STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

CHARLES MICHAEL FIEBING and
MONIKA H. FIEBING,

Plaintiffs,

v

File No. 09-27707-PD
HON. PHILIP E. RODGERS, JR.

RICHARD R. ERICKSON and MEREDITH J. ERICKSON and PORT OF OLD MISSION ASSOCIATES, INC.,

Defendants.
/

David A. Becker (P30090)
Attorney for Plaintiffs

H. Wendell Johnson (P24247)
Attorney for Defendants

DECISION AND ORDER DENYING
PLAINTIFFS' MOTION FOR RECONSIDERATION

Plaintiffs have filed a Motion for Reconsideration regarding the January 21, 2010 Order Denying Plaintiffs' Motion for Possession Pending Judgment entered by this Court. At the January 11, 2010 hearing on the Plaintiffs' Motion for Possession Pending Judgment, due to his unforeseen health issues, the Court invited Plaintiffs' counsel to submit a Motion for Reconsideration citing law to support Plaintiffs' Motion for Possession. The Court will now make its findings of fact and conclusions of law.

I. Court Standard

Defendants correctly state the standard of review pertaining to Motions for Reconsideration, as set forth in MCR 2.119, which states:

> (3) Generally, and *without restricting the discretion of the court*, a motion for rehearing or reconsideration which merely presents the same issues ruled on by

> the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. MCR 2.119(F)(3) [emphasis added]

It is the Court's discretion whether to hear a motion for reconsideration. Pursuant to the January 11, 2010 hearing, the Court previously granted the Plaintiffs permission to submit a Motion for Reconsideration citing law to support their Motion for Possession, therefore, the Court will not address the issue of whether Plaintiffs' Motion met the standard for reviewing motions for reconsideration.

II. Case Law

In support of their Motion for Reconsideration, Plaintiffs cite *Sickles v Hometown America, LLC*, a decision reversed by the Michigan Supreme Court. *Sickles v Hometown America, LLC*, 477 Mich 1076 (2007). In *Sickles*, the parties entered into a consent judgment after summary proceedings were initiated against the lessee in district court. When the lessee failed to make payments under the terms of the consent judgment, the lessor obtained an eviction order and writ of restitution. The lessor hired a construction company and proceeded to have the lessees' mobile home and contents removed from the leased lot space. Lessees were told they would have 30 days to retrieve their home and its contents after it was transferred to a secure lot outside of the mobile home park. However, the construction company instead bulldozed the home, leaving it in a garbage dump. The lessees' mobile home was destroyed and they were unable to reclaim their personalty. The Supreme Court held that the lessor could not defend its actions pursuant to the court order because the "destruction of plaintiffs' property in a manner that was neither necessary to effect the eviction nor incidental to the process of eviction cannot be said as a matter of law to be within the scope of the . . . order of eviction." *Id.*

Here, Plaintiffs analogize their claim and delivery action to *Sickles,* arguing that the Plaintiffs made immediate and repeated attempts to remove their personal property from the home and that the Defendants continuing withholding of their personalty amounts to conversion because Plaintiffs were, at the time, holdover tenants under the land contract. The Defendants contend that *Sickles* is inapplicable to this matter because *Sickles* is a landlord-

tenant case and the procedures and law pertaining to landlord-tenant evictions do not apply to the present circumstances.

The Court agrees that this case does not deal with landlord-tenant eviction issues. Instead, this case concerns a negotiated settlement agreement as a voluntary resolution to the forfeiture action previously filed in the 86th District Court.

At the September 9, 2009 hearing before the Honorable John D. Foresman, the Plaintiffs (formerly Defendants) agreed to vacate the home by October 15, 2009, remove their personalty from the real property by October 30, 2009 and to provide a deed in lieu of foreclosure to the Defendants (formerly Plaintiffs). The Plaintiffs executed a quit claim deed to the subject property on November 2, 2009 which was then provided to Defendants. The face of the deed indicates that all the grantors rights arising pursuant to the land contract, purchase agreement and addendum are extinguished. Therefore, pursuant to the September 9, 2009 negotiated settlement agreement and the executed quit claim deed, the Plaintiffs cannot claim an interest in the property, nor claim they were holdover tenants on November third or eighth when they trespassed on the real property. The *Sickles* case is inapposite.

In their Response to Defendants' Reply to Plaintiffs' Motion for Reconsideration, the Plaintiffs concede that *Dietrich Family Irrevocable Trust v SE Michigan Law Associates, PLLC* is inapplicable because it is a non-binding, unpublished opinion.

III. Estoppel Argument

A consent judgment is the product of an agreement between the parties. *Sylvania Silica Co v Berlin Twp*, 186 Mich App 73; 463 NW2d 129 (1990). When properly entered on the record in open court, consent judgments are binding on the parties unless there is a satisfactory showing of mistake, fraud or unconscionable advantage. *Dresselhouse v Chrysler Corp*, 177 Mich App 470; 442 NW2d 705 (1989). A settlement agreement is a contract and is construed and applied under general contract principles. *Michigan Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 483; 637 NW2d 232 (2001) quoting *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). When parties agree to the material terms set forth in an agreement, the agreement is enforceable even though there may be minor details to

be resolved. *Knopf v Knopf*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2003 [Docket No. 238377].[1]

Acquiescence to the entry of a consent judgment may work as an estoppel to question, change or modification of the judgment. *Hooper v Hooper*, 26 Mich 435 (1873). However, this is not due to the judgment itself, but due to the consent or contractual nature of the agreed judgment. *Id.* A consent judgment is equally as strong and unyielding as one that has gone to affirmance, and the court must uphold it as an effective agreement of the parties that adjudicates the rights of the parties with respect to the subject matter. *Bauer v Redford Twp*, 367 Mich 71; 116 NW2d 326 (1962). It remains in force and cannot be set aside or vacated without the consent of the parties. *Union v Ewing*, 372 Mich 181; 125 NW2d 311 (1963); *Douzeff v Soneff*, 330 Mich 295; 47 NW2d 616 (1951); Newton *v Security Nat'l Bank of Battle Creek*, 324 Mich 344; 37 NW2d 130 (1949); *Nat'l Bank of Rochester v Meadowbrook Heights, Inc*, 80 Mich App 777; 265 NW2d 43 (1978); *Ortiz v Travelers Ins Co*, 2 Mich App 548; 140 NW2d 791 (1966). Furthermore, a consent judgment is not invalidated by a party's failure to perform a condition on which the consent was based. *Trendell v Solomon*, 178 Mich App 365; 443 NW2d 509 (1989).

The transcript from the September 9 hearing confirms, as a resolution to the forfeiture action, the Plaintiffs agreed to completely vacate the property prior to October 31, 2009 and also to provide a deed in lieu of foreclosure to the Defendants. The record reflects that the Judgment for Possession was to be held until October 31 and then filed with the Court if the deed was not tendered.

The parties' negotiated settlement agreement was properly entered on the record in open court at the September 9 hearing. The Plaintiffs have not shown any mistake, fraud or unconscionable advantage relating to this agreement. Therefore, the resolution agreed to by the parties was, and remains, binding upon the parties. The Plaintiffs acquiesced to the entry of a consent judgment after October 31 if they had not provided a quit claim deed to the Defendants. Plaintiffs knowingly breached the September 9 agreement as the quit claim deed was not executed until November 2. Thus, Plaintiffs were also aware that Defendants could consequently enter the consent judgment with the Court. Due to their acquiescence to the entry

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[1] Referencing *Scholnicks's Importers-Clothiers, Inc v Lent*, 130 Mich App 104, 109-110; 343 NW2d (1983).

of the consent judgment, Plaintiffs are estopped from questioning, changing or modifying the judgment. Plaintiffs are prohibited from arguing they are holdover tenants with any rights to physically invade the real property because they consented to forfeit such rights after October 31 and further, they executed a quit claim deed that extinguished any claims to the property.

However, as defense counsel noted, parties cannot repudiate or rescind a contract and at the same time affirm and rely on it to sue for a breach or retain benefits received. *Livingston v Krown Chemical Mfg, Inc*, 394 Mich 144, 152; 229 NW2d 793 (1975). Defendants also agreed that all claims would be extinguished after October 31 and cannot rely on Section 2(d) of the land contract to support an estoppel argument.

IV. Abandonment Argument

Defendants argue that Plaintiffs cannot maintain a claim and delivery action for their property because the personalty in question was abandoned, citing to MCL 600.2920 which states:

> (c) An action may not be maintained under this section by a person who, at the time the action is commenced, does not have a right to possession of the goods or chattels taken or detained. MCL 600.2920(c).

Defendants contend that Plaintiffs had vacated the realty and executed the quit claim deed when they trespassed on the property on November 3 and 8, 2009 and that all property remaining on the premises after October 30 was abandoned. Plaintiffs acknowledge that they did not sign the deed until November 2, arguing they executed the deed on this date so that it could be "promptly" returned to Defense counsel.

Abandonment is composed of two elements, an intention to relinquish the property and an external act putting that intention into effect. *Hough v Brown*, 104 Mich 109; 62 NW 143 (1895); *Detroit Int'l Bridge Co v American Seed Co*, 249 Mich 289; 228 NW 791 (1930). Nonuser, by itself is insufficient to show abandonment. *Hustina v Grand Trunk Wester R Co*, 303 Mich 581; 6 NW2d 902 (1942); *Goodman v Brenner*, 219 Mich 55; 188 NW 377 (1922). Nonuser must be accompanied by some act that shows the intent to relinquish the property. *Kraft v Mill*, 314 Mich 390; 22 NW2d 857 (1946); *McMorran Milling Co v Pere Marquette R Co*, 210 Mich 381; 178 NW 274 (1920).

The Court is not persuaded by the Plaintiffs' claims. The hearing transcript clearly demonstrates that Plaintiffs were fully aware of the dates they were to vacate the house and to have all their personal property removed from the premises. According to the hearing transcript, Plaintiffs consented to vacate the house by October 15 and "vacate and empty" the house and remaining buildings by October 30.[2] The parties' settlement was placed on the record September 9, leaving the Plaintiffs 36 days to vacate the home and 51 total days to remove their personalty from the premises.

Both parties agree that abandonment is defined as "an intention to relinquish the right or property, without intending to transfer title to any particular person, and the act by which the intention is carried into effect." 15 Mich Civ Jur Abandonment §5.

The Plaintiffs argue they never had nor manifested an intention to abandon their personal property. However, one's 'intention' is not a thing that can be subjectively measured. Evidence of intent may instead be demonstrated by actions or inactions on the abandoning party's behalf. Certain evidence may indicate that the party did not intend to permanently abandon the property or that they intended to return later and recover the personalty. *Emmons v Easter*, 62 Mich App 226; 233 NW2d 239 (1975). Conversely, if one can demonstrate that the owner was given notice that action adverse to his or her interest in the property would be taken if the owner did not act to prevent such action may show that the owner's inaction reflected an intent to abandon. 21 Causes of Action 655 §12 page 26. The Court may consider an owner's intent to abandon from the surrounding facts and circumstances and the nature and situation of the property. *Id* at 27.

On September 9, Defense counsel mailed correspondence, reiterating the terms of the settlement agreement, and a quit claim deed to Plaintiffs' counsel for Plaintiffs' signatures. The quit claim deed was provided to the Plaintiffs on September 22, 2009 with instructions for its proper execution. Plaintiffs understood the final date for removing their property from the premises was October 30. They had sufficient time to arrange for the removal of their personal possessions from the property and to provide an executed deed to Defendants. The quit claim deed was sent to Plaintiffs on or around September 22 and even if it was not received until the end of September, they would have still had a month to sign and deliver the deed.

[2] Summary Proceedings Transcript lines 9-14 (September 9, 2009).

Due to the Plaintiffs' active participation in determining the final date for removal of their property, in conjunction with their signing the quit claim deed on November 2, there is considerable circumstantial evidence that the Plaintiffs intended to abandon their personalty. The Plaintiffs willingly entered into a settlement on the record that they would vacate the premises and remove their property by October 30, exchanging a deed in lieu of foreclosure. The Plaintiffs 'contracted' with Defendants to mutually resolve the foreclosure action; the 'offer' was to vacate the property completely by October 30 and execute a quit claim deed transferring the property to Defendants, the bargained for exchange or 'consideration' was a deed in lieu of foreclosure and 'performance' was the signing of the deed. See *Michigan Mut Ins Co, supra*. The presumption is, that by signing the quit claim deed the Plaintiffs intended to extinguish any claims they had regarding the realty *including any personalty located thereon*. Plaintiffs' claim that the language "to extinguish all rights of the Grantors" only applies to the real property, not personalty. Nonetheless, it is a reasonable conclusion that once one agrees to extinguish his or her rights to access certain real property, said individual would also be prohibited from accessing or retrieving any personal items remaining on the property. The Plaintiffs November 3 and 8 physical entry upon the property to recover personalty constituted trespasses since they no longer had permission to be on the realty. The Plaintiffs also trespassed through the continued presence on the land of personal property that they placed there, even though the property was originally placed with the Defendant-landowner's consent. Plaintiffs did not promptly remove their property after that consent was withdrawn or effectively terminated on October 30, which constituted additional trespass. Restatement Second, Torts §160.

It is illogical to think that a grantor could execute a quit claim deed extinguishing all his or her rights to the realty, but still retain rights to enter upon the land and retrieve personal property. Further, the Plaintiffs had already contracted with Defendants to be gone from the premises by October 30. Plaintiffs' failure to remove their personalty by October 30 along with signing the quit claim deed objectively indicated their intention to abandon the remaining personalty. The act carrying the Plaintiffs' intention into effect was their signing the quit claim deed. Thus, given the facts and circumstances and the nature and situation of the property, there is sufficient evidence to establish abandonment.

Finally, Plaintiffs' contention that the quit claim deed was signed on November 2 purely to expedite deliverance to Defense counsel contradicts their prior statements. Plaintiffs cannot argue that they only signed the quit claim deed to affect its prompt return to defense. Any implication that their signatures were somewhat rushed or forced is unfounded. Plaintiffs had significant forewarning of the dates they were to vacate to property and further, were in possession of the quit claim deed for over a month before it was signed.

V. Extinguishment of Claims Argument

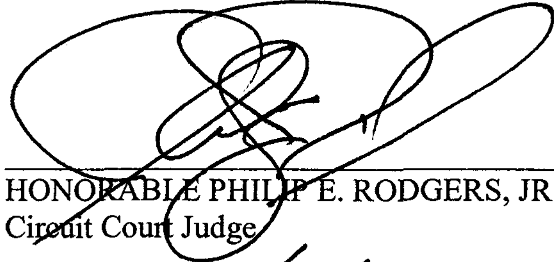
Regardless of whether the executed quit claim deed extinguished Plaintiffs' rights to their personalty as well as the realty, the settlement agreement reached by the parties explicitly noted the dates Plaintiffs were to vacate the house and have their personal property removed from the premises. Plaintiffs maintain that the "agreement made in Court was to the Land Contract only" and that there was never any indication that Plaintiffs would forfeit all right title and interest in personalty remaining on the property after October 31. This Court finds that Plaintiffs' agreement on the record to "vacate the house by October 15th and vacate and then empty out the outbuilding or the pole building . . . by October 30th" cannot have multiple interpretations.[3] Plaintiffs cannot rationally argue that they misunderstood what they agreed to in Court. The language is plain and unambiguous and the Plaintiffs were the party who suggested the October 30 date. As stated above, it is implausible and contradictory that a quit claim deed extinguishing one's rights to realty would also allow one rights to enter upon the land and retrieve personal property. The two concepts are not mutually exclusive. Extinguishing one's claims to realty also extinguishes right to entry and it follows that said individual would be prohibited from retrieving any personalty remaining on the realty. Plaintiffs knowingly signed the deed extinguishing their rights before they finished removing their personal property, therefore, they forfeited any personalty that remained after November 2, 2009.

[3] Summary Proceedings Transcript lines 9-14 (September 9, 2009).

VI. Conclusion

For the reasons stated herein, the Court denies Plaintiffs' Motion for Reconsideration. Defendants are awarded their actual attorney fees and costs for having to defend the Motion for Reconsideration. An affidavit of said expenses shall be submitted within seven (7) days of the date signed below or the award of sanctions shall be deemed to have been waived.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 4/06/10