

STATE OF MICHIGAN
COURT OF APPEALS

JAMES J. KELLEY and LORETTA KELLEY,

Plaintiffs/Counterdefendants-
Appellants,

v

NORDMANN ROOFING COMPANY,

Defendant/Counterplaintiff-
Appellee,

and

ROBERT R. CARNS,

Defendant/Counterplaintiff.

UNPUBLISHED

May 22, 2001

No. 216762

Monroe Circuit Court

LC No. 95-003226-CK

NORDMANN ROOFING COMPANY,

Plaintiff/Counterdefendant-
Appellee,

v

JAMES J. KELLEY AND LORETTA KELLEY,

Defendants/Counterplaintiffs-
Appellants.

No. 216763

Monroe Circuit Court

LC No. 95-003229-CK

Before: Talbot, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiffs/Counterdefendants James J. Kelley and Loretta Kelley appeal as of right from the trial court's order dismissing all claims in these actions pursuant to the terms of a consent judgment. We affirm.

The Kelleys (both hereinafter referred to as “Kelley”), brought a libel action against defendants/counterplaintiffs Nordmann Roofing Corporation (hereinafter referred to as “Nordmann”), and defendant Robert R. Carns. Kelley’s claim was based upon Nordmann’s filing of a construction lien against Kelley for failure to pay for roofing work performed by Nordmann. Nordmann filed a countercomplaint and also initiated a separate cause of action to foreclose on the construction lien.

The parties stipulated to the entry of a consent judgment which provided that Nordmann would pay Kelley \$2,500 by September 12, 1997 and “withdraw and cancel” the construction lien. If the \$2,500 were not paid by September 12, 1997, Kelley would be entitled to an additional \$2,500. The consent judgment provided:

1. Stipulated judgment in case 95-3226-CK for **Kelley, et al**, and against **Nordmann** and **Carns** for \$2,500.00.
2. Judgment to be fully paid by September 12, 1997.
3. Upon payment of \$2,500.00, all **Nordmann** complaints are dismissed with prejudice.
4. **Nordmann** shall withdraw and cancel its construction lien.
5. If \$2,500.00 is not paid by **Nordmann**, and **Carns** to **Kelley** by September 12, 1997, and the construction lien is not withdrawn and canceled then judgment will enter for **Kelley** and against **Nordmann** and **Carns** for an additional \$2,500.00 for a total of \$5,000.00.
- 6 Each party releases the opposing party from any and all claims arising out of the May 25, 1993, roof contract transaction between the parties and no warranties are provided pursuant to the settlement. This provision is operative only if **Nordmann** and **Carns** comply with their obligations in this order.

On November 7, 1997, Kelley filed a motion for supplemental judgment to enforce the contingency contained in the consent judgment on the basis that Nordmann failed to comply with its terms. The trial court initially granted Kelley’s motion for supplemental judgment on the grounds that Nordmann did not make payment by the deadline, and that the lien was not withdrawn and canceled. Thereafter, Nordmann filed a motion for reconsideration arguing that it had complied with the terms of the consent judgment because Kelley accepted a cashier’s check for \$2,500 without objection, and because it had recorded a discharge of lien. The trial court granted Nordmann’s motion for reconsideration. The trial court determined that Nordmann had timely paid the judgment, ordered Nordmann to execute and record a document indicating that the lien was withdrawn and canceled, and dismissed all remaining claims.

On appeal, Kelley argues that the trial court erred in determining that Nordmann had complied with the terms of the consent judgment regarding its obligations to pay \$2,500 and to withdraw and cancel the construction lien. To the extent that the trial court made factual findings regarding Nordmann’s compliance with the terms of the consent judgment, this Court reviews

those findings for clear error. *Giordano v Markovitz*, 209 Mich App 676, 678-679; 531 NW2d 815 (1995); MCR 2.613(C). The trial court's interpretation and application of statutes are questions of law that we review de novo. *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 596; 608 NW2d 57 (2000).

“As a general rule, consent judgments will not be set aside or modified except for fraud or mutual mistake. Indeed, the review of a consent judgment is ordinarily limited.” *Trendell v Solomon*, 178 Mich App 365, 367-368; 443 NW2d 509 (1989) (citations omitted). The remedy for one party's failure to comply with the terms of a consent judgment is the enforcement of that judgment. *Id.* at 369.

With respect to the payment of the \$2,500, it is undisputed that at approximately 5:00 p.m. on September 11, 1997, Nordmann's attorney, Peter Zaums, delivered to Kelley a cashier's check in the amount of \$2,500. Kelley deposited the check. The check was honored and the funds were available to Kelley on September 13, 1997. Kelley argues that his acceptance of the check as satisfaction of the consent judgment was conditioned upon the availability of the funds in Kelley's bank account by September 12, 1997. Kelley typed his conditional acceptance on the back of the check before he deposited it.¹ Kelley asserts that he told Zaums that his acceptance of the check was conditional. Contrarily, Zaums stated in an affidavit that Kelley placed no such qualifications on his acceptance of the check.

We conclude that the trial court did not err in finding that Nordmann had timely paid the \$2,500. The trial court cited MCL 440.3310(2); MSA 19.3310(2), which provides:

Unless otherwise agreed, if a certified check, cashier's check, or teller's check is taken for an obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation.

We agree with the trial court that payment by cashiers check was sufficient to suspend the obligation to pay \$2,500 by September 12, 1997. The consent judgment did not specify the method of payment. Because Kelley negotiated the check and the check was ultimately honored, the obligation was timely satisfied. See *Staff Builders of Philadelphia, Inc, v Koschitzki*, 989 F2d 692 (CA 3, 1993); *Roy v Mugford*, 642 A2d 688 (Vt, 1994); *Kohler Company v Sogen International Fund, Inc*, 608 NW2d 746, 752, (Wis App, 2000).

On appeal, Kelley argues that the provision “unless otherwise agreed” in MCL 440.3310(2); MSA 19.3310(2) applies in this case because Kelley and Zaums agreed that

¹ Kelley typed the following on the back of the check:

This check, drawn on an Ohio bank, was delivered to payees about 5 PM on September 11, 1997, after banking hours. Payees accept this check only upon the condition that it will not constitute payment until \$2500 has been forwarded by the bank upon which it is drawn, to payee's bank with which it is deposited for collection.

Kelley's acceptance of the check was conditioned upon the availability of the funds by the deadline. Kelley's contention is contrary to Zaums' affidavit in which he stated that Kelley did not refuse to accept the cashier's check, and did not say he would not accept it. Although Kelley contends that he made his objection to the check known to Zaums and said at the time that the check would not constitute payment until the funds were available to Kelley, Kelley does not contend that Zaums expressly agreed with Kelley's position, only that he did not object or request that the check be returned. The question whether Kelley and Nordmann "agreed otherwise" is at best a factual issue, and the trial court's resolution of this question was not clearly erroneous. Further, by his own actions in depositing the check, Kelley is deemed to have accepted payment, regardless of the protest Kelley typed on the back of the check. Because the check was ultimately honored, Nordmann is deemed to have made payment on the date the check was delivered, September 11, 1997. The trial court did not err in its application of the statutory law.

Regarding Nordmann's obligation to withdraw and cancel the construction lien, Kelley's arguments on this issue are based upon his contention that the consent judgment imposed a specific deadline for Nordmann to withdraw and cancel the lien. Kelley interprets the consent judgment to require that the lien be withdrawn and canceled by the September 12, 1997 deadline. Kelley's interpretation is not supported by a plain reading of the consent judgment.

The two requirements of Nordmann under the consent judgment are the payment of \$2,500 and the withdrawal and cancellation of the lien. These provisions are set forth separately in paragraphs two and four, respectively. The September 12, 1997 deadline is included only in paragraph two regarding the payment of \$2,500. Paragraph four contains no such time constraint. Paragraph five, upon which Kelley relies, contains a contingency for the payment of an additional \$2,500. The reference to the September 12 deadline clearly applies only to the payment of \$2,500:

"If \$2,500.00 is not paid by **Nordmann**, and **Carns** to **Kelley** by September 12, 1997, and the construction lien is not withdrawn and canceled then judgment will enter for **Kelley** and against **Nordmann** and **Carns** for an additional \$2,500.00 for a total of \$5,000.00."

This provision establishes two conditions which must occur to entitle Kelley to the additional \$2,500. The September 12 deadline is contained in the first clause addressing payment, and does not apply to the withdrawal and cancellation of the lien. This reading is consistent with the manner in which the two requirements are set forth separately in paragraphs two and four.

We reject Kelley's contention that the word "then" in paragraph five refers to a time by which the lien must be withdrawn and canceled. The logical reading of this paragraph suggests that "then" is used in conjunction with "[i]f" and introduces the consequences of the failure to pay by September 12 and withdraw and cancel the lien, and does not refer back to the September 12 date to provide a date by which the lien must be canceled. Accordingly, Nordmann's failure to withdraw and cancel the lien by September 12, 1997 does not entitle Kelley to the additional \$2,500.

Kelley also argues that the trial court erred in dismissing all remaining claims and denying Kelly's request to tax costs. Because Nordmann complied with the terms of the consent judgment, the court properly dismissed all remaining claims. Kelley was not the prevailing party and is therefore not entitled to tax costs. See MCR 2.625(A)(1).

Affirmed.

/s/ Michael J. Talbot

/s/ Martin M. Doctoroff

/s/ Helene N. White