defendant bearing the cost of paving the ten foot [parking area] when the fence is removed, five foot of which is on plaintiffs' lands. The driveway as a whole would be expanded by ten feet in width by these improvements, and I think that's beneficial to both parties, even though that the ten foot area would be used primarily by the defendants, so my first decision is that the order of 6/30/95 should control.

Plaintiffs contended that they should be reimbursed for the paving they did for which defendants were responsible under the agreement. In response, the trial court acknowledged that circumstances had changed since the settlement but stated:

> The point is that either side or the court could have noticed it on for hearing and resolve [sic] it between February 10th and June 30th when . . . the order was entered. . . . [I]f you don't come to court and get the order entered and you go out and you pave a piece of ground that maybe you shouldn't have paved or maybe the other side should have paid for[,] I think you do so either as a volunteer or subject to the possibility that your motion to tax the costs of that paving will not necessarily be granted[.] [S]o what I'm saying I don't have any problem with you coming back, but I'd much rather see the two of you agree on what the value of that paving portion was, and then that you make an adjustment between the two of you . . . .

This Court reviews a decision to enforce a consent judgment and to deny a motion to set it aside for an abuse of discretion. *Trendell v Solomon*, 178 Mich App 365, 369-370; 443 NW2d 509 (1989). This Court reviews trial court factual findings under the clearly erroneous standard. MCR 2.613(C).

Although not raised by the parties, we initially note that because the settlement here was made in open court, it was binding on the parties under MCR 2.507(H). MCR 2.507(H) states:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

On appeal, plaintiffs' basic contention is that the consideration for the consent judgment substantially failed due to defendants' refusal to perform their responsibilities under the settlement and their objection to the proposed judgment. They argue that one of the principle reasons they entered into the settlement was to acquire the easement over the disputed triangular parcel and that this easement is no longer necessary because they relocated that portion of the driveway. Plaintiffs claim that they no longer consented to the consent judgment at the time the trial court entered it because they had acted to their detriment in reliance on defendants' initial refusal to agree to the proposed judgment.

There is a "chicken and egg" problem to the issue of performance. Performance of the settlement was clearly not accomplished in spring 1995. But it is unclear which party is more blameworthy for this failure. Defendants were to pave the parking area at the same time plaintiffs resurfaced the driveway. Defendants could not pave the parking area until the fence was removed. Because of the interrelation of the work to be performed by the parties, neither plaintiffs nor defendants were likely to initiate performance until they were assured that the other side was also ready to perform. In this context, defendants' failure to initiate performance cannot be reasonably viewed as a failure of consideration. Further, there is no evidence that defendants refused to perform their obligations under the settlement and judgment. Defendants' objection to plaintiffs' proposed judgment constituted a claim that the proposed judgment did not conform to the settlement and did not indicate that defendants were reneging on the settlement. In their brief on appeal, defendants indicate that they are still willing to perform their duties under the judgment even though it will be more expensive for them to perform their paving project now than if it had been done at the time plaintiffs resurfaced the driveway.

Plaintiffs are not in a good position to argue that defendants' objections to the proposed judgment constituted a failure of consideration. MCR 2.602(B)(3) specifically allows a party to object to a proposed order in writing within seven days. Defendants timely filed a written objection here. Moreover, MCR 2.602(B)(3)(c) states:

> If objections are filed, the party who filed the proposed judgment or order must notice the judgment or order for settlement before the court within 7 days after receiving notice of the objections.

Here, plaintiffs failed to notice the proposed judgment for settlement within seven days of receipt of defendants' written objection. If plaintiffs had done so, whatever objections defendants had to the proposed judgment might have been resolved at a time when the settlement was relatively fresh in the minds of the parties and trial court. If the judgment had been timely settled, the improvements contemplated by the judgment could have been completed in spring 1995.

For these reasons, we find no clear error in the trial court's factual findings or any abuse of discretion in its entry of the proposed judgment and its implicit grant of defendants' motion to enforce the judgment and denial of plaintiffs' motion to vacate the judgment.

Affirmed.

/s/ David H. Sawyer
/s/ Stephen J. Markman
/s/ Harvey A. Koselka

[1] At a July 12, 1995 hearing, defendants' counsel stated that the judgment "comports and conforms exactly to the settlement on the record."