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By Michael G. Hillinger

Waiver or Modification:

That Is the Question



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The elusive distinction between waiver and contract modification has reared its head in Massachusetts. What's the difference? A party who "waives" a contract term can retract the waiver in the absence of the other party's detrimental reliance, whereas a party cannot unilaterally retract a contract modification. Stating the legal consequences that flow from each event is easy. Figuring out which event has occurred is not.

In *Dynamic Machine Works, Inc. v. Machine & Electrical Consultants, Inc.*, 352 F.Supp.2d 83 (D. Mass. 2005), the U.S. District Court for the District of Massachusetts addressed these issues. In January, 2003, Dynamic agreed to purchase a lathe from Machine, a distributor, which the latter would procure from a Taiwanese manufacturer. Delivery was originally scheduled for May 15, 2003.

Delivery was delayed due to events beyond Machine's control, including the "SARS" epidemic. In an exchange of letters, Machine and Dynamic confirmed their oral agreement extending Machine's deadline to install and commission the lathe until September 19. On October 9, Machine finally delivered the lathe. Dynamic spent the next two months trying to make it perform to specification.

On December 9, Dynamic wrote a letter to Machine, stating as follows:

As I stated to you early this morning on the telephone, we will grant you one last and final deadline for the machine to be fully and unconditionally commissioned by ... Friday December 19....

The next day, Dynamic's president received information from which he concluded the lathe could not meet the required specifications. On December 11, Dynamic's counsel wrote Machine revoking Dynamic's acceptance of the lathe, and then Dynamic sued Machine in Superior Court alleging breach of warranty, breach of contract, and violation of Chapter 93A. Machine removed the action to federal court and counterclaimed for breach of contract.

The parties agreed that no material facts were in dispute, including the fact that Machine had not detrimentally relied on the December 9 extension. The court characterized the "principal issue" as "whether Dynamic was entitled to revoke its ... December 2003 decision to extend the time allotted to Machine to bring the ... Lathe into full compliance with the required specifications." 352 F.Supp.2d at 87. After discussing UCC § 2-209, the court held as follows:

Dynamic was entitled to and did properly revoke the December 9, 2003 letter extending the commissioning deadline, regardless of whether that letter is termed a "modification" or a "waiver" under section 2-209.

Id. at 89. Having decided the principal issue, the court nevertheless went on to certify the following question to the SJC:

Under the Massachusetts version of the Uniform Commercial Code, does a buyer have a right to retract a written

extension allowing more time for the seller to cure defects in a delivered product absent reliance on the extension by the seller?

Id. at 92. The court's "question" seems to restate the general understanding of waiver - the waiving party can retract its waiver if the other party has not detrimentally relied.

The SJC characterized the real issue as whether Dynamic's December 9 letter was a bilateral modification or a unilateral waiver. *Dynamic Machine Works, Inc. v. Machine & Electrical Consultants, Inc.*, 444 Mass. 768, 831 N.E.2d 875 (2005). It further characterized the issue as largely factual. It also disagreed "as a general principle" with the District Court's conclusion that Dynamic was entitled to revoke the letter regardless of whether the letter was a modification or a waiver. *Id.* at 772, n.2.

The SJC answered the certified question as follows:

If the written extension constitutes a modification of the agreement to purchase the product, then the buyer may not retract it unilaterally. If, on the other hand, the written extension constitutes a waiver of an executory portion of the agreement, the buyer may retract it "by reasonable notification received by the [seller] that strict performance will be required ... unless the retraction would be unjust in view of a material change of position in reliance on the waiver."

444 Mass. at 768-69.

Because the SJC was answering a question of law, we are no closer to knowing whether Dynamic's letter of December 9 constituted a waiver or a

contract modification. Instead, we are left knowing only two things: the issue is one of fact and reducing an extension to writing is not dispositive. The distinction is so elusive as to make it virtually impossible to describe it in words. Rather than litigating it, the party receiving such a concession with respect to a contract should insist on a writing signed by both parties that characterizes their understanding as a contract modification pursuant to §2-209(1) of the Uniform Commercial Code, which states that "An agreement modifying a contract needs no consideration to be binding." ■



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