

STATE OF MICHIGAN
COURT OF APPEALS

GENO ENTERPRISES, INC.,

Plaintiff-Appellant/Cross-Appellee,

v

NEWSTAR ENERGY USA, INC.,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

June 5, 2003

No. 232777

Bay Circuit Court

LC No. 00-003784-AV

Before: Smolenski, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff Geno Enterprises, Inc. (GEI), appeals by leave granted the circuit court's affirmance of the district court's order of judgment allowing defendant Newstar Energy USA, Inc. (Newstar), an opportunity to cure its breach of an oil lease and thereby avert the issuance of a writ of restitution. Newstar cross-appeals the determination that it breached the lease. We affirm the court's determination to deny an unconditional judgment of possession. The cross-appeal is moot.

I

Newstar is a wholly owned subsidiary of Newstar Resources, a publicly traded Canadian corporation. Newstar is in the oil exploration business and owns numerous wells in Michigan and other states. Newstar is the holder of a lease giving it the right to use certain property of plaintiff GEI to drill for oil under Saginaw Bay.

On March 30 1999, GEI filed a complaint in district court under the summary proceedings act, MCL 600.5701 *et seq.*, seeking a writ of restitution removing Newstar from the premises. GEI's complaint claimed Newstar had violated and breached "several express covenants and provisions" of the lease, that more than thirty days had passed since Newstar had received GEI's written notice of the violations, that Newstar was in default under the lease, and that, pursuant to the lease, Newstar's rights thereunder had ceased and been terminated. Newstar's answer to GEI's complaint included the affirmative defenses of lack of jurisdiction, waiver, laches/estoppel, and that it had paid GEI all royalties required under the agreement, although it noted that GEI returned several of those checks in July 1999.

At the bench trial on October 13, 1999, GEI stipulated to try three grounds for Newstar's default: failure to provide proof of liability insurance, failure to provide proof of a \$50,000 clean-up bond, and failure to provide seismic data relating to the drill site. The district court found in defendant Newstar's favor on the first two grounds, but concluded (after amending its factual findings¹) that Newstar had violated the lease by not fully providing seismic data to GEI. The court concluded, however, that Newstar's breach was not a material breach warranting termination, and granted Newstar additional time to comply fully with the lease's seismic data requirement.

GEI appealed to the circuit court, and Newstar cross-appealed. The circuit court affirmed the district court and dismissed Newstar's cross-appeal.

A

At trial, the evidence showed that on January 20, 1994, Florence Geno, as lessor, and Jeffrey A. Foote, as lessee, entered into a "surface lease agreement" for the use of Geno's land to drill a gas well under Saginaw Bay. Florence Geno's attorney drafted the lease. The lease was for a primary term of thirty-six months and "as long thereafter as oil and/or gas are being produced or capable of being produced in paying quantities . . ."

The surface lease provided in pertinent part:

D. DEFAULT OF LEASE

1. In the event Lessor shall determine a default in the performance by Lessee of any express or implied covenant of this lease, Lessor shall give notice, in writing, by certified United States mail, addressed to Lessee's last known address, specifying the facts by which default is claimed. Lessee shall have thirty (30) days from the date of receipt of such notice in which to satisfy the obligation of Lessee, if any, with respect to Lessor's notice.

* * *

K. RELEASE CLAUSE

If the Lessee fails to comply with the terms and conditions stipulated in this lease, then and in such events all of his rights hereunder shall cease and determine, and thereupon he or his assigns shall execute written release of said premises to said Lessor and his assigns.

¹ The district court initially concluded that Newstar did not breach the seismic data requirement. The court later granted plaintiff's motion to amend findings on the seismic data issue, noting that it had presumed, improperly, that the two Shell lines had been drilled after the Geno 1-18 well, when in fact they were drilled before. The court noted, however, that the amended findings did not change its conclusion that there was no material breach of the lease by Newstar.

L. ADDITIONAL PROVISIONS

* * *

2. Lessee shall provide Lessor with a copy of all title opinions, geological information (including logs, *seismic*, geochemistry and topographical maps) and other information regarding the lands covered by exploration activities from the leased premises *within sixty (60) days after the completion of any well drilled from the leased premises at no cost*; provided, however, that all such data and information shall remain the sole property of Lessee and Lessor will not make the same available to third parties without prior written consent from Lessee. *This information will be provided by Lessee upon written request from Lessor.* [Emphasis added.]

Florence Geno conveyed the property and her interest in the surface lease to plaintiff GEI in January 1994. In 1995, Foote had a gas well known as "Geno 1-18" drilled from a 300 foot by 300 foot parcel of the GEI property to a bottom hole under Saginaw Bay. Foote assigned his leasehold interest to Newstar in 1997.

Wayne Geno testified at trial that GEI received and cashed royalty checks from Newstar until January 1999, totaling approximately \$302,000. Around January 1999, one of Newstar's royalty checks to GEI bounced due to insufficient funds. By letter dated January 19, 1999, GEI wrote to Newstar that it was in breach of the lease, for reasons including failure to provide seismic data under paragraph L(2) of the lease,² quoted *supra*. Newstar responded by a letter

² Wayne Geno's letter to John Piedmonte, Newstar's president, dated January 19, 1999 stated in part:

Dear Mr. Piedmonte:

This letter is to notify you that Newstar is in breach of contract. We have not been paid in a timely manner as per the agreement to lease the surface property located in Pinconning, Michigan to operate a gas well . . . The following will need to be satisfied within thirty (30) days from this date:

1. Par B.2. – Supply all moneys due GEI immediately and all payments are to be brought up-to-date within the time frame specified above. . . .
2. Par L.2. – All Seismic data pertaining to this well is to be supplied to GEI within ten (10) days of the issuance of this letter.

* * *

The above items are due on or before the date specified or further action will be taken.

which was dated February 18, 1999,³ but was mailed on March 3 or 8, 1999. Newstar's Michael Barratt further responded to GEI's January 19, 1999, by letter dated March 8, 1999, included with which was some seismic data.⁴

By letter dated March 22, 1999, GEI's counsel informed Newstar that the lease had terminated as of February 18, 1999.⁵ GEI filed a summary proceedings action in district court on March 30, 1999.

³ Newstar's letter to GEI dated February 18, 1999 stated in pertinent part:

Thank you for your January 19, 1999 letter regarding the above referenced surface lease agreement. The purpose of this letter is to address your requests identified in that letter. . . .

- All monies due to Geno Enterprises, Inc. (GEI) have been paid . . .

* * *

- As you are aware, Newstar did not generate the data to support drilling the Geno 1-18 nor was it the operator during the drilling operation. Any seismic data that you requested should have been previously provided to you. I will, however, make sure copies of the seismic are provided to you. You can expect this to be delivered to you under separate cover within the next two weeks. Please be advised that pursuant to paragraph L.2 of the surface agreement, this seismic data remains the sole property of Newstar and GEI [Geno] may not make this seismic available to any third party without the prior written consent of Newstar. [PI's trial ex 1.]

⁴ Newstar's (Barratt's) letter to Geno dated March 8, 1999 stated in part:

This letter is in response to your January 19, 1999 letter to Mr. John A. Piedmonte requesting that seismic data pertaining to this well is to be supplied to GEI.

Mr. Piedmonte responded earlier to you in his February 18, 1999 letter addressing your concerns.

Please find enclosed the portion of seismic line NS-SB-1-97 that traverses the State Fraser & Geno # 1-18 producing unit. I am also enclosing a shot point map along with the line. This is the only line which Newstar has ownership of within the unit. The portion of the enclosed line is from the Northwest end of the line to shot point 90. Shot point 90 crosses the South unit line. The bottom hole location of the St. Fraser and Geno #1-18 is located approximately at shot point 50.

If you need additional information or have any questions regarding the seismic lines, please contact me at the above address.

⁵ The March 22, 1999 letter terminating the lease stated:

(continued...)

Testimony adduced at the bench trial included that seismic lines are typically run for future exploration. A map admitted at trial showed drilling units and seismic lines that had been shot in the pertinent area, and that three seismic lines were involved. The three seismic lines were about seven miles, three miles, and five miles long. Defendant Newstar ran the five mile seismic line in 1997, and provided seismic data pertinent to that line to GEI. The other two seismic lines had been run before Jeff Foote drilled the Geno 1-18 well in 1995. Shell Oil had licensed those two lines to Jeff Foote. Under licensure, the licensee is prohibited from showing the seismic lines to a third party. GEI had requested the Shell seismic data from Foote, but Foote refused because the information was licensed.

(...continued)

Dear Mr. Piedmonte:

We have been authorized, as attorneys for Geno Enterprises, Inc., to inform you that the surface lease agreement dated January 20, 1994 (Liber 1367, Pages 241-248) is terminated effective February 18, 1999. The lease has been terminated due to the default and failure of Newstar Energy USA, Inc., to comply with the terms and conditions of the lease agreement, specifically, its failure to satisfy its obligations with respect to the notice of default dated January 19, 1999, in the following regards:

* * *

4) Failure to provide Plaintiff with a copy of geological information, including seismic data and other information regarding the lands covered by exploration activities from the leased premises within 30 days from the date of service of notice; and

5) Failure to satisfy the Lessees [sic] obligations with respect to the Plaintiff's notice within 30 days from the date of receipt of the notice.

Accordingly, on behalf of Geno Enterprises, Inc., we hereby demand immediate possession of the premises upon which the State Fraser Geno 1-18 well is located

.....

* * *

Pursuant to the terms of the lease agreement, it is necessary that Newstar Energy USA, Inc., vacate and remove itself, its employees, agents . . . from the premises, cease any further activity on the premises, and deliver up to Geno Enterprises, Inc., possession of the premises. Furthermore, Paragraph K of the lease agreement requires that Newstar Energy USA, Inc., execute the enclosed release of said premises. Newstar Energy USA, Inc., will be considered a "holdover tenant" if it fails, refuses or neglects to comply with the terms and conditions of the lease agreement and does not immediately vacate and remove itself from the premises.

Wayne Geno testified at trial regarding the seismic data:

Q. Let's move on to seismic. Now, th – this well was drilled back in 1995, correct?

A. I believe so.

Q. And the lease is back in 1994. And the lease says that there's seismic information that – that you want within 60 days after completion of the well, correct?

A. Yes.

Q. So – so, any request in 1999 for seismic information is somewhere around four years late, correct?

A. Yes.

Q. And during that time there was never a termination notice sent sayin' 'we haven't gotten seismic and we're gonna terminate your lease'?

A. To Newstar? No.

Q. How about to Mr. Foote?

A. We requested that data from Mr. Foote, and he would not give it to us. I did not request a termination [of the lease from Foote].

* * *

Q. Well, isn't it – isn't it correct that Mr. Foote gave you the same reason that Mr. Piedmonte stated earlier today for not giving the seismic information, and that's that it was not information that he could give to you, it was licenses?

A. It was licensed.

* * *

Q. Okay. Now I- it's also true about the seismic that you don't really know for sure what seismic data even pertains to this well?

A. What seismic data pertains to this well? I do not --

Q. Correct.

A. --I do not know 'cause I've not seen it.

Q. But a – as a general standpoint, you – you couldn't' tell me – you know, take a map and tell me 'this is what pertains to this well and this doesn't'?

A. Probably not.

Q. Now, it's also true that – that there's been no harm to Geno Enterprises by not having that seismic data has there?

A. I believe there has because we tried to negotiate with Mich Con earlier to do a well east of this well--

Q. So – so, the reason that there is damage to you then would be that you wanted to use this data to negotiate with somebody else?

A. No. It was –

Q. Well, th- that's what you just said.

A. It was to keep us informed of what's out there.

Q. So – so, you wanted to know what was out there so that you could negotiate with somebody else

A. For what?

Q. I don't know for what, for

A. For – for –

Q. --another well, correct?

A. --for another well east of this well.

Q. Thank you.

A. If we needed it.

B

The district court applied the material breach doctrine, concluding on the seismic issue:

8. MATERIAL BREACH IS AN EQUITABLE DEFENSE: The Defendant asserts that even if all is well with the Plaintiff's attempt to terminate the lease, the breach was not material and therefore the termination should be unenforceable. This is an equitable defense which the Court is considering pursuant to MCL 600.8302(1) & (3).⁶ Section (3) states “. . . the District Court

⁶ MCL 600.8302(1) provides:

(continued...)

may hear and determine an equitable claim relating to . . . or involving a right, interest, obligation, or title in land.” It goes on to provide that the District Court may enter a judgment or order to effectuate its ruling. The question then becomes as a matter of law does the equitable doctrine of material breach apply to the exercise of a power to terminate contained in a lease.

There are no cases involving leases on point in Michigan. The case of *Erickson v. Bay City Glass Company*, cited by the Defendant, uses the word “material,” but the decision did not turn on that issue. That case held that where a power to terminate the lease does not expressly include a breach for non-payment of rent, the lease may not be terminated for non-payment of rent because the non-payment of rent provisions contained in MCL 600.5714 and MCL 554.134 are applicable.

Many cases dealing with the “material breach” issue can be found in the law of contract as it applies to the remedy of rescission [sic rescission] which is similar to the contractual remedy of termination. Many Michigan cases holding the applicability of the “no material breach” or “substantial performance” equitable defense to contract rescission [sic] may be found in West’s Michigan Digest Contracts 95K261(2) (see *Omnicom of Michigan v. Giannetti Inv. Co.*, 561 N.W.2d 138, 221 Mich. App. 341, 1997). This doctrine exists to avoid harsh results when a contract has been substantially performed, the aggrieved party has received most of the agreed upon benefits, and the aggrieved party has other remedies available.

Another example of the law of contract that seeks to avoid harsh results is the doctrine holding that agreed upon damage provisions, liquidated damages, in a contract are unenforceable where they are excessive and do not reasonably relate to damages that are likely to occur. Another example where the law of contract avoids a rescission [sic] or breach of contract is the “time is of the essence doctrine,” which states unless it is otherwise specified, late performance within a reasonable time is not grounds for a rescission [sic] (see also MCL 440.616). A final example of the law seeking to avoid harsh results is found in the land contract forfeiture provisions. MCL 600.5726 expressly requires a “material breach” before a forfeiture may be declared. However, the Plaintiff on this point

(...continued)

Sec. 8302. (1) In addition to the civil jurisdiction provided in sections 5704 and 8301, the district court has equitable jurisdiction and authority concurrent with that of the circuit court in the matters and to the extent provided by this section.

Subsection (3) provides:

(3) In an action under chapter 57, the district court may hear and determine an equitable claim relating to or arising under chapter 31, 33, or 38 involving a right, interest, obligation, or title in land. The court may issue and enforce a judgment or order necessary to effectuate the court’s equitable jurisdiction as provided in this subsection. . .

could argue that if the legislature wanted to require a material breach prior to the exercise of a power to terminate, it would have placed that requirement in the [summary proceedings] statute, as it did in the land contract forfeiture cases. This Court's best guess is that the equitable defense of "material breach," which seeks to avoid harsh results for minor breaches, is applicable to the exercise of a power to terminate contained in a lease especially in view of the fact that policy considerations for cancellation of contracts and cancellation of leases seem to be the same. If this legal conclusion is incorrect, this is a classic situation where hard cases make bad law.

[¶ 9. court applies the material breach/substantial performance considerations of *Omnicom, supra.*]

In considering all of the above, this Court finds that the Defendant's breach was not a material breach warranting a termination. The Defendant has performed all of its other duties under the lease, including paying the Plaintiff sums due under the lease. The Court is very reluctant to refrain from enforcing the specific terms of the lease but believes that the Plaintiff has suffered little damage, has had substantial performance, and is trying to use a relatively minor and negligent violation of the lease to terminate it. Under these circumstances, the Court believes that an immediate termination is not fair and therefore, an unconditional judgment for possession is denied. The Plaintiff however is entitled to the Shell lines and, therefore, is granted a judgment for possession that provides that the lease shall be terminated and a writ of restitution will issue in the event that the two Shell lines are not provided to the Plaintiff within 28 days of the judgment. This remedy is not expressly authorized by the summary proceedings statute but is entered pursuant to MCLA 600.8302(1) & (3) [see n 7, supra]. This judgment for possession shall be processed in the same manner as any other summary proceedings judgment. In the event a higher court finds that the "material breach" defense is not applicable, an unconditional judgment for possession with a ten day writ of issuance period should be entered in favor of the Plaintiff. [Emphasis added.]

The district court's order of judgment allowed Newstar time to cure its breach:

Judgment for possession is entered in favor of the Plaintiff [Geno], subject to the Defendant's right to cure the existing breach by providing two Shell seismic lines to the Plaintiff on or before September 26, 2000 (28 days after the date of this Judgment) in which case the parties lease shall not be terminated and no writ of restitution will issue.

On all other claims, judgment is entered for the Defendant [Newstar]. In the event a higher court finds that the "material breach" defense is not applicable, judgment should be entered in favor of the Plaintiff for the technical violation.

The circuit court affirmed, and dismissed Newstar's cross-appeal. Post-trial, Newstar purchased a license for the two Shell lines' seismic data and provided that data to GEI, in compliance with the district court's judgment.

II

Whether the doctrine of material breach may be applied in a summary proceedings action involving a lease is a question of law this Court reviews de novo. *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997). The trial court's factual findings will not be overturned unless clearly erroneous. *Id.*

A

GEI is correct that the material breach doctrine arises in rescission cases, and that rescission is not the same as forfeiture, the latter of which is the theory plaintiff advanced in this action:

§ 450. Provisions for forfeiture

A forfeiture, is that which is lost, or the right to which is alienated, by a breach of contract. Unless there is a provision in a contract clearly and expressly allowing forfeiture, breach of a covenant does not justify cancellation of the entire contract, and courts will generally uphold a forfeiture only where a contract expressly provides them. The declaration of a forfeiture for the breach of a condition of a contract, in accordance with a stipulation therein, is to be distinguished from a rescission of the contract in that it is an assertion of a right growing out of it. It puts an end to the contract and extinguishes it in accordance with its terms similarly to the manner in which it is extinguished by performance. Forfeiture terminates an existing contract without restitution, while a rescission of such contract terminates it with restitution and restores the parties to their original status. [17B CJS, Contracts, § 450, pp 66-67.]

There are no Michigan cases addressing the question whether the material breach doctrine, applicable in rescission cases, may be applied in a summary proceedings action to declare a lease forfeited. Nevertheless, we conclude that the court did not err in applying the doctrine in the instant case.

There is no Michigan precedent compelling a court to automatically declare a forfeiture under a contract provision without looking to the equity of the situation. See 49 Am Jur 2d, Landlord and Tenant, § 339, "Equitable Relief From Forfeiture," which states in pertinent part:

Forfeitures are not favored in equity, and unless the penalty is fairly proportionate to the damages suffered by reason of the breach, relief will be granted against a forfeiture where the lessor can, by compensation or otherwise, be placed in the same condition as if the breach had not occurred. Thus, equitable relief against forfeiture of a lease is generally granted in all cases of nonpayment of rent if such payment is delinquently made or tendered, unless there is some ground for denying such relief, and relief against forfeiture of a lease is generally granted in cases other than those for nonpayment of rent, where the grounds for relief are fraud, accident, or mistake. *Likewise, a lessee who has breached a covenant of the lease providing for its termination because of such breach may, under some circumstances, avoid the forfeiture of the lease through intervention of equity,*

where it clearly appears necessary to prevent an unduly oppressive result, or to prevent an unconscionable advantage to the lessor. . . This is particularly true where the breach is of a covenant of minor importance, as, for example, where a tenant's default under the lease is a technical one and the tenant has duly paid rent and taxes on the property over a long period of time, has substantially complied with the other lease obligations, and offers promptly to cure the default.

Equity may also relieve a lessee from a default in breaching a covenant of the lease where the lessor's right to cancel the lease has been waived. [49 Am Jur 2d, *supra* at pp 304-305. Emphasis added.]

Applying these principles, we find no error. There was evidence that Newstar had a substantial investment in the property, had otherwise complied with the lease, and that GEI could be made whole.

B

GEI also argues that MCL 554.46 implicitly rejects application of the material breach doctrine in forfeiture actions where the breach is not nominal, and since the lower courts in the instant case both concluded Newstar's breach was not nominal, the court's rulings violated the clear intent of the standard imposed by the Legislature.

MCL 554.46 provides:

When any conditions annexed to a grant of conveyance of lands are merely nominal and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto.

MCL 554.46 does not set the upper limit of any threshold, but rather sets a minimum threshold. See MCL 600.5744(6), which provides that a land contract forfeiture clearly requires a material breach.

III

Although we have determined that the district court did not err in permitting Newstar to avoid the forfeiture by providing the seismic data, and Newstar's cross appeal is therefore moot, Newstar having provided the data, we nevertheless address one aspect of the cross-appeal as an alternative basis for affirming the trial court's denial of an unconditional judgment of possession. We conclude that the trial court erred in rejecting Newstar's claim that GEI waived its right to declare a forfeiture for failure to provide the seismic data.

The Supreme Court in *Van v Zahorik*, 460 Mich 320, 336; 597 NW2d 15 (1999), stated the requirements for equitable estoppel:

Equitable estoppel arises where a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe facts, the other party

justifiably relies and acts on that belief and the other party will be prejudiced if the first party is allowed to deny the existence of those facts.

See also 49 Am Jur2d, Landlord and Tenant, §§ 328, 329, pp 295-296, which states in part:

Forfeiture of leases is not favored, and the courts will readily adopt any circumstances that indicate waiver of forfeiture.

The existence of a waiver of the right to terminate a lease is a question of fact for determination by the trier of fact. The right of forfeiture may be waived either expressly or by the lessor's conduct. Generally, any act by a landlord which affirms the existence of a tenancy and recognizes the tenant as the lessee, including the failure to exercise the remedy of forfeiture, after the landlord has knowledge of a breach results in the landlord's waiver of the right to a forfeiture. Thus, a lessor's conduct constitutes a waiver of the right to enforce a forfeiture where, after a fire, the lessor commences restoration of the premises and fails to communicate to the lessee the intention to rely upon a lease term providing for termination in the event of fire.

* * *

No waiver occurs, however, where the lessor acts promptly to terminate the lease upon learning of the lessee's breach of a covenant. . . .

§ 329. Delay in declaring forfeiture; consent to, or acquiescence in, breach

. . . where . . . a lessor delays unreasonably in declaring a forfeiture of a lease the forfeiture is deemed to have been waived.

A lessor who consents to acts of the lessee which otherwise would constitute ground for a forfeiture will not be permitted to enforce a forfeiture, because there is in such a case no breach by the lessee.

In the instant case, plaintiff GEI delayed for years before requesting seismic data or enforcing a forfeiture on the basis of the seismic data requirement. The Geno 1-18 well was drilled in 1995 by Foote. The lease provision stated both that the data was required to be provided within sixty days after the completion of any well drilled, and that the data will be provided upon written request from the lessor. GEI requested the seismic data from Foote, but he refused to provide it because it was under license, and the matter was not pursued. Foote assigned his interest in the lease to Newstar in 1997, after the data was due under lease, after it had been requested and denied, and after GEI waived its right to declare a forfeiture based on that denial. GEI first requested the seismic data from defendant Newstar in January 1999. Newstar is correct that the district court did not address plaintiff's conduct before it sent Newstar the termination letter in January 1999, as evidenced in the district court's opinion:

7. *EQUITABLE ESTOPPEL/WAIVER*: The Court finds that the Plaintiff *at all times from January 19, 1999* conducted itself in a manner that was consistent with terminating the lease. The original 30 day notice of default threatened further

action if the alleged breaches were not cured. The Plaintiff did send a termination notice in March, although it was not required to do so. Shortly thereafter, the Plaintiff commenced a summary proceedings action to have the Defendant removed from the premises. The Court cannot find any conduct on the part of the lessor that would constitute a waiver of the exercise of the power to terminate the lease. In addition, any theory of estoppel is not supported by the facts since the Plaintiff did not engage in any conduct that would have caused the Defendant to take a position or action in reliance on representations or conduct it may have engaged. [Emphasis added.]

Notwithstanding the trial court's observations concerning GEI's conduct after January 19, 1999, prior to that date GEI very clearly waived its right to forfeit the lease based on the failure to provide seismic data relating to the Geno 1-18 well, drilled in 1995, and led Foote and Newstar to believe that it did not read the lease as requiring the production of seismic data that was subject to license.

We affirm the court's determination to deny an unconditional judgment of possession. We grant no relief on the cross-appeal because Newstar has already complied with the terms of the conditional judgment.

/s/ Michael R. Smolenski

/s/ Helene N. White

/s/ Kurtis T. Wilder