

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

CHALLENGE MFG. COMPANY,

Plaintiff/Counter-Defendant,

vs.

SUPERIOR ROLL FORMING CO., INC.,

Defendant/Counter-Plaintiff.

Case No. 16-01140-CBB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER DENYING CHALLENGE'S
EMERGENCY MOTION TO ENFORCE SETTLEMENT

The Court must once again turn its attention to this supply-chain dispute because the parties have become unsettled about their settlement agreement. On March 6, 2017, after several hours of hard bargaining, the parties placed a partial settlement on the record. The Court opened the record by explaining the general terms of the partial settlement, then the attorneys for both sides added gloss to the Court's statement of the partial settlement. In the wake of their partial settlement, the parties went about their business for some time, but a dispute eventually erupted about the terms of payment that Defendant Superior Roll Forming Co., Inc. ("Superior") imposed upon Plaintiff Challenge Mfg. Company ("Challenge"). Simply put, Superior insisted on payment for upper tie bars within 20 days, even though the parties had agreed to payments on a net-45-day basis for lower tie bars. Challenge promptly filed an emergency motion demanding that the Court enforce the partial settlement through an order providing that all payments for upper and lower tie bars alike must be on a net-45-day basis. But because neither the partial settlement agreement nor the parties' course of performance mandates a net-45-day basis for upper-tie-bar payments, the Court must deny the motion.

I. Factual Background

By all accounts, the parties entered into a contract that obligates Defendant Superior to ship both upper tie bars and lower tie bars to Plaintiff Challenge, which welds the tie bars into assemblies and ships the assemblies to General Motors. Over the life of the contract, Superior has encountered difficulties in furnishing satisfactory lower tie bars to Challenge, but the production of upper tie bars has created few, if any, problems. According to a blanket purchase order issued on June 13, 2016, Superior assumed the responsibility to ship lower tie bars to Challenge for a price of \$5.39 per piece, but Challenge agreed to pay that price under protest, leaving Challenge free to argue at a later time that the original contract price of \$4.25 should apply to each lower tie bar. In contrast, the shipment of upper tie bars continued without protest or modification of the parties' contractual terms.

After Plaintiff Challenge filed the instant case against Defendant Superior, the Court invited the parties and their attorneys to take part in a settlement conference on March 6, 2017. During that settlement conference, the parties reached a partial resolution of their dispute, so the Court instructed the parties and the attorneys to place the partial settlement on the record. The settlement conference had focused entirely upon pricing and payment terms for lower tie bars, and the parties had reached a partial resolution that afforded Challenge the time and opportunity necessary to search for a new company to perform the bending and cutting of the lower tie bars, thereby relieving Superior of those responsibilities. Against that backdrop, the Court provided the following explanation of the partial settlement concerning payment terms:

For the next six months, the terms of payment imposed upon Challenge to make payments to Superior Roll shall be net 45 days. But if after six months Challenge is unable to reduce its obligation simply to purchase roll form from Superior, then after six months the terms of payment will change to net 20.

See Hearing Tr (March 6, 2017) at 4. Then the Court invited the attorneys to offer comments about the Court's statement of the partial settlement. Counsel for Challenge spoke first, clarifying a few important points. Then counsel for Superior raised the issue of upper tie bars in a brief colloquy with the Court:

MR. WARNER: Just a few things, your Honor. Just so the record's clear, the part we're talking about is only the Lower Tie Bar, correct?

THE COURT: Yes. I'm sorry. I – you know –

MR. WARNER: That's fine.

THE COURT: – we've had so many discussions that it just simply slipped my mind to say that the Upper Tie Bar is not even a part of this discussion at all.

MR. WARNER: I just wanted to make sure the record was clear on that.

THE COURT: Right. Absolutely.

See Hearing Tr (March 6, 2017) at 6-7. Counsel for Challenge subsequently furnished an additional point of clarification on a different subject, but the record contains nothing further on the subject of upper tie bars. When asked about his client's assent, counsel for Challenge stated that, "your Honor, the way you have indicated, with my clarifications and Mr. Warner's, are satisfactory to Challenge Manufacturing Company." Id. at 9.

After reaching their partial settlement, the parties continued to do business involving lower and upper tie bars. Specifically, Defendant Superior consistently shipped upper tie bars to Plaintiff Challenge and sent invoices to Challenge that uniformly stated: "Terms NET 15." See Superior's Response to Challenge's Emergency Motion to Enforce Settlement, Exhibit 1. Superior also shipped lower tie bars to Challenge on a consistent basis, but the invoices for those lower tie bars sometimes specified payment "Terms NET 45" and other times stated: "Terms NET 15." In practice, however,

Challenge routinely did not send payment for upper or lower tie bars within 15 days. Consequently, each party can point to some evidence of a course of conduct that offers support for its interpretation of the partial settlement. Thus, the Court must decide what the partial settlement entails.

II. Legal Analysis

In moving to enforce the partial settlement, Plaintiff Challenge has asked for three forms of relief: (1) a declaration that the net-45-day payment term applies with equal force to upper and lower tie bars; (2) a finding that Challenge properly debited Superior \$3,046.70; and (3) a clear directive that Defendant Superior must continue to supply upper tie bars pursuant to the terms of the parties' contract. The Court regards the dispute about the debit of \$3,046.70 as an issue of damages that has nothing to do with the partial settlement. Accordingly, the Court cannot provide relief to either party on that issue. Beyond that, Superior's counsel made an unequivocal promise that Superior will ship upper tie bars under the terms of the parties' contract, so that assurance effectively resolves the third request for relief presented by Challenge. But the Court plainly must address the principal issue that Challenge has raised, *i.e.*, whether the partial settlement obligates Superior to supply upper tie bars on a net-45-day basis, as opposed to a net-20-day basis.

"A settlement agreement is a binding contract." Reicher v SET Enterprises, Inc., 283 Mich App 657, 665 (2009). The validity of a settlement agreement depends, in the first instance, upon the parties' compliance with MCR 2.507(G), see Michigan Mutual Ins Co v Indiana Ins Co, 247 Mich App 480, 484-485 (2001), which provides that a settlement agreement "is not binding unless it was made in open court, or unless evidence of the agreement is in writing[.]" See MCR 2.507(G). Here, the parties placed a partial settlement on the record on March 6, 2017, so the validity of that partial

settlement is unassailable. Its terms, however, remain open to debate, so the Court must turn to “the legal rules applicable to the construction and interpretation of other contracts” in order to determine the meaning of the parties’ partial settlement. See Reicher, 283 Mich App at 663.

“‘The primary goal in the construction or interpretation of any contract is to honor the intent of the parties[.]’” Klapp v United Ins Group Agency, Inc, 468 Mich 459, 473 (2003). Courts must “determine the parties’ intent by interpreting the language of the contract according to its plain and ordinary meaning.” Bank of America v First American Title Ins Co, 499 Mich 74, 85-86 (2016). Additionally, “contracts must be ‘construed so as to give effect to every word or phrase as far as practicable.’” Klapp, 468 Mich at 467. Here, the Court’s statement of the parties’ partial settlement used sweeping language to describe the application of the net-45-day payment term, see Hearing Tr (March 6, 2017) at 4, but counsel for Defendant Superior later clarified – without an objection from Plaintiff Challenge – that the partial settlement concerned “only the Lower Tie Bar,” id. at 6, which the Court confirmed in explaining “that the Upper Tie Bar is not even a part of this discussion at all.” Id. at 6-7. Therefore, the most natural reading of the partial settlement limits its application to lower tie bars. Indeed, a broader interpretation of the partial settlement to also include upper tie bars would render nugatory the entire colloquy between the Court and counsel for Superior. Consequently, the Court concludes that the net-45-day payment term included in the partial settlement applies to lower tie bars, but not upper tie bars, shipped by Superior to Challenge beginning on March 6, 2017.

Plaintiff Challenge insists that, even if the partial settlement placed on the record in March of 2017 does not extend the net-45-day payment term to upper tie bars, the parties’ course of conduct after March 6, 2017, requires application of that term to upper tie bars. To be sure, a contract may be altered “where a modification is established through clear and convincing evidence of a written

agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract.” Quality Products and Concepts Co v Nagel Precision, Inc, 469 Mich 362, 373 (2003). But “in situations where a party relies on a course of conduct to establish modification, mutual assent is less clear and thus the rescission, or waiver, of the original contract’s terms is not so evident.” Id. “As a result, where course of conduct is the alleged basis for modification, a waiver analysis is necessary.” Id. at 373-374. Under Michigan law, “a waiver is a voluntary and intentional abandonment of a known right.” Id. at 374. Here, the parties’ course of conduct involves Superior sending Challenge invoices for upper tie bars that uniformly define the payment term as “NET 15,” while also sending Challenge invoices for lower tie bars that sometimes define the payment term as “NET 45” and other times define the payment term as “NET 15.” If any conclusion should be drawn from the invoices for upper and lower tie bars shipped after the partial settlement on March 6, 2017, that conclusion militates in favor of Superior’s more narrow application of the net-45-days payment term that was part of the partial settlement. In any event, the record manifestly does not support the argument of Challenge that the parties’ course of conduct reflects Superior’s knowing waiver of the restriction of the net-45-days payment term to lower tie bars. Accordingly, the Court must deny the request by Challenge to apply the partial settlement’s net-45-day payment term to upper tie bars.

IT IS SO ORDERED.

Dated: June 13, 2017



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge